NORTH CAROLINA REPORTS

VOL. 87

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER TERM, 1882.

REPORTED BY

THOMAS S. KENAN

(VOL. 12.)

Annotated through Vol. 242

RALEIGH
REPRINTED BY BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1956

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OCTOBER TERM, 1882

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ASSOCIATE JUSTICES:

THOMAS S. ASHE. THOMAS RUFFIN.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

MARSHAL OF THE SUPREME COURT:

ROBT. H. BRADLEY.

ATTORNEY GENERAL:

THOMAS S. KENAN.

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OF THE

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†Henry A. Gilliam	2d	"
Allmand A. McKoy	3d	"
James C. MacRae	4th	"
John A. Gilmer	5th	"
Wm. M. Shipp	6th	"
Jesse F. Graves	7th	"
Alphonso C. Avery	8th	"
James C. L. Gudger	9th	"

*James E. Shepherd succeeds Mills L. Eure.
†Frederick Philips succeeds Henry A. Gilliam.

SOLICITORS

*Cyrus W. Grandy	1st	Dist.
John H. Collins	2d	"
Swift Galloway	3d	"
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†Frank I. Osborne succeeds W. J. Montgomery.

CRIMINAL COURT JUDGE

Oliver P. Meares ..... Wilmington.

SOLICITORS

Benjamin R. Moore ..... Wilmington.

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OCTOBER TERM, 1882.

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LOCKE CRAIG,
HENRY E. FAISON,
ATLAS P. GILBERT,
EDWARD T. GREENLEE,
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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

OCTOBER TERM, 1882

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*A. K. ROULHAC, Ex'r, v. WM. GARL BROWN.

Order of Arrest—Res Adjudicata.

Upon refusal of a motion to vacate an order of arrest, the party at the next term makes a similar motion and upon the same grounds; *Held*, that the judge presiding at such next term properly declined to entertain it. It is *res adjudicata.*

APPEAL from an order made at Fall Term, 1882, of ORANGE Superior Court, by *Graves, J.*

This appeal presents but one question for consideration, and that is whether a motion to vacate an order of arrest can be entertained after a similar motion had been made in the progress of the cause, upon the same grounds, and refused. (2)

The action in which the motion was made was commenced by summons on the 5th day of September, 1881, and a complaint was filed the same day. The plaintiff also obtained an order of arrest on the same day returnable before the clerk of the superior court on the 4th day of October, 1881, which was duly executed, and on that day the defendant moved to vacate the order of arrest, and reduce the bail, which after being heard by the clerk was refused, and the defendant appealed to his Honor Judge Gudger, at Fall Term, 1881, of the superior court for said county, who heard all the matters involved in the motion upon the affidavit of the plaintiff, the counter-affi-

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

davit of the defendant, and opposing affidavit offered by plaintiff; and, after argument of counsel for both parties, sustained the decision of the clerk and refused to vacate the order of arrest or reduce the bail.

The defendant thereupon prayed an appeal to this court, but afterwards withdrawing his appeal gave an undertaking with security acceptable to the plaintiff, filed a demurrer to the complaint, and the cause was continued to Spring Term, 1882. At that term, the defendant appeared and was surrendered by his bail into the custody of the sheriff, withdrew his demurrer, and confessed judgment for the amount claimed in the complaint, which was duly entered.

A motion was then made by the defendant's counsel to discharge the defendant from custody, upon the ground that no allegations of fraud were set forth in the complaint.

After argument of counsel his Honor dismissed the motion, assigning as reasons for doing so, that it appeared from the order heretofore made, that a motion to vacate the order of arrest and reduce the amount of bail had been made at the preceding term, and denied by Judge Gudger, and that no appeal had been taken from said
(3) order, and that in the affidavit upon which the order was made there was an allegation of fraud in attempting to evade the performance of obligations, etc., by concealing property, and, also that the motion then made was similar in effect to a motion to vacate the order of arrest, and should have been made before judgment taken in the action.

Mr. John W. Graham, for plaintiff.
No counsel for defendant.

ASHE, J., after stating the above. We are unable to discover any error in the ruling of his Honor, or in the reasons assigned for his conclusion. The motion to discharge the defendant from custody was in effect a motion to vacate the order of arrest, which is the only means provided by which a defendant under arrest under such circumstances can obtain his deliverance, and that motion, as his Honor correctly held, can only be made before judgment, (C. C. P., Sec. 174.) And the ground of the motion that there was no allegation of fraud in the complaint is untenable. It was not necessary that the complaint should contain any allegation of fraud. When the action is like this, for a simple money demand, the grounds for the arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, "and that the case is one of those mentioned in section one hundred and forty-nine." C. C. P., Sec. 151. *Peebles v. Foote,* 83 N. C., 102.

The motion to discharge the defendant from custody, being in effect the same as the motion to vacate the order of arrest, the defendant was concluded from renewing that motion, even if it had been made before judgment. The decision upon the first motion was made by a Court of competent jurisdiction upon a substantial right which was reviewable by appeal, but no appeal was taken, and must (4) therefore govern this case as *res adjudicata.*

There are many motions incidental to the progress of a cause, made to facilitate the trial, that may be made from time to time, the rulings upon which are not the subject of appeal; but when a motion is made involving, as in this case, a *substantial right* and is reviewable by appeal, but not appealed from, the decision must be as conclusive as a final judgment in the action. *Sanderson v. Daily*, 83 N. C., 67; *Mabry v. Henry*, 83 N. C., 298.

A case in point is *State v. Evans*, 74 N. C., 324, where a prisoner was put in jail for larceny, and the jury not being able to agree were discharged. The prisoner's counsel thereupon moved for his discharge. The motion was refused, and at the next term a similar motion was made and allowed. On the appeal this court said: "So we have the conflicting rulings of two of the judges of the superior courts in the very same case; in fact, one judge reverses the decision of the other judge. How is this unseemly conflict of opinion to be prevented? It can only be done by enforcing the rule *res adjudicata.* See also 2 Taylor on Ev., Sec. 1513. To the same effect are the cases of *Wilson v. Lineberger*, 82 N. C., 412, and *Jones v. Thorne*, 80 N. C., 72.

There is no error. Let this be certified to the superior court of Orange County.

No error. Affirmed.

349; *Pasour v. Lineberger*, 90 N.C. 161, 162; *Wingo v. Hooper*, 98 N.C. 484; *Patton v. Gash*, 99 N.C. 285; *Tucker v. Wilkins*, 105 N.C. 277; *Ashby v. Page*, 108 N. C. 9; *Baker v. Garris*, 108 N.C. 226; *Herndon v. Ins. Co.*, 108 N.C. 650; *Sheldon v. Kivett*, 110 N.C. 411; *Hopkins v. Bowers*, 111 N.C. 179; *Parker v. McPhail*, 112 N.C. 504; *Springer v. Shavender*, 116 N.C. 18; *Henry v. Hilliard*, 120 N.C. 487; *Clement v. Ireland*, 138 N.C. 139; *Herring v. R.R.*, 144 N.C. 211; *Mitchell v. Lumber Co.*, 169 N.C. 398; *Dockery v. Fairbanks*, 172 N.C. 530; *Mfg. Co. v. Lumber Co.*, 177 N.C. 407; *Jenette v. Hovey*, 182 N.C. 32; *Revis v. Ramsey*, 202 N.C. 816; *S. v. Lea*, 203 N.C. 322; *Fertilizer Co. v. Hardee*, 211 N.C. 58; *In re Adams*, 218 N.C. 381; *Corporation Com.* v. *Bank*, 220 N.C. 51; *Neighbors v. Neighbors*, 236 N.C. 533.

O. L. HALL v. L. GIBBS.

Statute of Limitations.

The presumption of payment of a bond arises after ten years from the time the right of action accrues. Rev. Code, ch. 65, sec. 18. (The provisions of section 43 of the Code of Civil Procedure do not apply to this case.)

(5) CIVIL ACTION tried at Spring Term, 1882, of CARTERET Superior Court, before *Gilmer, J.*

This action is founded on a sealed note executed by defendant to plaintiff's intestate on the 24th of January, 1866, payable two years after date, and upon which a credit of $85.46 was endorsed on the 14th of September, 1869.

The defence set up was, that the bond was presumed to have been paid by lapse of time, and that it had in fact been paid to said intestate in goods.

The action was commenced on the 20th of January, 1881.

The plaintiff's intestate died on the 17th of April, 1875, and there was no administration on the estate until the appointment of the plaintiff on the 16th of December, 1880.

On the trial the judge intimated that the bond was presumed to be paid, and in deference to that opinion the plaintiff submitted to a nonsuit and appealed.

Messrs. Green and Stevenson, for plaintiff.
No counsel for defendant.

ASHE, J. The opinion intimated by his Honor is correct. The bond sued on matured on the 25th of January, 1868, and the cause of action then having accrued to the plaintiff, the statute of presumptions in force previous to the ratification of the Code of Civil Procedure is applicable. C. C. P., Sec. 16.

The action was not brought until 20th of January, 1881, more than ten years after the right of action had accrued on this bond, and the presumption of its payment or satisfaction had arisen within that time. Rev. Code, ch. 65, Sec. 18. (Act of 1826.) It is true this presumption may be rebutted, but there was no proof offered in rebuttal in this case. There was nothing shown on the trial to obstruct the running of the statute. The death of the plaintiff's intestate,
(6) the obligee of the bond, could not have that effect. In the act of 1826, which provides for the presumption of payment or satisfaction of bonds, etc., after ten years, there is no saving whatever.

"It seems," as PEARSON, C. J., said in *Hamlin v. Mebane,* 54 N. C., 18, "to have been intended emphatically as a statute of repose."

Nor was its course suspended by the death of the obligee before the expiration of the ten years after the right of action accrued under section 43 of the Code, for the provisions of that section only apply to the limitations prescribed in the Code of Civil Procedure.

No error. Affirmed.

Cited: Tucker v. Baker, 94 N.C. 165; *Long v. Clegg,* 94 N.C. 767; *Baird v. Reynolds,* 99 N.C. 473; *Coppersmith v. Wilson,* 107 N.C. 35; *Woodlief v. Bragg,* 108 N.C. 573.

J. C. KENNEDY AND OTHERS v. JAMES WILLIAMS.

Roads.

A public highway is one under the control of and kept up by the public, and must either be established in a regular proceeding for that purpose, or generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities of a county.

MOTION for an injunction to restrain the defendant from obstructing a road, heard at Spring Term, 1882, of LENOIR Superior Court, before *Gilmer, J.*

The restraining order theretofore issued was continued until the final hearing of the action, and the defendant appealed.

No counsel for the plaintiff.
Messrs. Strong and Smedes, for defendant.

RUFFIN, J. The plaintiffs, being the owners of certain pub- (7) lic mills, complain that the defendant, by obstructing a certain public road leading to the same, has done them great damage in the way of loss of patronage, for which they seek to recover compensation of him; and in the meantime, alleging that he intends to erect other obstructions, they ask for an injunction restraining him from so doing.

The appeal is taken from an order at chambers granting the injunction prayed for.

In his answer, the defendant denies that the road is a public highway, and insists that it has been hitherto used only by his permission, subject to be recalled at his pleasure.

Much testimony, in the way of affidavits and counter-affidavits, was offered by the parties in support of their respective positions, but it is unnecessary that we should refer to it at all, since, in the opinion of this court, the plaintiffs must fail upon their own allegations and proofs.

As alleged in their pleadings and testified to by themselves and their witnesses, the facts of the case are as follows:

Some six years before the institution of the action, the defendant, owning a tract of land in the vicinity of the plaintiffs' mills, agreed with them that if they would assist him in removing a certain barn and stable, he would give them and the public a right of way over his land, to lead from the Wilmington road, near by, to the mills, and thence out in another direction to the said Wilmington road. The plaintiffs rendered the assistance asked, and thereupon the defendant removed his fence and established it along the proposed new road, saying that it should be a public road, free to the plaintiffs and all persons going to and returning from the mills. As soon as thus opened, the public—that is to say, persons traveling—began to use the road, and have ever since continued to do so, though the county au-
(8) thorities have not recognized it as a public road, or taken supervision of it.

The plaintiffs rightly concede that they can lay no claim to the road in question as a *private way* over the land of the defendant, the right to use which belongs to them. Such an easement in lands cannot be the subject of a parol grant.

The sole question then is—whether under the circumstances of the case it has become a *public highway,* as known to our law, the obstruction of which is unlawful, and gives a right of action to the plaintiffs for any special damages they may have sustained thereby.

According to the current of decisions in this court, there can be in this state no *public highway,* unless it be one, either established by the public authorities in a proceeding regularly constituted before the proper tribunal; or one generally used by the public, and over which the proper authorities have exerted control for the period of twenty years; or one dedicated to the public by the owner of the soil, with the sanction of the authorities, and for the maintenance and reparation of which they are responsible. *State v. Johnson,* 61 N. C., 140; *State v. McDaniel,* 53 N. C., 248; *Boyden v. Achenbach,* 79 N. C., 539; *State v. Purify,* 86 N. C., 681.

To constitute it a public highway, however originating, it must be a public charge, and must of necessity have an overseer and hands to work it; bridges erected when needed, and kept in repair at the public expense. And hence the law, in order to avoid an intolerable burden

being thrown upon the public, will not permit every citizen, of his own head and according to his own ideas of necessity, to establish a highway by a mere act of private dedication.

Since there can be no pretence made that the officials of Lenoir County, whose duty it is to determine the wants of the people of that county, and who alone are capable of assenting to the establishment of the road in question as a public highway, have ever given it their sanction, either by formal acceptance or by assuming the control of it, it must necessarily follow that it cannot be such a (9) thoroughfare as renders the defendant liable to the plaintiffs' action, because of its obstruction.

It was therefore error in the judge to grant the order of injunction, and the same is reversed.

Error. Reversed.

Cited: Stewart v. Frink, 94 N.C. 488; *S. v. Long,* 94 N.C. 899; *S. v. Wolf,* 112 N.C. 894; *S. v. Fisher,* 117 N.C. 738; *S. v. Gross,* 119 N.C. 870; *S. v. Lucas,* 124 N.C. 806; *Tise v. Whitaker,* 146 N.C. 376; *Bailliere v. Shingle Co.,* 150 N.C. 633; *S. v. Haynie,* 169 N.C. 283; *Sexton v. Elizabeth City,* 169 N.C. 390; *Sugg v. Greenville,* 169 N.C. 613; *Haggard v. Mitchell,* 180 N.C. 261; *Draper c. Conner,* 187 N.C. 21; *Wright v. Lake Waccamaw,* 200 N.C. 617; *Hamphill v. Board of Aldermen,* 212 N.C. 188; *Hildebrand v. Telegraph Co.,* 219 N.C. 405; *Chesson v. Jordan,* 224 N.C. 291; *Lee v. Walker,* 234 N.C. 695; *Rowe v. Durham,* 235 N.C. 161.

ANDREW J. NORRIS v. THOMAS FOWLER.

Evidence—Contract—Usage.

The usage of one in conducting his own business, if known to the party dealing with him, is competent evidence of the terms of the contract between them.

CIVIL ACTION tried, on appeal from a justice's judgment, at Fall Term, 1880, of HARNETT Superior Court, before *Avery, J.*

Appeal by plaintiff.

Messrs. T. H. Sutton and Hinsdale and Devereux, for plaintiff.
No counsel for defendant.

RUFFIN, J. A single exception disposes of this case. The plaintiff sues to recover forty-five dollars, the value of a bale of cotton burnt

while in the defendant's cotton gin, or press, and seeks to hold the defendant liable as an insurer, and also for negligence.

As a witness on behalf of himself the plaintiff testified that he
(10) carried his cotton to defendant's gin in November, 1879, to be ginned and packed, and that the gin was run by a steam engine, which was also the motive power for a saw mill, and that he lost 1180 pounds of his cotton worth $45.

He further testified that the defendant afterwards told him that his cotton had been ginned and had been put in the press, but was not pressed, and was burned while in that condition with the gin house.

For the purpose of fixing upon the defendant a liability as an insurer, the plaintiff tendered several witnesses to prove that the defendant, while ginning cotton for them, had declared that he held himself responsible for all cotton taken to his gin, until it left the press—the plaintiff also proposing to show that these declarations were made known to him before he took his cotton to the defendant's gin. Upon objection on the part of the defendant, the court excluded the evidence and the plaintiff excepted.

The testimony offered consisted of the plaintiff's own declarations, and if pertinent must certainly be competent. It tended to show his general usage, or habit of trade, and thus afforded some evidence of the terms of his contract with the plaintiff. His manner of dealing with others being a fact, or circumstance, from which the extent and purport of his agreement in this instance may be made out, and consequently the evidence with regard to it was pertinent.

In the notes to *Wigglesworth v. Dallison,* 1 Smith's Leading Cases, 300, the principle is stated: "The usage of an individual in his own business as to the manner of performing it, and the like, if known to the party dealing with him, is competent *to show that the contract was on those terms.*"

So again in 2 Greenl. on Ev., Sec. 251, it is said that the usage, or habit of trade or conduct of an individual which is known to the person who deals with him, may be given in evidence to prove what was the contract between them.

It was upon the strength of these authorities that this court
(11) held in *Vaughan v. R.R. Co.,* 63 N. C., 11, that it was proper to receive evidence of the custom of the defendant as to weighing and marking goods delivered for shipment, as bearing upon the question, whether it had received the cotton in controversy or not; and that case goes far beyond the present, in that, there, the defendant sought to free itself of responsibility by making proof of its own custom, and was permitted to do so.

The case is clearly distinguishable from *Adams v. Otterback*, 15 How., 538, since there, the evidence as to the usage was offered, not as here, to establish the terms of an uncertain contract, but with a view to modify a contract already ascertained.

In our opinion therefore the testimony tendered was improperly excluded, and there must be a *venire de novo*.

Error. *Venire de novo.*

Cited: Simpson v. Pegram, 108 N.C. 410; *Blalock v. Clark*, 137 N.C. 142; *Riddick v. Dunn*, 145 N.C. 33.

B. R. MOORE v. W. P. ROBERTS, AUDITOR.

Solicitors—Salaries and Fees.

The solicitor of the criminal court of New Hanover County has no claim upon the State for such compensation as is allowed the district solicitors under Bat. Rev., ch. 105, sec. 13. The act establishing said court puts the burden of sustaining the same upon the county.

APPLICATION for *mandamus*, heard at Fall Term, 1881, of NEW HANOVER Superior Court, before *Shipp, J.*

Under the act of 1876-77, ch. 242, establishing the criminal court of New Hanover County, the plaintiff was elected solicitor of that court, and entered upon the duties of his office at the first term, held in April 1877, and has since continued in the discharge of such duties.

In his complaint he alleges that as such solicitor he is en- (12) titled to receive from the state treasury the sum of twenty dollars for his attendance upon the court at its said April term, and that with a view to receive the same he has procured the certificate of the clerk as to such attendance, and filed it with the defendant, who is the state's auditor, and requested of him that he should audit the claim and issue a warrant therefor upon the treasurer of the state, which however he refuses to do, and therefore it is he prays for a *mandamus*.

The defendant demurs to the complaint upon the ground that the plaintiff is entitled to no such compensation from the state for his services as solicitor under the provisions of said act or any other law of the state, and judge sustained the demurrer, and thereupon the plaintiff appealed.

No counsel in this court for plaintiff.
Attorney General for the defendant.

RUFFIN, J. The terms of the statute referred to leave no room to doubt the correctness of his Honor's ruling with reference to the plaintiff's demand. The ninth section, after providing for the election of a solicitor to prosecute in behalf of the state in said court, declares that he shall "receive the *same fees* as are now allowed by law to the solicitors of the several judicial circuits, and in addition thereto shall be paid an annual salary of five hundred dollars to be paid quarterly by the county treasurer of the county of New Hanover, upon the certificate of the clerk," etc. The provision made by law for the compensation of the several district solicitors is,—

1. Twenty dollars for each term of the superior court they may attend, to be paid by the public treasurer of the state upon the presentation of the proper certificate; and,

2. "In addition to the above *general compensation,*" certain
(13) *fees* to be taxed in the costs against the party convicted. See Bat. Rev., ch. 105, sec. 13, and acts of 1873-74, ch. 170.

The line therefore between the *general compensation* of the district solicitors which they are to receive from the state, and the *fees* which they are entitled to have taxed against the convicted offenders, is distinctly drawn, and a law which confers upon the plaintiff the right to receive the latter only, cannot by any legitimate rule of construction be so interpreted as to include the former.

Besides this, from the tenor of the whole act of 1876-77, it is perfectly manifest that the legislature intended that no part of the expense of maintaining the criminal court of New Hanover County should fall upon the state treasury, but that the whole burden should rest upon the treasury of the county, except so far as it might be relieved by the fees paid by the individuals for services rendered; and this intention extended alike to the compensation provided for the sheriff, the clerk, the judge and the solicitor.

As written, the statute provided for the officer in question two sorts of remuneration for his services, and two sources from which it should be drawn, and no more—a salary of five hundred dollars, to be paid from the county treasury, and fees to be paid by the defendants on the docket whom he might convict; and because the legislature, afterwards, by the act of 1879, ch. 330, saw fit to take away the salaried portion of his compensation, and leave him entirely dependent upon the fees collected in the costs, it cannot have the effect to change the construction of the original act, so as to confer upon the plaintiff a claim upon the state, and hence it is, that the judgment in the court

below, sustaining the demurrer of the defendant, is correct and must be affirmed.

No error. Affirmed.

ELLINGTON, ROYSTER & CO. v. J. J. WICKER.

Excusable Neglect Under Section 133 of the Code.

Distinction drawn between omissions of an attorney and personal inattention of a suitor, in an application for relief from a judgment—approving *Wynne v. Prairie*, 86 N. C., 73.

MOTION under section 133 of the Code, to set aside judgment, (14) heard at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The plaintiffs appealed.

Messrs. Mason and Devereux, for plaintiffs.
Messrs. Strong and Smedes, for defendant.

SMITH, C. J. The plaintiffs bring their action upon the official bond of defendant, Wicker, former sheriff of Moore County, against him and the other defendants, his sureties, to recover damages alleged to have been sustained by his neglect, and the penal sum of $500, incurred for a false return. The summons was issued returnable to Fall Term of Wake Superior Court, 1881, which began on the 8th day of August, previous to which the complaint had been filed in the clerk's office, and the process was duly returned with service accepted by the principal defendant and some of the sureties, and was not served upon others misnamed. On the 4th day of August, the counsel in Moore County employed by Wicker to defend the suit, addressed a letter to the plaintiffs' counsel at Raleigh, asking for further time to answer, and the latter, in their letter in reply, consented to an extension of the time asked until the first of November, if the misnamed defendants would also agree to accept service of the summons. On August 8th Wicker applied to his counsel to know if it was (15) necessary for him to attend Wake Superior Court, and was told by them that it was needless for him to go, as they had received a letter from plaintiffs' counsel giving time until November 1st for putting in the answer.

On the last day of the term, which continued for three weeks, no appearance being entered for the defendants, the plaintiffs obtained

leave to withdraw their complaint and file one in amendment, wherein the claim for official neglect is abandoned, and the recovery of the penal sum for the false return is alone demanded. Upon filing the amended complaint the plaintiffs moved for and obtained judgment final for the said penalty against the defendants upon whom service had been made, and, correcting the names of the others, had entered an order for the issue of process against them. Wicker made some effort to procure the acknowledgment of service from them, but discontinued, on noticing in the newspaper that judgment had been rendered in the cause. At the next term thereafter, pursuant to notice, the said Wicker made application to the judge to set aside the judgment on the ground of surprise and excusable neglect, upon the hearing of which and the accompanying affidavits at January Term, 1882, the court found the facts as above set out, and adjudged that upon the defendants putting in their answer on or before the second Monday of the next term, which was held in February, as of Fall Term, 1881, the judgment be set aside and annulled with costs. From this ruling the plaintiffs appealed on the ground that,

1. The defendant, Wicker, was voluntarily absent and in personal default; and that,

2. The condition on which the indulgence was granted was not fulfilled; and they further insist

(16) 3. The judgment if set aside at all should only be set aside as to the defendant Wicker.

These propositions are also pressed in the argument before us for a reversal of the judgment.

The cases referred to in the argument for the appellant, terminating in *Wynne v. Prairie*, 86 N. C., 73, recognize the distinction between the omissions of a retained attorney, and the personal inattention and negligence of the party himself, in an application for relief from a judgment within the purview of section 133 of the Code; and it is quite manifest if there is neglect, excusable or not, in the present case, it must be attributed to the former rather than to the latter. It does not appear from the findings of fact, by which alone we are governed, and not by the affidavits needlessly appended to the case and sent up, that the terms of the conceded indulgence were communicated to Wicker, when he made enquiry of his attorney whether he should go to Raleigh to attend to his case. On the contrary their advice to him was, they had a letter from one of plaintiffs' counsel allowing time for the answer and his presence there during the time was not required. Surely his absence upon this information was excusable and the judgment entered up a surprise within the meaning of the statute, and no culpable default can be imputed to him. Nor

are we prepared to say from the response to the application for further time that it must bear the strict interpretation put upon it in the appellant's argument, which requires the acknowledgment of service to be made and the summons thus endorsed returned during the term, since the proposed indulgence suspends all further action in the cause, and the service acknowledged and the filing of the process at any time before answer put in, would secure to the plaintiffs all the advantages to be derived from its being done during the term of the court.

If indeed the delay be considered as accorded to all the defendants, an answer from all would be a waiver of process, and (17) if confined to those on whom it was served, their omission to answer within the time would entitle the plaintiffs to the judgment which was entered up, and hence no inconvenience from the delay would accrue to them.

But the case presents another aspect similar to that in *Wynne v. Prairie.* The complaint first filed and withdrawn alleged two causes of action, in one of which the jury was required to assess the damages, and upon a complaint in that form, the plaintiffs were not entitled to a final judgment by default for want of an answer for that cause of action, which standing alone would warrant it under the practice. *Depriest v. Patterson,* 85 N. C., 376. The change in the complaint was made on the last day of the term, and that substituted, and followed by different consequences, not in fact put in during the first three days of the term. Acts 1870-71, ch. 42, sec. 3. This fact gives increased force to the present application, since while the legal relation of the amendment to the beginning of the term is admitted, it is a substantial departure from the act which requires its earlier filing, and really gives no time to the defendants to put in an answer or demurrer, to which it may in its amended form be deemed subject.

It is suggested that the application shows no meritorious grounds in its support, and hence should not be entertained. Without adverting to the fact that the plaintiffs have abandoned all claim to actual damages resulting from the official misconduct of the sheriff, the enforcement of mere penalties when no injury has accrued is one of strict legal right and not entitled to special favor.

It is urged that the rescission of the judgment should be confined to the defendant Wicker alone, as there has been an inexcusable inattention in the other defendants. The sureties we think may well repose confidence in the sheriff for whose default they are liable, to defend the action for all, and it is this very omission for which we think no inexcusable neglect can be charged. It (18)

would be a singular result if the judgment were to stand against the sureties and they made liable for a penalty which the final trial should show had never been incurred by their principal, when the statute provides that "the bond shall be liable for all fines and amercements *imposed on him,*" (the sheriff). If he is not subject to the fine, how can the sureties be, since their liability is collateral and dependent? But this suggestion is made merely to support the ruling of the court in setting aside the judgment as to all the defendants, and without intending to express any opinion on the point.

We concur in the ruling of his Honor and affirm the judgment. Let this be certified.

No error. Affirmed.

Cited: Pickens v. Fox, 90 N.C. 372; *Wiley v. Logan,* 94 N.C. 566; *Gwathney v. Savage,* 101 N.C. 107; *Phifer v. Ins. Co.,* 123 N.C. 409; *Schiele v. Ins. Co.,* 171 N.C. 431; *Grandy v. Products Co.,* 175 N.C. 513; *Holland v. Benevolent Assoc.,* 176 N.C. 87; *Sutherland v. McLean,* 199 N.C. 350.

JOHNSON, CLARK & CO. v. MAXWELL & BUTLER.

Verification of Pleadings—Right to Open and Conclude.

1. A verification to a complaint, made by an agent or attorney of a non-resident, to the effect that the claim sued on is in writing and in his possession for collection—giving facts in his personal knowledge and sources of other information—meets the substantial requirements of section 117 of the Code.
2. The right to open and conclude the argument is with the plaintiff, where there are several issues and he is called on to sustain only one of them.
3. No appeal lies from an order granting or refusing a continuance.

CIVIL ACTION tried at Fall Term, 1881, of MECKLENBURG Superior Court, before *Avery, J.*

Verdict for plaintiffs, judgment, appeal by defendants.

(19) *Messrs. Jones and Johnston, for plaintiffs.*
Messrs. Hoke & Hoke and T. M. Pittman, for defendants.

SMITH, C. J. The action is instituted to recover of the defendants the aggregate amount due on the several promissory notes described in the complaint, with interest since their maturity, given on September

1st, 1876, as is alleged in the settlement of a pre-existing indebtedness, then in suit, and to obtain further time for payment.

The defendants admit the indebtedness, as charged, and set up three counter-claims for damages sustained by a breach of contract of the plaintiffs, to wit:

1. In selling sewing machines within certain territory assigned to the defendant, Maxwell, their agent in the business, under an agreement that he should have the exclusive right of vending them therein.

2. In failing to advertise the agency of said Maxwell in the advertisement of their own business in said territory.

3. In neglecting to reimburse their said agent for moneys expended in replacing defective and worn out parts of the machinery, as stipulated in the several contracts of sale to be replaced by the plaintiffs on certain conditions to the respective vendees.

To these several counter-claims the plaintiffs put in a replication of denial, and say that any such claims or causes of action existing prior to September, 1876, were included in the adjustment then made, the balance of which is represented in the several notes in suit.

I. The first exception appearing on the record is taken to the refusal of the court to grant a continuance upon the grounds stated in the affidavit submitted, and compelling a trial.

The cause had been depending since 1877, and at Spring Term, 1881, had been continued on an affidavit for defendants for the absence of some or all of the witnesses, and for causes similar to those now assigned in support of the motion. For this and other reasons (20) deemed sufficient by the court, the defendants were ruled into trial. We refer to this exception, not pressed here as a reviewable error, only to say that in the light of repeated decisions, and with the law well settled, we are unable to understand why it should be the subject matter of appeal. We deem it entirely useless to make references on the point.

II. The defendants were overruled in their demand for judgment for their counter-claim, on the ground of insufficiency of the verification of the replication made to their sworn answer.

The affidavit, essentially the same as that annexed to the complaint and to which no exception was taken, is as follows:

"R. Barringer makes oath that the plaintiffs are all non-residents; that he is both agent and attorney for them in this county and state; that the claims sued on are all in writing and in his possession for collection; that most of the facts involved are in his personal knowledge, or derived from correspondence with the plaintiffs, and from frequent interviews for them with defendant, Maxwell; and that the same are

true except those stated on information and belief, and as to those, he believes them true." (Sworn and subscribed by R. Barringer, before the clerk.)

The affidavit is in our opinion a substantial compliance with the requirements of the Code. Sec. 117. It declares that the claims sued on are in writing and are in possession of affiant as the plaintiffs' agent and attorney for collection; that most of the facts are within his personal knowledge, and that the scources of his information are communications from his principals and interviews with the debtor; and that the plaintiffs do not reside in the state. This seems to fulfil the conditions prescribed when the verifying oath is made by the
(21) agent. A verification not as full and explicit was held sufficient in *Wheeler v. Chesby*, 14 Abbott, 442.

III. The remaining exception is to the refusal of the judge to allow the defendants' counsel to open and conclude the argument before the jury, after the third counter-claim had been withdrawn. Two issues were submitted to the jury:

1. Was there a settlement between plaintiffs and defendant in September, 1876, and did the defendant on said settlement execute a release of all claims against the plaintiffs on his part, arising prior to that date?

2. What damages, if any, is the defendant entitled to recover by reason of any breaches of contract on the part of the plaintiffs after September 2d, 1876?

The defendant admitted that the release mentioned in the first issue was executed, and the jury responded to the inquiry of damages that the defendant was entitled to none.

The controversy involved in the last issue seems to arise out of the plaintiffs' allegation in the replication, that all the counter-claims were concluded in the settlement and extinguished by the release, while the defendant insisted there were claims outside of and subsequent to the release. The burden then rested on the plaintiffs to give the comprehensive scope to their defence, against the defendant's demands that the release extended to all. Such seems to have been the view of the controversy taken by the court, and on which the ruling was made.

It may admit of some doubt on which party the affirmative devolved, but as ordinarily the plaintiff opens and concludes, the scale in such case must incline to support the general rule which accords the privilege to the plaintiff. When there are several issues, if the plaintiff is called on to maintain a single one, and the defendant the others, the right is accorded to the former. Aside from the fact that the first

issue was an affirmative resting on the plaintiffs, the second seems to be double, and virtually to include two affirmative propositions—first, that the release covered all the claims, and secondly, that it did not cover such as accrued subsequently. We therefore sustain the ruling of his Honor. (22)

It is to be regretted that a matter of practice, in reference to the conduct of the discussion and the order of argument, should have been allowed to be assigned as error in law for a supervising appellate jurisdiction, and not left to the sound discretion of the presiding judge in the court of trial. But the adjudications have settled the matter otherwise, and we do not feel at liberty to disturb the line of decisions hitherto made by the court. There is no error.

No error. Affirmed.

Cited: Jaffray v. Baer, 98 N.C. 59; *McQueen v. Bank*, 111 N.C. 514; *Michaux v. Rubber Co.*, 190 N.C. 618.

BANK (COMMERCIAL NATIONAL OF CHARLOTTE) v. HUTCHISON & HUTCHISON.

Verification of Pleadings—Corporations.

A verification to a complaint made by an officer of a corporation, need not set forth "his knowledge or the grounds of his belief on the subject, and the reasons why it was not made by the party." A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself.

CIVIL ACTION tried at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves, J.*

The only question presented in this case is as to the sufficiency of the verification of the complaint. It is as follows: "R. M. White maketh oath that the plaintiff is a corporation duly organized under the laws of the United States; that he is an officer thereof, (23) to-wit, the president; and that the facts herein set forth of his own knowledge are true, those otherwise stated he believes to be true." (Signed by R. M. White, and sworn to and subscribed before the clerk on the 31st of August, 1882.)

The defendant, D. P. Hutchison, filed an unverified answer, and at Fall Term, 1882, the plaintiff moved for judgment upon the complaint, as for want of an answer, which the court granted; and therefore the

defendants excepted, insisting that the verification of the complaint was not in compliance with section 117 of the Code, and so dispensed with a verification of the answer.

Messrs. Bynum & Grier, for plaintiff.

Messrs. Burwell & Walker and Wilson & Son, for defendants.

RUFFIN, J. In *Alspaugh v. Winstead,* 79 N. C., 526, the form of the verification used was almost identical with that made use of in this case. No substantial difference can be perceived between the two. And in matters so purely technical, the court will not be astute in looking for distinctions. That then is an authority for sustaining the ruling in the court below, provided the complaint and verification had been the party's own.

But it is further objected here, that the verification is by an officer of the plaintiff company, and that it should go further and set forth "his knowledge or the grounds of his belief on the subject, and the reasons why it was not made by the party," as required by section 117 of the Code.

The answer to this is, that the statute imposes no such condition upon those who verify as the officers of a corporation. It is only agents and attorneys that are required, when swearing to the pleadings for their principals or clients, to disclose their knowledge
(24) and its sources, and explain why the verification is not made by the party in person.

A corporation can take no oath, and can therefore make no verification; and it would be idle for its officer to explain why it has not done so. It can act only through its officers and other agents, and it is only by a fiction, because of their actual knowledge, that it can be said to know anything. When such an officer swears that he has knowledge of the facts set forth in the complaint and that they are truly stated therein, he has done all, it would seem, that can be done, and certainly all that need to be done.

The provisions of the New York Code in regard to this matter are the same with ours, and it is there held that the verification of pleadings by an officer of a corporation is the verification of the corporation itself, and need not state the defendant's ground of belief or sources of information. 1 Whit. Prac., 604, and cases cited; Vorhees Code, 311.

To require any verification at all to the answer of a corporation, is a great advance upon the practice of courts of equity, where it was well settled that a corporation aggregate made its answer, not as

in common cases under oath, but under its common seal. Angell & Ames on Corp., Sec. 665.

No error. Affirmed.

Cited: Banks v. Mfg. Co., 108 N.C. 283.

J. B. REYNOLDS AND ANOTHER v. J. C. SMATHERS AND OTHERS.

Amendment—Pleading—Counterclaim.

1. An amendment which includes a change of plaintiffs is allowable, and the defendant's demurrer was properly overruled.
2. A complaint without verification is not subject to a motion to dismiss; its effect is to dispense with the oath in support of any subsequent pleading.
3. An answer setting up a counterclaim, but which fails to show that the same subsisted between the parties when the action was begun, or that it arose out of, or was connected with the subject of the plaintiff's action, is demurrable.

CIVIL ACTION tried at Spring Term, 1882, of MECKLENBURG (25) Superior Court, before *Gudger, J.*

S. C. Burchard, one of the plaintiffs, pursuant to the summons issued against the defendants, filed his complaint and alleged an assignment to him by the partnership firm of Smathers & Forbis of a claim held by them against the defendants, for goods sold and delivered, in the sum of $253.30, (the particulars being set out in an exhibit) and payable at sixty days from November 8, 1878, no part of which has been paid.

The defendant, J. C. Smathers, answering for himself and co-defendants, denies the averments of the complaint, as to the plaintiff's right as assignee, and, upon information and belief, says that the whole stock of merchandize, including the accounts, notes and other property of said firm were assigned and conveyed to one J. B. Reynolds, or some one to them unknown, in trust to secure creditors, and the trust, as they are informed and believe, remains undischarged.

Thereupon at July Term, 1881, the amended complaint, filed by leave of court, substituted the said J. B. Reynolds as plaintiff, and as thus changed, reiterated the allegations contained in the first complaint.

The defendant demurred to the amended complaint, assigning grounds as follows:

1. The facts contained in the amended are materially different from those in the original complaint.

2. There is a variance between the summons and the amended complaint.

(26) 3. The complaint fails to allege that the debt sought to be recovered is due to the plaintiff, or that he has any interest therein.

His Honor overruled the demurrer and gave the defendants leave to answer within twenty days.

The defendants then moved to dismiss the amended complaint for want of a proper verification—the original complaint and answer having been put in on oath. The court held the verification to be insufficient, but refused the motion, declaring the amended complaint to be an unverified pleading, and to be treated as put in without oath. Defendants excepted.

Thereupon the defendants answer, denying in a single clause the four enumerated articles constituting the complaint, inclusive of the alleged assignment averred in their first answer, and say—

1. The plaintiff has taken possession of and applied to his own use a large amount of property belonging to said firm, and fails to account for the same.

2. That this firm became largely indebted to the defendants before this suit, by reason of an assignment to them of his notes of over $1100, due by said firm.

3. That the plaintiff under the assignment of said trust, claims to have taken possession of property of the debtors (the said firm), but he has failed to pay the indebtedness due the defendants; and,

4. That plaintiff has, or ought to have, in his hands funds applicable to, and which should be applied in payment of defendants' claim.

To this answer the plaintiff demurs, and assigns for cause of demurrer,

1. That the answer does not say that the defendant (referring to the said J. C. Smathers) is now, or was at the commencement of this action or the filing of the answer, the owner of the notes mentioned therein.

(27) 2. Nor does it state that the notes were executed by the said firm upon their transfer of the claim sued on to the plaintiff.

3. The notes are not sufficiently described in the answer to enable the plaintiff, or the court, to ascertain their terms or amount.

4. It is not alleged that the defendant is, or ever was, owner of the notes, or had any property therein.

5. Nor that they are secured in the deed of assignment, or can they be identified as such, if secured.

The plaintiff's demurrer was sustained, and the parties went to trial before a jury who find all the issues in favor of the plaintiff. Judgment for plaintiff against the defendant, J. C. Smathers, for the amount of plaintiff's demand and costs, (a *nol pros.* having been entered before verdict as to the other defendants), and the defendant appealed.

Messrs. Jones & Johnston, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. There were some exceptions taken during the progress of the trial which were not pressed or relied on in the argument, and we advert to them only to say, that we regard them as untenable. We will consider the others.

1. The amendment authorized by the court, in our opinion, included a change of plaintiffs, and within the competency of the court to permit. An amendment in changing plaintiffs has been repeatedly allowed. In *Bullard v. Johnson*, 65 N. C., 436, and *State v. Cauble*, 70 N. C., 62, such substitution was made in the superior court upon an appeal from a judgment of a justice of the peace. And in *March v. Verble*, 79 N. C., 19, a plaintiff was made during a trial before a jury. See also, *Cheatham v. Crews*, 81 N. C., 343; *Gilchrist v. Kitchen*, 86 N. C., 20, and numerous cases of amendment.

2. The demurrer to the amended complaint, if not frivolous, (28) rests upon no substantial grounds, and the causes assigned are entirely insufficient. It was therefore properly overruled.

3. The defendant's motion to dismiss the amended complaint was irregular in itself, and was properly refused. The only regular motion that could be made was to withdraw it from the files, and if put in that form, it should have been denied. The effect of filing an unverified pleading is to dispense with the oath in support of any subsequent pleading.

4. The demurrer to defendant's counterclaims was rightfully sustained. These were neither set out and shown to be within section 101 of the Code, and subsisting between the parties when the action was begun, nor are they described as arising out of the contract set out in the complaint, or connected with the subject of the plaintiff's action, so as to be capable of being thus asserted.

Upon a consideration of the whole record, we find no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Kron v. Smith, 96 N.C. 392; *Brown v. Mitchell,* 102 N.C. 374; *Jarrett v. Gibbs,* 107 N.C. 304; *Maggett v. Roberts,* 108 N.C. 177; *Puffer v. Lucas,* 112 N.C. 382; *Comrs. v. Telegraph Co.,* 113 N.C. 220; *Smith v. French,* 141 N.C. 10; *Campbell v. Power Co.,* 166 N.C. 490; *Clevenger v. Grover,* 212 N.C. 16; *Barber v. Edwards,* 218 N.C. 732.

H. & E. HARTMAN & CO. v. RICHARD P. SPIERS.

Practice—Consolidation of Causes.

It is error to consolidate cases which are essentially different and the parties in each are not the same. Cases in which consolidation may be ordered, stated by SMITH, C. J.

(29) APPEAL by plaintiffs from an order made at Spring Term, 1882, of HALIFAX Superior Court, by *Bennett, J.*

Messrs. R. O. Burton, Jr., and Gilliam & Whitaker, for plaintiffs.

Messrs. Hill, Batchelor, Peebles, and Mullen & Moore, for defendants.

SMITH, C. J. The sheriff of Halifax, having in his hands two executions issued on judgments recovered before a justice of the peace of the county by the plaintiffs, against the defendant, and docketed in the superior court on December 21, 1880, proceeded to appoint appraisers to designate and allot to the defendant his homestead in land proposed to be sold. The appraisers accordingly valued and laid off as such homestead a portion of a lot in the town of Weldon belonging to the defendant, and which he had theretofore conveyed in three successive deeds in trust, with all the other lands, (except a part of lot number 2, in said town, which at the time was supposed by the defendant, as by others, to be included in the conveyances aforesaid) to secure debts.

The sheriff then sold the residue of the lands from which the homestead portion was taken, and with the report of the action of the appraisers made return of the sale upon his execution to the succeeding term of the court. All the encumbered lands have been sold under the deeds and the proceeds have not been sufficient to discharge the secured debts, and the assigned homestead has been lost. The defendant protested against the allotment and undertook to appeal from

the action of the appraisers to the board of county commissioners, but his appeal was not entertained for want of jurisdiction, and from this decision he asked an appeal to the superior court, but no transcript was sent up.

These are in substance the facts stated in the defendant's application to the judge of the superior court for a writ of (30) *certiorari* directed to the county commissioners, for a transcript of the proceedings, which having been awarded, they have been certified and sent up. This cause was thereupon ordered to be consolidated with an action pending in the same court prosecuted by R. O. Burton against this defendant and one Clark for the recovery of lands purchased under execution, and from this judgment of his Honor the appeal is taken by Hartman & Co.

We think there was error in this ruling, and the cases were not such as to warrant the consolidation of them. The actions are essentially unlike, and the parties in each not the same. In the one, the object is to annul and set aside the allotment of the homestead as illegally made, with a view to another allotment in the unencumbered land; in the other, the purpose of the suit is the recovery of land claimed by the plaintiff as purchaser at an execution sale, and the title is contested by the defendants, one of them alleging himself to be the owner.

The cases in which, under the practice, consolidation may be ordered seem to arrange themselves into three classes:

1. Where the plaintiff might have united all his causes of action in one suit, and has brought several, and these causes of action must be in one and the same right and a common defence is set up to all. *Buie v. Kelly*, 52 N. C., 266.

2. Where separate suits are instituted by different creditors to subject the same debtor's estate. *Campbell's case*, 2 Blan. (Md.), 209.

3. Where the same plaintiff sues different defendants, each of whom defends on the same grounds and the same question is involved in each. *Jackson v. Schouler*, 4 Cowen (N. Y.), 78.

These may not embrace all the cases, but they serve to illustrate the rule by which the court is governed in ordering such union.

This cause was never rightfully before the county commis- (31) sioners, since the appellate jurisdiction given to the township trustees by the act of 1868-69 (Bat. Rev., ch. 55, sec. 20) is not transferred to the county commissioners by the act of 1876-77, ch. 14, as is decided in *Jones v. Commissioners*, 85 N. C., 278.

While the point is not presented, as to the remedy for a creditor or debtor dissatisfied with the allotment when not made in accordance

with law, it would seem from the directions of section 4 of the act, that the appraisers' report shall accompany the return of the execution, be filed by the clerk with the judgment roll in the action, and a minute thereof entered on the docket, and that it becomes a record in that court, subject to a motion to set aside when made in a reasonable time, since the setting aside may involve a setting aside the sale under execution of the unallotted part of the land, and the restoration of parties to their antecedent status. We make the suggestion merely leaving the question open for decision when it may properly be presented.

The order of consolidation is reversed and this will be certified to the superior court of Halifax.

Error. Reversed.

Cited: Lumber Co. v. Sanford, 112 N.C. 658; *Wilder v. Greene,* 172 N.C. 95; *Ins. Co. v. R.R.,* 179 N.C. 259; *Henderson v. Forrest,* 184 N.C. 232; *Blount v. Sawyer,* 189 N.C. 211; *Rosenmann v. Belk-Williams Co.,* 191 N.C. 496; *Kalte v. Lexington,* 213 N.C. 781; *In re Will of Atkinson,* 225 N.C. 529; *Peeples v. R.R.,* 228 N.C. 592.

G. E. THOMAS AND OTHERS v. T. H. B. MYERS AND OTHERS.

Practice—New Trial.

An order granting or refusing a motion for a new trial will not be disturbed by this Court, in a case where the determination of a question of law is not involved.

(32) CIVIL ACTION tried at Spring Term, 1882, of BEAUFORT Superior Court, before *McKoy, J.*

The defendants offered in evidence, on the trial of the issues before the jury, a written acknowledgment purporting to come from one of the assignors of the plaintiff, and bearing the signature of the firm of which he was then a member, of the receipt of the defendants' note for $650, due at six months on account; and underneath, upon the same page and of the same date and bearing the firm name, was an explanatory memorandum, addressed to the defendants, stating that in case the sale of the Taylor Gin should be insufficient to cover the above amount, a remittance would be made to meet the deficiency, and in time to take up the note.

These papers bear date June 17th, 1872. Upon previous trials the entire paper had been introduced by the defendants and read in evidence. At the last trial the defendant, T. H. B. Myers, examined on his own behalf to prove the execution of both writings, and after a close inspection, testified that they were not both in the same handwriting, and the explanatory memorandum was ruled out, and the plaintiffs had a verdict for a part of their demand.

The defendants thereupon moved for a new trial, and in support thereof, the affidavit of said Myers was submitted, wherein he says that for the first time when giving in his testimony he discovered the difference in the handwriting, and that in his opinion each was written by a member of the firm, though not by the same person, and he expects to be able to show the fact at the next term.

The court being of opinion that the defendants were surprised and the verdict, if allowed to stand, "would work injustice," to the defendants, "in its discretion" ordered the verdict and judgment to be set aside and a new trial awarded. From this ruling the plaintiffs appeal.

Mr. Geo. H. Brown, for plaintiffs. (33)
Mr. W. B. Rodman, for defendants.

SMITH, C. J. The numerous adjudications heretofore made, that this court will not revise and reverse the exercise of a power committed to the discretion of the judge of the superior court, would seem to render superfluous any discussion or reference to precedents, and the granting or refusing a motion for a new trial, not involving the determination of a question of law, it is well settled, belongs to this class and is not subject to review on appeal.

"The new trials which have been awarded here," is the language of HENDERSON, J., in *Bank v. Hunter,* 12 N. C., 100, "were in cases where there was some error which infected the verdict, such as the admission or rejection of evidence, which ought to have been received or rejected, or some misdirection of the judge to the jury, on questions of law arising on the trial, or the like."

In answer to an argument for the revisal of a judgment, on the ground of *surprise*, the same judge declares that "it is matter addressed to the discretion of the judge below, over which we have no control." *Lindsey v. Lee, Ib.,* 464.

So GASTON, J., declares in *State v. Miller,* 18 N. C., 500: "There is a marked distinction between the awarding of a new *venire* because of the verdict being thus declared bad, and the setting of a verdict aside

and granting of a new trial. The former must be for matters apparent only on the record, and is of right; the other may be for matters not appearing on the record, and is addressed to the discretion of the court. The former is matter of error, and must be noticed by the appellate court; the latter is ordinarily not matter of error, nor elsewhere examinable."

The distinction is noted in *Moore v. Edmiston,* 70 N. C., 471, and other cases.

It is true an appeal lies under C. C. P., Sec. 299, from the
(34) granting or refusing a new trial and the ruling will be revised, but it is allowed only when the action of the court is one "involving a matter of law and legal inference," and not the exercise of a discretionary power.

In accordance with this section, this court in *Bryan v. Heck,* 67 N. C., 322, entertained an appeal of the plaintiff from an order setting aside the verdict and vacating the judgment, on the ground of the erroneous ruling of the judge that the plaintiff was only entitled to nominal damages, while the jury had assessed substantial damages, such as he was entitled to recover, and the order was reversed. See also *Quincey v. Perkins,* 76 N. C., 295; *Long v. Gooch,* 86 N. C., 709.

The court in the present case, while reporting the evidence, declares the case to be one of surprise, injurious to the defendants, and awards a new trial as, in its judgment, under the circumstances, due to the defendants. It will not therefore be disturbed, and the appeal must be dismissed.

PER CURIAM. Appeal dismissed.

Cited: Carson v. Dellinger, 90 N.C. 229; *Puffer v. Lucas,* 107 N.C. 325; *Edwards v. Phifer,* 120 N.C. 406; *Wood v. R.R.,* 313 N.C. 48; *Johnson v. Reformers,* 135 N.C. 387; *Oil Co. v. Grocery Co.,* 136 N.C. 356; *Abernethy v. Yount,* 138 N.C. 347; *Goodman v. Goodman,* 201 N.C. 810.

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*JAMES W. GRANT, ADM'R, v. JOSEPH J. BELL.

Pleading—Issues—Account—Executors and Administrators—Parties.

1. The pleadings should present the main facts of a case—those upon which the right of action, or of defence, depends, and which are indispensable

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

thereto. And the court must not submit to the jury such issues as are directed to the mere details of evidence.

2. Where the main issue is as to the fraudulent procurement of a settlement between parties, it is not error to refuse to submit an issue relating to the insolvency of one of them and the payment of money to him—this being merely a circumstance bearing on the main issue—as for instance, the acceptance by the executor in this case of his own insolvent paper for debts due the estate, is some evidence of fraud, and proper for the jury to consider in making up their verdict upon the main issue.

3. In an action for an account, where defendant pleads *quod plene computent*, he must aver that there has been an "account stated," and that the same is just and true; and where a receipt is given for the amount ascertained to be due, it operates a bar to an action for another account touching the same matters.

4. An executor who pays his private debt out of assets of his testator commits a *devastavit*, and the creditor of the executor who knowingly accepts the same, is guilty of collusion, (whether he believes the executor to be solvent or not) and is liable to an action for the amount of the assets so misapplied.

5. An administrator *d. b. n., c. t. a.*, is the representative of the testator, and the proper party plaintiff in an action to recover the assets of the estate.

CIVIL ACTION for account and settlement, tried at Spring (35) Term, 1880, of NORTHAMPTON Superior Court, before *Gudger, J.*

In 1841 one William B. Lockhart died, leaving a last will, whereof he appointed as executors one Gray and the defendant, who had intermarried with one of his daughters, she, however, being then dead.

By said will the testator devised a certain tract of land known as the "Gee tract," to his widow, Sarah Lockhart, requesting her however to permit the defendant to occupy it until he should contract another marriage, and thereafter to cultivate it for the benefit of William T. Bell, who was the infant son of the defendant and grandson of the testator.

By other clauses of his will he devised and bequeathed to the defendant other lands, and several slaves and stock, etc., to (36) be his until he should marry again, and upon that event to be the property of his said son William T.

Sarah Lockhart, the widow of the testator, died in April, 1855, leaving a will in which she devised the said "Gee tract" of land to her grandson, the said William T., and bequeathed to him several other slaves, and immediately thereafter the defendant became the guardian of his said son, and took his estate into his keeping and management.

The defendant married a second wife in August, 1844, but continued to have the use of the "Gee tract" and the other property given him under the will of the testator, William B. Lockhart, until his son arrived at age.

After his arrival at age, he and the defendant formed an agricultural partnership for the cultivation of the "Gee tract" of land and an adjoining place known as the "Rex tract," and the defendant afterwards contracted with him for the purchase of a part of the "Rex tract."

The defendant and his son attenpted to have a settlement of their accounts, but in consequence of the latter's ill-health it was not effected, and in 1863 the son died, leaving a will in which he bequeathed to an uncle, one B. F. Lockhart, whom he also appointed his executor, two-thirds of his whole estate, and to one Joseph G. Lockhart the residue—the defendant being still liable to account, by reason of the premises as trustee, partner and guardian.

In 1864, B. F. Lockhart, as executor of said William T., filed a bill in equity against the defendant for an account and settlement of all their matters, when it was referred to the then clerk and master to take and state the account, who made a report ascertaining the amount due from the defendant in his several capacities—the amount thus ascertained the plaintiff insists was about $20,000, whereas the defendant insists that it was about $12,000.

(37) This suit gave rise to great bitterness of feeling between the parties to it, and was conducted with much acrimony on their part—the said executor having for his attorney the late Thomas Bragg, and the defendant being represented by Matt. W. Ransom and David A. Barnes.

Through the intervention of their respective attorneys, the parties were brought together and an adjustment effected, in which the executor agreed to take a decree of $12,077.34, and to accept in part discharge therefrom some notes, which he, as an individual, was owing to the defendant, and accordingly this arrangement was carried out on the 25th day of September, 1868, the defendant paying the executor some money, and delivering up the notes on him agreed to be taken, and the latter giving him a receipt in full of all demands.

The estate of the said William T. Bell, the testator of said B. F. Lockhart, was indebted to parties who took judgment against his executor, which judgments remain unpaid, and in January 1875, his letters were revoked, and letters of administration *de bonis non, cum testamento annexo*, upon the estate of the said William T. Bell, have since been granted to the plaintiff.

The acquittance given by the executor, Lockhart, to defendant at the time of their adjustment, is as follows:

"Received of Joseph J. Bell the sum of nine thousand, two hundred and fifty dollars in full payment, satisfaction and discharge of a de-

cree rendered against him in favor of B. F. Lockhart, executor of W. T. Bell, deceased, in superior court of Northampton County, and also received the further sum of two thousand, eight hundred and twenty-seven $^{34}/_{100}$ dollars, good bonds, in full payment, satisfaction and discharge of that part of the said decree in reference to 58¾ acres of land passed by the said decree to the said Joseph J. Bell; and I, the said Benjamin F. Lockhart, executor as aforesaid, do hereby acquit and fully discharge and release the said Jos. J. Bell in full of all claims whatsoever, on account of the said Wm. T. Bell, and the said estate and decree. The clerk is authorized to file this receipt (38) with the papers. 25th November, 1868."

(Signed) "B. F. LOCKHART, Ex. of W. T. Bell.

Witness: M. W. RANSOM."

No such decree as the one referred to in that instrument can be found on the files of the court.

W. H. Gray, who was surety on the bond of Lockhart, as the personal representative of W. T. Bell, was also his surety on one of the bonds, which the defendant held on the said Lockhart, and which was taken, as has been said, by him in part satisfaction of the alleged decree, and he was present at the adjustment made between them, and gave his approval to it.

In his complaint the plaintiff alleges that at the time of making the settlement with the defendant, the executor, Lockhart, was in very straightened if not insolvent circumstances, that his home had been sold to one Long, who had, however, given him an opportunity to redeem it, and he had been sued by some of his creditors, and was threatened with a suit by the defendant, who living in Virginia could sue in the federal court where a right to homestead as against debts contracted before 1868 was not recognized. That taking advantage of his distressed condition, the defendant fraudulently prevailed upon him to compromise his suit and to accept greatly less than was due the estate of his testator, as well as to receive his own private debts in part discharged thereof, and he prays that the receipt given in consequence of a settlement, so covinously procured, should be declared void, and that the defendant may be now required to account fairly for all the several matters involved in the premises.

On the other hand the defendant alleges that it was a fair and just settlement of all he owed, proposed and urged by Mr. Bragg, as the counsel for the executor, and conducted by Messrs. Ransom and Barnes on the part of the defendant. That defendant did (39) not then believe the executor to be insolvent, but whether so or not, there was no effort to intimidate him, and no duress put upon

him. That it was no compromise of the amount due from him to the estate of his son, but a payment of the whole sum found to be due after a careful investigation and full proofs, as to every matter connected with the transaction between his son and himself.

On the trial in the court below the plaintiff introduced as evidence the records of many judgments taken against B. F. Lockhart, and of actions still pending against him—all being for debts contracted prior to 1868, and amounting in the aggregate to some $17,000, and the sheriff's return of *nulla bona* to the executions issued upon the judgments.

To some of these debts the defendant was bound as the surety of the said Lockhart.

He also introduced as a witness T. W. Mason, who testified that in a conversation with him, the defendant said that he had paid Lockhart, in his settlement with him as executor, only some $10,000 or $12,000 and this he had paid partly in bonds he held upon him. This witness also testified that the feeling between the parties anterior to the settlement in 1868, was exceedingly bitter, but that after that time their relations were cordial and friendly, and that he heard the defendant say, soon thereafter, that he intended to purchase a tract of land then about to be sold, for Lockhart's family, and that his purpose was to befriend him.

The defendant introduced as witness Messrs. Ransom and Barnes, who had been of counsel for him in the matter, to whom it had been referred to take the account between the parties to the action of Lockhart against the defendant, had made two reports, one based on the rents and hires of the property, and the other upon the average profits derived therefrom, and that, just upon the eve of going to trial, Mr. Bragg, of counsel for Lockhart, approached them, with the
(40) suggestion that the matter should be settled, and a proposition to settle according to what was known as the "rent and hire account." The defendant insisted that the hires were too high, and proposed then and there to furnish proof of that fact; but after further consultation, they settled according to said account, except that an abatement of $1,000 was made on account of the alleged extravagance of the charges, and it being further stipulated that the amount to be paid should be accepted in good bonds in lieu of cash. Accordingly the settlement took place on this footing.

Amongst the bonds agreed to be taken were some which the defendant had upon Lockhart—some with and some without surety. Also one on N. M. Long, which Lockhart afterwards used in paying a debt he owed to said Long.

The acquittance, before set out, was then prepared by the witness, Mr. Ransom, and signed by Lockhart; and Mr. Bragg, at the same time, and at the same table, drew the decree to be filed in the cause—the presiding judge having delayed the adjournment of the court in order to sign it.

Mr. Ransom also testified that in the settlement each party stood upon his own rights, and insisted upon receiving all that was due him; also, that they were very hostile towards each other, but became friendly at the time of the adjustment of the suit, and remained so afterwards.

Two issues were submitted to the jury:

1. Has the defendant settled in full with B. F. Lockhart, executor of William T. Bell, all demands of said Bell against him, and been released from his liability therefor?

2. Was said release obtained by fraud on the part of the defendant?

To the first they responded in the affirmative, and to the latter in the negative.

Judgment was rendered in favor of the defendant, from which the plaintiff appealed, (his exceptions being set out in the opin- (41) ion of the court.)

Messrs. R. B. Peebles and Thos. N. Hill, for plaintiff.

Messrs. Mullen & Moore, J. B. Batchelor and Day & Zollicoffer, for defendant.

RUFFIN, J., after stating the above. As disclosed in the record, the plaintiff's first two exceptions relate to the admission of certain evidence, but as his counsel failed to advert to the subject in their argument here, we infer their purpose to abandon them, and therefore content ourselves with saying that in our opinion they were properly abandoned.

In lieu of the issues submitted and passed upon by the jury, the plaintiff proposed the following:

1. Was B. F. Lockhart insolvent on the 25th day of November, 1862? (that being the day on which he executed the receipt.)

2. How much money did the defendant then pay to said Lockhart as executor of W. T. Bell?

These, his Honor deemed unnecessary, and rejected, and his action in this particular is the subject of the plaintiff's third and fourth exceptions.

Strictly speaking, the pleadings should present only the *issuable facts* of the cause—that is, those facts upon which the right of

action or of defence ultimately depends. But parties oftentimes, and sometimes properly, in order to give point to their main matters, introduce matters merely evidentiary, that is, such as need only be proved at the trial in support of the essential issuable facts.

Frequently it is difficult to distinguish between the two classes of facts. But still, it is the duty of the court to do so, and to submit only such issues as are directed, not to the mere details of evidence, but to those main conclusions of fact that are indispensable to
(42) the right of action, or of defence—or else, there will be no such thing left to the juries of the country as a general verdict, but all their findings must assume the form of special verdicts, ascertaining only "the dry facts" of the case, and leaving their legal effect to be declared by the court.

Doubtless his Honor under the provisions of C. C. P., Sec. 233, might in his discretion have required the jury to find the facts, and reserved to himself the right to pronounce the judgment of the law. But this was not incumbent upon him, and as he deemed it best to submit such issues as were compounded of both law and fact, and left their dicision to the jury under such instructions as he might give them, there was no room for either party to complain—since the statute expressly clothes him with that discretion.

The main issuable fact apon which the plaintiff's right of action in this case depends, is the fraudulent procurement of the settlement and acquittance by the defendant. This the latter denies, and so it becomes the conclusive essential fact in the cause, and the insolvency of the executor and the non-payment to him of any money, while material and important circumstances, are but matters or details of evidence, bearing upon it. Suppose both those facts to be established, as contended for the plaintiff, it would still leave the main and more comprehensive issue as to the fraud, undecided. The proposed issues were, therefore, too narrow, and failed to reach the whole merits of the controversy, and were properly rejected by the court. *Jenkins v. Conley*, 70 N. C., 353; *Albright v. Mitchell, Ib.*, 445.

In this fifth and sixth exceptions, the plaintiff complains of the issues actually submitted, upon the ground that they are not such as are raised by the answer—the allegation of the settlement therein contained being as he says insufficient to raise the issue of *in simul computassent,* because no account is therein set out, accom-
(43) panied by an oath as to its being just and true.

The authorities all say, that whenever to a bill for an account the defendant pleads *quod plene computent,* he must aver that that there has been an *account stated* between the plaintiff and him-

self, and that as stated it is just and true; and when practicable, it is proper that a copy of the account so settled should be annexed to the answer.

As far as lies in his power, this defendant seems strictly to have complied with this requirement of the courts.

The complaint itself alleges that the action heretofore brought by Lockhart, as executor, against the defendant, embraced the very matters which are now in controversy, and further that in the progress of that action a reference had been made to the master to state the account of the defendant in his threefold capacity of guardian, trustee and partner, and a report from him presenting the account in two aspects—which report and account have been lost from the files. All this the defendant admits, and alleges that his ultimate settlement took place upon the basis of one of the accounts as reported by the master, and that as thus settled it embraced every item with which he should have been charged, and was both just and true, and its loss from the files and his inability to restate it, owing to the great lapse of time, he tenders as his excuse for not setting it out in his answer—and surely in a court of equity this must suffice.

As for the acquittance, it is not pleaded, or relied upon, as a technical *release*, operating *proprio vigore* as a discharge of the defendant, but as a written acknowledgment of satisfaction of the amount so ascertained to be due, and it cannot be necessary to cite authorities to prove that an account so stated and settled, and its satisfaction so evidenced in writing, must be a bar to an action for another account touching the same matters. Fair settlements, like other contracts, must be observed by the parties, and will be upheld by the courts without stickling as to form. The facts set out in *Meb-* (44) *ane v. Mebane*, 36 N. C., 403, differ so immaterially with those of the present case, as to make it a direct authority for us; and so too in *Costin v. Baxter*, 41 N. C., 197, and *Harrison v. Bradley*, 40 N. C., 136. In each of those cases, there had been an "account settled," though not an "account stated," and a receipt given; and it was held that it would be mischievous to allow such settlements to be disturbed after the accounting parties had, perhaps, lost or destroyed their vouchers.

Seventh exception. The plaintiff asked that the jury should be specially instructed that, inasmuch as the burden rested on the defendant to show that a fair and true account of the several matters, now involved, had been stated between the former executor and himself, and he had failed to furnish such proof, they should find both issues,

as submitted, against him. This instruction his Honor refused to give, and in the opinion of this court, properly so.

Apart from the defendant's own allegations, his attorney, Mr. Ransom, who aided at the settlement, testified, that except as to an abatement of $1,000 in the rents and hires charged, it was made upon the basis of what was known as "the rent and hire account"—that being one form of the account so stated by the master—and that both parties were then fairly represented by counsel, and both stood upon their rights and contended at arm's length. Without, then, invading the province of the jury, the court could not give the instruction prayed for.

Eighth. The plaintiff prayed the court to instruct the jury that in passing upon the second issue they should not consider the characters of Messrs. Bragg, Ransom and Barnes, the attorneys of the respective parties, who aided at the settlement. This was also properly refused by the court. As disclosed, there is literally nothing in the case which could justify any such instructions. No sort of prominence ap-
(45) pears to have been claimed for those gentlemen, and no proof either way as to their reputation, or their abilities as attorneys. But the fact that both parties to the agreement were fairly represented by counsel learned in the law, is relied on as tending to show that no undue advantage was taken by one over the other—and surely it would have been to reverse the rule of every day's experience, for the court to caution the jury against the integrity and intelligence of those, by whose advice, and through whose coöperation, it had been effected.

Ninth. The plaintiff further asked that the jury should be instructed that it is *fraud in law* for an insolvent executor to take, in payment of debts the estate, his own insolvent paper; and therefore if they should believe that the executor, Lockhart, was insolvent, and gave the discharge relied on by the defendant, on account of the surrender and cancellation of his own notes, he was guilty of fraud, and the defendant likewise guilty of a wilful participation therein. His Honor declined thus to instruct the jury, but told them that it was some evidence of fraud, on the part of the executor, to accept his own insolvent paper in discharge of debts due the estate of his testator.

Admitting that some slight obscurity attaches to this portion of the instructions given, we still can discover no such error as in our opinion would justify us in disturbing the verdict as rendered. The plaintiff's allegations set forth the conduct of the defendant as fraudulent in two particulars: First, in taking advantage of the exposed and impoverished condition of the executor, and by use of the power of a creditor, constraining him to settle upon terms injurious to the estate, and to

accept less than the amount justly owing to the same; and secondly, in inducing the executor after the amount was thus agreed upon, to accept in payment his own private debts.

The fact that payment was thus made, either in whole or in part, by the surrender of debts on the executor is nowhere denied (46) in the answer. On the contrary, it seems to have been conceded throughout the whole case, and was proved by the defendant's own witness and counsel. This being so, there was no issue raised as to that branch of the alleged fraud, which needed to be passed upon by the jury; and consequently, his Honor seems to have confined his own and the jury's attention exclusively to the fraud alleged to have been practiced in procuring the settlement.

Taken in this light, the acceptance of his own notes by the executor ceased to be a matter of legal intendment, and become, as we had occasion to say with regard to his insolvency, one of the details of evidence, proper to be submitted to the jury and to be weighed by them in determining the main issue as to the fraudulent procurement of the settlement and discharge.

The tenth and last exception is taken to the refusal of the judge to grant the plaintiff judgment *non obstante veredicto*. This we think he was entitled to, not to the full extent claimed by him, but to the extent to which the defendant discharged his indebtedness to the estate of his son by the surrender of debts upon the executor.

No principal seems to be better supported by reason, or more firmly established by authority, than that the payment by an executor of his own private debt out of the assets of his testator is a clear *devastavit*; and that he, who knowingly accepts the assets in extinguishment of his private claim upon the executor, is guilty of collusion to make a *devastavit*, and will not be allowed to retain them against creditors or legatees, or those who represent them. The executor, although complete owner of the legal title of the property in his hands, is still in equity regarded as a trustee for creditors and legatees, and perfect good faith, on his part and those dealing with him, is exacted by the courts; and, as in all other cases, where a trustee has parted with the property in breach of his trust, the *cestui que trust* may follow it into the hands of any one who has been guilty of a (47) collusion with the executor.

It is no answer to say that he believed the executor to be solvent, and that he would replace the amount to the credit of the estate. The assets are a fund for the payment of the testator's debts and the legacies bequeathed in the will, and not the debts of the executor; and when his private creditor, who knows his representative character

and duty, consents to accept payment out of a fund appropriated to other purposes, that circumstance is all that is needed to fix him with notice; and the later and better doctrine is, that in such case he acts at his peril and takes upon himself the risk of the executor's right to so apply the assets, and of his ability to replace them in case of necessity. *Petric v. Clark*, 11 Sergt. & Rawle, 377; *Colt v. Lanier*, 9 Cowen, 320.

Objection, however, is taken that the action is improperly brought in the name of the administrator *de bonis non*, and that it can only be maintained by the defrauded legatees, or creditors, if there be such. This we do not regard as an open question. In *Colt v. Lanier, supra*, it is said that an administrator *de bonis non* is the full representative of the testator as to all effects not duly administered, and that he can therefore seek a discovery and account of assets in whosoever hands they may be, as long as they belong to the estate, and accordingly he was allowed to have his action against one who had taken the assets of the estate in payment of the executor's private debt. The same was held in *Dobson v. Simpson*, 2 Randolph, 294, and it must needs be so in this state, where it has been so long held that none but an administrator *de bonis non* can sue for a *devastavit* committed by a previous representative of the estate.

Nor can it materially alter the case that the executor in this instance was a legatee, as well. At most he was only a legatee for life with remainder to his children, if any, and if not, then to his
(48) brother's children. But above all this, the defendant had notice that the executor was applying the assets out of the ordinary course of administration, and he participated therein, and must be taken to have dealt at his peril in this particular also, and he cannot be permitted to retain the fruits of his collusion so long as a single debt of the testator remains unpaid, or a legatee of any description, unsatisfied.

Of course, he should be allowed to have the interest of Lockhart in the estate, whatever that may be. But this could only be to stop interest on the amount thus misappropriated during his life; and that, provided it may not be needed to pay creditors who have the first and highest equity.

Our conclusion therefore is, that the settlement made in 1868, between the defendant and the acting executor cannot be disturbed—its *bona fides* being fully established by the verdict of the jury. But that the plaintiff is entitled to judgment in this court for so much of the sum then ascertained to be due, as is unpaid, including such amounts as were attempted to be paid in the private debts of the

executor, whether endorsed or not, together with interest from the death of the executor, unless otherwise directed after a reference, which, if the parties so desire, may be had to the clerk of this court to ascertain the sum still due, and to inquire touching the debts of the testator. The plaintiff is also entitled to recover the costs of the action.

Error. Judgment accordingly.

Cited: Suttle v. Doggett, 87 N.C. 206; *Grant v. Bell*, 90 N.C. 560, 563; *Grant v. Bell*, 91 N.C. 495; *Grant v. Edwards*, 92 N.C. 444; *Coppersmith v. Wilson*, 104 N.C. 32; *Cornelius v. Brawley*, 109 N.C. 548; *Patterson v. Mills*, 121 N.C. 266; *Jackson v. Telegraph Co.*, 139 N.C. 357; *Durham v. R.R.*, 185 N.C. 244; *Dulin v. Dulin*, 197 N.C. 219.

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(49)

D. G. FOWLE AND S. W. VICK v. F. W. KERCHNER AND J. L. BOATWRIGHT.

Liability of Agent—Contract.

1. A party is an agent or principal in accordance with the intention of the parties to the instrument.
2. An agent, contracting as such, is liable only where he agrees to become responsible for his principal, or where he has been guilty of fraud.
3. Where one signs an unsealed instrument, without any qualification, the court will look at the whole instrument to arrive at the intention of the contracting parties; and if it be seen that the undertaking is in behalf of another and that there is no purpose to bind the party signing, personally, the form of the signature will not be regarded, nor will he be liable.
4. This rule applies where there is no principal, and that fact is known to the other contracting party.

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

In this case numerous exceptions were taken in the court below and argued here, but as in the opinion of this court the case was made to turn upon the construction of the contract between the parties, only so much of the case is set out as is necessary to make that part intelligible.

On the 4th day of May, 1876, the plaintiffs and defendants entered into the following stipulation:

"We, as trustees of the Journal Publishing Company, make the following proposition to Messrs. Fowle and Vick, the present owners

of the paper: To purchase the entire paper, good will, stock of every kind on hand, and in short, everything appertaining to the concern as it now stands. We will give $6,500 for the concern upon the following terms: $1,500 to be paid in cash within the next sixty days;
(50) $4,500 to be secured by first mortgage upon the company's entire property, to be paid in equal instalments at one, two and three years, with eight per cent interest per annum and five share of stock of the capital stock of the company. The new company to take the property entirely untrammeled, and to be responsible for no debts whatsoever that may now be against the same. The Price mortgage to be settled by Messrs. Fowle and Vick. As regards the debts now due to mortgagees which they cannot realize in money, because payable in type, etc., a private arrangement will be made with them by the trustees.

(Signed) F. W. KERCHNER.
JOHN L. BOATWRIGTH."

"I accept the above proposition.
(Signed) S. W. VICK."

"I accept the above proposition.
(Signed) D. G. FOWLE."

May 4, 1876.

"It is understood the mortgage for $4,500 is to be unendorsed. The Price mortgage amounts to $682, and can be paid in three, six and nine months. The private arrangement about the type, etc., means that the new company will pay for it in money—some $200 or $300 worth, I am told. (Signed) W. L. SAUNDERS."

In their complaint the plaintiffs allege, that at the time of the execution of said agreement, the defendants were the promoters of a projected joint stock company which when organized was to be styled "The Journal Publishing Company," and was to be the proprietor and publisher of a newspaper in the city of Wilmington.

That the plaintiffs were the owners of the property and good will of the Wilmington Journal—a paper which had theretofore been published in that city—all of which they agreed to sell, and did sell, to the defendants upon the terms set forth in the foregoing stipulations.

That in pursuance thereof plaintiffs delivered the said property
(51) to the defendants, who accepted the same.

They also paid off the Price mortgage, and have been ever since ready and willing to allow the said projected company to take the said property unencumbered and free from any liability whatsoever; but that the defendants had wholly failed to perform any part of their undertaking.

In their answer the defendants admit that they were promotors of a joint stock company for the purposes set forth in the complaint, but say that the plaintiffs were likewise promoters of said projected company.

That prior to the 4th of May, 1876, when their proposition was submitted to the plaintiffs through the active agency of the plaintiff, Vick, acting for himself and his copartner, Fowle, many persons had agreed to become shareholders in said company, but upon the express condition that the company was not to be organized, or the subscribers required to pay their subscriptions until $5000 of capital stock had been subscribed. That the names of many persons were put upon the list of subscribers by the defendant. Boatwright, under the direction and authority of the plaintiff, Vick. That at a meeting of the subscribers, the said plaintiff being present and assuming to represent the shares of those whose names he had caused to be put upon the list, (which of themselves constituted a majority of the whole number of shares) the defendants with one Atkinson, who declined to act were appointed trustees of proposed company. That believing the declarations of said plaintiff, and that the subscriptions which he professed to represent were really authorized by the persons in whose names they were entered, and that they were truly represented by him, the defendants proceeded to act in behalf of their associate subscribers, as trustees of the proposed company, and as such made the proposition before recited to the plaintiffs—the same being made in their representative and not in their individual characters; and being so accepted by the plaintiffs with the full knowledge and under- (52) standing on the part of the plaintiff, Vick, of their said intention, and that they were not to be personally bound for the performance of its stipulations. That the plaintiff, Vick, was not only a subscriber to the stock of the proposed company, but after Atkinson declined, was himself chosen a trustee and as such acted with the defendants. That of the shares subscribed and represented by said Vick, nearly the whole were afterwards repudiated, as unauthorized, by the parties in whose names they were taken; and that notwithstanding the defendants, together with the plaintiff Vick and other genuine subscribers, used every effort to procure other subscribers of stock, they failed to do so, and the project of organizing the company had to be abandoned.

The defendants further admit that in pursuance of the proposition made by them, as such trustees, and soon thereafter the Journal newspaper and its appurtenances were informally delivered to them, and they continued to hold the same and make use thereof until the

September following, when despairing of being able to organize the company they discontinued the publication of the paper and left the property in the hands of their business agent for redelivery to the plaintiffs when called for; and they allege that the plaintiffs soon thereafter resumed possession of it, and in January, 1877, resold and delivered the same to one Harris.

As a further defence the defendants allege that it was not intended that the contract should bind them personally, and if it was so written, it was done by mistake, or procured by the fraud of the plaintiff, Vick, and they ask that it may be either rescinded or reformed.

In their reply the plaintiffs deny all fraud and mistake and all knowledge of the defendants' mistake; and while they admit a resale of the property to Harris, they deny that they assumed posses-
(53) sion thereof with the intention of rescinding their contract with the defendants.

On the trial the following correspondence was offered in evidence:

"Yarborough House,
"Raleigh, N. C., 30th April, 1876.

"Dear Sir: As you are aware, I telegraphed on yesterday to Messrs. Vick, Kerchner and Boatwright that all you desired was to be properly secured; that I would decline the proposition here and put myself in their hands. As I have had no reply, I presume that the answer was satisfactory and that the only question now to be determined is, what is proper security. To hasten that determination, I beg that you will state explicitly what you deem proper security in the premises, so that the parties in Wilmington may act at once.

Very respectfully,
(Signed) W. L. SAUNDERS."

D. G. Fowle, Esq.

"Raleigh, April 30th, 1876.

"W. L. Saunders, Esq.:

"In reply to the within note, I have to say that the security named in the proposition left by you in Wilmington will be satisfactory to me—that is to say, mortgage notes executed to the amount of the debt due, secured upon all the property of the new company and endorsed by gentlemen of Wilmington known to be good. If the mortgage notes will be good security for me, they will be good for the endorsers, who will also have an eye upon the business, which I cannot. I will say further, to show my disposition in the matter: if Mr. Vick will pay down one half of the debt to Judge Pearson and half

the note in bank, I will pay the other half, and take endorsed first mortgage notes of the new company for the amount paid up by me.

Yours truly,

(Signed) DANL. G. FOWLE."

"Wilmington, N. C., 3d May, 1876." (54)

"My Dear Sir:

"Enclosed I send you proposition of trustees of new Journal Company [the contract sued on] which if you sign please return by next mail. I beg also that you notify me at once by telegram of your action in the premises. In my judgment, the security for the $4,500 is good—that is to say, a mortgage on all the property of the new company. I think upon the whole that the proposition is in as good shape and as advantageous as can be had. It would not have been made but for the danger there was that I might be thrown overboard, by failure to reëstablish *The Journal,* and as it is, my pay is to be only $1,500 per annum, to be increased—so I am told *sub rosa*—if the condition of things will justify. But whatever is done, ought to be done at once, on a good many accounts.

"If I had not formally declined the proposition at Raleigh, the whole thing would have fallen through. I state this so you can see how the ground lies.

"Please telegraph me at once. I have done the best I could for all parties, but a man who has placed himself in the hands of others cannot help feeling nervous about results when of so much importance to him and those depending on him. Very respectfully,

(Signed) W. L. SAUNDERS."

"To D. G. Fowle, Esq.

"Kerchner and Boatwright knew nothing of the proposition and memorandum I left here for their consideration until my return.

(Signed) W. L. S."

In response to issues submitted to them, the jury found that the possession of the property described in the written instrument was delivered by the plaintiffs and accepted by the defendants in pursuance of the terms thereof, and that such possession was not subsequently resumed by the plaintiffs with any intention to rescind the contract or release the defendants. They also nega- (55) tived the allegations of the answer as to the mistake in the parties in the execution of the instrument, and also as to the fraud on the part of the plaintiff Vick, procuring subscribers to the capital stock of the company, and in his representations as to the effect of the contract signed.

After the verdict the defendants moved for judgment, for that, upon a proper construction of the contract sued on, no personal judgment could be rendered against them, but his Honor refused the motion, holding that by the terms of the contract, "the defendants became bound to pay to the plaintiffs, for the property therein described, the sum of fifteen hundred dollars at the end of sixty days, and for the value of a mortgage upon the property for $4,500 payable in one, two and three years with interest at eight per cent, and for the value of five shares in the proposed company, and that plaintiffs became bound to deliver the property to the defendants with the title untrammeled, that is, free from any substantial liability for any debt except the Price mortgage, and also bound to relieve the property from the Price mortgage in a reasonable time."

After verdict and judgment for the plaintiffs the defendants appealed, assigning for error this ruling of his Honor.

Messrs. E. G. Haywood, Reade, Busbee & Busbee, Merrimon & Fuller, Battle & Mordicai and Geo. H. Snow, for plaintiffs.

Messrs. Hinsdale & Devereux, G. V. Strong, and Gilliam & Gatling, for defendants.

RUFFIN, J., after stating the above. The contract which is the basis of the action, being in writing and its terms therefore fixed, his Honor rightly treated its construction as a matter of law, the determination of which rested with the court. But we are constrained to
(56) say that we cannot concur in the interpretation which he placed upon it.

The legitimate aim of all interpretation is not to make a contract for the parties, or to modify the one they have made for themselves, but simply to ascertain their intentions and to give them effect, if not inconsistent with some policy of the law; and in the effort to arrive at their intentions, it is always proper for the court to consider not only the precise terms of the instrument, but the circumstances under which it was made, the situation of the parties, and the manner in which they have borne themselves with reference to it. Omitting the question as to the defendants' lack of authority to contract for the "Journal Publishing Company," and for the present supposing them to have been duly authorized, and considering only the terms in which they have expressed their intentions, and the concomitant circumstances, there would seem but little room to doubt, that according to the understanding of the parties, then existing, the defendants contracted in their representative character as trustees, and that their

own personal responsibility did not enter into the expectation of any of the contracting parties.

It is true their signatures affixed to the instrument are without any qualification, and in many doubtful cases, this circumstance has been seized upon by the courts as tending, *prima facie*, to show a purpose, on the part of the parties signing, to oblige themselves personally. But the signatures apply to the entire context of the instrument, and if from this it be plainly seen that the undertaking is in behalf of another then the courts without regard to the form of the signature must so construe it, and not treat it as the personal contract of the party signing it.

In 1 Parsons on Contracts, 54, it is said "that the more recent cases and the better reasoning, are, for determining in each instance and with whatever technical inaccuracy the signature is made, from the facts and the evidence, that a party is an agent or a (57) principal in accordance with the intention of the parties to the instrument."

In *De Wolf v. Insurance Company*, 8 Pick., 56, Chief Justice PARKER declared that the rule that the agent to bind his principal must sign the name of the principal, applies only to deeds, but that, as to other instruments, their effect must depend upon the intention with which they are made, and if from the whole instrument it can be ascertained that the party signing it intended to act for another, and not for himself, then he will not be bound.

In other words the courts now regard the particular form of executing a contract, not under seal, by an agent, as being wholly immaterial, provided the context of the instrument, and the circumstances under which it was executed, show that it was a ministerial act on his part.

Recurring then to the contract now under consideration, we see that not only did the proposition which the defendants submitted to the plaintiffs, and which upon their acceptance became the contract between the parties, expressly purport to be made *as trustees* and in behalf of the projected company; but, as if to exclude by express provision all possibility of personal liability on their part, the defendants indicate the company's property as that which should be given in mortgage for the debt, and the company's funds as the source of its ultimate payment, and if to this we add the further fact disclosed in the correspondence between the plaintiff, Fowle, and the witness, Saunders, that at one time he insisted that the mortgage upon the company's property should be endorsed by parties "known to be good," but that he finally, upon being assured by Saunders, that the proposition as submitted was as advantageous as could be had, agreed to accept it

"unendorsed," it would seem, if we are to adopt the intentions of the parties as the governing rule of construction, absolutely to ex-
(58) clude all thought of responsibility on the part of the defendants personally.

Indeed we understand plaintiffs' counsel to admit so much as this, when in their brief, they say, that they do not mean to assert that the contract in terms bound the defendants to pay the amount of the purchase money out of their own pockets, but that it "operated as a guaranty by the defendants to the plaintiffs of the success of the scheme for organizing the company, and that it would perform what the defendants had agreed in its behalf."

But we find no such stipulation in the writing; nothing beyond a proposition as trustees to purchase for the benefit of the company: an agreement to mortgage the company's funds; a refusal to procure any indorsement of the mortgage, and the consent of the plaintiffs to accept it without such indorsement.

It is too apparent that all parties with equal opportunities for information were inspired with confidence in the successful organization of the proposed company, and that they dealt with each other on the footing of this assurance; and that *their contract,* not contemplating a failure of the scheme, did not provide, and was not intended to provide, for such a state of affairs—and for the court, now to make it do so, would be to go outside of the intentions of the parties, and to make and not to interpret the contract.

Neither do we feel at liberty, so plainly have the parties manifested their intentions, to vary this construction of the contract, because of the fact that the defendants had no principal capable of conferring upon them the authority to act as its agents—it being apparent, both from the pleadings and the proofs, that the plaintiffs had full knowledge of their want of authority.

It is unquestionably true that all the authorities concur in saying, that when upon a written contract in which mention is made of both principal and agent, he who is styled the principal, should not
(59) be bound, it furnishes a strong argument for holding the agent to be bound. The rule, as one of construction, has been applied to those cases in which upon the face of the instrument, it was left doubtful whether the named principal, or the party signing, was intended to be bound, and *a fortiori,* would it apply to a case in which like the present, it appeared that there was no principal to be bound—that is to say—if there could be the least doubt in the minds of the court, arising from the terms of the contract or the circumstances surrounding the case, as to the party intended to be charged.

The rule however is, as we have said, one of construction, and by no means a legal conclusion. The parties having entered into a contract are presumed to have contemplated a performance of its stipulations by some one, and since the principal cannot be held to such performance, it must have been the intention of the parties that the agent should be—the maxim being *ut res magis valeat quam pereat.* But the rule itself has no application to a contract in which there is a clear manifestation of a purpose to bind the principal, and the principal only, accompanied with a refusal on the part of the agent to obligate himself.

When the form of the instrument clearly indicates it to be done in behalf of another, the courts must give it the construction that it is not the personal contract of the party signing the instrument, and no consideration respecting the plaintiff's remedy against any other party should prevail with the court to change the contract—say the courts in *Rice v. Gove,* 22 Pick, 158; *McBeath v. Maldimand* 1, Term Rep., 172.

It is just this distinction that has been taken in the case of an agent contracting in behalf of a foreign principal. There, if the language of the contract is at all ambiguous, so as to leave it doubtful to whom the credit was given, the principal or the agent, the circumstance that the principal is resident abroad may be taken into consideration in determining that question—it being reasonable, in a case (60) admitting of doubt, to suppose that the other contracting party trusted the agent residing at home and subject to the laws and process familiar to himself, rather than one living beyond the reach of domestic laws.

But still it is a question of intention, and if the contract be in writing, and its terms clearly manifest a purpose to bind the principal, though a foreigner, it must be deemed to be the final repository of the intention of the parties, and its construction and effect should not be varied so as to charge the agent in consideration of its unreasonableness or inconvenience. *Bray v. Kettell,* 1 Allen, 80.

The general rule is that whenever a party assumes to act as agent for another, if he have no authority or if he exceed his authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having authority, he misleads the other party into making the engagement. But this rule is founded upon the supposition, say the court of appeals of Kentucky in *Murray v. Caruthers,* 1 Met., 71, that the want of authority is unknown to the other party, or if known, that the agent undertakes to guaranty a ratification of the act, and when the want of authority

is known, and it is clear that the agent did not undertake to guaranty a ratification, it results that the agent is not personally bound.

Here, it is manifest both from the pleadings and the proofs that the plaintiffs had full knowledge of the nonexistence of the "Journal Publishing Company" as a corporation; and the terms of the written contract, as read in the light of the conduct of the parties, leave not the least reason to suppose that there was any undertaking on the part of the defendants to become sponsors for the proposed new company. Indeed they preclude any such hypothesis.

In Story on Agency, Sec. 265, is is said, there are exceptions
(61) to the rule that persons contracting, as agents, are held personally responsible when there is no principal to whom resort can be had, and as an illustration is cited the case of an agent who should declare that he had no authority to contract for his principal, and yet refused to bind himself personally; and again in section 287, the case is put of a voluntary society, the members of which having subscribed for some charitable purpose engage an agent to procure supplies, and he should do so with an understanding on the part of those furnishing them, that they should rely for their reimbursement solely upon the funds that should from time to time be subscribed. In such cases the author declares there could be no doubt, that neither the subscribers nor the agent would be personally liable.

In *Smout v. Ilberry*, 10 M. & W., 1, an agent, to whom no fraud was imputable and who had assumed no personal obligation, was held not to be responsible, though as the court declared they felt themselves "pressed with the difficulty that if the agent were not liable, there was no one that could be liable on the contract."

In *Wake v. Harrop*, 1 H. & C. (Exchequer), 200, the court say, they are not bound to say whether the intended principals are liable; it is enough that the intention was that the defendants (the agents) should not be personally liable, and that even if the principals were not liable, there could be no good reason for suing the agents when there was an agreement that they should not be personally liable.

In the absence of all agreement, express or implied, to be personally bound, there can be found no case, we apprehend, in which an agent has been held responsible who has not been guilty of fraud, either actual or constructive. If, having no authority and so knowing, he yet contracts as though he had, then upon the plainest principles of right he should be held responsible because of his positive fraud; and so, if honestly believing himself to have authority while in fact
(62) he has none, he contracts, he will likewise be held responsible, for though not acting *mala fides* he has still stated to be true

what he did not know to be true, and if his wrong should work an injury to an innocent person, who has relied upon his assertion of authority, it is but just that he should make compensation.

The true principle derived from all the cases, is, that an agent can be made liable upon a contract made for his principal, only, upon the ground that he has agreed to be responsible or that he has been guilty of some wrong or omission of right; and since as we have seen neither of these circumstances attach to the contract made by these defendants, it follows that they cannot be responsible.

Independently of any agreement on their part, and without reference to any question of authority or fraud, the defendants most undoubtedly would have been liable if the consideration or benefit had moved to them *personally*. But their contract was made as trustees, and as such they received and used the property delivered to them by the plaintiffs; and, so far as the case discloses, not a particle of personal benefit did they or either of them derive from it. This distinction we think clearly exists and was recognized by this court in *Hite v. Goodman*, 21 N. C., 364.

Judgment reversed and *venire de novo*.

Error. *Venire de novo.*

Cited: Hicks v. Kenan, 139 N.C. 344; *Basnight v. Jobbing Co.*, 148 N.C. 357; *Perry v. Surety Co.*, 190 N.C. 291; *Yarn Mills v. Armstrong*, 191 N.C. 129.

JOHN S. STELL v. WYATT BARHAM.

Deed.

A deed reciting that the grantor conveys to the grantee a certain tract of land and agrees with the grantee and his heirs to warrant the title to the *grantee*, passes only a life estate. (Distinguished from *Phillips v. Davis*, 69 N. C., 117; *Phillips v. Thompson*, 73 N. C., 543, and other cases.)

EJECTMENT tried at Fall Term, 1881, of WAKE Superior (63) Court, before *Gilmer, J.*

The following issues were submitted to the jury:

1. Is the plaintiff entitled to the possession of the land described in the complaint?

2. Does the defendant unlawfully withhold said land from plaintiff?

The plaintiff read in evidence a deed from Judkins Barham executed to Perry Barham in 1837, a deed from Perry Barham to W. H. Pace

executed in 1880, and a deed from Pace to plaintiff. He also read in evidence a deed from Perry Barham to Isham Young executed in 1854, for the same land. When the deed from Judkins Barham to Perry Barham was offered in evidence, the defendant objected to its introduction, on the ground that it was void for uncertainty in the description of the land. The only description in the deed was "a certain piece of land, to-wit, adjoining the lands of Wm. Roles, Reuben Mitchel, Hardy Dean, John L. Terrell, C. Vanderford, and others."

His Honor remarked that he could not say the deed was void on its face, for that, it might be aided by parol evidence of the identity of the land. To this the counsel of the defendant assented, but asked that his exception might be noted in order to avail himself of it if said uncertainty should not be corrected by parol evidence.

The plaintiff then proved by Perry Barham under whom he claimed, that the land had been occupied by Judkins Barham before his death,
(64) and was the only land ever owned by him; that it was bounded by the lands of the parties mentioned in the description of the same in the said deed, and joined no other person; that he took possession of it after the execution of said deed and conveyed it to said Pace by the deed referred to, and that he recognized it as the land conveyed by Pace to the plaintiff, by the boundaries given in the deed by Pace to the plaintiff; that he put the defendant on the land as his tenant before the year 1845, and soon after his purchase thereof, where he has since remained, never having claimed any right therein, and paying to the witness rent for the same until his sale to Pace; that he had never surrendered his tenancy, and on various times and occasions up to the execution of the deed to Pace, admitted that said land belonged to witness. To the same effect was the testimony of A. R. Young, another witness for the plaintiff.

The plaintiff also introduced one T. J. Barham, who testified that he knew the land all his life; that it was on the south side of the road adjoining the lands of Isham Young, Clayton Lee, Squire Fleming, and known as the "Perry Barham" land, and contained one hundred and odd acres, on which the defendant lived, and had never lived on any other land since the witness knew him. The defendant excepted to the evidence of this last witness.

The deed offered by the plaintiff from Perry Barham to Isham Young, after reciting a consideration of three hundred dollars, proceeded, "hath granted, sold and conveyed unto said Isham Young a certain tract of land lying and being in Wake County, etc., known as the 'Judkins Barham' land, and the said Perry Barham doth agree with the said Isham Young, his heirs and assigns, to warrant and forever defend the right and title of the said land unto the said Isham Young

from any and all lawful claims from any person or persons whatever." It was proved that Isham Young died in the year 1875.

The court charged the jury that if they were satisfied from (65) the evidence that the defendant entered on the land as the tenant of Perry Barham, and had never surrendered the possession, he could not deny the title of Perry Barham, or any one claiming under him, and that the deed from Perry Barham to Isham Young only conveyed to the latter a life estate, and that on the death of said Young the land reverted to Perry Barham.

The jury returned a verdict for the plaintiff, responding in the affirmative to each of the issues. There was judgment accordingly and defendant appealed.

Messrs. Battle & Mordecai, Batchelor, Pace & Holding and Strong & Smedes, for plaintiff.

Mr. Armistead Jones, for defendant.

ASHE, J. The appeal was dismissed at October Term, 1881, for the want of an appeal bond, but brought again to this court by a writ of *certiorari*, returnable to the February Term, 1882.

There were one or two exceptions taken by the defendant to evidence which we deem immaterial in the view we take of the case. But there were some exceptions to the evidence offered in regard to the identity of the land in dispute, which it is proper to consider, to-wit: 1st. That the parol evidence adduced did not identify the land, and 2nd, that there was error in overruling the objection to the testimony of T. J. Barham.

The first exception cannot be sustained, for the defendant expressly assented to the remark made by his Honor, that he could not say the deed was void on its face, for that, it might be aided by parol evidence of the identity of the land described in the deed from Perry Barham to Isham Young, and reserved his exception until he could see whether the evidence should "fit the description to the thing." It was an exception, if one at all, to the sufficiency of the evidence and not (66) to its admissibility. We think the identity of the land was unmistakably established by the uncontradicted testimony of Perry Barham and A. R. Young. At all events, their testimony on that point was sufficient to be left to the jury, and they found it in favor of the plaintiff.

As to the other exception to the testimony of T. J. Barham, the record does not disclose the ground upon which it proceeded, and as counsel assigned none, and we are unable to perceive any, it must be overruled.

The main question for our consideration, and that upon which the case hinges, is, did the deed from Perry Barham to Isham Young convey a fee simple or only a life estate? If it conveyed a fee simple, the plaintiff could not recover; but if only a life estate, then the plaintiff was entitled to a verdict.

His Honor charged the jury, that the deed conveyed only a life estate, and in this ruling we hold there was no error.

There is no principle of law better established than that the word *heirs* is absolutely necessary in a deed to convey a fee simple estate. It is familiar elementary learning that the word *heirs* is necessary to be used either in the premises or habendum of a deed to convey an estate of inheritance. It is not essential that it should be in the habendum. Its insertion in the premises will answer, for a deed may be good without any habendum to pass a fee simple, if the words of inheritance are used in the premises, but it is most formal and usual to insert it in the habendum, as that is the orderly part of a deed in which is defined the estate or interest granted. 2 Blk., 298.

It has been held by repeated decisions in this state that the use of the word *heirs* in the premises or habendum of deeds at common law, or those operating under the statute of uses, is so essential that a life estate cannot be inlarged into a fee either by a warranty in fee, or by a covenant for quiet enjoyment. *Roberts v. Forsythe,*
(67) 14 N. C., 26; *Register v. Rowell,* 48 N. C., 312; *Wiggs v. Saunders,* 20 N. C., 618, and *Snell v. Young,* 25 N. C., 379.

The defendant, however, contends that the rigid rule of construction maintained in these cases has been relaxed, and that deeds have been since held to convey estates in fee simple where the word *heirs* was not employed in either the premises or habendum, and cites in support of his position, *Phillips v. Davis,* 69 N. C., 117; *Phillips v. Thompson,* 73 N. C., 543; *Waugh v. Miller,* 75 N. C., 127, and *Allen v. Bowen,* 74 N. C., 155. But upon examination of these decisions it is found that in every case it was held that there was an habendum to the bargainee and *his heirs*—however confusedly mixed up with the clauses of warranty.

In *Phillips v. Davis,* the deed was held to pass a fee simple because there was an habendum to the bargainee and his heirs, mixed in with the clause of warranty. The deed read, "To have and to hold free and clear from all just claims, I the said J. B., doth warrant and defend the right and title of said tract of land to him, and *to hold* free and clear from me and my heirs, and the claims of any other persons unto him the said G. P., *his heirs and assigns.*

The deed in the case of *Phillips v. Thompson,* was held to pass the fee simple for a like reason. There, the words of limitation were, "*To have and to hold* all and singular the aforesaid land and premises, and we do for ourselves, our heirs, executors and administrators, warrant and forever defend against the lawful claim or claims of all persons whatever unto the said C. D. *to him, his heirs and assigns forever.*" Judge SETTLE who spoke for the court said, if we strike out the words which have no sense either by themselves or in connection with others or rather if we permit them to remain dormant, we have a perfect habendum in fee.

Very similar to the preceding cases is that of *Waugh v. Miller.* The conveyance was, "of all the land, together with all and singular his right and title of, in, and to the same, to the aforesaid (68) Waugh and Findly to which he (the bargainee) binds himself, his executors, administrators and assigns, to warrant and forever defend, etc., to the said W. and F. *their heirs, etc., to have and to hold, etc.* Judge BYNUM who delivered the opinion in this case said: The habendum and the warranty are mixed and confused. The grantor bound his *heirs* to the grantee's *heirs,* and the words may be so transposed as to give the conveyance of a fee simple both of form and substance.

The deed in *Allen v. Bowen* was couched in the following terms: "The understanding is that we sell all the right, title and claim that we have in the lands of Respass, deceased, unto the said William Bowen, of the second part, and by these presents hath bargained and sold and conveyed our land or right aforesaid, which we do warrant and forever defend. And we, Thomas A. Pritchett and Elizabeth his wife doth for themselves, their heirs, executors, administrators and assigns, forever the land to the said William Bowen, *his heirs,* executors, administrators and assigns forever clear of all encumbrances whatever." Judge BYNUM who also delivered the opinion in this case said: "The confusion here as in that case (referring to the case of *Phillips v. Thompson,*) is produced by the attempt to incorporate a clause of warranty with the habendum."

The deed in our case is much more informal and defective than even the deed in the last case. It reads, "hath granted, sold and conveyed unto said Isham Young a certain tract of land lying and being in Wake County, etc. And the said Perry Barham doth agree with the said Isham Young his heirs and assigns to warrant and forever defend the right and title of the said land to the said Isham Young from any and all lawful claims of any person or persons whatsoever."

This case it will be seen is notably distinguishable from those
(69) relied upon by the defendant's counsel, in that, there are no words of inheritance in the premises, the habendum, if there be one, or the clause of warranty. And no case, we presume, can be found where a fee simple has been held to be created by a deed without the word heirs. In the clause of warranty in this deed, the grantor agrees with the grantee and his heirs and assigns to warrant and defend the right, etc., to the said Isham Young, but not to his heirs. There is no transposition of the words which will warrant the construction that the deed conveyed a fee simple. It may have been so intended by the parties, but we are unwilling to make, by a strained construction, any further relaxation of a rule of law so long and so uniformly established.

Concurring as we do in the correctness of his Honor's charge, the judgment of the court below must be affirmed.

Being of opinion with the plaintiff upon the merits of the case, we have deemed it unnecessary to discuss or to decide the preliminary motion made by the defendant's counsel.

No error. Affirmed.

Cited: Batchelor v. Whitaker, 88 N.C. 354; *Staton v. Mullis,* 92 N.C. 627; *Bunn v. Wells,* 94 N.C. 69; *Ricks v. Pulliam,* 94 N.C. 230; *Anderson v. Logan,* 105 N.C. 270; *Allen v. Baskerville,* 123 N.C. 127; *Real Estate Co. v. Bland,* 152 N.C. 228, 229; *Cullens v. Cullens,* 161 N.C. 347; *Whichard v. Whitehurst,* 181 N.C. 84; *Whitley v. Arenson,* 219 N.C. 124.

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*MARTHA V. MOSELY v. GRACE E. MOSELY AND OTHERS.

Deed—Trusts and Trustees.

1. A deed to M and his heirs, in consideration of one dollar, "as well as the natural affection" of the grantor to his daughter, wife of said M, conveys an absolute estate to the grantee, and does not annex a trust in favor of the wife.
2. No consideration is necessary in a deed executed under the statute, as none was under a feoffment to which it succeeds.
3. Trusts arising from operation of law are: 1. Where an estate is purchased in the name of one person and the consideration is paid by another. 2.

*MR. JUSTICE ASHE did not concur with the majority of the Court as to the principle announced in reference to consideration in deed.

Where the intention not to benefit the grantee is expressed upon the instrument.

PROCEEDING for dower heard on appeal at Spring Term, 1882, (70) of HALIFAX Superior Court, before *McKoy, J.*

Appeal for defendants.

Mr. R. O. Burton, Jr., for plaintiff.
Messrs. T. N. Hill and Day & Zollicoffer, for defendants.

SMITH, C. J. The plaintiff, widow of Richard E. Mosely, in this action against the defendants, his offspring by a previous marriage and heirs at law, claims dower and asks to have it assigned in the tract described in her petition and of which she alleges the intestate was seized and possessed at the time of his death. The defendants deny the allegation of title in their father, and insist that the deed of conveyance therefor, executed on April 2nd, 1857, by William H. Wesson, their maternal grandfather, to the intestate, and of which they annex a copy to their answer, created a trust for the donor's daughter, and vested in the intestate, if any, an estate for his own life only. To this answer the plaintiff demurs, and upon the hearing before the probate judge, the demurrer was overruled. Upon the plaintiff's appeal to the superior court, the judgment was reversed, and from this ruling the defendants bring the case before us, and present the question as to the construction and legal effect of the said deed, which is as follows:

"This indenture made this the 2nd day of April, 1857, between William H. Wesson of the one part and Richard E. Mosely of the other part, both of the county of Northampton and state of North Carolina, witnesseth: That for and in consideration of one dollar to the said Wm. H. Wesson in hand paid by the said Richard E. Mosely, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, as well as natural affection of said Wesson to his daughter, wife of said Mosely, he the said Wm. H. Wesson hath granted, bargained, sold, etc., and by these presents doth grant, bargain, sell, etc., to the said Richard E. Mosely, his heirs and (71) assigns, the tract or parcel of land, etc., (describing it.) The said Wm. H. Wesson doth hereby warrant and defend the title to the said lands to the said R. E. Moseley and his heirs forever against all claims whatsoever. In witness whereof," etc. (Signed and sealed by W. H. Wesson.)

The deed in terms conveys the estate of the donor to the intestate, uncoupled with any attaching trust for the wife, positive or implied.

There are but two parties to the instrument, and the recited pecuniary consideration passes from one to the other. The super-added words, "as well as natural affection of said Wesson to his daughter, wife of said Mosely," expressing the inducements which prompted the conveyance to the husband, do not in form undertake to fetter or qualify the estate granted, nor do they in law raise and annex thereto a trust in favor of the wife. The conveyance in form and effect is absolute. It cannot grow out of the recital of the inducement to the making of the deed, since the title is directly transmitted, and, upon a consideration received from the husband, to him alone. Indeed no consideration is necessary in a deed executed under the statute, as none was under a feoffment to which it succeeds. This is decided in the case of *Ivey v. Granberry*, 66 N. C., 223, in the conclusion of the opinion in which READE, J., uses this language: "Surely one may give by deed while he lives as well as he may by devise after his death. In either case no one can be heard to complain except creditors or purchasers for value."

Trusts arising by operation of law result in two cases it is said by an eminent author:

1. Where an estate is purchased in the name of one person and the consideration is paid by another.

2. Where the intention not to benefit the grantee is expressed upon the instrument, as where the conveyance is *"upon trust"* and
(72) none is declared, or that declared fails. Lewin on Trusts, 168, 175.

The present conveyance belongs to neither of these classes, and the intent to make the donation to the intestate and for his sole use is apparent upon its face, the donor securing to his daughter the incidental benefits accruing from the intestate's ownership and her marital relations with him.

There is no error and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

Cited: Love's Executors v. Harbin, 87 N.C. 252; *Bond v. Moore,* 90 N.C. 244; *Thurber v. LaRoque,* 105 N.C. 306; *Cheek v. Nall,* 112 N.C. 373; *Butler v. McLean,* 122 N. C. 358; *Howard v. Turner,* 125 N.C. 109; *Bryan v. Eason,* 147 N.C. 292; *Tire Co. v. Lester,* 190 N.C. 416; *Ex Parte Barefoot,* 201 N.C. 397.

J. O. BOONE, TRUSTEE, v. R. W. HARDIE, SHERIFF.

Deed—Fraud—Evidence.

1. The maker of a deed cannot be allowed to prove that he had made an agreement with the trustee inconsistent with the one expressed in the deed.
2. A deed of trust conveying a stock of goods to secure certain debts, and providing that after the expiration of twelve months and in case of default, the trustee shall take possession and sell the same, after allotting to the trustor his personal property exemption, is fraudulent in law.
3. And proof that the trustor remained in possession and managed the business, as agent of the trustee, and received and expended profits on his own responsibility, furnishes conclusive evidence of fraud.

CIVIL ACTION tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The plaintiff appealed.

Messrs. Sutton, Guthrie and Hinsdale & Devereux, for plaintiff.
Messrs. Ray, Huske and Rose, for defendant.

RUFFIN, J. On the 18th day of February, 1879, the plain- (73) tiff, Bell, being insolvent, executed a deed wherein he conveyed his stock of goods, liquors, groceries and notions, together with his evidences of debt and his household and kitchen furniture to his co-plaintiff, Boone, in trust to secure certain debts then owing by him, with a proviso however, that if he should pay the same on or before the 18th day of February, 1880, then the conveyance should be void, but if not, then and in that event the said Boone should "*take possession of the said property, and after allotting to the said Bell his personal property exemption thereout according to law,* sell the same," and apply the proceeds as directed.

The deed was registered on the first of the following month, and soon thereafter certain creditors of Bell, unsecured in the deed in trust, obtained judgments against him, and placed executions in the hands of the defendant, who as sheriff of the county, levied upon the property embraced in the deed, and afterwards sold it and applied the proceeds to the satisfaction of the judgment creditors.

Thereupon the plaintiffs bring this action to recover damages for the conversion of the property. The defendant justifies under the said executions, and impeaches the deed in trust as having been made with intent to hinder and delay the creditors of the maker, Bell.

At the trial, the following issue was submitted and responded to by the jury in the affirmative: "Was the deed in trust referred to in the complaint fraudulent as to creditors?"

1st Exception—The plaintiff, Bell, was introduced as a witness, and after testifying to the execution of the deed and the genuineness of the debts secured therein, the plaintiffs proposed to prove by him that at the time of the execution of the deed, it was agreed between the parties that the trustee should take immediate possession and control of the property conveyed. This was objected to, and the court sus-
(74) tained the objection—holding that the witness might speak of what was done by the parties, but not of their agreements outside of the deed.

The deed upon its face admits of but one construction. Until default made, by a failure on the part of Bell to pay the debts secured, within the twelve months next after the execution of the deed, the trustee had no power conferred upon him to take possession and dispose of the goods. At the end of that time, and not until then, in case of such default, was he authorized to take dominion over them; and in the meantime they were to remain in the custody and under the control of the debtor.

Apart from the plain wording of the instrument, the fact that he reserves his exemptions as allowed by law, and makes their allotment the first act to be done by the trustee, and yet postpones it until after the lapse of the twelve months, precludes the possibility of giving to it any other construction. And such being the interpretation put upon it by the court, it must follow necessarily that the maker could not be heard to say that he had a different understanding with the trustee, inconsistent with the one expressed in the deed.

2. The plaintiffs then proposed to ask the witness, Bell, what his intentions were in executing the deed, but upon objection was not allowed to do so. To settle this point, it is only necessary to refer to the decision made when this cause was before this court on a former appeal. 83 N. C., 470. It was then declared by the court, that though the deed was not upon its face so clearly fraudulent as to justify the court in pronouncing its condemnation, as a matter of law, it was still presumptively fraudulent, and needed that presumption to be rebutted, and that in determining that question, the intent of the maker as a bare mental operation and apart from his consent, was altogether immaterial; and this, upon the ground that a party cannot be permitted to say that he did not intend the necessary and natural consequences of his own act. See also *Cheatham v.*
(75) *Hawkins,* 80 N. C., 171.

3. The presiding judge, construing the deed to provide that the property should remain in the possession and control of the debtor for twelve months after its execution, without his having to account to any one therefor, held, as this court did, that there was a presumption of fraud against it, and holding also that there was no evidence offered which tended to rebut that presumption by explaining the delay, so instructed the jury, and caused them to find the issue for the defendant. So that, the only question now is—Was there any such evidence?

The only witnesses who testified, as to that point, were the two plaintiffs, and in substance their testimony was, that though the deed was executed and proved before the clerk on the 18th of February, it was not registered until the 1st of March. On the day of its execution, Boone, as trustee, assumed the control of the property, but left it in Bell's possession to hold and manage, as his agent, but without a word of agreement as to his compensation. Bell kept no account of sales or expenses, though he did of the cash, and sold mostly for cash. After the execution of the deed, Boone visited the store some two or three times a week, and had a general knowledge of what was going on, though Bell did not advise with him as to his sales, and one debt to the bank he paid off in full, of his own accord and without the knowledge of Boone. Though no new goods were contracted for after the deed was executed and before it was registered, some came to the store, and were received and kept until they were seized by the defendant, and after the deed was registered Bell made other purchases. No allotment of Bell's personal property exemption was made, until after the seizure by the defendant, and then it was made by the officer.

The effect of this testimony may be to show, that perhaps (76) the parties misconstrued the deed as to the power and authority of the trustee, but it furnishes literally no explanation of the motive which prompted the debtor to postpone his creditors for twelve months, during which time he expected to retain possession of the property, and to receive and expend the profits upon his own responsibility—as indeed he did, according to his own statement, until its seizure by the officer. So far from rebutting the legal effect of the deed, and explaining its tendency to delay and hinder creditors, it serves to make that a conclusion, which before was but a presumption of fraud.

No error. Affirmed.

Cited: Phifer v. Erwin, 100 N.C. 64; *Martin v. McNeely*, 101 N.C. 639; *Booth v. Carstarphen*, 107 N.C. 400, 402.

DAVID H. GILL v. LUCY S. EDWARDS AND OTHERS.

Homestead.

A homestead cannot be sold under an execution issued upon a judgment rendered in an action *ex delicto*—affirming *Dellinger v. Tweed*, 66 N. C., 206.

SPECIAL PROCEEDING for partition of land, commenced before the clerk and transferred to and tried at July Special Term, 1882, of VANCE Superior Court, before *Graves, J.*

The plaintiff in his complaint alleges that defendants Lucy S. Edwards, Mary L. B. Edwards and Elizabeth P. Edwards were tenants in common and owners in fee simple of the tract of land described in the petition for partition; that L. A. Paschall, administrator of one Martha Edwards, deceased, instituted a suit in the superior
(77) court of Granville County against the said Mary Edwards and Elizabeth Edwards, for the conversion to their own use of a promissory note belonging to his intestate, in which he recovered judgment against them, and execution issuing thereon was levied on the undivided interest of the said Mary and Elizabeth in said land by the sheriff of Granville County, who made sale of the same for cash, and the plaintiff became the last and highest bidder, and received a deed from the sheriff for the interest of the defendants in the execution, and thereby became entitled to two undivided thirds of said land as tenants in common with said Lucy S. Edwards; and prayed that commissioners might be appointed to make partition of the land between him and Lucy S. Edwards according to their respective rights, etc.

The defendants, Mary and Elizabeth, in their answer as matter of defence state, that the sheriff levied on and sold their said interest in the land described in the petition, without laying off any homestead to them or either of them, and that said sale was void by reason thereof, and plaintiff acquired no title.

The facts set forth in the pleadings being admitted, there were no issues to be submitted to a jury. But the plaintiff's counsel insisted that, inasmuch as the judgment for the satisfaction of which said interest were sold, was for damages for a tort and not for debt, no part of said interests was exempt from sale under execution to satisfy the same, and that said Mary and Elizabeth were not, nor was either of them entitled to any homestead exemption against said judgment and execution.

The defendant's counsel on the other hand contended, that they were entitled to homesteads against the judgment and execution,

notwithstanding the judgment was for damages for a tort, and that said interests being admitted by plaintiff to have been levied on and sold by the sheriff, without laying off any homestead, the sale was void and the plaintiff acquired no title. (78)

His Honor being of the opinion that both the defendants, Mary and Elizabeth, were entitled to their homesteads in the land in question, notwithstanding the judgment was for damages for a tort, and not for a debt, and that the sheriff before levying upon and selling their interests ought to have had their homestead exemptions laid off and allotted to them respectively in the said land, and to have levied on and sold the excess only, and that as he did not do so, the sale and deed from the sheriff was void, and that the plaintiff acquired no title thereby, gave judgment against the plaintiff, from which he appealed.

Messrs. M. V. Lanier and W. H. Young, for plaintiff.
No counsel for defendants.

ASHE, J. Whatever may be our individual opinions upon this subject, it is now too late to moot the question. The point involved was fully and ably discussed in the case of *Dellinger v. Tweed*, 66 N. C., 206, and after the court had twice taken an *advisari*, it was decided that "the homestead and personal property exemption under article ten of the constitution (of 1868) and the laws passed in pursuance thereof, cannot be sold under an execution issued upon a judgment rendered in an action *ex delicto*." It is true it was a divided court, but the adjudication has been too long acquiesed in now to be disturbed, and acting upon the principle of *"stare decisis"* which has almost uniformly governed the decisions of this court, as at present organized, we feel constrained to adhere to that decision.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

Cited: Oakley v. Lasater, 172 N.C. 97; *Coble v. Medley*, 186 N.C. 481.

(79)

A. K. MURCHISON AND WIFE v. JOHN C. PLYLER.

Homestead.

The provisions of law in reference to homestead do not apply to a remainder dependent upon a life estate. Whatever may be the nature of interest in land, whether legal or equitable, in order to constitute a homestead, it must be such as carries with it a present right of occupancy.

CIVIL ACTION tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The plaintiffs intermarried in the year 1870, and have infant children now living. In 1872, John A. Murchison, the father of the male plaintiff, died leaving a will in which he devised the land in controversy to his widow, Barbara, for life, with remainder in fee to his said son.

In 1875, the plaintiff, A. K. Murchison, executed a mortgage whereby he conveyed the said land to one Blackmer, as security for a debt—his wife however not joining in the same.

In 1876, Blackmer sold under the mortgage to one Summers, who on the 1st day of January, 1877, sold and conveyed the same to the defendant.

On the 10th day of March, 1877, the life tenant, Barbara Murchison, died. The plaintiffs, nor either of them, owned any other land than that in controversy, at the date of the execution of the mortgage to Blackmer, nor have they since acquired any, and their prayer is to have that instrument declared inoperative because of its non-execution by the feme plaintiff, and to have a homestead allotted to them in the premises.

His Honor, being of the opinion that there could be no homestead in a remainder sold during the pendency of the life estate, non-suited the plaintiffs, and they appealed.

(80) *Mr. J. M. Clement, for plaintiffs.*
Mr. D. M. Furches, for defendant.

RUFFIN, J. A careful examination of the law in relation to homestead exemptions, as written in the constitution and the statute, and expounded by the courts, seems to lead necessarily to the conclusion, that land held in remainder dependent upon a life estate in another, is not susceptible of that immediate occupancy, which is contemplated by law in order to constitute a homestead.

While it may not be necessary, and as declared by the courts, is not necessary in order to bring it within the purview of the law, that

the land to be exempt should be actually occupied by the claimant of the exemption, it must still be so circumstanced with reference to his estate and interest therein, as to be presently subject to such occupancy.

According to the express provisions of both the statute and the constitution, it is the *actual homestead* and the dwelling and other buildings *used* therewith, or in lieu thereof, such portion of the owner's real estate as he may elect, and as is *occupied by him,* that is declared to be exempt from sale under execution.

Another provision is that the *land* shall be set apart by *metes and bounds,* and in case of the debtor's death, leaving a wife and no children, that the rents and profits thereof shall inure to the widow during her widowhood.

With every disposition liberally to construe the law, and to give the fullest effect to its beneficent intentions in behalf of the debtor, we cannot perceive how these provisions can be made to apply to a mere remainder in lands dependant upon a life estate. It could never have been, nor can it presently become the dwelling of the party. In no mode possible to conceive of, can a present interest therein, to the exact value of a thousand dollars, be defined by metes and bounds; nor, in the event of the owner's death, can the rents (81) and profits inure to his widow.

The policy of the law is to provide a shelter for the debtor and his family and to give them, not a prospective interest in the land valued at so much, but the land itself, described by metes and bounds for their immediate occupancy and support. The statute, no more than the constitution, has undertaken to exempt a homestead in mere expectancy. But it first requires a party to acquire a *homestead in fact* and then applies the exemption to it. In short, there can be no *homestead* without a *home* or the immediate possibility of a *home* upon the land itself.

The restriction put by the constitution upon the husband's power to convey his homestead with the assent of his wife, signified by her private examination, confers upon the wife no estate in the premises, so as to constitute her a joint tenant with the husband. The land, though subject to exemption, is the absolute property of the husband, and the only effect of this constitutional provision is to fetter his power of alienation. But to do even this, it must be a *homestead,* that is, be susceptible in point of interest or estate, of a present occupancy and use by the husband and his family; and if not so susceptible, then it is not, and cannot be impressed with the homestead characteristics, and the owner's power to convey is without any limit or qualification. And if he should exert this power, either absolutely

or conditionally, by a sale of his estate and interest in the land while thus untouched by the right of exemption, it can never again be made subject to that right by anything that may thereafter occur.

We do not mean to assert it to be essential to the right of homestead, that the party claiming it should have a perfect legal title to the lands sought to be subjected to it. An equitable interest in lands answers to the term "real estate," used in the statute, as well
(82) as a strict legal title does, and falls as clearly within the spirit and purpose of the law.

Accordingly it has been held that a debtor is entitled to a homestead in an equity of redemption, subject to the mortgage debts; and so, we doubt not, is a vendee under a contract for the purchase of land, or the holder of any such equitable interest. But whatever the nature of the interest, be it purely legal or equitable, in order to constitute a homestead it must be such as carries with it a present right of occupancy and enjoyment, or else makes that right to depend upon something to be done by the owner himself, and consequently subject to his control.

When once established and impressed upon the land, the right to homestead cannot be waived. Nor can it in any manner be diverted, save as provided for in the constitution, and then too are the possible rights of the wife and children in the right of exemption observed and guarded by the law. But these are all incidents to a homestead *in fact,* and not to contemplate future homestead—for such a homestead the law has made no provision.

There is still another view of the question, which, if every other objection to the right of plaintiffs to the homestead claimed were overcome, would seem to be conclusive against it. If that right ever existed, it must have done so before and up to the time of the conveyance to Blackmer by the husband. Now, for the whole of that period the life tenant was living, and was herself entitled to homestead in the same land, and to have it laid off to her by metes and bounds. And it is difficult for us to understand how two separate homesteads, thus laid off and described, can exist in the same land at one and the same time. Suppose that instead of one, the testator had had five sons and the remainder had been to them all; if the plaintiff's position be correct, then we shall have the same parcel of land simulta-
(83) nously embraced in six distinct homesteads, for if good for one, it must be so for all.

The estate which the husband had in the land that is the subject of controversy here, was conveyed before the homestead quality (such as the constitution contemplates) attached to it, and when he had an

unqualified power of disposition over it, and consequently it never became subject to that right.

The judgment of the court below is therefore affirmed.

No error. Affirmed.

Cited: McCracken v. Adler, 98 N.C. 403; *Stern v. Lee,* 115 N.C. 428, 432, 443; *Wright v. Bond,* 127 N.C. 41; *Moody v. Phillips,* 133 N.C. 786; *Thomas v. Bunch,* 158 N.C. 178; *Assurance Society v. Russos,* 210 N.C. 125.

W. A. CUMMING v. R. N. BLOODWORTH AND OTHERS.

Homestead—Lien for Materials Furnished.

The homestead right is not affected by a lien for materials furnished and used in improvements upon land covered by homestead, and the act of assembly (Bat. Rev., ch. 65, sec. 1), in so far as it gives such lien is unconstitutional.

EJECTMENT tried at Spring Term, 1882, of PENDER Superior Court, before *Gilmer, J.*

The plaintiff alleges that he is the owner in fee of the land in controversy and that the defendants wrongfully withhold the possession of the same. Defendants deny the allegations of the plaintiff and the following issues were submitted to the jury:

1. Is the plaintiff the owner in fee of the land described in the complaint?

2. Do the defendants wrongfully withhold the possession of the same from the plaintiff?

The plaintiff showed title as follows: That from October 18th, 1877, to April 17th, 1878, the firm of Northrop & Cum- (84) ming furnished lumber to the defendant Bloodworth of the value of $169.79 which was furnished for and used in the construction of a dwelling house on the land in dispute owned by the defendant Bloodworth, and now claimed by the plaintiff in this action; that said Northrop & Cumming were lumber merchants in the city of Wilmington, N. C., and duly filed a lien in the proper office against said land, on which the said house was erected, and in due time brought their action against Bloodworth in a justice's court for the bill of lumber, and recovered judgment therein; that the judgment was duly docketed in the superior court, and on the 10th day of November, 1880, execution issued thereon and was levied by the sheriff upon the land set forth in the complaint; that the sheriff sold the land to

plaintiff W. A. Cumming and made a deed to him for the same, which said deed covered the land in dispute, and that the defendants are in possession of the same.

The defendants in support of their title showed that at the time of levy of the execution aforesaid, the defendant Bloodworth claimed the land in dispute as his own, and demanded that the sheriff lay off and allot his homestead therein according to law; that the sheriff thereupon summoned appraisers who proceeded to lay off the same in accordance with the requirements of the statute and made due return thereof, and that the homestead so laid off covered the whole of the land claimed by the plaintiff in this action, and as described and conveyed by the sheriff's deed, and that the value of the premises was set forth in the return of the appaisers as $500. The defendants further showed that at the time of said levy and sale, the defendant Bloodworth owned no real estate whatever except the land so laid off as a homestead, and on which he then and now resided, and that the sheriff disregarding the action of the appraisers subsequently sold the land to the plaintiff, under the opinion that the lien of Northrop
(85) & Cumming for materials furnished prevailed against the homestead.

The defendants requested the court to charge the jury that the lien of Northrop & Cumming being for materials furnished did not prevail as against the exemption of the homestead from execution, and that the land in dispute, being covered by the homestead laid off and allotted to the defendant, Bloodworth, the sale and deed of the sheriff were nullities and conveyed no estate to plaintiff.

The court refused the instructions asked and charged the jury that said lien was good and valid as against the homestead, and that the sale and deed of the sheriff entitled the plaintiff to recover. Defendants excepted.

Verdict for plaintiff, judgment, appeal by defendants.

No counsel for plaintiff.
Mr. E. S. Martin, for defendants.

ASHE, J. The question presented by the appeal is, does the lien given by the act of 1869-70, (Bat. Rev., ch. 65) to one who furnishes materials, which are used in buildings or improvements upon land covered by the homestead of the owner, supersede the right of homestead therein?

The right to a homestead not exceeding one thousand dollars in value, is given by the constitution to every resident of the state who owns and occupies land, and it is declared to be exempt from execu-

tion on the final process obtained on any debt, but not from sale for taxes, or for payment of obligations contracted for the purchase of said premises. Art. X, Sec. 2. And it is further declared, that the provisions of section one and two of this article, shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises. Art. X, Sec. 4.

So it is to be seen that these four exceptions to the exemption (86) of the homestead are allowed by the constitution, viz: the liability to sale for taxes, the payment of obligations contracted for the purchase of the premises, and the lien of laborers and mechanics; and they are the only exceptions designated in that instrument. We are therefore unable to perceive how it can be contended that the lien for materials furnished, given by an act of the legislature, can constitute a lien upon land covered by the homestead when no such lien is anywhere mentioned in the constitution.

If it had been the intention of the framers of that instrument to make the lien for materials furnished an exception to the general exemption of the homestead from execution, etc., they would have so declared in language as explicit as that used in reference to the exceptions mentioned; but as they did not do so, the conclusion is that they did not intend to allow any other exceptions than those expressly designated. *Expressio unius exclusio alterius.*

And the homestead being a right created and vested by the constitution, with the exceptions to its exemptions defined and enumerated in the same, it was not in the power of the legislature to impair or abridge its efficacy for the purposes of its creation by adding other exceptions. To hold that the legislature can exercise such a power, would be conceding to it the right to override the constitution and frustrate the intention of its framers.

We think it is too plain to admit of controversy that the act of 1869-70, so far as it may have been intended to give a lien for materials furnished upon land set apart and allotted as a homestead, is in violation of the constitution, and we therefore hold that the charge of his Honor to the jury was erroneous, and that his judgment be reversed.

Let this be certified to the superior court of Pender County that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: Broyhill v. Gaither, 119 N.C. 445; *Cheesborough v. Sanatorium,* 134 N.C. 248; *Roper v. Ins. Co.,* 161 N.C. 160; *Johnson v. Leavitt,* 188 N.C. 686; *Cameron v. McDonald,* 216 N.C. 714; *Johnson v. Sink,* 217 N.C. 703.

(87)

R. O. BURTON, JR., v. R. P. SPIERS AND ANOTHER.

Homestead—Equity of Redemption.

1. The validity of a homestead allotment cannot be impeached by evidence of matter *in pais*, but the aggrieved party, creditor or debtor, must make a direct application to the court to which the execution and allotment are returned.
2. An exception to the qualification of an appraiser must be taken before he enters upon the discharge of his duty.
3. An equity of redemption is subject to homestead; and the equitable estate is not destroyed by the fact that the property is over-burdened with trust debts.
4. Analogy in assignment of dower in equity of redemption pointed out, and method of procedure in allotting homestead suggested by SMITH, C. J.

EJECTMENT tried at Spring Term, 1882, of HALIFAX Superior Court, before *Bennett, J.*

Appeal by plaintiff.

Messrs. Gatling & Whitaker, for plaintiff.

Messrs. Batchelor, Hill, Peebles, and Mullen & Moore, for defendants.

SMITH, C. J. The plaintiff derives title to the lot described in his complaint, and for the recovery of which the present suit is instituted, by virtue of a sale made by the sheriff of Halifax under several executions issued from the superior court against the defendant Richard P. Spiers, and the deed to him therefor.

The defendants resist the recovery on the ground that the
(88) homestead of the defendant, Spiers, has not been laid off and assigned to him as required by law, and they allege that the action of the appraisers summoned by the sheriff, and whose report of an assignment of the homestead is returned with the executions, for certain errors and irregularities, is inoperative and void. They impeach the validity of the proceedings of the appraisers for the reasons:

1. That the portion of the lot assigned as an exemption was not selected by the defendant, but by the appraisers themselves against his will and under protest.

2. That it was taken from land conveyed in two successive deeds in trust, made to secure debts greater in amount than the value of the entire lot from which it is separated.

3. That the said Spiers had but an equitable estate in the premises, not liable to sale under execution and not subject to the jurisdiction of the appraisers summoned by the officer.

4. That one of the appraisers had not the qualifications of a juror and was incompetent to act.

5. That the notice of the intended appeal, followed by a persistent effort to have a review of the proceedings of the appraisers and their action reversed, suspended the officer's authority to make the sale without another allotment of homestead, until the controversy respecting the legal efficacy of the first was determined.

6. That the appraisers erred in placing their estimate upon the land, as unaffected by the attaching trusts, instead of upon the defendant's equity of redemption or trust estate.

The defendant, Clark, to whom a portion of the land in dispute had been previously conveyed by Spiers and wife, was allowed to come in, as a co-defendant, and assert his title thereto, and in his answer he unites in the same defence.

Several issues, eliminated from the pleadings, were offered by the plaintiff and accepted by the defendants who proposed (89) another in these words:

"Is the defendant, Spiers, entitled to a homestead in the land and premises mentioned in the complaint, or any part thereof?"

This issue alone was by the court submitted to the jury, and the others withheld to await the rendition of the verdict.

On the trial the defendants were allowed, after objection from the plaintiff overruled, to introduce witnesses to prove what took place before the appraisers while they were engaged in estimating and laying off the exemption, the contention of the parties, and the rule that controlled their action, for the purpose of showing an infecting illegality, and annulling and avoiding the result.

The testimony is set out at great length, interspersed with numerous exceptions resting upon the same principal, the recital of which in detail is needless, since in our view, the allotment made and returned, quasi-judicial in its nature and entirely regular upon its face, cannot be thus collaterally assailed and treated as a nullity for any of the imputed defects.

The homestead assigned, whether valid or void, as an estate protected from final process for debt, ceased to exist when, by the sale under the deed in trust afterwards, the land upon which it was placed was found insufficient, as appears upon the case sent up, to discharge the secured debts; and thereafter the debtor, then having none, would be entitled to the exemption of any property proposed to be sold, as if no allotment had ever been made. But while the former remained in

force and the reserved estate or interest was still vested in the debtor, and thus put beyond the creditor's reach, however unfruitful of benefit it might thereafter prove, the debtor could not claim another allotment, for the simple reason that he already had an allotted homestead.

(90) Referring to an exception taken to the validity of a homestead, not assigned in the debtor's place of residence, and assailed as in contravention of the constitution (Art. X, Sec. 2), READE, J. says: "When the allotment was made to him in two other tracts by the sheriff's appraisers, and he took no exception thereto and no appeal therefrom, and disclaimed title to the home place and claimed no homestead therein, he assented to and was bound by the allotment, *and the same became an estoppel of record against him.* He has his homestead regularly allotted to him, and having that, *he cannot claim another.*" *Spoon v. Reid,* 78 N. C., 244.

So in *Gheen v. Summey,* 80 N. C., 187, where the exemption had been laid off by appraisers selected by the sheriff, when acting under execution for a debt contracted prior to 1868, it was held that the allotment was void, because as to such debts the statute was void, and the court, through ASHE, J., says, that "in order to be conclusive the judgment relied on as *res adjudicata* must have been one of a legally constituted court," and it may be added invested with jurisdiction in the particular case.

Since the repeal of the law creating the township board of trustees under the authority conferred upon the general assembly by the amendment to the constitution (Art. VII, Sec. 14), and the failure to deposit an appellate jurisdiction elsewhere, for revising the action of the appraisers, as held in *Jones v. Commissioners,* 85 N. C., 278, the remedy for a party, creditor, or debtor aggrieved, would seem to be in a direct application to the court, to which the execution and the allotment are returned.

The statute requires that the appraisers "shall make and sign, in the presence of the officer, a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated, and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket." Bat. Rev., ch. 55, sec. 4.

(91) This direction as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set it aside, and which order would most commonly render necessary the setting aside the sale also, since the boundary of the excess might be changed by an alteration in the limits of the exemption, upon a new assignment. In the absence of any vitiating illegality apparent upon the

face of the proceeding, it ought not to be disturbed by evidence of matter *in pais*, except upon a direct impeachment of the complaining party.

As it may conduce to a termination of the controversy, (the policy aimed at in the new method of civil procedure,) we will briefly notice, as if the allotment were exposed to the attack, as permitted by the judge below, the several objections offered to its legal efficacy and operation. These objections are:

1. That the lot of land from which the exemption is taken was not selected by the defendant.

The testimony upon which the jury were instructed upon this branch of the case, most favorable to the defence, is that of the defendant, Spiers, himself, who supposing as did all others, that all his lands were encumbered, objected to any homestead being set off for that reason; but upon the sheriff's saying it must be done, and inquiring where he would take it, the defendant said he would be glad to have it at the place where it was accordingly located by the appraisers. While the statute gives the debtor the right of selecting the location of the proposed exemption, if he fails to exercise it, the appraisers are required to make the election for him, always including the dwelling and buildings used therewith." Sec. 6.

The *selection of the place* was made by the debtor, and though he disclaimed any right to a homestead in lands, all of which were supposed to be heavily encumbered, and his equity of redemp- (92) tion regarded, (as the results of the sale proved to be true) of no practical value to the debtor, he is not less bound thereby, because an exemption may be in an equity of redemption. *Cheatham v. Jones*, 68 N. C., 153; *Crummen v. Bennet, Ib.*, 494.

2. Whether the equity of redemption in the land conveyed in trust to a trustee is subject to execution or not, in relation to which different opinions have been expressed, it is certain from the two last cases cited it is subject to the homestead, and it was unencumbered land, (relieved of the homestead lien by reason of a common misapprehension of parties) that was sold and is claimed in the present suit.

3. The disqualification of one of the appraisers is not an exception of which the defendants can now avail themselves, as it should have been taken, and so the judge properly held, before they entered upon the discharge of their official duties, and not after they have been performed.

4. The fact that the lot was over-burdened with trust debts does not destroy the defendant's equitable estate therein, though the event proved that such an estate was valueless.

5. We cannot ascribe to the misdirected efforts of the defendant, to bring the case before a tribunal without jurisdiction, the effect of arresting the action of the sheriff in proceeding to execute the mandate issued to him. This is evidence of dissatisfaction with the allotment, but when made, it leaves the officer freedom, and it becomes his duty to act.

6. We do not feel called upon to decide the question discussed in the argument, and so difficult of a satisfactory solution, whether the homestead should have been set apart and assigned of the required value upon the land itself, without reference to the encumbrance; or upon an enlarged area, the equity of redemption in which is estimated to be worth one thousand dollars—in other words, should the assign-
(93) ment be of the *land* or of the *equitable estate in the land* remaining in the debtor.

If the latter course be pursued and the incumbrance afterwards be removed, it is obvious the exemption would exceed the constitutional limits and a re-assignment would become necessary. If the former, as was adopted by the appraisers in the present case, that result would be obviated and the discharge of the liens would leave the debtor in possession of what he is entitled to, and dispense with another assignment, giving permanence to the first and without prejudice to either party. In such case, as is suggested in *Cheatham v. Jones, supra,* the debtor might have a right to require of the trustee, in case a sale became necessary, to dispose of all the land outside the bounds of the portion exempted, and apply the proceeds in exoneration of the latter to that extent. If all the debtor's lands were under the same trusts, and created in one instrument, the practical results to the debtor would be alike, whichever method of allotment be pursued; since in both, the unsold land left after discharging the incumbrance would remain to the debtor.

An analogy may be found in the assignment of dower to the widow in an equity of redemption, in lands conveyed by her deceased husband, which is given her by the statute, (Bat. Rev., ch. 117 sec. 2), and it is held that when set apart, she may require the sale of all other lands and of the reversion in the part allotted for her dower in exoneration, by a discharge of the secured debt. *Caroon v. Cooper,* 63 N. C., 386; *Creecy v. Pearce,* 69 N. C., 67. The dower is given in the *equity of redemption,* or other trust estate, and it is ascertained and assigned in the land itself, and not in the equitable estate in the land, and the benefits are secured through the attaching equity declared by the court.

Why should not the same course be pursued by the appraisers, the debtor's claim to the exemption and the widow's right to dower

being alike paramount to those creditors? If there are lands (94) possessed by the debtor free from encumbrance, the exemption may be of the whole or a part of them, and then no question could arise in respect to it.

In support of this view, it will be observed in the language of BYNUM, J., in *Citizen's Bank v. Green*, 78 N. C., 247, that, "the homestead is not the creation of any new estate vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after as before the assignment of homestead." The constitutional provision *exempts* a certain part of the debtor's estate "from sale under execution or other final process," and land of the limited value is simply set apart and freed from sale for the debt, whatever may be the measure of value of the debtor's interest therein. If the debtor has an estate for a term of years or less than a fee simple, he retains that estate and has the occupation and use of land, in which the estate is held for the prescribed period of time, if it endure so long, and within the limits of the valuation specified. But he would not be allowed land of greater value because his interest is less than a fee, the purpose of the law being to protect the insolvent debtor in the use and enjoyment of land estimated to be worth $1000, and to others after his death for a limited period, *or for so long a time as his estate and right of possession endure.*

For these reasons we are disposed to uphold the action of the appraisers as to the manner of the allotment, but we refrain from determining the point until it shall come before us and become necessary in deciding the cause.

We simply decide on this appeal that the validity of the allotment of the homestead cannot be asserted in the collateral manner allowed by the court below, for any of the causes specified, dehors the allotment itself, and that in this ruling there is error. The judgment must be reversed, and a new trial had; and it is so ordered.

Error. *Venire de novo.*

Cited: Albright v. Albright, 88 N.C. 241; *Hinson v. Adrian*, 92 N.C. 125; *Lowdermilk v. Corpening*, 92 N.C. 336; *Pate v. Harper*, 94 N.C. 26; *Hartman v. Spiers*, 94 N.C. 154; *Welch v. Welch*, 101 N.C. 570; *Hughes v. Hodges*, 102 N.C. 261; *Whitehead v. Spivey*, 103 N.C. 70; *Askew v. Askew*, 103 N.C. 293; *Long v. Walker*, 105 N.C. 114; *Thurber v. LaRoque*, 105 N.C. 314; *Rouse v. Bowers*, 111 N.C. 367; *Springer v. Colwell*, 116 N.C. 523; *Gudger v. Penland*, 118 N.C. 834; *Oates v. Munday*, 127 N.C. 446; *Hughes v. Pritchard*, 153 N.C. 25; *Cheek v. Walden*, 195 N.C. 754; *Chemical Corp. v. Stuart*, 200 N.C. 493; *Miller v. Little*, 212 N.C. 615.

(95)

R. W. DANIEL v. POLLY HODGES.

Divorce and Alimony—Lis Pendens—Purchaser.

The rule of *lis pendens* does not generally apply to a proceeding for alimony, which prefers a *personal* claim against the husband and does not attach to any specific part of his estate. But the facts of this case make it an exception to the general rule, in that, the lot in question specifically described in the petition for alimony, the only property of the husband and sought to be subjected by the plaintiff, was assigned the wife by order of the court and she was in actual possession at the time the deeds mentioned in the case were executed. *Held further*, That a proceeding which draws property incidentally in question is such *lis pendens* as affects a purchaser *pendente lite*, with notice, and the same is not destroyed by the reversal of an order in the cause.

EJECTMENT tried at November Special Term, 1881, of HALIFAX Superior Court, before *Gilmer, J.*

The facts set forth in the answer as admitted by the demurrer are as follows:

In the year 1876 the defendant instituted in the superior court of Halifax County a suit against one Joseph Hodges, who was the husband of the defendant, setting forth that her said husband had abandoned her, and left the state, and failed to contribute anything for her support and maintenance; that the said Joseph had no property in this state except the lot described in the petition, it being that now claimed by the plaintiff, said description being as follows: A messuage in the town of Weldon in said county of Halifax abutting on the line of the Raleigh and Gaston Railroad Company, being a corner lot formerly occupied by one John Valentine. The prayer of the petition was for reasonable alimony and that the lot be assigned to her.

(96) Thereupon an order in the cause was made at the Spring Term, 1876, of said court, assigning the lot to her till the further order of the court. In the order the lot was described as in the petition, and further, as adjoining the lot of Alfred Gee, Hicks, and others. At Spring Term, 1879, the said Joseph Hodges moved to set aside the order assigning the said lot to this defendant, the petitioner. He appealed to the supreme court, where, at January Term, 1880, the order was reversed, on the ground that the petitioner seeking no divorce or separation could not under the statute be allowed alimony *pendente lite*. 82 N. C., 122. This opinion was certified down to the superior court, but no judgment was ever entered up in accordance therewith, and this defendant continued to occupy said property. While the order was in force, and this defendant was in possession of the land thereunder, the said Joseph Hodges made a deed of trust for

the land to one W. W. Hall, with power to sell the same when requested by W. H. Day, who was attorney for said Joseph Hodges in said suit for alimony, and pay a certain alleged debt of four hundred dollars to said Day, and any surplus over to said Joseph Hodges. The said deed was executed on the 16th day of November, 1877, and duly registered.

Under the said deed, Hall the trustee sold the lot on the premises, and on the 29th day of December, 1877, executed a deed to the plaintiff for the consideration of $205. No part of this sum was due to Day except $— as his fee in said suit for alimony, and the said debt was fictitious and pretended.

The proceeding for alimony is made a part of the answer in this case, and the prayer of the petition was for such alimony out of the estate of the said Joseph Hodges as the court may deem her entitled to. At November Term 1880 of said court, the suit for alimony came on for final hearing, and the said land was assigned to her for her maintenance and support during her natural life.

That from January 1st, 1877, to the time of the institution (97) of this action, this defendant has been continually in possession of said lot under said order of court, and at the time of the sale by said Hall, as trustee, when plaintiff purchased, to wit, 29th December, 1877, the plaintiff had express knowledge that she was in possession under said order of court made at May Term, 1876, and that a suit for alimony was pending in which it was sought to subject said lot.

That this defendant and Joseph Hodges were married prior to 1867, and the said lot or parcel of land was acquired by Joseph Hodges in 1871.

That the value thereof is less than $1,000 and that neither she nor the said Joseph have any other real estate in this state, and that she did not join in the deed executed by said Joseph Hodges to the said Hall.

The demurrer to the answer was sustained and there was judgment for the plaintiff, from which the defendant appealed.

Messrs. Day & Zollicoffer and Batchelor, for plaintiff.
Mr. R. O. Burton, Jr., for defendant.

ASHE, J. "The defendant contends that the conveyances from her husband, Joseph Hodges, to W. W. Hall and from Hall to the plaintiff, having been made while her action for alimony was pending, and especially after the order of the superior court assigning her the lot in question, are brought within the principles involved in the law of *lis pendens.*

The rule of *lis pendens* is a principle founded not so much upon the doctrine of notice, as in motives of public policy. Hence it is held as a general principle that every one is presumed to be attentive to what passes in the courts of justice in the state where he resides, and that he who purchases during the pendency of a suit the property in litigation therein, is held bound by the decree or judgment
(98) that may be rendered against a party to the action from whom he derives title; and this, whether he purchased for a valuable consideration and without any express or implied notice in point of fact. 1 Story Eq. Jurisprudence, Secs. 405, 406.

But in order to give effect to this principle, two things are said to be indispensable. First, that the litigation should be about some specific thing which must be necessarily affected by the termination of the suit; and secondly, that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril. Freeman an Judgments, 196; *Green v. Slaytor,* 4 Jon. Ch. Rep. 38.

Under the application of these principles, it has been held by an almost invariable uniformity in the decisions upon the subject, that the rule of *lis pendens* does not apply to proceedings for alimony, for the reason that such a suit is *in personam* and does not apply to any specific part of the personal or real estate of the husband. The judgment obtained in such a proceeding, says Judge STORY, constitutes a lien upon the defendant's property from the time of the docketing, but does not constitute a *lis pendens* any more than any other sufficient cause of action. 1st Story Eq. Jur., Sec. 196.

In *Almond v. Almond,* 4 Randolph, (Va.,) 662, the same doctrine is announced. It is there held that the claim of the wife for alimony is a personal claim on the husband, and that she has no lien on any specific property without an agreement—and to the same effect is *Brightman v. Brightman,* 1 Rhode Island, 112.

It must be admitted that these decisions are supported by sound reason and good policy. For as the prayer of the petition for alimony according to the formula is, to have such reasonable subsistence secured to her out of the estate of her husband as may be deemed just and proper by the court, the application of the rule of *lis pen-*
(99) *dens* in such a case would lock up the entire estate of the defendant, for the alimony would attach to every part of the real and personal property the husband had at the time of filing the petition.

Such we understand is the generally received doctrine in regard to the exclusion of the application of *lis pendens* in proceedings for ali-

mony. But the particular circumstances of the case before us in our opinion constitute an exceptional case.

While the prayer of the petition for alimony is in the usual form, it stated in the petition, that the lot in question was the only property in the state owned by the husband, and was the only property out of which alimony could be granted, and it was specifically described with such particularity, that every person reading the petition could learn thereby what property it was she sought to have made subservient to her claim. And although the prayer of her petition was in the usual general form, it was as evident that she was seeking to subject the lot in question to her claim for alimony, as if she had specifically prayed that it might be assigned to her. And then it was assigned to her by the order of the court, and she was put in possession, and was occupying it when the deeds were executed to Hall and the plaintiff, he having at the time of his purchase actual notice of the pendency of the suit, the order of the court, and the possession of the defendant by virtue of the order.

It is true the first order of the superior court was reversed by this court, on the appeal of the defendant in the petition, but that did not effect the *lis pendens*. The reversal was upon the ground that the order was premature, and could only be made at the termination of the suit. The suit was continued and diligently prosecuted to a final termination, when the lot was again assigned to the petitioner. The case of *Stoddard v. Myers*, 8 Ohio, 203, is a direct authority for the position that the *lis pendens* was not destroyed by the reversal of the order of the supreme court. Judge LANE, who delivered (100) the opinion of the court, said: "It is assumed that when the right to recover in the bill in equity was taken away by the reversal of the judgment, the suit ceased to be pending so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems to be plain, that by the institution of a suit, the subject of litigation is placed beyond the power of the parties to it; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. This suit instituted in 1831 was regularly continued until the final decree in 1838. The supplemental bill was engrafted into the original bill and became identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation."

In the argument before us, the position was taken by the plaintiff's counsel that it was essential "to make an action a *lis pendens*, it should be an action creating a lien, or for a specific thing." The authorities, as we have shown, are in support of the position, but the principle has been recognized by several decisions of this court, that a suit which

draws property incidentally in question is such *lis pendens* as binds the purchaser *pendente lite.*

In *Baird v. Baird,* 62 N. C., 317, the original suit was for a valuation of lands advanced, and the partition of slaves under a will, which provided that advancements should be accounted for, and it was held that the principle of *lis pendens* affected the land so as to bind it, in the hands of a purchaser *pendente lite,* for the payment of the judgment to make the slaves equal.

In *Isler v. Brown,* 66 N. C., 556, which was a motion to issue a *vend ex.,* and the land sought to be sold was aliened pending the consideration of the motion; it was held the rule of *lis pendens* applied. See also *Tabb v. Williams,* 57 N. C., 352, and *Gilmore v. Gilmore,*
(101) 58 N. C., 284; and these decisions of our court we find supported by the case of *Gouth v. Ward,* 2 Atkins 174, where it was held that a suit by devisees against the heir to perpetuate testimony and to establish the will, was such a *lis pendens* as affected a purchaser of the property with notice.

So in the case of *Culpepper v. Aston,* 2 Chan. Cases 115 and 221-223, a bill was filed by the heirs against the executors for an account, alleging the land was not wanted to discharge the debts, and during the pendency of that suit the executor sold the land; it was held "that the suit for the account was notice to the purchaser." And much more would these principles apply to our case, since by statute lands are made subject to alimony.

Upon due consideration of the authorities we have cited and others we have looked into bearing on the question presented by the record we are of the opinion the petition for alimony under the particular circumstances of the case, constituted such a *lis pendens* as affected the purchasers with notice, independent of the actual notice had, and rendered their deeds void.

There is error in sustaining the demurrer. It should have been overruled. The judgment of the court below must be reversed.

Error. Reversed.

Cited: Dalrymple v. Cole, 181 N.C. 287.

L. H. BLAIR & CO. v. PURYEAR & MILES.

Attachment Proceedings—Interpleader.

Third persons, upon proper allegation of an interest in the property attached, have the right to intervene to make up a collateral issue; but whether the attachment proceedings are regular, is a matter between the parties to the main action.

APPEAL from an order made at Fall Term, 1882, of DURHAM (102) Superior Court, by *Shipp, J.*

The plaintiffs commenced this action on the 3rd of July, 1882, returnable to fall term of the superior court, and on the same day procured a warrant of attachment to issue, which was levied upon a certain fund belonging to the defendants in the hands of R. C. Strudwick.

On the 27th day of the same month, C. W. Thorn & Co., and others, creditors of the defendants, recovered judgments against them in a justice's court, and immediately had them docketed, and instituted proceedings supplementary to execution, and on the 5th day of August obtained an order from the clerk of the superior court appointing a receiver with instructions to take the fund then in Strudwick's hands, *subject, however, to all prior liens.*

At the return term of this action, those judgment creditors, together with the receiver, filed their petition asking to be allowed to intervene in the action, and thereupon the judge directed them to be made parties, with leave to prepare such an issue as would "present the special lien claimed by the petitioners," and in the meantime instructing Strudwick to retain the fund in his hands until the further order of the court, and the plaintiffs appealed.

Messrs. Roulhac & Fuller, for plaintiffs.
No counsel contra.

RUFFIN, J. We understand the judge's order to mean that the intervening parties should be admitted, not to defend the main action between the plaintiffs and defendants, but to present an issue between themselves and the plaintiffs as the superior rights to the fund in controversy.

Thus understood, the decision in *Toms v. Warson,* 66 N. C., 417, governs the case. That was an attachment levied on land. Third parties claiming to own the land petitioned to be admitted as parties to defend the action; and it was held that they had no (103) right to intervene in the original action between the plaintiff

and defendant, so as to contest the former's right to recover, for as to that, they were strangers, and could neither be benefited nor prejudiced by the result. But, that upon proper allegations of an interest in the property attached, they were entitled to intervene so far as to make up a collateral issue as to the title. See also *Sims v. Goettle,* 82 N. C., 268.

By parity of reasoning, we should hold that third parties, so intervening, could not be heard to object to the regularity of the attachment proceedings—that being a matter between the parties to the main action; and this objection the defendant might waive, and no one else can make for him. But here, the order of the court restricts them to a single collateral issue as to the better lien on the fund; and consequently there is no error.

No error. Affirmed.

Cited: Cook v. Mining Co., 114 N.C. 620; *Bank v. Furniture Co.,* 120 N.C. 477; *Cotton Mills v. Weil,* 129 N.C. 455; *Forbis v. Lumber Co.,* 165 N.C. 406; *Patrick v. Baker,* 180 N.C. 592; *Feed Co. v. Feed Co.,* 182 N.C. 691; *Temple v. LaBerge,* 184 N.C. 254.

B. F. SUMROW v. W. J. BLACK AND WIFE.

Bankruptcy.

'All the property of a bankrupt, including that which is subject to mortgages or liens, passes to the assignee; and the bankrupt court is the proper tribunal to administer the remedies for the enforcement of liens.

MOTION to dissolve an injunction heard at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves, J.*

(104) An order had been made restraining an execution issued from the superior court upon a judgment rendered at Spring Term, 1877, in favor of the plaintiff against the defendants, and this motion was made by the plaintiff to dissolve the same.

His Honor found these facts: That on the ..... day of ....., 1877, the plaintiff issued a summons against defendants returnable to Spring Term, 1877, which was executed on the male defendant, but was not served on his wife, M. A. Black, the feme defendant; but endorsed thereon was the entry in the husband's handwriting, "service accepted, M. A. Black by W. J. Black, agent." The defendant had no

authority to accept service for her, nor did she ever ratify his act in that behalf.

That plaintiff filed his complaint at said spring term; no appearance was entered for either of the defendants, and judgment was rendered for want of an answer, and the feme defendant did not know the judgment had been rendered until a few days before this motion was made.

That on the 29th of August, 1878, the male defendant filed his voluntary petition in bankruptcy and was adjudged a bankrupt, and on the ..... day of ....., 1879, received his discharge from all debts and liabilities existing against him prior to said 29th of August.

That the debt due plaintiff being for money borrowed by the defendant, upon which this action was brought, was contracted prior to the 29th of August, and was never proved in bankruptcy, and that plaintiff caused an execution to be issued on his said judgment, returnable to Spring Term, 1882, of said court.

Upon these facts, and after argument of counsel, his Honor ordered that said judgment and execution be vacated as to the feme defendant, for want of service of process; that plaintiff be perpetually enjoined from levying any execution that may be issued on the judgment against the defendant, upon any property of his which was not subject to the lien of said judgment on said 29th of (105) August, 1878; and from proceeding in any way under the same; and as to all his property upon which, on the 29th of August, 1878, the said judgment was a lien, the motion of defendant is refused; and to this extent the injunction heretofore granted is dissolved, and the plaintiff may proceed to enforce said judgment as he may be advised, and as herein directed.

The male defendant excepted to so much of the above order as dissolved the injunction and refused to restrain the plaintiff from proceeding under the judgment against any and all his property, and appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. Burwell & Walker, for defendants.

ASHE, J. The exception of the defendant, W. J. Black, was well taken. The judgment of the plaintiff against Black and his wife was rendered in 1877. On the 29th of August, 1878, he filed his petition in bankruptcy, and on the ..... day of ....., 1879, was adjudicated a bankrupt and received his discharge from all debts and liabilities existing against him prior to the date of filing his petition, to wit, the 29th of August, 1878.

The plaintiff contends that his judgment having been rendered and docketed before the 29th of August, 1878, created a lien upon the land of the defendant which was not discharged by the adjudication in bankruptcy, and that he had the right to enforce the lien by an execution. This, it has been decided, he has no right to do.

In *Blum v. Ellis*, 73 N. C., 293, followed with approval by *Withers v. Stinson*, 79 N. C., 341, and *Dixon v. Dixon*, 81 N. C., 323, it was held that all the property of the bankrupt, as well as that which is subject to mortgages and liens, as that which is unencumbered, passes to the assignee, and is *in custodia legis*, to be administered by (106) the assignee subject to liens and priorities, and all claims against the estate of the bankrupt, however evidenced or secured, are required to be proved; and the bankrupt court is the proper tribunal to administer the remedies for the enforcement of liens.

The effect of the adjudication of the defendant's bankruptcy was to give him a final discharge from all previous debts then provable; and this is so, notwithstanding the plaintiff's name was omitted to be inserted in the sworn list of creditors, and by reason of the omission the plaintiff had no notice of the proceedings in bankruptcy, and could neither prove his claim against the defendant, nor oppose the granting of the discharge. *Knabe v. Hayes*, 71 N. C., 109.

We therefore hold, that the refusal of the court below to dissolve the injunction as to the property owned by the defendant upon which the plaintiff's judgment had a lien on the 29th of August, 1878, was erroneous, and the judgment in the matter of the injunction must be so modified as to perpetually enjoin the plaintiff from issuing any execution upon his judgment against the defendant, W. J. Black, and his wife, M. A. Black.

Error. Reversed.

SUSAN J. CLAYTON v. SAMUEL W. ROSE, AND OTHERS.

Married Women—Estoppel—Statute of Limitations—Adverse Possession—Infancy.

1. Equitable as well as legal estates in land vested in a married woman can be transferred only upon her privy examination in conformity to the statute, unless the power is given her in the instrument creating the trust; and where the transfer is not made according to law, the declaration of the husband in her presence that he had a good title, or her direction as to the appropriation of the purchase money, will not estop her from asserting a claim to the land.

2. Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. C. C. P., Sec. 27.

3. In such case, the defence of adverse possession set up in the answer amounts to a denial of the plaintiff's title, and is open to rebuttal, though no replication of infancy is put in.

EJECTMENT tried at Fall Term, 1881, of HYDE Superior Court, (107) before *Bennett, J.*

Appeal by Plaintiff.

Mr. Geo. H. Brown, Jr., for plaintiff.
Mr. W. B. Rodman, for defendants.

SMITH, C. J. On November 2nd, 1855, Allen Burrus conveyed the land in dispute to Thomas S. Burrus in trust "for the sole use and benefit" of the plaintiff then the wife of William P. Clayton, "during her natural life, and that after her death the trustee shall hold and possess the land and premises aforesaid for the sole benefit and advantage of the heirs of her body begotten by her present husband, to be conveyed to her said heirs when the youngest shall have arrived at the age of twenty-one years provided the said Susan be then dead," and in case there shall be no such heirs, then the remainder to be conveyed to say William, if living, and if not to his heirs.

On January 1, 1868, William P. Clayton and his wife executed a deed undertaking to convey the said land to the defendant Mahala, then a feme sole and since intermarried with the defendant, Samuel W. Rose, for the consideration of one thousand four hundred dollars, which with the assent of said Susan, and by direction (108) of her husband, was paid to one Saunderson in discharge of a debt theretofore contracted by the husband in the purchase of other land. This deed was proved on November 12, 1879, by the subscribing witness and registered without any privy examination of the feme bargainor. The land passed into the possession of Clayton and wife soon after the making of the deed from Allen Burrus, and so remained until their deed to Mahala, since which she and her tenants have continued in uninterrupted occupation. Thomas Burrus, the trustee, died in 1866, leaving several children, all of whom are minors except the eldest, Allen, who arrived at full age in 1879. William Clayton died in November, 1878, leaving issue of the said Susan who are still living.

Before paying the money to Saunderson which was on January 1st, 1868, the said Mahala, in the presence of the plaintiff, asked her hus-

band, the said William Clayton, if he was making her a good title, "and he replied that he had a good title if ever there was one." The plaintiff herself was silent.

The action was begun on May 13th, 1879, against the defendants, Samuel W. Rose and William Jones, and at Spring Term, 1881, an amendment was allowed making said Mahala a party defendant, and a summons was thereafter issued and served on her on July 19th, 1881.

Upon these facts found by the judge, a jury trial being waived, the court was of opinion and so ruled that the deed from Clayton and wife did not convey the estate of said Susan, because there had been no privy examination of her under the requirements of the statute.

2. That the statute of limitations under the findings was no bar to her recovery; and

3. That there was no estoppel produced by the declaration of said William as to the title, in the presence and hearing of the plain-
(109) tiff, and to which she made no answer, nor by her direction of the payment of the purchase money to Saunderson. From the judgment rendered for the recovery of the land the defendants appeal.

The brief of the appellants exhibiting much research and learning, places the defence upon several grounds which we proceed to consider.

1. It is urged that an equitable estate in special tail converted into a fee under the act of 1784, for the separate use of the plaintiff, passes under the deed of Allen Burrus, and that her deed of January, 1868, without a privy examination is sufficient to convey an equitable estate for her life. We do not give our assent to the proposition that equitable estates in land vested in a married woman in the absence of a power in the instrument creating the trust, pointing out and authorizing a different mode, can be transferred without conforming to the statutory regulations applicable to legal estates. The act in force when the deed was executed declares that all conveyances in writing and sealed by husband and wife, for any lands, and duly proved or by them personally acknowledged before one of the judges of the supreme or superior courts, or in the court of the county where the land lieth, the wife being first privily examined before said judge or some member of the county court, appointed by the court for that purpose, whether she doth voluntarily assent thereto, and duly registered, shall be valid in law to convey *all the estate, right and title* which such wife may have in the said lands, tenements and hereditaments. Rev. Code, ch. 37, sec. 8.

The statute admits no distinction between legal and equitable interests and embraces every "estate, right and title," which the married woman may possess in land, and such is the construction put upon it by the court. Thus RUFFIN, C. J., says: "But that (the exclusion of

the husband from the wife's land) does not enable the wife to dispose of it as a feme sole, which she can only do when she has a power to that effect." *Newlin v. Freeman,* 39 N. C., 312. Near the (110) conclusion he adds in the same opinion: "As there was therefore no power in the marriage articles which comprised after-purchased lands, and no power of devising it reserved to the wife, in the deed which she took to her trustee, we can only look to this, *as to any other ordinary trust of real property for a married woman, and she can convey the land only by the ordinary means by which she can convey her legal estates, for as to that equity follows the law.*"

The argument which seeks to deduce from adjudicated cases elsewhere a capacity in a feme covert to dispose of her equitable estate in land, when not restricted by the provisions of the instrument creating it, as if she were *sole and unmarried,* overlooks the case of *Hardy v. Holly,* 84 N. C., 661. After a full review of the decisions in this state and an exhaustive examination of the subject, the conclusion arrived at is thus announced by RUFFIN, J.: "We must take it to be the settled law of this state, at least, that a married woman as to her separate property, is to be deemed a feme sole only to the extent of the power expressly given her in the deed of settlement." And in *Scott v. Battle,* 85 N. C., 184, it is held that a feme covert's deed, not executed in the prescribed mode is wholly inoperative. Abiding by these decisions we do not propose to re-open the question.

2. Nor do we think the defendants can protect themselves under a seven years adverse possession with color of title. It is conceded that where the right of entry is barred and the right of action lost by the trustee or person holding the legal estate through an adverse occupation, the *cestui que trust* is also concluded from asserting a claim to the land. Lewin on Trusts, marginal page 604; *Herndon v. Pratt,* 59 N. C., 327. And the correlative must be accepted that when the trustee is not barred, neither can the *cestui que trust* be, since as against strangers they are identified in interest. The alleged hostile possession by the defendant began after the death of the (111) original trustee and when the legal estate had descended, clothed with the trust to his infant children, and this disability prevents the statute from starting to run to their prejudice. This is true if the former statute governs (Rev. Code, ch. 65, sec. 1,) of the substituted limitations contained in the Code. In both there is a saving of the rights of infants. C. C. P., Sec. 27.

The criticism to which section 20 may be obnoxious in misreciting other intended sections, cannot affect the application of section 27 to the previously limited actions for real property, to which these are expressly made subject.

But it is argued that the statute of limitations being relied on to protect the defendants' possession cannot be met except upon a replication of infancy, and none such is put in.

This is a misconception of the issue, if sufficiently made in the first clause of the answer, which asserts that the feme defendant has been in the adverse possession of the land claimed since January 1st, 1868, as her own, under the deed from the plaintiff and her husband. This averment is of title, thus acquired, in the defendant and is open to rebuttal. It is not so much a plea of the statute as barring the suit, but the denial of the plaintiff's title, and an allegation that it has become, by the means aforesaid, vested in the feme defendant. In *Call v. Ellis*, 32 N. C., 250, NASH, J., says: "The statute of 1820 does not bar merely the action after three years' adverse possession (of a slave) but *confers title*," and he assimilates the case of the operation of a seven years' adverse possession of land under color of title. The controversy there is as to title, and is open to evidence impeaching, as well as that sustaining, the allegation. *Freeman v. Sprague*, 82 N. C., 366; *Jones v. Cohen, Ib.*, 75.

3. The remaining objection to be noticed is the estoppel arising out of the feme defendant's direction as to the appropriation of
(112) the purchase money, and her silence when her husband declared that a perfect estate vested under the deed. We cannot see how any such supposed consequences can follow. The presumed marital influence repels the inference of actual fraud from the failure of the wife to make any response to her husband's declaration, and if she is to lose her estate thereby it is difficult to understand how coverture would ever be a shield, since every deed made, in the very act of execution, involves an assertion of some title in the person who makes it, and thus the disability would be unavailing to avoid the conveyance. The declaration cannot be construed to mean more than that a good estate was in the bargainors, and is transmitted in their deed. The first is true, and the second is an assertion as to the sufficiency of the deed to pass the estate, and this is a proposition of law. Of course it is not meant that proof and registration were not necessary to its efficacy, and in these is included the privy examination as necessary thereto.

Again, fraud as a fact is not found, and we cannot infer it from the evidence. The judge below, acting in place of a jury by consent, must find the existence of fraud, and we can only revise his ruling as to what constitutes it. The objection is untenable.

The matters involved in the reference are not before us on the appeal, and without intimating an opinion we simply refer to the case already cited (*Scott v. Battle*) as to the equities of the parties

growing out of the avoidance of the plaintiff's deed. There is no error, and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

Cited: Hodge v. Powell, 96 N.C. 70; *Clayton v. Cagle,* 97 N.C. 303; *Chancey v. Powell,* 103 N.C. 160; *Mobley v. Griffin,* 104 N.C. 117; *Dameron v. Eskridge,* 104 N.C. 625; *King v. Rhew,* 108 N.C. 700; *Herndon v. Ins. Co.,* 110 N.C. 283; *Mayo v. Farrar,* 112 N.C. 69; *Kirby v. Boyette,* 116 N.C. 167; *Cross v. Craven,* 120 N.C. 332; *Smith v. Ingram,* 130 N.C. 104; *Cameron v. Hicks,* 141 N.C. 27, 29, 30, 31, 33; *Webb v. Borden,* 145 N.C. 197, 201; *Cooley v. Lee,* 170 N.C. 24; *Freeman v. Lide,* 176 N.C. 439; *Sills v. Bethea,* 178 N.C. 318.

(113)

J. J. HOWELL v. W. T. FERGUSON AND OTHERS.

Pleading—Sham and Irrelevant Answers.

A sham answer is false in fact; an irrelevant or frivolous one has no substantial relation to the controversy and presents no defence to the action, though its contents may be true. The order to strike out the answer in this case is affirmed.

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

The only question presented by this appeal is whether the court below committed an error by striking out the answer of the defendants, as sham and frivolous, and giving judgment for the plaintiff.

The plaintiff alleged that the defendants were indebted to him by two single bills, which were as follows:

First. Twelve months after date we promise to pay J. J. Howell four hundred and fifty dollars value received, interest at eight per cent from date, provided the note is paid in twelve months, if not at six per cent. Dec. 6th, 1879. (Signed and sealed by Wm. T. Ferguson and Joel T. Ferguson.)

Second. Six months after date we promise to pay J. J. Howell four hundred and fifty dollars, for value received, interest at eight per cent from date, provided the note is not paid in twelve months, if so, at six per cent. Dec. 6th, 1869. (Signed and sealed by same parties.)

The defendants admitted the execution of the notes and that no part thereof had been paid, but for a defence alleged that they were the executors of W. B. Ferguson, who died in the county of Wilkes

about a year previous, and that the mother of the plaintiff is one of the heirs at law and devisee of said Ferguson, and that during the life of the father of the plaintiff, and at the time of the execution (114) of the notes sued on, plaintiff claimed to be the assignee of the interest to a certain extent of his said mother in the estate of the said W. B. Ferguson, and applied to defendants for payment thereof, but presented no assignment from his mother, with the written assent of the husband, and that the defendants inadvertently and without proper reflection as to their duties in the premises executed the notes sued on.

They further aver that said assignment has not as yet been made to appear to them with the assent of the husband of the plaintiff's mother, either written or verbal; also, that it was a condition precedent to the execution of the notes, that they were to have a reasonable time within which to convert real estate into assets for the payment of the notes after the expiration of the periods set out in the same, and that they have not considered it consistent with the large discretionary power conferred upon them in the will of said W. B. Ferguson, to sell real estate for the payment of said notes, if it should turn out that plaintiff is the proper owner thereof, for the reason that owing to the scarcity of money and the nature and character of the real estate of the testator to be sold for the payment of the distributive shares of the heirs and devisees, they think it would work an injury to the devisees' interests in said estate to make sales, etc. That said notes were not given for borrowed money, and they are advised and believe that they are only chargeable with interest at the rate of six per cent.

His Honor holding that the answer was sham and frivolous, ordered it to be stricken out, and rendered judgment for the plaintiff, and defendants appealed.

No counsel for plaintiff.

Messrs. Strong & Smedes and B. F. Montague, for defendants.

(115) ASHE, J., after stating the above. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in its discretion impose. C. C. P., Sec. 104. A sham answer is one that is false in fact; an irrelevant answer is one which has no substantial relation to the controversy between the parties to the action; and an answer is frivolous when, assuming its contents to be true, it presents no defence to the action. Bliss on Code Pleading, 507, and note.

It would seem from the definitions, that the distinction between an irrelevant and frivolous answer is virtually without a difference, and that they may be considered as correlative terms.

Assuming then all the allegations of the defendants' answer to be true, there is not one of them that constitutes a substantial defence to the action, and the answer is therefore frivolous, and should have been stricken out and judgment given as for the want of an answer.

But we might very well have put our decision on this appeal upon another ground, which is, that there is no error assigned by the defendants and as none appears on the record, the judgment of the court below should be affirmed. *Swepson v. Summey,* 74 N. C., 551.

No error. Affirmed.

Cited: Weil v. Uzzell, 92 N.C. 517; *Council v. Dickerson's, Inc.,* 233 N.C. 474.

HAWKINS & HAWKINS v. S. A. HUGHES AND OTHERS.

Plea in Abatement—Jurisdiction.

1. A party cannot have the benefit of a plea in abatement upon a motion in arrest of judgment.
2. The pendency of a former action is strictly a matter of abatement, and must be set up in the answer, or in some way insisted on before verdict; if not, it is deemed to be waived.
3. Where there is defect of jurisdiction, it cannot be conferred by consent; but where the court has a general jurisdiction of the subject, and the lack of it in a particular case depends upon some exceptional matter, objection must be taken *in limine.*

CIVIL ACTION tried at July Special Term, 1882, of VANCE (116) Superior Court, before *Graves, J.*

The plaintiffs, having obtained a judgment against the male defendant for $752.56, in Warren superior court, and caused it to be docketed in Granville superior court, bring this action, in which they allege that the said defendant being indebted to them and insolvent, contracted to buy the land described in the complaint of one Kittle, and afterwards paid for the same, and on the 18th of March, 1877, procured a deed from Kittle to be made to his wife, the feme defendant, in order to conceal his interest in the land and withdraw it from the satisfaction of his debts and thereby defraud his creditors; and thereupon they ask that the feme defendant may be declared a trustee as to the said land for the benefit of her husband's creditors, and that

it may be sold after setting apart a homestead to the defendants, and the proceeds applied to the plaintiffs' judgment.

The defendants admit the insolvency of the husband, the purchase of the land and the execution of the deed to the wife, but deny the fraud alleged, and say that the land was bought by the husband as agent of the wife, and was paid for, not with his money, but with money belonging to her separate estate.

The jury found that the land was purchased by the husband and paid for with his own money and not that of his wife, and the plaintiffs moved for judgment, but the defendants moved in arrest of judgment upon the ground that the plaintiffs should have
(117) sought relief, not by an independent action, but by the supplemental proceedings in the original cause. Defendants' motion was overruled and they excepted. The court then gave judgment for plaintiffs, and the defendants appealed.

Mr. J. B. Batchelor, for plaintiffs.

Messrs. Merrimon & Fuller, for defendants.

RUFFIN, J. The court is inclined to the opinion, inasmuch as the defendant debtor had no estate, and never had, in the land which is the subject of controversy, that, perhaps, a distinction might be drawn between the present case and *Hinsdale v. Sinclair,* 83 N. C., 338, and *McCaskill v. Lancashire, Ib.,* 393, in support of the plaintiffs' right to have their independent action. But, though very ably argued at the bar, we have not felt called upon to decide that point, nor how far the court might have restricted them, in case objection had been made in apt time, to such relief as might have been had in their former action. For conceding the point to be against the plaintiffs, and that they not only could, but should have sought relief by proceedings supplementary to execution, we are still of the opinion that it was too late for the defendants to make their objection after verdict.

A party cannot have the benefit of a plea in abatement upon a motion in arrest of judgment; and such in effect is the motion which the defendants now make.

The pendency of a former action is strictly a matter of abatement, and must be set up in the answer or in some way, be insisted on before a trial upon the merits; if not, it is considered to be waived.

In *Smith v. Moore,* 79 N. C., 82, it is expressly said, that if two actions are between the same parties for the same cause, and the first is so constituted as to afford complete relief, the second
(118) is unnecessary and will be dismissed; but that the pendency of

such other action will not be noticed by the court unless it appear of record by answer or demurrer.

Again in *Winfield v. Burton*, 79 N. C., 388, which was an action brought upon a bond given for the purchase money for land sold by order of court in a proceeding for partition, which proceeding was still pending, RODMAN, J., referring to the very point now made for the present defendants, observed, that regularly the relief ought to have been sought by motion in the original cause, but that it was an irregularity, merely, to have brought the action, which could be waived and accordingly it was so treated.

It is said, however, that it is a question of jurisdiction which can neither be conferred by consent, nor the lack of it waived by the act of the party. True, this is so, where there is a defect of jurisdiction in the court itself, so that it has no general jurisdiction over the subject matter of the action. But it is otherwise, where the court has such a general jurisdiction, and the lack of it in a particular case depends upon some exceptional matter, such as the pendency of a previous action, or the existence of some peculiar privilege or exemption on the side of the defendant. In such case, it is a matter of defence and must be taken *in limine*, or else not at all. *Walton v. Walton*, 80 N. C., 26; *Branch v. Houston*, 44 N. C., 85.

Now it will not be doubted that the superior court, by virtue of its powers as a court of equity, has a general jurisdiction of an action, such as this is, to follow the funds of a debtor fraudulently converted into land conveyed to his wife. And the only reason that can be suggested why it should not exercise it in this particular case, is, the fact that there is a former action pending, in which the plaintiffs could have complete relief. Had this objection been taken in time—such is the disfavor with which the law regards a multiplicity of actions—it might have availed the defendants, and would have done so, unless, as we intimated at the outset, the present case be an ex- (119) ception to the rule. But not having been thus taken, and the court having a general jurisdiction of the subject matter of the action, it now comes too late.

No error. Affirmed.

Cited: Hunter v. Yarborough, 92 N.C. 70; *Lackey v. Pearson*, 101 N.C. 655; *Montague v. Brown*, 104 N.C. 164; *Hicks v. Beam*, 112 N.C. 645; *Davis v. Terry*, 114 N.C. 31; *Smith v. Lumber Co.*, 140 N.C. 378; *Baxter v. Irvin*, 158 N.C. 281; *Warren v. Susman*, 168 N.C. 462; *Brown v. Polk*, 201 N.C. 376; *St. Dennis v. Thomas*, 235 N.C. 393; *McDowell v. Blythe Brothers Co.*, 236 N.C. 399.

R. M. NIMROCK v. R. T. SCANLIN AND ANOTHER.

Foreclosure Proceedings—Parties.

1. A married woman who with her husband executes a mortgage of land, is a necessary party defendant in foreclosure proceedings.
2. The decree in such case should direct the sale to be made at the expiration of a reasonable time—that is, three months from its rendition.

CIVIL ACTION tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

This action was brought by the plaintiff as mortgagee against the defendant R. T. Scanlin and A. A. McKethan, to recover the possession of the mortgaged premises. It appeared upon the trial that the plaintiff claimed under a mortgage executed by R. T. Scanlin and his wife Martha D., dated the 19th day of June, 1880, and registered on the 26th of same month, and was subsequent to a mortgage executed by the same parties to A. A. McKethan upon the same land, dated the 18th day of January, 1877, and that no part of the debts secured by either mortgage had been paid.

It was found by the verdict of the jury that a demand was made by the plaintiff upon the defendant, R. T. Scanlin, for the pos-
(120) session of the land before the action was brought and that the rent of the land was worth fifteen dollars per month.

The defendant insisted that Martha D. Scanlin was a necessary party to the action, and that the plaintiff was not entitled to any relief in this action.

The prayer of the complaint was for the possession of the house and lot, and for damages, and all such other and further relief as may be right and proper in the premises.

The court refused to grant the plaintiff judgment for the possession or damages, but under the prayer for general relief made a decree directing a sale of the mortgaged premises by A. A. McKethan, first mortgagee, which decree is as follows: "The court doth order and adjudge that the defendant, A. A. McKethan, be a commissioner appointed by this court, as soon as practicable and at some convenient time between this and the next term of this court, to make sale of the mortgaged premises in accordance with the terms and provisions of said mortgages, as to notice, time and place; and on such sale the purchaser shall be required to give note with good security for the purchase money, payable on or before the Tuesday of the second week of the next term of this court, and a report of the sale, together with said note, shall be filed with the clerk of this court within five days

after the sale. Due notice shall be given to Martha D. Scanlin to show cause at the next term of this court why said sale shall not be confirmed. And the cause is retained for further directions."

From this judgment the defendants appealed.

Mr. N. W. Ray, for plaintiff.

Messrs. Sutton, Huske and Hinsdale & Devereux, for defendants.

ASHE, J. The point was raised on the trial in the court below, that Martha D. Scanlin was a necessary party to the action.

We are of the opinion the point is well taken, for she joined (121) with her husband in both deeds of mortgage, and if the land was the absolute property of her husband, there is nothing in the deeds to show that her joining in them was intended to affect her dower or homestead right in the land. But for aught that appears upon the face of the deeds, she may have been the owner of the same in her own right, or had a joint interest in it with her husband; but however this may be, the deeds are susceptible of that construction, and an adjudication upon her rights in the action, without her being a party and having an opportunity to assert and defend them, would be an act of injustice to her.

While we concur with his Honor in the court below, that the relief he proposed to give the plaintiff was not inconsistent with the case made by the complaint, and the plaintiff under the prayer for general relief, was entitled to such relief as it was the purpose of his Honor to grant by the decree rendered, we do not concur in the mode of granting it, and think there was error in the decree in that respect.

The practice in foreclosing mortgages has long been established by the courts. They never, as in this case, make an order or decree for an unconditional sale, but decree a sale to be made after a certain time, usually three months from the decree, unless the money secured by the mortgage is in the meantime paid. *Capehart v. Biggs,* 77 N. C., 261; 2 Jones on Mortgages, Sec. 1563; Johnson Ch. Rep., 140.

This condition was introduced in the decrees of sale of mortgaged property, to prevent mortgagors from being taken by surprise, and to give them an opportunity of raising the money and saving their property from sale.

We therefore remand the cause that Martha D. Scanlin may be made a party to the action, and that the decree may be modified, if the plaintiff shall be so advised, in conformity to this opinion.

Cited: Vanstory v. Thornton, 114 N.C. 376; *Chadbourn v. Johnston,* 119 N.C. 287.

(122)
WILLIAM REDMOND AND OTHERS v. COMMISSIONERS OF RUTHERFORD.

Taxation.

Personal property of a non-resident (here, notes secured by land) held by his agent in this state, is subject to tax here. The legal fiction that it is deemed to follow the person of the owner, has no application to questions of revenue.

MOTION for injunction to restrain defendants from collecting certain taxes, heard at Fall Term, 1881, of RUTHERFORD Superior Court, before *Avery, J.*

Motion allowed and defendants appealed.

Mr. M. H. Justice, for plaintiffs.
Messrs. W. P. Bynum and J. A. Forney, for defendants.

RUFFIN, J. The plaintiffs are domiciled in the state of New York, but were owners of lands lying in several of the counties of this state, which had been sold by their agent, who keeps an office in the town of Rutherfordton in this state, and had power to sell and execute covenants for title and to collect the money. The covenants to pay the purchase money are solvent only because of the fact that the title to the lands is retained as a security.

These covenants for the purchase money amount to many thousands of dollars, and are all kept in the office of said agent at Rutherfordton; and the single question presented in the record is, whether they are liable to a state, county and corporation tax.

The judge in the court below held them to be exempt, and enjoined the authorities of the county and town from levying and collecting the tax thereon.

(123) The statute providing for the levying and collecting of taxes in this state, after pointing out the several subjects of taxation, directs that "every person required to list property, shall make out and deliver to the township list-taker a statement verified by his oath of all the real and personal property, moneys, credits, investments in bonds, stocks, etc., in his possession or under his control on the first day of June, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, *agent*, factor, or otherwise."

The theory of taxation is, that the right to tax is derived from the protection afforded to the subject upon which it is imposed.

The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds;

and so far as they have any substantial existence, they are in this state and not elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicil. It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing.

The actual *situs* and control of the property within this state, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged, that it is deemed to follow the person of the owner, and to be present at the place of his domicil, has no application. In such case, the maxim *mobilia personam sequuntur* gives way to the other maxim *in fictione juris semper æquitas existat.*

In *Alvany v. Powell*, 55 N. C., 51, after stating the proposition that the object of taxation is to support the government which protects persons and property, and that consequently the burden (124) should be borne by such persons and property as are protected, Chief Justice PEARSON declares that the true principle upon which to determine whether personal property is liable to be taxed, is the *situs* of the property, and that the distinction attempted to be made between that and real estate, depending upon the domicil of the owner, "is based upon a fiction which has no application to questions of revenue."

The leading case upon the point is *Cuttin v. Hull*, 21 Vermt. 152, where the facts are, that a party domiciled in the state of New York owned bonds and notes upon parties resident in the state of Vermont, which he had deposited with an agent living in the latter state for management, collection and investment; and the question was whether they were subject to tax. The Vermont statute, very much like ours, provided that property held in trust by an executor, administrator, agent or trustee, should be assessed, etc. On behalf of the agent it was insisted that personal property, and especially debts due, having no fixed *situs,* follow the person and are to be considered as situate where the owner is domiciled, and hence could not be taxed because he lived out of the state. The supreme court after much consideration, rejected the argument, and referring to the fiction relied on, observed that "the rule is merely a legal fiction, adopted from considerations of general convenience and policy, and to enable persons to dispose of property at their decease without being embarrassed by their ignorance of the laws of the country where the same is situate. But

the doctrine in relation to the *situs* of personal chattels and their transfer and distribution, does not conflict with the actual jurisdiction of the state where it is situate, over it, or with the right to subject it, in common with the other property of the state, to share in the burden of government, by taxation." And it was further said, "that if persons residing abroad bring their property and invest it (125) in this state, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

This decision has been cited in many of the highest courts of the Union, and always with approbation, and though not mentioned by Chief Justice PEARSON, must have been known to him when he wrote the opinion in *Alvany v. Powell, supra*—judging from the great similarity of thought and expressions to be found in them both.

The principle established has been recognized and acted upon in *People v. Gardner*, 51 Barb., 352; *City of Albany v. Meekin*, 3 Ind., 481; *Wilkey v. City of Pekin*, 19 Ill., 160; *Johnson v. City of Lexington*, 14 B. Mon., 648; and *Finley v. City of Philadelphia*, 32 Penn., 381; in which last named case the judge, with some apparent feeling, observed: "There is nothing poetical about tax laws. Wherever they find property they claim a contribution for its protection without any special respect for the owner or his occupation."

In *Hoyt v. Commissioner of Taxes*, 23 N. Y., 238, and several of the cited cases, the converse proposition was held, and that the personal property of a resident of the state of New York was not subject to be taxed there, if actually situated in another state; and this, though it consisted in part of *choses in action.*

This court therefore is of opinion that the writ restraining the collection of the taxes assessed against the agent of the plaintiffs was improvidently granted, and the order to that effect must be reversed.

Error. Reversed.

Cited: Worth v. Comrs., 90 N.C. 411; *R.R. v. Comrs.*, 91 N.C. 457; *Bain v. R.R.*, 104 N.C. 365; *Jones v. Layne*, 144 N.C. 602; *Person v. Watts*, 184 N.C. 515; *Trust Co. v. Doughton*, 187 N.C. 272; *Mecklenburg County v. Sterchi Bros. Stores*, 210 N.C. 84, 87.

(126)

E. D. LATTA & BRO. v. W. P. WILLIAMS AND ANOTHER.

Taxation of Drummers.

The drummer's section of the revenue act, gives the party licensed the right to sell the commodities mentioned in any county of the state, without being liable to county or municipal tax.

CIVIL ACTION, commenced before a justice of the peace and tried on appeal at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

The following are the facts agreed upon: On the 15th day of September, 1878, the plaintiff procured from the treasurer of the state license under the provisions of section 24, schedule "B," of an act to raise revenue, ratified March 10th, 1877. After the license had been taken out, and while the same was in full force, the town of Davidson College was incorporated by act of assembly, ratified the 11th day of February, 1878, the fifth section of which provides: "That the said commissioners shall have power to levy and collect a tax on all subjects of state taxation not to exceed one dollar on the poll and thirty-three and one-third cents on real estate and personal property, and to impose fines for the violation of town ordinances and collect the same," etc. The town was shortly thereafter organized by the election of the defendant, W. P. Williams, as mayor, and J. R. Johnson, constable; and the commissioners of the town passed an ordinance on April 1, 1879, of which the following is a copy: "Any peddler or non-resident merchant selling goods in this corporation shall pay an annual tax of ten dollars; provided that this ordinance shall not apply to drummers selling exclusively to merchants." After the passage of this ordinance, and in the month of May, 1879, the plaintiff went to said town and undertook to sell clothing by (127) sample to persons other than merchants within the limits of town. Whereupon the defendants under and by legal proceedings seized the plaintiff's property and sold the same to satisfy the tax prescribed by the ordinance.

This action was brought by the plaintiff to recover the value of the property so converted, the same not exceeding twenty dollars.

It is agreed that if the court should be of opinion that the plaintiff is entitled to recover upon the foregoing facts, that judgment shall be entered in his favor, otherwise for the defendants. There was judgment for plaintiff, and defendants appealed.

Messrs. Jones & Johnston, for plaintiff.
Messrs. Burwell & Walker, for defendants.

ASHE, J. Section 24 of Schedule "B" of the revenue act, ratified the 10th day of March, 1877, under which the plaintiffs claims exemption from the tax in question, provided: "That every person acting as a drummer in his own behalf, or as agent for any other person, who shall sell, or attempt to sell goods, wares or merchandise not of his own manufacture, or any spirituous, vinous or malt liquors with or without samples, except agricultural implements or fruit trees and seeds of all kinds intended for the improvement of agriculture, shall, before soliciting orders or making any such sale, obtain a license to sell one year from the public treasurer, by paying said treasurer an annual tax of fifty dollars, but shall not be liable to be taxed by any county because of his sales."

We think the proper construction of this section is that the legislature intended to give to every one, who should pay the state fifty dollars and take out the license provided in the act, the right
(128) to sell any of commodities mentioned therein in any of the counties of this state, without being liable to any further taxation. It expressly declares such person shall not be liable to be taxed by any county because of his sales.

We do not think the authorities of the town of Davidson College have the power under the charter to levy a tax upon occupations, trades, etc. It was chartered by the act of 1879, the 5th section of which was in these words: "That the said commissioners shall have power to levy and collect a tax on all subjects of state taxation not to exceed one dollar on the poll, and thirty-three and one-third cents on real estate and personal property, and to impose fines," etc.

In the construction of municipal powers, it is held to be a general rule, that the powers of a municipal corporation are to be construed with strictness; and Judge COOLEY in his work on Taxation (page 387), says, this rule is peculiarly applicable to taxes on occupations. "It is presumed," he adds, "the legislature has granted in plain terms all it has intended to grant at all. If it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal."

In the act incorporating this town, while there is a general provision that the town may collect a tax on all subjects of taxation, it proceeds to mention specifically *polls, real estate and personal property,* as subjects of taxation, and nothing is said about a tax on merchants, drummers, or any occupation. Giving to the act the strict

construction laid down by Judge Cooley, the town would not have the power to tax anything but polls, real estate and personal property.

But there is another rule of construction applicable to this charter, which must exclude the right to tax in this particular. It is that an enumeration of particulars, following a general expression, controls it and limits it to the particulars enumerated. *Expres-* (129) *sio unius exclusio alterius. Dixon v. Coke,* 77 N. C., 205. This rule was recognized and enforced in the construction, by this court, of the charter of the city of Raleigh. *Pullen v. Raleigh,* 68 N. C., 451.

The construction we have given to the charter of the town of Davidson College is in consonance with the policy of the legislature in regard to powers of taxation by municipal corporations, as indicated in the act entitled "Towns." Bat. Rev., ch. 111, sec. 16. There, it declares that towns may lay a tax on real estate situate within the corporation, on such polls as are taxed by the general assembly for public purposes, on all persons (apothecaries and druggists excepted) retailing or selling liquor or wines of the measure of a quart or less, a tax not exceeding twenty-five dollars, on all such shows and exhibitors for reward as are taxed by the general assembly, on all dogs, and on swine, horses and cattle running at large within the town. There is nothing in the act to authorize the right to tax trades or occupations, and when the legislature has refrained from granting such power in a general law, it would not be reasonable to presume, in the absence of any express declaration to that effect, it intended to do so when it was granting special power of taxation.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

Cited: Redmond v. Comrs., 106 N.C. 127, 149; *Guano Co. v. Tarboro,* 126 N.C. 70; *Plymouth v. Cooper,* 135 N.C. 6, 7; *Griffith v. R. R.,* 191 N.C. 89; *Kenny Co. v. Brevard,* 217 N.C. 272.

ATLANTIC, TENNESSEE & OHIO RAILROAD COMPANY v. COMMISSIONERS OF MECKLENBURG.

Taxation—Railroads.

The franchise of the Atlantic, Tennessee and Ohio Railroad Company is subject to tax. It is a distinct species of property from that enumerated in the clause of the charter exempting the road-bed, etc., from taxation for a limited period.

(130) MOTION by plaintiff company for an injunction heard at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

The court refused to grant the motion, and dissolved the restraining order theretofore made, and the plaintiff appealed.

Messrs. Jones & Johnston, for plaintiff.
Messrs. Burwell & Walker, for defendants.

SMITH, C. J. The case presents the question whether the plaintiff company is liable to be assessed for state and county taxation upon the value of its corporate franchise and roadbed; and the facts set out in the complaint and answer, used as affidavits on the motion for an interlocutory injunction, and the only evidence in the case, are as follows:

The general assembly of Tennessee in February, 1852, passed an act incorporating the Atlantic, Tennessee and Ohio railroad company, for the purpose of constructing a railroad from the waters of the Atlantic to the Ohio river, traversing the states of North Carolina, Tennessee, Virginia and Kentucky (to accomplish which the concurring legislation of the other named states was necessary and expected), the 37th section of said act being in these words:

Be it further enacted, that the president, directors, clerks, agents, officers and servants of said company shall be exempt from military duty, except in cases of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads; and the capital stock of this company shall forever be free from taxation; the road with all its fixtures and appurtenances, including
(131) workshops, warehouses and vehicles for transportation, shall be exempt from taxation for the period of twenty years from the completion of said railroad, and no longer. The company shall have full power and authority to purchase and own such number of shares as may be necessary for the construction of said road and keeping the same in repair, which shall likewise be exempt from taxation.

This enactment is recited in words in the act of incorporation passed in this state, and which took effect on February 15th, 1855, and it is therein declared: "That the said Atlantic, Tennessee and Ohio railroad company shall be a body corporate in this state, and, with the powers and privileges in said act of incorporation granted, shall also have power to extend their railroad to some point on the North Carolina Western railroad, or to some point on the North Carolina railroad."

The fifth section (omitting such others as are not deemed material in this inquiry) allows the company five years in which to begin the gradation, and fifteen years in which to finish the road and put it in operation. Acts 1854-55, ch. 227.

It being found difficult, if not impracticable, to carry out the original enterprise and construct the road in its entire length as contemplated, at least in any reasonable time, and to ensure the building of a portion of it in this state, the general assembly of the state in February, 1861, passed what in its title is denominated "an act to amend" the act of incorporation, therein incorporating the stockholders residing in North Carolina, "under the name of the Atlantic, Tennessee and Ohio railroad company in North Carolina," distinguishing the new from the old company by adding to the corporate name the concluding words *"in North Carolina."*

We had occasion to consider in another aspect the effect of this legislation upon the rights and liabilities of dissenting (132) stockholders, and declared our opinion to be that the amending statute, if not an abrogation and substitution of another company in place of the former, nevertheless "effects such fundamental changes as are equivalent in their legal consequences." *Bank v. Charlotte,* 85 N. C., 433.

The act creating the new organization and suspending the exercise of corporate functions by its predecessor, until the road proposed to be built under its provisions shall extend to and intersect the East Tennessee and Virginia railroad, does not undertake to confer or define the powers and rights necessary to the accomplishment of the purpose for which it was formed, nor mention the privileges and benefits to be secured by an investment of funds in the prosecution of the work, since it is manifest the legislature intended that their own citizen stockholders and the new organization should retain and enjoy all such as are bestowed in the original act upon them and their associates, as inducements to build a road of larger extent. The new therefore must succeed to all the privileges and immunities conferred in the original charter, in like manner as to the powers necessary to the prosecution of the work.

If the present company had been successful in constructing the road to the Western limit mentioned, and having thus fulfilled the purposes of its existence, then give place to the revived company, it is plain the latter could claim the privileges and exemptions provided in its charter, the law of its being, and it would be a strained interpretation of the legislative will as expressed in the successive acts, whereof one is always mentioned as an amendment of the other, that those granted to all the stockholders in the former should be denied to

its own resident stockholders in the latter, when perhaps even greater inducements were necessary to secure contributions of money towards the construction of the road. The public interest in the enter-
(133) prise is shown by its two subsequent acts, authorizing an assessment upon the shareholders to raise means in furtherance of it, and again providing for an exchange of state bonds for those of the company to the amount of two millions, upon which to raise needed funds for the work. Private Acts 1868, ch. 20. Acts 1868-69, ch. 31.

Our opinion then is that the 37th section in the Tennessee act of incorporation, already recited, enures to the benefit of the plaintiff as it did to the benefit of the original company, and that it is entitled to the exemptions therein provided.

2. The next inquiry is as to the extent of the exemption from liability to taxation:

The complaint states that the present road was finished in 1862, and it would seem, as further efforts to extend it have ceased, that the period of exemption will expire, *as to it* in twenty years from the time of its completion. Unless this construction be adopted, the liability might never arise and exemption continue indefinitely because the whole road described in the act has not been built. The road between its present termini *is completed,* and as such its exemption ought to expire and we think does expire under the act in twenty years thereafter, to-wit, in 1882.

It is not necessary to consider whether the exemption begins at the completion of the work and continues thence for the limited time, or may also be claimed during its progress, the end of the work being referred to only to measure the period when the exemption must cease. It can scarcely be admissible to impute to the legislature a purpose to burden and embarrass an enterprise in course of execution, and wholly unremunerable, when public favor and friendliness are most needed, and to remove the burden and exonerate the property when the work is done and the operations of the road may be making a return for the outlay. It is a more reasonable interpretation
(134) that the exemption was intended to be in force from the beginning, and the terms used are to fix the period when it shall cease. But the assessment now enforced is within the letter of the act and forbidden upon any construction of its terms.

The franchise, however, as a distinct species of property from any enumerated, and not embraced in the words of the section, upon the rule of construction that none of the taxing power of the state will be deemed to have been surrendered unless the intent to do so is manifest upon a fair and reasonable interpretation of the language used, is we think a subject of taxation and not included in the exemption.

Railroad v. Brogden, 74 N. C., 707; *Belo v. Commissioners*, 82 N.C., 415; *Railroad v. Commissioners*, 84 N. C., 504; *Railroad v. Commissioners*, 72 N. C., 10.

The collection therefore of so much of the tax as is levied upon the road-bed should have been restrained by the court, while the sheriff should be left free to collect that imposed upon the franchise, the value of which is apportioned to the county, under the "act to provide for the levying and collection of taxes." Act 1881, ch. 117, sec. 11.

There is error as specified, and this will be certified to the end that a modified order of injunction may be made in conformity with this opinion, and the cause proceed in the court below.

Error. Modified.

Cited: R. R. v. Comrs., 88 N.C. 525.

DUNCAN CROMARTIE v. COMMISSIONERS OF BLADEN.

County Commissioners—Mandamus—Contempt—Taxation.

1. Where the fund raised by taxation is required to meet the necessary expenses of a county government, and no part thereof can be legally applied to the satisfaction of a debt, the commissioners, acting in good faith in the execution of their powers, cannot be put in contempt for failure to pay such debt.
2. But in such case, an *alias* writ of *mandamus* should be awarded, to the end that any excess of revenue raised under the law may be applied to the debt.
3. The commissioners have no power to increase the levy beyond the constitutional limit without legislative authority, given in advance.

RULE on defendants to show cause why they should not be (135) attached for contempt in failing to obey a writ of *mandamus*, heard at Fall Term, 1882, at BLADEN Superior Court, before *Gilmer, J.*

When this cause was here on a former appeal at October Term, 1881, it was upon such a defective finding of facts that the court was unable to dispose of the controversy upon its merits, and it was remanded. (See 85 N. C., 211.) After its return to the superior court of Bladen, it was by order of the court, without objection, referred to G. F. Melvin, the clerk, to hear such evidence as the parties may submit before him, and to report such evidence, together with his findings of fact thereon, to the court at the next term. The referee

accordingly proceeded to take depositions bearing upon the subject matter in the presence of both parties, and made his report with the evidence to Fall Term, 1882. The facts found by him are in substance as follows:

The debt due the plaintiff was based on county orders taken up by him, and disallowed upon his settlement, as treasurer, for want of county funds which could be legally appropriated to their payment, and the indebtedness for which the orders were issued was contracted after the adoption of the constitution in 1868, and prior to January 1st, 1877.

(136) The county commissioners on the first Monday in August, 1880, for the fiscal year thence ensuing, during which the original *mandamus* in the case was sued out, levied for county purposes a tax of 34⅓ cents upon every hundred dollars on the valuation of taxable property, real and personal, being with that levied by the general assembly for state objects for the same year, up to the full limits of 66⅔ cents allowed by the constitution to be levied for both.

This levy and the receipts from other sources for the general fund, aggregate the sum of $5,093.83, whereof has been expended during the year the sum of $3,087.30, in payment of current demands, which in detail are set out in an accompanying exhibit; and these are all found to be necessary and economical. There were also outstanding liabilities for court costs incurred at Fall Term, 1880, and that succeeding, which have been since paid, $249 more. Since December 1st, 1876, about the commencement of the term of service of the defendants as county commissioners, the county government has been honestly and economically conducted.

The court house and county jail are out of repair, the latter unsafe for the custody of prisoners and needing two iron cages, for which the sum of $2,800 is estimated to be necessary, and several bridges need reparation at a cost of $150 or $200, and it was the intention of the commissioners to appropriate of the taxes of 1880 a sufficient sum for these objects.

In 1876, soon after entering into office, the commissioners applied to the general assembly for authority to levy a special tax to meet the county indebtedness, of which that due the plaintiff was part, and were refused; and they afterwards procured the passage of the act of 1879, ch. 162, which authorized the funding of a floating debt upon a compromise with creditors, and the issuing of bonds therefor, the interest on which was to be provided for, and a sinking fund for the

(137) ultimate redemption of the principal, by a special tax not to exceed 24 cents on the hundred dollars value of property in any

one year; and a board of audit was constituted to adjust the claims for which the commissioners were to issue bonds.

An effort was made to give practical effect to this legislation, but it proved unavailing, the creditors refusing their assent to its provisions.

The valuation of the taxable property of Bladen in 1880 was $1,310,769 and upon this sum was assessed the taxes for that year, up to the maximum allowed by law. The public buildings are still in pressing need of the repairs mentioned.

To the report numerous exceptions were taken by the plaintiff, most of them to the insufficient findings of fact, which we do not propose to consider specifically, since in our opinion the report is ample and furnishes all the information needed to pass upon the conduct of the commissioners, and their legal ability to comply with the mandate for the disobedience of which they are called on to answer.

Upon the hearing of the exceptions and the arguments of counsel, the court overruled the exceptions and confirmed the report, and proceeded to adjudge that the rule against the defendants to show cause why they should not be attached for contempt, be discharged; that the plaintiff's application for an *alias* peremptory writ of *mandamus* be refused; that the clerk pay over to the county treasurer the moneys in his hands to wit, $2,000, held under an order of Spring Term, 1881, and that the defendants recover their costs of plaintiff—the cause being retained for further proceedings and directions.

From the rulings upon the exceptions and the judgment rendered, the plaintiff appeals.

Messrs. T. H. Sutton and W. A. Guthrie, for plaintiff.
Messrs. D. J. Devane and C. C. Lyon, for defendants.

SMITH, C. J., after stating the above. When the cause was (138) before us on the former appeal, and the facts upon which the culpability imputed to the defendants depended were insufficiently developed for us to decide upon the contempt, we used this language in the opinion: "It is manifest that where the public interests conflict with private interests, the latter must yield. If the entire fund which can be raised by taxation is required to meet the necessary expenses of an economical administration of the county government, and none can be diverted to pay its indebtedness without serious detriment to the public, none ought to be thus appropriated. * * * The commissioners are under an official obligation to keep and maintain the public buildings and bridges, falling under their supervision, in good repair and safe condition, and to provide for the other specified public objects."

The facts found and reported meet the conditions and requirements of the proposition thus announced, upon which their exemption from criminal responsibilty depends, and sustain their answer to the rule.

It appears that all the financial resources of the year were used or were required, and were prevented from being used by the issuing of the rule, in defraying necessary county charges, and none could be spared for an indebtedness incurred in former years without injury to the public interests. The commissioners in exercising their official functions must be left to their own judgment in determining what are necessary expenses in conducting the county government, and when acting in good faith cannot be put in contempt for a failure to do what they cannot do, with the means at their command, without a dereliction of duty in regard to other objects more imperative, and alike urgent. Nor does the writ require this of the commissioners, but only that they exercise the powers confided to them to raise the means to meet the plaintiffs' demand; and this, in subordination to the higher
(139) claims of the public. A *mandamus* does not warrant the commissioners, in the words of SETTLE, J., "in levying taxes in any other manner or at any other time than is prescribed by law. The *mandamus* must be understood to mean that they shall levy and collect according to the general law governing the subject." *Mauney v. Commissioners of Montgomery*, 71 N. C., 486.

The taxes which the commissioners are empowered to levy have their limitations in the constitution, and these cannot be exceeded "except for a special purpose and with the special approval of the general assembly." Const., Art. V, Secs. 1 and 6. The construction of these clauses has been fixed by a series of decisions, from one of which *French v. Commissioners of New Hanover*, 74 N. C., 692, we extract the emphatic declaration of BYNUM, J.: "It admits of no dispute now that taxation for state and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and *new debts.*" *Trull v. Commissioners of Madison*, 72 N. C., 388; *Clifton v. Wynne*, 80 N. C., 145; *Mauney v. Commissioners of Montgomery, supra.*

In the last cited case the ruling of BUXTON, J., was approved in these words: "As they (new debts) were contracted with a knowledge of the constitutional restrictions upon the county authorities in regard to taxation, the county authorities must observe the constitutional limitations, and not assess more than double of the tax for state purposes in any one year."

In *Broadnax v. Groom*, 64 N. C., 244, PEARSON, C. J., speaking in reference to the exercise by the court of a supervisory control over these officers, inquires, "who is to decide what are the necessary ex-

penses?" and answers his own question thus: "The county commissioners, to whom is confided the trust of regulating all county matters. Repairing and building bridges are a part of the necessary expenses of a county, as much so as keeping the roads in order or making new roads." The same language is reiterated in *Satterthwaite* (140) *v. Commissioners of Beaufort,* 76 N. C., 153. In the same opinion it is laid down that "the court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the constitution upon the legislative department of the government, *or upon the county authorities.*"

In the argument here for the appellant, it is urged that the disobedience consists in the failure to levy a tax adequate to pay the plaintiff's judgment, above the legal limits, and then to ask the approval of the general assembly in order to its collection, and that this is the proper course to be pursued in obtaining legislative sanction to the proposed increase. We do not give our assent to this interpretation of the clause in the constitution which declares that "the taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for special purposes and with the special approval of the general assembly." The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority, to levy special taxes beyond the assigned limits; though if given after the levy, it would doubtless be equally effectual. This is implied in the ruling in *Simmons v. Wilson,* 66 N. C., 336, that a legislative approval previously given and afterwards recalled, arrested all further collections of taxes imposed by its authority, and intimated in *French's,* and assumed in *Broadnax's* case, already referred to.

There is a manifest propriety in asking the assent of the legislature to an increased levy in advance, as has been, we believe, the uniform practice, when such assent is necessary to its validity and the enforcement of the taxes. The tax list and the clerk's endorsement of an order for collection have, under the statute, the force and effect of a judgment and execution against the property of each person charged in the list. Acts 1879, ch. 71, sec. 25. And it (141) could not be intended that an unwarranted tax should be inserted in the process, or that the collection should be suspended until by the action of the general assembly it is legalized.

Nor are we prepared to admit that an application for approval is not one resting in the sound discretion of the commissioners, and that any judicial coercion can be used to control the exercise of their own judgment in the matter.

"In short," is the language of the Chief Justice in a case already cited, "this court is not capable of controlling the exercise of power on the part of the general assembly, or of the county authorities, and cannot assume to do so without putting itself in antagonism to the general assembly or to the county authorities, and erecting a despotism of five men"—referring to the number of the justices then constituting this court.

But if it were otherwise, the commissioners did make the application for permission to provide for the county debt, including that of the plaintiff, and were denied authority to do so.

Upon review of the whole case we think the rule was properly discharged. But we think the refusal of the court to award an *alias* writ of *mandamus* was error, for it is in the nature of final process to which the plaintiff is entitled, so that whenever the necessary county expenses can be met without absorbing all the county revenue which can be raised under the law, the excess must be applied to the debt recovered, and this is the full extent to which the process can go.

The judgment must be thus modified, and then affirmed. Let this be certified.

Error. Modified and affirmed.

Cited: Evans v. Comrs., 89 N.C. 159; *Barksdale v. Comrs.*, 93 N.C. 476; *Mayo v. Comrs.*, 122 N.C. 17; *Herring v. Dixon*, 122 N.C. 423; *Jones v. Comrs.*, 137 N.C. 599, 613; *R. R. v. Comrs.*, 148 N.C. 235; *Burgin v. Smith*, 151 N.C. 567; *Drainage District v. Comrs.*, 174 N.C. 740; *R. R. v. Cherokee County*, 177 N.C. 90; *R. R. v. Comrs.*, 178 N.C. 452, 453; *Green v. Kitchin*, 229 N.C. 460.

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THOMAS J. PERSON v. JAMES W. NEWSOM.

Execution—Amercement of Sheriff.

1. A sheriff endorsed upon an execution the words, "debt and interest due to sheriff, costs paid into office;" and upon another, the word "satisfied," without stating what disposition he had made of the fund; *Held* that the returns are sufficient in law to relieve the sheriff from amercement for not making "due return."
2. In such case he is allowed all the days of the term to return an execution, unless he be ruled, upon motion and cause shown, to return it on some intermediate day.
3. Nor is he required to note thereon the date of its delivery to him. (The act of assembly has no reference to final process.)

PERSON *v.* NEWSOM.

AMERCEMENT of sheriff—Motion of plaintiff to make judgment *nisi* absolute, heard at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

On the 17th of October, 1878, execution issued on a judgment recovered in the said court by the plaintiff against the Seaboard and Roanoke railroad company, and was delivered to the defendant, then sheriff, returnable to the next ensuing term, which began on the 4th Monday after the 1st Monday in March.

The writ not having been returned, the plaintiff, on the 12th of April, 1879, the last day of the term, moved the court and obtained a judgment *nisi* against the defendant for his failure; whereupon being present he asked the court to prolong the session until he could make his return, which being granted, he returned the process in his hands at the hour of 5 p. m., with his endorsement in these words: "Debt and interest paid shff., costs paid into office." No money was collected by the defendant, but he paid the amount due the (143) plaintiff from his own funds.

Upon these facts the court ruled that the return was not sufficient, and rendered the judgment, absolute, for the penalty of one hundred dollars, and the defendant appealed.

Mr. R. B. Peebles, for plaintiff.
Messrs. Mullen & Moore and W. Bagley, for defendant.

SMITH, C. J. The question presented is as to the liability of the defendant to the amercement for not making "due return" of the process under the statute, (Bat. Rev., ch 106, sec. 15), either because not in time or insufficient in form.

The return is in substance that the debt and interest had become the property of the defendant, and he had a right to forbear the enforcement of the mandate. If such be the fact, and it must be so assumed, upon the motion for an amercement, the debt being under the control of the defendant, as owner, its collection may be suspended without the incurring of liability to the plaintiff as an "aggrieved party." It may be an untrue return subjecting the officer to the heavier penalty imposed for making a false return, for that, the payment extinguished, but did not transfer the debt; still the return is sufficient in law to excuse the defendant from further proceeding under the process, and protects him from this penalty now sought to be enforced. *Waugh v. Brittain*, 49 N. C., 470.

The next inquiry is whether the return is in due time: The case of *Ledbetter v. Arledge*, 53 N. C., 475, cited in the argument for the appellant, is directly in point, and decisive. There, the plaintiff was

allowed to enter up judgment *nisi* against the defaulting officer on Thursday of the term, and immediately thereupon the defendant, with leave of the court, made his return, and moved to vacate the (144) judgment. Delivering the opinion of the court, MANLY, J., says: "The sheriff is allowed all the days of the term to return a *fieri facias*, unless he be ruled, upon motion and cause shown, to return it to some intermediate day. When the motion is made, like other acts of the court, it stands by relation as if done on the first day."

The statute now in force expressly directs that "all executions on judgments in civil actions," shall be returnable to the *term of the court* next after that from which they bear teste," not specifying any day thereof. Bat. Rev., ch. 18, sec. 7.

The same inference would seem to be authorized by the decision that the amercement can be imposed upon application at a subsequent term. *Halcombe v. Rowland*, 30 N. C., 240.

There is error, and the judgment below must be reversed, and judgment entered here for the defendant.

Error. Reversed.

Cited: Turner v. Page, 111 N.C. 292; *S. v. Moore*, 230 N.C. 649.

In WYCHE v. NEWSOM, from Northhampton:

There was judgment for the defendant and the plaintiff appealed.

SMITH, C. J. The facts before us upon this appeal are similar to those in *Person v. Newsom, ante*, 142, differing in that the return here made is simply, "satisfied," and without explanation.

Besides the objection pointed at the delay, the plaintiff insists that the return is insufficient in law in not further stating what disposition has been made of the fund.

In *Davis v. Lancaster*, 5 N. C., 255, where the sheriff made a similar return upon an execution in his hands, and the proceeding was to amerce him under the act of 1777, it was declared he had not incurred the penalty. This construction of the act is recognized and enforced in the latter case of *Cockerham v. Baker*, 52 N. C., 288, and is (145) no longer open to controversy.

Since the argument our attention has been called to the Revised Code, ch. 31, sec. 39, which imposes a forfeiture of one hundred dollars upon a sheriff or other officer receiving process for execution and failing to note on it the date of the delivery to him. This section obviously has no reference to final process, as shown by its connections. And this is the more manifest by reference to the similar section

in the Revised Statutes, ch. 31, sec. 43, which with some modifications has been introduced into the Revised Code. It is there declared, that,

"The clerk or attorney issuing process shall mark thereon the day on which the same shall be issued, and the sheriff or other officer receiving the same to execute, shall in like manner mark on each process the day on which he shall have received it; and every clerk, attorney, sheriff, or other officer, neglecting so to do, shall forfeit and pay the sum of one hundred dollars, to be recovered by action of debt, in any court of record having cognizance thereof, by any person who shall sue for the same, with costs."

Reference was had to an independant action to enforce this penalty for the failure of the defendant to endorse upon a writ of *capias ad respondendum* the day of its delivery, in *Hathaway v. Freeman*, 29 N. C., 109; and if the penalty did attach to such a default in returning an execution, it could not be recovered in the summary proceeding for a neglect to make "due return," that is, as defined by Mr. Jacobs in his Law Dictionary, to endorse his certificate "of what he hath done touching the execution of any writ directed to him."

But the suggestion meets with another obstacle not less formidable —the point is not presented in the case transmitted on appeal, and cannot be made here for the first time.

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

No error. Affirmed.

Cited: Wyche v. Newsom, 87 N.C. 144.

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(146)

MARX MAYERS v. H. E. CARTER, AND OTHERS.

Execution Sale.

Execution sales made at an improper time and place are void. (Act of 1877, ch. 216, sec. 2, establishes sale-days.) The case of *Biggs v. Brickell*, 68 N. C., 239, where assent of defendant in the execution to change place was given, discussed by SMITH, C. J.

EJECTMENT tried at July Special Term, 1882, of DUPLIN Superior Court, before *Gilliam, J.*

Judgment for plaintiff, appeal by defendants.

No counsel for plaintiff.

Mr. O. H. Allen, for defendants.

SMITH, C. J. The plaintiff derives his title to the land described and claimed in his complaint by virtue of a sale under execution against the defendant, Carter, made by the sheriff on the first Monday in May, 1879, that being a month in which is held a term of the superior court of Duplin, commencing on the third Monday thereof. Carter, who had previously executed a deed conveying the premises to his co-defendant, Cavanaugh, which the plaintiff impeached for fraud, was himself present with the attorney representing both, objected to the sale by the sheriff, saying that the land was the property of Cavanaugh and the purchaser would get himself into trouble. Two issues were submitted to the jury, to the first of which they responded in the affirmative and to the latter in the negative.

1. Was the deed from Carter to Cavanaugh made with the (147) intent of both parties to hinder and delay creditors of Carter?

2. Did Carter or Cavanaugh in person or by attorney object to a sale of the land on the 5th day of May, 1879, because that was not a legal sale-day?

The court upon the rendition of the verdict gave judgment in favor of the plaintiff, to which the defendants excepted on the ground that no title passed by the sale, it being made in a month in which a superior court is held and not during the term.

The sole question presented in the appeal is as to the validity of the sale and the deed executed pursuant to it. The statute then in force regulating judicial sales, declares, "that sheriffs and other public officers selling real estate under execution shall sell the same at the court house of the county in which the property, or some part thereof, is situate, on the first Monday in every month, except the month in which the superior court is held therein, then the sales shall be made during the first three days of the court. Acts 1876-77, ch. 216, sec. 2.

In *State v. Rives*, 27 N. C., 297, RUFFIN, C. J., in the concluding part of the opinion thus declares the law: "The sale in this case was on the premises and on a different day of the week. We have more than once said that this is a substantial part of a sheriff's sale, because the regulation is for a sale of all the property at one place and at the same time which may be offered for sale in the county in one month, under the expectation that there will be numerous bidders and fair prices had. Of such a regulation every one must be cognizant, and therefore we have held that the purchaser gets no title by a sale at an improper time and place." The cases of *Mordecai v. Speight*, 14 N. C., 428, and *Avery v. Rose*, 15 N. C., 549, are referred to in support of the proposition.

It is equally true that the non-observance by the officer of (148) those provisions of the statute which are directory merely and

relate to matters *in pais,* in the absence of participation in or notice of the officer's disregard of the requirements, will not infect the title acquired under an execution sale.

"Third persons," remarks the same learned judge delivering the opinion in the case last cited in reference to a tax sale, "need not show affirmatively the observance on the part of the sheriff of all legal prerequisites to the sale, nor are they charged to take notice of all irregularities when shown on the opposite side, as in the advertisement, or adjournment of the sale, or that there were chattels which the sheriff might have seized instead of the land."

Accordingly it is held that under the act requiring sales of land to be made on the same Monday in every month on which the several county courts are held in the respective counties, with authority to postpone from day to day until the sales are completed (Rev. St., ch. 45, sec. 10), a sale made on Tuesday or Wednesday of the week will pass the title. *Brooks v. Ratcliff,* 33 N. C., 321.

And so it was declared that a sale on Friday of the week is valid, PEARSON, C. J., distinguishing "between things relating to the power of the sheriff and things only directory, in regard to which he may be sued for damages, as for not advertising in two or more public places, etc., *purchasers not being required to see to matters of mere detail.*" *Wade v. Saunders,* 70 N. C., 270; *Hays v. Hunt,* 85 N. C., 303.

The decision in *Biggs v. Brickell,* 68 N. C., 239, sustaining the sale, is put upon the ground that the defendant assented to it, and BOYDEN, J., intimating a doubt as to the correctness of some previous adjudications, says: "We hold it to be clear that a sale made at the court house door by the sheriff, where the general law requires sales to be made, the debtor may waive the benefit of the private local law directing such sales to be made upon the premises, and *assent to the sale as was done in this case,* which would not only bind the debtor, but the purchaser would acquire the title of the defendant in (149) the execution."

Whether a verbal assent or acquiescence, not involving an element of fraud, can operate as an estoppel under the statute of frauds, and thus pass an estate in land, it is not necessary now to inquire, since in our case not only was no assent given, but the defendant, Carter, the attorney for both being present, as the case states, "objected to the sale by the sheriff," assigning the reason for so objecting that the property belonged to Cavanaugh. How an assent can be inferred from his giving an insufficient reason for his refusal, we are at a loss to understand. The finding of the jury upon the second issue that the objection was not put on the ground that it was not a legal sale day, is wholly insufficient to eliminate the illegality which infects the act

of the officer in his disregard of the statutory mandate, and avoids the sale.

There is error in rendering judgment upon the verdict and it must be set aside and a new trial had.

Error. *Venire de novo.*

Cited: Dula v. Seagle, 98 N.C. 461; *Wortham v. Basket,* 99 N.C. 72; *Loudermilk v. Corpening,* 101 N.C. 650; *Williams v. Dunn,* 163 N.C. 213; *Ricks v. Brooks,* 179 N.C. 208; *Johnston County v. Smith,* 203 N.C. 256; *Bladen County v. Breece,* 214 N.C. 547.

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*JOHN S. LOCKHART v. COOPER & LUNSFORD.

Insurance.

An insurance policy was issued to defendant warehousemen on leaf tobacco, by them "owned, or held in trust, or on commission, or sold and not delivered." The plaintiff bought twenty-five particular hogsheads of tobacco, removed five, and suffered the others to remain in the warehouse, and the same with the building was destroyed by fire, and was also a considerable quantity of tobacco owned by defendants themselves, exceeding in value the whole amount of the insurance; *Held,* that the goods had been sold and delivered, and that plaintiff is not entitled to recover any portion of the insurance money.

(150) CIVIL ACTION tried at Fall Term, 1882, of ORANGE Superior Court, before *Shipp, J.*

On November 8th, 1880, the plaintiff bought of the defendants, Cooper & Lunsford, (who were conducting at Durham, N. C., the business of storing and selling leaf tobacco, and had a warehouse used for that purpose) twenty-five particular hogsheads of such tobacco then in their warehouse, at the price of $2,538.38, of which number five were removed and the others suffered to remain.

At the same time the plaintiff gave an acceptance payable on time for the purchase money, saying that in a few days he would remove the others. Subsequently he was asked to take them from the warehouse and he promised the defendants that he would do so, but finding that the tobacco had been placed in the basement of the warehouse and was less in the defendants' way, to which they made no objection, it was allowed to remain, until most of the tobacco was after-

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

wards destroyed with the building by a fire which occurred on December 1st, of the same year.

Previous to the burning, the defendants' book keeper informed him that the tobacco was covered by insurance policies taken out by the defendants.

The defendants had effected several open or floating policies of insurance against loss by fire with the several companies, who are associated with them in the action as co-defendants, in the aggregate sum of $8,000 on leaf tobacco, by them *"owned or held in trust or on commission, or sold and not delivered,"* and these policies were in force when the property was burned.

The defendants themselves owned and had in their warehouse, at the same time, leaf tobacco which was consumed, exceeding in value by $2,000 the whole amount of the insurance, and they collected what was due from the companies and applied it to their own indemnity, refusing, (as do the insurance companies) to pay any thing to the plaintiff, and denying his claim to any part of the insurance money under the terms of the policies. The draft or acceptance (151) of the plaintiff went to protest; and the defendants who had endorsed it advanced the money due thereon to the holder, and were afterwards reimbursed by the plaintiff.

These are the undenied facts alleged in the pleadings and findings of the jury, as presented in the transcript for review of the ruling of the court as to their legal effect in interpreting the policies.

The court held that the tobacco had been sold and delivered, and was not then held in trust, within the meaning of the contract of insurance and under its protection, and gave judgment in favor of the companies for their costs, and that the defendants recover their counter claim. From this judgment the plaintiff appeals.

Messrs. Merrimon & W. W. Fuller, for plaintiff.
Mr. J. W. Graham, for defendants.

SMITH, C. J. The only question we are called on to decide is whether the plaintiff's tobacco upon the facts stated was held by the defendants Cooper & Lunsford at the time of the fire, "in trust, or sold and not delivered," in the sense of the contract of insurance, for the plaintiff, and he is entitled to share with them in the fund collected from the companies.

An insurance against loss by fire, effected by one who has no interest in the property insured, is but a wagering contract not sanctioned by the common law, and void. The interest must exist at the time the policy is issued or the contract entered into, as well as at the time when

the loss occurs. *Saddlers Co. v. Babcock,* 2 Atk., 554. It is not necessary, however, that the insured shall have an absolute and unqualified property in the thing insured. A mortgagee, trustee, factor or agent entrusted with goods for safe keeping, or sale, and en-
(152) titled to compensation therefor, may insure them in his own name, and in case of loss recover the full amount of the policy applying so much to his own use as measures the value of his own interest, and holding the residue for his principal. *Ætna Ins. Co. v. Jackson,* B. Mon., (Ky.) 242; *Williams v. Ins. Co.,* 15 La., (Ann.) 651.

Thus a commission merchant in custody of goods consigned for sale; a carrier in possession for the purpose of transportation; a vendee with a right of possession under a contract on payment of the purchase money, have been held to have an insurable interest to the full value of what is insured. *De Forest v. Fulton Ins. Co.,* 1 Hall, (N. Y.) 84; *Savage v. Corn Exc. Co.,* 36 N. Y., 655; *Shotwell v. Ins. Co.,* 5 Bosw., (N. Y.) 247; 1 Phill Ins., Sec. 172, and succeeding sections; 2 Greenf. Evi., Sec. 379.

We concur in the ruling that the facts constitute a transfer of title and an accompanying legal possession of the tobacco to the plaintiff; and, though left in the warehouse, it was thereafter under his control and at his risk, the insurable interest before vested in the defendants having ceased to exist.

Numerous cases were cited in the argument to show that the goods were still *"held in trust"* for the vendee; and if not, that they were embraced in the descriptive words, *"sold and not delivered."* Upon an examination they will be found not to support the proposition contended for.

In *Haugh v. Fire Ins. Co.,* 36 Mary., 398, the law is declared to be well settled that a person having goods in his possession, as consignee or on commission, may insure in his own name, and recover the full insurance and after satisfying his own claim he will hold the balance as trustee for the owner.

In *Siter v. Morris,* 13 Penn. St., 218, the defendants were commission merchants and forwarding agents who kept a warehouse for receiving goods to be forwarded as directed, for which they
(153) received a compensation, and the policy covered goods "their own, or held in trust or on consignment."

In *Stillwell v. Staples,* 19 N. Y., 401, the plaintiffs held in their possession cloths sent to them by the defendant to be made into clothing, and which when burned had been manufactured, and it was decided that in the absence of any ratification of the contract of insurance, and the defendants made no claim on the company for the loss of the cloths and applied the insurance money to compensation for their own

losses which were in excess, the defendants had elected to cancel so much of the policy as purported to insure goods held by them in trust, and the plaintiff could not recover. Without assenting to the correctness of this exposition of the law, and of the relations created between the agents in the manufacture and their principal in respect to the insurance, the case furnishes no assistance to the claim of the plaintiff in the case before us.

In *Ætna Ins. Co. v. Jackson,* 16 B. Mon., (Ky.) 242, the pork had been bought but not delivered, and was to be paid for on delivery. It was held that the property therein had not passed to the vendees, but remained in the plaintiffs who had not only possession and right of possession, but ownership itself in substantially the same plight as before sale, except that their obligation to deliver on payment of the price restricted them from selling the pork to others, and this was still under cover of the insurance policy.

In *Phœnix Ins. Co. v. Favorite,* 49 Ill., 259, it was decided that goods on storage were within the terms of the policy, which extended its protection to such as were held "in trust or on commission."

In *Waters v. Ins. Co.,* 85 E. C. L. Rep., 868, the goods insured were in the custody of the plaintiff a wharfinger and warehouse-man, deposited with him in that capacity, and he had a lien for charges of cartage and warehouse rent; and in *London and N. W. Railway Co. v. Glyn,* 102 E. C. L. Rep., 651, the goods were in the hands of the plaintiff as a common carrier and were declared to be held (154) in trust within the meaning of the policy, when destroyed, and the plaintiff could recover full insurance, but would hold the fund after reimbursing their own loss, for the owner, their principal.

These and the other authorities relied on by the appellant recognize an insurable interest in the depositary who has a charge upon the goods committed to his custody, with a correspondent responsibility for their safe keeping and forwarding, but none reach a case in which there has been an absolute sale and delivery, transferring both title and possession to the vendee, and the goods are temporarily left (without an actual removal) in the place of deposit.

But we have been referred in both arguments to a case decided in 1871, in the court of Appeals of New York, (*Waring v. Fire Ins. Co.,* 45 N. Y., 606,) in which the subject and the legal effect of such clauses contained in a fire policy are discussed by FOLGER, J., which seem to furnish a satisfactory solution of the present controversy. The words in the policy were these: "Do insure Waring, King & Co., against loss or damage by fire to the amount of $3,000 on refined carbon oil and packages containing the same, their own, or *held in trust, on commission, or sold but not removed,* contained in bonded warehouse."

Other policies were obtained at the same time in different companies amounting in all to $30,000. Subsequently part of the property was sold, but remained in possession of the insured (they informing the purchasers that it was covered by insurance until removed) until consumed by fire, which occurred in less than a month after the insurance was effected. "We have but little difficulty," say the court, "in holding, from the peculiar phraseology of the policy, that something other was meant than property of which a contract of sale had been made, but of which no delivery had yet taken place. 'Sold but not delivered' is a phrase common with insurance men and has an ascertained (155) and definite meaning. It applies to property of which a *contract of sale has been made, but of which the ownership has not been changed* by a delivery in pursuance of the contract. 'Sold but not removed' is another, and we deem a newer form, to express something else. We judge that it was meant to cover that which had been sold and of which a legal binding delivery had been made, the ownership and right of control of which had passed, but which had not been in fact, removed, of which no change of place indicated a change of ownership and possession."

In our opinion this is a fair and reasonable interpretation of the clause of the policy, and the distinction properly drawn between the expressions "sold but not delivered" and "sold but not removed." The first contemplates goods sold, but in a legal sense not delivered, so as to vest the title and possession in the vendee; the latter refers to what is in law a sale and delivery, but where the goods remain where they were. The *delivery* may be without the *removal,* and the latter word is substituted to give a wider scope to the contract and to extend its protection to cases not embraced before.

We therefore concur in the ruling of the court and declare there is no error.

No error. Affirmed.

Cited: Wright v. Ins. Co., 138 N.C. 494; *Ins. Co. v. Reid,* 171 N.C. 518.

HARVEY BECKWITH v. MINING CO.

Execution—Motion to Set Aside Sale Under.

1. A sale under execution will not be set aside on the ground of inadequacy of price, unless it suggests undue advantage or is connected with circumstances of fraud or mistake; in such case, the party complaining has the right to have the facts found.

2. A plaintiff at whose instance an execution issues, or any other party interested, may move to set aside the sale on the ground of inadequacy of price.

MOTION to set aside a sale of lands, made under an execution, (156) heard at July Special Term, 1882, of GASTON Superior Court, before *Gudger, J.*

The execution issued under a judgment which the plaintiff of record recovered in the superior court against the defendant, (The King's Mountain Mining Company) for the sum of $2,711.72. In the judgment, after premising that the defendant was a corporation, and had given a mortgage upon all its property within the state, but that the plaintiff's debt existed prior thereto, it was declared by the court that the said debt should constitute the first lien upon said property, and unless discharged by a given day, that then the sheriff shall proceed to execute the same in the mode prescribed by law for sales under execution.

This judgment the plaintiff caused to be docketed, and after the expiration of the time fixed by the judgment, he procured execution to issue, which the sheriff levied on the lands known as the "King's Mountain Mining Company," comprising some 485 acres, including the gold mines and buildings and machinery belonging thereto; and on the 5th day of May, 1882, the same was sold, and R. W. Sandifer became the purchaser at the price of one hundred dollars.

At the ensuing term of the court, the plaintiff moved that said sale be set aside and a new sale ordered, accompanying his motion with the affidavits of his attorney and the sheriff, as to the gross inadequacy of the price bid, and also with an offer to increase the bid ten per cent. The purchaser, representing himself and the defendant company, resisted the motion, filing counter-affidavits, setting forth that the property was all subject to prior mortgages and older judgments, and that the sale had been fairly and openly conducted. (157)

The judge after hearing argument of counsel, "refused to pass upon the plaintiff's offer to increase the bid, or the question as to the inadequacy of the price, being of the opinion that as the sale had been made under a decree and execution in favor of the plaintiff, and therefore at his instance, the law would not entertain or hear a motion from him to set aside the sale, and that he had no standing in court." The motion was accordingly overruled and the plaintiff appealed.

Messrs. Burwell & Walker, for plaintiff.

Messrs. G. F. Bason and Hoke & Hoke, for defendant.

RUFFIN, J. If his Honor had entertained the plaintiff's motion, and in the exercise of a legal discretion refused it upon the ground that he did not under the circumstances of the case regard the inadequate price bid a sufficient reason for disturbing the sale, this court would in all probability have felt itself bound to concur in that decision. As a general thing, mere inadequacy of consideration, standing alone and disconnected with any circumstance of fraud or surprise, is not a sufficient cause for setting aside a sale under execution. Such is the rule now generally adopted in the courts, and, though it may sometimes work particular hardships, is found to be best on the whole, as well for the parties as purchasers and the public, as tending to give certainty and stability to sales under process issuing from the courts.

But still, in adequacy of price, if combined with any other circumstances calculated to throw suspicion upon the sale, or if in itself so gross as to be suggestive of mistake or undue advantage, may prevail with the court from which the process issued, to dispense with the sale and order a resale; and at all events, a party com-
(158) plaining of it has a right to have the facts ascertained, in order that the court may act understandingly in the matter.

Now, as we understand the ruling in the court below, his Honor declined out and out to consider the plaintiff's motion or to hear the evidence tendered in support of it, holding it to be a conclusion of the law, that under no circumstances can a plaintiff, at whose instance a judgment has been rendered and an execution issued, be heard to complain of the sale because of its inadequacy, however gross or glaring it may be.

We know of no authority going to support the distinction, which his Honor seems to make, between a plaintiff and any other party who may be interested in the matter. On the contrary, it is said in Freeman on Executions, Sec. 305, that "the plaintiff, the defendant, and the purchaser, may each be aggrieved by a sale under execution, and therefore each is entitled to prosecute a motion to set it aside;" and upon a reference to the adjudged cases upon the subject, we find that in a large number of them the motion to set aside came from the plaintiffs in the judgments, at whose instance the executions had issued. For this error the judgment must be reversed, though we confess we have reached this conclusion after considerable hesitation.

There seems to be no suggestion of fraud in the case, nor of any circumstance of surprise or undue advantage, and if permitted, therefore, to examine for ourselves the affidavits filed, we might be able to see that his Honor's ruling was in fact right, though supported by an incorrect reason. But this court, in such a case as this, cannot consider the evidence, but must act exclusively upon the facts as found

in the court below, and the error consists in finding no facts, either for its own guidance or the guidance of this court. The only legal proposition declared by his Honor is, as we have seen, unsupported by the authorities. There is error.

Error. Reversed.

Cited: McCanless v. Flincham, 98 N.C. 365; *Williams v. Dunn,* 158 N.C. 401; *Weir v. Weir,* 196 N.C. 269; *Scott Register Co. v. Holton,* 200 N.C. 480; *Davis v. Land Bank,* 217 N.C. 150.

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(159)

JOHN D. WILLIAMS v. JOHN MULLIS AND OTHERS.

Executions—Statute of Limitations.

An execution may be issued after the lapse of ten years from the date of docketing the judgment, where the judgment has been kept alive by the issuance of executions within each successive period of three years after its rendition; and a levy and sale of *personal* property under it are valid. (The ruling does not apply to sales of land under execution.)

MOTION by defendants to set aside an execution, heard at Spring Term, 1881, of UNION Superior Court, before *Eure, J.*

At Fall Term, 1869, of the superior court of Union County, the plaintiff recovered judgment against the defendants upon a debt contracted in March, 1861, and caused the same at once to be docketed. Executions issued regularly and in succession, without satisfaction, or the period of three years at any time intervening between them, and were delivered to the sheriff—on only one of which returnable to Fall Term, 1878, a small sum was received from the sale of land and applied to the debt; and at Fall Term, 1880, another execution issued, by virtue of which, on March 2nd, 1881, the sheriff seized certain personal property belonging to the defendants, and advertised the sale thereof on the 15th day of the same month.

On the day after the levy, the defendants served a notice on the plaintiff of an intended application to the clerk at his office, on the day preceding the proposed sale, to vacate and set aside the execution.

The motion was accordingly made on the ground that the judgment was barred by the statute of limitations, and could no longer be enforced. The motion was refused, and the defendants appealed to the judge of the superior court.

(160) The sheriff in the meantime, (while the defendants' appeal was pending) sold the property levied upon and held the proceeds of sale in his hands, without having made any appropriation of them, or any return of the execution.

When the motion was heard in the superior court, the judge was of opinion that the statute of limitations prevented the suing out of final process to enforce the judgment, reversed the ruling of the clerk, and ordered the execution to be set aside. From this judgment the plaintiff appealed.

No counsel for plaintiff.

Messrs. A. W. Haywood and Covington & Adams, for defendants.

ASHE, J. There are but two inquiries presented by the record:

1. Can a plaintiff sue out execution after the lapse of ten years from date of docketing his judgment, to enforce payment thereof, when the judgment has been kept alive by the issuing of continuous and unsuccessful executions for collection during this period of time?

2. Can the execution be set aside for this reason, and in this summary mode after the sale under it?

The first subject of these inquiries has given rise to such a diversity of opinion that we approached its consideration with some degree of diffidence, but we think the legislative provision and the "reason of the thing" lead to the conclusion that the statutory bar of ten years, the time prescribed by section 14 of the Code for bringing actions on judgments, does not prevent an execution from being issued, and the seizure and sale of personal property thereunder, after the expiration of the limited period, where the vitality of the judgment has been preserved by the issuance of executions within each successive period of three years after it rendition. C. C. P., Sec. 255.

(161) When there has been a failure to issue execution at any time within that period, the judgment becomes dormant, and no execution thereon can be issued but by leave of the clerk of the court. But the leave shall not be necessary when execution has been issued on the judgment within the three years next preceding the suing out execution, and returned unsatisfied in whole or in part. Sec. 256.

What then is the reason, when the life of the judgment has been thus preserved, an execution may not be issued after the limit of the statutory bar? If the effect of the statute is to extinguish the judgment, it certainly could not be issued; for it would be absurd to hold that an execution could have any force or validity, when the judgment upon which it is issued is extinct. But does the statute annihilate the judgment? There is a general concurrence of opinion that it does not, and that it acts merely upon the remedy and not the debt—as is

illustrated by the familiar case, where there is a new promise to pay a debt barred by the statute of limitations, the action is always brought on the old promise, and never on the new, except on promises made by a bankrupt, or an administrator to pay the debt of the intestate.

In the case of *Sturges v. Crowninshield,* 4 Wheat, 122, it was said by Chief Justice MARSHALL, "that statutes of limitation are not within the prohibitory laws of the constitution of the United States, because they act upon the remedy merely, and do not impair the obligation of the contract."

If then the statute applies only to the remedy, it cannot operate to extinguish the judgment after the expiration of the ten years, until an action or proceeding in nature of *scire facias* is brought to revive it, when the statutory bar may be set up by answer as a defence to the action; and this is the only mode prescribed in the Code of Civil Procedure by which a defendant can avail himself to such a defence. Section 17 provides that "civil actions must be com- (162) menced within the period prescribed in this title, (ten years) after the cause of action shall have accrued," except where in special cases a different limitation is prescribed by statute. *But the objection that the action was not commenced within the time limited, can only be taken by answer;* that is, by answer either to the action or the *scire facias,* to which latter process it is held in *McDonald v. Dickson,* 85 N. C., 248, the statute of limitations may be pleaded.

If the plaintiff in the judgment should permit three years, after obtaining his judgment, to elapse without issuing an execution, he of course would have to apply to the clerk of the court for leave to issue; and in that case, as was decided in *McDonald v. Dickson, supra,* the application for leave being in the nature of a *scire facias,* the defendant may oppose the motion by interposing the obstruction of the statute. But where he has issued his executions, regularly, within each consecutive period of three years after judgment, we can see no reason, under existing law, why he may not continue to do so, even after the ten years have expired, indefinitely, so long as he may continue to issue his execution within every three years. And the reason is, because so long as the plaintiff refrains from bringing an action on his judgment, which of course he will never do so long as he can avail himself of his remedy by execution, there is no means provided by which the defendant can set up the statute in his defence.

This opinion is not intended to apply to the sale of land under execution. We will consider that question when it is directly presented.

The execution in this case having been regularly issued, so as to prevent the dormancy of the judgment, our opinion is, the levy and

sale under it were valid; and the conclusion necessarily follows that there is error in the ruling of the superior court in setting aside the execution. And this disposes of the remaining inquiry presented by the record.

(163) The judgment must be reversed and the motion denied, and it is so adjudged.

Error. Reversed.

Cited: Berry v. Corpening, 90 N.C. 398; *Spicer v. Gambill,* 93 N.C. 380; *Lytle v. Lytle,* 94 N.C. 686; *McCaskill v. McKinnon,* 121 N.C. 195; *Heyer v. Rivenbark,* 128 N.C. 272; *Cone v. Hyatt,* 132 N.C. 812; *Smith Ex Parte,* 134 N.C. 502; *Pants Co. v. Mewborn,* 172 N.C. 334.

HENRY SHEPPARD AND OTHERS v. THEOPHILUS BLAND.

Executions—Purchaser—Notice—Order Taxing Costs.

1. This case is remanded for additional findings of fact.
2. An execution under which a stranger purchases, will not ordinarily be set aside upon the ground of irregularity, unless the purchaser has actual notice of such irregularity.
3. Every execution presupposes a judgment, and the right to issue the one implies the existence of the other; and an order taxing the costs of action against a party, in favor of the officers of the court, is in effect a judgment. Rev. Code, ch. 102, sec. 24.

MOTION to set aside an execution heard at Fall Term, 1881, of PITT Superior Court, before *Shipp, J.*

In 1867, Theophilus Bland instituted an action in the superior court of Pitt County against C. J. O'Hagan and others, which pended until Spring Term, 1870, when it was brought to trial and a verdict rendered in favor of the defendants, and thereupon it was adjudged that the defendants recover of the said plaintiff and his sureties on the prosecution bond the costs of the action. There was an appeal to the supreme court where the judgment of the superior court was affirmed, and at Fall Term, 1870, of this latter court the following judgment was signed by the presiding judge: "Judgment in pursance of the decision of the supreme court against the plaintiff for the costs of this suit."

At the same term there was spread upon the judgment docket (164) of said court what purported to be a judgment in favor of the "Clerk's office against Theophilus Bland," wherein was an

itemized statement of the amounts due the officers of the court from the said Bland, amounting to $21.35. Under this judgment executions were several times issued and returned without sale, until June 7th, 1880, when an execution issued and the sheriff returned thereon that he had sold the land of the said Bland thereunder to Harry Skinner, as the last and highest bidder.

On the 10th day of September, 1880, the defendants in said execution gave notice to the clerk of the superior court for Pitt County, and to Messrs. Latham & Skinner, attorneys at law, that he should move the court, at its ensuing term, to set aside and cancel the execution under which the land had been sold, and which purported to have been issued on the 7th June, 1880, "upon the ground, amongst others, that the pretended judgment was dormant and had never been docketed."

At Spring Term, 1881, Harry Skinner, as the purchaser of the land, is allowed to intervene and oppose the motion to set aside the execution, and at fall term of that year both parties filed affidavits and introduced much evidence before his Honor Judge Shipp, then holding the court, who after considering the same, found the following facts:

1. That at Fall Term, 1870, of the superior court of Pitt County, a judgment was rendered in favor of the officers of the court against Theophilus Bland for $21.35 which with the accruing costs to Spring Term, 1880, amounted to 24.50.

2. That said judgment was duly docketed at Fall Term, 1870.

3. That executions issued thereon from time to time which were returned unsatisfied.

4. That an execution issued from Spring Term, 1880, returnable to fall term of the same year, by virtue whereof the sheriff after due advertisement sold a tract of land belonging to Bland to (165) said Skinner as the last and highest bidder and made him a deed therefor.

5. That the said Bland had notice of the issuing of the several executions from time to time under said judgment.

Thereupon it was adjudged that the motion of the defendant Bland to set aside the execution be dismissed, and from this judgment the defendant appealed.

Mr. W. A. Moore, for plaintiffs.
Messrs. Strong & Smedes, for defendant.

RUFFIN, J. After much consideration bestowed upon this cause, rendered exceedingly difficult by reason of the cumbersome and illegible record which accompanies it, we feel ourselves constrained to remand

it to the end that additional facts may be ascertained and the conclusions of law declared thereon.

The jurisdiction of this court is purely an appellate one, to be exercised only after the court below has passed upon all the facts essential to a proper settlement of the contention between the parties, and found them to be one way or the other, and thereupon, separately, declared the conclusions of law. *Foushee v. Pattershall,* 67 N. C., 453. And, except as regards some interlocutory orders, such as granting injunctions, the appointment of receivers and the like, the facts as thus found are concluded, so far as we are concerned. *Clegg v. Soapstone Co.,* 66 N. C., 391; *Powell v. Weith, Ib.,* 423.

In the notice of his motion given by the defendant, Bland, to the officers of the court, the dormancy of the judgment is especially assigned as one of the causes why the execution in question should be recalled and cancelled, and we can see from the statement of the case, and the character of some of the evidence which accompanies it, that the point was in fact made before his Honor, and still,
(166) he wholly omits to make any finding in regard thereto, or to declare his opinion of the law upon it.

We are not at liberty to assume, from the fact that his Honor declined to grant the motion, that he found the fact to be that the judgment was not dormant, for as was said in *Foushee v. Pattershall,* that would be to supply by intendment just the facts necessary to support the judge's conclusions, and would of course render it impossible in any case to assail his judgment successfully.

It is said, however, that admitting the judgment to have been dormant, and that the execution had issued irregularly, it still ought not to have been set aside to the prejudice of Skinner who had acquired rights under it, and had been allowed to intervene for their protection. There lies the very difficulty in the case, and renders more apparent the necessity for additional findings. We are completely in the dark as to the grounds upon which his Honor's refusal to recall the execution proceeded—whether because the judgment was not in fact dormant, or whether because Skinner had acquired interests under it. Indeed as to this latter matter there is no finding at all, nor as to the extent to which he had knowledge of the irregularities connected with the issuing of the execution (if such there were) and while it is true, ordinarily, that a court will not set aside an execution under which a stranger has purchased, merely upon the score of its being irregular, still if the purchaser have actual notice of the irregularity, then he can no more shield himself under it than can the plaintiff at whose instance it issued.

The judgment below is reversed, and the cause remanded to the end that the court may find the facts more fully and state its conclusions of law thereon, and that the cause may be proceeded with according to law.

Before parting with the case, however, there is one point made by counsel for defendant which we deem it best to decide now, (167) as we may thereby remove an obstacle in the way of another trial. As we understand the counsel, he insists that what purports to be a judgment in behalf of the office against Bland, is in fact no judgment, such as could be docketed and thereby made to become a lien on the defendant's lands. We cannot take this view of it. The statute (Rev. Code, ch. 102, sec. 24,) provides that when suits are determined and the fees due to officers are not paid by the party for whom services have been rendered, the clerks of the courts shall issue executions therefor to the sheriffs, who shall levy them as in other cases, and that to said executions shall be annexed a bill of costs written, so as plainly to show each item of costs, etc. Now, every execution presupposes a judgment of some sort, and the right given to issue the one implies the existence of the other.

In *Clerk's Office v. Allen,* 52 N. C., 156, a similar objection seems to have been taken, and it was held that while strictly not such a judgment as would be rendered between parties in an adversary suit, it was still such an order as every court has a right to make to enforce the taxing and payments of costs due to officers and witnesses, and we can see no good reason why such a judgment more than any other, should be deprived of the security to be acquired by being docketed—and it fully answers all the purposes of the statute to enter upon the docket all the items of the costs, so as plainly to show on what account they are taxed.

Our conclusion therefore is the same as found by his Honor below, that there was a judgment rendered against the defendant and in favor of the officers of the court at Fall Term, 1870, and that the same was then docketed and became a lien upon all the lands of the defendant within the county. Let this opinion be certified.

Error. Reversed.

Cited: S. v. Wallin, 89 N.C. 580; *Morris v. Morris,* 92 N.C. 143; *Lytle v. Lytle,* 94 N.C. 685.

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HARRY SKINNER AND OTHERS v. THEOPHILUS BLAND.

Judge of Superior Court.

A judge of the Superior Court has no power to entertain a motion in a cause, which by appeal is in the Supreme Court.

MOTION to set aside a judgment, heard at Spring Term, 1882, of PITT Superior Court, before *Gilmer, J.*

This is another motion made in the cause of *Shepard v. Bland,* the preceding case, and to which reference is made for the better understanding of the facts of this case.

After the motion of the defendant, Bland, to set aside the execution, under which his land had been sold and purchased by Skinner, had been heard at Fall Term, 1881, of the superior court of Pitt County, and refused by the court, and after the said Bland had taken an appeal and caused the same to be docketed in this court, he served notice on Skinner and the officers of the court, that at Spring Term, 1882, he should move the court to set aside the order refusing his motion to vacate the execution, and to grant him a new trial.

Accordingly at Spring Term, 1882, he made such motion before *Judge Gilmer,* and supported the same by his affidavit setting forth that after the trial had at Fall Term, 1881, the same being before Judge Shipp, the plaintiffs had been allowed to introduce evidence which was considered by the court after the trial in the court house had closed, and while the judge had the cause under consideration, of which the defendant and his counsel had no notice, and while in fact he and one of his attorneys were absent and another one sick—thus taking him by surprise.

To this the plaintiffs replied by counter-affidavits, denying that any such evidence had been received after the trial was closed, al-
(169) leging on the contrary, that the evidence was all taken openly in the court house, and when the cause was regularly called for trial, and when, if the defendant or his attorneys were absent, it was their own fault.

His Honor Judge Gilmer refused to entertain the defendant's motion upon the ground that the cause by appeal was in the supreme court, and he had therefore no power to hear the motion or grant a new trial, and accordingly dismissed the defendant's motion, and he appealed.

No counsel for Plaintiffs.

Messrs. Strong & Smedes, for defendant.

RUFFIN, J. His Honor's ruling is in itself manifestly correct, and is fully supported by the authority of *Isler v. Brown*, 69 N. C., 125, and for the very reasons assigned by him. There is no error.

No error. Affirmed.

Cited: Hannon v. Comrs., 89 N.C. 125; *Green v. Griffin*, 95 N.C. 52.

DAVID S. CRAWFORD v. G. L. D. McLELLAN.

Pleading—Statute of Presumptions and Limitations.

1. The complaint alleged that a certain sum, with interest from June, 1860, was due the plaintiff on a bond; the answer alleged that the complaint was untrue, for that, more than ten years had elapsed before suit brought; and the only proof offered was the bond sued on, the execution of which was admitted; *Held*, that the answer set up a valid defence in a legal way, and defendant was entitled to have the jury instructed that a presumption of payment had arisen.
2. The statute of limitations has no application to bonds due before the adoption of the Code of Civil Procedure.

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

The plaintiff commenced this action on the 11th of October, (170) 1881, to recover the sum of $98.37 alleged to be due him from the defendant upon a bond given on the 20th of June, 1860, and payable one day after date. After averring the execution and delivery to himself of the bond, he alleges in the second article of the complaint, "that the said sum of $981.37, with interest from June 21st, 1860, is now due to the plaintiff on said bond," and demands judgment for the same.

The answer admits the execution of the bond but alleges:

1. That the second article of the complaint is untrue, in this, that more than ten years have elapsed before the commencement of this action.

2. That the action is barred by the statute of limitations.

3. That the statute of limitations is pleaded in bar of the plaintiff's recovery.

On the trial the only proof offered was the bond sued on, which was read to the jury; and thereupon the defendant's counsel requested the judge to instruct the jury that a presumption of payment had arisen, and they should therefore find in favor of the defendant. This

instruction was refused. Verdict for plaintiff, judgment, appeal of defendant.

Messrs. Merrimon and Fuller, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

RUFFIN, J. The second and third defences set up in this action are of course wide of the mark, since, as to bonds due before the adoption of the Code, the statute of limitations has no application, but only the statute of presumptions of 1826.

We cannot, however, concur with his Honor in thinking the allegations of the second article to be insufficient to raise an issue proper to be submitted to the jury.

(171) Under the Code, it is the facts of the case, whether relating to the plaintiff's cause of action or to the defence, and not conclusions of law, that must appear in the pleadings; and the only requirement is, that they shall be properly arranged and stated with such precision as if proved will enable the court to proceed to judgment thereon.

The law itself declares that a presumption of payment or satisfaction on all contracts, shall arise within ten years after the right of action thereon shall have accrued; and since it can never be necessary to allege more than it is necessary to prove, nothing beyond an averment of the lapse of that period of time, can be needed to state a valid legal defence thereto, for if true, then the consequence follows as a legal intendment.

It is true, the defendant might have had the benefit of the same statutory presumption under the allegation that the plaintiff's demand has been paid, but really, it would seem, that such a mode of pleading is less in keeping with the spirit of the Code, than the one adopted in the answer, and less calculated to give that notice of the real defence relied on, which it should be the object of every well devised system of pleading to secure.

We think, therefore, that the defendant's answer set forth a valid defence in a legal way, and as the proofs correspond with the allegations contained therein, he was entitled to the instructions asked for at the hands of the court; and because of the failure to give them, he is entitled to a *venire de novo.*

Error. *Venire de novo.*

Cited: Pipes v. Lumber Co., 132 N.C. 613.

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A. & M. HAHN v. GUILFORD & LATHAM.

Appeal—Landlord and Tenant—Equitable Title—Estoppel.

1. An appeal must be taken to the *next* term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee that he may show cause against it.
2. In a proceeding under the landlord and tenant act, the question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of *tenancy*, and if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy.
3. The equitable title which serves to defeat the estoppel, is only that which arises out of some peculiar relation between the parties, as would make it inequitable on the part of the landlord to oust the tenant.

SUMMARY PROCEEDING in ejectment heard at Spring Term, 1881, of BEAUFORT Superior Court, before *McKoy, J.*

Mr. W. B. Rodman, for plaintiffs.
Mr. George H. Brown, for defendants.

RUFFIN, J. In our opinion two errors were committed in the trial of this cause in the court below, for either one of which the plaintiff is entitled to have the judgment reversed.

1. The proceeding was a summary one, before a justice of the peace, under the "Landlord and Tenant Act" to recover the possession of the premises claimed by the plaintiff.

The trial before the justice took place on the 19th day of February, 1881, resulting in a judgment for the plaintiff from which the defendant gave notice of appeal, but failing to give the bond for the suspension of the execution, the justice failed to send up the transcript of appeal, and the cause was not docketed in the supe- (173) rior court at either Spring or Fall term, 1881, On the 18th day of March, 1882, the justice forwarded the transcript, and at spring term of that year the cause first appeared upon the docket of the superior court, without however the plaintiff's knowledge. On the first call of the docket at that term, the cause was marked "continued," but afterwards that entry was stricken out, and it was set for trial on a day certain in the second week in the term, at which time it was taken up, in the absence of the plaintiff and without notice to him, and judgment was rendered dismissing the action.

An appeal, as has been said, means an appeal to the *next term* of the appellate court. Instead, therefore, of allowing two terms of the

superior court to pass, without moving in the matter, it was the duty of the defendant upon discovering the failure of the justice to transmit his appeal, to have moved promptly at the first term, for a writ of *recordari* directing him to do so.

In *Brown v. Williams*, 84 N. C., 116 this court declined to allow a writ of *certiorari* to issue, upon the ground that it had not been asked for the term next after the rendition of the judgment complained of, notwithstanding the party seeking it seemed to have merits in his appeal, and had otherwise been diligent.

It may well therefore be questioned whether the defendant has not by his laches forfeited his appeal altogether, and the right to have the cause constituted one in court. But whether so or not, it is certain the plaintiff was entitled to have that question passed upon, and have notice given him before the cause was docketed, in order that he might, if so advised, have opposed its being done.

The question is not as to the continuance of the cause, nor as to whether his Honor erred in proceeding with the trial in the absence of the plaintiff, for as to these matters his decision would have (174) been final. But the error consists in proceeding to judgment in a cause, thus apparently out of court, without giving to the plaintiff a day to show cause against it.

2. In his complaint the plaintiff alleged that the defendants entered upon the land as his tenants, but that their term had expired, as well by the non-payment of the agreed rent as by lapse of time. In his return, the justice says the answer had been lost, but he certifies that in it, besides denying the tenancy and the allegation that rent was due from them, the defendants "set up an equitable title to the land in themselves"—omitting, however, to give the particulars of their alleged equity. In the superior court, his Honor, looking only to the pleadings and the return of the justice, and without hearing any evidence upon the issue as to the tenancy, or as to the nature of the *equitable title* claimed by the defendants, held, that the title to the land was involved in the action, and thereupon dismissed it, as not being within the jurisdiction of the justice.

In *Foster v. Penry*, 77 N. C., 160, upon the idea that it would be unreasonable to allow a defendant *merely by his answer* to determine the jurisdiction of the court, and that it must be the necessary function of every court to pass in the first instance upon its own jurisdiction, whether dependent upon a matter of fact or otherwise, it was held that where in a proceeding under the landlord and tenant act the defendant in his answer denies the tenancy, it is the duty of the justice, not to dismiss the action, *but to try the issue of tenancy;* for if that should be found for the plaintiff, then because of the estoppel operating

upon the defendant, it was impossible that the title to the land could be drawn in controversy. And in case of an appeal, it is the duty of the judge in the superior court to try the case and render the judgment just as the justice should have done; and the decision in *Parker v. Allen*, 84 N. C., 466, is to the same effect. (175)

Again, in *Turner v. Lowe*, 66 N. C., 413, and in *Parker v. Allen, supra*, it is said that notwithstanding the rule that a tenant cannot dispute his landlord's title, it is open now, as it always has been, to the defendant to set up, by way of defence, an equitable title in himself, which grew out of relations subsisting between the plaintiff and himself, such as should make it inequitable in the plaintiff to use the legal estate to oust him of the possession—and as illustrations, the relations subsisting between vendor and vendee, and mortgagor and mortgagee are cited.

It is not, therefore, *every equitable title* that will serve to defeat the estoppel, but only such as arise out of relations of the character indicated, that is to say, such as a court of equity, under our former system, would protect even after judgment in a court of law. If a perfect legal title purchased from a stranger could not prevail over the estoppel, surely it cannot be supposed that an equitable title so acquired could do so.

Before dismissing the action, therefore, because of the "equitable title" set up by the defendants, his Honor should have heard the evidence as to the issue of tenancy, which if found for the defendants of course put an end to the action; but if for the plaintiff, then, he should have enquired into the nature of the alleged equitable estate and the circumstances under which it originated. If of the character indicated, and he should ascertain that there was a *bona fide* controversy between the parties with regard to it, then he should have dismissed the action; but if otherwise, he should have proceeded with the trial as to any other issues that might be involved, since in that state of the case the estoppel would operate and prevent the title's being called into question.

In short, after the expiration of the term, either by a breach of covenant or lapse of time, the landlord, if in fact he be such, (176) is entitled to the possession of the leased premises, unless by his dealings with his tenant he established such relations between them, as renders it contrary to equity and good conscience that he should deprive him of the possession—and this, it being a preliminary matter, the court, whether it be the justice or the judge, must determine, without the intervention of a jury.

In both the particulars specified his Honor erred and the plaintiff is entitled to a new trial.

Error. *Venire de novo.*

Cited: Boing v. R.R., 88 N.C. 63; *Dunn v. Bagby,* 88 N.C. 93; *Sparks v. Sparks,* 92 N.C. 361; *Paine v. Cureton,* 114 N.C. 608; *Alexander v. Gibbon,* 118 N.C. 805; *Brown v. Plott,* 129 N.C. 274; *Hudson v. Hodge,* 139 N.C. 308; *Isler v. Hart,* 161 N.C. 500; *Jerome v. Setzer,* 175 N.C. 393; *Hargrove v. Cox,* 180 N.C. 363; *Pickens v. Whitton,* 182 N.C. 780; *Summerell v. Sales Corp.,* 218 N.C. 453; *Electric Co. v. Motor Lines,* 229 N.C. 89, 91.

J. C. WITHROW v. A. V. BIGGERSTAFF.

Ejectment—Evidence of Fraud.

In ejectment, where both parties claim under A, the defendant alleged that the deed to plaintiff (prior to the one to him) was fraudulent as to subsequent purchasers, and introduced testimony bearing upon question of fraud, and then offered a deed in evidence from said A to his wife, conveying the same land; *Held,* that the latter deed was irrelevant and therefore incompetent evidence. That A made a fraudulent deed to his wife is no proof that his deed to the plaintiff is fraudulent.

EJECTMENT tried at Spring Term, 1882, of RUTHERFORD Superior Court, before *Gudger, J.*

Both parties claim title under Jason H. Withrow.

The plaintiff offered in evidence a deed from said Jason to himself dated June 15, 1882, for one half interest in the land in dispute, which was admitted to probate on the 24th of September, 1877.

(177) For the purpose of estopping the defendant, and for no other purpose, the plaintiff offered in evidence a deed from said Jason and wife to the defendant, dated December 7, 1872, for the same land, which was admitted to probate on the day of its date, and registered on 5th of August, 1879.

The defendant alleged that the plaintiff's deed was fraudulent as to subsequent purchasers for value and without notice.

It was in proof that plaintiff went to Texas in a few days after Jason H. Withrow made the deed to him, and remained absent several years.

There was much evidence on the question of fraud. Defendant testified that he bought the land from said Jason for $900 and paid

the same; that it was a fair price, and he had no notice whatever of plaintiff's deed or of his claim of title to the land, until suit brought, and that said Jason remained in possession until he sold to him, and then delivered possession to him.

And after offering other evidence to show that Jason remained in possession after his conveyance to plaintiff, as relevant to and bearing upon the question of fraud, the defendant proposed to offer in evidence a deed from Jason to his wife, Louisa Withrow, for the same land, dated August 10, 1871, and probated and registered on the following day. The objection of plaintiff was overruled and the deed admitted, and plaintiff excepted.

Verdict for defendant, judgment, appeal by plaintiff.

Messrs. Hoke & Hoke, for plaintiff.
Mr. W. S. Mason, for defendant.

ASHE, J. The only exception taken by the plaintiff on the trial was to the admission in evidence of the deed from Jason H. Withrow to his wife, and that presents the only question for our determination.

Our opinion is the deed was improperly admitted. It was ir- (178) relevant testimony and should have been excluded upon the principal of *res inter alios actæ*. His Honor was probably controlled in his ruling by the decision in *Brink v. Black*, 77 N. C., 59, but that case cannot be relied upon as authority for the ruling in this case. That decision was an exception to the rule of *res inter alios actæ* and was predicated upon the fact that the transactions were of the *same character* and between the *same parties*. There, one Van Amringe being indebted to the plaintiff and others gave to the plaintiff a mortgage on the brick-kiln in 1872, and was permitted to remain in possession of the kiln, sell the brick, and render no account of the sales; and then in 1873, when he made to the same person another mortgage on another kiln to secure a larger amount of indebtedness than he owed in 1872, this last mortgage was alleged to be fraudulent. The first mortgage was admitted in evidence, the court holding that the fact that Van Amringe was permitted to remain in possession of the property conveyed under the mortgage of 1872, being of the same character, and dealing with it and treating it as his own, was not only some evidence, but very strong evidence of an intention that the kiln of 1873 was to go in the same way as the kiln of 1872, for the enjoyment of Van Amringe in spite of his creditors.

In *Holmesly v. Hogue*, 47 N. C., 391, it was held that it was not competent for a creditor to establish the fraud in question, by showing that the debtor had made a fraudulent transfer of other prop-

erty to another person—Chief Justice NASH saying, "that A has made an usurious contract with B, is no proof that his contract with C is usurious. Such evidence is irrelevant and mischievous, having a direct tendency to mislead the jury." Taylor on Ev., 366, 368.

Error. *Venire de novo.*

Cited: Loftin v. Hill, 131 N.C. 110.

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(179)

H. C. WHITEHURST v. ISRAEL PETTIPHER AND OTHERS.

Ejectment—Location of Boundary—Evidence.

The declarations of a disinterested person, since deceased, made before a controversy has arisen in reference to private boundaries, are admissible in evidence; and this rule is not varied by reason of the fact that the party making the declarations was at the time a slave, since if alive he would now be competent to testify.

EJECTMENT tried at Spring Term, 1881, of PAMLICO Superior Court, before *Gilmer, J.*

Appeal by defendants.

No counsel for plaintiff.

Messrs. L. J. Moore and Merrimon & Fuller for defendants.

SMITH, C. J. The defendant claiming title to the land, for the recovery of which the action is instituted, under a deed executed to him in the year 1841, proposed upon his own examination as a witness for himself to show the position of the beginning corner, under its calls, by the declarations of one Gaskins, then a slave, whose master was in possession of an adjoining tract, as owner, and his pointing out its location. Both master and slave were dead at the time of the trial. The testimony on objection of the plaintiff were refused, and this ruling presents the only question on the appeal.

The rule is well settled by a series of decisions, commencing as far back as the case of *Harris v. Powell*, 3 N. C., 349, determined in the year 1805, that in questions relating to private boundaries, the declarations of disinterested persons since deceased made before any controversy has arisen, are admissible to show their location. *Gervin v. Meredith*, 4 N. C., 439 (Battle's edition); *Hartzog v. Hubbard*,

19 N. C., 241; *Dobson v. Finley*, 53 N. C., 495; *Caldwell v.*

(180) *Neely*, 81 N. C., 114.

This admitted departure from the general rule which excludes hearsay as evidence of the fact declared, is a necessity growing out of the difficulty of obtaining other and positive proof of the location of boundary marks, and will be heard only when the testimony proceeding from the mouth of a living witness would be competent. The declaration is received under the conditions mentioned as evidence, instead of the sworn statement for which it is substituted, when the party making it is dead and the evidence would otherwise be lost. It is manifest that if the declarant were alive, and would be allowed to prove the fact to which the declaration relates, the declaration itself may be proved after his death. If then the deceased, were he alive, would be competent to testify to what came to his knowledge when a slave, and this does not admit of doubt, the fruits of that knowledge then acquired and uttered in the hearing of another may be shown by the latter. Nor does it make any difference that the evidence rendered competent by changes in the law, has reference to transactions occuring previously to such changes, and a retroäctive effect is ascribed to them. *Tabor v. Ward*, 83 N. C., 291.

The record does not disclose the grounds upon which the evidence was rejected, but we assume from the case stated that it was free from any objection which could be made, if the declaration had come from a person at the time competent to testify under the law then in force, and that it is aimed at the legal incapacity incident to the status of a slave when the declaration was made. We do not concur in this view, and in our opinion the true test is, whether the witness still living would be allowed to testify to the locality of the corner designated in the deed, and if so, his substituted declarations are receivable after his death. The principle and the distinction between reputation and hearsay evidence, as bearing on questions of private boundary, are clearly enunciated by the late Chief (181) Justice in *Dobson v. Finley, supra*, and in speaking of the latter, he says: "It is necessary, as a preliminary to its admission, to prove that the person whose statement it is proposed to offer in evidence, is dead, not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive, he should be produced as a witness."

If the witness cannot testify, neither can what he said be shown after his decease, for this would be to exclude sworn and admit unsworn statements from the same party to establish an existing fact. With the value of the rejected evidence, we have nothing to do. If it was competent, it was error to exclude it from the jury who alone must give it the weight to which they think it entitled, under the attending circumstances.

It must be declared there is error, and the judgment reversed, the verdict set aside, and a *venire de novo* awarded.

Let this be certified.

Error. *Venire de novo.*

Cited: Kesler v. Mauney, 89 N.C. 371; *Dugger v. McKesson,* 100 N.C. 6; *Yow v. Hamilton,* 136 N.C. 359; *Timber Co. v. Harbrough,* 179 N.C. 339.

GEORGE W. McKEE v. E. N. LINEBERGER.

Ejectment, Evidence in—Witness Under Section 343.

1. In ejectment, as in other cases, the order in which evidence is introduced is discretionary with the presiding judge.
2. In such case, where the purchaser at sheriff's sale is the plaintiff in the execution, he must show both judgment and execution; if not, he need only show an execution, levy and sale. The plaintiff here bought under an execution to which he was a stranger, and hence the estoppel insisted on does not apply.
3. The recital in a sheriff's deed is *prima facie* evidence of the facts set forth.
4. The cases of *Morgan v. Bunting* and *Lockhart v. Bell,* 86 N. C., 66 and 443, in reference to competency of witness under section 343 of the Code, approved.

(182) EJECTMENT tried at July Special Term, 1882, of GASTON Superior Court, before *Gudger, J.*

The plaintiff offered in evidence a deed from R. D. Rhyne, sheriff of Gaston County, to himself, dated 9th September, 1876, reciting judgments of G. W. McKee against Jacob Lineberger, and James M. Wright against Jacob Lineberger for the land in controversy.

The defendant objected to the introduction of this deed, because no record of any suit or action was shown as a foundation for issuing the execution, but the defendant stated he would show judgment, execution, etc., and the deed was allowed to be read in evidence to the jury. The defendant excepted.

In the progress of the trial the plaintiff produced the judgment docket of Gaston County, in which was recorded the docketing of a judgment of Wright against Lineberger, and also a certified copy of a judgment of the supreme court, of G. W. McKee against Jacob Lineberger, but showed nothing more as to any suit constituted in court on which said judgments were or could be rendered, and proposed to read the same in evidence to the jury. To this the defendant objected.

The objection was overruled and the evidence was admitted. The defendant excepted.

The record of the judgment docket above mentioned of Wright against Lineberger, was dated as having been docketed August 28th, 1873, for $254.66 in favor of Wright, and the copy of the judgment of the supreme court was certified as having been rendered at June Term, 1873.

The plaintiff then offered in evidence an execution issuing (183) from the supreme court on the 1st of July, 1876, in favor of G. W. McKee against Jacob Lineberger for $2,625, endorsed, "Levy made 3rd August, 1876;" also an execution in favor of James M. Wright against Jacob Lineberger, issued by the clerk of the superior court of Gaston County to the sheriff, on which was endorsed "Received July 3rd, 1876. Levy made August 3rd, 1876."

The plaintiff then testified that Sheriff Rhyne had the two executions in his hands at the time he purchased the land. This was objected to by the defendant on the ground that Rhyne was dead, (which was admitted) and that the plaintiff was an incompetent witness under section 343 of the Code. The objection was overruled and the defendant excepted.

The witness further testified that he purchased the land for $25.00 at the sale by Sheriff Rhyne, and paid him the money; that the defendant forbade the sale at the time he, the plaintiff, purchased the land, and he knew that the defendant had purchased the same land at a previous sale by the sheriff under an execution in his, plaintiff's, favor against Jacob Lineberger, which execution was issued at his instance.

The defendant offered in evidence a transcript from Lincoln superior court showing a judgment for $2,650.00 in favor of plaintiff, and execution issued November 20th, 1875, levied January 13th, 1876, and a sale to him, defendant, 3rd of April, 1876; also judgment docket of Gaston County, showing a judgment in favor of G. W. McKee against Jacob Lineberger, docketed November 8th, 1873, which was agreed to be for the costs in the action in which the foregoing judgment in favor of McKee against Lineberger was rendered; also a sheriff's deed for the land made by Rhyne to the defendant, dated 3rd day of April, 1876, in pursuance of the sale made by him under the execution issued on the judgment of McKee against Line- (184) berger.

The clerk of the superior court of Lincoln testified in behalf of the plaintiff, that after the money was paid into his office by Sheriff Rhyne, the plaintiff came and demanded the money which was refused, upon the ground that it was to be applied to the costs of the action,

and the plaintiff then drew a part of the money as assignee of some of the witness tickets. He further testified that the execution was issued in consequence of a letter addressed to him by the plaintiff.

Against the objection of the defendant, the court permitted the plaintiff to read a recital in the deed of the sheriff to the plaintiff, as some evidence of a levy and sale by him under the judgment in favor of Wright against Lineberger.

The defendant requested of the court the following instructions to the jury: If the plaintiff had the land sold on his judgment and received the purchase money or a part thereof and afterwards buys under another execution of older docketing, together with an execution in his own favor, the first purchaser as between them gets the title. This the court declined, and charged the jury, that if they should find from the evidence that there was a sale on the judgment of Wright against Lineberger, the plaintiff would be entitled to recover, for he was not estopped—the Wright judgment having been docketed prior to that of McKee against Lineberger; but if the land was sold on the judgment of McKee against Lineberger alone, the plaintiff could not recover.

There was a verdict for the plaintiff, judgment, appeal by defendant.

Messrs. G. F. Bason and Hoke & Hoke for plaintiff.
Messrs. Bynum & Grier, for defendant.

(185) ASHE, J. This appeal comes up upon exceptions taken by the defendant to the admission of evidence, and the refusal of the judge to give the instructions asked for.

The first exception was to the admission of a sheriff's deed in evidence, before there had been any evidence introduced to show any suit or action, as a foundation for issuing the execution.

There is no force in this exception. The plaintiff, as he stated to the court he would do afterwards in the progress of the trial, offered in evidence the record of the judgment and execution under which the sale was had, in pursuance of which the deed was executed to him by the sheriff. If the plaintiff had failed to produce the record of the judgment, or at least the execution, the error might have been readily cured by the court's withdrawing the evidence of the deed from the consideration of the jury; but the evidence was supplied, and it is a matter entirely within the discretion of the court as to the order in which evidence should be adduced before a jury.

The second exception was to the admission in evidence of the transcript of the docketed judgment of Wright against Lineberger, and the certified copy of the judgment in the supreme court of McKee

against Lineberger, upon the ground that there was no evidence to show any suit constituted in either court on which said judgments were or could be rendered.

Where the purchaser at a sheriff's sale is the plaintiff in the execution, in an action by him to recover the land purchased, it is encumbent on him to show both a judgment and execution; but if he is not the plaintiff in the execution, he need only show the execution. *Rutherford v. Raburn,* 32 N. C., 144. In this case, if the plaintiff acquired any title under the sheriff's sale, it must have been under the Wright judgment, for the counsel for the defendant were understood to admit that the plaintiff could not acquire any title under the execution from the supreme court; therefore he could only become (186) a purschaser under the Wright judgment and execution, to which he was a stranger, and in that case he would only be required to show an execution issuing from a court of competent jurisdiction, a levy, or as the case might require, a docketed judgment, and a sale.

The next exception to the evidence was to the admission of the testimony of the plaintiff to the fact that the executions of Wright and McKee were both in the hands of the sheriff at the time of the sale, because Rhyne was dead and the witness was incompetent under C. C. P., Sec. 343.

The objection was properly overruled. The knowledge of the fact that the executions were in the hands of the sheriff, was not necessarily obtained by a communication or transaction with him. The witness may have seen them in his possession, or he may have acquired the information by hearing the sheriff state the fact to some one else. But putting it in the strongest point of view for the defendant by conceding that the knowledge of the fact was obtained from a communication with the sheriff, there is no representative of his a party to this suit, and even conceding that the sheriff was the agent of the defendant in the sale of the land, it would not be incompetent for the witness to speak of a conversation with him. *Morgan v. Bunting,* 86 N. C., 66; *Lockhart v. Bell,* 86 N. C., 443.

The last exception to the evidence was to the reception of the recital in the deed of the sheriff of the executions of Wright and McKee, as evidence of the levy and sale. There can be no question about the admissibility of this evidence. It was expressly and *unqualifiedly* held in the case of *Hardin v. Cheek,* 48 N. C., 135, that the recital in a sheriff's deed is *prima facie* evidence of the facts set forth, it being the act of a public officer in discharging his official duties, reciting how and by what authority he had made the conveyance, nevertheless open to proof that the fact did not exist. (187)

The remaining exception to be considered was to the refusal of the judge to charge the jury that "if the plaintiff had the land sold on his judgment and received the purchase money or a part thereof, and afterwards buys under another execution of older docketing together with an execution in his own favor, the first purchaser would get the title." This exception was based upon the idea that the defendant would acquire under the circumstances mentioned the better title, by reason of an *estopped in pais* upon the plaintiff. But we do not think the doctrine of estoppel has any application. For the reason above assigned, the execution from the supreme court should be considered as out of the question. The purchase then made by the plaintiff at the sheriff's sale was under the execution upon the Wright judgment, to which the plaintiff was a stranger and had the same right to buy under it as any other person.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

Cited: Miller v. Miller, 89 N.C. 405; *Farrior v. Houston,* 100 N.C. 374; *Shaffer v. Bledsoe,* 118 N.C. 281; *Wainwright v. Bobbitt,* 127 N.C. 278; *Person v. Roberts,* 158 N.C. 171; *Riley v. Carter,* 165 N.C. 338.

T. J. BOST AND OTHERS v. DANIEL SETZER AND OTHERS.

Ejectment—Notice of Possession.

1. Plaintiff abandoned the possession of a tract of land four or five years before the purchase by defendant; *Held,* that there was not such a possession of the plaintiff as to give notice or put the defendant upon inquiry.
2. Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor.

(188) EJECTMENT tried at Fall Term, 1882, of CATAWBA Superior Court, before *Avery, J.*

The following issues were submitted to the jury:

1. Did Jonathan Bost sign, seal and deliver the paper writing offered in evidence, and under which the plaintiffs claim?

2. Did the defendant, Daniel Setzer, have notice of the execution of said deed, and the claims of the heirs of Miles W. A. Bost, when the said Jonathan Bost conveyed the land in controversy to said Daniel Setzer?

3. Did Daniel Setzer pay a fair price for the land in controversy?

4. What is the annual rental value of the land in controversy?

The plaintiffs in support of their title introduced a deed from their grand-father, Jonathan Bost, for the land in controversy, for the consideration of love and affection, bearing date the 12th of June, 1858, and then offered evidence tending to establish the following facts:

That the deed to the plaintiffs, who at the time of its execution were infants and the children of Miles W. A. Bost, a son of the donor, was delivered in 1858 by the donor to their mother for the benefit of the plaintiffs. Miles Bost, the father of the plaintiffs, had moved upon the land before the execution of the deed to his children—and he and his family continued to occupy it until 1863, when his wife with the children abandoned the possession, in consequence of the absence of Miles in the army. Whilst Miles was in possession, he cleared and cultivated about an acre of the land, erected a house thereon, and planted an orchard; and the defendant, Daniel Setzer, lived about a mile from the land, and during the time of its occupancy by the parents of the plaintiffs, interchanged frequent visits with them. About the beginning of the war, while Miles and his family were living on the land, Jonathan Bost called for the deed which he had given the plaintiffs, saying he wished to make some alterations in it be- (189) cause the children might otherwise turn out their father; the deed was surrendered to him and never returned. Miles Bost had claimed the land as his own, and paid the taxes one year, while he occupied it, and the taxes were paid by Jonathan Bost the other years. The annual rental was worth twenty-five dollars per annum, and five hundred dollars was a fair price for the land.

The defendants offered in evidence a deed from Jonathan Bost to the defendant, Daniel Setzer, for the consideration of five hundred dollars, dated March 8th, 1867, which embraced in its boundaries the land covered by the deed to the plaintiffs, and some other land in addition; and Daniel testified that he paid at the rate of seven dollars and fifty cents per acre for the land in dispute, and five hundred dollars for the whole, which was a fair price; that he had been in possession since 1867, had cleared and cultivated since then a portion of the land, and had never heard of the deed to the plaintiffs, nor had he heard that plaintiffs claimed the land until about the time this action was brought.

The plaintiffs' counsel asked the court to instruct the jury, "that if the possession of Miles and his wife was taken or held under said deed to the plaintiffs, the possession constituted notice in law of the claim of plaintiffs, and not simply evidence of notice."

The court declined giving this instruction and charged the jury, "that unless the said Miles and his wife had possession, claiming the land in 1867, when the defendants bought, the possession at a time anterior to his purchase, would not constitute constructive notice of the claim of the plaintiffs, and rebutted the question of notice upon an issue framed to the jury."

The plaintiffs excepted, and the jury in their responses to the issues submitted, found, that the deed to the plaintiffs from Jonathan Bost was duly executed and delivered; that Daniel Setzer, at the (190) time of the execution of the deed of Jonathan Bost to him, had no notice of the deed of the said Bost to the Plaintiffs, nor of any claim of theirs to the land; that seven dollars and fifty cents was a fair price for the land, and that the annual rental was worth twenty-five dollars.

There was a motion for a new trial by the plaintiffs which was denied, and judgment was given for the defendants.

No counsel for plaintiffs.

Mr. M. L. McCorkle, for defendants.

ASHE, J. The only question which the record presents for the consideration of this court is—was Daniel Setzer, the defendant, by the deed he received from Jonathan Bost in 1867, a purchaser of the land in controversy for a fair price and without notice of the deed or claim of the plaintiffs?

It was in evidence that the defendant paid for the land in controversy seven dollars and fifty cents per acre, and the jury found that that was a fair price; and the only inquiry then is—was the purchase without notice.

The notice, to affect the title of a subsequent purchaser under the statute of 27 Elizabeth, is either actual or constructive. Actual notice is where a knowledge of the fact is brought directly home to the party; and constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not ever allow of its being controverted. 1 Story Eq. Juris., 399; 2 Sugden on Vendees, 320.

A case in which the violent presumption of notice, or what is by some authors called legal notice, arises, is where one purchases land which he knows to be in the occupation of another than the vendor; and the reason given is, because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possessor. *Lessee of*

Bellinger v. Welsh, 5 Binn., 53; Adams' Eq., 158; *Webber v.* (191) *Taylor,* 55 N. C., 9.

If for instance a person should purchase an estate from the owner, knowing it to be in the possession of a tenant, he is bound to inquire into the estate which the tenant had, and has an implied notice of the nature of his title. 1 Story Eq. Juris., Sec. 400.

But to constitute constructive notice, the possession must be open, notorious, and exclusive, and existing at the time of the purchase. *Edwards v. Thompson,* 71 N. C., 177, and the cases above cited.

In the case before us the possession had been abandoned by the plaintiffs and their parents, four or five years before the purchase by the defendant, and was not such a possession as to give notice or put the defendant upon the inquiry. There was then no error in the refusal of his Honor to give the jury the instructions asked; and those given by him, being sustained by the authorities cited, and the jury under them, having found that the defendant's purchase was without notice and for a fair price, our conclusion is, there was no error, and the judgment of the superior court must be affirmed.

No error. Affirmed.

Cited: Staton v. White, 95 N.C. 18; *Patterson v. Mills,* 121 N.C. 268; *Smith v. Fuller,* 152 N.C. 12; *Grimes v. Andrews,* 170 N.C. 524; *Perkins v. Langdon,* 237 N.C. 165, 166.

JOHN J. ROBERTSON, ADM'R, v. W. A. DUNN, ADM'R.

Negotiable Instruments—Statute of Limitations—Demand—Trust—Agency.

1. The presumption of fact that the holder of unendorsed paper is the owner, is only evidence against the maker in an action on the note, but cannot avail the holder in an action brought against him by the legal owner.
2. Where the holder has converted the note by suit and judgment, the legal owner can maintain trover, or waive the tort and suit in *assumpsit,* (if the money has been received) within three years from the conversion or receipt of the money.
3. The rule in reference to demand, in cases arising upon express and implied trust or agency, when necessary to terminate the same and put the statute of limitations in operation, stated by ASHE, J., and distinction drawn.

CIVIL ACTION tried at Spring Term, 1882, of HALIFAX Supe- (192) rior Court, before *Bennett, J.*

The following facts were agreed upon:

1. On the 10th day of December, 1862, one David C. Camp, covenanted under his hand and seal to pay Ann Camp, the intestate of the plaintiff, the sum of seven hundred and ninety-five dollars with interest from date in manner and form as follows:

"With interest from date I promise to pay Mrs. Ann Camp, or order, the sum of seven hundred and ninety-five dollars for value received, this December 10th, 1862." (Signed and sealed by D. C. Camp.) And the same is credited with fifty dollars, Oct. 12th 1863.

2. That J. O. Camp, the intestate of the defendant, brought suit on said note in his own name on the 6th day of April, 1874, said note being in his possession and produced by him at the trial, and recovered judgment thereon at special term of the court held on the 7th day of December, 1874, against the administrator of D. C. Camp, and received from him $1059.75 on the 14th day of January, 1875, and the residue, $280.46, on the 5th day of March, 1877.

3. The said note was never indorsed to the said J. O. Camp.

4. That J. O. Camp, the intestate of the defendant, died in June, 1879, and the defendant qualified as his administrator on the 6th of August of said year.

(183) 5. That Ann Camp, the intestate of the plaintiff, died on the 12th day of September, 1879, and the plaintiff qualified as her administrator on the 1st day of May, 1880.

6. That on the 18th day of May, 1880, the plaintiff demanded of the defendant payment of the aforesaid amounts collected by his intestate as aforesaid, but the defendant refused.

7. That this action was begun the 24th day of May, 1880.

There was judgment for the defendant and the plaintiff appealed.

Mr. Thos. N. Hill, for plaintiff.
Mr. J. B. Batchelor, for defendant.

ASHE, J. There are only two questions presented by the record. First, has the plaintiff a right of action against the defendant; and, secondly, is his right of action barred by the statute of limitations?

The note in suit was never indorsed. The defendant's intestate was the holder, and the plaintiff's intestate had the legal title. The defendant's intestate unquestionably had the right to bring the action upon the note as holder and recover judgment thereon, for when the holder produces the note sued on, and offers it in evidence, it raises a presumption of fact that he is the owner, and unless rebutted by the defendant entitles him to judgment. *Pugh v. Grant*, 86 N. C., 39; *Jackson v. Love*, 82 N. C., 405, and cases there cited.

But it is a presumption which is only evidence against the defendant in an action upon the note, and, as a mere presumption, cannot avail the holder in an action brought against him by the legal owner.

When a note is sued on and reduced to judgment in the name of the holder, it is such a conversion in the absence of any proof as to his right of possession, as will give the legal owner an action of trover against him, and the action would be barred after three (194) years from the conversion. But the legal owner, if he choses to do so, may waive the tort and bring an action in nature of assumpsit for money had and received to his use, where the money has been collected, and the statute in that case bars the action after three years from the time of the receipt of the money, or a demand therefor, according to the relation of the parties.

But it is contended by the defendant's counsel, that while the action of trover is barred after three years from the conversion, the action of assumpsit being in this case for the same cause of action, must be subject to the same limitation. This position of the learned counsel is not supported by the authorities. For it is held that an action of assumpsit may not be barred by the statute, when to an action for a tort upon the same demand the statute may be pleaded. When there has been a tortious taking of his property, the injured party may bring trespass or trover, or he may waive both and bring assumpsit for the proceeds, when it shall have been converted into money; and if he choose the latter mode of redress, the tort-feasor cannot allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute." Angel and Limitations, Sec. 72, and cases cited in note 2.

So in *Lamb v. Clark,* 5 Pick., 193, it was held that "where the defendant obtained possession of divers promissory notes without legal transfer from the owner, and received payment of some of them, more than six years, and of others, within six years next before the commencement of the action, it was held he was liable in assumpsit for the sums received within the six years, and that he was estopped to say that the notes were obtained by fraud, and so an action of trover would have been barred by the statute." This case is directly in point with that under consideration.

The position was taken in the argument before us that the defendant was an agent and the statute did not begin to run (195) against him until a demand, and the demand not having been made until within three years before the commencement of the action, there was nothing to prevent the plaintiff from recovering the sums received by the defendant, both before and within the three years before the commencement of the action. But in this we do concur.

For while it is well settled that time does not bar a direct or express trust, as between trustee and *cestui que trust*, till the trust is put an end to by a disavowal of the trustee (as is evidenced, for instance, by a demand and refusal,) yet it is as well settled that whenever a person takes possession of property in his own name, and is afterwards by matter of evidence or construction of law changed into a trustee, lapse of time may be pleaded in bar. Angel on Limitations, Sec. 471. And it is laid down by the same author, in section 178, that if one receive money or goods of another, believing that they belong to him, when in fact *ex æquo et bono* they belong to a stranger, that is an implied trust, and the stranger is entitled to recover and he may be barred by the statute of limitations.

We take the distinction to be, that if it is an express trust or agency, a demand is necessary to terminate the trust and set the statute in operation; but if it is only an implied or constructive trust or agency, then no demand is necessary, but the statute is put in motion as soon as the property is taken into possession or the money received. Therefore, as the defendant in the case before us offered no evidence as to the means by which his intestate acquired the possession of the note, he must be deemed a tort-feasor, and as the action of assumpsit is founded in contract, for the purposes of this action, he is regarded as an agent only by construction and becomes liable to the plaintiff's action, as soon as he received the proceeds of the note, and the statute began to run from that time, and no demand was necessary to put it in motion.

(196) We are therefore of the opinion that the sum of one thousand and fifty-nine $^{75}/_{100}$ dollars received by the defendant's intestate on the 14th day of January, 1875, is barred by the statute of limitations, but that there is no bar to the recovery of the sum of two hundred and eighty $^{46}/_{100}$ dollars, with interest, that sum having been received within three years before the death of Ann Camp, plaintiff's intestate, and the action was brought within one year after the issuing of letters of administration on her estate. C. C. P., Sec. 43.

The judgment of the superior court must be reversed and judgment entered in this court in accordance with this opinion.

Error. Reversed.

Cited: Bryant v. Peebles, 92 N.C. 179; *Furman v. Timberlake,* 93 N.C. 67; *Holly v. Holly,* 94 N.C. 672; *Ballinger v. Cureton,* 104 N.C. 478; *County Board v. State Board,* 107 N.C. 367; *Kennedy v. Cromwell,* 108 N.C. 3; *Board of Education v. Henderson,* 126 N.C. 694; *Vann v. Edwards,* 130 N.C. 72; *Dunn v. Dunn,* 137 N.C. 534, 535; *Dry-Kiln Co. v. Ellington,* 172 N.C. 486; *Pritchard v. Williams,* 175

N.C. 331; *Hayes v. Green,* 187 N.C. 777; *Teachey v. Gurley,* 214 N.C. 293; *Bright v. Hood, Comr. of Banks,* 214 N.C. 422.

PETER McRAE, ADM'R, v. CHARLES MALLOY.

Demand—Interest—Executors and Administrators.

Where a definite sum is ascertained to be due to a distributee upon settlement of an estate, and ordered to be paid, no demand is necessary before suit brought to entitle him to interest on the amount from the date of the decree.

CIVIL ACTION tried at Spring Term, 1882, of RICHMOND Superior Court, before *Shipp, J.*

The plaintiff alleged that Alexander Malloy died in the year 1878, and the plaintiff during the same year was appointed and qualified as his administrator, and that the defendant in the lifetime of his intestate executed to him the bond sued on, which is as follows: "One day after date I promise to pay Alexander Malloy, or order, the sum of five hundred dollars, for value received of him." (Signed and sealed by C. Malloy on January 27th, 1872.)

The defendant pleaded as a counter-claim that the intestate (197) of the plaintiff on or about the 26th day of October, 1872, became indebted to the defendant in the sum of about four hundred and fifty-seven dollars on account of money received by him as commissioner, appointed by the probate court of Richmond County, to sell lands of John Malloy, deceased, for partition, in the case of David Malloy and others—the defendant being one of the tenants in common, and entitled to a share of the proceeds of sale received by said intestate as such commissioner; that the exact amount could not be stated, but would appear by reference to the pleadings and proceedings in said cause, or could be determined therefrom by computation.

The plaintiff replied, that he had no knowledge or information sufficient to form a belief as to the truth of the defence; and further, that no demand was made by defendant for the amount claimed in the counter claim, or the interest on the same prior to the commencement of this action.

The case at Fall Term, 1880, was referred by order of the court to John W. Cole and R. A. Johnson to take and state an account, and at Fall Term, 1881, in pursuance of the order, the referees reported "that in an action or proceeding pending in this court for the

sale of land for partition among the heirs of John Malloy, deceased, the plaintiff's intestate was appointed by the court commissioner to effect the sale, and that the purchase money of the lands sold by him amounted to thirty-one hundred and ninety-three $^{9}\%_{00}$ dollars, which was received by him previous to the 29th of March, 1875, and that on that day by a decree of the court the sale of the lands was confirmed, and plaintiff's intestate ordered to make title to the purchasers. It was further ordered in said decree that the plaintiff's intestate first pay the costs of the proceeding incurred up to that time, including the allowance to which he was entitled under the law for selling the lands and making title, and that he pay one seventh of the balance to the defendant, Charles Malloy, to which it was ad-
(198) judged he was entitled as one of the heirs of John Malloy, deceased; that the allowance to the commissioner was $51.93 and the costs amounted to $37.50 leaving in the hands of the plaintiff's intestate, as commissioner, the sum of $3,104.47 the one seventh of which is $443.50 to which the defendant was entitled.

They further reported that the defendant was entitled to a credit for that amount with interest from a reasonable time thereafter—say thirty days—as a counter-claim to the plaintiff's action, and allowing him credit for that amount with interest from the 29th of April, 1875, leaving a balance of $176.42 due the plaintiff on the 21st day of November, 1881.

The plaintiff excepted to so much of the report as allowed the defendant interest on $443.50 from thirty days after the 29th of March, 1875, for the reason that defendant made no demand for said money before the institution of this action.

His Honor overruled the exception and gave judgment in behalf of the plaintiff for the balance due on the bond of the defendant, after deducting the amount found by the referees to be due to the defendant from the plaintiff's intestate. From this judgment the plaintiff appealed.

No counsel for plaintiff.
Messrs. Burwell & Walker, for defendant.

ASHE, J. We do not think in a case like this a demand is necessary to give the defendant a right of action, or interest in his claim.

The plaintiff's intestate had received money which belonged to the defendant, and the court had ordered him to pay it to the defendant, which it had the right to do. The order of the court made the plaintiff's intestate debtor to the defendant, and holding that relation to him, he like any other debtor was bound to seek the defend-

ant and pay him. And it is a general rule established in this state, that whenever one person has the money of another and knows what sum he ought to pay, he must pay interest on (199) the same. *Harrison v. Bowie,* 57 N. C., 261; *State v. Blount,* 2 N. C., 4; *Hunt v. Jucks, Ib.,* 173.

In this case it is true the decree of the court had not ascertained with exactness the amount due by the plaintiff's intestate to the defendant, but it had settled the amount with such certainty that it required only a simple computation to ascertain the exact sum due, and *id certum est quod certum reddi potest.*

The referees might very properly have given the defendant interest on his counter-claim from the date of the decree; for the plaintiff being the creditor of the defendant and having money in his hands due to him, in legal intendment it was a payment. *Norment v. Brown,* 77 N. C., 363; *McDowell v. Tate,* 12 N. C., 249. And there is no doubt from the circumstances of the case, the original parties so considered it; otherwise we would be at a loss to conjecture why the defendant allowed his dividend of the proceeds of the sale of the land to remain for some four years in the hands of the plaintiff's intestate, and never set up any claim to it until this action was brought.

If it had been allowed as a payment, it would have satisfied the defendant's bond *pro tanto,* and of course would have stopped the interest on so much of it. And it would have amounted to about the same as if they had allowed the defendant interest from the date of the decree.

The referees, however, gave him interest on his counterclaim only after thirty days from the decree, instead of from that date, which was erroneous, but as no exception was taken by the defendant to this ruling of the referees upon this point, their report must stand and the plaintiff's exception must be overruled.

There is no error. The judgment of the court below is affirmed.

No error. Affirmed.

Cited: Stephens v. Koonce, 103 N.C. 269; *Brem v. Covington,* 104 N.C. 594; *McNeill v. R. R.,* 138 N.C. 4; *Hackney v. Hood, Comr. of Banks,* 203 N.C. 488.

(200)

G. W. CHALK v. BANK (TRADER'S NATIONAL).

Account—Partnership.

An account was properly ordered, where in the conduct of the business of a firm, debts were contracted with defendant bank, to secure which, certain collaterals were deposited in excess of the same, to the end that the residue may be applied to other partnership debts in exoneration of the plaintiff—who was sole owner by assignment of his associate.

APPEAL from an order made at Spring Term, 1881, of MECKLENBURG Superior Court, by *Eure, J.*

The plaintiff alleges that the partnership firm of G. W. Chalk & Co., constituted of himself and defendant J. L. Hardin, in conducting their business as such, and the plaintiff in prosecuting it in his individual capacity after he became sole owner of its effects by an assignment from his associate, became indebted to the defendant bank in the two notes of $2,000, and $550, to secure which, drafts, notes and acceptances of more than $8,000 in amount were deposited with the bank.

That the smaller note has been satisfied, and the said collaterals which have been, or ought to have been, collected and applied, are more than sufficient to pay the said debt, leaving a residue for the plaintiff, and that the said Hardin has been adjudged a bankrupt, and the defendant S. P. Smith appointed his assignee.

The demand is for an account—the application of so much of the deposited claims as are required to discharge the debt, and the payment over of such sums as have been collected in excess, and the redelivery of such as have not been collected, and for general relief.

The bank and the assignee unite in their answer, (the other defendants not answering) and say that R. N. Littlejohn was also
(201) a constituent member of the partnership firm of G. W. Chalk & Co., and that they did borrow money of the bank and deposit with it collaterals to secure payment; and that after the firm began to wind up its business in 1877, the partners, Chalk and Littlejohn, assigned their interest in its effects to the partner, Hardin, to pay the debt due the bank and other debts of the firm, and apply any surplus to his own use and benefit, and that this transfer was made in the presence of the president of the bank and with his assent.

The answer admits the execution of the two notes as charged, and the payment of the smaller one, but not by the plaintiff individually; and states, that the larger note of $2,000 remains due, only a small portion of the interest having been paid, and that the bank holds collaterals to secure its payment, not in the amount charged, and of which a detailed statement is submitted with the answer. This ex-

hibit does not accompany the transcript and the reference in the answer alone discloses what it contains.

At Spring Term, 1881, an order of reference was entered in these words: "It is ordered by the court in this case that it be referred to the clerk of this court, J. R. Erwin, to state an account of the dealings between the plaintiff and the defendants, the Traders' National Bank and S. P. Smith, assignee of J. L. Hardin, and to take an account, and also ascertain what debts, if any, are outstanding against G. W. Chalk & Co., and report to the next term of this court."

From this order the defendants appealed.

Messrs. Bynum & Grier, for plaintiff.
Messrs. John E. Brown and R. D. Graham, for defendants.

SMITH, C. J., after stating the above. While there are discrepancies in the statement of facts in the complaint and answer, accepting those set out in the answer as correct, the plaintiff is entitled to an account and to a reference. The plaintiff remains liable upon the note held by the bank as well as to any other outstanding (202) liabilities of the firm, and has a clear right to enforce the execution of the admitted trust upon which the collaterals in possession of the bank are held, and to compel their appropriation to the partnership debts as a means of exonerating the plaintiff. This equity is not impaired by any provision as to the disposition of the surplus, should there be such, whether it belongs to Hardin for his own use or is to be distributed as if no assignment were made to him.

"Any matter which has a bearing upon the right of the plaintiff to a decree for an account," remarks PEARSON, J., laying down the rule of practice, "comes up at the hearing when the decree for an account is asked; but a matter of charge, that is, what does or does not form a part of the fund or of discharge, cannot then be gone into, but comes up regularly by exception to the report." And he adds: "Where the suit is for an account, all the evidence necessary to be read at the hearing is that which proves the defendant to be an *accounting party, and then the decree to account follows of course." Dozier v. Sprouse,* 54 N. C., 152. Other cases are to the same effect. *Hairston v. Hairston,* 55 N. C., 123; *Railroad Company v. Morrison,* 82 N. C., 141.

In the present case the admissions in the answer show a liability in the defendant Bank to an account of the fund and fully warrant the order of reference.

We renewedly call attention to the distinction between an order of reference following a decree *quod computet,* under the former equity practice, and such order made under the Code, pointd out in the

case of *Barrett v. Henry*, 85 N. C., 321, the recognition of which may obviate errors into which parties not observing the difference are liable to fall.

There is no error, and this will be certified that the cause may be proceeded with in this court below.

No error. Affirmed.

Cited: Cotton Mills v. Maslin, 200 N.C. 329.

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(203)

D. D. SUTTLE, SHERIFF, v. M. W. DOGGETT AND OTHERS.

Account and Settlement—Contract—Fraud.

An account stated and settlement made between parties, (here a county and its tax collector—Bat. Rev., ch. 102, sec. 40,) have the force of a contract, and operate as a bar to a subsequent accounting, except upon a *specific* allegation of fraud or mistake.

CIVIL ACTION tried at Spring Term, 1882, of CLEVELAND Superior Court, before *Eure, J.*

This action, begun on the 31st day of March, 1882, is brought by the plaintiff, as sheriff and treasurer of Cleveland County, against the defendant Doggett, as tax collector for said county, and the other defendants, as the sureties on his official bond, given as such.

After alleging the appointment of said Doggett to said office for the year 1876, and the execution of the bond, the complaint proceeds to state that a settlement was had between the said defendant and a committee approved by the board of commissioners, on the 17th day of April, 1878, and another on the 26th day of the same month, but that the same was erroneous, and failed to charge him with the full amount due; so that, there still remains due to the county the sum of three hundred dollars more or less, which sum has been demanded of him, and he refuses to pay the same; and that said settlements were made on statements given by the said Doggett, mistaken in fact and fraudulent, but that the plaintiff is unable to point to any specific error for the reason that the vouchers are all in the hands of the said defendant.

Thereupon the plaintiff demands judgment for the sum of forty thousand dollars—that being the amount of the bond given—to be
(204) discharged upon the payment of such sum as may be found to be due upon taking another account.

The defendants admit the appointment of Doggett as tax collector and the execution of the bond, and also that the settlement took place between him and the commissioners, as alleged in the complaint, and they aver that it contained a full and true statement and exhibit by him of every item with which he was properly chargeable, and that they were all carefully examined and passed upon by the committee and ratified by the commissioners, and the same entered of record in the minutes of their proceedings, a transcript of which, they say, is annexed to their answer and pray to be taken as a part thereof.

They further allege that the defendant Doggett fully discharged the amount so ascertained to be due and obtained a receipt therefor, and they plead such settlement and payment in bar of the plaintiff's right to have another account of the same matters.

When the case was called for trial and after the jury had been impanelled, the court upon hearing the complaint and answer expressed the opinion that the plaintiff could not maintain his action, and in deference thereto he submitted to a non-suit and appealed.

Messrs. Hoke & Hoke, for plaintiff.
Messrs. Bynum & Grier, for defendants.

RUFFIN, J. Every intendment that can be fairly made, should be made in support of the judge's ruling. Therefore, though no copy of the account, alleged to have been stated between the parties, is sent with the transcript to this court, we still infer from the statement contained in the answer that it was in fact annexed to the answer, and showed the account to have been itemized; or else, that the plaintiff accepted as true the statement that such a settlement had (205) been made and appeared of record on the books kept by the board of commissioners, and was willing that his Honor should upon that footing determine the question, whether the settlement so made and recorded was as a bar to the plaintiffs' right to have another account, upon such allegations of fraud and mistake as are made in his complaint.

Viewing the case in this light, this court can feel no sort of hesitation in giving its concurrence to the ruling of his Honor. The statute (Bat. Rev., ch. 102, sec. 40) provides for the appointment at the end of each and every year of a committee, whose duty it shall be to audit and settle the accounts of all officers authorized to receive and disburse the county funds, and that the accounts so audited shall be reported to the county commissioners, and when approved by them, shall be filed with their clerk, and recorded in his book, and shall be *prima facie* evidence of their correctness, and be impeachable only for *fraud or specified error.*

To hold that the presumption thus created in favor of such settlements can be removed, and the accounts reopened upon allegations so loose and general in their nature as those contained in plaintiff's complaint, would be to discard the statute altogether, and really to put parties in a worse condition than they would be without it.

Independently of any enactment, the well established principle of a court of equity is, that an account once settled is conclusive, unless assailed for fraud or mistake; and in order thus to assail it, the complaint must not simply insinuate fraud, but must charge it, and aver the particulars with such definite certainty as that issues may be raised in regard to them. *Mebane v. Mebane,* 36 N. C., 403; *McAdoo v. Thompson,* 72 N. C., 408; *Witherspoon v. Carmichael,* 41 N. C., 143.

(206) When to this principle governing courts of equity, we have added, a positive declaration of the legislature that accounts taken and evidenced as this was should be deemed correct unless impeached for fraud or *specified* error, it would seem to put the matter beyond question, and to require clear, distinct and specific assignments of error in order to open the way for another accounting.

The distinction between this case and *Commissioners v. Taylor,* 77 N. C., 404, is, that there, there had been no accounting—that is, no itemized statement of the account, and consequently there was nothing to surcharge and falsify. The plaintiff admits that there has been an account of some sort taken between the defendant and the committee on the part of the county commissioners, and it is impossible for him to know of the existence of any error therein, however originating, without his being able to point to it with more certainty and precision than he has done; and a mere fishing suit is exactly what the statute is intended to avoid.

As said in *Harrison v. Bradley,* 40 N. C., 136, cited before at this term in *Grant v. Bell, ante,* 34, a settlement is a contract, and like all other contracts ought to be binding on the parties. And there can be no good reason why there should be one law for settlements for which the public is a party, and a different one for those between private individuals. If fairly made, they should be binding on all alike; or if made after full investigation, it should require something more definite than a mere suggestion of fraud or mistake to set them aside and put the parties at sea again.

There is no error in the judgment of the court below, and the same is affirmed.

No error. Affirmed.

Cited: Williamson v. Jones, 127 N.C. 180; *Jones v. Wooten,* 137 N.C. 423; *Morganton v. Millner,* 181 N.C. 366.

(207)

F. J. ANDERS, EX'R, v. J. W. ELLIS, ADM'R.

Damages for Breach of Contract—Evidence.

In a suit for damages for breach of a contract entered into in 1860, in which the party covenanted to buy a slave to be worth not less than $900, and to be held in trust for another, and no proof was offered on the question of damages other than that contained in the covenant; *Held*, no error to instruct the jury to give only nominal damages. The words "to be worth not less than $900" are used as descriptive of the property and not the sum to be laid out in its purchase.

CIVIL ACTION tried at Spring Term, 1882, of BLADEN Superior Court, before *Shipp, J.*

The testatrix of the plaintiff and the intestate of the defendant on January 17th, 1860, and just previous to the solemnization of their contemplated marriage, executed a deed of marriage settlement, to which one Samuel Anders was also a party, whereby certain slaves, household furniture and notes belonging to the testatrix were conveyed to the latter for her separate use, and upon the specific trusts therein mentioned. The deed contains the following provision:

"And the said Hulin G. Barnhill for the above consideration covenants and agrees to and with the said Samuel Anders and Catherine A. Anders, that he will within four years from the consummation of the aforesaid marriage, purchase or cause to be conveyed to the said trustee, Samuel Anders, a negro woman to be worth not less than nine hundred dollars, to be held in trust for the said Catherine A. under the same restrictions as the negroes hereinbefore conveyed."

The present action is instituted to recover for a breach of said covenant, in the failure of the intestate to purchase or procure such slave during the period mentioned, or afterwards during his life, and the plaintiff demands judgment for the sum of nine hundred (208) dollars and interest from the 17th day of January, 1864, and also asks for general relief.

Upon the trial the plaintiff introduced the marriage settlement and read it to the jury. Both parties offered testimony, but none was made on the question of damages, other than what is contained in the said deed.

The court thereupon remarked that in the absence of evidence to ascertain the damages, the jury would be instructed to give nominal damages only. The plaintiff insisted on his right to recover the sum demanded in his complaint, suffered a non-suit and from the judgment appeals to this court, and the only inquiry is into the correctness of this ruling.

Mr. C. C. Lyon, for plaintiff.
Messrs. N. A. Stedman and T. H. Sutton, for defendant.

SMITH, C. J., after stating the case. It is properly conceded, and such is the frame of the complaint, that the intestate had the entire four years ensuing the marriage in which to fulfill his stipulation to procure and put such slave under the trusts of the deed, and that his covenant was broken by his failure to do so at the expiration of that time.

We interpret the contract to mean that a slave woman of such condition and quality as would be worth the sum specified, at the time when it was entered into, should be obtained and settled to the separate use of the wife, and that if one of this description, at whatever price obtained, had been placed under the said trusts, within the time limited, the obligation assumed would have been met.

The words "to be worth not less than nine hundred dollars" are used as descriptive of the female slave to be purchased, and not of the sum to be laid out in the purchase. Thus understood, if slavery had ceased to exist before the lapse of the period allowed, it would have
(209) operated as a discharge, since no one can be required to do an illegal act or be liable in damages for not doing it. So if by the approach of that inevitable event, this form of property had become so reduced in value as to be almost worthless, the compensation would be measurable by the value of what, if furnished, would have been a compliance with the terms of the contract and which the testatrix has lost.

Slavery was not in fact abolished on January 1st, 1863, by the president's proclamation, but in the exercise of a war power the slaves themselves were set free as the territory wherein they were found came under the control of the advancing armies of the United States. *Harrell v. Watson*, 63 N. C., 454. But the tenure by which this species of property was held became, in the progress of events, weakened, and its value greatly impaired; and to what extent was a matter to be left to the jury in estimating the damages sustained? What is the extent of the injury to the testatrix?

Had the slave been obtained, the property therein would have speedily perished, and in the light of an equitable proceeding, the damage would have been the loss of services for a brief period only. But whatever rule of estimating damages he adopted, it is plain they must be assessed by a jury upon evidence, and without evidence, only nominal can be recovered.

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

No error. Affirmed.

THOMAS MOORE v. COMMISSIONERS OF GREENE.

Statute of Limitations—Waiver of Delay.

1. Where the plaintiff made a payment, the defendant promising to refund any excess of the amount due, and upon a reference a balance was reported in favor of plaintiff; *Held* in an action to recover the amount, that the statute begins to run only from the date of such finding.
2. *Held further:* The unreasonable delay on the part of the plaintiff to assert his rights, is deemed to have been waived by the acts of the defendant, in that, the refusal to refund the money was upon the ground that the proof was insufficient to establish plaintiff's claim.

CIVIL ACTION, tried at Fall Term, 1882, of GREENE Superior (210) Court, before *MacRae, J.*

This action was begun on the 1st day of March, 1880. The plaintiff alleges that being tax collector for Greene County he had a settlement with the defendants, and the then treasurer of the county on the 30th day of May, 1873, and that he then paid to the latter the sum of $7,451.70 in full of the amount collected by him from all sources—taking a receipt therefor. That in the year 1874, the defendants in consequence of a report from a committee they had appointed to examine into the plaintiff's accounts, insisted that there was an error in the previous settlement, and that he was still owing for taxes collected the sum of two hundred and fifty dollars, and threatened to sue him and his sureties, if the same was not paid. That rather than have his sureties sued and be himself pronounced a defaulter, he paid the said sum of two hundred and fifty dollars, though under protest, the defendants then and there promising that the same should be refunded to him in case it should be made to appear that it was not in fact owing to the county. That the plaintiff could never procure satisfactory proof that the said sum was not due until October, 1879, when he demanded the same of the defendants who refused to pay it.

The defendants say in their answer that they have no knowledge or information sufficient to form a belief as to the several matters set forth in the complaint, and insist that even if true, the plaintiff's claim is barred by the statute of limitations, and that it is also (211) barred because not presented within two years after its maturity as required by the act of 1874-75, ch. 243.

By consent of the parties the cause was referred to F. A. Woodard, to pass upon all issues of fact and law, with a provision that his findings as to the facts should be conclusive.

The referee found the following facts:

1. That the plaintiff was the tax collector for Greene County for the year beginning in September, 1871, and ending in September, 1872.

2. That in 1873 the board of commissioners of the county appointed a committee to settle with the plaintiff, who reported that he was due the commissioners the sum of $7,451.70 and thereupon the plaintiff paid that sum to the county treasurer and took his receipt in full, on the 30th of May, 1873.

3. That in the year 1874 the said board of commissioners appointed another committee to examine into the accounts of all the officers of the county, who after examining the lists of 1871-72, reported that the plaintiff was indebted to the county in the sum of $250.00, and soon thereafter the board demanded that sum of the plaintiff who refused at first to pay it, alleging that he did not owe it, but afterwards agreed to pay it, and did pay it on the 2nd day of November, 1874, the said board then agreeing "that if it should be shown that there was a mistake made by the committee in their report, and that the said sum was in fact not due from the plaintiff, then the said sum of $250.00 was to be refunded to him by the commissioners."

4. That on the 3rd day of November, 1879, the plaintiff presented his claim to the defendant board of commissioners and demanded that the said sum of $250.00 should be refunded to him, alleging that he had discovered evidence showing the error in the report of the com-
(212) mittee, which newly discovered evidence established the fact that the said sum was not due the county at the time of its payment. But the board refused to refund the same, insisting "that the newly discovered evidence did not establish the fact of error in the report of the said committee."

5. That according to the report of the committee there was due from the plaintiff for taxes collected from all sources the sum of $7,575.03, on which he was entitled to credits for his commissions and for insolvents for $772.17, leaving a balance due from him of $6,802.86, so that in paying the sum of $7,451.70 in May, 1873, he largely overpaid the amount due from him without any reference to the $250.00 subsequently paid, and therefore the said sum of $250.00 paid in November, 1874, was not due the county when the plaintiff paid it.

6. That the demand for repayment of the sum so paid was not made upon the board of commissioners, by the plaintiff, within two years after its payment—the same not being made until January 1st, 1877.

7. That at the time the plaintiff paid to the commissioners the $250.00, he knew the same was not due the county, and that he had at the time of such payment full and sufficient proof that the same was not due from him.

Upon the foregoing findings of fact the referee concluded as a matter of law that the plaintiff's cause of action was barred by the statute of limitations, and directed that judgment should be entered for the defendant, and against the plaintiff for costs.

Both parties filed exceptions to the report of the referee, but according to the view taken by this court it is needless to state them, except that the plaintiff insisted that according to the facts as found, it was error to direct the judgment to be entered for the defendants, and that on the contrary he is entitled to have payment for his demand and interest.

His Honor overruled all the exceptions and gave judgment (213) according to the report against the plaintiff for the costs—both parties appealing from the ruling of the court in regard to their exceptions.

Mr. W. T. Faircloth, for plaintiff.

Messrs. Grainger & Bryan, for defendants.

RUFFIN, J. As established by the findings of the referee, the agreement made on the second of November, 1874, between the plaintiff and the then board of commissioners was, that the money paid by plaintiff under protest should be refunded to him *"if it should be shown that there had been a mistake in the report of the finance committee and that the sum was not in fact due from him."*

Both upon principle and authority, then, we think the statute of limitations could have no application to the case. It was evidently contemplated by the parties that there was to be a re-reckoning of the plaintiff's accounts, as the tax-collector of the county, and that the rights and duties of the parties should be determined by the result of that investigation, and until this took place, there could be no breach of the contract on the part of the commissioners, and consequently no right of action could accrue to the plaintiff.

In *Falls v. McKnight,* 14 N. C., 421, the action was upon a receipt given by the defendant in the cause to the plaintiff's testator, and worded as follows: "Received of Robert Simonton, executor of James Heart, $953.24 which I have received as heir to James Heart, *and if it is too much, I am to return the balance,"* and it having been ascertained by arbitration and award, within the three years next before the commencement of the action, that the defendant had been overpaid, it was held that the statute did not apply until the award was made.

So in the present case, the promise was to repay the amount whenever it should be ascertained by the new reckoning that the (214) plaintiff in fact owed nothing to the county, and when that fact

was ascertained and not before, did a cause of action arise and the statute begin to run.

But because there was no statute of limitations running which could bar the plaintiff's demand, it does not in the least follow that there was no limit to his rights or necessity on him to use reasonable diligence. A party will not be allowed to sleep over his rights to the prejudice of another, against whom he prefers a claim, and who by his delay may be injured by the loss of evidence or other means of defence, and if he do so, the courts will treat his claim as stale and grant him no relief upon it.

In this case, after his agreement with the commissioners, it devolved upon the plaintiff to procure the proper and necessary evidence to establish his demand, and there being no time agreed upon in which this should be done, the law implied that it was to be done within a reasonable time.

What that is, cannot be determined according to any precise rule, but must depend upon the circumstances of each particular case. In the absence of any unusual cause for delay, it would seem to be reasonable to require the evidence to support the claim, in a case like the present, to be sought after and procured within the time limited for bringing an action upon an accrued right. There is the same necessity for requiring diligence in the one case as the other, and an unreasonable delay should be attended with the same consequences in both.

The burning of the court house in 1876 furnishes no excuse for the plaintiff's want of diligence. For even after that, he was able to procure from the public auditor's office, proofs ample to satisfy the referee of the justness of his claim, and with equal, or greater ease could this have been done, before the destruction of the county records.

(215) Outside of this, there appears to be nothing that affords the semblance of an excuse for a failure to press his demand, extending from 1874 to 1879, and we should therefore entertain no doubt upon the question of the plaintiff's laches, if the defendants had assumed that ground in 1879, and refused to recognize the plaintiff's demand on the score of his unreasonable delay.

But instead of this, the referee finds expressly that they based their ultimate refusal to refund the plaintiff's money, upon the ground *that his proofs were insufficient to establish his claim;* and from this we are obliged to infer, that they consented to try and did try the cause upon its merits, hearing the evidence and weighing its effects, either in a body or through the agency of a committee; and if so, it must be taken to be a clear waiver of the plaintiff's antecedent laches.

It would be inconsistent with fair play for the defendants, after having gone into a trial with the plaintiff as to the merits of his demand,

and when the weight of the testimony was found to be against them, then to complain of the plaintiff's want of diligence in bringing his cause to a trial.

As to the act of 1874-75, ch. 243: For the reasons given in *Wharton v. Commissioners*, 82 N. C., 11, we think it has no application to a claim against a county, constituted as the plaintiff's is. The defendants and their predecessors in office had notice from the beginning of its origin, nature and amount, and of the fact that it could not mature until the accuracy or inaccuracy of their previous settlement with the plaintiff could be ascertained. Such a claim falls neither within the letter nor the spirit of the act.

Our conclusion upon the whole case therefore is, there being no statute of limitations which bars the plaintiff's action, and the defendants having waived his laches, he is entitled to judgment according to the finding of the referee for the sum of $250.00 with interest from the 2nd day of November, 1874, and for costs.

Error. Judgment accordingly.

Cited: Lanning v. Comrs., 106 N.C. 510.

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(216)

BUTLER & CO. v. P. N. STAINBACK, AND OTHERS.

Equity—Marshalling Assets—Mortgage—Trust—Homestead.

1. Equity will not displace one right to uphold another.
2. The doctrine of marshalling securities does not apply where one security is given and expressly declared to be in exoneration of another, though other interests are involved in the latter security and it is insufficient to protect all of them.
3. Mortgage of land to R. & Co., and afterwards a deed in trust by same party conveying other property to secure them and other creditors; *Held*, that R. & Co. are entitled to share *pro rata* in the proceeds of the trust sale, so as to exonerate *pro tanto* the mortgaged premises and relieve the mortgagor's homestead.

CIVIL ACTION, tried at Spring Term, 1882, of HALIFAX Superior Court, before *Bennett, J.*

Defendants appeal.

Mr. Thomas N. Hill, for plaintiffs.

Messrs. Mullen & Moore, for defendants.

RUFFIN, J. The record in this case discloses but a single issue, raised by demurrer of the plaintiffs to the answer of the defendants, A. L. Stainback and wife.

The facts of the case are as follows: On the 9th day of March, 1881, the defendants, T. M. White and A. L. Stainback, as partners and as individuals, and their wives, executed a mortgage to the defendants, Rountree & Co., to secure to them a debt of about $8,000, wherein were conveyed a storehouse and lot then occupied by the firm, the residence of White and the residence of Stainback.

The residence of White, so conveyed, and the one undivided half of the storehouse and lot are the property of Mrs. White; and the
(217) residence of Stainback is his individual property, and the other half of the storehouse and lot is the firm property.

On the 6th day of February, 1882, the said firm of White & Stainback executed to the defendant P. N. Stainback a deed, wherein, after reciting the fact that they had previously given the mortgage, including the separate property of Mrs. White, and that they were desirous of paying the debt thereby secured, in order to relieve her estate, they conveyed all their firm assets, consisting of goods and evidences of debt, in trust to sell and collect, and with the proceeds to pay, as constituting the first class, certain enumerated debts, ten in number, and aggregating some $13,000, including the debt of Rountree & Co. for $8,000, and a debt of $1,112.24 due the plaintiffs.

The fund in the hands of the trustee is insufficient to pay the whole of the preferred debts, and the plaintiffs, while conceding for the present that so far as Mrs. White's separate property is embraced in the mortgage, she is a surety and entitled to be exonerated, insist, that they have an equity to compel the defendants, Rountree & Co., to resort for the payment of their debt to the other half of the store-house lot and the residence of Stainback, and to exhaust them before they can be allowed to participate in the funds in the hands of the trustee, and to enforce this equity is the purpose of their action.

On the other hand the defendants, Stainback and wife, insist that, as to the plaintiffs and all the other creditors of the firm, they are entitled to a homestead in their residence embraced in the mortgage to Rountree & Co., and to have the funds in the trustee's hands applied ratably to all the preferred debts, including that to Rountree & Co., so, as far as possible, to relieve their homestead, and in their answer they ask that this may be done.

The plaintiffs demur to this answer upon the ground that the
(218) facts of the case do not in law establish a right in the defendant, Stainback, to have a homestead superior to the equity claimed by the plaintiffs.

The judge presiding in the court below sustained the demurrer, holding that the defendants, Rountree & Co., could not participate in the trust fund, until they had exhausted the real estate of A. L. Stainback conveyed in the mortgage, and requiring them to look to that and the undivided half of the storehouse belonging to the firm, as their first source of payment.

To this administration of the rights and equities of the several parties, this court is unable to give its concurrence.

In the first place, the deed of the 6th of February, 1882, expressly provides that the debt due to Rountree & Co. shall share in the benefits of the trust with the other debts therein enumerated, as preferred. It matters not what motive prompted such a provision, the makers of the deed, who were the owners of the property conveyed, and therefore competent to dispose of it upon any terms not inconsistent with the policy of the law and the demands of good faith, have affixed to the trust this condition, that a ratable part of the fund raised thereunder should go to the debt to Rountree & Co., as a *pro tanto* exoneration of the lands hitherto conveyed to them by mortgage. The plaintiffs, while accepting the benefits of the trusts and seeking as they are to have distribution under it, cannot be permitted to object to the terms imposed. They are themselves enjoying a preference over the unsecured creditors of their common debtor and it poorly becomes them to cavil at the terms upon which they are permitted to do so.

After a careful examination of all the authorities bearing upon the subject, we have found no case in which the equitable doctrine of marshalling securities has been applied, where one security was given and expressly declared to be in exoneration of another previously given, even though other interests might be involved in the later (219) security, and it should prove to be insufficient fully to protect them all. Nor indeed can we conceive how it could do so, if in any degree respect is to be shown to the will of the creator of the two securities.

Again, while the doctrine of marshalling securities by which a creditor, having a lien on two funds, will be confined to that fund which is not common to both, is well established, and as was said by Chancellor KENT in *Cheeseborough v. Millard*, 1 John., Ch. 409, "is recognized in every cultivated system of jurisprudence," still, it is not founded on contract, but rests upon equitable principles only, and the benevolence of the court; and it is never extended so as either to affect injuriously the creditor who has double security, or trench upon the rights of the common debtor or of third persons. *Ayres v. Husted*, 15 Conn., 504; *Leib v. Stribling*, 51 Md., 288. And especially will a court of equity never displace one equity or right for the purpose of upholding or asserting another.

The defendant in this case, it is true, has encumbered his homestead with a mortgage; but, save as to the creditor therein secured, his right of homestead remains, and if by a proper application of the other property of the firm conveyed in the same mortgage, and of that part of the trust fund specially appropriated to the satisfaction of the mortgage debt, his homestead can be disencumbered, he has a clear right to have it done. *Cheatham v. Jones,* 68 N. C., 153. There can be no principle of equity which will deprive him of this right merely in order that a creditor, to whom no lien upon the homestead has been given, may reap a larger dividend from another fund.

To apply the principle of marshalling assets in such a case, would be but an indirect way of subjecting a homestead to the payment of debts, when the very object of the law is to confer a homestead exemption superior to all creditors, and ever consecrated, except so
(220) far as it may be impaired by the voluntary act of the claimant himself.

In *Maw v. Lewis,* 31 Ark., 203; *Dickson v. Chom,* 6 Iowa 19, and *McArthur v. Martin,* 23 Minn., 74, we have authorities directly in point. In each case a creditor had a mortgage on two tracts of land, and another creditor held a mortgage on one of the tracts, and the latter sought to compel the former to exhaust the tract not embraced in his mortgage first, it being however the one in which the mortgagor claimed a homestead; and it was held by reason of the mortgagor's equity (it being one which the courts favor) the securities should not be marshalled.

Though not directly in point, no decision can furnish a stronger analogy or serve more certainly to show the disposition of the courts to favor such exemptions, than that rendered by this court in *Curlee v. Thomas,* 74 N. C., 51, in which a judgment was not allowed to be set off by another judgment upon the ground that it was needed to make up the party's personal property exemption; and this, notwithstanding the equitable jurisdiction to set off cross-judgments has been immemorially exerted, and certainly is as firmly established on the basis of reason, and appeals as strongly to the sense of justice, as does the doctrine of marshalling assets, on which the plaintiffs in this action rely.

In the opinion of this court, therefore, it was error in the court below to sustain the demurrer, and the judgment thereof is reversed, and judgment will be entered here overruling the plaintiffs' demurrer, and the same will be certified to the end that the cause may be proceeded with in reference to the issues involved.

Error. Judgment accordingly.

Cited: Wilson v. Patton, 87 N.C. 324; *Pope v. Harris,* 94 N.C. 65; *Harris v. Allen,* 104 N.C. 91; *Long v. Walker,* 105 N.C. 115; *Leak v. Gay,* 107 N.C. 476; *Winston v. Biggs,* 117 N.C. 208; *Graves v. Currie,* 132 N.C. 312; *Stokes v. Stokes,* 206 N.C. 110; *Hood, Comr. of Banks, v. Macclesfield Co.,* 209 N.C. 279; *Miller v. Little,* 212 N.C. 615.

(221)

H. O. PARKER, ADMINISTRATOR, v. M. A. BLEDSOE AND OTHERS.

Injunction.

An injunction to restrain plaintiff from executing his judgment against defendant, will not be granted. The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment, and an order suspending proceedings thereunder.

MOTION for an injunction heard at Fall Term, 1882, of WAKE Superior Court, before *McKoy, J.*

The action is to recover the amount due on a promissory note which the complaint states to have been executed on November 1st, 1874, by the defendants to the intestate of the plaintiff in the sum of $1,244.72 bearing interest from date, and that no part thereof has been paid. The defendants in separate answers admit both allegations, and as a defence say that one George W. Phillips, as principal, and the defendant Moses A. Bledsoe, as surety, on March 3rd, 1866, made their note to the intestate in the sum of $799.20 payable in specie or its equivalent, on which the latter in August 7th, 1869, paid to the intestate $300.

The 4th clause of the answer declares "that the amount demanded by the plaintiff over and above said $799.20 after allowing defendant credit for three hundred dollars as aforesaid, is interest, except $105 thereof," and proceeds to say that successive drafts were afterwards given for the debt by the defendant, Moses A. Bledsoe, part of the accumulating interest, which is alleged to be usurious, being paid by him, and the residue with the remaining principal merged in the note described in the complaint. Replication being put in by the plaintiff at Spring Term, 1881, held in February, an order of reference under the Code was made, and the following judgment rendered: (222)

This cause coming on to be heard, and it appearing from the answer of the defendant that they are justly due the plaintiff herein the sum of four hundred and ninety-nine and $^{2}/_{100}$ dollars with interest from November 1st, 1874, at 6 per cent. per annum, and it appearing from the answers of the defendants that an account is necessary, and

that a full adjustment cannot now be had of the matter on account of the need of a reference: it is upon motion of plaintiff's attorney adjudged that the plaintiff recover of the defendants the sum of four hundred and ninety-nine and $^{2}\%_{00}$ dollars with interest thereon from the 1st day of November, 1874, with interest at 6 per cent. per annum, the same being the amount admitted to be due by the defendants; the action as to the residue of the claim is retained for further hearing without prejudice to balance of the plaintiff's claim.

On March 25th, 1882, execution issued on the judgment, whereupon application for an injunction was made to the judge presiding at June term following, supported by the affidavit of the defendant, W. H. Bledsoe. An order to show cause on a designated day why the motion should not be allowed was granted by the judge, and meanwhile the plaintiff restrained from proceeding to enforce his execution.

Upon the hearing of the opposing affidavits of parties before his Honor, Judge McKoy, on September 2nd, 1882, the injunction asked for was denied, the restraining order vacated, and from this ruling the defendants appealed.

Messrs. Pace & Holding, for plaintiff.
Mr. Armistead Jones, for defendants.

SMITH, C. J., after stating the above. The answer clearly admits to be due of principal money upon the original merged in the note
(223) sued for, at least the sum of $499.20, the residue after applying the alleged payment, and this judgment seems to be warranted by the express provision of the Code. Sec. 215, par. 5. The reference must be construed as confined to what is still claimed by the plaintiff and contested by the defendants, the order therefor and the judgment rendered being the action of the court at the same term.

If there be any cause of complaint, the defendants' remedy should have been sought in an application to the judge for such modification of the terms of the judgment as would remove the grievance, or for an order suspending proceedings under it to enforce payment of the sum adjudged to be due. It is entirely irregular under our present system to seek relief in a personal injunction against the plaintiff and restrain him from the advantages of a judgment unreformed, where it can and ought to be obtained, if proper in itself, by an order in the cause.

As the superior courts now possess and exercise the hitherto divided jurisdiction conferred upon courts of law and courts of equity, the proposition of the defendants is that the same court shall restrain a suitor from pursuing the very remedies it has given him, and in the language of Judge NASH, an application to a court of equity to restrain

its own proceedings is a novelty; and he adds, the court is called on "to pronounce that to be iniquitous and wrong, which it has already declared to be right and proper," yet "the court can, and, upon a proper case made, supported by affidavit, will withdraw the process itself or stay an execution by granting a *supersedeas.*" *Greenlee v. McDowell,* 39 N. C., 481.

So this court said in *Chambers v. Penland,* 78 N. C., 53, "while the action is pending, relief can be obtained by a defendant aggrieved by a judgment by his applying to the court wherein it was rendered for a modification, and meanwhile for a *supersedeas* or other order arresting proceedings, until the application can be heard." (224)

But if the application had been made to set aside or reform the judgment under section 133 of the Code, or for irregularity, we see no ground on which the motion could be allowed. More than a year had elapsed from the rendition of the judgment, (*Mabry v. Erwin,* 78 N. C., 45; *Askew v. Capehart,* 79 N. C., 17,) and no irregularity is imputed in entering it up.

But we are confined as a reviewing court to pass upon the ruling which annuls the temporary restraining order and refuses the injunction, and there is no error therein. The judgment is affirmed, and this will be certified.

No error. Affirmed.

Cited: Grant v. Moore, 88 N.C. 78; *Roulhac v. Miller,* 89 N.C. 196; *Coward v. Chastain,* 99 N.C. 445; *Curran v. Kerchner,* 117 N.C. 265; *Stewart v. Bryan,* 121 N.C. 48; *Banks v. Lane,* 171 N.C. 507, 511; *Fertilizer Co. v. Trading Co.,* 203 N.C. 262; *Finance Co. v. Trust Co.,* 213 N.C. 372; *McDay v. Investment Co.,* 228 N.C. 291.

HENRY DUNKART v. WILLIAM RINEHART AND OTHERS.

Injunction—Cutting Trees.

1. An injunction will not be granted to prevent the cutting and carrying away of walnut trees, unless, from the insolvency of the alleged trespasser, compensation in money cannot be had.
2. An allegation of insolvency is essential to the granting of an injunction except in special cases, in which the injury will be irreparable even though the defendant is solvent.

MOTION for injunction heard at chambers in Asheville on the 14th of March, 1882, (in an action pending in HAYWOOD Superior Court) before *Gilliam, J.*

The plaintiff in his complaint alleges that on the 23d of February, 1881, the defendant, Rinehart, sold to him a number of walnut trees standing on the land of said defendant, in the county of Hay-
(225) wood, and at the time of the sale reduced the contract of sale to writing, a copy of which is as follows:

I, William Rinehart, of Waynesville, N. C., agree to sell unto Henry Dunkart of Asheville, N. C., any of my black walnut trees, not exceeding fifteen in number, that will girt eight feet six inches, at the following prices, to wit, all trees measuring eight feet six inches in circumference and under ten feet, at $2.00 each, and all trees measuring ten feet in circumference and upwards, at $2.50 each. I also agree to give the necessary right of way through my land to get said timber to the public road.

That he then paid Rinehart sixteen dollars in part payment for the trees, and is ready and willing to pay such balance as may be due.

That the defendants, McCracken and Herren, have entered upon said land and are cutting timber, and threatening to fell and carry away the plaintiff's trees, claiming the right to do so under a contract of purchase of the said land by one Boyd from the defendant Rinehart, and the assignment of his right, evidenced by a bond for title, to said McCracken, who is in possession, and has made a pretended sale of the timber to said Herren; and that one or the other of them has paid only one half of the purchase money to Rinehart, and no deed of conveyance for the land has been made by Rinehart to Boyd, or either of the said defendants.

That Rinehart at the time of entering into said contract of purchase, informed Boyd and the defendant McCracken that he had sold the said walnut trees and received from the plaintiff sixteen dollars of the price.

The defendants admitted that the plaintiff had paid sixteen dollars to Rinehart in part payment for trees contracted for, and that Boyd had no deed from Rinehart for the land, but only a bond for title which he had assigned to defendant McCracken, and had paid Rinehart
(226) about one half of the purchase money, but denied specifically all the other allegations of the complaint.

And for a further defence, the defendants, McCracken and Herren, state that about the 14th of January, 1882, the defendant, Rinehart, contracted to sell to one Boyd the land in question, and gave him a bond for a good and sufficient deed of conveyance for the same, without any reservation whatever; that Boyd paid one half of the purchase money to Rinehart, and the remainder is not yet due, but he is solvent and able to pay when the debt falls due.

That Boyd afterwards (about January 14, 1882,) sold his interest in the land to McCracken, and gave him a bond for title, without any

reservation, and he has paid nearly all the purchase money, and is solvent.

That about the first of February, 1882, the defendant, McCracken, sold to the other defendant, Herren, a lot of walnut trees standing on said land, who paid for the same; and that there were no marks on said trees at the time of the purchase by Herren, and only five of them that would measure as much as eight feet six inches.

Upon the verified complaint and answer, treated as affidavits, the court denied the motion for an injunction, and the plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff.
No counsel for defendants.

ASHE, J. The contest between the parties is about certain walnut trees to which both parties claim title.

The plaintiff sues for a specific performance of the contract set out in the complaint and for damages for a breach thereof, and that the defendants in the meantime be enjoined from cutting and carrying away the walnut timber described in the complaint, until the plaintiff shall have removed the trees claimed by him.

Whether the title to the trees passed by the contract between (227) the plaintiff and Rinehart, is an immaterial inquiry in the case. For conceding that the contract was an absolute sale of the trees to the plaintiff, he is not entitled to the extraordinary remedy he seeks.

It has been too often decided by this court, to be any longer an open question, that the extraordinary power of the courts will not be exercised to restrain the cutting of trees, other than those for ornament, or any other trespasses to real property, except where the injury will be irreparable, and not compensable in damages in consequence of the insolvency of the trespasser.

The allegation of the complaint that the defendants are insolvent, is an essential averment, without which an injunction will not be granted, except in some special cases where it is made to appear that the injury will be irreparable, even when the defendant is solvent. *McCormick v. Nixon,* 83 N. C., 113; *Thompson v. Williams,* 54 N. C., 176; *Gause v. Perkins,* 56 N. C., 177. In the latter case, which was a bill in equity for an injunction, alleging that a trespasser was about to commit an irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, without an averment of the defendant's insolvency, the bill was dismissed. Chief Justice PEARSON in delivering the opinion of the court, said: "Does the cultivation of pine trees for turpentine, or the cutting down oak trees for staves, or cypress trees for shingles, cause

an irreparable injury? one which cannot be compensated for in damages? The very purpose for which these trees are used by the owners of land, is to get from them, turpentine, staves and shingles for *sale.* It follows therefore as a matter of course, that if the owner of the land recover from a trespasser the full value of the trees that are used for these purposes, he thereby receives compensation for the injury, (228) and it cannot in any sense be deemed irreparable. So that, private justice and public policy which call for a full development of the resources of the country, alike forbid the interference of equity, except in cases where from the insolvency of the alleged trespasser, the compensation in money cannot be had."

In the case before us, there is no allegation that the defendants are insolvent, or that the injury sought to be enjoined will be irreparable. But on the contrary, the uncontradicted proof is that the defendants are solvent. There is no reason why the plaintiff, if he has title to the trees, may not receive full compensation in damages for any loss resulting from the acts of the defendants.

This case is distinguished from the cases of *Troy v. Norment,* 55 N. C., 318, and *Purnell v. Daniel,* 43 N. C., 9, which were special injunctions, continued to the hearing, where there was no allegation of insolvency; but they turned upon special circumstances, and are not authorities in conflict with this opinion and the decision above cited in its support.

Our opinion therefore is, that there is no error in the ruling of his Honor in refusing to grant the injunction prayed for in the plaintiff's complaints. Let this be certified to the superior court of Haywood County that further proceedings may be had according to law.

No error. Affirmed.

Cited: Dunkart v. Henry, 87 N.C. 229; *R. R. v. R. R.,* 88 N.C. 82; *Levenson v. Elson,* 88 N.C. 185; *Frink v. Stewart,* 94 N.C. 486; *Bond v. Wool,* 107 N.C. 153; *McKay v. Chapin,* 120 N.C. 160; *Griffin v. R. R.,* 150 N.C. 315.

HENRY DUNKART v. JOHN A. HENRY AND ANOTHER.

(For syllabus, see preceding case.)

MOTION for injunction heard at Chambers in Asheville on the 14th of March, 1882, (in an action pending in HAYWOOD Superior Court) before *Gilliam, J.*

The motion was denied and the plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff. (229)
No counsel for defendant.

ASHE, J. The facts of this case are very similar to those in *Dunkart v. Rinehart, ante,* 224. The difference in the state of facts is not sufficiently material as to effect the application of the doctrine announced in that case; and our opinion is, the principle there enunciated governs this case, and there is therefore no error in the denial by his Honor of the motion of the plaintiff.

Let this be certified to the superior court of Haywood County where the cause is pending.

No error. Affirmed.

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*W. W. ROLLINS v. THE EASTERN BAND OF CHEROKEE INDIANS.

Cherokee Indians—Jurisdiction.

The Cherokee Indians in this state have been placed upon the same footing with other tribes by an Act of Congress, passed in pursuance of the power granted by the Constitution in reference to "regulating commerce with foreign nations among the several states, and with the Indian tribes"; and their contracts made with the plaintiff to prosecute and collect claims alleged to be due them, cannot be enforced against them in a state court, without the consent of Congress. The jurisdiction to determine such matters is lodged in the Interior Department.

CIVIL ACTION tried at Fall Term, 1880, of BUNCOMBE Superior Court, before *Gilmer, J.*

This action was brought by the plaintiff against Enola or "Black Fox," Swanooka or "Flying Squirrel," John Ross and Lloyd R. Welch, chiefs and head-men of the eastern band of Cherokee (230) Indians, and about two thousand other Cherokees, whose names are unknown to the plaintiff, and who are too numerous to be made parties, but who have a common interest with the above named defendants in the matters involved in this litigation. These Indians live in the counties of Cherokee, Graham, Swain, Macon and Jackson, and a few families in Georgia, and Tennessee.

The suit is brought upon a contract made in pursuance of a series of resolutions, in substance as follows:

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

CHEOAH COUNCIL GROUNDS, October 9th, 1872.

Whereas, it is the sense of this council to employ some discreet person to prosecute all claims of the Eastern Band, or North Carolina tribe of Cherokee Indians, against the government of the United States at Washington, arising under different treaties and laws, from the year 1783 to the present time: Now therefore be it resolved,

1. That John Ross, chief, be authorized to employ some discreet and trusty person to have custody of and prosecute said claims for "Reservations, Spoliation, and Pre-emptions" under the treaties of 1817 and 1819—the payments provided for by the treaty of 1835.

2. To assert and establish before the proper authorities of the United States all claims arising under said treaty and the provisions of an act of congress, approved July 29, 1848.

3. To collect for said tribe such moneys as they are entitled to from a fund derived from the sale of lands, known as the "neutral lands"—the Cherokee strip in the state of Kansas, and other lands, as per treaty of July 19th, 1866; and also, whatever may be due on account of misappropriations of the fund of five millions of dollars, set apart as well for said tribe, as for those of the Cherokee Nation who removed to the west by virtue of the treaty of 1835, which claims are yet unadjusted;

and also, to procure payment of so much of an appropriation,
(231) now in the Interior Department, as said tribe may be entitled to, under the act approved May 29th, 1872.

4. That John Ross be, and he is hereby instructed to contract with some competent person to carry out the intentions and purposes of this council; provided that the person selected shall not be allowed more than twenty-five per cent as compensation for his services, and that the contract shall be approved by the Secretary of the Interior, and the Commissioner of Indian Affairs, as required by the act of Congress of May 21st, 1872, regulating the mode of making private contracts with Indians, and that a copy of these resolutions shall accompany the contract.

(Signed) JOHN ROSS, Principal Chief,
DAVID ADAMS, Clerk of Council.
DAVID TUCKER, Interpreter.

Witnesses:
JOHN G. LATHAN,
JAMES TAYLOR.

Accordingly, John Ross selected the plaintiff, Rollins, and entered into a contract with him on the 15th of May, 1874, to continue four years from date. The stipulations in the contract, in reference to the prosecution of the claims mentioned in the above resolutions, and the

attention to be given by the plaintiff to the business of the Cherokees, material to the case, are incorporated in the opinion of this court. The contract is signed by Jooojoudtjotb and Jdg. F. Paa, in behalf of the tribe, and by W. W. Rollins, the plaintiff.

And another contract of same date was also entered into with the plaintiff, the terms of which are similar to the above, and signed by the following chiefs and "head-men" of the tribe, namely, Swanooka, Enola, Big Witch, Osanoh, John Jackson, Jonny Light, Jackson Blythe, James Blythe, Tom Skella, Wilson Wolf, Young Squirrel, Hugh Lambert, (his x mark), Sau-ya-ta-owl, Wilson New- (232) comer, Jim Boss, Jo. Welch, Tauquetla, Chequellette, Minx,- Long Bear, Will Peckerwood, and Johnson Graybeard.

The matters of difference involved in the suits pending in the United States circuit court, before *Dick, J.*, at Asheville, in which the said Cherokees were plaintiffs and their agents defendants, were at May Term, 1874, referred to Rufus Barringer, John H. Dillard and Thomas Ruffin, whose award, submitted on the 23rd of October following, was to be a rule of court.

In their report, the arbitrators say: We, having taken upon ourselves the burden of this reference, and having considered the pleadings, proofs, etc., in said suits, and heard the arguments of counsel, do make and publish our award in writing, of and concerning all the several matters referred to us, in the manner following:

1. That William H. Thomas became, and was the agent of the Eastern band of Cherokee Indians, living in North Carolina, after the removal of their brethren west in the year 1838, and as such undertook to purchase and did purchase for them land (hereinafter described) with money coming from the United States under treaties and the laws of Congress; and did also from time to time, buy lands from various persons, for them as a tribe or community, being a large tract carved up into towns, and situated on Soco creek and Ocona Lufta river, and their tributaries, and known as "Qualla Boundary":

Beginning at a stump near the spring on the Jackson County line at the head of Jonathan creek, where the Soco road crosses the mountain; thence northerly with said county line to the ridge which divides the waters of Raven's fork from Bradley's or west fork of the Ocona Lufta river; thence with the water-shed of that ridge to the Hughes line; thence eastwardly with said line and the lines of (233) Enloe to Ocona Lufta river, and down the river to the southern boundary of Samuel Monteith, and across the river with Monteith's line to his southwest corner; thence with the lines of an entry made by said Thomas, and other lines of Thomas, keeping on the outside lines, to the dividing ridge between the waters of Adams' creek and New-

ton's mill creek, so as to include all the Indians living on the head waters of Adam's creek; thence in a southerly direction to Sherrill's line, and with the same to Ocona Lufta river, so as to include all the Indian settlements on the east side of Newton's mill creek; thence with and across the Ocona Lufta to the upper boundary of J. M. Bird, and with his line to the corner of the first tract of what is known as the "state surveys," and up said river with the line of said survey, (but excluding the tract occupied by Gibbs, and some of the Thomas entries); thence up the river to a tract occupied by an Indian named Ahma-cha-ma, and with the line of that tract and including the same, to the old line of Scroop Enloe, and including the tract occupied by Mason Reckley; thence with the line of his tract, crossing the Soco river below his (Reckley's) house, to the old Enloe line; thence with the same to Thomas' mill tract; thence with the line of the mill tract and of an entry (Thomas' 500 acre entry, but leaving it outside) to the line of J. B. Sherrell; thence with his line to a tract conveyed by J. W. King to Flying Squirrel; thence with the line of that tract, so run as to include it, to Thompson Carter's tract, and with the same, including it, to the top of the ridge between Soco creek, and Shoal creek; thence with the water-shed of the ridge to the south corner of the "Cathcart survey," and with its line to the beginning at the head of Jonathan creek.

2. That within the Qualla Boundary, said Thomas at divers times sold and conveyed tracts of land to the following named Indians,
(234) or persons of Indian blood: To Enola or "Black Fox," forty acres; to One-tah, thirty-three acres; to Standing Wolf and children, two hundred and eighty-six acres; to Catalaska, three tracts, containing together one hundred and ten acres; to Charlie Hornbuckle's heirs, one hundred acres; to Salo-lu-netah, or "Young Squirrel," fifty-three acres; to Nellie Jonnson, two hundred acres; and to Jimmy Reed, two hundred acres; and received from them, respectively, the purchase money.

3. And he contracted in writing to sell other tracts in the Qualla Boundary to the following named Indians: To Chu-lo-gu-lah, or "Cloud," fifty acres; to Wilson Oocummah, two tracts—one of twenty acres, and the other known as the "Cayuatago tract"; to the heirs of Jeff. Hornbuckle, two hundred acres; to Swanooka, the lands surveyed by Dills, being part of the "Holland old field"; to Ben Quain, fifty acres, where he lives; to the heirs of Long Blanket, the tract on which they live; to the heirs of Little Witch, the place where they live; to Wilson Wolf, the milltract, purchased of Abraham Mungus; to Ta-a-kah, the "Thompson place" tract; to Wilson Reed, one hundred and twenty-five acres, surveyed to him by Terrell; to Standing Water, the

place where he lives; to Ta-ya-hah, a part of the "Holland old field"; to Tah-gul-se-nah, the tract occupied by him; and received from them, respectively, in whole or in part, the purchase money.

We do therefore award that the Qualla Boundary belongs to, and shall be held by the Eastern Band of Cherokee Indians, living in North Carolina, as a tribe or community, whether living at this time at Qualla, or elsewhere in the state; and that the individual Indians, above named, as holding under said Thomas, either by deed or contract, shall hold and possess their several tracts of land, as their separate property, with the quality of being inheritable, but without the power of alienation, except from one Indian to another, and then only with the assent of their council, and to be subject to (235) the payment of a sum of money, hereinafter provided for.

4. We find that the wife and children of an Indian, named "Little John," have a deed to a tract of land, containing one hundred and seventy-three acres, lying on the Tuckaseegee river and outside of the Qualla Boundary, upon which they live; and we award that the same is a good title, as against all parties and privies to these suits. We also find that they have a title-bond from said Thomas for a hundred acres lying on both sides of Skeekee branch, and have paid for the same; also, that the heirs of Will-gees-ka have a similar bond for the tract on which they live, on the south side of the Tuckaseegee, and have paid for the same; and we therefore award that the defendants convey the said tracts to them.

5. We find, that at one time it was contemplated between Thomas and the Indians living in the region, described in the pleadings as "Cheoah," to make a similar purchase of a general boundary of land in that section of the state, and that there was a written agreement to that effect between them; but afterwards the Indians declined to furnish the funds necessary thereto; and we therefore award that the said agreement to make the purchase was abandoned, and in lieu thereof, the following individual Indians made separate purchases from Thomas and others, paid the money, and have sufficient titles: Sakah, one hundred acres in district No. 9, section 589; Corn-Silk, same number in section 347, and also, the same in district No. 10, section 374; Chick-a-lilla, same number in No. 9, section 393, and also, an adjoining tract of forty-eight acres; Walla-na-kah, one hundred acres in district No. 10, section 552; Ches-que-ne-tah or "Young Bird," (son of Ty-al-ta) same number in district No. 9, section 364; Tom Big-Meat, the same, section 359, and aslo 90½ acres, section 360; and Con-na-see-yah, one hundred acres in district No. 10, section 386. We therefore award that they have and hold title (236) in fee, as against all parties and privies to these suits.

We also find that the following who have title-bonds from Thomas, having paid the purchase money, are entitled to, and we award, specific performance: Ka-qu-ka, or "Ground Squirrel," two hundred and eighty acres in district No. 10, section 23, Cherokee County, and James Taylor, district No. 7, in Cherokee County, Nos. 19, 21 and 27. And also, that the following have contracts in writing, and are entitled to deeds upon payment of purchase money: Dick-a-gees-Kus' heirs, one hundred acres in district No. 9, section 367; Ootal-ka-nah, same, section 373; Chin-a-que, or "John Owl," the land on which he lived in 1855, in Cherokee County, excepting all mineral interests; Too-way-al-lah, part of No. 12, district No. 10; Corn Silk, one hundred acres in district No. 9, section 588; Tracking-Wolf, same, section 404; Richard Henson and others, and their heirs two hundred and ten acres in district No. 5, section 11, and Richard Henson, one hundred and fifty-seven acres in same district, section 14, with a bounty claim of twenty-seven hundred acres; Salkenah and others, eighty acres in district No. 6; Tes-a-tees-kah, one hundred acres in district No. 9, and George Oo-yah-ste-ah, same, section 365, and Cah-nah-a-to-go and others, same, section 405; Coheloskah, one hundred and twenty acres, same district, section 93; and no districts or sections are given to Too-nah-lu-yah, Chess-gul-ne-tah, or Tetal-ka-nah. And if the parties fail to pay the purchase money, the said Thomas shall have the right to sell the lands according to law.

6. We find that in the course of the agency of Thomas, he received large sums of money from the sale of lands in Qualla, in contributions of individual Indians, and in payments by the government; and on the other hand, the tribe became largely indebted to him for services rendered in their behalf, and by his furnishing them through
(237) a series of years with clothing, food, farming implements and other necessary supplies; and after adjusting all claims between them (except as hereinafter mentioned) we find they owe him a balance towards the purchase money of the Qualla Boundary, of $18,250; that after the purchase of the same by defendant, Johnston, under his execution against Thomas, the plaintiffs in pursuance of a contract with Johnston for the redemption of the lands, paid to him, on the 29th of September, 1869, the sum of $6,500, which we award Johnston shall apply as a credit on his judgment against Thomas, as money paid by the plaintiffs on account of the balance due of the purchase money, as aforesaid, which with interest thereon reduces said balance to $9,764, and this amount was further reduced by the arbitrators to $7,066.11, (by reason of a payment to Thomas in the matter of the suit upon a bond of defendant Terrell and his sureties), who awarded that on payment by the Indians to Johnston of this last mentioned sum, he should

credit it on his judgment against Thomas, and that then they should have an equity to demand and have of Johnston a conveyance of the legal title to Qualla Boundary.

7. The arbitrators then say: Wishing to secure repose of titles, and to end litigation between the parties, we have considered all claims between the plaintiffs as a tribe, and every member thereof in the state, and the defendants, and do award all such claims to be treated as adjusted and concluded between them, except as hereinbefore stated in relation to the contracts for sale of lands, and a matter now in litigation in the state court, between members of the Raper family in reference to their "reservation" money, (which was not considered by the arbitrators).

8. The arbitrators finding that certain title-papers in which the plaintiffs are interested, had not been registered, award that they shall be registered in the proper offices of the state, and to that end a delivery of the same to one of plaintiffs' agents was (238) awarded. The compensation to Thomas for his services, and costs of the suits were then passed upon and determined by the arbitrators. The amount of the allowance to them and the manner of its payment, was left to be fixed and provided for by the judge of the circuit court, to which the award was submitted, and became a decree thereof.

In the court below, the defendants' counsel moved to dismiss the action for want of jurisdiction, and as the case turns upon that question, it is not deemed material to set out the issues submitted to and passed upon by the jury. The question of jurisdiction was reserved by the court.

The facts contained in the statement of the case, as tried before Judge Gilmer, are briefly as follows:

1. Under treaties and laws of the United States, the defendants became entitled to certain moneys, known as "Capitation," "Removal and Subsistence," "Spoliation," "Preemption and Reservation," funds, which are retained and invested by the federal government for the benefit of Indians who did not remove west, and paid out by agents appointed by the government.

2. For many years before the late civil war, William H. Thomas was the agent of defendants, and James W. Terrell, disbursing agent of the fund, which amounted to a large sum at the commencement of the war. And when the war closed, the government declined to appropriate any portion of the same to these defendants, upon the ground that they gave their adherence to the Confederate States, many of them serving in the armies thereof.

3. These Indians have an organization or government amongst themselves, and transact their common business by means of "Councils," composed of chiefs and head-men, selected in various ways to
(239) represent their settlements or "towns." One of their own number presides as chairman, and the secretary is assisted by white persons, (selected by them) who record and transmit to the Department at Washington, by messenger or otherwise, such proceedings as relate to their business affairs with the government.

4. In 1868, congress passed an act providing for the enrolment and enumeration of these Indians, and the government was empowered to take supervisory charge of them, as other tribes of Indians, and it has since assumed control over them—appointing agents, establishing schools, and disbursing money to them—reorganized their "council" plan of government—each settlement to be entitled to at least one member—the principal chief, elected for four years, to be the executive officer, but with no power to bind them by contract except by the approval of the Council.

5. It being alleged that Thomas and Terrell had failed to account for moneys received for them in 1870, congress passed an act authorizing them to bring suits in the circuit court of the United States in North Carolina, to recover the same. (These are the suits in which a reference was had to the arbitrators whose report is above set forth.)

6. In March, 1875, the plaintiff in this suit, W. W. Rollins, (and O. F. Presbrey who was made a co-plaintiff) applied to the Interior Department for payment of fees for services performed under the contract sued on, and filed a written and verified statement of the claim amounting to $42,236.77. The application was referred to the board of Indian commissioners, who recommended the payment of $5,200 in full of the demand. This was approved by the Secretary of the Interior, and the amount paid to plaintiffs, but "without prejudice to the parties to claim a balance to be still due to them." A subsequent application for the alleged balance due was refused.

Upon the foregoing facts, his Honor being of opinion that the
(240) court had no jurisdiction of the case, allowed the motion of the defendants' counsel and dismissed the action, and the plaintiffs appealed.

Messrs. A. S. Merrimon and J. H. Merrimon, for plaintiffs.
Messrs. T. F. Davidson and Reade, Busbee & Busbee, for defendants.

SMITH, C. J. This action is prosecuted against the remnant of the Cherokee Indians remaining in the south-western counties of the state, after the removal of the great body of the nation under treaty

arrangements with the government of the United States, to the reservation provided for them beyond the Mississippi river, for the recovery of compensation for services under contracts entered into on the same day between the plaintiff and John Ross, their Chief, and between him and a large number of their head-men and chiefs, both undertaking to act on behalf and by the authority of the entire body, as a separate and organic community.

The contracts bear date May 15th, 1874, the one entered into by their principal chief, being pursuant to certain resolutions adopted at a general council of the Indians, held on October 9th, 1872; and the other, essentially of the same import in its general provisions, executed by other chiefs and head-men; and both professing to be obligatory upon the entire tribe.

The contracts were on the same day presented to the judge of the district court of the United States, then holding a term of the circuit court at Asheville, and the execution of each acknowledged by the parties, and so, certified by him under the seal of the court with certain other facts stated, as required by the act of congress, hereafter more particularly referred to.

The contracts were with these certificates submitted to, and bear endorsed, the approval of the Commissioner of Indian Af- (241) fairs and of the Secretary of the Interior Department at Washington.

Among the claims asserted in the contract, five of which were against the government or its official agencies, to be prosecuted and pressed by the plaintiff, and to which he promises to give diligent attention, the last is thus described: "Sixth. To prosecute and attend to personally, and by such attorney or attorneys as he may employ, and whom he is hereby authorized to employ, all suits now pending in the courts of the United States in behalf of the Eastern Band of Cherokees against any person or persons whatsoever, and such other suits as it may be necessary hereafter to institute in any court of the United States or of the state of North Carolina, or of any other state or territory, to establish any right, or redress any wrong or injury done to the undersigned, chiefs or head-men, their tribe or any of their tribe."

The plaintiff stipulates to prosecute the several claims mentioned in the contract, and due from the different sources specified, and the suits on their behalf before these instituted and undetermined, and to receive as his remuneration therefor, the amount of twenty per centum, fixed in the contract with Ross, on whatever funds and the value of what ever property may be by him secured for them from the government or its agents, and from the said, or other suits, as their direct results, or upon any award made by referees or arbitra-

tors, or upon a compromise, but declared in the other contract to be a sum *"not to exceed twenty per centum to be allowed by the Commissioner of Indian Affairs,* out of such amounts as he may collect for, or establish to be due to the Eastern Band of Cherokees on account of any one or all of the claims hereinbefore mentioned, and at the same rate out of the amounts of money or property as may be recovered in the said above suits at law or in equity, now pending or which may be hereafter instituted.

(242) The resolutions adopted in the Indian council in 1872, before the suits were brought for the services in which the present demand is made, conferring authority upon John Ross to employ counsel on behalf of the tribe, enumerate their several claims upon the government only, and make no mention of suits to be brought in the courts, while the contract actually made by him with the plaintiff, embraces attention to the suits which had in the meantime been brought, and were then pending. Both contracts were to be in force for four years, and the compensation sought in the present action is limited to the services rendered in the suits only.

The somewhat anomalous condition in which the Indians were placed by reason of the participation of large numbers of them in the military service of the Confederate government during the civil war, and the refusal of the government to pay over the funds due them in consequence, was put an end to by the passage of the act of congress, approved July 27th, 1868, in which the Secretary of the Interior is directed to "cause a new roll or census to be made of the North Carolina or Eastern Cherokees, which shall be the roll upon which payments due said Indians shall be made," and to "cause the Commissioner of Indian Affairs to *take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."* Acts 40 Cong., 2 Sess., ch. 259.

Under this act an enrolment was made and the Interior Department assumed and has exercised such supervisory control over the interests of these Indians, establishing schools, appointing agents and disbursing money to them, and they have organized and put in operation a form of local civil government and public administration, but of course in subordination to the state government.

To enable the Indians to pursue and obtain their funds and the lands which had been purchased with them by preceding agents,

(243) in the act appropriating money for the Indian service for the year ending June 30th, 1871, congress inserted the following clause: "That the Eastern Band of the Cherokee Indians by that name and style be and they are hereby authorized and empowered to institute and carry on a suit or suits in law or equity, in the district or circuit

courts of the United States, against the present or former Indian agent or agents of said Band, their administrators, executors and heirs, and against the securities of such agent or agents, their administrators, executors, curators or trustees, for all claims, causes of suit or rights, in law or equity, that said Band may have against them or either of them; and the law of limitations shall apply to such claims, causes of action and rights, from and after the day this act takes effect. It shall be the duty of the District Attorney and the Attorney General of the United States to institute and prosecute all suits, causes for which may arise under this section." Acts 40 Cong., 2 Sess., ch. 296, sec. 11.

Pursuant to this enactment, which, if it does not confer, recognizes a corporate capacity in the Indians as a collective body or tribe to pursue and recover their property by action in the federal courts, sanctions its institution and provides counsel to prosecute it, suits were instituted on their behalf, one in equity against W. H. Thomas, William Johnston and James W. Terrell, and the other, at law, against them and two other co-defendants, in the circuit court of the western district of North Carolina, which were depending when the contracts were made with the plaintiff, Rollins, and to his services in conducting them, and the compensation provided therefor, the before recited provisions apply.

These cases and the controversies which gave rise to them were, by written consent of the parties, and the approval of the district judge presiding and holding the court, and that of the Commissioner of Indian Affairs, and the Secretary of the Interior, as well as the department of justice at Washington, referred to three referees or arbitrators, for a full adjustment, "whose award was to be final (244) and a rule of court."

The referees with great and unwearied care and diligence entered upon and discharged their duties, and made their report, awarding the Indians a large extent of territory, and settling and determining the claims of the parties against each other, and the right and title of individual members of the Band to various tracts under previous contracts with agent. The award was made and became a decree of the court.

Upon the determintion of the suits, the plaintiff, Rollins, and his coplaintiff, Otis F. Presbrey, to whom one moiety of the claim had been assigned, made demand for compensation according to the terms of the contract with the head-men and chiefs, in March, 1875, on the Interior Department accompanying the application with a detailed and verified statement thereof in writing, as directed by section 2104 of the Revised Statutes of the United States, and claiming to be due the sum of $42,236.77. The application was referred to the board of Indian

commissioners for examination and report, and they made their report in September following, recommending the payment of $5,200 to the claimants in full of their demand. On the same day the Secretary approved the allowance, adding, "without prejudice to the parties to claim a balance to be still due to them." This sum was paid to the plaintiffs. Subsequently a second application for an additional allowance was preferred before the Commissioner and Secretary and denied by them, and thereupon this action was brought.

In the exercise of the power conferred by the constitution "to regulate commerce with foreign nations, among the several states and with the Indian tribes," congress has by law prescribed in what form and with what solemnities contracts "with any tribe of Indians or individual Indians, not citizens of the United States" must be made, in order to their validity, Rev. St. U. S., Sec. 2103, to the provisions (245) of which these contracts seem to have been intended to conform; and the statute declares that "all contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value, paid to any person, by any Indian or tribe, or any one else, for or on his or their behalf on account of such services in excess of the amount approved by the Commissioner and Secretary, for such services, may be recovered by suit in the name of the United States, in any court of the United States, regardless of the amount in controversy."

The next section (2104) forbids the payment to any agent or attorney by an officer of the United States, under any contract, other than the fees due for services rendered thereunder, and proceeds to declare that the moneys due the tribe, Indian or Indians, as the case may be, shall be paid by the United States through its own officers or agent to the party or parties entitled thereto; and no money or thing shall be paid to any person *for services under such contract or agreement* until such person shall have first filed with the commissioner of Indian affairs, a sworn statement showing each particular act of service, under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom, whether in their judgment such contract or agreement has been complied with; if so, the same may be paid; and if not it shall be paid in proportion to the services rendered under the contract.

Section 2105 subjects the person receiving money in violation of the provisions of the two preceding sections, and his aiders and abettors, besides the forefeiture, to punishment by imprisonment for not less than six months, and a fine not less than one thousand dollars. The remnant band of Cherokees remaining in the state, by distinct legislative action, have been placed upon the same footing with other In-

dian tribes, under the protection and care of the government, (246) and these statutory provisions apply with equal pertinency and force to them as to that portion of the tribe who have emigrated, and been located in their western home.

This seems to have been so understood by the plaintiffs, and is manifest not only in pursuing the prescribed formalities in the initiating the agreement, but in applying to the department for the allowance and payment of the remuneration it provides; and resort is had to the jurisdiction of the state court, only after efforts for an additional sum have proved unavailing and fruitless, there.

It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safe-guards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenceless of a race rapidly diminishing in numbers, and deemed incapable of self-protection.

This policy finds expression in the legislation of congress in reference to the tribes and the superintending control assumed over them for their benefit. We do not undertake to say nor intimate the use of any improper influence in bringing about these contracts—for there seems to have been none—nor to under-estimate the advantages derived by the Indians from the energetic and persistent efforts of their agent in the successful prosecution of the suits; but nevertheless, the compensation to be paid must pass under the revision of the national authorities, charged with this imposed duty, as it has passed, and the result is conclusive upon the court.

The present action is in substance an indirect appeal from the twice rendered decision of the department, and after a distinct and final denial of further compensation.

In our opinion, as that was the only tribunal empowered to entertain the application for payment and determine the amount to be paid, so its decision is exclusive of the interference of a court (247) of the state, and conclusive in effect.

Indeed this is conceded in one of the contracts, which specifies a maximum of compensation—not in excess of twenty per centum—leaving the amount "to be allowed by the Commissoner of Indian Affairs out of such amounts as he (the agent) may collect," and applying the same rule and rate to the value of property acquired by the suits, arbitration or compromise. The sum has been fixed by the Commissioner, sanctioned by the head of the department and paid, and however inadequate it may appear to us, as a remuneration, it is beyond the jurisdiction of the superior court to revise and modify, or to make addition in amount.

Again, the allowance was intended to be, and so it is declared in the report of the board to the Secretary, in satisfaction of the whole claim, and it is not the less so, because the latter left the claimants free to assert, as they afterwards did unsuccessfully assert, a right to an additional allowance upon the same offices, and thus the adjudication became and was unconditional and final.

Strongly corroborating these views is the provision in the enactment authorizing the suits which imposes upon the District Attorney and Attorney-General the duty of bringing and prosecuting the proposed suits in their official capacity; and as the necessity of employing further professional aid is left with the public authorities, so must be the duty imposed of passing upon the extent and value of the services and their just measure of remuneration.

Indeed it is a question not wholly free from doubt, whether, as the professional services of the District Attorney and Attorney-General are expressly given to the Indians in the authorized suits, any additional professional services under contract or otherwise, could under the law be recognized and allowed by the Commissioner out of the moneys due the Indians. But it is not our province to decide the point, and it is referred to only to sustain our conclusion that (248) to no other source can the plaintiff look for compensation.

Some embarrassment would be met if there were jurisdiction in enforcing in one action two contracts so variant in the provision for compensation to the same attorney and agent, and for the same services in the one case, determinate, and in the other, dependent upon the action of another party, both of which contracts have been sanctioned according to the findings of the jury, by the Eastern Band, as a collective and tribal body. But the jurisdictional difficulty met *in limine* precludes any inquiry as to the effect of the contracts in this respect.

Nor have we considered the defence under our own statute (Bat. Rev. ch. 50 sec 9) which avoids all contracts made since May 18th, 1838, for an amount equal to ten or more dollars, with any "Cherokee Indian or any person of Cherokee Indian blood within the second degree," unless it be in writing and signed in the presence of two attesting witnesses. If this act be not obnoxious to the imputation of discriminating between this and other classes of citizens, under the prohibition of the recent changes in the constitution of the United States, it is inapplicable to the present case, if not for the reason that it deals with individual Indians rather than with the tribes, in their political and corporate relations, because of the superseding and annulling effect of the legislation of congress covering the same matter.

It is quite obvious then that the general government having assumed the guardianship and oversight of the various Indian tribes, and prescribed rules and regulations for their guidance and protection, their contracts cannot be enforced against them in the state courts, without the consent of this parental authority, and redress must be sought for violated agreements in a different jurisdiction.

The question of jurisdiction was reserved and the trial allowed to proceed before the jury, but whether reserved or not, if the defect or want of jurisdiction appears, even after verdict, the (249) action should be dismissed, since the results of a trial *coram non judice,* are absolutely null.

We therefore sustain the ruling of his Honor in dismissing the action upon the facts found by the jury and contained in the statement accompanying the record, for the reasons we have already given, and in leaving the plaintiffs to seek elsewhere the relief, if any, to which they may be entitled.

No error. Affirmed.

Cited: Frazier v. Cherokee Indians, 146 N.C. 482.

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*J. R. LOVE'S EXECUTORS v. J. W. HARBIN AND OTHERS.

Witness—Deed, Its Execution and Probate.

1. No consideration is necessary in a deed. (See *Mosely v. Mosely, ante,* 69.)
2. A witness is incompetent under section 343 of the Code to prove the declarations of one deceased in reference to the deed involved in an ejectment suit, a party to which having contracted to sell the land to the witness.
3. A deed to which there is no subscribing witness may be admitted to probate and registration upon proof of the hand-writing of the maker, whether he be living or dead.
4. A certificate of the register of deeds, to the effect that a copy of a deed with the order of probate and registration are of record in his office, is *prima facie* evidence of its execution and probate, subject to be rebutted where the *factum* of the instrument, or probate, is disputed.

EJECTMENT tried at Fall Term, 1882, of HAYWOOD Superior (250) Court, before *Shepherd, J.*

*MR. JUSTICE ASHE did not concur with the majority of the court as to the principle announced in reference to consideration in deed. His dissent, as to that, is also noted in *Mosely v. Mosely, ante,* 69.

In this action the plaintiffs seek to recover the possession of a tract of land, claiming title to the same under the last will of James R. Love, deceased.

On the trial it was admitted by the defendants that said testator had once been seized of the land, and that the plaintiffs are entitled to the same under his will, unless the defendants could show that he had executed a deed in the year 1859, whereby he conveyed the same land to J. W. Harbin, the ancestor of the defendants, and which they set up in their answer as the source of their title, the only issue submitted being, "Did plaintiffs' testator execute the deed alleged in defendants' answer?"

At a previous term, at the instance of the plaintiffs, the court had put a rule upon the defendants to produce upon the trial the original of said deed, or account for its absence, and accordingly the defendants offered the affidavits of themselves and their attorneys to show that diligent search had been made for it amongst the papers of the testator, and in the register's office of the county, and nowhere could it be found; and thereupon the court held that the defendants had sufficiently accounted for the absence of the original.

The defendants then offered in evidence a certified copy of the deed from the register of the county, to which the plaintiffs objected, first, because it appeared from the paper itself that it was no deed, as there was no consideration expressed in it; secondly, the probate was not such as to justify the registration of the original deed, as there was no subscribing witnesses to the instrument, and it was admitted to probate upon proof merely of the hand-writing of the maker; and thirdly, because the probate, even if sufficient to authorize the original to be registered, was not sufficient to authorize the introduction of the copy as evidence, but that it was incumbent on the defendants, since
(251) the execution of the deed was denied, to prove it as at common law, notwithstanding it had been registered.

These objections were all overruled by the court, and the defendants excepted.

The defendants then read in evidence the copy of the deed as certified by the register of deeds for the county, and closed their case, and thereupon the plaintiffs requested the court to adjudge as a matter of law that the execution of the deed had not been sufficiently proved, and that the plaintiffs were entitled to a verdict upon the issue submitted, which was declined by the court, and the plaintiffs excepted.

Much testimony was then introduced bearing upon the question of the genuineness of the deed, and amongst other witnesses the plaintiffs introduced one Robertson, and offered to prove by him certain declarations of J. W. Harbin, the ancestor of the defendants and the person to

whom it was alleged the deed in question had been made, in reference to the same. But it being admitted that the said Harbin was dead, and that the witness had contracted to purchase the land in dispute from the plaintiffs and taken a bond for title from them, his competency was objected to by the defendants and their objection was sustained, and the plaintiffs excepted.

The plaintiffs then asked for some special instructions to the jury, but as they were in substance a repetition of their objections to the probate of the deed, it is needless to set them out.

The court charged the jury that the affirmative of the issue was upon the defendants, and it devolved upon them to establish it by a preponderance of testimony; that the certified copy of the deed was *prima facie* evidence of its execution, but if the testimony offered to impeach it was such as to leave their minds in doubt upon the point as to its execution, then they should find for the plaintiffs. The jury were also instructed that the deed needed no consideration to support (252) it, as the seal itself imported a consideration.

After verdict and judgment for the defendants, the plaintiffs appealed.

Mr. James H. Merrimon, for plaintiffs.
Mr. George A. Shuford, for defendants.

RUFFIN, J. Whatever may once have been our opinions upon the subject, it is now the settled rule in this state, that by reason of the efficacy which the statute gives to the fact of their registration, all deeds are put upon the footing of feoffments which take effect by livery of seizen, and need no consideration, as between the parties, to support them. *Hogan v. Strayhorn,* 65 N. C., 279; *Ivey v. Granberry,* 66 N. C., 223; *Mosely v. Mosely, ante,* 69.

It is difficult to conceive of one whose equitable interest as a purchaser from the plaintiffs of record, with a bond for title of the very lands in dispute, could be more directly and positively affected by the result of the action, than that of the proposed witness Robertson. He falls both within the letter and the spirit of the statute (C. C. P., Sec. 343) and was properly excluded as a witness in regard to a communication with the deceased ancestor of the defendants.

The objections which the plaintiffs make to the admission of the copy of the deed as certified by the register, as we understand them, are three in number:

1. That the law makes no provision for the probate and registration of a deed upon proof of the hand-writing of the maker only, there being no subscribing witness to the instrument.

2. That there was no proof *aliunde* the certificate of the register, that the original deed in this case had ever been proved before any tribunal, competent to take the probate thereof and order its registration.

(253) 3. That where the execution of a deed is denied and notice given to produce the original, then under no circumstances (however the absence of the original may be accounted for) can the copy from the registry be used as evidence, but the deed must be proved *de novo,* at the trial, by evidence competent to show its execution.

Their first exception is fully answered by the decision in *Black v. Justice,* 86 N. C., 504, where it was held that a deed to which there was no subscribing witness might be admitted to probate and registration, upon proof of the maker's hand-writing only; and this, without reference to the fact whether he be living or dead. And attention was called to the change in the statute since the decision in *Carrier v. Hampton,* 33 N. C., 307, upon which the plaintiffs rely.

In considering the second objection, it must be observed that the statute nowhere makes it the duty of the officer, who admits a deed for probate, whether he be a clerk or judge, to make and record a formal adjudication of its probate; and in the case of the judge it would be manifestly impossible for him to do so, except upon the instrument itself. Nor is there any provision which requires the register to spread upon his books the certificate of such adjudication, in case the same be made. Still, the uniform habit has been for every officer, before whom a deed is proved, to endorse upon it his adjudication of probate and order for registration, and for the register to spread upon his minutes both the deed and the certificate of probate; and whenever needed in evidence, a copy of the deed and of such certificate certified by the register is all that has ever been required. As said in *Starke v. Etheridge,* 71 N. C., 240, it would shake too many titles to allow such an objection to prevail at this day. In our case we have a copy of the deed, and of the certificate of the judge of probate, before whom it was proved, setting forth his adjudication of the probate and order

(254) for registration and the evidence upon which it was allowed, together with a certificate from the register, that they all appear of record in his office, and this taken in connection with the maxim *omnia praesumuntur rite acta,* we must hold to be sufficient *prima facie* evidence of the probate.

The third objection seems too to be entirely met by the decision in *Short v. Currie,* 53 N. C., 42. That was a suit upon a clerk's bond, the defence being *non est factum.* On the trial the plaintiff produced the original and undertook to prove its execution by the examination of witnesses, but failed to do so successfully. He then offered in evidence

a registered copy of the bond, but upon objection it was excluded by the court, and thereupon he submitted to a non-suit and appealed. This court, taking notice of the fact that such bonds were required to be registered like deeds, reversed the decision of the superior court, upon the ground that the statute made the registry or duly certified copy of the record of a deed, or other instrument required to be registered, sufficient evidence of the execution of the instrument; and this, even, in the trial of the general issue, directly involving the question of its execution, and after the party had failed to make direct proof thereof.

A main purpose intended to be accomplished by registration is the perpetuation of the instrument, and of the memorial of its probate and order of registration, and it will not do to hold that this intention of the statute may in every case be defeated by a notice to produce the original. Under the operation of such a rule, it would be next to impossible to establish any title depending upon very ancient deeds, as they are rarely preserved so as to pass with the land; and this, partly because it is universally understood that when once registered, the proofs of their execution and probate are perpetuated.

It is not intended to say that the fact of registration is conclusive as to either the execution or probate of the deed, but only (255) *prima facie* evidence, and as the *factum* of the instrument may be disputed after its registration, so may the fact that it was ever admitted to probate, or that it was proved by a competent witness, as was done in *Carrier v. Hampton, supra.*

No error. Affirmed.

Cited: Strickland v. Draughan, 88 N.C. 317; *Aycock v. R. R.,* 89 N.C. 324; *Howell v. Ray,* 92 N.C. 512; *Rowland v. Rowland,* 93 N.C. 221; *Simpson v. Simpson,* 107 N.C. 559; *Devereux v. McMahon,* 108 N.C. 145; *Perry v. Bragg,* 111 N.C. 164; *Cheek v. Nall,* 112 N.C. 373; *Helms v. Austin,* 116 N.C. 755; *Mabe v. Mabe,* 122 N.C. 555; *Griffith v. Richmond,* 126 N.C. 378; *Tarlton v. Griggs,* 131 N.C. 221; *Wetherington v. Williams,* 134 N.C. 281; *Bryan v. Eason,* 147 N.C. 292; *Lumber Co. v. Lumber Co.,* 169 N.C. 97; *Belk v. Belk,* 175 N.C. 72; *McMahan v. Hensley,* 178 N.C. 588.

WHITEHEAD & STOKES v. WILMINGTON & WELDON RAILROAD COMPANY.

Common Carriers—Railways, Liability of—Bill of Lading.

1. The rigid rule of the common law in reference to the liability of common carriers, should not be applied to a case involving the violation of a penal statute.
2. In an action by the plaintiff against a railway company for the penalty for delay in shipment of cotton, under the act of 1874-75, ch. 240, sec. 2, caused by increase of freight; by the refusal of a connecting road of the same through line to transfer defendant's flat-cars over its road loaded with cotton; by the detention of defendant's box cars at terminus of said connecting road; and by its inability to procure other cars in time to ship plaintiff's cotton; and not by its competition with other lines for through freight—the defendant not being responsible for the causes of delay; *It was held:*

   (1) To relieve from the penalty, the burden is upon the defendant to show that the shipment was "otherwise agreed" upon between the parties.

   (2) And the through bill of lading (advantageous to both) received by the plaintiff, without objection, that the cotton was to be shipped "at company's convenience," is evidence of plaintiff's assent to the restriction of defendant's common law liability, equivalent to an express agreement, and affects plaintiff with legal notice of its terms.

   (3) Ordinarily, a stipulation to ship "at company's convenience" is too indefinite, and therefore unreasonable; but under the circumstances in this case, the defendant is entitled to set up the agreement as a defence to the action for the penalty.

   (4) Common carriers exercise a *quasi* public office, and are subject to legislative control.

SMITH, C. J., *Concurring.*

RUFFIN, J., *Dissenting.*

(256) CIVIL ACTION begun before a justice of the peace and tried on appeal at Spring Term, 1882, of EDGECOMBE Superior Court, before *Bennett, J.*

This action was brought to recover the penalty under the act of 1874-75, ch. 240, sec. 2, for failing to ship the cotton of the plaintiffs for more than five days after its delivery to defendant company.

The act is as follows: It shall be unlawful for any railroad company operating in this state to allow any freight it may receive for shipment, to remain unshipped for more than five days, unless otherwise agreed between the company and the shipper; and any such company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same.

A jury trial was waived, and the facts were found by the court as follows:

1. Plaintiffs delivered to defendant's agent at Battleboro station on the 2nd of November, 1881, four bales of cotton consigned to Tredwell & Co., at Norfolk, Virginia, and the defendant allowed the same to remain unshipped for six days in excess of five full days of demurrage.

2. A bill of lading, of which the following is a copy, was executed on the day the cotton was delivered:

[No. 264] WILMINGTON & WELDON RAILROAD, (257)
BATTLEBORO STATION, Nov. 2d, 1881.

Received of Whitehead & Stokes for transportation, at company's convenience, with liberty to compress while in transit, as per marks and directions as herein given, subject to the conditions stated upon the back of this receipt, and to which, by the acceptance thereof, the shipper assents, the following described bales of cotton. (The marks indicated the consignors, number and weight of the bales of cotton, and name and place of consignee, and the receipt was signed by the company's agent.)

3. The said bill of lading was on the same, or the next day, put into the hands of W. D. Stokes, one of the firm of Whitehead & Stokes—both members of the firm being educated men, able to read and write.

4. The cotton was not shipped until the 14th of November, 1881.

5. The said firm did not know the contents of the bill of lading, and never read it, until after suit brought, nor did the said agent of the defendant.

6. The road of defendant company is a connecting link in the Atlantic Coast Line, and the defendant's rolling stock was sufficient to transfer all the freight which came to it, either as through or local freight, with prompt dispatch.

7. Early in September, 1881, the Seaboard & Roanoke Railroad Company, one of the links of the Atlantic Coast Line, notified the defendant that it would not transfer over its road flat-cars, belonging to defendant company, loaded with bales of cotton.

8. During the months of October, November and December, 1881, there was an increase of 4,836 bales of cotton carried by defendant over its road, as compared with the same months of the year before.

9. Of such increase 734 bales were at Battleboro and Whitaker's stations, and 1,149 bales were at points south of those (258) places.

10. The defendant owns 120 flat-cars, each of capacity to carry forty bales of cotton, and they could not have been replaced with box-cars between September and November, 1881.

11. Defendant shipped no cotton beyond its immediate line on flat-cars, after the notice from the Seaboard road, but did ship some flat-loads of cotton received by it from the North Carolina road.

12. Shipments of cotton over defendant's road were greater in November and December, each, than in October, 1881.

13. The cotton for which the bill of lading was given was through freight, the plaintiffs applying for and receiving the same, to a point without the state and beyond the terminous of defendant's road, and a through bill of lading was advantageous to plaintiffs by giving them lower rates, and also to defendant by obviating the necessity of breaking bulk at Weldon (the northern terminus of defendant's road.) Through bills of lading have been in use by defendant for ten years.

14. There was an increase in the tonnage carried over defendant's road during October, November and December, 1881, of 11,054,437 pounds.

15. The cotton of plaintiffs received by defendant was carried through to Portsmouth, Virginia, in cars belonging to defendant.

16. The refusal of the Seaboard road to carry flat-cars of defendant loaded with cotton, over its road, and the increased tonnage of defendant's freight and detention of defendant's cars at Portsmouth, were causes of delay in carrying through freight.

17. Plaintiffs knew that the cotton was not shipped within five days after delivery, and yet made no objection before the 14th of
(259) November, 1881, to the bill of lading; but did not know at the time, that is, during the delay in shipment, the contents of the bill of lading.

18. Defendant has used flat-cars for ten years in shipping cotton.

19. The delay in the shipment was not caused by competition for through freight.

20. Defendant employed the services of a car-tracer, and used the telegraph wire almost daily to get its cars returned promptly from Portsmouth; and if its cars had been used to carry freight to Portsmouth, all freight could have been moved without delay.

21. The form of said bill of lading was first used by defendant after the ratification of the said act of 1874-75.

22. The defendant, in fact, ran over its road two kinds of freight trains, a "through" and "local," and the same number of each, daily; the through freight train took no freight along the line of road between Wilmington and Weldon, except at Goldsboro, (where now and then it took on cars). These freight trains were made up of cars belonging to the Seaboard road, as well as those of the defendant.

Upon these facts the judge held that the defendant was liable to the penalty of twenty-five dollars per day, for six days. Judgment was accordingly rendered in favor of the plaintiffs, and the defendant appealed.

The defendant excepted to the conclusions of law as announced by his Honor, because,

1. Under the facts found the defendant is exonerated from the penalty, and the judgment is erroneous.

2. By applying for a bill of lading to have freight shipped beyond the state and defendant's terminus, and receiving the same, the plaintiffs thereby waived the penalty.

3. The plaintiffs, having received the bill of lading and having made no objection thereto, are bound by its terms.

4. The act cannot be construed to embrace freight agreed to be shipped as through freight by defendant, and beyond its line (260) and out of the state.

5. The act is unconstitutional, in that; first, it is in contravention of defendant's charter, and secondly, it affects inter-state commerce.

Messrs. Bunn & Battle, for plaintiffs.
Mr. John L. Bridgers, Jr., for defendant.

ASHE, J. We cannot concur in the conclusion of law to which the court came, upon the facts found.

The action is brought upon a penal statute, which is always to be construed strictly in favor of those who are charged with violating its provisions. The rigid rules, therefore, of the common law with reference to the liability of common carriers, should not be applied to a case involving the violation of a penal statute.

In *Branch v. R. R. Co.*, 77 N. C., 347, which like this was an action to recover the penalty given by the act of 1874-75, it was very clearly intimated, that the excuse of inability to provide cars sufficient to transport the freight delivered to the company, in consequence of the accumulation of freight, would have availed the defendant as a defence to the action, if it had not caused the accumulation by a competition with other roads for through freight.

In *Keeter v. R. R. Co.*, 86 N. C., 346, which has been referred to as authority for the position that no excuse is admissible to exempt a railroad company from the penalty, when it violated the letter of the statute, it may be well to observe that this court did not enter fully into the discussion of that question; for it was not necessary to do so, as the case turned upon the point, that the delay with which the defendant was charged, had not continued beyond five full running days. *Branch's case* was cited as authority for that position, and the case went off upon that point. The other point as to the excuse, did not engage the special attention of the court, as its consideration (261) was not necessary to the decision of the case; and the court could not have intended to hold that there could be no excuse, when it was citing *Branch's case* with approval, in which it is conceded that excuses may be admitted.

The question then is, has the defendant incurred the penalty, or are the excuses given by it sufficient to exonerate it from liability?

The statement of the case discloses the following facts:

That there was a considerable accumulation of freight along the line of defendant's road during the months of October and November, caused by an increase in the crop, but not by any competition of the defendant for through freight.

That it had been shipping cotton on flat-cars over the Seaboard road for ten years previous to October, 1881, and had 120 cars, each with capacity to carry forty bales of cotton, which were sufficient to transport all the freight that came to it, either as through or local freight, with promptness and dispatch. But sometime in September, 1881, the Seaboard road notified the defendant that it would not transfer over its road flat-cars, belonging to the defendant, loaded with bales of cotton; and after that, box-cars in place of these excluded cars, could not have been procured before the 2d day of November, when the cotton was delivered by the plaintiffs for shipment. After the exclusion of its flat-cars from the Seaboard road, the defendant was put under the necessity of running through to Portsmouth its box-cars to carry freight through, and but for that, could have transported all the freight delivered.

That the delay in shipping the plaintiffs' cotton was caused by the increase in freight, the refusal of the Seaboard road to admit the defendant's flat-cars on it, loaded with cotton, the detention of its
(262) box-cars at Portsmouth, and its inability to procure other cars in time for this shipment.

And for these causes of delay, it does not appear that the defendant was in any way responsible. It could not have prevented the increase in freight, nor the unexpected action of the Seaboard road in reference to its flat-cars, and it seems, it did all in its power to prevent the detention of its cars at Portsmouth. It employed the services of a "car-tracer," and used the wires almost daily to get its cars returned from Portsmouth.

It is true, if the defendant's box-cars had not been used to carry the freight through to Portsmouth, the plaintiffs' cotton and all other freight could have been moved without delay. But a through bill of lading is advantageous to both parties—to the defendant, by saving it the trouble and expense of breaking bulk at Weldon, and to the plaintiffs, by giving them lower rates of transportation, and this is probably the reason they applied for and received a bill of lading for through freight to Norfolk; and after doing so, it will not do for them to say, if their cotton had been shipped only to Weldon and the defendant's box cars had not been used to carry cotton to Portsmouth, the delay would not have occurred.

The delay in making the shipment then, it seems, has not been caused by any act of negligence or default on the part of the defendant, but resulted from the concurrence of circumstances entirely beyond its control. And if a common carrier can be exonerated in any case from the penalty given by the statute, we think this is one of the cases where it should be excused. When the facts as found in this case show that, by force of circumstances for which it was in no way responsible, it was disabled from performing the duty imposed by the statute, it would be unjust to punish it for failing to comply with its requirements.

Every common carrier who receives goods for transportation is bound to ship them within a reasonable time, and when the (263) common law imposed that duty, and the legislature defines what is reasonable time, and subjects to a penalty the failure to comply with its requirements, *unless otherwise agreed* between the railroad and the shipper, the burden is on the railroad company to show the agreement relied upon in its exoneration. The defendant here says there was such an agreement between the railroad and the plaintiffs, and points to the restriction in the bill of lading given the plaintiffs, which is, *that the cotton of plaintiffs is received for transportation at company's convenience.*

That a railroad may restrict its common law liability, except for its own or its servants' negligence, is now generally admitted to be law. Redf. on Railways, 99, and the authorities there referred to; *Capehart v. R. R. Co.*, 81 N. C., 438, and cases there cited.

But to avail the defendant, the restriction must be brought to the knowledge of the shipper; and it is held that a restriction in a bill of lading given to the shipper at the time of the delivery of the goods, and received by him without remonstrance or objection, is evidence of an assent to the restriction, and is equivalent to an express agreement. *Burgess v. Townsend*, 37 Ala., 247; *Belger v. Ginsmore*, 54 N. Y., 166.

The plaintiffs however say they did not read the terms of the shipment until a few days before the action was commenced, but they could read, and the condition is in full print upon the face of the bill of lading, and it was their own fault they did not read it. We think it affected them with legal notice. *McMillan v. R. R. Co.*, 16 Mich., 79.

There was here then an agreement between the plaintiffs and the defendant company to ship the plaintiffs' cotton *at its convenience*, and the question resolves itself into the inquiry whether the restriction or agreement was reasonable.

Except under circumstances like those disclosed in the case, we should unhesitatingly hold that it was not a reasonable restric- (264) tion upon defendant's liability. When it is its duty to ship in a reasonable time, and the law limits the time to five days, a stipulation

to ship *at convenience* is too indefinite, and therefore unreasonable. But under the extraordinary combination of adverse circumstances developed in this case, over which the defendant had no control, nor power, nor means to prevent or foresee, we must conclude that the condition was not so unreasonable as to prevent the defendant from setting it up as a defense, in an action for the penalty prescribed by the statute.

The view we have taken thus far, disposes of the first four points of law raised by the defendant in the court below.

But the defendant also insisted that the act of 1874-75 is in violation of the constitution, and in contravention of its charter. Both of these questions are definitely settled adversely to the defendant's position, by the decision in *Branch's case, supra.*

The defendant further contended that said act affected inter-state commerce, and was therefore void. But this question has been as satisfactorily settled as those just mentioned. The Supreme Court of the United States has recently decided that railroads as common carriers exercise a sort of public office, and have duties to perform in which the public is interested; and that being so, they are subject to such regulations as may be established by the proper authorities for the common good. And where a railroad is situated within the limits of a single state, its business is carried on there; and its regulation being a matter of domestic concern, if it is employed in state as well as interstate commerce, unless congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its territory, though in doing so,
(265) it may indirectly operate upon commerce outside its immediate jurisdiction. *Munn v. Illinois,* 4 Otto (U. S. Rep.), 113; *Chicago, Etc., v. Iowa, Ib.,* 155.

In view of the special circumstances of this case, our conclusion is that the defendant is exonerated from liability to the penalty, and that there is error in the judgment of the superior court, which is therefore reversed, and judgment must be entered here for the defendant.

SMITH, C. J., *Concurring.* I concur in the conclusion reached by my brother ASHE, that upon the facts found by his Honor the defendant company has not incurred the penalty imposed by the act of 1874-75, for delay in transporting the plaintiffs' goods. It is given to any person suing for the same, whenever any railroad company operating in the state shall *allow* any freight it may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper—contemplating a voluntary and unreasonable delay in forwarding.

When the construction of the act came before the court in *Branch v. R. R. Co.*, 77 N. C., 347, in answer to the argument that it was in violation of charterd rights, RODMAN, J., delivering the opinion, declared that "the act does not supersede or alter the duty or liability of the company at common law; the penalty in the case provided for is superadded; the act merely enforces an omitted duty."

It therefore becomes a question, whether, if the owner sued to recover damages for the delay, the matters in explanation and excuse would be a defence to the action, and exonerate the company from the imputed negligence on which its liability depends. The delay is accounted for by the defendant on the ground that early in September the Seaboard and Roanoke Railroad Company, one of the connecting lines over which the cotton was to pass in reaching the place of destination, refused to carry cotton longer over its road in flat or open cars, rendering (266) useless to the defendant for that purpose 120 cars of that class, before in use as part of its rolling stock, and its inability to procure box or close cars to take their place after such notice and before November, on the second day of which the cotton was placed in the defendant's warehouse; and further, because of the large accumulation of freight in excess of that received the previous year, during the same interval, heavily taxing the resources of the company and its means of transportation.

It is found by his Honor in general terms that these, and the detention of the defendant's cars at Portsmouth, the northern terminus of the through route, notwithstanding the diligent efforts of the defendant by the constant use of the wires to procure their prompt return, were causes of delay in carrying through freight.

Under these circumstances can it be said that the defendant did *"allow,"* in the sense of the statute, that unreasonable delay in forwarding the goods, which subjects to the condemnation and severe inflictions, irrespective of actual damage, imposed therefor? The enforcement of such a construction would be harsh to those public carriers that are made to suffer by it, and would not subserve any good purpose to those for whose benefit it was made. There is no discrimination made between through and local freight, since trains of each kind ran each way daily over the road, furnishing equal facilities for the moving of both.

In construing a statute of New York, which requires its railroad corporations to have fixed times for running their passenger and freight trains, and that they shall "furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting and the junctions of other railroads, and at usual

stopping places established for receiving and discharging way
(267) passengers and freight," etc., in an action brought to recover damages for delay, the court of appeals of that state use this language: "What is a reasonable period must depend upon the actual circumstances existing at the time the property is offered for transportation."

Referring to the finding of the referee, DENIO, J., states them summarily thus: The defendants were without fault in respect to the state of their roads; they had provided sufficient cars and engines, and sent forward as many freight trains as safety would permit; but owing to an unusual demand for transportation at that time, the plaintiff's property could not be sent forward faster than it was sent. If under such circumstances a railroad company would be liable on account of a tardy delivery, the business would be quite too hazardous to be followed by business men. * * * If, when a particular parcel is offered, the next train is filled up, the goods must wait for the succeeding train; or if, on account of an unusual accumulation, the means of transportation for several successive trains, or for several days, are anticipated, the property must remain until its time shall arrive, *subject to the qualification that the company must not be in fault in providing sufficient accommodation for the general traffic of the road under ordinary circumstances. Webert v. N. Y. & E. R. Co.*, 2 Kernan, 245.

The principle extracted from this case is thus declared by an eminent author: "If the carrier, being a railway company, make no special contract to deliver in any particular time, and a delay happen in the transportation in consequence of an unusual press of business, the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances, they are not liable for damages." 2 Redf. on Railways, Sec. 173 (2).

This seems to be a just view of the carrier's liability at common law; and the statute, as this court declare in the case cited,
(268) does not enlarge or extend the obligation, but merely provides an additional method of enforcing it.

In ascertaining the legislative will, as conveyed in enactments, it is the duty of the court to put a fair and reasonable interpretation upon the language used to express it, so as to subserve the ends to be attained without injustice to those of its citizens upon whom its provisions operate. And in my opinion the delay was not *allowed*, that is, the transportation not unreasonably and negligently deferred, so as to expose the defendant to the punitive inflictions of the statute.

I therefore express my concurrence in the opinion delivered as that of the court.

RUFFIN, J., *Dissenting.* I am always distrustful of myself when differing in opinion with my associates, and nothing induces me to do so now, but a conviction, so strong, that I cannot get rid of it, and yet one which I most respectfully give utterance to, that the conclusion reached by them in this case is not a correct one in principle nor supported by authority.

In the first place, I cannot agree that the statute under which the plaintiffs proceed, and to which reference is had in the opinion of the court, should be strictly construed because of its nature. It imposes no new duty upon the defendant, nor adds to or alters the obligations which it has voluntarily assumed. Like every other common carrier, the defendant owes the duty, by virtue of the common law alone, of providing adequate facilities for the transportation of goods received by it for that purpose, and of transporting them within a reasonable time. And the statute, so far from being in derogation of common right, is intended simply to enforce an admitted duty, and to declare a reasonable time within which it must be performed. Its purpose is to promite the public convenience, and therefore its interpretation should be, neither liberal nor rigid, but *just*, and such as (269) will give effect to the salutary intention of the legislature; and nothing short of that diligence, which would acquit the defendant of its common law duty and liability, should be allowed to exonerate it from the penalty prescribed by the statute.

In the next place, the fact, as established by his Honor, that so soon as the statute was enacted the defendant adopted for use the form of the bill of lading, given to the plaintiffs, promising *to transport at the convenience of the company,* goes very far towards proving that its conduct in the matter has not, at all times, been controlled by the pressure of necessity, so much as by a purpose to evade the law, and at the same time avoid the consequences of so doing. It is difficult under such circumstances to listen with entire confidence to the tale of an overruling necessity, which the defendants puts up in the case.

The statute, however, provides that the parties may by special agreement regulate the time of shipment, and the defendant insists that it has done so in this case, and that by such agreement it was allowed *to transport at the convenience of the company.* But, as I understand the opinion of my brethren, they hold that such a stipulation as this is too unreasonable and uncertain to have the effect of taking the case from within the statute, (and in this conclusion I most heartily concur) and the exoneration of the defendant is made to depend solely

upon the circumstances of uncontrollable necessity, in which it unexpectedly found itself placed.

What those circumstances are, thus relied upon by the defendant, is clearly established by the findings of the judge in the court below, and (discarding all immaterial matters) may be stated to be:

1. The increase in the defendant's freight and tonnage in the
(270) fall of 1881, resulting from the increased crop of cotton made that year.

2. The detention at Portsmouth of such of defendant's cars as had been sent forward to that place.

3. The refusal of the Seaboard and Roanoke railroad company to transfer its flat-cars if loaded with cotton.

And the only remaining question is as to their sufficiency for the purposes for which they are invoked.

As to the first—The increase in freight and tonnage: It has been solemnly adjudged by this court in *Branch v. R.R. Co.*, 77 N. C., 347, to be insufficient to excuse the negligence of a carrier, such as the defendant is, for that, it is the duty of every carrier who invites custom, and especially one having a monopoly of carriage, *to foresee* with approximate accuracy any increase of *local freight* that may be likely to occur, and to provide for it, in anticipation, the requisite power and vehicles of transportation.

Second—The detention of the defendant's cars at Norfolk, surely, is entitled to no more weight than the other excuse. It could have proceeded only from one of two causes—either the defendant or its co-operating roads must have failed to provide sufficient car-force for the work to be done upon the whole line, or else some one of the other roads has been positively negligent in returning the defendant's cars when not needed. And if from the latter cause, then, the defendant has its redress upon that negligent company for any damages it may have to pay the plaintiffs.

Third—the refusal of the connecting road to transfer the defendant's flat-cars seems to fall directly within the principle decided in *Condict v. R.R. Co.*, 54 N. Y., 500. There, the defendant being a railroad carrier had an arrangement with other roads as to freight and the division thereof, which however proving unsatisfactory, those roads, about two weeks before the plaintiff's goods were delivered for transportation, refused to take any more goods from the de-
(271) fendant without an increase in charges, which defendant refused to pay, and hence the plaintiff's goods were delayed; *it was held* that the defendant should not, with a knowledge of all the facts, have contracted for the delivery of the goods within a reasonable time, at

least, without giving the owner notice of the difficulties in the way. And just so it is with this defendant.

With a full knowledge of its lack of proper facilities for shipping cotton, and having had timely notice given it of the purpose of the connecting road not to receive it when loaded upon flat-cars, it contracted, without a word of warning to the plaintiffs, for the delivery of their cotton at Norfolk with reasonable dispatch; and it is now too late for it to claim exemption from a delay caused by the refusal of the other road.

Again, upon what was that refusal to transfer flat-cars based? Manifestly upon the well known insecurity which attends that mode of moving cotton. And should the defendant, who owes the duty of providing safe as well as prompt transportation, be permitted to excuse its negligence upon a plea that for ten years it had resorted to that reckless mode of shipment? This, to my mind, is to allow the defendant to take advantage of its own wrong, and to establish for itself an immunity by its own persistent violation of duty.

Another fact found by the judge, and I think conclusive upon the point of defendant's liability, is, that during the whole of the eleven days in which the plaintiffs' cotton was delayed, the defendant had, in addition to its "local freight train," a regular "through freight train," composed of its own cars and those belonging to the Seaboard road, which passed daily by its depot where the cotton was stored; but, that upon this latter train, it permitted no goods to be shipped at any point north of Wilmington, with the single exception of Goldsboro.

Now according to the decision in *Branch's case, supra,* it is (272) at this point that the defendant was most at fault, and utterly without any justification. It is there said, that the chief object sought to be attained by the statute is the *protection of local shippers,* for whose benefit and by whose money the road was principally built, and to prevent their being sacrificed because of the complete monopoly which the company enjoys, as against them, in the effort to secure freight from Wilmington and points further south. It is expressly declared, also, that while it is the duty of railroad carriers to provide for all freight offered, through as well as local, still, if for any unexpected reasons they cannot accommodate all, their first and highest duty is to their local customers, whose wants they are bound to foreknow and provide for; that to these they owe an *absolute* duty, while to the others, but a reasonable one.

As I view it, this court has never rendered a decision more important in its consequences, and so nearly affecting the every day interests and welfare of the people of the state, as this one in *Branch v. R.R. Co.,*

supra. It was delivered after much consideration, as is shown by the learning and sound reasoning it displays; and believing it to be supported by the highest considerations of public utility, I confess, it is with the deepest concern that I see its principles departed from, as seems to me to have been done in the decision of this case.

PER CURIAM. Reversed.

Cited: Branch v. R.R., 88 N.C. 574, 575; *Bell v. R.R.*, 88 N.C. 701; *Middleton v. R.R.*, 95 N.C. 169; *McGowan v. R.R.*, 95 N.C. 427; *Alsop v. Express Co.*, 104 N.C. 299; *Hodge v. R.R.*, 108 N.C. 32; *Sutton v. Phillips*, 116 N.C. 505; *Carter v. R.R.*, 126 N.C. 444; *Alexander v. R.R.*, 144 N.C. 100; *Stone v. R.R.*, 144 N.C. 223, 224; *Jenkins v. R.R.*, 146 N.C. 183; *Garrison v. R.R.*, 150 N.C. 580; *Reid v. R.R.*, 150 N.C. 764; *Kime v. R.R.*, 160 N.C. 464; *Grocery Co. v. R.R.*, 170 N.C. 244.

(273)

B. M. CARPENTER, AND OTHERS, v. H. B. HUFFSTELLER, ADM'R, AND OTHERS.

Amendment of Pleadings—Evidence—Fraud—Impeaching Decree.

1. No amendment of pleadings is permitted, where the proof establishes a case different from the one alleged in the complaint.
2. In an action to impeach the sale of land by an administrator upon the ground of fraud, and an issue submitted as to defendants conspiring to destroy competition among bidders, *it was held*, that the plaintiff could not be allowed to offer in evidence the record of a homestead allotment and a deed from the administrator to show that the land was sold subject to the same, or to show irregularity in the proceedings to obtain license to sell, or the value of the land sold—the proof forming no part of the alleged fraudulent conduct of the defendants.

CIVIL ACTION tried at Fall Term, 1881, of GASTON Superior Court, before *Avery, J.*

This action is brought to impeach a sale of lands made by the defendant Huffsteller, as administrator of J. M. Roberts, deceased, to his widow, and to have the order of the probate court confirming the same set aside upon the ground of fraud.

After setting out the death of said intestate in 1865, and the appointment of the defendant as administrator, the plaintiffs, who are creditors holding claims against him matured at the date of his death, allege that he died seized of the land in question, containing 396 acres, subject to the dower right of his widow, the defendant Lucinda R., who

procured the same to be allotted to her, covering 122 acres of the tract; that the administrator then instituted proceedings and obtained leave to sell the land for assets, and accordingly did sell it, on the 20th day of April, 1869, when the defendant Lucinda R. became the purchaser at the price of $122.50, and made report thereof to said court, and the sale was confirmed; that the land was then worth, even with the incumbrance of dower upon it, the sum of (274) $1200, but that with a view to deter other persons from bidding, and to enable the widow to purchase at an under-value, the defendants conspired to have it understood that she was also entitled to homestead in the land, and the same was sold subject to that right and as if the homestead had been actually allotted to her, whereas they well knew that no such right existed, and no such allotment had been made.

The plaintiffs also allege that the defendant administrator has since settled his account with the probate judge, showing that all assets which came to his hands had been exhausted, except the sum of thirty-five cents, and that if the sale of the land, thus fraudulently conducted, is to stand, they will be without the means of obtaining satisfaction for their demands against the estate.

They therefore ask that the order confirming the sale be vacated, and the sale itself declared void, and a new sale ordered, and that an account may be taken of the administration of the assets.

The defendants admit that the land was sold subject to both dower and homestead, but deny that it was fraudulently done. On the contrary they say that the widow was expressly advised by counsel that she was entitled to homestead, and that acting upon such advice she made due application for its allotment for herself and children, and the same was regularly made and recorded in the register's office of the county, and was so done at the time of the sale; and they aver that the sale was fairly conducted and the land brought a fair price under the circumstances.

When the cause was called for trial, the plaintiffs moved for a reference to take and state the account of the administration of the estate by the defendant, Huffsteller, which however was refused by the court. They then proposed to submit to the jury the following issues:

1. Was the defendant, Lucinda R. Roberts, entitled to home- (275) stead in the lands of her husband?

2. Was the assignment of homestead fraudulent and void as to the creditors of the estate?

These were objected to by the defendants because they did not arise upon the pleadings, and they tendered the following issue: Did the defendants, Huffsteller and Lucinda R. Roberts, fraudulently conspire to sell and buy said lands with the incumbrance of homestead

upon it, and by so doing to throw a cloud upon the title and deter others from bidding, and thus enable the said Lucinda R. to purchase at an under-value?

To this issue the plaintiffs assented, and stated that they could not maintain the affirmative thereof, and therefore the jury might find it in favor of the defendants.

His Honor then said that he would reserve his decision as to the issues as proposed by the plaintiffs, until he heard the evidence and the decision upon them.

The plaintiffs then offered in evidence the record of the homestead allotment, and the deed from the administrator to the widow, to show that the land was sold subject to the homestead right of the latter, but this upon objection of the defendants was excluded by the court, as not being material to any issue raised by the pleadings.

They next offered to show that there was irregularity in the proceedings under which the administrator obtained leave to sell the lands of his intestate, but this was also excluded upon the same grounds.

They then offered to show the real value of the land sold, but were not permitted to do so, the court holding that the evidence could only be material to the issue tendered by the defendants, and which with the consent of the plaintiffs had been found for the defendants.

Upon the issue thus found, judgment was rendered for the defendants, and the plaintiffs appealed, assigning for error the refusal
(276) of the court to grant them the reference asked for, and the exclusion of the testimony offered.

Messrs. Bynum & Grier, for plaintiffs.
Messrs. Hoke & Hoke, for defendants.

RUFFIN, J. It is with some reluctance that the court has concluded to affirm the judgment in this case; for though not entitled to be relieved to the extent to which they ask, or in the manner attempted in their complaint, we can see from the whole case that the plaintiffs have a right to some relief in the premises.

The sale by the administrator was expressly confined to the reversionary interest in the land, dependent upon both dower and homestead—the first embracing one third of the tract, and the latter the whole. As to the demands of the plaintiffs (there being no other property to satisfy them) the allotment of the homestead was a nullity, and since the administrator's deed could convey no more than was actually sold, it is manifest that some portion of the estate, to wit, that part of the land which is outside of the dower and embraced in the homestead, remains yet undisposed of, and subject to the claims

of creditors; and the only question is, whether, considering the state of their pleading, the court should have given them this relief in the present action.

This point is the only one which the counsel for the plaintiffs seriously urged before us: their argument being that the testimony offered, while at variance with the allegations of the complaint, still tended to show that the plaintiffs were entitled to relief against the defendants, and that the Code, in such cases, did not permit it to be altogether rejected, and judgment given against the party, as for the want of evidence, but required the court to admit the testimony, though variant, and then, by the allowance of proper amendments in the pleadings, to make the two consistent.

Conceding the liberality of the Code in the way of allowing (277) amendments, we can discover no where in this record any request, coming from the plaintiffs, to be allowed to amend their complaint, and we could not think of holding it to be the duty of the court, unsolicited, to thrust this advantage upon a party, and that a failure to do so, on its part, would amount to an error in law.

But more than this, and considering the question as one of legal right on the part of the plaintiffs, we have upon further reflection come to the conclusion that the testimony was properly excluded, and the judgment in the court below in all respects correct.

Liberal towards amendments as the code-procedure may be, it fails to provide for a case like this of the plaintiffs, wherein the variance is, not so much between the pleadings and the proofs, as in the substance of the two causes of action themselves—the one as stated in the complaint, and the other as in fact existing.

The right to recover, as set out in the complaint, arises out of and depends upon the fraudulent practices of the defendants, and yet the plaintiffs would recover upon proof of a cause wholly freed of every contrivance, and of which the alleged fraudulent conduct of the defendants forms no part.

It is an instance, therefore, in which the allegations of the cause of action are unproved, not as to some particulars only, but as to its entire scope and meaning, and rightly falls under section 130 of the Code which forbids the allowance of any amendments in such cases.

For the court to hold otherwise, and permit a plaintiff to recover upon proof of a cause of action, not only differing from but wholly inconsistent with the one alleged in his complaint, would be to dispense with everything like notice to the defendants, and thus defeat the very object sought to be attained by requiring the parties to file their pleadings.

(278) The rule that the *allegata et probata* must correspond, obtains under the Code, the same as under the old system, and it is as much incumbent upon a plaintiff to prove his case as alleged, as it ever was. The only observable difference between the old and the new system is, that the latter has introduced a new rule for determining what a variance is, and its consequences. A variance, so slight and unimportant that the adverse party cannot have been misled by it, is deemed immaterial, and the court will either order an amendment without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in the case of a material variance, so substantial that the adverse party may have been misled by the averments, still, if the proofs have an apparent relation to and connection with the allegations, the court will allow of an amendment, though, upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. C. C. P., Secs. 128, 129, 130, and Pomeroy on Rem., Sec. 553.

The case of the plaintiffs falls clearly within the principle last stated, and as the only effect of the evidence offered could be to prove a case wholly at variance and inconsistent with the case stated in the pleadings, it was properly excluded by the court.

We are unable to perceive any disadvantage to which the plaintiffs were put, by reason of his Honor's refusal to order the account to be taken of the administration of the estate. The sole object of the action is to impeach the sale of the lands and to procure a resale for the payment of debts, and, as the defendants admit, that so far as assets had come to the hands of the administrator, they had been fully and rightly administered, the plaintiffs could need nothing more in this regard to enable them to prosecute their action.

No error. Affirmed.

Cited: McLaurin v. Cronly, 90 N.C. 53; *Kron v. Smith,* 96 N.C. 391; *Brown v. Mitchell,* 102 N.C. 374; *Davis v. Stroud,* 104 N.C. 489; *Maggett v. Roberts,* 108 N.C. 177; *Faulk v. Thornton,* 108 N.C. 320; *Craven v. Russell,* 118 N.C. 565; *Reynolds v. R.R.,* 136 N.C. 349; *Wright v. Ins. Co.,* 138 N.C. 499; *Alley v. Howell,* 141 N.C. 115; *Adickes v. Chatham,* 167 N.C. 683.

(279)

W. A. POSTON v. JOHN ROSE.

Counter-claim—Appeal—Discretion of Judge in Allowing Plea.

1. In an action upon contract, though a lien upon property is involved, it is competent to the defendant to extinguish the debt due from him, by proof of counter-claim, and a verdict ascertaining the amount of the opposing demands is sufficient to sustain a judgment.
2. The subject matter in contest cannot be changed by a removal of a cause to the appellate court.
3. The plea of the statute of limitations, not relied on before a justice, cannot be set up on appeal in the superior court, without leave. Amendment of pleadings in such case is matter of discretion.

CIVIL ACTION tried at Fall Term, 1881, of ROWAN Superior Court, before *McKoy, J.*

This suit was begun on January 30th, 1879, before a justice of the peace by the issuing of a summons in which the defendant is required to answer the plaintiff, "in a civil action for the recovery of corn and flour furnished while cropping on defendant's land," accompanied by an affidavit in the prescribed form in a proceeding for the claim and delivery of personal property, under chapter 251 of the acts of 1876-77.

At the same time the plaintiff gave the required bond, but no indorsement in writing was made on the affidavit by the parties directing the officer to take the articles therein specified from the defendant, and deliver them to the plaintiff, nor were any further steps taken in relation thereto.

Upon the trial the plaintiff presented his account for goods sold and delivered in the sum of $40, and the defendant averred a payment of $10 on the claim set up, and relied on an account in the sum of $158.61 against the plaintiff, for board and lodging of plaintiff's child, and work and labor done, due himself, as a counter-demand.

Both parties introduced evidence in support of their respective (280) charges, and the defendant had judgment for the excess found due him, $112.58, and for costs.

These facts are embodied in the statement of the justice transmitted on the plaintiff's appeal to the superior court, with the itemized accounts produced by each on the trial.

The following issues were submitted in the superior court:

1. Is the defendant indebted to the plaintiff in the sum of $40, or any other sum? If so, how much?

2. Was any portion thereof a lien upon the crops of 1878? If so, how much?

3. How much is the plaintiff indebted to the defendant, by way of counter-claim?

The jury responded to the first issue that the defendant is indebted to the plaintiff to the amount of his account as sworn to; and to the second, none.

The answer to the third issue is, that the plaintiff is indebted to the defendant to the amount of his account as sworn to.

Upon this verdict the defendant recovered the excess of his claim, and from the judgment the plaintiff appealed.

Messrs. W. H. Bailey and J. M. McCorkle, for plaintiff.

Messrs. Kerr Craige and Lee S. Overman, for defendant.

SMITH, C. J., after stating the above. Various exceptions were taken to the rulings of the court during the progress of the cause, up to final judgment, by the appellant, which in the order of time we proceed to notice.

1. The first exception is to the submission of any issue in regard to the counter-claim, and the introduction of any evidence in its support, as not within the provisions of section 101 of the Code.

(281) It is manifest the form of the action as tried before the justice, and as understood by both parties, was upon contract, and the controversy was as to the validity and amount of the claims of each preferred against the other, and no objection was then made to the introduction and proof of the defendant's for the reason now assigned that it was inadmissible under the rules of the pleading.

It was certainly competent for the defendant to extinguish, by payment or proof of a counter-demand, the indebtedness due from the defendant, since the lien must be commensurate with the debt and will cease when it is discharged. It is not an action merely to recover the possession of the property to which the lien adheres, but to have the indebtedness ascertained and adjudged, and then to enforce its payment, if necessary by a sale of the property. In determining the amount of the claim so asserted, there is no reason why the defendant may not reduce the amount or discharge it by any proof pertinent thereto, or by effacing it altogether by a larger counter-demand.

It is true, in answer to the *certiorari* issued by order of the court, there has been sent up as found among the files a complaint appropriate to an action for the recovery of possession alone, but it is not recognized in the record and is at variance with the mode in which the proceedings have been conducted, and hence we cannot ascribe any legal effect to its presence, or allow it to control what was done in the court below. The justice pursuant to the statute (Bat. Rev., ch. 63, sec. 57,) has made

"a return to the appellate court and filed with the clerk thereof the papers, proceedings and judgment in the case," and until an amendment is allowed, this must be deemed the case constituted by the appeal, and to be there retried. If new amendments in the complaint, changing the nature of the matters in contest, or new and different defences are made after the removal, it must be with the approval of the court, and is not a matter of right to either. No such changes are shown by the record to have been asked or allowed, and therefore the trial (282) rightfully proceeded in the appellate court upon the issues tried in that of the justice. These exceptions are therefore overruled.

2. The defendant was entitled to claim for services rendered by his wife with his approval and her consent that he should have them.

3. The defence of the statute of limitations was not set up on the former trial to defeat the counter-claim, nor permitted to be added by his Honor, and hence it was unavailing. *Hinton v. Deans,* 75 N. C., 18.

We do not assent to a construction put by plaintiff's counsel on rule 1 of section 20, chapter 63, of Battle's Revisal, that inasmuch as the pleadings in a justice's court consist of the complaint and answer, of which a counter-claim forms part (rule 4), therefore any and all defences are open to a counter-claim in the appellate court, whether made in that of the justice or not, for such a practice would often thwart the course of justice and be a surprise for which the other party would not be prepared. While the *pleadings* need extend no further, the subject matter in contest should not be changed by the removal of the cause to another appellate tribunal; and without this interpretation, the act requiring the return of proceedings had before the justice for the information of the court above, would be meaningless.

We see no reason why, if the statutory bar was not relied on in the first trial it could not be set up without leave of the court in the second trial, as was decided in *Hinton v. Deans,* it is not equally inadmissible to set it up under like circumstances to defeat the counter-claim which is virtually a cross-action itself, with reversed relations of the parties.

4. The only remaining exception to be noticed is to the vagueness of the findings upon the opposing claims. These accounts are part of the record, and the verdict is rendered definite and certain by reference (283) to them, and the rendition of the judgment only requires the subtraction of the one from the other, and the ascertainment of the difference in their amounts. A verdict very similar was upheld in *Ransom v. McClees,* 64 N. C., 17, where the finding was "that one bond should off-set the other," which PEARSON, C. J., delivering the opinion, says, "was in substance a verdict for the defendant, and his Honor might well have instructed the clerk to so enter it."

The present finding is separately in favor of each of the rendered accounts filed, and which were in evidence before the jury, and there can be no uncertainty as to the sums intended.

No error. Affirmed.

Cited: Moore v. Garner, 109 N.C. 158; *Lumber Co. v. McPherson,* 133 N.C. 290; *Dameron v. Carpenter,* 190 N.C. 598.

E. C. CHASTAIN v. S. P. CHASTAIN AND OTHERS.

Certiorari—Appeal.

A *certiorari* stands upon the same footing as an appeal. The case of *Bryson v. Lucas,* 85 N. C., 397, in reference to the statute requiring the justification of sureties to the bond in such case, is approved, but a wish expressed by the court that the legislature will relax the stringent requirements of the statute.

CIVIL ACTION, tried upon a demurrer to the complaint, at Spring Term, 1881, of CLAY Superior Court, before *Bennett, J.*

Judgment overruling the demurrer was rendered by the court, but by reason of matters beyond their control the defendants were prevented from taking their appeal in time, and at the October Term, 1881, of this court they made application for a writ of *certiorari,* and the
(284) same was granted and issued returnable on the first Monday of April 1882.

There was a return to the writ and the cause docketed on the 6th day of April, 1882, and continued at that term because not reached on the call of the docket.

When called for trial at this term, the plaintiff moved to dismiss upon the ground that the bond which the defendants had given, was not justified according to the statute. This motion the defendants resisted upon the ground:

1. That though the record sent was attached to the writ of *certiorari,* it did not in terms purport to have been sent in obedience thereto, and so might be disowned by the defendants and an *alias* writ asked for.

2. That as the case was docketed and stood for trial at the last term, the motion to dismiss should have been made at that time, and not being made then, it is now too late.

Messrs. G. A. Shuford and Gray & Stamps, for plaintiff.
Messrs. Merrimon & Fuller, for defendants.

RUFFIN, J. The court feels constrained, though reluctant, to yield to the plaintiff's motion to dismiss. A *certiorari*, being but a substitute for an appeal, can only be allowed upon the same terms as are prescribed for it, and must be attended by like security. *Estes v. Hairston*, 12 N. C., 354.

The defendants having, themselves, recognized the record sent from the superior court as a return to the writ of *certiorari* issued from this court, and as such procured the same to be docketed, it is now too late to disclaim it. Besides this, it is attached to and associated with the writ, and it is impossible to avoid knowing that it was sent in obedience to the writ and as a return thereto.

As decided in *Hutchison v. Rumfelt*, 82 N. C., 425, a motion to dismiss an appeal for irregularity may, under the rule of this court, be made at the time when the cause is called for trial, though it may have been on the docket at a previous term and continued for (285) want of time to try it.

It is much to be hoped that the legislature will, in some way, relieve the court and the parties from the present stringent requirements of the law with reference to appeals.

The terms of the statute are so plain that we could give them no other interpretation than the one adopted in *Bryson v. Lucas*, 84 N. C., 397, and yet we are painfully conscious, at times, of its doing injustice to parties.

The motion to dismiss is allowed.

PER CURIAM. Motion allowed.

N. C. HALL v. SAMUEL YOUNTS AND OTHERS.

Partnership—Evidence—Conversion, Measure of Damages—Judgment—Costs—In Forma Pauperis.

1. Where members of a firm are sued as individuals for the conversion of plaintiff's property, evidence of transactions with the firm in respect to it, and of the membership thereof, is competent to affect them. Each and every member is responsible for the tortious acts committed by an agent of the firm in matters connected with the business, and a partner, acting in their name and with their knowledge, is regarded as their agent.

2. Evidence of the declarations of a partner, upon whom there was no service of process as a party to the suit, is competent against his co-partners. Nor does the mistake made by one of the firm in drafting what purported to be an attachment bond in this case, affect the competency of the bond as evidence for the purpose for which it was offered.

3. A deed conveying a "black horse" to defendant mortgagee, is evidence upon the question of title, though the plaintiff's complaint describes the horse as being of a different color. The question of identity of the property is one of fact for the jury.
4. Where property is seized, the burden of proof rests upon him who makes the seizure, to show proper legal process; and the court will presume that an unauthorized seizure is in violation of the laws of another state.
5. The value of the property at the time of the tortious taking, is the measure of damages in a suit for its conversion. It was therefore error to permit the jury to add to the damages the expenses incurred by the mortgagee in this case in going to South Carolina to recover it.
6. A judgment rendered in favor of a plaintiff, and an affirmative one in favor of a defendant, though written and attested separately, constitute but one judgment.
7. A party suing *in forma pauperis* is not allowed to recover cost of action. (But in this case, as no objection was taken in the court below, and the matter not brought to the attention of the judge, the court will not disturb the judgment for costs.)

(286) CIVIL ACTION tried at Spring Term, 1882, of MECKLENBURG Superior Court, before *Gudger, J.*

This action is for the conversion of a horse of the value of one hundred and twenty-five dollars, and of a saddle, blanket and bridle of the value of ten dollars. It was commenced against Samuel Younts, John Younts, James Wolfe, John Grier and S. L. Hoover, but the summons was not served on Grier.

The complaint, after averring the title of the property to be in the plaintiff, subject to a chattel mortgage given to the defendant, Hoover, upon which there was a balance due of twelve dollars, alleges that the defendant Wolfe and one Powell acting in behalf of the other defendants, except Hoover, wrongfully took the property from the plaintiff's possession, and that it was afterwards converted to their own use by the defendants in whose behalf it was done.

It is also alleged that the defendant, Hoover, being mortgagee as aforesaid, refuses to join the plaintiff in the action, and therefore is made party defendant, though no judgment is asked against him.

(287) The answer of the defendants, Samuel and John Younts and James Wolfe, consists mainly of a denial of the allegations of the complaint, and as a further defence alleges that the property was taken from the plaintiff's possession, while in South Carolina, by the said Powell, acting as an officer of that state, to wit, as constable.

The defendant, Hoover, also answered insisting upon his right as mortgagee to recover of his co-defendants for the conversion of the property, and alleging that he had made a demand on them for the property which they refused to deliver.

On the trial issues were submitted to the jury and responded to as follows:

1. Did the defendants, or any of them, wrongfully convert the property mentioned in the complaint, and if so, who? Answer—Yes: Samuel Younts, John Younts and James Wolfe.

2. What damages, if any, did the plaintiff sustain by reason of such conversion? Answer — Total damages one hundred and thirty-five dollars with interest from the date of seizure.

3. What damages, if any, did the defendant Hoover sustain by reason of such conversion? Answer. Hoover as mortgagee $10.55 with interest from maturity of mortgage, and damages by trip to Fort Mills in South Carolina, $5.00.

4. Was the horse described in the complaint the same with the one included in the mortgage? Answer. Yes.

The court thereupon gave judgment in favor of the plaintiff according to the finding of the jury in his behalf, and also for the costs of the action, and at the same time, though on a separate paper, judgment was rendered in favor of defendant, Hoover, according to the verdict in his behalf, including the sum of $5.00 allowed for his expenses incurred. Defendants appealed.

Messrs. Jones & Johnston, for plaintiff. (288)
Mr. T. M. Pittman, for defendants.

RUFFIN, J. Several of the exceptions taken in the cause turn upon matters of fact and have been decided by the jury.

Taken in connection with the verdict, the evidence discloses the following case: The plaintiff is a resident of this state and owned no other property than that mentioned in the complaint. He was indebted to the firm of S. Younts, Son & Co. in the sum of $65.00 due partly by note and partly by account—the said firm being composed of Samuel Younts, John Younts and James Wolfe, parties defendant, and W. E. Younts and John Grier who are not sued.

In March, 1879, the plaintiff started on a visit to some relatives and passed the store of the defendants, and had some conversation with Sam'l Younts about trading horses, and informed him where he could stop that night at a place in South Carolina.

Plaintiff went to the place, and during the night the defendant Wolfe and one Powell came there and took possession of the horse, bridle, blanket and saddle, and carried them away, so that witness has never recovered them since.

When making the seizure, Wolfe said they had an attachment, but no such paper was then produced, nor was it on the trial—though Powell was a constable in South Carolina.

The defendant Hoover had a mortgage on the property upon which there was a small balance due him. After the seizure he met with the defendant John Younts, and asked him if he did not know that he had such a mortgage, to which he replied that he did not, and upon being assured that such was the case told said defendant "to go and prove his horse." Hoover then went to Fort Mills in South Carolina, where the horse was, and demanded it of the person in possession of it—
(289) that person being a stranger to the action.

The defendant Wolfe was present at the store when his co-defendant and the plaintiff had the conversation about trading horses, and the same evening, at the suggestion of Sam'l Younts, he took the notes and accounts, which the firm held on the plaintiff, to South Carolina, and the defendants alleged that he there sold them to one Bacharock, and that the property of the plaintiff was seized at the instance of that person, and not of the defendants; and they introduced the deposition of Bacharock tending to prove that such was the case, and that he gave in exchange for the claims upon the plaintiff, a note on a third party.

It was in evidence, however, that the defendant Wolfe, in the name of the firm, executed what purported to be an attachment bond, and that he procured one Gibson to become surety thereon.

The first three exceptions taken by the defendants being *in pari materia*, we have considered together. The first is to that portion of the plaintiff's testimony, wherein he was permitted to speak of his indebtedness to the firm of S. Younts, Son & Co., the second, to the evidence admitted to show the membership of that firm, and the third, to evidence received as to declarations in regard to the sale of the plaintiff's horse made after its seizure, by John Grier, who, though a member of the firm, was not a party to the action.

The contention of the defendants is, that as the plaintiff has seen fit to sue them as individuals, he should not be permitted to speak of acts and circumstances connected with the firm, and so as to affect them through the firm, and more especially to affect them by the declarations of one who is not a party to the action.

This seems to us to be reversing the common order of things. For, though accustomed to see the point raised as to how far a firm may be answerable for wrongs committed by its individual members, we
(290) have never before heard a doubt expressed as to the responsibility of each and every member, for the tortious acts of the firm, and we cannot conceive it to be well founded. As a general rule, partners, though bound by the contracts, are not bound by the torts of each other, that is to say, torts committed with regard to matters disconnected with the partnership business. Nor are they ever held to be

criminally responsible for the acts of each other, even though done in the course of trade, but only those who are actually guilty. But partners like individuals are responsible for torts committed by their agents under express commands, under the maxim *qui facit per alium facit per se,* and a partner acting in the name of the firm, touching its business and with a knowledge of the other members must be regarded as the agent of all. In such cases, says Collyer on Partnership, Sec. 457, the tort is looked upon as the joint and several tort of all the partners, and they may be proceeded against in a body, or one may be sued for the whole of the injury done. And this doctrine of the text-writer is fully supported by the decisions of the courts in *Gray v. Cropper,* 1 Allen, 337; *Linton v. Hurley,* 14 Gray, 191; *Locke v. Steains,* 1 Met., 560.

And in *Doremus v. McCormick,* 7 Gill., 49, and *Boyce v. Watson,* 3 J. J. Marshall, (Ky.,) 498, the very point was made, as here, in regard to the declarations of Grier, and it was held that the declarations of a partner upon whom the *capias* had not been served, were properly admitted as evidence against his co-partners. The declarations of one partner are admissible against his co-partner, not upon the ground of their being parties to the same action, but because of their unity as partners.

4th Exception. That the defendant Hoover was allowed to speak of a demand for the horse, made of a stranger who had him in possession at Fort Mills. We do not stop to consider the competency of this evidence; for conceding it to be incompetent, no possible prejudice could result to the defendants from it. In the interview, (291) which it is not denied took place between the witness, Hoover, and the defendant, John Younts, the latter was informed of the former's claim to the property, and had his attention called to the mortgage under which it was derived, and yet put him off by telling him "to go and prove his horse." If any demand were needed to support the action, this in itself, is sufficient.

5th and 8th Exceptions. In the complaint the horse sued for is described as "a dark chestnut colored horse," and in the mortgage to Hoover as "a black horse;" and when it was proposed by the plaintiff to put the mortgage in evidence, the defendants objected because of this discrepancy in the description; and when the judge came to charge the jury, they requested him to say to them that there was no evidence that the horse sued for was the one conveyed in the mortgage.

There can certainly exist no good ground for either of these exceptions. The mortgage was properly receivable in evidence, as any other deed would be, in order to show the source from which the defendant, Hoover, derived his title to the property in dispute; and as both he and the plaintiff testified to its identity, it became a question of fact for the

jury. And moreover, in their answer the defendants expressly admit it to be true that the "defendant Hoover has a mortgage upon the horse mentioned in the complaint," and therefore the evidence in regard to it was both needless and harmless.

6th Exception. That plaintiff was permitted to put in evidence the attachment bond, given in the name of the firm by the defendant, Wolfe, at the time of the seizure of the property.

This bond on its face purported to be made for the benefit of Bacharock, the alleged assignee of the defendants' claims upon the
(292) plaintiff, and to bind the plaintiff, Hall, to pay him such sum as might be awarded him because of the suing out of an attachment; and the defendants insisted that this mistake in drawing it rendered it inadmissible as evidence. This testimony was offered as tending to disprove the alleged assignment of the claims, or as affecting the *bona fides* of the same, and for either purpose it was clearly competent. We cannot conceive how it could be rendered incompetent by any mistake in drafting it. It was still the act of the defendant, Wolfe, done in the name of the firm.

7th and 9th Exceptions. That the court instructed the jury, that as the defendants had shown no legal process to justify the seizure of the horse, it was illegal in them to have made it, and if the jury should believe that the defendants took the benefit of the sale of the horse, whether in money or in a note on a third party, they would be liable. And that the court refused to give the following instruction: That it must appear that the act complained of was unlawful when committed, and if done in South Carolina, and there being no proof that the law of that state forbids it to be done, then the jury should find for the defendants.

The seizure of property and taking it from the owner's possession is a wrong, unless justified by the process of some court competent to authorize it to be done. Such justification is therefore a matter of defence, and the burden of proof rests upon him who makes the seizure; and in the absence of all evidence going to show the existence of any such process which could justify the seizure of the plaintiff's property, the first instruction was properly given. And there being nothing to show to the contrary, it was safe in the court to presume that a wanton seizure of property, unauthorized by the order of any tribunal, was contrary to the laws of the state of South Carolina.

10th Exception. That the court instructed the jury that in case they found in favor of the defendant, Hoover, they should allow him
(293) compensation for his expenses incurred by reason of the wrongful acts of the defendants.

This exception we think is well founded. In actions of this character, the value of the property at the time of the conversion or tortious taking is the measure of the damages. *Selkirk v. Cobb,* 13 Gray, 313; *Hurd v. Hubbell,* 26 Conn., 389; *Grier v. Powell,* 1 Bush., (Ky.), 489.

It is not however necessary that the verdict should be altogether set aside because of this error, as the damages assessed on account of expenses incurred were distinguished by the jury from those rightfully assessed, and the error can therefore be corrected here.

11th Exception. That the court erred in signing two judgments—one in favor of the plaintiff and the other in favor of the defendant, Hoover.

As we understand the exception, it was not intended to raise a question as to the power of the court to give judgment in favor of one defendant against another, but simply to object to the form of the judgment, in that, it was written on separate sheets of paper and attested by two signatures of the judge. But however taken, it is utterly without force. The statute expressly provides that the court may determine the ultimate rights between the two parties on each side as between themselves, and give judgment accordingly. C. C. P., Sec. 248. And however written or attested, it constitutes but one judgment pronounced at one and the same moment of time.

12th Exception. That plaintiff, though suing *in forma pauperis,* was allowed by the judgment to recover the costs of the action.

It is impossible to doubt that this error would have been corrected had his Honor's attention been called to it at the time. But it is manifest that no such objection was urged in the court below, and to allow it now to prevail under a mere general exception taken "to the form and substance of the judgment," would be alike unfair to the judge and unjust to the other parties, and for this reason we (294) decline to make the correction here.

The judgment of this court therefore is, that except as to the sum of five dollars allowed to the defendant Hoover for his expenses incurred, the judgment of the court below is affirmed, and the plaintiff will recover the costs of this court of the defendants and their sureties.

PER CURIAM. Modified.

Cited: Draper v. Buxton, 90 N.C. 185; *Harris v. Woodard,* 96 N.C. 235; *Waller v. Bowling,* 108 N.C. 297; *Cates v. Hall,* 171 N.C. 362; *Bagging Co. v. Byrd,* 185 N.C. 138; *Dwiggins v. Bus Co.,* 230 N.C. 234; *Johnson v. Gill,* 235 N.C. 43; *Keith v. Wilder,* 241 N.C. 676.

DAVID JONES v. NARCISSA McKINNON, ADM'X.

Judgment, Assignment of—Guardian—Surety—Trust and Trustees.

1. The effect of an assignment of a judgment upon a guardian bond to a stranger, who has paid the amount with the money of one surety, is to keep the judgment alive as to the principal, but not as to the administrator of a co-surety, against whose estate there is only a right of contribution.
2. The guardian alone, and not such stranger, is the trustee of an express trust, who is allowed under section 57 of the Code to sue as relator upon such guardian bond.

CIVIL ACTION tried upon complaint and demurrer, at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

A creditor's suit being prosecuted in the probate court against the defendant, as administratrix of Murdock McKinnon, the present plaintiff presented his claim, and, it being disputed, filed a complaint to which an answer was put in, and the issues of law and fact, with the record out of which they arise, were transferred for trial before the judge in the superior court, pursuant to the act of 1871-72, ch. 213, secs. 10, 11.

(295) At Fall Term, 1882, the plaintiff had leave to file an amended complaint, (on payment of all costs,) in which the state is made a party, and the plaintiff, relator, in a substituted action upon a guardian bond executed by defendant's intestate and one H. H. Tomlinston, as sureties, to Robert Wooten, the guardian.

In the substituted complaint, the plaintiff alleges in substance that in 1860 the guardianship of six infant children, whose names are set out, was committed by the county court to said Wooten who thereupon executed a bond in the penal sum of $4,000 with the intestate, Murdock McKinnon, the said Tomlinson and one John T. Wright (who has since died insolvent and there has been no administration on his estate) as co-sureties, with condition for the safekeeping and proper management of the estate of said wards, as required by law; and thereupon the said Wooten received into his possession a large sum of money belonging to the infants, which he has misapplied and squandered.

That several successive bonds in renewal were executed by Wooten with the same sureties, except that the said Wright did not execute those given in 1864 and 1866.

That in November, 1867, Wooten was removed from office, and the guardianship committed to one John W. Pearce, who brought an action against the former guardian, and at February Term, 1870, recovered in the superior court the sum of $1750 and costs, and the judgment has being docketed in Cumberland and Lincoln counties, in the latter of

which counties the said Wooten resides; and that executions issued against him have been returned unsatisfied, though some partial payments (dates and amounts recited in complaint) have been made in reduction of the debt, and Wooten is insolvent.

That the full amount due on the judgment and costs has been paid to the guardian, Pearce, by the plaintiff relator out of moneys furnished by the co-surety, Tomlinson, and the same has been assigned to the plaintiff in trust for Tomlinson to prevent an extinguishment (296) of the judgment and to preserve the same in force for him.

That the defendant's intestate, who died in 1878, recognized his liability by reason of his suretyship, for his share of the damages arising out of the official delinquency of the former guardian, and, with his associate surety, Tomlinson, resisted the action of the last guardian, employing counsel in the defence, and finally compromised the demand by assenting to a judgment for the sum stated, a large reduction of the amount due, $2,587.90, as reported by a referee.

The proceeding in which the present action originates was commenced against one W. H. McKinnon, first appointed administrator, on whose removal the present defendant was appointed in his stead.

The defendant demurs to the amended complaint assigning as causes therefor:

1. The relator is a stranger to the bond sued on, and cannot maintain the action.

2. The complaint shows that the bond has been satisfied.

3. The relator is a trustee for one surety, suing for his benefit, and cannot recover on a bond executed by himself, against his co-surety.

The court sustained the demurrer and rendered judgment dismissing the action with costs, and the plaintiff appealed.

Messrs. Hinsdale & Devereux, for plaintiff.

Messrs. T. H. Sutton and R. S. Huske, for defendant.

SMITH, C. J., after stating the above. The argument for the appellant proceeds upon the idea, that the assignment of the judgment recovered by the guardian, Pearce, for and in behalf of his wards, to preserve its vitality as a subsisting security, operated in equity as a transfer also of his interest in, and right of action on the bond, and hence the latter may sue in his own name as trustee of an express trust, (297) under section 51 of the Code.

The assignment of the judgment only is averred in the complaint to have been to avoid the consequences at law of a direct payment which would have been an extinguishment, not only of the judgment, but of the cause of action contained in the bond, because it would have been a

satisfaction of the damages sustained by its breach. The equity vesting in the surety, whose money has been paid in securing the transfer, is to convert the guardian into a trustee, whose name may be used in collecting the judgment as well as in enforcing by action the obligation contained in the guardian bond, both of which would have been defeated by a payment without such assignment. The party therefore who recovered the judgment, can also as relator sue on the bond; and he, if any one, is the trustee of an express trust, as the surety, Tomlinson, is the *cestui que trust,* entitled to the damages recovered within the meaning of the Code.

But it is obvious he is the real party in interest, and in any action could recover a moiety only, of the sum due from the principal, of his co-surety the intestate.

If he could recover the whole damages, it would in effect be a recovery as to the other half against himself; and thus we should have the anomalous result of a recovery by the real party in interest, and who is alone recognized as entitled to what is recovered, against himself.

The difficulty would not be obviated by suing the intestate alone, since the liability of both arises upon one and the same instrument.

We think the legal effect of the assignment is *to preserve the security of the judgment against the principal debtor,* for the reimbursement of what has been paid by Tomlinson, and of both sureties when the intestate's estate has made good the portion of the common indebtedness resting upon it.

(298) In our present method of procedure, Tomlinson must be deemed to have paid the amount of the judgment, and to have by reason thereof a claim upon the intestate's estate for contribution; and the assignment only serves to keep alive the judgment rendered against Wooten.

It follows, therefore, if the action can be prosecuted upon the bond, it must be in the name of the party who alone could before maintain it, and for the benefit of Tomlinson, but not in the name of the present relator; and so can the paying surety compel the estate of his co-surety to repay one-half of the sum paid by himself.

We therefore concur with his Honor in sustaining the demurrer and dismissing the action—the case not coming within the purview of section 131 of the Code, which applies to a demurrer for the misjoinder of several causes of action alone. The judgment must be affirmed.

No error. Affirmed.

Cited: Fowle v. McLean, 168 N.C. 592; *Bank v. Thomas,* 204 N.C. 602; *Burleson v. Burleson,* 217 N.C. 339; *Casey v. Grantham,* 239 N.C. 130.

JOHN DAVIS v. ALBERT HIGGINS.

Ejectment—New Trial.

Where, in ejectment, a *venire de novo* was awarded below because the jury were misled by the instruction "that although the plaintiff at the trial disclaimed title to a part of the land in dispute, the jury might render a general verdict, and the plaintiff would take out his writ of possession at his peril"; *Held* that the new trial was properly awarded.

EJECTMENT tried at Spring Term, 1882, of RUTHERFORD Superior Court, before *Gudger, J.*

The complaint asserts and the answer denies that the plaintiff is the owner in fee, and entitled to the possession of the land (299) described and withheld by the defendant; and thereupon an issue was submitted to the jury, with an inquiry of damages dependent upon the finding, in these words:

Is plaintiff the owner and entitled to the possession of the land mentioned in the complaint?

In the argument on the trial, the plaintiff's counsel disclaimed any right to recover a part of the land, containing twenty acres. After instructions the jury retired to consider their verdict, and subsequently came into court again, and inquired of the judge if they could return a verdict for the whole tract, or for a part, to which the court responded and informed them that if their verdict was for the plaintiff, it might be general or special, setting out therein what part of the land belonged to plaintiff, and if defendant was in possession of any part of plaintiff's land, he would be entitled to recover; and "would take out his writ of possession at his peril, if their verdict was for the plaintiff without further qualification." The jury then responded in the affirmative to the issue, and that no damages had been sustained.

After the rendition of the verdict, the court being of opinion that the instruction given as to the effect of a general verdict was erroneous and misleading, directed the verdict to be set aside and award a *venire de novo,* and from this order the plaintiff appealed.

Mr. J. B. Batchelor, for plaintiff.

Messrs. P. J. Sinclair and Hoke & Hoke, for defendant.

SMITH, C. J. We concur in the action of the court in awarding a new trial, and the sufficiency of the reasons for so doing. Although some doubt was expressed upon the point by RODMAN, J., in *Johnson v. Nevill,* 65 N. C., 677, an early decision made after the introduction of the new system of pleading under the Code, it has (300)

been since settled that a matter put in issue and material to the result is conclusively determined by the verdict and judgment, where land is sought to be recovered, as it would be if the recovery of personal property was the object. Here, both the pleadings and the issue involve the determination of the title and consequent right of possession in the plaintiff, and this is distinctly and definitely decided in the verdict. It could not therefore be drawn in question between the parties again by the defendant, and becomes *res adjudicata* of record.

We refer to some of the many adjudications of this court—*Falls v. Gamble,* 66 N. C., 455; *Isler v. Harrison,* 71 N. C., 64; *Gay v. Stancell,* 76 N. C., 369; *Yates v. Yates,* 81 N. C., 397; *Tuttle v. Harrill,* 85 N. C., 456.

No error. Affirmed.

Cited: Johnson v. Pate, 90 N.C. 336; *Springs v. Schenck,* 99 N.C. 556; *Bickett v. Nash,* 101 N.C. 583; *Ferguson v. Wright,* 115 N.C. 569; *Wyatt v. Mfg. Co.,* 116 N.C. 283; *Turnage v. Joyner,* 145 N.C. 83, 84.

GEORGE W. McKEE v. THOMAS WILSON.

Slander—Infamous Offence.

1. In slander, it must appear from the complaint that the libellous matter in respect to the plaintiff's conduct in office, and actionable only by reason thereof, was written while he was holding such office.
2. To constitute oral slander, the words must impute to the plaintiff the commission of an infamous offence.
3. An offence is infamous, where the conviction and punishment for its commission, involve moral turpitude and social degradation. A misdemeanor punishable only by fine or imprisonment is not infamous.

(301) CIVIL ACTION tried on complaint and demurrer at July Special Term, 1882, of GASTON Superior Court, before *Gudger, J.*

The complaint consists of a series of counts or causes of action separately stated, and imputes to the defendant the utterance of slanderous words, both written and spoken, concerning the plaintiff, whereof the first and second charged the publication in the *Gastonia Gazette* of the libellous matter therein set out, and the others with verbal defamation.

As explanatory of the meaning and application of such words, the complaint alleges that the plaintiff was sheriff of the county of Gas-

ton from the 31st day of July, 1868, until the 2nd day of September, 1872, and as such, collector of the public taxes during that period, including those levied for the last mentioned year, and that they were intended to charge, and do charge, (varying somewhat in phraseology in the different averments but in import substantially the same) the plaintiff with dishonesty and fraud in his settlement with the proper county officer of the taxes so collected, withholding a part thereof and corruptly appropriating the same to his own use.

It is not deemed necessary to set out in terms the defamatory language imputed in the several enumerated causes of action, since the essential charge in each is of corrupt and dishonest conduct in the office of tax-collector in failing to account for, and intentionally withholding moneys so collected and due the county, and fraudulently applying them to his personal use.

The defendant put in his answer to the two causes of action containing charges of the libellous publications, and demurred to the other causes of action imputing verbal slander, assigning as the grounds thereof:

1. That the words do not impute an infamous crime.

2. That it is not averred that the words were spoken of the plaintiff while in the exercise of his office.

3. The offence charged is barred by the statute of limitations (302) and no prosecution will lie therefor.

4. There is no allegation of special damage.

The court on the hearing overruled the demurrer and allowed the defendant time to answer, from which judgment the defendant appealed.

Messrs. Bynum & Grier, for plaintiff.

Mr. G. F. Bason and Hoke & Hoke, for defendant.

Smith, C. J. after stating the above. It is well settled on authority that words spoken of a person in respect to his office or employment and actionable only by reason thereof, must be spoken, while he is holding such office or pursuing such employment, and not afterwards. 1 Stark. on Slander, 123. "It must appear," says the writer, when the words were spoken of a barrister or physician, "that he practiced as such at the time the words were spoken," and to the same effect is 5 Wait Act. and Def., 742.

This is expressly ruled as a correct statement of the law in *Edwards v. Howell,* 32 N. C., 211; *Collis v. Malin,* Cro. Chas., 282; *Ferevard v. Adams,* 7 Wend., 204.

2. To constitute oral slander, the words must impute to the plaintiff the commission of an infamous offence, an offence the conviction and punishment whereof involves moral turpitude and social degradation. The malversation in office, that is, the corrupt and fraudulent failure to account for and pay over the public taxes, is declared to be punishable as for a felony by imprisonment in the penitentiary by the act of 1868-69, ch. 74, secs. 35 and 38, while by the subsequent act of 1871-72, ch. 49, secs. 38 and 41, the same offence is made a misdemeanor to be punished by fine or imprisonment. This enactment took effect on January 17th, 1872, and covers any defalcation that occurred during the last year of the office. *Ibid.* Sec. 21.

(303) If this latter statute does not annul the preceding act, being *in pari materia,* the complaint does not show to which period of time the imputed official misconduct is to be referred, and therefore it cannot be seen that an offence higher than a misdemeanor is charged, and such a charge is clearly not actionable according to all the authorities, when only a fine or imprisonment can be imposed. Says DANIEL, J., delivering the opinion in *Skinner v. White,* 18 N. C., 471: "It seems to us that the rule laid down by LORD HOLT, that the words, if true, must not only subject the party to imprisonment but an infamous punishment, is the rule in this state." See also *Shipp v. McGraw,* 7 N. C., 463; *Brady v. Wilson,* 11 N. C., 93.

There being no averment of special damage, the case is not relieved from the operation of the general rule applicable to slander, actionable *per se.*

There is error and the judgment must be reversed. This will be certified that the action may proceed in the court below.

Error. Reversed.

Cited: Harris v. Terry, 98 N.C. 134; *Gudger v. Penland,* 108 N.C. 599; *Barnes v. Crawford,* 115 N.C. 77; *Gattis v. Kilgo,* 128 N.C. 424; *Beck v. Bank,* 161 N.C. 206; *Hadley v. Tinnin,* 170 N.C. 86; *Elmore v. R.R.,* 189 N.C. 671; *Oates v. Trust Co.,* 205 N.C. 16; *Scott v. Harrison,* 215 N.C. 430; *S. v. Surles,* 230 N.C. 276.

MARIA SOWERS v. W. C. SOWERS.

Slander—Exemplary Damages.

1. In slander, where the defendant sets up no justification, the matters alleged in the answer are only admissible in evidence to mitigate damages; and a general report of the loose morals of the plaintiff may also be given in evidence for the same purpose.
2. The slanderous words charged, to wit, "if the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse; and it was therefore held to be unnecessary to inquire of a witness his understanding of their meaning; otherwise, where the words are ambiguous.
3. Punitory damages may be awarded in slander, and for acts of personal violence in which malice enters as an ingredient.

CIVIL ACTION to recover damages for slander tried at Spring (304) Term, 1882, of IREDELL Superior Court, before *Eure, J.*

The slanderous words charged to have been spoken and published by the defendant concerning the plaintiff (who is called Bettie Sowers) and proved on the trial, were these: "If Bet Sowers did not have a young one she missed a damn'd good chance," and it is alleged in the complaint that he meant thereby to charge her with incontinency. The issues submitted to the jury were as follows:

1. Were the words alleged in the complaint spoken by the defendant of the plaintiff, and did he thereby charge her with being incontinent?

2. If so, were they true?

3. What damage has the plaintiff sustained by reason of the speaking the same?

The jury responded in the affirmative to the first issue; in the negative, to the second; and in answer to the third, assessed the damages at the sum of eight hundred dollars,

The defendant asked that a further issue be submitted, to-wit: Was the defendant justified in the use of the words uttered by him of the plaintiff? This, after the evidence was all in, was refused by the court upon the ground that all the matters of defence and extenuation set up in the answer were embraced in the others. To this ruling the defendant excepts.

During the examination of witness on the trial, two of (305) them, in whose presence the imputed words were uttered, were allowed after objection from the defendant to testify, each, that he understood the defendant to charge that the plaintiff had been with a man

and was with child, and incontinent. To the inquiry, and the evidence elicited by it, the defendant also excepts.

The defendant proposed to put to a witness introduced and examined by the plaintiff, but not as to the character of the plaintiff, the following question: Have you heard a report in the neighborhood, where the plaintiff is generally known, that she has been pregnant? On objection to the form of the inquiry as confined to a single person, the court ruled it was not admissible, remarking at the same time to defendant's counsel that he might inquire as to a general report in regard to the plaintiff's supposed pregnancy. The defendant declined to modify the form of his question, and excepted to the ruling excluding it.

The court was asked by the defendant to instruct the jury, that, if the plaintiff's character was such when the words were spoken of her that they would not injure her reputation, nor place her in a worse light than her own acts had done, she was not entitled to recover. The instruction was refused and the defendant excepts.

Messrs. M. L. McCorkle and W. R. Henry, for plaintiff.
Messrs. Robbins & Long, for defendant.

SMITH, C. J., after stating the case. These are the several exceptions and the statement of facts upon which they rest, brought up for review by the defendant's appeal, and we proceed to consider them in their successive order.

1. There is no justification set up for the utterance of the slanderous words, and the matters alleged in the answer are only admissible in evidence in mitigation of damages, and hence may be proved under the third issue for that purpose.

(306) 2. A fair and reasonable construction of the defendant's language in reference to an unmarried woman does, we think, import and impute personal bodily prostitution to the plaintiff, without the aid of collateral and explanatory facts, not averred in the complaint, to ascertain and point its meaning. It implies an illicit sexual intercourse, not followed by the usual consequences of pregnancy. If the plaintiff did not give birth to a child, she missed a good chance of having it. This is in substance the charge, and presupposes, not a lost opportunity for sexual intercourse, but the fact itself unattended by the natural result of childbearing.

It was then unnecessary to inquire of the witnesses their understanding of the meaning of the words, as their actionable character was to be declared by the court.

If they were ambiguous and defamatory only by reason of other associated facts, and these had been averred in the complaint, with the further allegation that they were understood by the hearers as imputing criminal intimacy with a man, then it would have been competent, but not otherwise, to ascertain in what sense they were understood by the hearers. *Briggs v. Byrd,* 33 N. C., 353; *Sasser v. Rouse,* 35 N. C., 142.

3. A general report and belief of the loose morals and prositution of the plaintiff, may be given in evidence to mitigate damages. *Nelson v. Evans,* 12 N. C., 9; and so, evidence of her general bad character was admissible for the same purposes. *Goodbread v. Ledbetter,* 18 N. C., 12; *Smith v. Smith,* 30 N. C., 29; 2 Greenl. Evi., (Damages), Sec. 275. Testimony of this kind the judge offered to hear, but it was not offered, the defendant declining to modify his question.

4. The remaining exception is to so much of the charge as left the jury free, if they found that the defendant spoke the words maliciously to find punitory or exemplary damages.

The appellant insists that since the slander of innocent (307) women, maliciously and wantonly uttered, has been made indictable by statute, (acts 1879, ch. 150) and may be punished by a public prosecution, punitory damages merely ought not to be assessed in a private action for compensation for the personal injury suffered. There would seem to be much force in the argument, if the question were an open one in this state. The right to recover damages purely punitive, and not in compensation for individual injury, is combatted with much earnestness, and upon a critical examination of adjudged cases, by Mr. Greenleaf in an elaborate note to section 253 of the second volume of his valuable work on Evidence; but the decisions in this state have been uniform, that in slander, and for acts of personal violence in which malice enters as an ingredient, exemplary damages may be awarded, and the defendant in case of assaults remain liable also to indictment. The statute only places slander in this regard upon the footing of a malicious assault. We are content to refer to some of the cases. *Duncan v. Stalcup,* 18 N. C., 440; *Causee v. Anders,* 20 N. C., 388; *Wylie v. Smitherman,* 30 N. C., 236; *Gilreath v. Allen,* 32 N. C., 67; *Bradley v. Morris,* 44 N. C., 395; *Pendleton v. Davis,* 46 N. C., 98.

And even after conviction and punishment by fine under an indictment for an assault, it would not defeat the right of the injured party to recover exemplary damages, or as it is sometimes called, "smart money," and could only be made available in reduction of damages. *Smithwick v. Ward,* 52 N. C., 64.

We cannot, for any suggested inconveniences, or upon the idea of inflicting a double punishment for one and the same act, disregard this uniform line of decisions. There is no error.

No error. Affirmed.

Cited: Bowden v. Bailes, 101 N.C. 616; *S. v. Hinson,* 103 N.C. 376; *Kelly v. Traction Co.,* 132 N.C. 374; *Saunders v. Gilbert,* 156 N.C. 476; *Ivie v. King,* 167 N.C. 177; *Worthy v. Knight,* 210 N.C. 500.

(308)

A. L. LOGAN v. W. W. FITZGERALD AND OTHERS.

Ejectment—Judge's Charge.

In ejectment, where a party relies on two independent sources of title, to wit, a thirty years' adverse possession, and a seven years' one with color, it is error in the court to omit to explain the character, nature and extent of the two kinds of possession, so as to enable the jury to determine whether the acts of ownership come up to the requirements of the law.

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

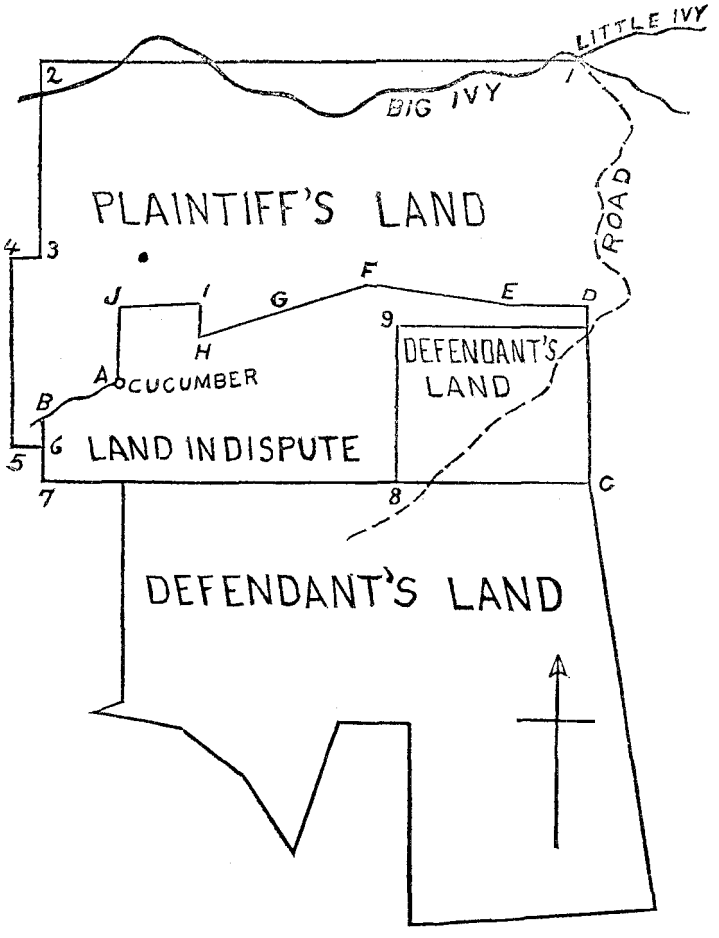
The plaintiff claimed to be the owner in fee of the land in dispute, and the defendant, Lorena Ramsey, admits the same, except as to a portion embraced within the letters and figures as set out in the opinion of this court, to which portion she alleges title in herself, and claims under a continuous adverse possession under known and visible boundaries for more than forty years, and also under a seven years' adverse possession with color. Upon the case stated in the opinion, the jury found against the plaintiff, and he appealed from the judgment rendered.

Mr. J. H. Merrimon, for plaintiff.

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

(310) SMITH, C. J. It is conceded that the deed executed in September, 1833, to Thomas Deaver, under whom the plaintiff claims, covers the territory in dispute, and he has title thereto, unless it has been diverted by long adversary possession in the defendant, Lorena Ramsey, and those whose estate she has acquired.

The answer sets up two sources of title, the one derived under such unbroken possession alone, running back for a period of thirty years,



Plaintiff's claim—Beginning at 1, thence to 2, 3, 4, 5, 6, 7, 8, 9, thence to the road and with the road to the beginning.

Defendants' claim—Beginning at A (cucumber tree), thence down a small creek to B, thence to 7, C, D, E, F, G, H, I, J, thence to the beginning.

That part south of line 7—C, is defendants' land, outside of lap.

unsupported by deed or other instrument in writing; the other, under a possession of more than seven years with color of title furnished both by will and deed.

The testimony discloses that previous to his death in 1844, Jacob Ramsey resided on a tract of land of which that in controversy (and

represented in the accompanying diagram within the letters and figures, A. B. C., 7, 8, 9, 10, D. E. F. G. H. I. J.) is alleged to constitute part, at a place below the line, 7, 8, C., and that his son Wm. T. Ramsey thereafter continued the occupancy during his life time, and at his death in 1863, devised the same to said Lorena, his surviving wife in fee, describing it in his will as "all that tract and parcel of land on which I now live, known and described as the "Jacob Ramsey Farm," and she has resided thereon since.

In October, 1870, divers persons, with the wives of such of them as were married, united in executing a deed to said Lorena, which in terms conveys a tract of land with distinct and well defined boundaries, embracing that in controversy, as well as the territory south of the line, 7, 8, C., whereon Jacob Ramsey and his successors in estate resided, and pursuing in its runnings westward the irregular line in the diagram from D. to A., at which stood a cucumber tree, as therein represented.

The execution of the deed was proved, as to a part only of those whose signatures and seals are affixed, by the subscribing wit-
(311) ness, and registered upon this probate; and its introduction as evidence on account of the alleged insufficient proof was resisted by the plaintiff.

In 1862, the defendant's land was surveyed by one Blacklock, not under the directions of any deed or other written instrument of title, and the line run as laid down in the diagram between D. and the cucumber tree at A., as its northern boundary; and this line is recognized and pursued as such in the subsequent deed of 1870.

It was in evidence that a stable had been built upon the disputed land above and near to the point 8, enclosed and used as such for thirty years, and also that there was a clearing thereon in 1867 of some seven or eight acres (the old Jacob Ramsey clearing) which has since been enlarged to twelve or fifteen acres; that Jacob Ramsey and his successors claimed to own up to the surveyed line, and cut timber upon and over the land at his pleasure; that there were two marked trees along the line from J. to D. previous to the survey, and marks from J. to A. extending two or more poles north of J., but it did not appear that they were directly in the line between those points; there were also marks found along the line from D. to F., but not shown to be in it; that the said Thomas Deaver, when owner of the plaintiff's land, also cut timber south of the line from D. to F., for the use of his mill, but had never caused a survey of his tract to be made; that in 1866 or 1867, an agent of Rollins to whom Deaver had contracted to sell, and did in January, 1868, convey his land, bought from the defendant trees standing south of the line D. E., and about the same time Rollins

changed the location of the fence for the purpose of straightening it and lessening the expense of its construction, so that it intersected the surveyed line, deviating about the same distance of ten feet from each extremity and its eastern terminus thus far within the disputed territory; that the former proprietor, Deaver, had proposed to sell a part of his land, westward from the cucumber, and pointed (312) out a spring to the east, adding that he had supposed the spring to be west from the cucumber, and did not claim land further than to that tree; and that Deaver, when in possession and being asked as to his boundary, said, he owned no land south of the fence between D. and E.

Two issues were submitted to the jury, the first of which only is material, (since the finding for the defendant dispensed with any response to the second—the inquiry into plaintiff's damages) and that is in these words:

"Is the plaintiff the owner of that portion of the land claimed by the defendant in her answer or any part thereof?"

The plaintiff asked the court to direct the jury that there was not sufficient evidence to show a possession by the defendant, and those through whom she made claim for thirty years of the land in dispute, under and up to known and visible boundaries, except as to so much as was occupied and used as the stable lot at the point 8.

In response to the request, the court said to the jury that the plaintiff was owner of the land whose possession was sought to be recovered, unless the defendant could show in herself and her predecessors in estate, an open, continuous, and exclusive possession for thirty years up to known and visible boundaries under a claim of title, and from such, when proved, the law will presume a grant and perfect the claim; that in case of a lap, the part covered by both deeds would in law be in possession of him who had actual possession of any portion, and if there was no actual possession in either, the possession would follow the title and be in him who had the superior title.

The issue submits the simple inquiry as to the plaintiff's title, permitting it to be antagonized in either of the modes suggested, by proof of an adverse possession for thirty years, unsupported by any written instrument ascertaining its extent and limits, or by such possession continued for seven consecutive years, under the will of the testator, Wm. T., and the partially proved and registered (313) deed, with its well defined and fixed lines, as affording color of title.

If the issue had been severed, so as to present in separate inquiries the two independent sources of title relied on to defeat the action, an error committed in instructions given upon one, might have been

obviated by the finding upon the other, in regard to which no error is assigned.

We are disposed to hold that as the deed executed more than seven years before the beginning of the action, describes the boundaries of the land conveyed with precision, and comprehends all up to the surveyed lines from D. to the cucumber tree, an unbroken adverse possession under it would vest the fractional parts of the estate in the defendant, notwithstanding any irregularity in the probate and registration, under the authority of *Hardin v. Barrett,* 51 N. C., 159, and for the sufficient reason that a fractional part of the estate, thus passing would be as effectual a barrier to this action as a full and absolute estate. But as we cannot say from the verdict that the jury did not determine the issue for the defendant upon the other ground of a possession of thirty years, without regard to the will or deed, if the jury were misdirected upon that point, the result must be a new trial.

There seems to have been overlooked, in the general instruction as to the effect of a mere naked possession, two qualifying propositions entering into it.

1. The elimination of the time ending on January 1st, 1870, more than eight years, which under the suspending statute (act 1866, ch. 50), should not have been counted.

2. The substitution of thirty for twenty years, the reduced time required to raise the presumption of a conveyance, when as in the present case the title has passed out of the state and the controversy as to ownership is between its citizens. *Rogers v. Mabe,* 15 N. C., 180.

(314) If this were the only objection to the charge, the error would be harmless, since the unbroken possession for the thirty years preceding will admit of a deduction of the whole interval of the suspension of the presumption, and still leave more than the twenty years necessary in raising it.

But a more serious difficulty is presented in the effect allowed to the evidence offered of possession, anterior to the making of the will and the deed. The rule laid down for the guidance of the jury is well established, when there is a paper title describing and defining the extent of the claim, in extending a constructive possession up to those limits, but in the absence of such, the actual possession, not resulting from occasional cutting of timber or other acts which may be but trespasses, interrupting but not divesting the owner's constructive possession, must alone determine its character and extent. The occupation *de facto* is the measure of possession unaccompanied by a conveyance, and it cannot be enlarged by declarations of a claim up to certain boundaries. *Bynum v. Thompson,* 25 N. C., 578.

But the possession required to raise the presumption of a conveyance, or to give effect to an instrument as color of title, has been discussed in the case of *Gudger v. Hensley,* 82 N. C., 481, and it is unnecessary to pursue the subject further.

We do not discover error in the broad propositions of law, but the misleading defect in the instruction is in the failure to define the possession, to which the law attaches such consequences as a transfer of property from the former owner, to the other presumed therefrom, and not open to rebuttal, so that the jury could see whether the acts of asserted ownership in proof come up to the requirements of the rule. So far as they are reported to us, they seem to fall short, and if they do so appear and are insufficient to raise the presumption, the court should in positive terms as a matter of law so direct the jury.

For the error mentioned the verdict ought to be set aside and (315) a *venire de novo* awarded, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

Cited: Ruffin v. Overby, 88 N.C. 373; *Staton v. Mullis,* 92 N.C. 633; *Hamilton v. Icard,* 114 N.C. 536; *Baggett v. Lanier,* 178 N.C. 132; *Land Co. v. Fitzgerald,* 189 N.C. 60; *Carswell v. Morganton,* 236 N.C. 378.

SAMUEL BARNES v. R. H. HYATT.

Executions—Title of Purchaser.

1. Irregularities alleged to have occurred before the issuing of an execution, nor the dormancy of the judgment, not known to the purchaser, do not invalidate his title.
2. The designation of particular land, defined in the levy of a *vend. ex.* only limits the authority of the sheriff, and cannot be prejudicial to the debtor.
3. The court intimate that a levy, by virtue of an execution under the Code, is an appropriation of the land to the debt, requiring its sale before resorting to other lands to which some equitable right has attached.

EJECTMENT tried at Spring Term, 1882, of CHEROKEE Superior Court, before *Gilliam, J.*

The plaintiff appealed.

No counsel for plaintiff.

Messrs. Battle & Mordecai, for defendant.

SMITH, C. J. The case sent up is so imperfect in its statement of facts, that we may perhaps misapprehend them. It does not appear that the judgment recovered or the successive executions issued (316) upon it, were against the person whose land was sold, nor whether he is the defendant in the present suit. We understand that the executions issued against the defendant who owned the land, and the appeal was intended to present the effect of the several processes in conferring upon the sheriff the right to sell, and the ruling of the court in relation thereto.

The judgment was recovered by George W. Swepson in the county court of Alamance, at its session held in June, 1866. In June, 1871, it was docketed, from a transcript, in the superior court of Cherokee.

On August 5, 1882, a *fieri facias* was issued from the superior court of Alamance to the sheriff of Cherokee, who made a levy on the land on August 26th, and returned it with his endorsement, "too late to sell."

On September 12th following, a *venditioni exponas* issued to the same officer, who made return, "suspended by order of the plaintiff."

On March 5th, 1873, a second *fi. fa.* was sued out, but indulged; and on May 11th, 1877, another *vend. ex.* was sued out of Alamance superior court, directed and delivered to the sheriff of Cherokee, reciting the levy made in August, 1872, and commanding him to sell the described land, pursuant to which it was sold and conveyed to the plaintiff.

Upon these facts the court was of opinion and adjudged, that no title passed to sustain the action, and gave judgment against the plaintiff for cost, from which he appeals.

It does not appear that any of the alleged irregularities, ante-dating the suing out of the writ under which the sale was made and the land conveyed, were known to the purchaser, the plaintiff in the present action, and a stranger to the other. And it is well settled that such a purchaser, in order to a recovery, is only required to show an execution regular in form, and issued from a court of competent jurisdiction to award it; a sale thereunder in the manner prescribed by law; and (317) the sheriff's deed of conveyance. *Rutherford v. Raburn*, 32 N. C., 144; *Green v. Cole*, 35 N. C., 425; *Hardin v. Cheek*, 48 N. C., 135.

The only inquiry then is the sufficiency, in form, of the writ to confer authority upon the officer to make the sale, since what transpired before and the dormancy of the judgment, not known to the purchaser, cannot be used to invalidate his title under the sale and deed.

As the levy on land presumes the want of personal goods, the purchaser is not bound to prove the fact on the trial of a case involving his title to land sold under such a writ. *Chasteen v. Phillips*, 49 N. C., 459.

The execution prescribed by the Code, Sec. 261 (1), requires the officer, where sufficient personal property cannot be found, to satisfy

the same "out of the real property belonging to the judgment debtor on the day when the judgment was docketed in the county, or at any time thereafter;" and the present execution commands the sale of land then in the county, described and defined in the levy, and therefore included in the broader words of the statute. The levy, if improper, is but superfluous; and the designation of particular land only gives a more limited scope and authority to the process than the law permits, and cannot be prejudicial to any right of the judgment debtor.

It does not appear that the tract described in the order of sale did not constitute all his real estate in Cherokee; and hence in practical results, the writ with its restricting terms would be as far-reaching and comprehensive as if it had pursued the very words of the statute. If in fact the debtor owned other lands in that county, he at least has little cause of complaint that they are left out of the writ, and remain in his hands undisposed of.

We have intimated that a levy, by virtue of an execution under the Code, may be an appropriation of the land to the debt, and require, if preserved, its prior sale for the satisfaction of the judgment before resorting to other lands to which some equitable subordi- (318) nate right has attached; but if not, this action at most is but a nullity, not impairing the efficacy of the execution which is in substance, in application to land, but a general order of sale of undescribed lands acquired by the debtor and held when the judgment was docketed, or acquired afterwards.

There is error, and must be a new trial. It is so adjudged, and let this be certified.

Error. *Venire de novo.*

Cited: Lytle v. Lytle, 94 N.C. 685; *Farrior v. Houston,* 100 N.C. 374.

J. W. WILSON v. MONT PATTON AND OTHERS.

Judgment—Notice of Lien—Homestead—New Contract—Application of Fund by Sheriff—Marshalling Assets.

1. The transcript of a judgment, sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the debt, and the costs of action, is sufficient to give notice of the lien on defendant's land.

2. A note given since the adoption of the Constitution of 1868, in renewal of an "old note," is a new contract, and subject to the homestead right.

3. The rule in equity in reference to marshalling assets, has no reference to a case where the homestead is involved.

4. The manner of applying the fund to the executions of the different claimants, pointed out by ASHE, J., the sheriff being directed to reserve $1,000 in lieu of defendant's homestead, as against the "new debts," but the same to be used, if necessary, in discharge of those privileged against the right of homestead.

APPLICATION of W. R. Young, Sheriff of Buncombe County, for instructions as to how he should apply certain moneys in his hands raised by sale of the lands of the defendant, Mont Patton, heard at
(319) Fall Term, 1882, of BUNCOMBE Superior Court, before *Shepherd, J.*

The facts agreed to by and between the parties interested are as follows: The sheriff at the time of the sale of the defendant's land on the.....day of August, 1882, had in his hands the following executions:

1. In favor of P. F. Patton, administrator of Anna E. Patton *v.* Mont Patton, issued upon a judgment rendered and docketed in the superior court of Buncombe County, at Spring Term, 1873.

2. In favor of Rankin, Son & Co. *v.* Mont Patton and W. W. McDowell, issued upon a judgment rendered and docketed in the superior court of Buncombe County at Spring Term, 1874.

3. In favor of A. T. Summey, administrator of John Franks *v.* Mont Patton, issued upon a judgment rendered and docketed in the superior court of Buncombe County, at Fall Term, 1874.

4. In favor of T. C. H. Dukes, administrator, etc., *v.* Mont Patton, issued upon a judgment rendered and docketed in the superior court of Buncombe County at Fall Term, 1875.

5. In favor of the Bank of Statesville *v.* Mont Patton and W. W. McDowell, issued upon a judgment rendered and docketed originally in Iredell County, and certified to Buncombe County, and docketed in the superior court of that county, on the 15th day of December, 1875.

6. In favor of J. W. Wilson *v.* Mont Patton, issued upon a judgment rendered and docketed in the superior court of Buncombe County, on the 3rd day of January, 1876.

7. In favor Thomas J. Lenoir *v.* Mont Patton, issued upon a judgment rendered and docketed in the superior court of Haywood County, and afterwards docketed in the superior court of Buncombe, on the 28th day of May, 1877.

Of these judgments, those in favor of P. F. Patton, administrator, A. T. Summey, administrator, and Thomas J. Lenoir, were re-
(320) covered upon notes dated prior to the 1st of January, 1868, and those in favor of T. C. H. Dukes and J. W. Wilson, upon notes

which were executed in renewal of notes given prior to that date. The other judgments were all recovered upon notes executed subsequently to 1868.

The homestead of Patton was not set apart to him, as some of the debts ante-dated the constitution of 1868. He did not demand that his homestead should be assigned him, nor did he object to the sale of his land. There was no money raised from the defendant McDowell.

But he claims that he is entitled to one thousand dollars out of the proceeds of the sale of his land in lieu of his homestead, inasmuch as there will be one thousand dollars left after satisfying the executions on the judgments recovered upon debts which ante-date the constitution.

The Bank of Statesville and J. W. Wilson resist this claim of the defendant, and insist that the whole of the proceeds of the sale should be applied to the executions in the hands of the sheriff; and J. W. Wilson contends that the execution on his judgment should be satisfied before anything is applied to the execution in favor of the bank, because, he says the judgment in favor of the bank was never docketed in the county of Buncombe. The following entry is to be found upon the judgment docket of the superior court of Buncombe County.

BANK OF STATESVILLE *v.* MONT. PATTON and W. W. McDOWELL. } *Iredell County.* In the superior court, Transcript of judgment.

At a superior court held for the county of Iredell at the court house in Statesville on the 22nd day of November, 1875, before his Honor D. M. Furches, Judge, judgment was rendered in favor of the Bank of Statesville, the above named plaintiff, against M. Patton and W. W. McDowell, the defendants, for the sum of seventeen hun- (321) dred and thirty-six dollars and sixty-four cents, with interest on $1,488.66 from the 22nd day of November till paid, at 8 per cent. per annum, and costs of suits, $12.13.

The above judgment was received and entered in this court this 10th day of December A. D. 1875.

(Signed) J. E. REED, Clerk.

In the transcript of this judgment from Iredell, the clerk of that county certified that the foregoing was a true and perfect transcript from the judgment docket in his office.

It was understood at the time of the sale that the defendant, Patton, should have the same right to claim one thousand dollars of the pro-

ceeds of the sale of his land, that he would have had to claim a part of the same, of the value of one thousand dollars before the sale was made.

The court adjudged that the defendant was not entitled to any part of the proceeds of the sale in the hands of the sheriff as his homestead, and that the sheriff do apply the said money to the satisfaction of said executions, according to the priority in the time of the docketing the judgments, upon which they issued, in the superior court of Buncombe County, and it was also adjudged that the judgment in favor of the Bank of Statesville was properly docketed.

The defendant appealed from the judgment refusing to allow him one thousand dollars out of the proceeds of the sale in lieu of a homestead. And J. W. Wilson appealed from so much of the judgment as is based upon the ruling that the judgment of the bank was properly docketed.

(Another case—BANK OF STATESVILLE v. J. W. WILSON and others—involving the same matters, is governed by the decision in this.)

(322) *Mr. J. H. Merrimon, for plaintiff.*

Messrs. H. B. Carter, J. M. Gudger, Johnstone Jones and *McLoud & Moore, for defendants.*

ASHE, J. The transcript of the judgment from Iredell County in favor of the Bank of Statesville, though informal, is, we think, not so much so as to vitiate it. It contains all the essential requisites of a judgment, the day of its rendition, the names of the parties, plaintiff and defendant, the amount of the debt, and the costs of the action. No one who reads it can doubt but that a judgment was rendered in the superior court of Iredell County in favor of the Bank of Statesville against Mont Patton and W. W. McDowell, for the sum mentioned in the transcript.

The main object of the legislature in requiring judgments to be docketed in counties other than that in which the judgment was rendered, is to give notice to the world that the plaintiff had a lien on the defendant's land in that county. And this judgment, as docketed, gave that notice as effectually as if it had been entered according to the most approved formula.

The next question which presents itself for our consideration is, whether the Wilson and Duke's judgments, which were rendered upon notes executed in renewal of notes which ante-dated the first of January, 1868, were to be considered as old debts, and therefore privileged from the right of homestead claimed by defendant. Upon this subject there is a diversity of opinion. In some of the states, the debt, evidenced by a note in renewal of one given previously to the statute

giving a homestead, is deemed to be a pre-existing debt. In Louisiana the contrary is held. Thompson on Homestead, Sec. 311.

The question has not been directly decided in this state, but in the case of *Cable v. Hardin,* 67 N. C,. 472, it was held that a note, given in renewal of an existing note, is a novation of the debt, and the old debt is extinguished by the new one contracted in its stead. But (323) there is an apparent conflict between the decision in this case and that in *Hyman v. Devereux,* 63 N. C., 624, where the opinion was delivered by the same learned judge. Though we think the decisions may be reconciled, we deem it unnecessary to attempt it here. For however it may be, and conceding that there was no novation, the new note is a new contract, (Story on Promissory Notes, Sec. 104) and when given since the adoption of the constitution of 1868, and payment is attempted to be enforced by means of a judgment and execution, the defendant has the right to claim his homestead against such a demand.

Our conclusion therefore is that the Wilson and Duke's judgments, founded on notes taken in renewal of pre-existing notes, are new contracts, and subject to the defendant's right of homestead.

The defendant is entitled to his homestead against all the judgments, the executions upon which were in the hands of the sheriff at the time of the sale, except those in favor of P. F. Patton, administrator, Summey, administrator, and T. J. Lenoir.

How then is the fund to be applied? Our opinion is, and we so decide, that in the first instance the sheriff shall reserve one thousand dollars for the homestead, and then apply the residue to the judgments according to the priority of their docketing; but as this will exhaust the fund before reaching the judgment in favor of T. J. Lenoir, as that is privileged against the defendant's right of homestead, it must be paid out of the thousand dollars reserved for the homestead, and the defendant will be entitled to what remains. But as he will be entitled to hold it only during his life, the remainder will be subject to the lien of the judgments as if it were land. The defendant may, if he shall choose to do so, give bond and security to such person as the judge of the superior court of Buncombe County may designate, to secure the return (324) of the amount upon his death, to be applied to such judgment or judgments as shall remain unsatisfied according to priority of docketing, or a reference may be ordered by the judge of the superior court of Buncombe County to ascertain the value of the life interest of the defendant, Patton, in the residue of the one thousand dollars, after satisfying the Lenoir judgment. But in ascertaining the value of his life interest, the homestead should be estimated at one thousand dollars, as the defendant would have been entitled to that amount for his homestead against the judgments founded upon new notes, if the

amount had not been reduced by an application of a portion thereof to the Lenoir judgment.

Lest it may be supposed we have overlooked the point raised in the argument before us with regard to marshalling the fund, we take occasion to say, that in our opinion that rule of equity has no application to a case where the homestead is involved. It is a "consecrated right" granted by the constitution, and is an equity superior to all other equities. See *Butler v. Stainback, ante,* 216.

Let this be certified to the superior court of Buncombe County that proceedings may be had in conformity to this opinion.

J. W. Wilson and the Bank of Statesville must pay the costs of this appeal.

Error. Modified.

Cited: Albright v. Albright, 88 N.C. 241; *Lee v. Bishop,* 89 N.C. 260; *Miller v. Miller,* 89 N.C. 404; *Hinson v. Adrian,* 92 N.C. 125; *Arnold v. Estis,* 92 N.C. 167; *McCanless v. Flinchum,* 98 N.C. 373; *McCracken v. Adler,* 98 N.C. 403; *Morrison v. Watson,* 101 N.C. 342; *Blanton v. Comrs.,* 101 N.C. 535; *Jones v. Britton,* 102 N.C. 178; *Long v. Walker,* 105 N.C. 101, 115; *Leak v. Gay,* 107 N.C. 476; *Vanstory v. Thornton,* 112 N.C. 209; *Brown v. Harding,* 171 N.C. 688; *Duplin County v. Harrell,* 195 N.C. 446; *Farris v. Hendricks,* 196 N.C. 442.

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(325)

J. J. GUDGER v. WESTERN N. C. RAILROAD COMPANY.

Railways—Negligence—Removal of Cause to Federal Court.

1. The plaintiff sues the Western North Carolina Railway Company for damages for personal injuries alleged to have resulted from its erection of an "engineer-stake," in the street of the town of Marshall, over which the plaintiff fell and broke his leg; *Held* that the wrong complained of is the personal act of those engaged in running the line for the proposed road, and, in law, the act of those by whose authority the work was done, and that the plaintiff has the right to elect to sue one or more of them, alone.
2. In the course of this proceeding, non-residents (assignees of the road) voluntarily become parties defendant, and ask for a removal of the case to the federal court; *Held* that their motion was properly refused.
3. To entitle a party to such removal, under the Act of Congress, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.

MOTION of defendants to remove the cause to the circuit court of the United States, heard at Fall Term, 1882, of MADISON Superior Court, before *Shepherd, J.*

The cause of action alleged in the complaint is the negligent and unlawful erection, in the street of the town of Marshall by the defendant company, of a stake against which the plaintiff accidentally struck his foot, and in falling broke the bone of his leg, and for this injury he seeks to recover damages.

The defendant in its answer admits its incorporation and organization under a law of the state, and says that the legal title to the corporate property remains in the state, while the equitable title thereto is vested in A. S. Buford, T. M. Logan and W. P. Clyde, assignees of W. J. Best, by virtue of a contract entered into between him and the state, and that they are necessary parties to the suit.

The answer then proceeds to explain that the engineer stakes were placed in the street, in the course of a survey for the route (326) for the extension of its road, under authority conferred and as necessary in order to the construction thereof, and denies that it caused to be put up the stake against which the plaintiff alleges he came in contact, and sustained the injury complained of.

It is further stated that the plaintiff saw and knew of the placing of the stake at the curb stone, near and in front of his residence, interfering neither with the use of the street nor side-walk, and if he stumbled against it, it was his own negligence alone that caused the injury, and the company is in no manner liable for the consequences.

It is not necessary to set out in greater detail the allegations contained in the pleadings, in order to show the nature and extent of the controversy between the parties.

The record states that at Fall Term, 1882, the said Buford, Logan and Clyde "are made parties defendant and filed their answer," but at whose instance, unless their own, does not appear. They also put in an answer alleging the same substantial matters of defence, and describing with minuteness of detail the proceedings whereby the former railroad property of the same name had come into their possession and under their control, under an assignment to them of the contract entered into with Best, and the interruptions and embarrassments that might ensue, in executing the contract for construction, through the recovery of judgment and its enforcement by the plaintiff against the franchise and property of the company.

At this stage of the proceeding, the three added defendants, citizens of other states than that of the plaintiff, file their petition for the removal of the cause to the circuit court of the United States, under the act of congress in that behalf. The motion was refused and they appeal to this court.

(327) *Messrs. J. H. Merrimon and J. M. Gudger, for plaintiff.*

Messrs. D. Schenck, F. H. Busbee and McLoud & Moore, for defendant.

SMITH, C. J., after stating the above. It is a matter of moment to the parties that a correct solution be reached of the inquiry, whether upon the case presented in the pleadings the defendants are entitled to an order of removal, or suspension of further action in the cause in the superior court, since, if it ought to have been, and is not transferred to the jurisdiction of the federal court, whatever proceedings may be thereafter had in the state court, are a nullity, and the progress of the cause is arrested by law at the point when the removal was demanded.

We have therefore carefully considered the act of congress of March, 1875, as interpreted by the Supreme Court of the United States in *Barney v. Latham,* 103 U. S., 205; *Blake v. McKim, Ib.,* 336, and *Hyde v. Reeble,* 104 U. S., 407, with a view to ascertain if the case made in the pleadings in the present action brings it within the scope and operation of the enactment, and entitles the defendants to an order of removal.

The action, divested of extraneous matter, is one of tort, and its object the recovery of damages sustained by the plaintiff, resulting from the negligence of the defendant company. No other person is charged with complicity in the unlawful act, if such there be, nor was it necessary for the plaintiff to pursue his remedy against all the wrong-doers.

His controversy is with, and his suit is against such party as he charges in the complaint with having placed the obstruction in the public street, and no other. If then the individual non-resident defendants come in and assume a common responsibility with the other de-

(328) fendant, while no recovery is asked against them, how can it be said that there has been constituted in the words of the statute, "a controversy which is wholly between citizens of different states and which can be fully determined as between them"? that is, as declared by the court in *Barney v. Latham, supra,* "a controversy finally determinable as between them, without the presence of their co-defendants or any of them, citizens of the same state with the plaintiff," when in fact it is exclusively upon the pleadings between the plaintiff and the defendant originally sued, as to an imputed unlawful act of the latter, the source and ground of the claim to compensatory damages. The defendants who subsequently come in and become parties, assume a common responsibility with the company, if there be any liability resting upon either, for the act, but this cannot impair the plaintiff's right to seek his remedy and pursue it against the company if he chooses so to do.

The wrong complained of in putting up the stake is the personal act of those who were engaged in running the proposed railroad route, and in law the act of those by whose authority and in whose service the work was done, and the plaintiff has his election to seek his redress against one or more of them alone.

It would in our opinion be a perversion of the purposes of the act, and unwarranted by its words, to permit other wrong-doers, not sought to be made liable and against whom no complaint is preferred, to come in and assume an unnecessary liability for themselves, and under this pretext to withdraw the only controversy of the plaintiff's seeking from a rightfully attaching jurisdiction of the court.

As the case stands upon the complaint, all the defendants are united in resisting a recovery against the company, and the asserted and denied right to maintain the action is the sole subject matter in contest.

A controversy between opposing parties to an action grows out of conflicting allegations in the adversary pleadings, and none is made in the complaint against the non-resident defendants (vol- (329) untarily becoming parties) and no issue as to them can be eliminated therefrom.

"The suit then, *as it stands in the complaint,*" remarks the chief justice in *Hyde v. Reeble,* "is in respect to a controversy between the parties as to the liabilities of the defendant on a single contract," and substituting *tort* for *contract* at the end of the sentence, the language is precisely adapted to the present case. "Neither do we think," he adds, "it (the cause) was removable under the second clause of the same section, on the ground that there was in the suit a *separate controversy* wholly between citizens of different states. To entitle a party to a removal under this clause, *there must exist in the suit* a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other."

In our view the case presented is not one for removal under the act, and the application therefor was properly denied.

There is no error and this will be certified to the end that the cause proceed in the court below. The appellants will pay the costs of the appeal.

No error. Affirmed.

Cited: O'Kelly v. R. R., 89 N.C. 60; *Douglas v. R. R.,* 106 N.C. 79; *Bowley v. R. R.,* 110 N.C. 317.

GEORGE W. LONG v. HUGH BARNES AND OTHERS.

Marriage—Deed—Survivorship—Married Women.

1. The living together of a man and woman (formerly slaves) as husband and wife after the passage of the act of 1866, validating marriages between such persons, is conclusive evidence of the parties' consent to the contract. *State v. Whitford*, 86 N. C., 636, approved.
2. An estate in fee to husband and wife; *Held* that they take *per tout, et non per my*, and upon the death of either, the estate goes to the survivor.
3. Married women have no greater estates, by operation of the Constitution of 1868, than those conveyed by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates changed by that instrument.

(330) EJECTMENT tried at Spring Term, 1882, of CALDWELL Superior Court, before *Avery, J.*

The defendants admitted in their answer that they were in possession of the land described in the complaint, and alleged that they claimed through John Barnes and were the owners of an undivided half of the land, and tenants in common with the plaintiff.

The plaintiff offered in evidence a deed from John Barnes to Thomas Barnes and Ailsy Barnes, dated January 14, 1869; also a deed from Thomas Barnes to the plaintiff, dated November 25, 1879.

Thomas Barnes and Ailsy Barnes were slaves up to their emancipation in 1865, and belonged to John Barnes. Ailsy died before November, 1879, and Thomas is still living.

It was in evidence that Thomas and Ailsy Barnes lived together as man and wife, recognizing each other and recognized by others as man and wife, while they were slaves and after their emancipation in 1865, and until Ailsy died, and that the defendants were their children, born while they were cohabiting as slaves.

No record of the marriage between them had ever been made in compliance with the act of 1866, ch. 40, sec. 5.

The only issue submitted to the jury was, "Was Thomas Barnes, the grantor of the plaintiff, and Ailsy Barnes, the mother of the defendants, husband and wife on the 13th day of January, 1869."

(331) The defendants' counsel asked the court to instruct the jury:

1. That the legislature had not the power to make parties man and wife without their free consent, and that unless they gave their consent to the same in the manner pointed out by the statute, the statute is a nullity as to them, and they were never man and wife.

2. That if the parties were man and wife without complying with the statute, the change in the rights of married women by the con-

stitution (Art. X, Sec. 6,) had the effect to change the construction heretofore placed by the courts upon a conveyance to husband and wife jointly, and that Ailsy Barnes took by the deed from John Barnes an undivided half of the land in controversy, which descended to the defendants, who were admitted to be her heirs at law.

The court refused to give the instructions asked, and the defendants excepted.

The court charged the jury:

1. That if they were satisfied by a preponderance of testimony that Thomas Barnes and Ailsy Barnes were slaves prior to the year 1865; were emancipated during that year, and while slaves and up to the time when the act of March 20th, 1866, took effect, cohabited together, recognized each other, and were recognized by others, as man and wife, then in contemplation of law they were man and wife from the time such cohabitation began.

2. That the acknowledgment provided for in section five, chapter 40, of the act of 1866, is, when entered by the clerk in conformity to the requirements of the statute, *prima facie* evidence of a marriage; but it is not essential to the validity of a marriage contract between freed persons, who were cohabiting together as husband and wife when the act took effect, that such acknowledgment should have been made or entered.

3. That if Thomas and Aisly Barnes were husband and wife then by the deed of January 13th, 1869, the land in controversy (332) vested in Thomas and Ailsy as joint tenants, and upon the death of Ailsy, the whole estate survived to Thomas, and his deed would pass the entire interest in the land to the plaintiff.

Defendants' counsel excepted to the charge.

The jury responded in the affirmative to the issue submitted to them, and there was judgment in favor of the plaintiff. Appeal by defendants.

No counsel for the plaintiff.
Mr. M. L. McCorkle, for defendant's.

ASHE, J. The first exception taken by the defendants' counsel was to the refusal of his Honor to charge the jury, "that the legislature had no power to make parties man and wife without their free consent, and unless they gave their consent to the same in the manner pointed out by the statute, the statute is a nullity."

The ruling of his Honor upon this instruction as asked was not erroneous. The first branch of the instruction is answered by the fact that Thomas Barnes and Ailsy Barnes continued to live together for

several years after the passage of the act of 1866, as man and wife, recognizing each other and recognized by others as standing in that relation to each other. This was certainly conclusive evidence of a *free consent,* and meets the constitutional objection. And the latter branch of the instruction has been settled by the decisions of this court in the cases of *State v. Adams,* 65 N. C., 537, and *State v. Whitford,* 86 N. C., 636, where it was held that a record of the acknowledgment of cohabitation was not essential to the consummation of marriage, and a marriage constituted by the operation of the act could not be avoided by a failure to have the acknowledgment entered of record; and that the purpose of the legislature in requiring the
(333) record to be made, was only to perpetuate the evidence of the marriage, for the benefit of the issue of such marriage.

The next instruction asked—that conceding the marriage of Thomas and Ailsy to be valid without a record of their cohabitation, the constitution had the effect to take from an estate granted to husband and wife, the right of survivorship, was properly refused. The section of the constitution referred to reads: "The real and personal property of any female in this state, acquired before marriage, and all property real and personal to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised or bequeathed, and with the written consent of her husband conveyed by her as if she were unmarried." Const. Art. X, Sec. 6.

We do not believe it was the intention of the framers of the constitution by adopting this provision in that instrument, to effect such a radical change in the construction of deeds and wills as that contended for by the defendants' counsel. We are of the opinion its sole purpose was to restrict the marital rights of husbands in the property of their wives, by investing all the real and personal property married women may acquire in their own right, with the attributes of "separate estate," but never had in contemplation to change the established rules of construction, or destroy or change the *properties* and *incidents* belonging to estates, or to give to married women any greater estates than are conveyed to them by the terms of the instruments under which they derive title.

Thomas and Ailsy then being husband and wife, the deed executed by John Barnes to them dated January 13th, 1869, vested in them a joint estate, not in joint-tenancy, for they were neither properly joint-tenants, nor tenants in common, for being considered as
(334) one person in law they could not take the estate by moieties, but took it by entireties—*per tout, et non per my*—and con-

sequently when Ailsy died the whole estate remained to Thos. Barnes the survivor. 2 Blackstone, 182; *Motley v. Whitemore,* 19 N. C., 537; *Todd v. Zachary,* 45 N. C., 286.

The exception to his Honor's charge is not sustainable. His instructions to the jury were substantially correct as applied to the facts of the case and are supported by the decision in *Whitford's case supra,* and the authorities there cited.

There is no error. The judgment of the superior court is therefore affirmed.

No error. Affirmed.

Cited: Baity v. Cranfill, 91 N.C. 298; *Simonton v. Cornelius,* 98 N.C. 436; *Branch v. Walker,* 102 N.C. 37; *Jones v. Hoggard,* 108 N.C. 180; *Harrison v. Ray,* 108 N.C. 216; *Bruce v. Nicholson,* 109 N.C. 204; *Phillips v. Hodges,* 109 N.C. 250; *S. v. Melton,* 120 N.C. 595; *Stamper v. Stamper,* 121 N.C. 254; *Ray v. Long,* 132 N.C. 896; *Bettis v. Avery,* 140 N.C. 186; *West v. R.R.,* 140 N.C. 621; *Bynum v. Wicker,* 141 N.C. 96; *Jones v. Smith,* 149 N.C. 320; *Isley v. Sellars,* 153 N.C. 378; *Forbes v. Burgess,* 158 N.C. 132; *Greenville v. Gornto,* 161 N.C. 343; *Freeman v. Belfer,* 173 N.C. 582, 584; *Croom v. Whitehead,* 174 N.C. 309; *Dorsey v. Kirkland,* 177 N.C. 523; *Moore v. Trust Co.,* 178 N.C. 123, 124, 125; *Odum v. Russell,* 179 N.C. 7; *Bowman v. Howard,* 182 N.C. 665; *Turlington v. Lucas,* 186 N.C. 285; *Davis v. Bass,* 188 N.C. 203; *Johnson v. Leavitt,* 188 N.C. 683; *Winchester-Simmons Co. v. Cutler,* 199 N.C. 712; *Bank v. Hall,* 201 N.C. 789; *Willis v. Willis,* 203 N.C. 520.

J. W. LUTZ AND WIFE v. W. H. THOMPSON.

Contract—Evidence—Jurisdiction.

1. The court will not enforce one part of a contract, not intended as a separate and independent transaction, and leave the other parts unfulfilled.
2. Where a general scheme of settlement of an ancestor's estate was agreed upon by the heirs, which failed by reason of the refusal of some of them to sign the instrument, *it was held* competent to show, in a suit upon a bond given by one of them, that it was executed at the same time with the agreement and as a part of the plan of settlement, and that the agreement is still incomplete.
3. Where a justice's court has jurisdiction of the principal matter of an action, it also has jurisdiction of incidental questions necessary to its determination, and hence may admit an equity to be set up as a defence.

(335) CIVIL ACTION tried at Spring Term, 1882, of CLEVELAND Superior Court, before *Gudger, J.*

This cause was begun before a justice and taken by appeal to the superior court, and comes here upon a single exception touching the admissibility of certain testimony offered by the defendant and excluded by the court.

The action is brought upon a plain bond for $16.11, dated July 31st, 1876, and given by the defendant to the feme plaintiff, the consideration being, as expressed upon its face, "real estate." Its execution and delivery were admitted by the defendant, but he put in evidence a paper, a copy of which accompanies the case marked "A," and proposed to show that it and the bond sued on were executed at the same time and under the following circumstances:

The children of Noah Hoyle, then lately dead, including the feme plaintiff and the wife of the defendant, were involved in disputes as to the advancements that had been made, by their ancestor during his life time, to the different members of his family; and there being no administrator, the parties met for the purpose of settling their difficulties, and supposing they had done so, the paper marked "A" was prepared and signed by the plaintiff and the wife of the defendant, together with some others of the family, with the understanding that it was to be signed by all, and that it was to be a complete adjustment of their differences, and with the same understanding and in pursuance of that agreement the bond sued on was then given.

He also offered to show that others of the children afterwards refused to sign it, or to submit to its terms; and that they, together with the plaintiff, had brought an action against the defendant for the recovery of the very land, to quiet the title to which the bond was given.

This evidence was offered with a view to showing that the two instruments being executed together, made but one instrument, constituting a part of an incomplete transaction, which was after-

(336) wards frustrated—the defendant insisting that under such circumstance, the plaintiff ought not to be permitted to recover the amount of the bond of him. But the court upon objection being made by the plaintiff, excluded the evidence.

[Copy of the paper marked "A."]

We the undersigned heirs of Noah Hoyle, deceased, have this day divided the estate in our opinion as equitably as could be done, and we hereby bind ourselves to abide by the settlement thus made, viz: each of us has received and hereby acknowledge the receipt, for each of us, of four hundred and twenty-one $^{8}\%_{00}$ dollars. Also, we appoint D. R.

Hoyle and W. B. Hoyle as our agents to settle up said estate, not already settled, collect all debts due said estate, and pay all legal claims against the same, and after such settlement is made, to divide the residue, if any, amongst the heirs. As witness our hands this the 31st July, 1876. (Signed by ten members of the family.)

Verdict and judgment for plaintiffs, appeal by defendant.

No counsel for plaintiffs.
Messrs. Hoke & Hoke for defendant.

RUFFIN, J., after stating the above. In the opinion of this court, the evidence of the defendant was improperly excluded. Not that he could by parol annex to his bond a condition which upon its face it did not bear, or avail himself, in the present state of the pleadings, of a failure in its consideration; but upon the ground that the evidence tended to show that the contract, of which the bond sued on constitutes only a part, is still incomplete; or rather to establish the fact that, instead of a contract, the stipulations between the parties amounted only to a proposed contract, which has never acquired the force of an agreement, and consequently cannot be enforced as a whole, because of the subsequent dissent of the necessary (337) parties.

Taking the testimony to be true, it is plain that the parol agreement made by the plaintiff in July, 1876, and the bond then given by the defendant, were but parts of a general scheme for the settlement of their ancestor's estate, and were never intended or expected by the parties to stand as separate and independent transactions; and it would be evidently unjust to enforce one part of that scheme and leave other parts unfulfilled. See *Bell v. Bowers*, 4 Coldwell, (Tenn.), 311.

Neither is there any difficulty in the question of jurisdiction over such a defence as that insisted on, because of the action having originated in the justice's court. Whenever such a court has jurisdiction of the principal matter of an action, as on a bond for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination. *Garrett v. Shaw*, 25 N. C., 395. And though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defence. *McAdoo v. Callum*, 86 N. C., 419.

Error. *Venire de novo.*

Cited: Dougherty v. Sprinkle, 88 N.C. 301; *Hurst v. Everett*, 91 N.C. 405; *Kornegay v. Everett*, 99 N.C. 34; *Berry v. Henderson*, 102

N.C. 527; *Guano Co. v. Tillery*, 110 N.C. 31; *Vance v. Vance*, 118 N.C. 868; *McCall v. Zachary*, 131 N.C. 468; *Walker v. Miller*, 139 N.C. 457; *Levin v. Gladstein, Barbee v. Greenberg*, 144 N.C. 432; *Fidelity Co. v. Grocery Co.*, 147 N.C. 513; *Wildes v. Nelson*, 154 N.C. 595; *Cheese Co. v. Pipkin*, 155 N.C. 400; *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; *Allen v. Ins. Co.*, 213 N.C. 589; *Realty Co. v. Logan*, 216 N.C. 28.

ELI PATTON AND OTHERS v. H. T. FARMER AND OTHERS.

Confederate Money—Trusts and Trustees.

1. The rule as to the acceptance and management of Confederate money by trustees during the late war between the states, is, that they are held to the same degree of care which prudent men exercised in the conduct of their business.
2. The facts here in reference to the acceptance of the money in 1862, by the defendant, clerk and master in equity, and his subsequent conversion of the same into Confederate certificates in the name of himself as "C. M. E.," are not sufficient to render him liable for the loss of the fund.

(338) CIVIL ACTION tried at Spring Term, 1882, of HENDERSON Superior Court, before *Gilliam, J.*

This action is brought to recover money received by the defendant H. T. Farmer, as clerk and master of the court of equity of Henderson County, the other defendants being the sureties on his official bond.

As admitted the following are the facts of the case: At the Spring Term, 1857, of said court a petition was filed by Mary A. Patton and others, as heirs at law of Martin A. Gash, for the sale and partition of certain lands descended to them from their said ancestor, and a decree to that effect being rendered, the defendant Farmer as clerk and master, sold the lands at the price of $7,500.00 and took notes from the purchasers, payable in two equal annual instalments, which sale was duly reported to the court at the ensuing term and in all respects confirmed. At Spring Term, 1859, the master was directed to collect the purchase money, and at Fall Term in the same year, he was directed to take an account and report the parties entitled to receive the fund.

Notices were issued and served on all the parties, commanding them to appear before the master in order that said account might be taken, but they all failed to attend.

At Fall Term, 1860, at his own suggestion, the master was ordered to pay the amounts then collected to J. P. Jordan, the solicitor of record for the parties, and accordingly he did pay to him the sum of $6,005.00, taking his receipt therefor—there being then a balance of $2,741.00 still due from the purchasers as principal and interest, which they paid to the master on the 1st day of April, 1862, in Confederate money, the attorney Jordan being then dead. In August of that year the master notified the parties that he would transfer the fund to them, if they would give him their notes to secure it, which they declined (339) to do, with the exception of the plaintiff, Patton, who took one thousand dollars of the fund and gave his note therefor, and he being now solvent the plaintiffs agree to accept it as cash.

D. S. Gash, the uncle and business agent of the plaintiffs, proffered to take the money and receipt for it, but the master was unwilling to pay it to him without a bond, which he also declined to give.

The balance of the money amounting to $1,741 was kept by the master in his office in the court house, locked in a safe in which were kept all moneys belonging to the office.

The particular bills received in this case were not labeled or kept to themselves, but were placed in the safe with moneys received in other cases, though on no occasion was any of his own money mixed therewith, or any of it used by him; and upon the books of his office a record was made of the amount received in each case, and at all times there was in the safe the full amount received from all sources, though not in separate packages, nor marked in the names of the different cases, and no entry of record was made to indicate that the money or bonds kept in the same belonged to the office.

The plaintiffs gave no instructions to the master one way or the other about receiving Confederate money, but at the time the master took it, in 1862, it was current in that section and received by prudent business men in payment of debts of every kind.

In March, 1864, the balance then in hand due to the plaintiffs (the sum of $1,741) together with the moneys belonging to other parties were funded according to an act of the Confederate congress, and certificates taken therefor, which were deposited in the safe, as the money had been. No part of the master's private funds was embraced in the certificates or in any way mixed therewith. The certificates were not taken separately for the sums due in the several cases, but so (340) as to embrace several of such sums in one, and when produced, as they were on the trial, they appeared on their faces to have been taken in the name of "H. T. Farmer, C. M. E."

There was no order of court which authorized such funding of the office moneys, but the master consulted with the attorneys of the court

and other persons, and acted upon their advice in the matter. There was no entry upon the books of the office referring to the fact, that the plaintiffs' money had been so funded, nor did the master ever tender them the certificates, or offer to pay them the amount collected, except upon the terms as before mentioned of their giving him their notes as security.

Upon the foregoing facts the judge, being of opinion with the defendants, gave judgment in their behalf, and thereupon the plaintiffs appealed.

Messrs. H. B. Carter and Charles A. Moore, for plaintiffs.
Messrs. David Coleman and J. H. Merrimon, for defendants.

RUFFIN, J. This court can perceive no error in the judgment of the court below.

The plaintiffs nowhere make a suggestion of any fraud on the part of the master, and if they had, there is nothing in the facts as agreed to which could give the least support to such an allegation. On the contrary, that officer seems to have been actuated by a high sense of his obligations, and to have been perfectly frank and unreserved as to his manner of dealing with the funds of the office, free of any purpose to make individual gain thereby.

And taking as a test, the rule, several times announced by this court, that as to the acceptance and management of Confederate money during the uncertain days of the war, trustees should be held to just that degree of care and circumspection which prudent men exer-
(341) cised under similar circumstances in the conduct of their own business affairs, we can discover nothing in the case which should convict the master of negligence, either, in the acceptance of the money in 1862, or his subsequent disposition of it. As to the former: it is expressly agreed to be true, that at that stage of the war the prudent business men of that section of the country were in the habit of taking such money in payment of debts of every kind, and consequently no default on that account can be imputed to the defendant in this case, and especially as the plaintiffs, with the knowledge that the order directing the collection of the money was unrevoked, withheld all sort of instructions with reference to it. And as to the conversion of the money into Confederate certificates, that too was done upon the advice of parties upon whose judgment he relied, and because it was thought to be the best that could be done. It is true it was unauthorized and done therefore at the master's risk, and if it had proved to be a mistake so that harm came to the plaintiffs from it, he unquestionably would have been responsible for the loss.

But as said in *Mabry v. Engelhard,* 70 N. C., 377, what harm did come to the plaintiffs?

The certificates and the money stood exactly upon the same footing, both representing the promises of the same power to pay, and depending alike upon the ultimate success of that power, and really if there was any difference in their values it was in favor of the certificates.

It is said, however, that instead of making any investment of the money, the master should have paid it out at once to the parties entitled to receive it. This surely comes with a bad grace from the plaintiffs, who, notwithstanding they had been expressly notified to come before the defendant in order that the parties entitled and their respective shares might (as the court had directed to be done) be ascertained and reported, wholly omitted to obey the summons, and (342) thus put it out of the defendant to know to whom, and how much he should pay.

It is next said that he should have made an investment of the fund, and that a mere change of securities upon the same party was equivalent to no investment. This is true, and this he sought to do by offering to let the plaintiffs have the fund, provided they would secure it by giving their notes therefor, but which however they positively refused to do, and it is not to be supposed, if they are unwilling thus to provide for the security of their own fund, that others could be found less reluctant to do so, merely for the privilege of using the money, which was constantly depreciating.

Indeed, in view of all the facts of the case, one cannot avoid an impression that the plaintiffs had made up their minds to do nothing, but to remain passive and commit their fund to the keeping and management of the defendant, hoping thereby to avoid on their own part, and put upon him, the responsibilities incident to the times, and in so acting they do not deserve to be encouraged by the courts.

They had notice of the payment into the office of their money, and we must take it for granted that they were informed of the death of their solicitor, and they owed the duty at least of selecting another, through whom they might ask for such orders as were needed to authorize the payment to them of their money, or for its better investment; and whatever loss they may have sustained is, in a greater degree, owing to their own neglect than to any want of diligence on the part of the defendant.

No error. Affirmed.

Cited: Coggins v. Flythe, 113 N.C. 113; *Fisher v. Fisher,* 170 N.C. 382; *S. v. Trust Co.,* 192 N.C. 248.

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J. M. RUNYAN v. WILLIAM PATTERSON.

Fences—Damages for Breaking.

1. A plaintiff, whose fence is insufficient (not five feet high as required by law), is not entitled to recover damages of the owner of a cow for breaking into plaintiff's enclosure, even though the vicious habit of the animal is known to the owner.
2. Proof that plaintiff's fence is a "good ordinary" one, such as his neighbors have, does not dispense with the statutory obligation.

CIVIL ACTION tried on appeal from a justice's judgment at January Special Term, 1881, of CLEVELAND Superior Court, before *Eure, J.*

Plaintiff appealed.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiff.

Mr. David Schenck, for defendant.

SMITH, C. J. The defendant's cow, whose vicious propensity to break through the enclosing barriers and feed upon the growing crops of others, was known to the defendant by repeated acts brought to his notice, made such an irruption into the plaintiff's cultivated field and committed the damages for which redress is sought in this action.

It was in proof that the plaintiff's fence, varying from a few inches over three feet to a few inches over four feet in height, was insufficient under the requirements of the statute for the protection of the crops it was made to surround, and that the entry of the cow was not at the lowest and most defective part of it.

Upon this evidence the court was of opinion that the plaintiff could not recover, and in submission thereto the plaintiff suffered a judgment of non-suit and appealed.

(344) The case falls directly within the principle decided in *Jones v. Witherspoon,* 52 N. C., 555, wherein the court declare "that the owner is not liable in trespass for breaking the close, when the former's cattle wander in search of food upon the latter's unenclosed ground," and "that the rights and liabilities of the parties would be the same in a case where there is no fence or barrier, and one in which the barrier is declared by law to be insufficient."

In full recognition of the rule, we have recently said, DILLARD, J., delivering the opinion, "that now, stock may be lawfully allowed to range at large without the right of one to recover for their trespasses, or do otherwise than drive them off their premises without hurt *unless he have a fence as required by law.*" *Burgwyn v. Whitfield,* 81 N. C., 261; *Morrison v. Cornelius,* 63 N. C., 346.

To the same effect are *Stoner v. Shugart,* 45 Ill., 76; *Richardson v. Milburn,* 11 Mary., 340; *Wagner v. Bissell,* 3 Iowa, 396.

The only feature distinguishing the present case from the cited adjudications, is the knowledge of this unruly and vicious habit of the cow, possessed by the owner, previously to her being permitted to go at large, and to the indulgence of which the reasonably anticipated depredations are attributed. But this does not excuse the plaintiff's negligence in failing to put up "a sufficient fence at least five feet high," unless where a navigable stream or deep water-course may constitute a part of the boundary, (Bat. Rev., ch. 48, sec. 1,) and thus provide against the inroads of unruly stock, prompted by a natural instinct in search of food. This neglect, if not an active cause in inviting and encouraging the entry upon a more attractive pasture, is so directly contributory to the result, as to debar all claim to remuneration for the injury sustained.

The purpose of the act is to protect the crop, not so much from the inroads of orderly and docile, as of vicious and unruly animals; and it is a condition precedent to the right of recovery that the (345) plaintiff should erect and maintain a lawful fence, such as the statute points out. Had this been done, the injury might not have occurred. Nor does the fact that the plaintiff had constructed "a good ordinary fence," such as others had in the neighborhood, dispense with the legal obligation imposed by the act upon such as cultivate the soil and raise crops thereon.

The point decided in *Morse v. Nixon,* 53 N. C., 35, has no bearing upon the facts of the present case. The poultry-eating sow, which upon being chased had been compelled to drop the duck in her mouth, and had started again in full pursuit of her *prey,* was held to have become an outlaw, and liable to death, when thus caught *in flagrant delicto,* at the hands of the owner of the duck. The same rule had been enforced against a sheep-killing dog in *Parrott v. Hartsfield,* 20 N. C., 242.

Depredations committed by stock under the promptings of a natural appetite, and in the absence of any barrier sufficient to check and restrain, stand upon a different footing when the owner is sought to be held responsible for the extent of the injury done.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: S. v. Smith, 156 N.C. 634.

THOMAS MYERS AND WIFE v. RICHMOND & DANVILLE RAILROAD COMPANY.

Negligence—Damages—Railways—Issues—Obstruction of Highway.

1. In an action for damages against a railway company for personal injuries alleged to have resulted from defendant's negligence in placing an obstruction in a public highway, crossing its track, which was struck by the wheel of plaintiff's vehicle, thereby causing the horse to take right and run away, and the plaintiff to be thrown from the vehicle and injured; *Held* error to submit issues involving only defendant's right to use the highway, and whether the user amounted to a partial or complete obstruction.
2. The inquiry should have extended to the negligence of the defendant in thus placing upon a highway obstacles calculated to frighten the horses of travellers.
3. The law relating to responsibility of those who put such objects in a public highway, touched upon, and the distinction between necessary and unnecessary instruments of alarm, pointed out by RUFFIN, J.

(346) CIVIL ACTION tried at July Spring Term, 1882, of GUILFORD Superior Court, before *Gilmer, J.*

This action is brought to recover damages for personal injuries sustained by the *feme* plaintiff while travelling on a public highway, and alleged to have been caused by the defendant's negligence.

The complaint alleges that while going from her home in the country to the town of Thomasville, travelling in a buggy, the *feme* plaintiff was forced to cross the track of the defendant's railroad at a point near said town upon a bridge which had been hitherto constructed by the defendant; and that upon the bridge on the day in question the defendant had negligently placed one of its hand or dump cars, partly obstructing the same, and so narrowing the passage across it, that whilst attempting with the utmost care to drive over it, the wheel of her buggy struck the dump-car and put the same in motion, whereby her horse became frightened and unmanageable and ran away, throwing her from the buggy and inflicting upon her serious and permanent injuries.

The answer of the defendant denies that the plaintiff was injured because of its negligence or that of its servants.

On the trial the following facts appeared: The highway travelled by the plaintiff crosses the track of the railroad used by the defendant company near Thomasville, at grade. On each side of the track,
(347) ditches had been cut something over two feet deep, which were spanned by bridges each eight feet long and sixteen feet wide—the company owning one hundred feet on both sides of the track—which span was cleared so that the bridges were plainly in view to persons approaching them.

On the day of the accident, the section-master on the defendant's road, who had charge of the hands employed in and about the road-bed, took a dump-car from the company's shelter which was located about two hundred yards east of the said crossing, and with his hands went to work upon the track—it being their invariable habit to have the dump-car to accompany the hands.

Their work that morning was about seventy-five yards from the crossing, and at seven o'clock the section-master anticipating the passage of trains, and in order that they might pass safely, moved the dump-car to the crossing and then had it taken from the track and placed partly upon one of the bridges mentioned.

The car measured six feet one way and six and a half the other, and as loaded at the time weighed some fifteen hundred pounds. Upon the car were some tools to be used by the hands, their coats and buckets containing their rations for the day, two kegs containing spikes and two red flags some twelve by eighteen inches in size, and fastened to handles three feet long—the handles being set in the kegs so that only the red flannel could be seen above their tops.

The flags were carried for the purpose of signaling trains, and it is the custom on all railroads to have such a car to accompany the section hands and to bear upon it the articles before enumerated.

About eight o'clock the *feme* plaintiff, riding in a buggy drawn by a gentle horse and which she had been accustomed to drive over the same route for two years, attempted to pass over the crossing, but in doing so the wheel of her buggy struck against the dump-car at (348) which the horse took fright, and ran away, and threw her upon the ground whereby she was seriously injured.

It was also shown in evidence that during the day and while the car occupied the same position upon the bridge, five wagons having wider treads than the plaintiff's buggy, passed the bridge without coming in contact with the car.

At the close of the evidence the judge prepared the following issues, as those which should be submitted to the jury:

1. Was there space left upon the bridge sufficient for the plaintiff with ordinary care to have passed with her horse and buggy?

2. Were the injuries to the *feme* plaintiff caused by the negligence of the defendant?

3. What damages did she sustain?

After the argument of counsel had somewhat progressed, his Honor announced that upon reflection he had concluded to have the jury to ascertain the facts merely, without their considering any mixed question of law and fact, and thereupon he withdrew the issues previously prepared, and in lieu thereof submitted the following:

1. Did the injury occur at a public crossing of the defendant's railroad?

2. Was the dump-car put upon the crossing by the defendant's servants?

3. Was there space left unoccupied by the dump-car sufficient for a person exercising ordinary care, to drive a horse and buggy over the crossing without striking the car?

4. Did the plaintiff's buggy-wheel strike the dump-car, and thereby the horse became frightened and running away cause her to be injured?

5. In what sum was the plaintiff damaged?

The plaintiffs excepted to the change of the issues as made by (349) the judge, and also to the sufficiency of the substituted issues, and they tendered other issues as being the proper ones, amongst which were the following:

1. Did the defendant carelessly and negligently cause and allow one of its dump-cars to be placed and remain on the bridge or crossing of its railroad?

2. Was the highway at said crossing obstructed by the dump-car so as to prevent the free passage of the plaintiff?

3. Was she injured by the negligence of the defendant?

4. Did she use ordinary care in driving over the bridge?

5. Did the plaintiff's horse become frightened (while crossing) at the dump-car or anything thereon?

These issues were rejected by the court, and the plaintiffs excepted.

In substance the verdict of the jury was that the injury to the plaintiff occurred at a public crossing of the defendants' road, upon which the dump-car had been placed by its servants; that there was space left upon the crossing, unoccupied by the car, sufficient for a person exercising ordinary care to drive a horse and buggy over, without coming in contact with the car, and that the injuries to the plaintiff resulted from the fact that the wheel of the buggy struck the car, and caused her horse to take fright and run away.

Thereupon judgment was rendered that the defendant go without day, and the plaintiffs appealed.

Messrs. Scott & Caldwell, for plaintiffs.

Mr. David Schenck, for defendant.

RUFFIN, J. In the opinion of this court, the plaintiffs have just cause to complain of the action in the court below in respect to the issues submitted to the jury.

As framed and responded to, they present the plaintiffs' case solely with reference to the defendant's right to use the highway, and make

it to depend upon the single question, whether the user amounted (350) to a partial or complete obstruction of the passage across the bridge. His Honor in fact throughout the entire trial seems to have considered the case only from this one point of view—as also did the defendant's counsel who argued the cause before us—thus excluding all inquiry as to the defendant's negligence in putting into the highway an object of a character likely to alarm the horses of those who might pass along it, which inquiry is certainly material to the plaintiffs' right of action, and we think fairly raised by the pleadings.

That one may be responsible for injuries resulting from negligently and unnecessarily putting into a highway objects likely to frighten horses of ordinary gentleness, is shown by the authorities.

In Wharton's Law of Negligence, Sec. 107, it is said, that inasmuch as it is neither unnatural nor unusual for horses, when travelling, to become frightened at extraordinary noises or sights, so therefore he, who upon a road thus travelled by horses, makes such noises or exhibits such spectacles, is liable for any damages caused by their taking fright.

The same author at section 836 notes the distinction between "necessary and unnecessary instruments of alarm," and says that the former—such for instance as a steam whistle or a locomotive, or the like—being essential to important industries, are tacitly, if not expressly, licensed by the state, and the necessary use of them is not negligence, even though animals should be frightened thereby and injury ensue; though it is otherwise, he declares, *when the use is not necessary to the industry.*

In accordance with the principle thus laid down by the text-writer, the Supreme Court of Massachusetts in *Jones v. R. R. Co.*, 107 Mass., 261, held the defendant to be liable for injuries sustained by the owner of a horse that took fright at a derrick, erected upon the company's lands, by swinging an arm over the tract; such an object, (351) they declared, being calculated to terrify animals.

Of course the responsibility of the defendant in this action, depends upon the question, whether the use which it was making of the highway at the time of the plaintiff's mishap, was a reasonable one or not, and this in turn depends upon the character of the object, the urgency of the occasion, the manner in which the road was frequented, and the hazard to travellers attending an obstruction at the particular locality.

These are all matters to be determined by a jury under such instructions with regard to the law, as may be given them by the court; but as to which it is not proper that this court should intimate an opinion at the present.

The issues submitted are not in themselves objectionable, but they touch only one phase in the plaintiffs' case, and it is due to them that

the other should be passed upon also, and therefore there must be a *venire de novo.*

Error. *Venire de novo.*

Cited: Harrell v. R. R., 110 N.C. 219; *Norton v. R. R.*, 122 N.C. 934; *Dunn v. R. R.*, 124 N.C. 256; *Stewart v. Lumber Co.*, 146 N.C. 59.

WILLIAM A. HANNAH v. RICHMOND & DANVILLE RAILROAD COMPANY.

Action in Tort—Jurisdiction.

1. An action for damages for an assault does not survive to a personal representative. Bat. Rev., ch. 45, secs. 113, 114.
2. An action by a passenger against a railroad company for a violated contract of carriage, is cognizable in a justice's court where the complaint shows upon its face that the claim asserted is less than $200; and the court will *ex mero motu* take notice of the want of jurisdiction.

(352) CIVIL ACTION tried at Spring Term, 1882, of ROWAN Superior Court, before *Eure, J.*

The action is for damages, and was begun by the plaintiff on the 15th of August, 1876, in the superior court of Davidson County, and after the pleadings were put in, was removed for trial to the county of Rowan. The plaintiff having died, his administrator, J. P. Hannah, at Spring Term, 1881, came into court and was made a party plaintiff and allowed to prosecute the suit.

Upon an intimation by the court that the plaintiff could not recover, he submitted to a nonsuit and appealed.

Messrs. J. M. McCorkle and W. H. Bailey, for plaintiff.
Mr. David Schenck, for defendant.

SMITH, C. J. The complaint alleges that the plaintiff purchased a ticket (for $2.75) from the defendant's agent at Thomasville for a passage on the defendant's train thence to Charlotte, and that while travelling on the train as he was entitled to do under the contract, he was forcibly expelled from the car, in which he was seated, at China Grove station, intermediate between the place of starting and of his destination, by the defendant, its agents and servants, in disregard of the agreement for carriage, whereby he was wronged, and suffered indignities, the damages for which he seeks a recovery in the action.

The complaint is, as we understand, in tort and for the assault upon the person of the plaintiff, in compelling him by the use of actual force to leave the train in which he was travelling and had a right to remain, until the arrival at Charlotte.

The defence set up in the answer is that the plaintiff voluntarily left the train, which he entered at Thomasville, at the station at Salisbury, where he remained one night, and, without another ticket, had resumed his journey in the succeeding passenger train on the next day, and was forced to leave it because of his refusal to pay the fare (353) from Salisbury to Charlotte, as passengers under such circumstances were required to do.

The cause was tried at Spring Term, 1882, and after hearing the whole evidence the court expressed the opinion that the plaintiff was not entitled to recover, in submission to which he suffered judgment of nonsuit and appealed.

As an action for an assault, it did not survive the death of the original party, and, as a cause of action, could not be prosecuted by the personal representative by the express words of the act of April 6th, 1869. Bat. Rev., ch. 45, secs. 113, 114. The case to which our attention has been called by the plaintiff's counsel in the argument, (*Peebles v. R. R. Co.*, 63 N. C., 238) is not applicable, since the decision, rendered at January Term, 1869, was itself previous, and upon facts that occurred before the passage of the act which governs and controls the present case, and upon a different law.

If treated as an action for a violated contract of carriage merely, the claim asserted in the complaint would be solely within a justice's jurisdiction—an obstacle equally fatal to the recovery. *Froelich v. So. Ex. Co.*, 67 N. C., 1. The want of jurisdiction appearing upon the face of the complaint may be taken at any time, and will be noticed and acted on *ex mero motu* by the court. *Israel v. Ivey*, 61 N. C., 551; *Winslow v. Weith*, 66 N. C., 432, and other cases.

The judgment should have been that the cause of action had abated, and this judgment will be entered in this court. Neither party will recover costs.

PER CURIAM. Judgment accordingly.

Cited: Bowers v. R. R., 107 N.C. 723; *Purcell v. R. R.*, 108 N.C. 424; *Scarlett v. Norwood*, 115 N.C. 286; *Harper v. Comrs.*, 123 N.C. 119; *Bolick v. R. R.*, 138 N.C. 372.

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*S. R. CARRINGTON v. JAMES ALLEN.

Practice—Evidence—Issues.

1. The question as to the plaintiff's right to open and conclude the argument is governed by the decision in *Stronach v. Bledsoe*, 85 N. C., 473.
2. Evidence relating to a collateral matter, is not within the rule which excludes secondary, when primary evidence is attainable—approving *Pollock v. Wilcox*, 68 N. C., 46.
3. In a suit upon a note, the defence was, that the consideration was for money won at unlawful gaming; *Held* no error to submit to the jury the single issue as to the alleged illegality of the consideration.

CIVIL ACTION tried at Fall Term, 1882, of DURHAM Superior Court, before *Shipp, J.*

The action is to recover upon a note under seal in the sum of $500, executed by the defendant to the plaintiff on February 21st, 1878, and payable one day after date. The answer, detailing at length the circumstances under which it was made, sets up as a defence that its consideration was for money won at unlawful gaming, and that the note by reason thereof is void.

After empanelling the jury and reading the pleadings, the court inquired if the issues had been drawn up, to which the plaintiff's counsel replied in the negative, suggesting that they should be as to the execution of the note and the alleged illegality of the consideration. The counsel for defendant then stated that they did not deny the making of the note, but impeached the consideration for which it was given. Thereupon a single issue was prepared and submitted to the jury in the following form.

(355) Was the consideration of the note in suit money won from the defendant by gaming?

The plaintiff's counsel then stated that the subscribing witness had been summoned and was then present to prove the execution of the note, and, upon his Honor's ruling that his examination was unnecessary, as the fact was admitted, claimed the right to open and conclude the argument. This was disallowed.

The defendant was then examined on his own behalf and testified to the illegality of the consideration and the manner in which the note was obtained. His counsel proposed to inquire of him, whether or not the plaintiff had not paid him a note for $1,500, secured by mortgage, since the date of that now in suit. The plaintiff's counsel objected to the witness being permitted to speak of the note unless it was produced.

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

The defendant stated that he did not propose to show the contents of the instrument, but only to prove the payment of a debt of about the sum mentioned, as a circumstance tending to show that the present claim, not then asserted, was invalid and was so considered by the plaintiff himself. The evidence was admitted, and the witness testified to the pre-existing indebtedness and its discharge by the plaintiff.

There was a verdict for the defendant and the plaintiff's counsel asked for a new trial, and assigned as the ground therefor three errors:

1. The denial to counsel of the right to open and conclude.
2. The admission of the evidence of the $1,500 debt, and its payment.
3. The insufficiency of the issue to present the matters in controversy.

The motion was denied and judgment being rendered for the defendant, the plaintiff appealed.

Messrs. Staples, Moring and Schenck, for plaintiff. (356)
Messrs. Roulhac & Fuller, and J. W. Graham, for defendants.

SMITH, C. J. The first alleged error is disposed of in the late case of *Stronach v. Bledsoe,* 85 N. C., 473, to which we refer without further comment.

2. The second assigned error is equally without support, as the instrument spoken of related to a collateral matter, and is not within the rule which excludes secondary when primary evidence is attainable. This is settled in *Pollock v. Wilcox,* 68 N. C., 46; and *State v. Carter,* 72 N. C., 99.

3. The issue as appears from the complaint and answer, and the concessions of counsel, comprehended the only matter in controversy, and the court properly refused to distract the attention of the jury by introducing unnecessary issues, and confining them to the one point—the illegality of the consideration on which the note was executed.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Cade v. Davis, 96 N.C. 142; *Faulcon v. Johnston,* 102 N.C. 268; *Banking Co. v. Walker,* 121 N.C. 116; *Morrison v. Hartley,* 178 N.C. 620; *Hunt v. Eure,* 188 N.C. 719; *Hunt v. Eure,* 189 N.C. 483; *Royster v. Hancock,* 235 N.C. 112.

NATHAN ADAMS v. WILLIAM UTLEY.

Evidence—Admissions.

The admissions of a party are always evidence against him, and the fact that they are contained in the pleadings filed in the cause, does not affect its competency.

CIVIL ACTION to recover balance due upon a bond, tried at Spring Term, 1882, of WAKE Superior Court, before *Bennett, J.*

Appeal by plaintiff.

(357) *Messrs. Fowle & Snow, for plaintiff.*
Messrs. Lewis & Son, for defendant.

RUFFIN, J. Of the several exceptions taken, it is necessary that we should notice but one, the others involving no legal principles, and being such as are not likely to occur upon another trial of the cause.

The plaintiff commenced his action on the 20th day of June, 1878, seeking to recover a balance alleged to be due on a bond, originally for $391.00, executed the 23rd day of October, 1867.

In his complaint, after setting forth in the first article the execution of the instrument by the defendant, he alleges in the second article, "that no part of the debt had been paid except $91.00 on the 2nd of November, 1867; $9.60 on the 24th of August, 1870; and $5.00 on the 5th of June, 1876."

In an answer filed at February Term, 1879, the defendant admits the execution of the bond, though he says, it was not given to plaintiff, but to plaintiff's wife; and in the 2nd article he avers "that item two of the complaint is not true, for that it does not state all the payments made on the bond; that about 1867, he paid $100 thereon, and soon thereafter $70.30, and afterwards and that at various times in small amounts he has paid on said bond about seventy-five dollars."

Afterwards the parties were allowed by the court to amend their pleadings, and in answer to a new complaint, substantially the same with the former, the defendant denies the allegations thereof *seriatim*, and as a further defence alleges that the bond sued on was executed more than ten years before the commencement of the action, and he therefore pleads payment thereof, and the statute of presumptions.

On the trial the plaintiff offered evidence for the purpose of showing that the credit dated the 24th of August, 1870, was in fact made at that time, and upon an intimation of the court that it was (358) insufficient to rebut the plea of payment, the plaintiff's counsel

then offered the original answer as containing the admission of defendant with reference to the credits upon the bond set out in the complaint—that answer having been read with the amended answer, as a part of the pleadings at the outset of the trial. "But the court, (we here quote *verbatim* from the case) being of opinion that the denials in the amended answer covered all allegations of payment made in the complaint, ruled against the plaintiff, to which ruling the plaintiff excepted."

We find it difficult to apprehend the exact purport of his Honor's ruling as thus given in the statement of the case. To know whether he rejected absolutely, as being incompetent, the evidence of the defendant's admissions contained in the original answer, or whether admitting it to be competent, he adjudged it to be, in law, insufficient to rebut the presumption of payment arising from the lapse of time. But taking it to be either way, we hold it to be erroneous.

The fact that the evidence of the admissions was contained in an answer constituting a part of the pleadings in the cause, cannot, as we conceive, detract from its competency. A man's own admissions touching the subject of a controversy to which he is a party, are always admissible against him, and much more ought they to be so, when solemnly made in a proceeding in a court of justice. 2 Danl. Ch. Prac., 977, and *Hunter v. Jones*, 6 Randolph, 541.

Neither, as we take it, can its competency be destroyed by the fact, that an amended answer was subsequently filed under the leave of the court. As a declaration of the defendant, it can lose none of its vigor because of that circumstance. It is still none the less his declaration, made at a time when he was called upon to disclose the truth, and as such, may be evidence against him, while neither the original nor amended answer could be evidence for him. Such a declaration has, more than ordinarily, the sanction of the presumption that a man will not untruly speak to his own hurt. (359)

We know of no authority directly in point. But the analogy afforded by *Isler v. Murphy*, 83 N. C., 215, tends strongly to support our view. There, the plaintiff recovered judgment in the superior court, and afterwards her attorney entered upon the judgment docket a receipt in full of the judgment. Subsequently the plaintiff moved in the cause upon notice to defendant to amend the record by striking the receipt from the docket, and the court ordered the same to be done. In another proceeding, and upon an issue as to whether the judgment had been satisfied, the defendant was allowed, notwithstanding the order of amendment, to put in evidence the original receipt, it not having been effaced, and this court approved of the ruling. "The receipt," says DILLARD, J., speaking for the court, "though

not admissible, nor received by the judge, *as the record,* or any part thereof, *is still the admission of payment by the party,* and as such proper to be laid before the jury.

In the present case the amendment was made by a new answer, and not by withdrawing or defacing the original; so that the defendant's admissions remain uncancelled. Indeed, in no other way than this, should the courts ever allow amendments to be made in the pleadings of a cause, since in this alone can a correct history of the case at every stage of its progress be preserved, and the records of the court, itself, kept free of mutilations, or defacement. 1 Danl. Ch. Proc., 470.

As to the competency of the testimony offered, so far as it depends upon its sufficiency to go to the jury, we do not see how it can be questioned. As we construe it, the answer as originally drawn contains an implied, but still unequivocal, confession, on the part of the defendant, to the truth of the credits specified in the complaint, and the only imputation upon its verity consists in the assertion that it failed to set forth other credits for payment alleged
(360) to have been made.

This confession, though not conclusive as to the true dates of the endorsed credits, certainly constituted evidence bearing directly upon that issue, and it would be strange indeed, if it could be bereft of its cogency, by an amended answer, which could under no circumstances be evidence for the defendant.

The genuineness of the credits and their dates as endorsed, was a question of fact for the jury. But when once established, then the effect upon the legal presumption of payment would become a matter of law for the court.

Seeing that the jury have been deprived of testimony competent and proper for their consideration in passing upon the question of fact, there must be a *venire de novo.*

Error. *Venire de novo.*

Cited: Covington v. Leak, 88 N.C. 137; *Guy v. Manuel,* 89 N.C. 84; *S. v. Suggs,* 89 N.C. 529; *Brooks v. Brooks,* 90 N.C. 145; *Smith v. Nimocks,* 94 N.C. 245; *Greenville v. Steamship Co.,* 104 N.C. 93; *Grant v. Gooch,* 105 N.C. 282; *Carey v. Carey,* 108 N.C. 270; *Cummings v. Hoffman,* 113 N.C. 269; *Gossler v. Wood,* 120 N.C. 73; *Chemical Co. v. Kirven,* 130 N.C. 164; *Norcum v. Savage,* 140 N.C. 473; *Morris v. Bogue Corp.,* 194 N.C. 280; *Hotel Corp. v. Dixon,* 196 N.C. 267; *Davis v. Morgan,* 228 N.C. 84; *Browder v. Winston-Salem,* 231 N.C. 403.

D. L. BOING v. RALEIGH & GASTON RAILROAD COMPANY.

Evidence—Jurisdiction.

1. Proof that the plaintiff's cow was seen near the defendant company's railway track, with one of its legs broken, about the time that two trains had passed over the road, is *some* evidence in support of the plaintiff's claim for damages. (Distinction between a *scintilla* and sufficiency of evidence.)
2. Jurisdiction of justices of the peace and superior courts—concurrent, exclusive and derivative—discussed by ASHE, J., citing the act of 1877, ch. 251, and *Allen v. Jackson*, 86 N. C., 311, and other cases.

CIVIL ACTION tried, on appeal from a Justice's judgment, at (361) July Special Term, 1882, of VANCE Superior Court, before *Graves, J.*

This action was to recover damages for injury to live stock, to wit, one cow of the value of twenty dollars.

This action was tried before the justice under the provisions of section 10, chapter 16, of Battle's Revisal. Two freeholders were summoned and sworn by the justice to ascertain the damages, who assessed the same at twenty dollars, and the justice thereupon rendered judgment against the defendant for that amount, from which judgment the appeal was taken.

The defendant by leave filed an answer in the superior court, and denied each of the allegations in the complaint, except that which alleged that the defendant was a corporation and owned the Raleigh & Gaston railroad.

On the trial in the superior court, the plaintiff introduced a witness who testified in substance that on the 14th day of September, 1881, about nine o'clock a.m., he passed over a certain section of defendant's road on his way to a certain store, and did not at that time see any cow near defendant's railway track; that he returned about eleven o'clock a.m. of the same day, and saw the cow of the plaintiff down some twelve or fourteen feet from the road bed of the defendant, with one of its legs broken or crushed; and he further testified that from nine to eleven o'clock that day, two trains (one passenger and the other freight) had passed over defendant's road.

There was some other evidence as to the value of the cow, and in corroboration of the testimony of the first witness, that the cow was lying with its leg broken within twelve or fourteen feet of the railroad.

Upon this evidence the court expressed the opinion, that while there was some evidence competent to go to the jury, it was a bare *scintilla* leaving the matter not proved; and upon this intimation the plaintiff submitted to a nonsuit and appealed. (362)

Mr. Geo. B. Harris, for plaintiff.
Messrs. Hinsdale & Devereux, for defendant.

ASHE, J. The opinion intimated by his Honor, we think, was manifestly erroneous. The evidence offered was competent, or it was not. If not competent, it should have been withdrawn from the jury; but if competent and any evidence of the matter in issue, then it was an invasion of the province of the jury for the court to express an opinion as to its effect.

The line of distinction between what is a *scintilla,* or, what is the same thing, no evidence, and sufficient evidence, is so narrow that it is often very difficult for a court to decide upon which side of the line the testimony falls.

There is no principle of practice better settled than that what is competent or admissible evidence, or whether there is any evidence, are questions for the court; but what is a sufficiency, or effect of evidence, lies exclusively within the province of the jury.

If there is merely a *scintilla* of evidence, or such as raises only a possibility or conjecture of a fact, it is no evidence, and the judge should so charge the jury. But when the evidence is relevant and tends to prove the matters in issue, it should be submitted to the jury, and the failure to do so is a violation of the act of 1796. *Matthis v. Matthis,* 48 N. C., 132; *Sutton v. Madre,* 47 N. C., 320; *Bailey v. Poole,* 35 N. C., 404; *Cobb v. Fogalman,* 23 N. C., 440; *State v. Revels,* 44 N. C., 200; *State v. Allen,* 48 N. C., 257. In this last case, PEARSON, C. J., in commenting upon the narrow boundary between no evidence and slight evidence, observed that "the dividing line may be marked thus far; when there is evidence of a fact, which in connection with other facts, if proved, would form a chain of circumstances
(363) sufficient to establish the fact in issue, the fact so calculated to form a link in the chain, although the other links are not supplied, is nevertheless *some* evidence tending to establish the fact in issue, and its sufficiency must be passed on by the jury. But when the evidence could under no circumstances form a link in the chain, and although competent, yet has no relevancy or tendency to prove the fact in issue, the jury should be so instructed."

Should a jury find against the weight of the evidence or upon insufficient evidence, it is in the province of the court to remedy the evil to some extent by granting a new trial.

The testimony offered in this case which his Honor held to be no proof, we think was *some* evidence of the fact in issue, and was not only competent but *relevant* and *tended* to prove the fact charged in the complaint, and should therefore have been submitted to the jury

that they might consider it and give it such weight as they might think it deserved.

In this court, the counsel for the defendant moved to dismiss the action for want of jurisdiction in the superior court, basing his motion upon the fact that the action was commenced before the justice of the peace under section 10, chapter 16, of Battle's Revisal, which had been declared to be unconstitutional. *Nance v. C. C. Railway,* 76 N. C., 9. The answer to that is that the act of 1876-77, ch. 251, gave to justices of the peace concurrent jurisdiction of civil actions not founded on contract, when the value of the property in controversy does not exceed fifty dollars; and although the justice in this case summoned freeholders to assess the damages, it was yet his judgment, though irregular and perhaps erroneous.

The counsel seems to have overlooked the distinction between the cases, where the jurisdiction of the superior courts and the courts of justices of the peace is concurrent, and where it is exclusive (364) in one or the other. We take the distinction to be, that where it is concurrent, and a case is carried by appeal to the superior court, and the appellant, as in this case, files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent of the parties thus manifested, however irregular the proceedings may have been in the justice's court. *West v. Kittrell,* 8 N. C., 493. But when a justice of the peace takes cognizance of an action of which he has no jurisdiction, and the case is carried by appeal to the superior court, that court acquires no jurisdiction because its jurisdiction is altogether derivative, and depends upon that of the justice from whose court the appeal is taken. *Allen v. Jackson,* 86 N. C., 321; *Boyett v. Vaughn,* 85 N. C., 363.

There is error. Let this be certified to the superior court of Vance County that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: Jones v. Bobbitt, 90 N.C. 395; *McMillan v. Reeves,* 102 N.C. 559; *Wilson v. Ins. Co.,* 155 N.C. 177; *S. v. McAden,* 162 N.C. 578; *Jerome v. Setzer,* 175 N.C. 398; *Holmes v. Bullock,* 178 N.C. 379, 390; *Hargrove v. Cox,* 180 N.C. 364.

S. H. HILTON v. R. J. McDOWELL AND OTHERS.

Partnership—Evidence—Statement of Case.

1. To render competent the declarations of one partner against another, it is incumbent on the judge to determine the question whether there is *prima facie* evidence of the copartnership, and from his decision as to this preliminary matter there is no appeal. The proof in this case furnishes some evidence that defendants were jointly interested in the business.
2. Suggestion as to preparation of statement of case on appeal—matter not pertinent to the point raised should be omitted.

(365) CIVIL ACTION tried at Spring Term, 1882, of MECKLENBURG Superior Court, before *Gudger, J.*

Defendants appealed.

Messrs. Bynum & Grier, for plaintiff.

Messrs. Wilson & Son, for defendants.

RUFFIN, J. In this case a single exception was taken in the court below, and that one was so faintly argued by counsel here as virtually to amount to its abandonment.

The plaintiff sues upon an account alleged to be due him from the defendants, as partners, for lumber furnished them for use at their gold mine, and the only question is, whether by his proofs of the partnership he had prepared the way for the admission of the declarations of one of the parties as evidence against another.

Being examined as a witness, the plaintiff testified that he had an interview with the defendant, Miller, prior to his undertaking to furnish the lumber; that Miller asked him whether he had seen Richardson, and at the same time said to him, "We will want a large lot of lumber and if you will sell it right we will take a good deal." He also told witness that he would find Richardson at the Central Hotel in Charlotte. The witness sought Richardson and found him at the place designated, and made a contract with him for the delivery of the lumber. It was then proposed to ask the witness, touching his conversation with Richardson in regard to the contract as evidence against the defendant, Miller, to which the defendants objected upon the ground that no sufficient proof of the existence of the copartnership had been offered. The court, however, held otherwise, and admitted the evidence—though only as against the defendant Miller.

It cannot be seriously doubted that the declarations of Miller to the plaintiff, furnished some evidence of the fact that he was (366) to be jointly interested with Richardson in the purchase of the

lumber; and this being so, it was incumbent on the judge to determine the question, at least, so far as to say whether there was such *prima facie* evidence of the copartnership as to render competent the declarations of one against the other—and from his decision as to this preliminary matter, there can be no appeal, and consequently there was no error committed.

We take this occasion once more to call the attention of the Bench and Bar to the manner of stating cases on appeal, and urge upon them the propriety of making their statements less cumbersome than they sometimes do. In this case the counsel having disagreed amongst themselves, it devolved upon the judge who presided at the trial to prepare the statement for this court, and instead of a simple summary of the evidence, which was all that was needed to present the only point made in the case, there is sent up as part of the record a detailed statement of the entire testimony, as given in by eight different witnesses and covering twelve entire pages of paper, all of which we have been forced to scrutinize in order to see whether other exceptions were not taken.

It would certainly seem that a proper consideration of the additional expense thus entailed upon litigants, and the needless consumption of the time of the court, ought to induce to somewhat more of care in this regard—to say nothing of the unseemly appearance which the records of the court are made to wear by such a mass of useless matter.

No error. Affirmed.

Cited: Baker v. Clayton, 202 N.C. 743.

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(367)

J. M. FAIRLEY v. B. R. SMITH & CO.

Evidence of Market Values—Expert—Newspapers.

1. A witness cannot be permitted to testify to a knowledge of the market value of a commodity in a distant city (Boston), where his information is solely derived from reading the market reports in a newspaper published at a remote point (Charlotte).
2. But it is competent for him to give an estimate and opinion of his own as to such values, provided he be qualified to speak as an expert.
3. Market reports of such newspapers as the commercial world rely on, are admissible as evidence of market values.

FAIRLEY *v.* SMITH.

CIVIL ACTION for damages tried at Fall Term, 1881, of UNION Superior Court, before *Avery, J.*

Defendants appealed.

Messrs. Wilson & Son, for plaintiff.

Messrs. Burwell & Walker, for defendants.

SMITH, C. J. In the trial of the issue of damages it became material to ascertain the market price of cotton in Boston between the 1st and 13th days of February, 1876, and to prove the value, one Townsend, a clerk and book-keeper in the plaintiff's employment during that period, and who had usually assisted in weighing the cotton bought and sent off, was introduced as a witness on his behalf. He testified to a knowledge of the market value of cotton in Boston at the date mentioned, and that he derived his information from reading the market reports in the *Charlotte Observer,* a daily newspaper published in that city, but that his present recollection of the price was only from having consulted the files of that paper to refresh his memory, the day before.

This testimony after objection was permitted to go to the jury
(368) and the exception to its admission constitutes the only matter for consideration on the appeal.

While the witness speaks of refreshing his memory by reference to the telegraphic reports in the columns of the *Observer,* and recalling what had faded from his recollection, it is plain the eivdence is but that what is thus supplied. The witness does not profess to derive, from this and other accessible sources of information, the means of forming an estimate and opinion of his own, for in such case the testimony would be competent; but he manifestly depends upon a single newspaper report alone of the condition of the market and the value of the commodity in a distant city. The witness thus becomes the medium of communication of the published report to the jury, and does not testify as an expert practically conversant with the cotton trade, and giving the results of his own inquiry and examination obtained from such reliable sources as were within reach, and confiding in which prudent men would act in the daily transactions of business.

Is evidence derived as this was from reading the reports of the Boston market contained in the columns of a single daily paper issued at Charlotte, competent to go to the jury in proof of the value of cotton in Boston in February, 1876?

This question we proceed to consider, and to examine the more important of the many adjudications to be found in the reports.

In *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489, the exclusion of evidence of the state of the market as derived from reports in newspapers was held to be error; and in the subsequent case of *Clev. and Tol. R. R. Co. v. Perkins*, 17 Mich., 296, the introduction of the papers themselves was sustained to show the market price of an article, COOLEY, J., who delivered the opinion in both cases, stating in the first, the general rule to be, "to admit market reports of such *newspapers as the commercial world rely on*, as evidence (369) of market values."

Mr. Justice STORY in *Alfonzo v. United States*, 2 Story, 421, designates one thus testifying, as an expert, and ruled that a witness residing in Boston could testify to the price of sugar at Matanzas, from which place it had been imported, (as could merchants in the latter place,) when he had equal facilities from his actual trade and business in Boston in obtaining knowledge of the market.

None of these cases recognize the competency of such testimony from one who derives his information from the reports in a single newspaper published at a remote point, and in the absence of any proof of the source from which it was obtained, or that it was accepted and acted upon as reliable by prudent business men.

In *Lawrent v. Vaughn*, 30 Verm. 90, a witness was heard to speak of the market price of peas in Albany, on its appearing that he was engaged in the produce business in that place, as well as in Vermont, and received his information from those with whom he then had business relations.

Similar testimony was received in *Lusk v. Druse*, 4 Wend., 313, the witness being qualified to speak of the market price of wheat from an examination of the books of large dealers in that article.

In *Henkle v. Smith*, 21 Ill., 238, the *Weekly Gazette* was allowed to be introduced as evidence of the market, it being shown that the reports of grain were corrected weekly by the defendants themselves, and were thus in a measure their own declarations.

In *Lawton v. Chase*, 108 Mass., 238, a person who had been for many years engaged in sawing and in buying and selling logs in neighboring towns, and had put up a saw mill of his own in the immediate vicinity of the premises, and thus possessing unusual opportunities for acquiring knowledge, was permitted to prove the value of the logs.

So again in *Whitney v. Thatcher*, 117 Mass., 528, a merchan- (370) dise broker in Boston, having, as a member of houses which had business relations with each other in that city and in New York, become conversant with sales of bags in the latter place derived from daily prices current lists and daily reports of sales in New York to the Boston

firm, was allowed to speak of the price of that commidity in New York, the court declaring "that it is *the experience which he acquires in the ordinary conduct of affairs and from means of information, such as are usually relied on by men engaged in business for the conduct of that business, that qualifies the witness to testify.*"

But a more recent and more lucid exposition of the principle is contained in the opinion in *Wheeler v. Lynch,* 60 N. Y., 469. There, the files of a newspaper were offered to show the market value of wool. After disposing of certain objections to the charge to the jury, MILLER, J., proceeds thus: "The court was also in error in admitting the shipping and prices-current list without some proof showing how or in what manner it was made up: where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper, containing the prices-current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little, if any weight. The credit to be given to such testimony must be governed by intrinsic evidence, and *cannot be determined by the newspaper itself, without some proof of knowledge of the mode in which the list is made out.*"

(371) Mr. WHARTON deduces the following general rule in regard to this form of evidence: A newspaper, whose office it is to procure and publish market prices, and whose editors are proved to apply to brokers and others dealing in the staple for information, is *prima facie* evidence of such prices at a time when living witnesses to the fact cannot be obtained. * * * But such *publications are not admissible without evidence showing that the prices-current are drawn from reliable sources.*" 1 Whar. Evi., Sec. 674.

In harmony with these expressions is the language of our own court in *Smith v. R. R. Co.,* 68 N. C., 107, where a witness stated that he knew the price of cotton in New York only from accounts of sale rendered by his commission merchants in that city, on whom he drew for the reported balances put to his credit, and from telegrams, circulars and correspondence. In regard to this testimony RODMAN, J., says: "And so with regard to the price of a commodity at a certain time and place, a single sale would be slight evidence, for it might be under exceptional circumstances; whereas the result of all the sales of the day, or of a period shortly before or after, embodied in a reputation among dealers in the article, is the best evidence which the nature of the case

admits. The reputation thus formed and circulated by telegrams, commercial circulars, and the prices current in newspapers, is such evidence, as is acted on without hesitation by all dealers in their most important transactions." He further declares that such a witness "must be regarded in the same light as a *scientific expert.*" See also *Cliquots Champagne,* 3 Wall., 117, and 145.

From this review of decided cases, it is plain the evidence received in the present case has none of those essential safeguards to ensure the accuracy of the published information, as to the state of a distant market, to warrant its unqualified submission to the jury. It does not appear that business men acted upon this information, as truthful and correct, in their transactions with each other; nor from (372) what source the information itself comes. Nor does the witness possess the qualifications permitting his opinions, if he had such outside the printed report, to be given to the jury as coming from one possessing personal experience and thereby rendered competent as an expert to give those opinions.

We therefore think there was error in the admission of the evidence, thus obtained by the witness, and without any proof outside the paper of its trustworthiness and recognition, as such, by business men dealing in cotton. There must be a new trial and it is so ordered.

Error. *Venire de novo.*

Cited: Suttle v. Falls, 98 N.C. 395; *Ins. Co. v. R. R.,* 138 N.C. 52; *Moseley v. Johnson,* 144 N.C. 270; *Ferebee v. Berry,* 168 N.C. 282; *Commander v. Smith,* 192 N.C. 160.

WILLIAM Mc. SURRATT v. J. D. CRAWFORD AND OTHERS.

Justice's Judgment—Evidence—Motion to Issue Execution—Appeal.

1. A transcript of a justice's judgment, sent up to be docketed in the superior court, need not contain more than the essential particulars constituting the judgment; and where the justice authenticates the same by his certificate, it will be regarded as having been regularly taken, in the absence of proof to the contrary, even though the judgment itself was not signed by the justice.

2. The fact that personal notice of a motion to issue execution was given to defendant, is determined affirmatively upon granting the order, where there is no proof that the same was not actually given. Nor is it necessary in such case that an affidavit should be made that the judgment is unsatisfied.

3. There is no necessity for making a levy on the real property of an execution debtor. The judgment creates the lien.
4. The irregular manner of preparing statement of case on appeal, condemned. It should only contain matter explanatory of exceptions taken.

(373) EJECTMENT tried at Spring Term, 1882, of MONTGOMERY Superior Court, before *Gudger, J.*

Verdict and judgment for plaintiff. Appeal by defendants.

Mr. J. W. Mauney, for plaintiff.
No counsel for defendants.

SMITH, C. J. The plaintiff derives title to the land mentioned in his complaint by virtue of a sale made by the sheriff of Montgomery County, under an execution issued from the superior court of Davidson County, upon a judgment originally recovered before a justice of the peace and upon a transcript thereof docketed in said court, and also docketed in the superior court of Montgomery, by Thomas A. Jones against the defendant, consummated by the execution of the sheriff's deed therefor.

The exceptions taken by the defendant and appearing upon the record are to the evidence introduced in support of the plaintiff's title, and its legal sufficiency to divest the estate of the debtor, and transfer it to the plaintiff.

1. The defendant objected to the admission in evidence of the judgment docketed upon the filing of the transcript from the justice by whom it was rendered, for that, the judgment had not the signature of the justice for its authentication.

The transcript sent up and certified was in the following form:

THOMAS A. JONES, *v.* J. D. CRAWFORD. } Transcript of judgment before H. B. Dusenbury, justice of the peace.

Judgment in the above entitled action was rendered for the
(374) plaintiff and against the defendant, the 9th day of September, 1874, for amount of principal, $50; interest from 13th day of December, 1865, $29.21; costs to J. H. Welborne, $1..... .....$80.51

I certify that the foregoing is a true transcript from my docket of the judgment rendered in said action by me this 9th day of September, 1874.

(Signed) H. B. DUSENBURY, J. P.

The judgment is authenticated by the certificate of the justice as a correct and true transcript, and the docketing in the superior court gave to it all the efficacy of a judgment originally there rendered for the purpose of enforcement under final process. Bat. Rev., ch. 63, sec. 19. *Broyles v. Young,* 81 N. C., 315; *Morton v. Rippy,* 84 N. C., 611; *Williams v. Williams,* 85 N. C., 383.

It is not required that the transcript, sent up in order to the docketing in the superior court, should contain more than the essential particulars constituting the judgment, and though the signature is not attached to the judgment, it must be assumed, from the terms of the certificate of authentication, that it was entered up regularly and in proper form in the absence of any proof to the contrary.

2. The second objection is to the alleged want of proof of personal notice given to the debtor of the proposed application to the clerk to revive the judgment, and for leave to issue execution thereon. The notice is as follows:

THOMAS A. JONES, Plaintiff. } Judgment in Davidson Superior Court.

Superior Court—Davidson County.

To J. D. Crawford:

You will take notice that on the 22nd day of March, 1879, at the court house in Lexington, Davidson County, we shall move the clerk of the superior court of said county for leave to issue (375) execution against you in above action for the debt and cost due in said case.

(Signed) THOMAS A. JONES, Plaintiff,
to use of W. McSurratt
by John H. Welborne.

The endorsed return thereon is "executed by reading summons this 11th day of March, 1879. Geo. W. Henderson, Const."

It is not material to determine whether the return is itself sufficient evidence of service, although it would be of a subpoena issued for summoning a witness to testify in a cause. C. C. P., Sec. 349. The fact that personal notice was given to the defendant as required by the statute, is determined affirmatively by the clerk in making the order, and there is no suggestion made or proof offered that it was not actually given. It was not necessary to be proved by affidavit, except when the plaintiff undertakes to testify to the fact, and the judicial action of the clerk in the premises, if liable at all to a collateral attack, must be presumed to be regular and proper.

3. The third exception is to the sufficiency in form and effect of the adjudication, in that, the clerk does not find on affidavit that the debt remains unpaid. The order made is in these words:

"Upon due service of notice to the defendant and satisfactory proof of the judgment of J. H. Welborne attorney it is ordered that the plaintiff have leave to issue execution against the defendant. March 22d, 1878." (Signed by C. F. Lowe, C. S. C.)

Notwithstanding the confusion of the name of the attorney acting with the plaintiff in obtaining leave to sue out execution, the association of the judgment with the notice sufficiently points out and identifies the judgment to be revived, and on which leave to issue
(376) execution was asked and allowed. It is not required that an affidavit be made that the judgment or some part of it remains unsatisfied and due, since, while if the fact is to be established by the plaintiff's own oath it must be in that form, any "other satisfactory proof" is admissible for that purpose.

4. The last exception is to the absence of any levy on the land, preceding the sale mentioned in the sheriff's return upon the process.

There would seem to be little if any advantage, and certainly no necessity for making a levy on the real property of the debtor, under the present system of practice which creates a lien on all such as belonged to the debtor on the day of docketing the judgment, or has been by him since acquired in the county where docketed; and the execution operates, where personal property cannot be found, as an authority and order for the sale. It is in the nature to this extent of the writ of *venditioni exponas*. The only effect of a previous levy is the specific appropriation of the property on which it is made, out of other equally liable to the plaintiff's debt, and may confer an equity on others to have the property first levied on, sold and exhausted before resorting to the other real property of the debtor. But the levy is recited in the sheriff's deed to have been made on March 31st, 1879, while the sale took place on May 5th following, and the omission so to state in the return cannot have the effect of avoiding the sale and the conveyance of the land.

Before concluding the opinion, we are constrained to refer to the loose and irregular manner in which the case on appeal is stated. Some of the exhibits are twice copied and are inserted without any regard to their mutual relations and order, producing a confusion in the record which greatly and unnecessarily adds to our labors in understanding the points arising on the appeal, and may lead to misapprehension of the facts. The case on appeal should not set
(377) out in full the evidence introduced, but only so much as is explanatory of an exception relating to its admission, exclusion

or legal effect, and the facts with the instructions, if there be exception thereto by the appellant, and the requests of counsel for instructions asked and refused, and such as were given instead, and a specific assignment of errors. C. C. P., 301. A compliance with the provisions of the Code would facilitate our own labors. There is no error.

No error. Affirmed.

Cited: Lee v. Bishop, 89 N.C. 260; *Hinton v. Roach,* 95 N.C. 111; *Farrior v. Houston,* 100 N.C. 374.

J. N. GRIER v. J. H. CAGLE, ADMINISTRATOR, AND OTHERS.

Witness—Section 343 of the Code.

A defendant administrator is incompetent under section 343 of the Code to testify in reference to a land transaction between the intestate and himself, in a suit against him by creditors of the estate to subject the land, which is alleged to have been fraudulently conveyed by the intestate to the defendant.

CIVIL ACTION, tried at Fall Term, 1882, of TRANSYLVANIA Superior Court, before *Shepherd, J.*

The plaintiff appealed.

Mr. James H. Merrimon, for plaintiff.

Mr. David Coleman, for defendants.

SMITH, C. J. The plaintiff, having recovered judgment against the defendant, as administrator of his deceased father, Leonard Cagle, and there being no available assets to satisfy the same, in this action, instituted on behalf of himself and other creditors of (378) the estate, seeks to pursue certain moneys of the deceased debtor, which it is alleged in the complaint were used in payment for the tract of land therein described under a fraudulent arrangement between him and the defendant, in pursuance of which the estate therein was conveyed to the latter to avoid payment of the debts of the intestate.

The aim and object of the suit is to charge the land with the sum invested in the purchase, and compel the defendant to account therefor, and upon his failure, to have the land and so much of the proceeds applied to the discharge of the claims against the intestate's estate.

The defendant denies the imputations of fraud, and avers that he paid the entire price from funds of his own, and the deed was properly and *bona fide* made to him by the vendor.

Upon this main issue made in the pleadings, the defendant was examined as a witness for himself, and was allowed to testify to transactions between himself and his intestate, in reference to the land, and precedent to the execution of the deed, terminating in the conveyance of title to himself.

The competency of the defendant to give these transactions in evidence was resisted by the plaintiff, as coming within the inhibition of section 343 of the Code, and the ruling of the court in admitting it constitutes the exception presented for review.

As the grantee and administrator are one and the same person, and the alleged fraud cannot be reached and remedied, even if they were different persons, under the act of 1846, which enables the personal representative of a deceased debtor, whose personal property proves to be insufficient, on application to the proper court for an order of sale, to subject such real estate as may be required in due course of administration in payment of debts and charges administration, as the debtor may have owned and "conveyed with intent to de-
(379) fraud his creditors, and all rights of entry and rights of action, and interests in lands, tenements and hereditaments, which he may devise or by law would descend to his heirs," the present mode of proceeding affords the only remedy for creditors in the case, and upon the facts alleged in the complaint. Bat. Rev., ch. 45, secs. 61 to 71 inclusive; *Rhem v. Tull*, 35 N. C., 57; *Wall v. Fairley*, 77 N. C., 105.

It is plain if a suit be brought under the authority of the act, by the personal representative against the devisee, heir or fraudulent alienee of the land, for its conversion into assets, the defendant could not be heard to testify to a *communication* or *transaction* between himself and the deceased in support of his own title and to defeat the plaintiff's action, and we see no reason why the statutory disability would not apply with equal force to such testimony proceeding from the defendant asserting title in himself, when the creditors sue both him and the personal representative, to enforce upon the latter a neglected legal duty. Though necessarily associated as defendants, their relations are adversary, *inter sese*, as to the subject matter of the action, as truly and for all practical purposes, as if they were arrayed in opposition upon the record; and certainly no prejudice ought to accrue to creditors because they coerce him to do what the obligations of his assumed trust required him to do without coercion.

The difference between the voluntary action of the representative, and the coercive order of the court, consists in the fact, that in one

case the creditors put in motion the legal machinery provided for the conversion of real into personal estate, which the representative ought and has refused to put in motion himself.

In the present case, the administrator cannot sue because the title was not in the intestate, and could not be fraudulently alienated; and the only remedy to recover the property thus, as alleged, fraudulently invested, and subject it to the payment of debts, (380) is open to the creditors by a direct action against the party, who participates in the fraud and takes title to himself. In all substantial respects as regards the alienee claiming the estate, the creditors occupy towards him the same relation as would the personal representative occupy in a proceeding by himself to obtain an order of sale of property, fraudulently conveyed, and within the terms and scope of the statute.

Nor is the case varied because the grantee is also the administrator of the deceased, and, refusing to account for the moneys of the intestate used in the purchase of the land and denying his liability in the premises, forces upon the creditor a recourse to the only remedy provided by the law.

The administrator, when he sues for the creditors, whose representative and trustee he becomes, and when he cannot, the creditors become actors and sue for themselves; and testimony incompetent in the former, would seem to be not less so in the latter action. The same rule ought to govern in both, and, in our opinion a fair and reasonable interpretation of the act, looking to its obvious purpose and the evils against which it is directed, includes the testimony of the defendant admitted on the trial, and it ought to have been excluded. The case is stronger than that of *Bryant v. Morris,* 69 N. C., 444, the facts in which were held to be within the spirit, if not within the letter of the disabling enactment.

Without passing upon other exceptions, the ruling to which we have adverted must be declared to be erroneous, entitling the plaintiff to a new trial, and in order thereto the verdict must be set aside. Let this be certified.

Error. *Venire do novo.*

Cited: Wilder v. Medlin, 215 N.C. 546; *Cartwright v. Coppersmith,* 222 N.C. 575.

(381)

ANDERSON STARR & CO. v. CAROLINE A. HALL, Ex'x.

Attorney and Client.

An attorney cannot, under his general authority, accept service for his client of the original process by which the action is begun.

APPEAL from an order made at Spring Term, 1882, of BUNCOMBE Superior Court, by *Gilliam, J.*

In this case the summons issued on the 29th day of November 1875, and was returned endorsed as follows, "Service accepted this 3rd December 1875.—C. A. Hall, per M. E. Carter, atto."

At Spring Term, 1876, the complaint was filed, and also what purported to be an answer for the defendant, prepared by Carter & Carter, attorneys, of which firm M. E. Carter was a member.

The cause stood upon the docket until Spring Term, 1882, when the defendant obtained a rule upon the plaintiff to show cause why the acceptance of service made in her name should not be stricken out, as unauthorized by her, and the answer made for her be withdrawn from the files of the court, and also moved to quash the summons and dismiss the action.

In support of the rule, she offered her own affidavit, in which she sets forth that while she had retained Mr. Carter, as her attorney in the general management of the estate of her testator, and in the prosecution and defence of several actions brought for and against her, as executrix, she had never given him authority to accept service of process in her name, or to enter an appearance for her without the actual service of process.

She further declares that until the very day upon which she applied for the rule, she had no notice of the pendency of the action,
(382) or that any summons had ever issued or been accepted, or any answer filed, or entry of appearance made for her, and that Mr. Carter had ceased to be her attorney since the year 1877, he then having other engagements which made it inconvenient for him to serve longer in that capacity.

Mr. Carter was also examined as a witness and stated that upon the death of the defendant's testator, he became the general counsel of the executrix for the management of the estate, and assumed the active control of all matters pertaining thereto; that he collected the money due for insurance upon the testator's life, sold a stock of goods belonging to the estate, and paid, and collected debts, giving receipts when necessary. He also brought several actions in the name of the executrix and conducted them to their determination

without advising her, and defended one or more suits brought against her—doing all these things by virtue of his employment as the general counsel for the estate, and not upon any special employment in any particular case. But that in no instance save this one, had he accepted service of a summons for her, nor had he been generally authorized to do so, or specially in this case, and that his only motive for doing so, in this instance, was to save the defendant the annoyance of having service made by an officer, and to avoid costs to the estate; and that, for the reasons, stated by the defendant, he had ceased to be her attorney since 1877. This motion was made by another attorney.

Upon the evidence the judge below found the fact to be: That the summons in this case did not go into the hands of the sheriff, nor was it served on the defendant or accepted by her, but that Mr. Carter, acting as her attorney, and at the request of the plaintiffs' attorney accepted the service thereof, the same being done to save her inconvenience and expense, though without authority, either general or special; that the defendant had no knowledge of such acceptance, nor of the entry of an appearance in her name, or the (383) filing of an answer, or of the pendency of the action, until the day upon which she applied for the rule, and then she learned it accidentally; and thereupon he allowed the defendant's motion, and ordered the entry of "service accepted" to be erased, and granted leave to withdraw the answer filed, and the appearance entered for her. To this ruling the plaintiffs excepted and appealed.

Mr. James H. Merrimon, for plaintiffs.
Mr. Johnstone Jones, for defendant.

RUFFIN, J. The authorities, with reference to the right of an attorney to bind his client by accepting service of process for him, leave no room to doubt the correctness of his Honor's ruling in this case.

An attorney cannot, under his general authority, accept service for his client of the original process by which the action is begun. 1 Wait's Actions, 439; *Bagley v. Barkland,* 1 Exch., (W. H. and G.) 1; *Masterson v. LeClaire,* 4 Minn., 108.

The principles upon which these authorities rest, is, that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client, of the original process by which the jurisdiction of the court over the person of the client is first established, for until that be done, the relation of client and attorney cannot begin; nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent, or attorney

in fact, than as an attorney of the court, and to give effect to it, therefore, there must needs be a special authority for it; and as the law is plain, that the summons must be personally served upon the defendant, if a party will take upon himself the responsibility of discarding the mode prescribed by law, and admit of a waiver of such
(384) service by an attorney, he is bound to see to it, that the latter has the authority to act, or else, the inconvenience must be on himself.

After judgment, even in the case of an unauthorized appearance for the defendant, the courts will use some caution in giving relief, and will consider how far they can do so without doing prejudice to the plaintiff, who may have trusted to the official character of the attorney and thereby been misled. But when pending the litigation the authority of the attorney is denied, they more readily grant relief if asked in due season. Weeks on Attos., Sec. 197.

We are bound to accept the facts as found in the court below, and taking it to be true that Mr. Carter, however he may have construed his right to act for the defendant, by reason of his general retainer as her counsel, had really no authority to bind her, or to enter an appearance for her; and that she remained ignorant of his action in the matter, and even of the pendency of the suit, until the day of her application to be relieved, there can be no question as to the duty of the court to protect her, and therefore the judgment is affirmed. Let this be certified.

No error. Affirmed.

Cited: Warlick v. Reynolds, 151 N.C. 611.

W. K. DAWKINS v. A. C. PATTERSON AND OTHERS.

Mortgagor and Mortgagee—Trusts.

Mortgagor defaulted, and mortgagee under a power in the deed sold the land after due advertisement; an agent of mortgagee became the purchaser in the amount of the secured debt, and after deed to him reconveyed to mortgagee; all of which was assented to by the mortgagor under an agreement that he was to have twelve months thereafter to redeem, which he failed to do; the sale was fairly and honestly conducted; *Held,*

(1) The rule prohibiting trustees from buying at their own sales, either directly or indirectly, does not apply to the facts of this case.

(2) The effect of the transaction is to convert the mortgage into an absolute deed, with a legal right in the mortgagor to reacquire the land upon the terms of the agreement.

CIVIL ACTION, tried at Spring Term, 1882, of RICHMOND Supe- (385) rior Court, before *Shipp, J.*

The plaintiff being indebted to the defendants in the sum of $367.15 by note executed and bearing date on October 30th, 1874, and payable at twelve months, on the same day with one Randolph McDonald (whose relations to the matter are unexplained), conveyed by mortgage to the defendants the tract of land described in the complaint, with condition that the deed should be void if the note was paid at maturity, according to its tenor; and if not, vesting in the mortgagees a power of sale for its satisfaction.

The plaintiff having made default, the defendants after due advertisement and according to the terms of the mortgage, sold the premises at public sale to William Blue, for the amount of the secured debt, and conveyed the same to him.

In bidding and buying, Blue acted as agent of the defendants, and subsequently for the same consideration reconveyed to the defendants.

The sale and purchase by Blue, as the last and highest bidder for the defendants was assented to by the plaintiff under an agreement between the defendants and himself, that he should have twelve months thereafter in which to pay the debt and redeem the land, and failing to do so, that the sale should stand and the title and estate of the defendants become and be absolute.

The land was not redeemed, nor was any offer to redeem (386) made, within the time limited by the agreement, and on February 5th, 1877, after the expiration of the time, the defendants under summary proceedings before a justice of the peace evicted the plaintiff and recovered possession for themselves.

The foregoing statement of facts rests upon the allegations in the complaint that are not denied, and the findings of the jury upon such as are controverted.

The case transmitted with the record presents only the additional matter that an issue as to the value of the land was tendered by the defendants, but on a suggestion from the court that it was unnecessary as evidence would be heard, as if such inquiry was put in the form of an issue, upon those that were submitted, it was withdrawn, and as understood by the court without objection from the plaintiff. Such evidence was introduced and heard by the jury, the estimates of the witnesses being that the land was worth in the opinion of some $400, in the opinion of others $500, and a declaration of one of the defend-

ants was proved to the effect that under certain circumstances he would not like to take $1,000 for the property.

Upon the rendition of the verdict the plaintiff moved for judgment thereon, and being denied, and judgment rendered dismissing the action with costs, the plaintiff appealed.

Messrs. Burwell & Walker, for plaintiff.
Messrs. J. D. Shaw and Battle & Mordecai, for defendants.

SMITH, C. J., after stating the case. The law is well settled by a series of decisions in this state, that a trustee or mortgagee acting under a power vested in him by the deed cannot become a purchaser at his own sale, either directly or through an intervening agency, for the reason that his duties as trustee in making sale, under circumstances to command the highest price for the property, would (387) be in conflict with his interests as a purchaser in obtaining it for the smallest sum. This is a principle enforced in equity for the benefit of the *cestui que trust* or mortgagor, and he may affirm or avoid the sale at his election. *Brothers v. Brothers,* 42 N. C., 150; *Patton v. Thompson,* 55 N. C., 285; *Froneberger v. Lewis,* 79 N. C., 426, and numerous other cases.

And this reserved right to avoid the sale may be exercised by creditors who are not secured in the trust deed, but are interested in the estate conveyed as the source to which they must look for payment. *Elliott v. Pool,* 56 N. C. 17.

It is also decided that the relations of the mortgagee (at least with a power of disposition) to the mortgagor, are, if not the same, so similar to those subsisting between a trustee and his *cestui que trust,* as to require the application of the rule, that where the mortgagee obtains the equity of redemption or equitable estate from the mortgagor, he must show in support of the validity of the conveyance or transfer, beyond that afforded by the production of the instrument itself, the fairness of the transaction and rebut the presumption of the exercise of undue influence arising out of the relation in securing it. *McLeod v. Bullard,* 84 N. C., 515; affirmed on the rehearing; 86 N. C., 210; *Taylor v. Heggie,* 83 N. C., 244.

If the facts of the present case brought it within the scope of the rule, we should disregard the sale and restore the parties to the position previously occupied by them, respectively, as mortgagor and mortgagee, with the incidents inseparable from that relation.

But no estate or interest in the land was passed or acquired under the agreement as to the bidding, but only the assent of the mortgagor given to the bidding by the agent of the defendants for them, and

their becoming the purchasers, if their bid was higher than the bid of others, and was of a sum sufficient to discharge the debt; and thus dispense with the rule, which, for his protection only, pro- (388) hibited them from purchasing at the sale. The consideration for the assent is a further extension of the time of redemption, and such contract though by parol is valid. *Blount v. Carroway,* 67 N. C., 396.

There is no suggestion in the complaint that the sale was not in all respects open and fair, or that any injury resulted to the plaintiff from the manner in which it was conducted and closed. The assent to the sale was unnecessary, for it was made pursuant to an agreement, and in the exercise of a power contained in the mortgage deed, and could have been made without the further assent then given. The only consent required was that the defendants might bid and buy, if necessary, to save their debt, and this was procured by an agreement for a right of redemption to be exercised within a year thereafter. The effect of the transaction was consequently to convert the mortgage into an absolute deed, with a legal right in the plaintiff to re-acquire the land on the terms of the substituted agreement entered into between the parties. If there were circumstances of fraud, oppression or undue advantage taken of the plaintiff, of which the record discloses none, the matters *in pais* might afford ground for the interposition of the court granting the plaintiff relief.

But his asserted equity is to have declared null the sale itself because of the bidding and purchase, however fair and honest and notwithstanding the waiver for a valid consideration, because the equitable principle governing such transactions, generally, has not been observed in this. We do not assent to the proposition, and in our view the arrangement was effectual and the plaintiff failing to take advantage of its terms cannot now find relief in this court.

We therefore uphold the ruling of his Honor and affirm the judgment.

No error. Affirmed.

Cited: Bruner v. Threadgill, 88 N.C. 368; *Jones v. Pullen,* 115 N.C. 471; *Hauser v. Morrison,* 146 N.C. 251.

(389)

FRED. H. STITH AND OTHERS v. JOHN F. McKEE AND OTHERS.

Deed—Evidence—Equity—Correcting Mistake.

1. Evidence of the value of land seven years after the execution of a deed conveying it, is not incompetent, as bearing upon the intention of the maker to convey a fee simple estate, to show that the consideration recited was the full value of that quantity of interest, even though the same is not paid in money, but in property.
2. Where a party has been in continued possession of land, the court will not withhold its aid in correcting a deed therefor upon the ground of his laches in seeking relief; to deprive him of this, there must be an abandonment of right or acquiescence in the enjoyment of the property by another, inconsistent with his own claim.

EJECTMENT tried at January Special Term, 1882, of DAVIDSON Superior Court, by *Seymour, J.*

This is an action for the recovery of land begun in 1881. Both parties claim under Nancy Trotter—the plaintiffs under a conveyance from her heirs since her death, and the defendants under mesne conveyances from Philip Hendrick, to whom she conveyed in 1826.

The deed to Hendrick after acknowledging the receipt of the sum of two hundred dollars as its consideration, contains the following limitation:

"The aforesaid land with all its waters, woods, etc., to have and to hold, and I the said Nancy Trotter do for myself and my heirs warrant and forever defend the right and title of the above bounded land against all and every other person or claim on the said Philip Hendrick, his heirs and assigns forever, etc."

The plaintiffs insist that the effect of the deed was to pass only a life estate to Hendrick, and as he is now dead, they are entitled to the possession of the land. On the other hand the defendants in-
(390) sist that it passed a fee simple estate, but that if it did not, it was so intended, and so understood by the parties, and if there is any failure in it, it is owing to a mistake in the draftsman.

In response to an issue submitted to them the jury found affirmatively, "that it was the intention of Nancy Trotter to convey, and of Philip Hendrick to purchase an estate in fee, by the deed, and that it was the intention of the parties that the deed should pass such an estate, and the words of inheritance were omitted by mistake."

Upon the strength of the verdict, judgment was rendered for the defendants, and the plaintiffs appealed.

Messrs. W. H. Bailey and Merrimon & Fuller, for plaintiffs.

Messrs. J. M. Clement, J. M. McCorkle and G. N. Folk, for defendants.

RUFFIN, J. The finding of the jury makes it unnecessary that we should consider the question as to the operation of the deed, and the estate which it in fact passed; for however that may be, the defendants are clearly entitled to the judgment of the court, unless some error was committed in the conduct of the trial, of which the plaintiffs can complain, and for which they are entitled to have the verdict set aside; as to which we will now proceed to consider their exceptions.

As bearing upon the intention, with which the deed was executed, the defendants offered evidence as to the value of the land in 1826, and to show that the sum of two hundred dollars recited in the deed as its consideration, was the full value of the fee simple estate therein. The first exception taken was, that one of their witnesses was allowed to speak of its value in 1833—seven years after the execution of the deed.

The most that could be said against this evidence is, that it was immaterial, and conceding it to be so, it would not be proper to disturb the verdict on account of its admission. If immaterial, (391) then it was harmless. If pertinent, then it was competent.

With the same view of affecting the intention of the parties to the deed, the plaintiffs offered evidence going to show that the consideration of two hundred dollars, recited therein, was not paid in money but in a stallion, and they then offered to show, by common reputation the value of the animal, which upon objection they were not permitted to do.

We deem it needless to consider the quality of the testimony offered, for whatever may have been the actual value of the horse, supposing the consideration to have been discharged in that way, the parties to the contract put their own estimate upon him—the one agreeing to part with, and the other to accept him at the price of two hundred dollars; and the only effect of the evidence, if received, could have been to show that they were mistaken in their estimate as to his value, and not as to the price agreed upon for the land; and therefore it could avail nothing towards conducting the jury to a proper conclusion as to the latter matter. If offered for the purpose of contradicting the deed, by showing that the real consideration paid was less than the one recited upon its face, then, in the absence of any suggestion of fraud or imposition, the testimony was clearly incompetent. *Jones v. Sasser,* 18 N. C., 452; *Powell v. Man. Company,* 3 Mason, 347; *Shelby v. Wright,* Willes Rep., 9.

The plaintiffs insist that Hendrick and those claiming under him have forfeited their right to the aid of the court, in correcting the deed, by reason of their delay in seeking such relief, and they therefore moved the court to give them judgment notwithstanding the verdict of the jury, but this the court declined to do.

That one may preclude himself by his laches from asserting a right which otherwise the courts would help him to enforce,
(392) there are abundant authorities to show. But to do so in any case, there must be something, on his part, which looks like an abandonment of the right, or an acquiesence in its enjoyment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which a court has withheld its aid in the enforcement of an equity, on the ground of the lapse of time when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident.

The cases, to which counsel referred us, were all cases depending upon the statute of limitations, or some kindred statutory provision, and in every instance there was a possession held adversely to the party seeking to be relieved.

In *Lewis v. Coxe*, 39 N. C., 198, the distinction which we are now attempting to make seems to be pointed out. That was a suit for the specific performance of a contract for the purchase of land, instituted after the lapse of forty years from the date of the contract. The court held that the lapse of time furnished strong grounds to believe that the contract had been abandoned, and at all events, repelled all claim to the interference of a court of equity; but at the same time there was a plain intimation that the decision would have resulted differently, if the plaintiff could have shown that he had entered, and kept possession under the contract.

In our case, Hendrick, the original purchaser, took possession under color of a deed, which, as the jury find, was intended to convey to him an absolute estate in the land, and he and those coming in under him have retained that possession continuously since 1826—just that possession which they would have taken and retained, had the deed been such as it was intended to be. Where then is the evidence of any abandonment of their right in the premises? or of any acquiescence in its enjoyment by another, inconsistent with the relief
(393) they now seek at the hands of the court?

While bound, like all others, to understand the law and to know the legal import of the deed under which they hold, they were not bound to anticipate an effort on the part of the plaintiffs or those who sold to them, to defeat the intention with which the deed was made, and to assert an inequitable claim to the land thereby con-

veyed. Until assailed from some quarter, they were not called upon to act, and consequently no presumption could arise against them because of their failure to do so.

The conclusion of this court therefore is that there is no error in the judgment of the court below, and the same must be affirmed.

No error. Affirmed.

Cited: Mask v. Tiller, 89 N.C. 427; *Hinton v. Pritchard,* 98 N.C. 357; *Hemphill v. Hemphill,* 99 N.C. 442; *Norton v. McDevit,* 122 N.C. 759; *Woodlief v. Wester,* 136 N.C. 168; *Jefferson v. Lumber Co.,* 165 N.C. 50; *Shell v. Lineberger,* 183 N.C. 443; *Spence v. Pottery Co.,* 185 N.C. 221; *Marshall v. Hammock,* 195 N.C. 201; *Wise v. Raynor,* 200 N.C. 571: *Bank v. Gahagan,* 213 N.C. 514; *Wolfe v. Smith,* 215 N.C. 291; *Bowen v. Darden,* 241 N.C. 17.

JOHNSTON & SILER v. N. W. JONES.

Judgment—Leave to Issue Execution—Statute of Presumptions and Limitations.

1. A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure, is subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code.
2. Leave to issue execution may be granted when the fact is established that the judgment has not been paid in full.

APPEAL from an order made at Spring Term, 1882, of MACON Superior Court, by *Gilliam, J.*

This was a motion for leave to issue execution made before the clerk of the superior court of Macon County on the 29th day of August, 1879, notice thereof issuing to the defendant on the (394) same day.

The judgment was obtained in the superior court of said county on the 15th day of April, 1867, and was docketed on the 26th day of December, 1868. Divers executions were issued, the last one in April, 1877.

The defendant filed a written answer to the motion, in which he alleged: 1. That he owed the plaintiff nothing. 2. That he had paid the judgment. 3. That the same was barred by the statute of limitations.

The plaintiff, Johnston, filed an affidavit before the clerk in which he made oath, that there was still a balance due on the judgment, and that the defendant had made frequent acknowledgments of his indebtedness upon said judgment, the last one being not more than eighteen months prior to the date of the motion.

After considering the defendant's answer and the affidavit of the plaintiff, the clerk found as a fact, that the judgment had not been entirely satisfied, and it was not barred by the statute of limitations, and thereupon he granted leave to issue execution for the balance due.

From this order the defendant appealed to the judge of the court, before whom the matter was again heard upon the same testimony, and the same findings and order made, from which this appeal is taken.

Mr. George A. Jones, for plaintiffs.
Mr. James H. Merrimon, for defendant.

RUFFIN, J. The competency of the plaintiff, Johnston, to testify at all in the matter since the act of 1879, ch. 183, amending section 343 of the Code, seems doubtful, to say the least of it. But the point does not appear to have been taken before either the clerk or the judge, and of course we cannot now entertain it.

(395) Taking his affidavit to be evidence, it certainly supports the finding that the judgment had not been entirely satisfied, and this was all that was needed to justify the leave given to issue execution.

The judgment having been rendered before the adoption of the Code in 1868, is subject only to a presumption of satisfaction under the act of 1826, and not to the statute of limitations as prescribed in the Code.

There is a plain distinction between this and the case of *Pasour v. Rhyne,* 82 N. C., 149, consisting in the fact that there, the defendant in the execution had been declared a bankrupt, and thereby wholly discharged from the debt, except in so far as it had become a lien upon his lands before going into bankruptcy. This, the plaintiff sought to establish; first, by showing an actual levy of a *fi. fa.* before the Code; and secondly, by virtue of the lien of a judgment docketed under the Code. The court held that neither could avail him; the one, because the levy had been destroyed by issuing an *alias fi. fa.;* and the other, because the lien acquired by docketing the judgment expired at the end of the ten years. This is all that case decides, and there is nowhere an intimation in it that a judgment obtained in 1867, becomes subject to the statute of limitations, because of its being docketed after the adoption of the Code.

We can perceive no error committed in the court below, and the judgment is therefore affirmed. Let this be certified.

No error. Affirmed.

Cited: Lee v. Beaman, 101 N.C. 298; *Smith, Ex Parte,* 134 N.C. 502.

(396)

R. M. MILLER, ADM'R, v. PHARR & MEANS, EX'RS, AND OTHERS.

Suit on Constable's Bond—Evidence.

1. Where the breach assigned in a suit on a constable's bond is that the constable failed to return a note to plaintiff, which he had placed in his hands for collection, it is a sufficient defence to show, as held in *Gregory v. Hooks,* 33 N. C., 371, that the officer had obtained judgment on the note before a justice of the peace, for then the note became merged in the judgment and remained in the office of the justice.
2. In such case, where the officer obtained judgment on a particular note, and the entry on the docket was, "debt settled, costs paid into office," *it was held* (the constable and justice both being dead), that the testimony of plaintiff's attorney that he had from time to time received money on the various claims placed in his hands for collection, but could not remember upon which, is some evidence that the constable paid the same to the plaintiff.

CIVIL ACTION upon a constable's bond, tried at Spring Term, 1882, of MECKLENBURG Superior Court, before *Gudger, J.*

This action is brought on the official bond, given in 1869 by J. N. Caldwell, as constable, with the defendants, E. P. Cochrane and J. S. Means, as his sureties. The said Caldwell and Means are both dead, and the defendants, H. S. Pharr and J. D. Means, are their executors.

The plaintiff alleges that in September, 1874, he, as the administrator of William Ross, deceased, placed a large number of claims in the hands of said Caldwell, as constable, for collection, and amongst them a note on Hugh Gilston, Joshua Glover, and John W. Elms, for seventy-five dollars, subject to a credit of $43.50, and he complains:

1. That Caldwell collected the claims and failed to pay over the proceeds.

2. That he failed to account for the evidences of debt, when demanded of him.

On the trial, Clement Dowd, witness for plaintiff, testified that (397) as his attorney he placed the claims in the hands of Caldwell, as constable, for collection, and took a receipt therefor, which receipt has been lost; that the said constable afterwards returned two of the claims, but which two the witness could not remember, though he erased them from the receipt; that the constable also paid him money from time to time on the claims, for which he gave him receipts, and after the death of the constable, the witness made a demand upon his executors, either

to pay the money collected or return the papers, telling them however that he thought there was very little, if anything, due on them, and that his chief object was to get up the papers. Witness could not tell upon which of the claims money had been paid him.

John W. Elms, a witness for the defendants, testified that he had paid to A. H. Martin, a justice of the peace, the balance due on the note given to the plaintiff's intestate by Gilston, Glover, and himself, and also the costs of action thereon in the justice's court. The justice is dead, but his docket was introduced showing the following entries:

"R. M. MILLER, administrator of WILLIAM ROSS, deceased, *v.* HUGH GILSTON, JOSHUA GLOVER and JOHN W. ELMS.	November 8th, 1870. Judgment for plaintiff—	
	Principal	$ 37.00
	Interest	1.85
	Costs	4.35
		$ 43.20

Debt settled, costs paid into office."

The note was on file with the papers in the justice's office, and also an execution filled up, but which did not appear to have been issued.

The justice died in the year 1875, and the constable in 1877, and no demand was ever made upon the latter for the money or the note.

(398) After the evidence was closed, the plaintiff abandoned all his causes of action, except that of the note on Gilston, Glover and Elms, and, with reference to it, requested the court to charge the jury:

1. That if Caldwell received the note for collection and failed to return it on demand, there was a presumption that he had collected it or converted it to his own use.

2. That if the entry upon the justice's docket, "Debt settled, cost paid into office," meant that Caldwell retained the amount of the debt and paid only the costs into office, the jury should find for the plaintiff, as to this debt, as there was no evidence that he had ever paid the amount to the plaintiff.

These instructions the court declined to give, and the plaintiff excepted. Verdict and judgment for defendants, appeal by plaintiff.

Messrs. Dowd & Walker and Reade, Busbee & Busbee, for plaintiff.
Messrs. Jones & Johnston, for defendants.

RUFFIN, J. There is no ground for the plaintiff's exception. The note was merged in the judgment, and we presume had been cancelled by the justice, as it should have been. At all events, it was properly

accounted for by proof that it was on file with the papers in the justice's office. *Gregory v. Hooks,* 33 N. C., 371. Therefore the first instruction asked for was properly refused.

As to the second instruction—Conceding it to have been the duty of the constable to have received the money of the justice and paid it over to the plaintiff, still, we think it was properly refused, as there was certainly some evidence going to show that he had so done. The plaintiff's own witness (Dowd) testified that he had received money on the claims from time to time, and until he thought all had been paid that could have been collected on them; and that he so declared (399) to the defendants when he made a demand on them after the death of the constable. In the face of this testimony, it would have been manifestly improper for the court to have instructed the jury that there was no evidence that the amount due, on this particular note, had ever been paid to the plaintiff.

No error. Affirmed.

NELSON HOWELL v. McCRACKEN & HOWELL.

Vendor and Vendee—Contract of Purchase—Judgment—Lappage—Constructive Possession.

1. Vendee, in contract for purchase of land, executed notes to vendor who endorsed them to another, and, upon judgment recovered against him alone, paid the same and had the notes reassigned to him (the vendor), and then, he transferred them to the plaintiff who sues the vendee to recover the amount; *Held* that the action is properly brought.
2. The judgment on the notes against the endorser, is a judgment on the contract of endorsement, and the obligation under the contract of purchase remains in full force against the vendee debtor.
3. Where the deeds of A and B cover the territory in dispute (as represented in diagram in *Logan v. Fitzgerald, ante,* 308) and B is in actual possession, under color of title, of a part of the lappage enclosed under fence, he is constructively in possession of the unenclosed part; but where the adverse claimant enters upon the part outside of the enclosure, under a claim of title, and exercises repeated acts of ownership over it, for the purposes for which the land is susceptible, the continuity of such constructive possession is destroyed, and B's claim to the unenclosed part, defeated.

CIVIL ACTION tried at Spring Term, 1882, of HAYWOOD Superior (400) Court, before *Gilliam, J.*

The defendants appealed from the judgment of the court below.

Mr. George A. Shuford, for plaintiff.
Mr. James H. Merrimon, for defendants.

SMITH, C. J. On the 10th day of October, 1876, a contract was entered into between one Mark Howell and the defendant for the sale and purchase of a tract of land of the former, pursuant to which the vendor in a title-bond covenanted to convey an estate in fee therein on payment of the purchase money, retaining the same as a security therefor, and the defendant vendee executed and delivered his three several notes under seal in the sums of $250, $300 and $325; parts of the deferred payment, bearing interest from date and due at one, two and three years. The notes were duly and for value endorsed by the payee to the plaintiff, who on April 11th, 1878, brought his action against the defendant on the note then matured, and on September 6th, 1880, on the two other notes, to recover the moneys due on them.

These two actions pending in the superior court, were consolidated by a consent order and tried as one suit.

The defence set up was that the vendor had not title to a part of the land embraced in the contract, of about ten acres in extent, and there should be an abatement of the sum contracted to be paid, corresponding with the value of that to which the vendor was unable to make title; and further, that the action was misconceived as to the last maturing notes, and should have been for money paid by the endorser, for the use of the principal debtor on the implied contract of suretyship.

(401) Three issues were submitted to the jury, the first and material one of which is in these words:

Did Mark Howell, and others under whom he claims, hold continuous exclusive adverse possession of the lappage, up to the Russell McCracken fence, for seven years before June 11, 1877? to which the jury responded, "yes."

The other issues were as to the value of the entire lappage, and of the part enclosed and under fence.

On the trial it appeared in evidence that Mark Howell, the vendor, had, previous to his assignment to the plaintiff, endorsed the notes maturing in 1878 and 1879, after maturity to one E. Sluder who brought suit thereon in said court against the defendant and the endorser, and having entered a *nol. pros.* (miscalled a non-suit in the record) as to the principal debtor, recovered judgment against the endorser at Spring Term, 1880. On May 10th thereafter, the said Mark Howell satisfied the judgment rendered against himself by payment to Sluder who at the same time re-assigned and delivered the notes to said Howell, and he thereafter transferred them to the present plaintiff.

It further appeared that the vendor held the land described in the contract, and of which the ten acres in dispute forms a part, under a grant from the state issued in 1851, while the adversary claim was derived under a deed executed in 1858 to one W. C. Hill, and possession thereunder for more than seven years.

The disputed territory is within the boundaries of both deeds, and the said Hill, it is admitted, has been in actual possession of about three-fourths of an acre of the lappage enclosed under fence, so as to divest the title to so much of it out of the grantee and transfer it to said Hill. The residue of the ten acres outside of the enclosure was wood-land, and while it is not stated that Hill at any time entered thereon or exercised any act of ownership, the grantee (Howell) did continuously during the interval enter upon the wood-land and get and remove fire-wood, rails and boards from the growing timber at his (402) pleasure.

The defendants' contention was that the occupation of the enclosed part was a constructive possession, extending to the boundaries of the land described in the deed to Hill, and perfected his title to the whole lappage.

The court ruled that the action was properly brought, and submitted to the jury as evidence, to be considered by them upon the question of possession, the use made of the woods of the unenclosed part of the disputed lappage by the owner, "for all the purposes for which such land was susceptible," in its present condition up to the boundary of the grant.

1. We concur with his Honor that the judgment on the notes against the endorser only extinguished and merged the cause of action arising upon his contract of endorsement, leaving in full force the contract obligation of the debtor to pay the debt.

It is familiar learning that an endorser may take up a bill or note and have recourse on the acceptor or maker, and any endorsers whose liabilities are prior to his own, while subsequent endorsers are discharged by such payment. *Casey v. Harrison,* 13 N. C., 244; *Phifer v. Giles, Ib.,* 498; 2 Dan. Neg. Ins., Sec. 1204; *Dickinson v. Van Noorden,* 4 N. C., 109; *Havens v. Huntington,* 1 Cow., 387; *Mead v. Small,* 2 Greenl., 207; *Gormez v. Berkley,* 1 Will., 47; *Price v. Sharp,* 24 N. C., 417.

We see no reason why a judgment upon the contract of endorsement against the party endorsing only, and its subsequent satisfaction by payment to the endorsee suing and recovering, should have any different effect upon the antecedent liabilities of others, than that which is produced by a payment without suit. In both cases the contract of the endorsee is discharged, and in each the contract, except as to

(403) subsequent endorsements, remains in full force as to the others.

But if it were otherwise, the moneys due from the defendant, whether upon his express promise to pay or his implied contract to indemnify the surety, have been transferred to the plaintiff, and he being entitled thereto can alone sue for the recovery under the Code. The transfer of the notes means an assignment of the interest of the assignor in them, direct or indirect, to the plaintiff.

2. If there is any error in the charge, it is an error favorable to the appellant, and he cannot complain. The authorities are numerous and ample that a possession under color of title, to divest the estate of the owner, must be adverse, open and continuous, and without interruption from the owner. Whether the acts of Howell would in themselves constitute a possession sufficient to ripen a defective into a perfect title, each is an entry under a claim of title, and an assertion of ownership, and breaks the continuity of the constructive possession of Hill outside of his enclosure, and defeats his claim to this part of the land. The repeated exercise of ownership in using the trees for his own purposes by Howell at his will, and the abstaining of Hill from any interference, certainly must have the effect of preserving the better title in the former.

"A seizin once lost by a disseizin," remarks a writer of authority, "may be regained by the disseizee by a re-entry upon the land without turning the person in the actual seizin out of possession. * * * The re-entry, in order to regain a seizin, must be done with that intent, and must be made upon some part of the land. It is enough, however, that the owner goes upon the land with the intent thereby to gain his seizin. Wash., Real Prop., 124. It may also be added that acts of ownership upon the land is the strongest evidence of the intent with which the entry is made. Again, the same author says: "Every element

(404) which goes to make a possession adverse, must occur, or it will not confer a title." "And if," in the language of the court of Pennsylvania, "there be one element more distinctly material than another in conferring title, when all requisites are so, it is the existence of a continuous adverse possession for twenty-one years." An actual interruption of the possession is fatal to the claim under it. *Ibid.*, 124.

The cases relied on for defendant are not applicable, since the true owner did not by entry revest possession in himself.

It is plain that no error has been committed against the appellant in either ruling, and the judgment must be affirmed.

No error. Affirmed.

Cited: Logan v. Fitzgerald, 92 N.C. 650; *Currie v. Gilchrist,* 147 N.C. 654; *McQueen v. Graham,* 183 N.C. 494; *Berry v. Coppersmith,* 212 N.C. 54.

ANGUS H. McDONALD v. R. D. DICKSON, AND OTHERS.

Judgment—Contract—Statute of Limitations.

1. The decision in this case, reported in 85 N. C., 248, is affirmed.
2. A partial payment, voluntarily made, on a judgment within ten years preceding a motion for leave to issue execution thereon, does not remove the statutory bar. C. C. P., Sec. 31.
3. A judgment is not a contract within the meaning of the act of assembly, which provides that a promise in writing, or an actual payment by the party, shall be received as evidence of a new and continuing contract, to repel the statute of limitations. C. C. P., Sec. 51.
4. The act confines the written acknowledgment, to actions on contract, and dispenses with a writing where partial payment is made, which is in effect a written promise.
5. A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter, a new cause of action arises out of the judgment.
6. Distinction between judgments and contracts, as separate and independent causes of action to which different periods of limitations are prescribed, stated by SMITH, C. J.

MR. JUSTICE RUFFIN dissents from the opinion of the Court.

PETTITION to rehear, decided at October Term, 1882, of THE (405) SUPREME COURT.

Messrs. Burwell & Walker, for plaintiff.

Messrs. J. D. Shaw and Hinsdale & Devereux, for defendant, cited *Taylor v. Spivey,* 33 N. C., 427.

SMITH, C. J. We are asked to re-consider the decision rendered in this cause at October Session, 1881, (85 N. C., 248) and our attention is called to the effect of the partial payment made on May 9th, 1871, and within the ten years preceding the application for leave to issue execution, in removing the bar of the statute of limitations relied on as a defence.

Under the former system, there was no period prescribed within which actions must be brought on judgments rendered, except those before a justice of the peace, or on sealed obligations other than official bonds, and the lapse of time only raised a presumption of payment, shortened by statute to ten years after the cause of action accrued, and this was open to disproof before the jury. Consequently a recognition of the debt, as subsisting, by making a payment upon it, a most unequivocal acknowledgment of the obligation, was held to rebut the presumption of payment and entitle the plaintiff to recover.

Judgments and contracts under seal under the superseding statute are now subject to limitations, and actions to enforce them must (406) be brought, as in the enforcement of other causes of action, within a fixed period, or the remedy meets the bar.

There is therefore no analogy which makes the decisions under the former precedents applicable to the present law, inasmuch as they relate entirely to rules of evidence and not to the removal of a statutory bar where the action is upon a bond or judgment. A payment of part of a debt resting upon a promise has the same effect in continuing or reviving it, as a new promise itself; and the very act is deemed a promise to pay the residue. Its effect is to revive and continue in force the antecedent liability when the promise is of the same nature as that to be revived, and the declaration is upon the original cause of action, the plea of the statute being neutralized and put out of the way by the new acknowledgment.

"Nothing is plainer," remarks RUFFIN, C. J., "than that making a payment on a note repels the statute. It is assuming the balance anew." *Walton v. Robinson,* 27 N. C., 341. And a promise after suit brought repels the statute and sustains the action, as is decided in *Falls v. Sherrill,* 19 N. C., 371. The subject has been so recently considered that it is needless to pursue the discussion further. *Hewlett v. Schenck,* 82 N. C., 234; *Green v. Greensboro College,* 83 N. C., 449.

In enacting the substituted statute which after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely, it is provided (C. C. P., Sec. 51) that "no acknowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing, signed by the party to be charged thereby. But this section shall not alter the effect of any payment of principal on interest." The section confines the new written acknowledgment or promise to actions on contract, and its force is spent in removing the bar and permitting a recovery on the cause of (407) action to which the defence is set up, and the concluding clause is but a qualification of what precedes, by dispensing with a writing when a payment is made, and imparting to that act the legal effect of a written promise. It is to be understood as declaring that an acknowledgment or promise in writing signed, or an actual payment by the party sued, shall be received as evidence of a new or continuing contract; and when the new promise, positive or implied, is not itself the cause of action, but is used to prove and support that to which it relates, and which would otherwise be barred, it must be confined to such as arise out of contract and none others.

The sole remaining inquiry then is, whether in the sense of the act a judgment can be deemed a contract and sued on as such, whether recovered upon a contract or for a tort.

There have been several adjudications that an action for a penalty, being in the former pleading classed with actions *ex contractu* as distinguished from those *ex delicto*, may be maintained before a justice of the peace, whose jurisdiction was restrained under the constitution to actions on contract, until amended, and then to a limited amount. *Town of Edenton v. Wool*, 65 N. C., 379; *Katzenstein v. R. & G. R. R. Co.*, 84 N. C., 688.

These adjudications do not determine the sense in which the word used in the statute is intended to be understood, and we think a cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment whenever it becomes necessary to enforce the obligation by suit. The liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed; and while the indebtedness thus established, when the enforcement of the judgment is obstructed by the statutory bar, may constitute the consideration of a subsequent promise as a new (408) cause of action, the promise itself cannot remove the legal consequences of the lapse of time upon the judgment itself.

The distinction between judgments and contracts as separate and independent causes of action, to which different periods of limitation are assigned, is marked and manifest throughout the present, as it was in the former acts of limitation. Thus the period of ten years is fixed within which actions must be brought on judgments other than those of a justice of the peace, and seven years for the latter; and again, leave must be obtained upon the first class of judgments before the action can be begun; while varying times are prescribed within which suit must be brought upon the different forms of contract, and against different parties liable thereon.

But the very point came before the supreme court of Kentucky and was determined in *Dudley v. Lindsey*, B. Mon., 486. There, an action of debt was brought on a judgment recovered in the circuit court of the United States in the state of Mississippi, to which was pleaded *nul tiel record* and the statute of limitations. The plaintiff demurred to the latter plea. The statute on which the defendant relied, declares "that all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within five years," and it was contended that a debt due by judgment is founded upon contract, and that, as the statute contains a single exception and that in the case of specialties, the limi-

tation applies to all other contracts, embracing a debt due by judgment. The court says: "A judgment for money is not strictly a contract, but it imposes a civil liability and is a more conclusive evidence of indebtedness than a contract by specialty; and therefore an action upon it is not embraced by the statute of limitations."

A *judgment* is not an *agreement, contract* or *promise* in writing,
(409) nor is it in a legal sense a specialty. Therefore the action on it is not within 21 James I, and similar enactments in the states. 7 Wait Actions and Defences, 253.

As then an unequivocal acknowledgment or promise in writing will not remove the statutory obstruction to the enforcement of a judgment by a new action, because it is not a contract within the meaning of the act, nor can a partial payment which implies such promise have greater effect than an express promise, the present proceeding whose purpose is to obtain an order for leave to issue execution upon the *dormant judgment,* must also be ineffectual. The case is one referring solely to a defence under the statute of limitations, not one raising a presumption capable of being rebutted, and therefore must be decided upon the principles involved in former adjudications. We must therefore affirm the judgment, and it is so ordered.

RUFFIN, J., *Dissenting.* It devolved upon me when this cause was first before the court, to prepare the opinion which is now the subject of review. I am very sure that at that time no one partook of more confidence in the correctness of the conclusion, then arrived at by the whole court, than myself; and I much wish I could concur with my associates in still thinking it to be correct. But the fact is otherwise, and it is but candid in me to say so. Not that my opinion of the law governing the case has undergone a change, but that I failed to impute to the fact that there had been a payment made upon the judgment, that significance which I think it deserves, and which I should then have given to it, if I had correctly apprehended its nature.

In investigating the case, which I endeavored to do thoroughly, it did not escape me that there had been a payment made; but, somehow from the fact of its beginning on a judgment, I received the impression that it had been involuntarily made, under execution, and could
(410) not therefore affect the rights of the parties, or the question I was then considering, and so took no note of it.

It turns out, however, to have been *voluntarily* made, and the question is, whether as such, it has the effect to repel the statute of limitations by virtue of the provision contained in section 51 of the Code, the words of which are correctly cited in the opinion of the Chief Justice. My brethren think it does not, while I think it was intended that it should do so.

I do not regard it as absolutely essential to the successful maintenance of my view of the case, that I should be able to establish the proposition that, as ordinarily understood, a judgment is a contract. Though, as to that matter, notwithstanding some apparent conflict amongst them, I conceive the weight of the authorities, as well as the reason of the law, to be with me.

Both PARSON and CHITTY, in their works upon Contracts, speak of judgments as coming within the very definition of the term "contract." In the former it is said, that "contracts by specialties are of two sorts—contracts under seal; and *contracts of record, such as judgments,*" etc.; and in the latter, that "contracts, or obligations *ex contractu,* are of two descriptions, and may be classed with reference to their respective degrees of superiority, as follows: *Contracts of record, consisting of judgments,*" etc.

In *Stuart v. Landers,* 16 Cal., 373, the supreme court of that state held, that, under a statute which gave to justices of the peace a jurisdiction over *contracts* for limited amounts, they had jurisdiction over actions brought upon judgments falling within the amount, and their decision was put expressly upon the ground that a judgment was a contract. And so under our constitution and statute, giving to them the exclusive original jurisdiction of all actions *founded on contract,* wherein the sum demanded does not exceed two hundred dollars, the justices' courts have uniformly entertained actions brought upon judgments previously rendered by justices. And I much ques- (411) tion whether there is, to-day, a lawyer in the state, who doubts their right to do so, or who believes that such actions could be brought in any other court.

I am very well aware that there is a series of cases in which it has been held that judgments did not come within the meaning of the statutes, which prescribed a period of limitation to "actions upon contracts" merely. But as I catch their import, they proceed, not upon the ground that a judgment is not a contract, but that it is not one in the ordinary acceptation of that term; and as every statute of limitation is in restraint of right, the courts construe them strictly, and will give them no effect beyond that which the plain and ordinary signification of their words requires.

Such certainly is the ground-work of the decision in *Pease v. Howard,* 14 John., 479, which, though not referred to in the opinion of the court, is exactly parallel with the case cited from the Kentucky reports.

This seems to me to be the true ground and one upon which all the cases, though apparently in conflict, may be reconciled. A statute so entirely in derogation of common right as is the statute of limitations, should be strictly construed, and under it a judgment should not be

treated as a contract, because it does not come within the necessity of that term. But a statute, such as we are now considering, which dispenses with the limitation imposed upon actions, and is in furtherance of common right, should be so interpreted by the courts, as to give the benefit of its relief to every person and subject, coming within its spirit and the mischief it was intended to remedy.

As I view the case before us, it is not so much a question as to the bare meaning of words, as it is one of intention. And conceding that ordinarily the term "contract" as used in a statute would not apply to a judgment, I still think that upon a fair construction of this (412) statute, according to legitimate rules for ascertaining the intention of those who framed it, it should do so in this instance, and indeed that it was so intended.

In construing a statute, the great rule of construction is to ascertain what was the intention of those using the language—to be gathered from the words themselves, taken in connection with the subject matter, and the condition of the law before its adoption.

On tracing the history of the common law in this connection, and of the legislation upon the subject, it will be seen that bonds for the payment of money only, and judgments, have invariably stood upon the same footing together. Originally, and as a bare rule of the courts, they were alike subject to a presumption of satisfaction arising from the great lapse of time; next, by positive enactment, the period for that presumption to arise was fixed at the end of twenty years; and afterwards, by the act of 1826, at the end of ten years; and at all times and in every stage of the law, they were alike affected by a partial payment upon them, that is to say, such a payment served to rebut the presumption of satisfaction that would otherwise have arisen, as to both forms of indebtedness, and from his having paid part of the debt the courts would presume a willingness on the part of the debtor to pay the whole.

Then again, upon the adoption of the Code of Civil Procedure, the two are made to occupy their same relative positions, being both made subject to an absolute bar at the end of ten years (Sec. 31); and I can conceive of no reason why after this there should be a discrimination made between them, whereby the effect previously attributed to a payment should be preserved as to bonds, and dispensed with as to judgments—thus leaving the latter, the only form of indebtedness known to the law, as to which nothing could repel the bar of the statute.

(413) Nor do I conceive that the language of the section referred to demands such an interpretation at the hands of the court. On the contrary, my brethren seem to me to put an unwarranted restriction upon the last clause of the section, and to construe it as if its words had been written, "but this section shall not alter the effect of any payment

of principal or interest, *upon any bond for the payment of money.*" Whereas, I take it to be a general declaration, that thereafter the effect of a payment should be just what it had always been, without regard to the form of the indebtedness to which it applies. It is true, the clause in question is put in immediate juxtaposition with other provisions of the statute that have reference to "promises" and "contracts," but that I would rather attribute to accident, or carelessness in the draftsman, than suspect a purpose on the part of the law-makers, so utterly inconsistent with the whole tenor of legislation upon the subject, and with the admitted policy of the Code in other respects.

It is said in *Davidson v. Alexander*, 84 N. C., 621, that the effect of the Code is such that in a great measure judgments have ceased to be the mere recorded conclusions of the courts, as to the rights of suitors before them, and are now made to perform many of the functions of mortgages, and to serve as securities for even future and contingent liabilities. Now, if this exposition of the new system be in any degree a correct one, how wide of the mark does it seem to be to say that a judgment is no longer a contract, and how unreasonable appears the supposition that the legislature intended this form of securities, thus designed to act so important a part in the business life of the country, to occupy a footing more hazardous than all others, and that as to them, there should be no stay whatever to the bar worked by the statute of limitations, and this too, when at the very same time a delay in the enforcement of judgments is courted, by declaring them to be a lien upon lands, to continue for ten years. (414)

Impressed with these convictions, I have allowed myself greater latitude in construing the statute, so as to attain what I conceived to be the legislative intention, than my associates seem willing to indulge in.

It may be that they are right, and very sure it is that henceforth their decision shall be the law with me, and my only object in expressing my views, at all, has been to call attention to the subject, so that, if deemed necessary, steps may be taken to make the law perfectly free from doubt, one way or the other.

PER CURIAM. Affirmed.

Cited: Moore v. Nowell, 94 N.C. 270; *Hughes v. Boone*, 114 N.C. 56; *McCaskill v. McKinnon*, 121 N.C. 195; *Carter v. R. R.*, 126 N.C. 443; *Grocery Co. v. Hoyle*, 204 N.C. 113; *Smith v. Davis*, 228 N.C. 177.

RALEIGH & GASTON RAILROAD COMPANY v. COMMISSIONERS OF WAKE.

Railways—Taxation of Stock, Etc.—Exemptions Under Raleigh & Gaston Charter.

1. The investment of money derived from the earnings of plaintiff road into "preferred stock" (of the value of which there is evidence in this case) of the Raleigh & Augusta Air Line, divests it of the character of non-taxable profits; neither it nor the rolling stock on the Air Line is exempt from taxation under the plaintiff's charter; but otherwise, as to the sinking fund.
2. The "guaranteed stock" of plaintiff, held under a guaranty of the payment of semi-annual dividends, is nevertheless *stock*, and not a credit to be diminished by outstanding indebtedness under the revenue act.
3. No deduction from the value of shares is allowed on account of debts owing by the tax-payer.
4. The plaintiff's charter authorizes the addition to the capital, by conversion into stock of certain moneys; *Held* that the increased stock thereby becomes *capital stock* and is included in the exempting clause.
5. The stock belonging to resident shareholders must be listed by them and not by the corporation; and they are allowed to deduct from the tax on their shares, a ratable part of the tax paid upon the corporate property by the corporation itself.
6. The tax can be levied from time to time, that is, as often as the profits reach the limit of the per centum prescribed in the charter.
7. The tax on the value of the stock is to be abated to the extent of the tax upon the corporate property.
8. The value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock.

(415) Application of plaintiff to be relieved from payment of certain taxes, heard at Spring Term, 1882, of Wake Superior Court, before *Bennett, J.*

The defendant commissioners in revising and completing the tax lists in their county for the year, 1881, pursuant to the directions of the act to provide for the levying and collecting of taxes (Acts 1881, ch. 117, sec. 21) without notice to the plaintiff company, inserted in the list, as proper subjects of taxation, ten thousand shares of preferred stock held by it in the Raleigh and Augusta Air Line railroad company, at the par value of one hundred dollars each, in the aggregate one million dollars, and the fractional part of its franchise, assessed in its entirety by the state board, apportioned to the county, as directed by section 11, at the value of twenty thousand dollars.

The plaintiff at the ensuing session of the board made application to strike out these subjects of taxation as unwarranted by law, and for excessive valuation of the former.

The commissioners refused to modify the value put upon the stock or to remove it from the list, but sustained the motion to strike out the franchise, and added, as omitted and proper subjects of taxation, certain engines, cars and personal property worked (416) exclusively upon the Raleigh and Augusta Air Line road, valued at $29,500; a sinking fund provided to meet its indebtedness amounting to $85,000; and imposed a tax of 25 cents a share upon 14,947 shares held by individual stockholders in the plaintiff's company.

From this action of the commissioners the plaintiff removed the cause to the superior court, and from its ruling and judgment, as set out in the opinion here, both parties appealed.

Messrs. Hinsdale & Devereux, for plaintiff, insisted that the "preferred stock," being an investment, under the sanction of the state, by the act of 1871-72, ch. 11, is exempt from taxation. *Dartmouth College v. Woodward,* 4 Wheat., 518, repeatedly approved by the supreme court of the United States, and of this state, (citing numerous cases in their brief.) Amendment to charter does not place the company under legislative control in respect to this matter. *R. R. Co. v. Brogden,* 74 N. C., 707. The charter must receive a fair, not a strained, construction. *U. S. v. Arradando,* 6 Peters, 740; 3 Howard, 145; 9 Howard, 210; 24 Howard, 435; 13 Wall., 264; *Attorney-General v. Bank,* 21 N. C., 216; *R. R. Co. v. Com'rs,* 84 N. C., 504. This charter has been construed by the supreme court of the United States, in *R. R. Co. v. Reid,* 13 Wall., 269, which decision is not disturbed by the *Delaware Railroad Tax,* 18 Wall., 208, and is clearly distinguishable. A similar charter considered in *Richmond v. R. R. Co.,* 21 Gratt., 604. An exemption of capital stock covers an increase thereof. *State v. R. R. Co.,* 30 Conn., 290. The exemption extends to all property in reference to which the stock exists. *R. R. Co. v. Allen,* 15 Fla., 637. The exemption clause here is more comprehensive than that construed in *R. R. Co. v. Com'rs,* 84 N. C., 504; or in *R. R. Co. v. Brogden,* 74 N. C., 707.

The case is thus to be distinguished from all the cases which (417) limit the exemption to property that is absolutely necessary to the working of the road.

The terms *"all property of every description"* are not confined to the property which the company owned at the moment of its creation. It then owned nothing. It must include all property acquired by the company at any time during its existence, either under of its original

charter, or by any amendment to the same, or by any authority from the state. This is the natural and reasonable construction. The court has no right to ignore the words "of every description."

The several acts are to be read together, as being *in pari materia,* and together constituting the charter of the company, and so it is as though the several acts had been passed at one time.

Messrs. Fowle & Snow, for defendants.

Smith, C. J. The original act incorporating the Raleigh and Gaston railroad company, passed in 1835, contains the following clause: Section 25: "All machines, wagons, vehicles and carriages purchased with the funds of the company or engaged in the business of transportation on such railroad, and all the works of said company constructed or property acquired, and all profits which shall accrue from the same, shall be vested in the respective stockholders forever, in proportion to their respective shares; and the same shall be exempt from any public charge or tax whatever for the term of fifteen years, and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum per share on each share of the capital stock, whenever the annual profits shall exceed six per cent."

The company organized under this charter, having exhausted the funds subscribed for its capital stock, were compelled to bor-
(418) row a large sum under a mortgage of the road to the state for indemnity as an endorser of its bonds, in order to prosecute its work to completion, and pursuant to said mortgage, was subsequently sold under a decree of the court of equity of Wake, to the state, the highest bidder therefor.

At the session of 1850-51 a new charter was granted, bearing the same name, under which a reorganization was effected upon a basis of a capital of $800,000, where of a moiety was to belong to the state, the estimated value of the property surrendered, and the other moiety to the stockholders who should subscribe an equal amount, with a similar exemption clause and a further provision for the free transportation of troops in case of domestic invasion or insurrection.

By an amendatory act, passed at the succeeding session of the general assembly, containing a similar clause for the transportation of troops and munitions of war free from charge, and providing for an extension of the road to Weldon, an exemption clause was re-enacted in these words: "The said railroad and all engines, cars and machinery, and all the works of said company, together with all profits which shall accrue from the same, and *all the property thereof of every description,* shall be vested in said company, one half thereof to the use and bene-

fit of the state, and the other half to the use and benefit of the individual stockholders, and the same shall be deemed and held to be personal estate, and *shall be exempt from any public charge or tax whatsoever, for the term of fifteen years,* and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum on each share of its capital stock held by individuals, whenever the annual profits shall exceed eight per cent." Acts 1852-53, ch. 140, sec. 8.

The stock has been since enlarged to the sum of $1,500,000, the expenditures for construction in excess of the capital subscribed being converted into stock by the sanction of the general as- (419) sembly, given in the act of February 23d, 1861, which on its acceptance is made a constituent part of the charter, and modifies it only so far as its provisions are repugnant to the amendment. Acts 1860-61, ch. 135.

In 1871 the Chatham railroad company, whose name was then changed to that of the Raleigh and Augusta Air-Line railroad company, whose tract has been constructed from Raleigh through the counties of Wake, Chatham, Moore and Richmond to its terminus at Hamlet, then in an unfinished condition, and to insure its completion, was authorized to increase its capital stock, making that portion "already authorized," or "any additions to the same as they (the stockholders) may deem advisable, a guaranteed or preferred stock, upon which such interest or dividends may be guaranteed as the directors may deem advisable," and with the assent of the stockholders, to secure such guaranteed interest or dividends by liens or mortgages upon all the property, franchise, and income of the company, and to this end subscriptions were authorized for the additional stock, common, guaranteed or both.

The fourth section of the act permits the Raleigh and Gaston railroad company, or other connecting railroad company "to subscribe to, or purchase stock of any kind of the Raleigh and Augusta Air-Line railroad company," and in order thereto authorizes the issue of "mortgage bonds" for such amount, in such form, and at such rate of interest as may be deemed proper. Acts 1871-72, ch. 11.

The plaintiff did accordingly subscribe for 10,000 shares at the par value of $100 each of such preferred stock, paying therefor in funds derived from its own operations and issuing its bonds secured by a conveyance of all its own property for the further sum of $820,000, in the aggregate $1,000,000, all of which has been used in the construction and equipment of the road to Hamlet, and the company thus aided has by deed of trust conveyed its road, rights, (420) privileges and franchises, and all its works and property of every description to trustees to secure the said guaranteed or preferred stock

and the accruing interest as it becomes due at the specified rate of eight per cent.

This succinct history of the past legislation of the state in relation to the plaintiff and the action taken under it, is sufficient to enable us to understand and dispose of the several exceptions taken by both parties to the rulings of the court below on the matters of law involved in both appeals, to which alone must our consideration be given.

The court finds upon the evidence the following facts, all additional to those already stated, which are deemed material to a proper understanding of the errors assigned:

The Raleigh and Gaston railroad company previous to December 25th, 1867, made an annual profit in excess of eight per centum, but has not since that date. In 1871, it declared a dividend of six per cent on the capital stock of $1,500,000, distributing among the stockholders the sum of $90,000. The increase of stock was paid for out of the earnings of the road. The preferred stock held in the Raleigh and Augusta Air-Line railroad company is of par value, and the common stock is entirely worthless. The road-bed and real estate of this company and its franchise apportioned among the counties through which the track runs, are assessed in them all in sums making an aggregate valuation of $241,783, except that the road-bed and real estate in Wake of the value of $46,000 are omitted, which added makes a total sum of $287,783 liable to taxation. The rolling stock used in transportation upon the road belongs to the plaintiff and is of the value of $29,500, and it has $85,000 invested in a sinking fund provided to meet its future debts.

Upon these facts the court was of opinion and ruled:

(421) 1. That the preferred stock properly assessed at $1,000,000 is liable to taxation, reduced by deducting therefrom the sum of $287,783 the value of the real estate and franchise already taxed in the several counties, and inserting in the tax list additionally $46,000 the value of the real estate in the county of Wake.

2. That the rolling stock, the sinking fund, and the shares of the capital stock held by individuals in the plaintiff company are, none of them, subject to taxation under the law.

The plaintiff files their exceptions to these rulings:

1. For that there is no evidence to sustain the finding of the value of the preferred stock to be $1,000,000.

2. For that the $180,000 invested in preferred stock were profits accruing from the operations of the road, and exempt under the charter, "from any public charge or tax."

3. For that the preferred stock is in substance a credit, to be diminished by taking from the amount of the indebtedenss of the com-

pany, by its outstanding bonds on which was raised the money used in payment of the stock.

The county commissioners also except to the rulings of the court and assign as grounds therefor:

1. For that the dividend in 1871 of six per cent on the whole stock, then increased to 15,000 shares, was in legal effect a compliance with the condition of an 8 per cent accumulation of profits, when applied to the original and exempted stock, as it existed before the increase.

2. For that the shares should be charged, each with the one fourth of one per cent authorized when the profits should be in excess of the specified per centum.

3. For that the preferred stock is not subject to abatement by the real estate and franchise tax.

4. For that the rolling stock and the sinking fund were both proper subjects for the imposing of taxation.

These exceptions will be considered and decided in the order in which they are enumerated.

I. The valuation of the preferred or guaranteed stock: It (422) is not our province to weigh the evidence and deduce therefrom the facts which, in our opinion, it may establish. This duty is imposed upon the tribunal that tried the cause and from whose judgment the appeal removes the cause to this court.

If there is any evidence, that is, evidence reasonably sufficient to warrant the finding and of the same import, the finding is conclusive.

It appears from the testimony that there has been expended in the construction of the road between its termini at Raleigh and Hamlet, in length 97 miles, $1,800,000, and the superintendent thinks the work could now be done at a cost of $1,200,000, or two-thirds of that sum. The payments received from the Raleigh & Augusta Air Line railroad during a series of years, commencing with the first payment made in December, 1874, and ending in September, 1881, amount upon a statement of the treasurer of both roads to the sum of $401,596.14. The superintendant and treasurer both estimate the value of the preferred stock at $500,000 or half its nominal value.

Upon this testimony and in the exercise of their own judgment as to the taxable value of this property on the part of the commissioners, (and we have said in the case of *Commissioners v. A. & C. A. L. R. R. Co.*, 86 N. C., 541, they are not confined to the estimates of value put upon property by witnesses), we cannot say there is no evidence warranting the conclusion at which they arrived and in which his Honor concurred, as to the assessment of the stock.

II. It is immaterial whether the $180,000 applied to the payment of the stock was derived from the earnings of the plaintiff or from some

other source; for by the investment it lost its character of non-taxable profits, and that form of property into which it was converted is not under the protection of the exempting clause. It would have been a misapplication but for the enabling act, and this act does not
(423) attach the non-liability of profits to the taxing power, after they have passed into other property purchased, and are not in the sense of the statute that which it was intended to relieve from public charges. None is exempt, in our interpretation of the clause of the charter, although the comprehensive words, "all the property thereof of every description," are used, except such as was convenient and necessary for the use of the road itself in accomplishing the ends of its organized existence. The advantages of lateral and feeding roads, rail or other, in augmenting its business may be very great, as is shown in the superintendent's testimony that this road furnishes to the plaintiff about $85,000 of business per annum, subject however to a deduction for operating and other expenses, yet the funds used in obtaining these collateral benefits through the purchase and control of other subsidiary lines of improvement, were not contemplated by the general assembly that granted the exemption to the property of the plaintiff as a company, and needful in the successful prosecution of its own corporate purposes, and we think not within the scope and meaning of the act. It might lead to most mischievous consequences, if we were to extend the immunity to all the property that the company may buy, simply because it will add to its business; for if so, the company might buy and run transportation wagons diverging from its different depots, and bringing in supplies of produce for the purpose of rail carriage, or steamers to pass up and down the streams crossed by its track in quest of freight, all of which outlay would then escape the burden of taxation altogether. Plainly, in our opinion, the statute does not authorize the exemption in such case, and it is equally manifest it cannot embrace that now claimed to be exempt. *Bank v. Tennessee*, 104 U. S. Rep., 493.

III. The stock held by the plaintiff though under a guaranty of the payment of the semi-annual divided, or interest, is nevertheless
(424) essentially and truly stock, and not a credit to be off-set and diminished by an outstanding indebtedness under the revenue act of 1881, ch. 117, sec. 8.

In paragraph five of the section, are enumerated, as liable to such reduction, "solvent credits, including accrued interest uncollected, owing to the party, whether in or out of the state," "by mortgage, bond, note, bill of exchange, certificate, check, open account, or whether owing by any state or government, county, city, town, or township, individual, company or corporation." It is also declared that a certifi-

cate of deposit in bank and the value of cotton, tobacco or other property in the hands of a commission merchant or agent, shall be deemed *solvent credits* within the meaning of the act. While stocks in incorporated companies are not mentioned by name, nor embraced in any general descriptive words used in the clause, they are distinctly specified as subjects of taxation in the next paragraph (6) which directs to be given in, "shares in national, state and private banks, railroad, canal, bridge or other incorporated company, or joint stock association," at their true value, concluding with a proviso that stockholders in valuing their shares, may deduct their ratable proportion of tax paid by the corporation upon its property as such in this state.

It is obvious from these provisions that no deduction from the value of shares (regarded not as credits but as property) is allowed on account of debts owing by the tax-payer.

The plaintiff's several exceptions are therefore disallowed, and we next proceed to consider those interposed by the commissioners, and in the same order.

I. The first objection is to an alleged misconstruction of the exemption clause in the charter and the consequent ruling that the dividend declared in 1871 of 6 per cent upon the full capital stock of $1,500,000 was not an annual profit in excess of 8 per cent on the capital stock of $975,000 existing before the increase, and thus a removal of the impediment to the exercise of the power to impose the twenty- (425) five cent tax on each share.

The act of February 23d, 1861, in direct terms authorizes the addition to the capital by the conversion into stock of the moneys derived from running the road and expended in its construction, constituting the cost of building it. In permitting the conversion, the increased stock necessarily falls under the exonerating provision of the charter, because it is capital stock, representing an equivalent expenditure, and put upon the footing of that originally subscribed and then supposed to be sufficient for the undertaken enterprise, and the exemption applies to "each share of the capital stock held by individuals" until the earnings pass the prescribed limit. Obviously it was the intention of the legislature, as in the original, so in the subsequent investment of funds in the road, to give them immunity from public burdens until a remuneration was afforded from profits, *upon the whole capital* above the specified per centum.

II. The taxation of the shares of stock in the plaintiff corporation disallowed by the court.

There is some ambiguity in the statement of the condition upon which depends the right to levy the small tax upon individual shares —whether, if in any one year the net receipts would admit of a divi-

dend in excess of the prescribed per centum, the condition was fulfilled and extinguished; or the tax could only be levied from time to time, that is, as often as the profits reached the said limit, and not when they fell short. The words of the act seem to favor the latter interpretation, since it says "the legislature may impose the tax" on each share, "whenever the annual profits shall exceed 8 per cent." As successive taxes may be imposed, it would seem to be the meaning of the general assembly to allow it only when the profits reach that sum, thus securing to the shareholder an interest or dividend on his investment, reducible only by the small tax allowed. Otherwise the tax could be collected when no profit whatever was made,
(426) out of which it could be paid.

But it is needless to determine the construction of the act in this regard, since, in our opinion, if the stock be chargeable with the tax, it should under the revenue law be listed by the stockholder himself, and has no place in the list to be charged to and paid by the company. The sixth paragraph to which we have referred and its concluding sentence clearly indicate that this, like any other property belonging to a *resident stockholder,* must be listed and the tax paid by himself, and not by the corporation.

III. The commissioners object further, that the assessed value of the preferred stock should be reduced by the value of the real estate and franchise as taxed separately in the several counties traversed by the road.

The ruling of the court in directing the reduction is obviously made to avoid the imposition of a double tax, since the value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock, and hence the general assembly permits stockholders in valuing their shares to "deduct their ratable proportion of tax paid by the corporation upon its property as such in this state." Sec 8, par. 6.

The section leaves it somewhat uncertain whether the value of the stock is to be reduced by the value of corporate property taxed, and the tax levied upon the difference, or the tax upon the former is to be abated to the extent of the tax upon the latter, but we interpret the latter to be the meaning. The effect of the ruling of the court is to deprive the counties through which the road passes of assessments of the corporate property in each, and transfer them to the county of Wake, while it is, in our opinion, the purpose of the statute to allow the tax-paying shareholder to deduct from the tax on his shares a ratable part of the tax paid upon the corporate property elsewhere by the corporation itself, but not to withdraw from

taxation in other counties such property of the corporation (427) therein as is liable to assessment and taxation.

The result is, that the county of Wake can impose a tax upon the resident stockholder of the full value of the stock, but to be reduced by all the taxes elsewhere levied upon corporate property, so that the residue is the tax which the county is authorized to collect upon the stock.

The consequences of either mode, if the same *ad valorem* tax is levied in each county traversed, to the defendant would be the same; but by that adopted, those counties collect the tax levied therein, and the ratable abatement is in the tax upon the stock to be paid to the county wherein the resident stockholder is taxable.

IV. The exception to the exoneration of the rolling stock used exclusively upon the Raleigh and Augusta Air-Line railroad track, is well taken and must be sustained. For reasons which have been already stated, this property is not so appurtenant to the plaintiff company as to be covered by the exemption, nor can it make any difference with what funds or in what manner this property was acquired. It is wholly employed in operating another road, and not its own. The incidental advantages it affords in keeping up a road that contributes to its own freight list, no more than if the rolling stock were let to an independent and intersecting road, equally useful in result, cannot claim an exemption secured to the plaintiff road, and convenient and useful directly in its own operations.

V. The sinking fund is but a provision to meet a future debt, and as a credit, is absorbed in the large mortgage debt intended to be met. It is therefore properly excluded from the list.

Thus we overrule all the exceptions of the plaintiff, and all those of the commissioners, except that in relation to the rolling stock of the plaintiff used upon the other road and valued at $29,500. (428)

The judgment from which the plaintiff appeals is in all respects affirmed, and that from which the defendants appeal will be modified in the manner described, and, thus modified, affirmed.

Let this be certified to the superior court of Wake.

PER CURIAM. Judgment accordingly.

Cited: R.R. v. Comrs., 91 N.C. 455; *R.R. v. Lewis,* 99 N.C. 62; *Pullen v. Corporation Com.*, 152 N.C. 556, 557; *Person v. Watts,* 184 N.C. 510, 515; *Trust Co. v. Doughton,* 187 N.C. 272.

E. MAUNEY, EX'R, AND OTHERS, v. M. L. HOLMES, ADM'R.

Executors and Administrators—Priority of Judgments in Settling Estates.

1. A personal representative must pay judgments docketed and in force to the extent to which they are a lien on the decedent's property *at his death;* and the priorities among judgment creditors are determined by the date of docketing, and are not disturbed by the time elapsing since the death of the debtor. *Daniel v. Laughlin, post,* 433, distinguished from this case.
2. Where there is unreasonable delay in settling the estate, a creditor can enforce his lien by a direct proceeding against the heir or devisee after three years from letters granted, to which the personal representative must be made a party.
3. The contention here that judgments rendered more than ten years before suit brought, are barred by the statute, is met by the provisions of section 43 of the Code, to the effect, that where the cause of action survives, suit may be commenced against the personal representative within one year after letters granted. (The remarks in *Flemming v. Flemming,* 85 N. C., 127, qualified and explained.)

SPECIAL PROCEEDING commenced in the Probate Court, for an account of administration, etc., heard on appeal at Spring Term, 1882, of ROWAN Superior Court, before *Eure, J.*

(429) In the month of April, 1871, were issued several executions to the sheriff of Rowan on judgments theretofore rendered in the superior court in behalf of several creditors against the debtor, Burton Craig, under which certain lands of his were assigned and set apart as a homestead, and exempt from execution under the provisions of the statute. Bat. Rev., ch. 55. He remained in the occupation and use of the land so assigned, until his death in 1875, and his surviving widow thereafter, until her own demise in July, 1881.

No administration was granted on the estate of the intestate debtor, until October, 1881, when letters were issued to the defendent M. L. Holmes. In December following, the defendant instituted proceedings in the probate court, for an order of sale of said lands for assets to be used in payment of debts, under which in March, 1882, they were sold for the sum of $3,794, and this sum, less the costs of administration and sale, the defendant holds to be applied to the creditors according to their several legal preferences in the order of payment.

The present action on behalf of all of the intestate's creditors has for its object the adjustment of priorities among the contesting claimants, the proper distribution of the fund among the parties as they may be entitled, and the settlement of the estate.

The debts, all contracted at a date anterior to January, 1868, were reduced to judgment, and as we understand the facts, docketed during the life-time of the debtor in the superior court of Rowan, at the respective dates assigned to each in the finding and judgment of the probate judge. Of the whole number, whose amounts, times of docketing, and names of creditors, are ascertained and stated by him, five were docketed at Fall Term, 1869; two, at Spring Term, 1870; three at Fall Term, 1870; one at Spring Term, 1871; two at Spring Term, 1872; one at Spring Term, 1873, and the remaining two, on transcripts of judgments before a justice of the peace, intermediate between (430) Spring and Fall Terms, 1871, the one on June 15th, the other on July 22nd.

The sheriff under four executions issued at the instance of R. J. Holmes, John A. Long, W. H. and C. Motts and J. C. Foard, the name of the last alone appearing in the list of judgment creditors claiming a right to share in the fund, but whether it be upon the same debt does not appear, raised by a sale of other property of the debtor not covered by his exemption, made in the spring of 1881, the sum of $2,441, which the probate judge declares to be, in law, a satisfaction *pro tanto* of those debts, and he further declares that other payments on the judgments held by the said Holmes and Foard have discharged them altogether.

The probate judge rules upon these facts, that all but the three judgments last docketed in time, are to be excluded, because more than ten years from the date of docketing each had elapsed before the present suit was begun on March 16th, 1882, and the liens under the statute thus extinguished; and directed the fund to be applied to the payment in full of the judgments of J. M. Coffin to the use of the defendant and of E. Mauney executor of David McMackin, of Spring Term, 1872, and the residue to the judgment of E. P. Hall and wife of Spring Term, 1873.

Upon an appeal to the superior court the ruling of the probate judge in the appropriation of the fund was reversed, and his Honor declared and adjudged that the judgment creditors mentioned were severally entitled to be paid in the order of time, and according to the several priorities of the docketing of their respective judgments, until by this appropriation the fund left in the defendant's hands, after payment of costs and charges of administration, is exhausted. From this judgment the plaintiff, E. Mauney, appealed.

Messrs. J. W. Mauney and L. S. Overman, for plaintiffs. (431)
Messrs. T. F. Kluttz and J. M. McCorkle, for defendants.

SMITH, C. J., after stating the above. The correctness of the method of distribution adopted in the probate court, is maintained in the argument for the appellant, upon the ground also that by the lapse of time the liens on all the judgments, excluded by the ruling in that court, were extinguished and thus became debts due by judgment merely, without relation to the time of docketing, and were displaced by those rendered and docketed at a later date, whose liens are preserved, and thus gave them the priority of right of satisfaction.

The argument is fully met by the statute, which directs the order in which the debts of a decedent must be paid by his representative. After mentioning four classes to which the preference is given, which has no reference to the present case, the next and fifth class in the order of payment is thus described: "Judgments of every court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased *at his death.*"

The priorities among the judgment creditors are plainly to be determined as they exist *at the death of the debtor,* and they remain unaffected by the lapse of time thereafter, as long as the bar of the statute does not interpose to defeat the debt itself. This is the manifest meaning of the act, and subserves its essential purpose to commit the administration of the assets, personal first, and if they are insufficient, real, in the discharge of the decedent's liabilities, to his personal representative.

The heir or devisee has a right to have the land derived from the ancestor or testator exonerated, if the personal estate which may be legally thus applied is sufficient to discharge the encumbering judgment debt, and hence no harm should come to the creditor by the
(432) necessary delay in the administration. "The administration of the whole estate," in the words of READE, J., "is placed in the hands of the administrator or executor, as best it should be, instead of allowing a creditor to break in upon it with an execution and sale for cash at a possible sacrifice, when it may turn out that the personal assets would be sufficient without a sale of the land at all." *Murchison v. Williams,* 71 N. C., 135.

If the delay should be unreasonable on the part of the representative in calling in and applying the assets, and, in case of deficiency, in obtaining an order for converting the land into assets also for the purpose of payment, a remedy is furnished the creditor having a lien, to enforce it by a direct proceeding against the heirs or devisees to have the land sold, (C. C. P., Secs. 318 to 324) after the expiration of three years from the granting of letters testamentary or of administration. In case of resorting to this remedy, the representative must be made a party in order that if he has funds which ought to be, they may be

applied to discharge diminish the lien debt, and relieve the land upon which it rests.

We sustain, therefore, the ruling of his Honor that the priorities subsisting among the judgment creditors at the death of the debtor, are not disturbed by the time since elapsing, nor are their liens displaced.

2. It is further contended that the judgments rendered more than ten years before the bringing of the action, are barred by the statute of limitations, and as no recovery could be had in a suit, they cannot be enforced against the intestate's estate. The answer to this contention is furnished in section 43 of the Code, which provides that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators after the expiration of that time, and within one (433) year after the issuing of letters testamentary or of administration." This would eliminate more than five years from the count of time, and leave it less than ten years as to each of the judgments.

In this connection we wish briefly to advert to and qualify, so as to avoid misconception, an expression used in delivering the opinion in *Flemming v. Flemming*, 85 N. C., 127. It is there said to be "equally well settled that the death of the debtor after the cause of action has accrued, will not suspend the running of the statute to the completion of the prescribed time." This was intended to be the statement of a general principle resting upon numerous adjudications, and without reference to the modification made by the words of the act recited, and to which attention was not at the moment of penning the sentence, directed, and certainly with no intent to disregard or ignore the express statutory mandate.

We think there is no error in the ruling of his Honor, and the judgment must be affirmed. As the settlement can be more conveniently proceeded with in the court below, we remand the cause in order thereto.

No error. Affirmed.

Cited: Daniel v. Laughlin, 87 N.C. 437; *Lee v. Eure*, 93 N.C. 9; *Sawyers v. Sawyers*, 93 N.C. 325; *Lilly v. West*, 97 N.C. 278; *Lee v. Beaman*, 101 N.C. 298; *Tuck v. Walker*, 106 N.C. 288; *Egerton v. Jones*, 107 N.C. 290; *Gambrill v. Wilcox*, 111 N.C. 44; *Holden v. Strickland*, 116 N.C. 190; *Winslow v. Benton*, 130 N.C. 60; *Tarboro v. Pender*, 153 N.C. 431; *Barnes v. Fort*, 169 N.C. 434; *Flynn v. Rumley*, 212 N.C. 27.

WOODSON DANIEL AND OTHERS v. W. J. LAUGHLIN.

Justice's Judgment—Statute of Limitations.

An action on a justice's judgment is barred after the lapse of seven years from its rendition, and neither the docketing of the same in the superior court nor the death of the debtor within that period will arrest the running of the statute. *Mauney v. Holmes, ante,* 419, distinguished.

(434) SPECIAL PROCEEDING tried at Spring Term, 1882, of RANDOLPH Superior Court, before *Graves, J.*

On the 29th of December, 1879, certain creditors of the estate of Mumford S. Harris, deceased, commenced a special proceeding in the nature of a creditor's bill against the defendant Loflin, as his administrator, in the probate court of Randolph County.

Due advertisement was made for creditors to file their claims, and amongst others, J. W. Gidney, as administrator of Jason C. Harris, produced the record of two judgments docketed in the superior court of said county, and asked to be made a party to said proceeding.

Upon being notified thereof, the defendant denied the liability of his intestate upon said claims, and thereupon pleadings were filed and an issue joined between the parties and the cause forwarded to be tried in the superior court at term.

The plaintiff in the issue declared upon two judgments which his intestate had recovered against the intestate of the defendant in a justice's court, on the 25th day of September, 1869, and cause to be docketed in the superior court on the 29th day of September, 1869—the one being for the sum of $138.87 and costs, and the other for the sum of $109.90 and costs. The defence relied upon was the statute of limitations.

In the superior court the parties waived a trial by jury, and the court found the facts to be as follows:

On the 25th day of September, 1869, the plaintiff's intestate obtained before a justice of the peace two judgments for the several amounts, before stated, against the intestate of the defendant, and had them docketed four days thereafter, and, on the same day with the docketing, procured execution to issue and be placed in the hands of the sheriff, who returned the same endorsed, "no fees paid or tendered," and
(435) no other execution was ever issued under either of said judgments.

The plaintiff's intestate died in 1874, and the plaintiff qualified as his administrator during the same year. The defendant's intestate died in January, 1877, and the defendant qualified as his administrator in February, 1877.

The present action was commenced on the 15th day of December, 1879.

The court thereupon adjudged that the plaintiff's cause of action was barred by the statute, and rendered judgment accordingly, and the plaintiff appealed.

Messrs. Scott & Caldwell, for plaintiffs.

No counsel for defendant.

RUFFIN, J. We do not understand counsel, who argued the plaintiffs' exceptions in this court, to insist very earnestly upon them. Nor can we ourselves perceive any error in the ruling of the court below. The statute fixes the limitation to actions upon judgments rendered by justices of the peace, at seven years, in language so plain and positive that it leaves nothing open for construction; and notwithstanding the fact that the judgments declared on in this case had been docketed, they continued to be the judgments of the justice for every purpose and intent, save those of lien and execution, and as much subject to the limitation prescribed for such judgments, as though no transcript of them had ever been forwarded to the superior court.

Such in effect is the decision made in *Broyles v. Young,* 81 N. C., 315. That was a motion for leave to issue execution made more than seven, and less than ten years from the date of docketing a justice's judgment, and the motion was allowed upon the ground that the statute made it a judgment of the superior court, in all respects, so far as they related to its lien upon lands and the enforcement thereof by execution. But at the same time it was expressly said, that (436) an *action* upon the judgment would then be barred, since more than seven years had transpired since the day of its rendition.

In the case at bar, however, it is immaterial in which light we treat the judgments sued on—whether as justices' judgments, or as court judgments, for as more than ten years intervened between the date of their docketing and the bringing of the action, they are barred, *quacunque via.*

Our attention was called to the law of executors and administrators (Bat. Rev., ch. 45, sec. 40) wherein it is provided that in the administration of a deceased debtor's estate, judgments docketed and in force should have priority over certain other claims to the extent to which they have become a lien upon the decedent's property, *at the date of his death:* and it was suggested that the effect of this provision was to fix the right of the judgment creditor at that day, and to stop the statute; so that thereafter it could not become a bar to his claim.

We cannot yield our assent to such a suggestion. The mischief attending stale claims which it is the object of the statute to avoid, is as great, if not greater after the death of the debtor, as before, and there is the same reason for requiring diligence in the one case as the other. Accordingly, upon looking to the statute, which defines the limitations to actions, we find certain cases declared to be exempt from its operations—but nothing like this.

Under the law as it stood before the present statute, there were certain priorities allowed, and amongst them that of a promissory note over an open account, and the right to such priority became absolute and fixed immediately upon the death of the debtor, and yet nothing was more common than for the statute to be pleaded to actions on such notes, in cases where the full period of time prescribed for the bar, had been attained after the debtor's death and the grant (437) of letters upon his estate.

This case is easily distinguished from *Mauney v. Holmes, ante,* 428, for there, notwithstanding the fact that more than ten years had elapsed after the judgments were docketed, they were held not to be barred by reason of the provision contained in the 43d section of the Code, and not being barred, they related to the death of the debtor, and their priorities determined according to the state of their liens at that time. But here, the judgments are barred and their liens exhausted, and there is nothing left that can have relation to the death of the debtor. Neither is there anything to show that the claims were ever presented to the defendant administrator and admitted by him, so as to bring the case within the act of 1881, ch. 80, and the stay to the statute therein provided.

Our conclusion therefore is that the judgment must be affirmed and that this be certified.

No error. Affirmed.

Cited: Heyer v. Rivenbark, 128 N.C. 272; *Springs v. Pharr,* 131 N.C. 194; *Oldham v. Rieger,* 148 N.C. 550, 552; *Matthews v. Peterson,* 150 N.C. 133; *Tarboro v. Pender,* 153 N.C. 431; *Fisher v. Ballard,* 164 N.C. 330; *Williams v. Johnson,* 230 N.C. 344.

JOHN C. JACKSON, ADM'R, v. ARCHIBALD SHIELDS AND OTHERS.

Executors and Administrators—Confederate Money.

1. An administrator, making a partial settlement with the next of kin, and retaining in his hands certain interest-bearing notes for the purpose of meeting claims against the estate then in litigation, provided they be declared valid, and who fails to keep an account of the time when the notes were collected and the amount of interest received, will be charged with interest during the whole time.
2. The case of *Purvis v. Jackson*, 69 N. C., 474, in reference to payment of Confederate money into the clerk's office, approved.

CIVIL ACTION tried on exceptions to referee's report, at Spring (438) Term, 1882, of MOORE Superior Court before *Shipp, J.*

Cornelius Shields died in Moore County in 1857, and letters of administration upon his estate were granted to John C. Jackson, the plaintiff of record. At April Term, 1859, of the county court, the plaintiff, as such administrator, filed a petition against the next of kin of his intestate, alleging that he had paid the debts of the estate and had in hand a large sum for distribution, and praying the court to have an account taken of his administration, and of the advancements that had been made by his intestate, and to ascertain and decree upon the distributive share of each one of the next of kin.

A reference was made to a commissioner, and upon the coming in of his report, at April Term, 1860, a decree was made charging the plaintiff with the sum of $13,227.72 as constituting the entire amount of the estate.

There were then some claims in litigation against the estate, and in order to provide for them in case they should be declared valid, it was provided in the said decree that the plaintiff should retain in his hands until the further order of the court, certain bonds then due and bearing interest, and amounting to $800, and the balance of the estate was directed to be distributed amongst the next of kin—the share of each one being definitely ascertained, and by the terms of the decree directed to bear interest from the 25th day of October, 1859.

In 1879, the defendants of record, being the next of kin of said intestate in whose behalf the decree had been rendered, filed an affidavit before the clerk of the superior court of Moore County, setting forth that the plaintiff had never paid the several amounts decreed to be due to them, nor in any wise discharged himself thereof, and asking that the cause might be transferred to the docket of that court, and reference be ordered to ascertain the amount still due from the (439) plaintiff on the judgments rendered against him in favor of

each of the defendants, and also to ascertain what disbursements, if any, he had made of the fund of $800, directed to be retained by him to meet possible contingencies.

After due notice to him the plaintiff filed an answer in which he insisted that he had paid the defendants the full amounts decreed to be due them, and had properly disbursed the whole sum of $800 left in his hands, and thereupon issues were joined and certified to the superior court at term for trial, and by consent were referred to A. H. McNeill to ascertain the facts and report his conclusions thereon.

To the report of the referee the defendants filed exceptions which were overruled by the court and they appealed. The nature of the exceptions appear in the opinion of this court.

No counsel for plaintiff.
Messrs. Hinsdale & Devereux, for defendants.

RUFFIN, J. The first exception taken in this court is the one numbered two in the record, and is a mere matter of computation. The referee finds that under the decree rendered in 1860, there was due to the defendant, Robert Shields, the sum of $416.10, with interest from the 25th day of October, 1859, and that this amount had been fully paid to him by the plaintiff. The only payments which the evidence discloses as having been made to him, amount to $412.52 of which $406.71 was paid him on the 7th of September, 1860, and $5.81 on the 1st of October of the same year. At that time there was due as principal and interest the sum of $441.06—thus showing a balance of $28.54, for which with interest from the said 1st of October, he is entitled to have execution against the plaintiff.

(440) Second exception (No. 7). The referee finds that by said decree there was due to the defendant, Cornelius Purvis, the sum of $97.90 also with interest from the 25th day of October, 1859, and that there had been paid to him the sum of $50 on the 28th day of February, 1863; $25.00 on the 20th of April, 1872, and $10.00 on the 8th of August, 1876—thus leaving a balance of $4.95 still due him from the plaintiff. The exception has reference to the $50 thus allowed as a payment. According to the finding it was paid by the plaintiff, not to the defendant in person, but into the clerk's office for him, and in Confererate money; and there is nothing, either in the evidence, or the findings, going to show that the defendant had any knowledge of it, or in any way gave his consent to it. The case therefore falls directly within *Purvis v. Jackson*, 69 N. C., 474. Indeed it is impossible to avoid a conviction that a payment in this case was made at the same time and under exactly the same circumstances, as that which

was then the subject of review, and of course it must share the same fate.

Third exception (Nos. 10 and 14). The referee finds as a fact that on the 8th day of September, 1873, the plaintiff paid the debts for which suits were pending at the date of the decree, and they amounted to the sum of $434.11—thus leaving of the $800 retained in his hands a balance of $365.89, and he further finds as a conclusion of law, that the plaintiff should be charged with interest only on such balance and from the date of the payment; whereas the defendants insist, that as the bonds retained were all interest-bearing, the plaintiff should be charged with the same from the date of the decree.

The referee also finds in this connection, that the plaintiff kept no account as administrator, and that he is unable to say when he collected the bonds or how much interest was received thereon.

It is no where denied that the bonds have been collected, and as they bore interest, the administrator must have received it (441) when he collected the principal, and as he would keep no accounts to show when he received it, or how much, there is no alternative but to charge him with the interest during the whole period. Speaking of just such a case, in *Finch v. Ragland,* 17 N. C., 137, the court declared that there was but one of two things the court could do —either to charge the administrator with interest, at the risk of making him pay more than he had received, or else allow him to keep the interest actually received as his own, and thereby encourage him to use his trust fund for his own advantage, and to keep no accounts, or if any, not true ones. When two such alternatives present themselves it was said, the court could not hesitate about which to adopt. The plaintiff must therefore be charged with interest on $800 from the 25th day of October, 1859, until paid, giving him credit for $437.11 paid according to the referee's finding on the 8th September, 1873, and also for $50 paid his attorneys, April 1st, 1879, and $374.99, paid to the clerk of the court and to Hinsdale and Worthy on the 26th day of July, 1880.

Fourth exception (No. 11). As the plaintiff is charged with interest upon the whole sum of $800, it would not be proper to charge him with it again upon the McKoy and Stults bonds, they being embraced in the larger sum.

The first, second and third exceptions of the defendants are sustained, and their fourth overruled. Their other exceptions were expressly abandoned by counsel, and therefore we have not considered them.

Error. Judgment accordingly.

(442)

W. J. ROGERS, ADM'R, v. J. T. GOOCH, ADM'R.

Executors and Administrators—Parties.

An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. (The suit on the bond in this case should have been brought by the administrator *d. b. n.* of the testatrix, to whose estate it belongs, and not by the administrator of her executor.)

CIVIL ACTION tried at November Special Term, 1881, of HALIFAX Superior Court, before *Gilmer J.*

This action is brought for the recovery of a sum of money due upon a bond, and the only question is as to the right of the plaintiff to maintain the action.

The facts are: Eliza A. Phillips died prior to the year 1860, leaving a will of which one J. M. S. Rogers was appointed and qualified as the executor. On the 22d day of May, 1860, he sold the personalty belonging to the estate of his testatrix upon a credit of six months, and one Virginia A. Johnson, who as a legatee under her will was entitled to one-ninth of her estate, became the purchaser of a portion of it, to the amount of two hundred and ninety $^{65}/_{100}$ dollars, and gave the bond sued on therefor, with one John J. Long as her surety—the same being made payable to Rogers *as executor.*

Both Mrs. Johnson and her surety, Long, are dead, and the defendant is the administrator of each of them. The executor, J. M. S. Rogers, died in 1874, and the plaintiff is his administrator. In 1876, James W. Grant qualified as the administrator *de bonis non* upon the estate of Eliza A. Phillips, and soon thereafter commenced an action against the plaintiff, as administrator of J. M. S. Rogers, for an account and settlement of the estate of Eliza A. Phillips, and at

(443) Fall Term, 1878, recovered judgment for the sum of $5,182.04, but no part of the same has ever been paid.

In taking the account in said action the plaintiff, as the administrator of said J. M. S. Rogers, was charged with the full amount of the proceeds of all the personalty sold, including that portion sold to Mrs. Johnson, and for which the bond sued on was given.

The said Grant, as the administrator *de bonis non,* afterwards brought a suit in the name of himself and all other creditors of J. M. S. Rogers against his administrator and heirs at law, seeking to subject his real estate, as well as his personal effects, to the payment of his debts, which action is still pending.

No part of the legacy to Mrs. Johnson has ever been paid.

Upon the foregoing facts the judge below was of the opinion that the plaintiff could not maintain the action, and accordingly gave judgment for the defendant, and thereupon the plaintiff appealed.

Messrs. Mullen & Moore and W. C. Bowen, for plaintiff.
Messrs. R. B. Peebles and Day & Zollicoffer, for defendant.

RUFFIN, J. The effect of the judgment, which Grant as administrator *de bonis non* recovered against the plaintiff as the representative of the deceased executor, Rogers, could not be to convert the whole of the Phillips estate, including the bond sued on, then in the hands of the plaintiff, into assets belonging to the estate of his intestate, even though it may have been for an amount equal to the full value of all the property sold and all assets that ever came to hand. Nothing short of a satisfaction of that judgment, full and complete, can have that effect, for until then, the estate of Rogers has been out nothing on account of these assets.

We think it clear, therefore, that the bond sued on together with the other property, in the plaintiff's hands, once belonging to the estate of Mrs. Phillips, continues to be a part of her estate (444) and can only be administered by her personal representative; and that under such circumstances, her administrator *de bonis non* must sue. And indeed that he is the only person who can sue on the bond, is now the settled law of the state, sanctioned by a series of decisions which it must be needless to add to. See *Eure v. Eure*, 14 N. C., 206; *Setzer v. Lewis*, 69 N. C., 133; *Davis v. Fox, Ib.*, 435, and *Alexander v. Wriston*, 81 N. C., 191.

If not altogether certain before, it is made absolutely so by the act of 1868 (Bat. Rev., ch 45, sec. 130) taken in connection with section 55 of the Code of Civil Procedure.

The provision of the statute is that every action brought by an executor or administrator, upon a cause of action, or right, to which the estate is the real party in interest, shall be brought in his representative capacity, and under the Code there is no middle ground; for whenever the action can be brought in the name of the real party in interest, *it must be so done.*

We take the liberty of suggesting that the plaintiff might have avoided useless litigation, and have accomplished his purpose, and in fact may yet do so, by making the defendant a party to the action now pending between the administrator *de bonis non* and himself, so that all the parties being before the court, the interest of Mrs. Johnson, as a legatee, and her liability upon the bond may be properly adjusted and *pro tanto* discharged, the one by the other.

That her estate ought not to be called upon to pay the bond, while her legacy remains unpaid, provided there be assets sufficient to entitle her to receive so much, is settled by the decision in *Whedbee v. Reddick*, 77 N. C., 521.

The present action, however, must fail, because the title to the bond sued on is not in the plaintiff, nor is the estate of his intestate the real party in interest.

No error. Affirmed.

Cited: Jennings v. Copeland, 90 N.C. 578; *Ballinger v. Cureton*, 104 N.C. 477; *Grant v. Gooch*, 105 N.C. 282; *Mayo v. Dawson*, 160 N.C. 79; *Winchester-Simmons Co. v. Cutler*, 198 N.C. 337; *Rental Co. v. Justice*, 211 N.C. 55; *Ins. Co. v. Locker*, 214 N.C. 2; *McGuinn v. High Point*, 219 N.C. 79.

(445)

JULIA A. VAUGHAN, ADM'X, v. A. P. HINES.

Executors and Administrators—Final Account—Statute of Limitations—Surety and Principal.

1. An administrator's account, filed and audited, in which a balance is ascertained to be due the heirs or next of kin, is a final account.
2. And an action by the next of kin upon the bond of the administrator to recover distributive shares, is barred after six years from the auditing of the same. The Code, Sec. 33 (2). This statute protects both principal and surety upon the bond.

CIVIL ACTION tried at December Special Term, 1881, of HERTFORD Superior Court, before *Graves, J.*

The action was brought by the plaintiff, as administratrix *de bonis non* of Henry Vaughan, against the defendant as a surety on the administration bond of Benjamin A. Spiers, the former administrator of said Henry Vaughan, to recover the amount of unadministered assets remaining in his hands after his death.

The bond of Spiers was executed on the 26th day of October, 1866. He died on the — day of —, 1874.

The plaintiff was appointed administratix *de bonis non* of Henry Vaughan on the 21st of February, 1881, and this action was commenced on the 4th day of April, 1881.

It was admitted that Benjamin Spiers, former administrator of Henry Vaughan, had in his hands at the time of his death $227.22,

with interest thereon from the first day of July, 1872, assets belonging to the estate of his said intestate, unadministered.

The defendant denied the right of the plaintiff to recover, and relied upon the statute of limitations, as set up in the answer, which was to the effect, that the records of the court show that the said Spiers, as administrator aforesaid, on the 13th day of May, (446) 1873, made a return of his account as such to the office of the probate judge of the county of Hertford, which was duly recorded, and in which he shows a balance of $227.22 due said estate on the first day of July, 1872, and that more than six years had elapsed since the making of said return and the commencement of this action.

Thereupon the judge submitted the following issue to the jury: "Is the plaintiff's claim barred by the statute of limitations as set up in the answer?"

The only evidence offered before the jury was two returns made by the administrator, Spiers, to the judge of probate. The first, on the 10th day of July, 1872, in which a balance is acknowledged to be *due the heirs* of $228.37 with the entry of the judge of probate in the records of his office that "the foregoing return of Benjamin A. Spiers, administrator of Henry Vaughan, is this day made to the undersigned judge of probate on oath, and with vouchers, and upon examination I find balance in hands of administrator, $207.62 principal money and $20.75 interest." The other was on the 13th day of May 1873, and was the return referred to in the answer and the issue, showing a balance due of $227.22 with the entry of the certificate of the judge of probate that, "the foregoing return of B. A. Spiers, administrator of Henry Vaughan, is this day made to the undersigned judge of probate, on oath, showing a balance of $227.22.

His Honor charged the jury that the latter return was a final account, and that the same had been duly audited, and if six years had elapsed since the filing of said account and the bringing of this action, the plaintiff's claim was barred by the statute of limitations. To the charge the plaintiff excepted, and the jury returned a verdict in favor of the defendant, responding "yes" to the issue. There was a judgment upon the verdict and the plaintiff appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff. (447)
No counsel for defendant.

ASHE, J. The only question presented by the record for our determination is—was the alleged error in the charge of his Honor, that the account filed by the administrator, Spiers, on the 13th day of May, 1873, was a final account, and if six years had elapsed since the filing

of said account and the bringing of this action, the plaintiff's claim was barred by the statute of limitations.

We concur in the ruling of his Honor that the account filed by the administrator, Spiers, on the 13th day of May, 1873, was a final account, though we see no reason why that filed by him on the 10th day of July, 1872, might not be so considered. It showed a clear balance due the heirs on the 1st of July, 1871, after the payment of all debts and expenses of administration. It purported to be a balance *due the heirs on the 1st of July*, 1871. The amount then shown to be in the hands of the administrator could not be due the heirs, by which was meant the next of kin, but after the payment of all the debts and expenses of administration. It was such a statement as showed to all persons interested in the distribution of the estate, that the administration of the estate was finished; that there was no longer a necessity for holding the surplus; and that it was subject to the call of the next of kin, the payment of which they had the right to enforce by action. The return on the 13th of May was but a repetition of the return of the 10th of July, 1872, varying only to the amount of a few cents, which was evidently the result of a clerical error.

The return then being held to be a final account, the question arises, how does that affect the defence of the statute of limitations?

It is settled as a general principle that the statute of limitations does not run in favor of an administrator against an action by the (448) next of kin for their distributive shares. *Bushee v. Surles*, 77 N. C., 62. In that case there had not been any final account filed by the administrator.

Before the adoption of the Code of Civil Procedure the statute of limitations had no application to such actions as this, nor, since the Code went into operation, to any such action where the right of action accrued prior to its adoption, but if it accrued since that date, then the statute of limitations prescribed by the Code applies. C. C. P., Sec. 16.

The plaintiff complains of no breach of the bond of the administrator prior to October, 1870, and as none is alleged, none is to be presumed; and if there was no breach prior to that date, then no right of action had theretofore accrued, and the statute of limitations prescribed by the Code applies to this action.

That being so, the question arises, does the statute of limitations prescribed by the Code run in favor of an administrator against an action brought by the next of kin for their distributive shares? It was held in *Ivy v. Rogers*, 16 N. C., 58, a case decided in 1826, and recently approved by this court in the case of *Hodges v. Council*, 86 N. C., 181, "that where there was a return made by an administrator to the county court admitting balance against him, the statute of presumptions was

put in motion, and after ten years from the date of the return a bill filed by the next of kin to recover that balance was held to be too late. Chief Justice TAYLOR, who delivered the opinion of the court, said:

"This case is purely of equitable jurisdiction, and not subject to any legal bar, by force of the statute of limitations, yet this court, from an early period, has adopted rules as to barring an equity, drawn as nearly as possible from analogy to the rules of law." And in answer to the objection that the defendant who was an administrator, was a trustee, and therefore could not avail himself of such a defence, proceeded to say: "I deem it unnecessary to examine the doctrine (449) relative to express and implied trusts, because the settlement of the account by the administrator presents a clear ground of decision, whatever the defendant's original character may have been. From that time the trust ceased to be open, and the defendant stood in a new relation to the complainant as his debtor. Could the complainant have sued at law, his cause of action would then have begun to run from that time."

The principle to be deduced from this decision is, that if an action should be brought at law upon the bond of an administrator, who had filed his final account in the proper office, the *statute of presumptions* would begin to run in his favor against the next of kin, and the claim would be presumed to be paid after the lapse of ten years from the time of filing the account.

But the statute of presumptions has been repealed so far as it applied to actions upon the bonds of administrators where the right of action accrued since the adoption of the Code, (Sec. 16) and in lieu thereof statutes of limitation substituted.

We can see no reason why the same principle which sets in motion the statute of presumptions against the next of kin, should not also put in operation the statute of limitations against them.

Our conclusion therefore is, that after the final account, the statute does run against the next of kin, and an action against the administrator upon his official bonds is barred after six years from the auditing of his final account. Sub. div. 2, Sec. 33, C. C. P. And if this statute protects the principal, it must also protect the surety on the bond.

The statute having been once put in motion in favor of the defendant as surety on the administration bond, its course could only be obstructed by a legislative enactment, and there is no legislation by which its running in this case has been checked or suspended. Section 43 of the Code is the only legislation upon the subject. It provides (450) that, "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against

his executors or administrators after the expiration of that time," etc. But it will be seen that the provisions of the section can have no application to this action, for the defendant here is still living, and they apply only to an action where the defendant dies before the expiration of the limited time.

Entertaining the opinion that the action is barred by the statute, the judgment of the superior court must be affirmed.

No error. Affirmed.

Cited: Andres v. Powell, 97 N.C. 160; *Woody v. Brooks,* 102 N.C. 338, 344; *Kennedy v. Cromwell,* 108 N.C. 3; *Brawley v. Brawley,* 109 N.C. 525; *Burgwyn v. Daniel,* 115 N.C. 119; *Self v. Shugart,* 135 N.C. 198; *Thacker v. Deposit Co.,* 216 N.C. 140.

BARBARY SIGMON v. JOHN HAWN.

Doctrine of Election—Will—Widow—Estoppel.

1. Where there is a plurality of rights, the party from whom one is derived intending that both shall not be enjoyed, the doctrine of election is enforced by the Court.
2. Therefore, where a widow sues for a tract of land, which was hers before marriage but disposed of by her husband's will, and sold to defendant by the executor; and by the same will devises and bequests were made to her which she accepted and enjoyed for two years, and dower under the will was allotted to her; *Held* that the plaintiff is not entitled to recover, first, by reason of the estoppel arising out of her election, and secondly, of that growing out of the judgment of the court in the dower proceeding.

CIVIL ACTION tried at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

(451) When this cause was before the court at the last term (86 N. C., 310) it was remanded in order that it might be certainly ascertained, whether the land which is now the subject of controversy had been embraced in the plaintiff's petition for dower, and had been treated by the parties and recognized by the court as belonging to the estate of her late husband, whereby she might be estopped from asserting her present claim to it.

It is now admitted by counsel for the defendant, that such is not the case, and that notwithstanding the similarity of description, as set out in the complaint filed in this action and that contained in the plaintiff's petition for dower, the land spoken of in the two instruments are in fact distinct tracts.

We have therefore to consider the rights of the parties in the premises, irrespective of any estoppel depending upon the identity of the lands involved.

In order that the point presented (for there is but one single one) may be the more easily understood, we recapitulate the facts as established by the pleadings and the findings of the judge in the court below —a trial by jury in that court having been waived by the parties.

The plaintiff sues for the possession of a tract of land, claiming to be entitled to the same in fee simple and of her own right. The defendant concedes that the land once belonged to her, but insists that the same was disposed of by the will of her late husband, Abel Sigmon, who directed the same to be sold by his executor, and by the same will made devises and bequests to the plaintiff, which she accepted and enjoyed, with a full knowledge of her right to the land, and thereby bound herself to submit to the provisions of the will.

The land in question was the property of the plaintiff before her marriage to said Sigmon in 1869. In 1877 her said husband being seized in his own right of a tract of land, known as the "Gross Tract," devised the same to J. L. and H. H. Sigmon, his two sons (452) by a former marriage, provided they would support the plaintiff and her only child Mary Sigmon, but in case they failed to do so to the satisfaction of the plaintiff, then at her election she should have the rents of the "Gross Tract" or take dower in his estate.

By the same will, the testator directed his wife's land lying in Burke County, (it being that in controversy) and another tract of his own known as the "Rocket tract," to be sold by his executor and with the proceeds his debts to be paid, and the residue to be divided equally amongst his wife and certain of his children.

At the time of the execution of said will, the plaintiff signed a paper writing which was incorporated in the will, whereby she professed to relinquish her right in her own land and all claim upon the "Rocket tract," as to which, however, she was never privily examined, nor has the same ever been registered.

After the lapse of nearly two years from the probate of her husband's will, the plaintiff filed with the judge of probate what purported to be her written dissent to the will, and at the same time a petition asking for dower in the Gross and Rocket tracts, as belonging to the estate of her husband. The heirs at law of the husband, being made parties defendant to said petition, opposed the claim of the plaintiff, and in their answer insisted that by her failure to dissent from the will within six months, she had elected to take under the will, and could only therefore have the dower allowed her in the will.

After consideration the judge of probate denied the plaintiff's right to have dower under the statute, because of her failure to dissent within the six months, but adjudged her to be entitled to dower under the will of her husband, and accordingly directed it to be so allotted to
(453) her, and the same was done—the dower given her being just what she would have been entitled to, had there been no will.

Afterwards the executor sold the land, now in dispute, to the defendant, and received from him the purchase money in full.

Besides the provision for the plaintiff before mentioned, the testator bequeathed certain personal property to her, not exceeding however in value the personalty which came to his hands, with her, at the time of their intermarriage. He also gave a legacy to her daughter (Mary) of $400, which amount exceeded the legacies given to his other children.

Upon the foregoing facts the judge below ruled as a conclusion of law, that the plaintiff was never put to her election as to whether she would take under or against the will, and that the allotment of dower to her under the circumstances was no act of election, by which she was barred from setting up claim to the land originally her own, and thereupon adjudged that she recover the same from the defendant. From that judgment the defendant appealed.

No counsel for plaintiff.

Messrs. G. N. Folk and M. L. McCorkle, for defendant.

RUFFIN, J., after stating the facts. This court cannot concur in the view which the learned judge seems to have taken of the law governing the case.

Whenever there is a plurality of rights, with a clear intention, express or implied, of the party from whom one is derived, that both shall not be enjoyed, the doctrine of election is enforced by the courts. The person who is to take has a choice, but cannot enjoy the benefits of both. 2 Story's Eq. Jur., Sec. 1075.

The foundation of the rule is, that no one can be permitted to accept and reject the same instrument; and in every case, therefore, coming before the courts in which such alternative rights are presented,
(454) there is but one thing left to be done, and that is, to ascertain the intention of the party from whom the last right emanates, and to know whether that intention would be frustrated by permitting both rights to be enjoyed by the same person.

In the case at bar, we have a plain instance of the occurrence of inconsistent rights in the same person; the right of the plaintiff to have and enjoy her own land, and the right to a support for herself and infant daughter, assured to her out of her husband's estate; this latter right

growing out of his will, and by which instrument he at the same time undertook to dispose of her land, away from her. And as to the intention with which this was done, there cannot be the least room for doubt, since, so careful was he to manifest his purpose to be, that she should not enjoy the benefit of both rights, he caused her to relinquish the one at the very moment he created the other.

It is true that this relinquishment might have been ineffectual if repudiated in time, but it comes too late after she has accepted and enjoyed for two years the provision made in the will—she being all that while *sui juris*.

If instead of applying at any time for dower, the plaintiff had been content to enjoy the support guaranteed to her in the will and made a charge upon the lands devised to her husband's two sons, can any one suppose that she would have been permitted at the same time to defeat her husband's intentions as to the sale of her lands, in the proceeds of which the very persons thus charged with her support were to share? and if not, why should not the same consequence attend her voluntary acceptance of the other provisions made for her in the will, by taking dower thereunder—this right being expressly given her in lieu of the support previously secured to her, and to be enjoyed only at her election, and because the other arrangement might be unsatisfactory to her?

Indeed the plaintiff in this action seems to us to be resting (455) under two estoppels, either one of which has force sufficient to bar her right to recover the land in controversy: First, that arising out of her election, knowingly made, between the right to have her own land and the inconsistent one bestowed upon her in her husband's will; and secondly, that growing out of the judgment of the probate court in the proceedings for dower, when her right to assert any claim contrary to the provisions of that will, was denied by the heirs and solemnly passed upon and concluded by the court.

Our conclusion therefore is, that there is error in the judgment of the court below and the same is reversed, and judgment will be entered here for the defendant who will also recover the costs of the action.

Error. Judgment accordingly.

Cited: Brown v. Ward, 103 N.C. 178; *Varner v. Johnston,* 112 N.C. 577; *Davenport v. Gannon,* 123 N.C. 367; *Earnhardt v. Clement,* 137 N.C. 93; *Elmore v. Byrd,* 180 N.C. 127; *McGehee v. McGehee,* 189 N.C. 560; *Adams v. Wilson,* 191 N.C. 396; *Wright v. Wright,* 198 N.C. 756; *Lovett v. Stone,* 239 N.C. 213.

H. McD. ROBINSON, ADM'R, v. A. E. McDIARMID, AND OTHERS.

Executors—Wills.

1. An executor cannot seek the advice of the Court in an application for the construction of a devise of land, unless it involves the administration of the personal estate.
2. A legacy to "each of my sister's children" goes to the children living at the time of the testator's death.
3. And where the "remaining portion" of the estate is given to a legatee, "to be disposed of as I have already directed" without proof of a further declaration of the trust, the interest so undisposed of is held by the trustee as a resulting trust for the heirs at law.

(456) CIVIL ACTION for construction of a will tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

Mary R. McDiarmid on July 25th, 1876, made her will disposing of her estate and nominating no executor, which after her decease in April, 1882, was admitted to probate, and letters of administration with the will annexed issued to the plaintiff. The will is as follows:

"I, Mary R. McDiarmid, being sound in mind, my last will and testament.

My bank stock, my county bonds I leave to my following heirs: Bank stock $5,000—$3,000 of it I leave to my mother, Ann Eliza McDiarmid; $800 to my nephew, Marshall McDiarmid Williams; $200 to each of my sister, Mrs. Ann V. Huske's children. County bonds $2,500—$500 to each of my brothers, Mr. A. K. McDiarmid and W. J. McDiarmid; $500 to my niece, L. M. Robinson: $500 to my nephew, H. McD. Robinson; $500 to my mother, Mrs. Ann Eliza McDiarmid. My interest in the Moore County land I leave to my niece L. M. Robinson and the children of my sister Mrs. Ann V. Huske; the remaining portion I leave to my mother to be disposed of as I have already directed."

(Signed,) MARY R. MCDIARMID, July 25th, 1876.

The relations of the several beneficiaries mentioned in the will are these:

Ann E. McDiarmid is the mother; A. K. McDiarmid and W. J. McDiarmid, the brothers of the testatrix. The plaintiff, H. McD. Robinson, and Lucy M., wife of John Williams, and who is mentioned in the will by her maiden name, are the children of a deceased sister, C. C. Robinson, who died before the making of the will.

Marshall McD. Williams is the son of another sister who was also deceased at the date of the will.

Clem, Joseph, D. McD., Herbert, Louise, Cattie and Sadie Huske are the surviving children of Ann V. Huske, a sister of the testa- (457) trix, who died during the interval between the execution of the will and her death, and of the children the two last named were also born after the date of the will, and prior to the death of the testatrix.

Another child, Clay Huske, was living when the will was made, but died before the testatrix.

The devisees and legatees mentioned are the next of kin, and would be entitled to the personal estate of the deceased in case of intestacy, and (except the mother) heirs at law.

The testatrix owned in July, 1876, fifty shares of stock in the Fayetteville National Bank of the par value of $100, each, and $2,500 in Cumberland County bonds.

In September, 1880, the testatrix at the instance of her brothers and for their accommodation, by the agency of W. J. McDiarmid, disposed of all the bank stock for $4,500, its fair market value at the time, and likewise $1,500 of the county bonds for $1,200, which aggregate sum was loaned to them, and their note bearing eight per cent interest executed to her therefor, the interest on which for one year was paid to her. Since her decease the note has been delivered to the plaintiff, as assets of the estate.

In April, 1882, before the death of the testatrix (as we infer from the case, though the fact is not distinctly stated) the remaining $1,000 in county bonds was also sold for $840; and that sum received credited to her on the books of her said brothers.

The interest in the Moore County lands is devised under the will of D. McDiarmid, the clause relating to which is in these words:

"It is my will and desire that my interest in the lands in Moore County, being one half of 5,000 acres, be sold, when it will be advisable to sell, and the proceeds of such sale be equally divided among my daughters, C. E. Robinson and M. R. McDiarmid, and my sons Archibald and W. J. McDiarmid, and my grandsons M. McD. (458) Williams and Daniel McD. Huske, and their heirs."

The testatrix also owned a moiety in the remainder of the land, known as the "McDiarmid homestead," consisting of about 1,250 acres —the homestead and about 1,250 acres having been devised in a codicil to the will of said D. McDiarmid to A. E. McDiarmid for life, with remainder to said C. E. Robinson and the testatrix, accompanied with a wish that it should continue "to be a home for such of the testator's family as had none elsewhere."

The testatrix held another note of her brothers, A. K. and W. J. McDiarmid, amounting in principal and interest to $2,371.32, and other

personal property worth $150, and the debts and liabilities to be provided for are estimated to be $1,000.

There are not found any directions in writing to the mother of the testatrix in regard to the disposal of the property included in the last clause of her will, and the said Ann E. McDiarmid, now advanced in years, in declining health and feeble memory, does not remember accurately or definitely the instructions given her in reference thereto.

The present action is instituted by the administrator against the beneficiaries under the will, for advice and direction in the execution of its imposed trusts, upon the facts stated, contained in the complaint and assented to by the defendants.

The inquiries with the response of the judge to each in the court below, are as follows:

1. Did the testator addeem the bequests of bank stock and county bonds by the sale in her life-time, or do the legatees share in the money fund as substituted for them and in like proportions?

The court declares in answer to the inquiry that the legacies are not addeemed, and the proceeds of the sale must be similarly distributed among the legatees.

(459) 2. Does the testatrix direct her interest in the Moore County land to be divided *per capita* between her niece L. M. Robinson (now Williams) and the children of her sister Ann V. Huske, or in moieties—one half to her named niece and the other half to the children of Ann V. Huske collectively.

The court rules that the division must be *per capita* between the legatee named and such of the children of Ann V. Huske as were alive at the death of the testatrix, each of said children taking an equal share with her.

3. The third inquiry, whether Clay Huske, who died before the testatrix, takes any interest under the bequest which is transmitted to his personal representative is answered in the preceding response.

4. Is Ann E. McDiarmid entitled to take and hold the property included in the words "the remaining portion" used in the concluding clause, to her own use?

This interrogatory is answered in the affirmative.

5. What property is embraced in the words, "the remaining portion," and what is the legal effect of the superadded words "to be disposed of as I have already directed her."

The court declares that the expression used, "the remaining portion," comprises all the real and personal estate of the testatrix not otherwise disposed of in the will, to-wit, the remainder in the homestead and all lapsed or void legacies, and the legatee holds the same for her own use,

subject, nevertheless, to any positive directions which may hereafter be made to appear to have been given to the said Ann E.

From the rulings of the court in response to interrogatories numbered 3, 4 and 5, the defendants John Williams and wife, and Marshall McD. Williams, appeal; and from the ruling in response to the 2d interrogatory, the defendant John Williams and wife alone appeal.

Messrs. Guthrie, Hinsdale & Devereux, Ray & Huske, repre- (460) *sented the contesting legatees and devisees.*

SMITH, C. J., after stating the above. The question in respect to the devise of the lands in Moore County is not within the jurisdiction of the court in the present proceeding, and cannot be considered. The construction of a devise of lands is the subject matter of a suit at law, and as the estate passes directly to the devisee, the representative of the testator has no duty to be performed in respect to it and consequently cannot seek the advice of a court of equity in a matter in which contesting devisees are alone the claimants.

"A court of equity can only take jurisdiction," in the words of PEARSON, C. J., "where trusts are involved, or where devises and legacies are so blended and dependent on each other, as to make it necessary to construe the whole, in order to ascertain the legacies; in which case the court, having a jurisdiction as to the legacies, takes jurisdiction over all other matters necessary for its exercise. *Tayloe v. Bond,* 45 N. C., 5.

So, as is said in a more recent case, "the court will entertain an application from a trustee for advice as to the discharge of the trusts with which he is clothed, and as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented in which the opinion can be made effective," (*Simpson v. Wallace,* 83 N. C., 477,) and only in such case.

The case cited in the argument to support the claim to jurisdiction (*Robinson v. McIver,* 63 N. C., 645,) was of the kind referred to by the Chief Justice, where there was a disposition of both real and personal estate in the same clause, and the construction involved the administration of the latter.

It is true the land is devised to the testatrix and others by her father, to "be sold when it will be advisable to sell," committing (461) the determination of the proper time for doing so to the discretion of his executor, yet the discretion has not been exercised and the land remains uncontroverted still, and falls under the principle enunciated. If it had been sold and the proceeds were in the hands of the executor, or other person, for a disposition under the will, then, the

present plaintiff, not having the fund in possession and with no present duty to perform in reference to it, cannot ask the advice of the court in advance.

"We see no ground," says the Chief Justice in discussing the subject in *Tayloe v. Bond, supra,* "for the jurisdiction to give advice to an executor in regard to his *future conduct* or his future rights."

We must therefore reverse the ruling of the court in assuming to put an interpretation upon this clause of the will, and determining the rights of parties under it, not because it is an erroneous interpretation, but for the reason that in this proceeding the question cannot be entertained. It is therefore to be left undecided as if not in this record.

2. We concur in the opinion that all the children of Ann V. Huske *living at the time of the death of the testatrix,* as well the two youngest born after the making of the will, as those born before, and none others, take the legacy given "to each of my sister, Mrs. Ann V. Huske's, children," excluding Clay, who died during the lifetime of the testatrix.

But this is not a case of lapse; the deceased child not being *in esse* at the death is not embraced in the words of the bequest to the others as a class. *Petway v. Powell,* 22 N. C., 308; *Knight v. Knight,* 56 N. C., 167; *Shinn v. Motley, Ib.,* 490; *Mason v. White,* 53 N. C., 421.

3. The remaining inquiry is as to the property comprehended in the expression used in the concluding clause, and whether it is an absolute gift to the mother upon the facts stated, for her own use and
(462) benefit, or with a resulting trust to those who would be entitled in case of an intestacy.

It is manifest from the language of the testatrix, and to be inferred from the testimony of the mother, that parol directions had been previously given by the testatrix, to which she refers in annexing to the gift the words "to be disposed of as I have already directed her." A trust is thus clearly declared to be enforced, though, in parol, if it could be ascertained, as is held in *Thompson v. Newlin,* 41 N. C., 380, and was previously in *Cook v. Redman,* 37 N. C., 623; and even where no indication of the trust is found in the will itself and must be shown by intrinsic proof. But the donee to whom the property is given, and who is the depositary of the intention of the testatrix, is unable to recall the instructions that constitute the trust and declare the terms, and hence the donation is to a trustee upon a trust which fails because its terms cannot be discovered, and which may be for the benefit of others, as it may be for her own.

"There is no equitable principle more firmly established," remarks a writer on the subject, "than that where a voluntary disposition of property by deed or will is made to a person, *or trustee,* and the trust is not declared at all, or is ineffectually declared, or does not extend to the

whole interest given to the trustee, or it fails wholly or in part by lapse or otherwise, the interest, so indisposed of, will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate." Hill on Trustees, 114. To same effect 2 Story Eq., Sec. 1196a.

The cases cited in the argument against the ruling of his Honor fully sustain the doctrine thus announced. When in disposing of the residue the testatrix says: "I direct my said trustee or trustees to pay and apply the same to such person or persons, for such uses and upon and for such trusts, interests and purposes, as I shall by my codicil to this my will, duly executed, direct and appoint," and the de- (463) ceased made no such codicil, though the heirs were excluded in other provisions of the will, it was held that the law must dispose of that held upon undeclared trusts. *Fitch v. Weber,* 31 Eng., Ch. Rep., (6 Hare,) 145.

In passing upon a bequest to the Bishop of Durham, "upon trust to pay her (the testatrix) debts and legacies, etc., and to dispose of the ultimate residue to such objects of benevolence and liberality, as the Bishop of Durham in his own discretion shall most approve of, he being appointed executor also, LORD ELDON thus lays down the rule: "If he (the testator) says he gives in trust and stops there, meaning to make a codicil, or an addition to his will, or when he gives upon trusts which fail or are ineffectually expressed, in all those cases, the court has said, if upon the face of the will there is declaration plain, that the person to whom the property is given, is to take it in trust, and though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party shall be a trustee, if not for those who were to take by the will, for *those who take under the disposition of the law. Morice v. Bishop of Durham,* 10 Vesey, Jr., 522.

But a case in its features closely resembling that before us, is that of the *Mayor, Aldermen and Burgesses of Gloucester v. Wood,* 25 Eng. Ch. Rep. (3 Hare) 131, the material facts of which are these:

James Wood in a codicil, dated July, 1835, uses this language: "In a codicil to my will I gave to the corporation of Gloucester 140,000l. In this, I wish that my executors would give 60,000l more to them for the same purpose as I have mentioned," etc. The testator died in April, 1836, and this and two other scripts of a prior date were propounded and proved, and no other testamentary paper could be found. In neither of these was found any purpose expressed as to the disposal of the fund thus given. Upon a bill filed for the legacy by the corporation, the Vice-Chancellor refused to decree the payment, (464) declaring that "no rule of law can be better settled than this: that unless the legatee intended to be benefited by a particular bequest

can be ascertained, the mere intention that the residuary legatees of a testator should not take, *will be inoperative,*" and he declined in dismissing the bill to dismiss it without prejudice. In this case a previous codicil referred to as declaring the trust or purpose of the testator in making the pecuniary bequest, could not be found—as the verbal directions of the testatrix to her mother, in reference to the disposition of the gift to her, had faded from memory of the latter and were wholly lost.

If the gift was to the devisee or legatee to be disposed of as she deemed proper, or followed by words of equivalent import, the gift would be in terms absolute, as the power of disposition is an element of property and unrestrained, incidental to ownership; but it is otherwise, if the disposal is restricted.

Thus, when the testator gave all the remainder of his estate to his wife, "to be divided among my children as she thinks proper," and not with an unrestrained power of disposition, it was declared that the wife took no beneficial interest, but held in trust for the children between whom she had authority only to divide and distribute. *Green v. Collins,* 28 N. C., 139.

These authorities seem decisive against the claim of the mother to the ownership of the estate mentioned in the residuary clause, and we must reverse the ruling of the court in this behalf, and declare that there is a resulting trust for the heirs and next of kin.

While we do not agree with his Honor that there is a legacy lapsed by the death of Clay Huske, we concur with him that all the undisposed of estate of the testatrix passes under the words, "the remaining
(465) portion," that is, such estate as is left after the previous disposition.

The inquiry as to the ademption of the bequests of the bank stock and county bonds, by their subsequent conversion into other interest-bearing securities, is not before us, there being no appeal from the ruling of the court in respect to that, and the parties submitting to the disposition directed of the substituted fund. We advert to it merely to avoid any inference of our acquiescence in the ruling in consequence of failing to notice the point.

A judgment may be drawn in accordance with this opinion, and the costs will be paid out of the funds in the hands of the plaintiff, as administrator. Cause remanded.

Error. Judgment accordingly.

Cited: Bond v. Moore, 90 N.C. 244; *Edwards v. Warren,* 90 N.C. 605; *Pitman v. Ashley,* 90 N.C. 614; *Trust Co. v. Stevenson,* 196 N.C. 31; *Cole v. Cole,* 229 N.C. 762.

D. MURCHISON'S EXECUTORS v. T. S. WHITTED, ADMINISTRATOR, AND OTHERS.

Wills—Executors and Administrators.

1. The testator, whose will was proved and administration taken out prior to the act of 1869, devised to the children of his deceased daughter certain lands, and provided if either of them should die without issue, then to go to the survivors and their heirs; *Held* that the devisees take a fee simple estate in common, defeasible upon the death of either in the testator's lifetime, without a child; in which event, his or her interest goes to the survivors.
2. An administrator cannot sell lands for assets to pay debts, which were sold by a devisee more than two years after his qualification; nor such as were sold by the devisee within the two years, and sold after that time by his vendee to a purchaser for value and without notice.

SPECIAL PROCEEDING begun in the probate court, and tried at (466) Spring Term, 1882, of BLADEN Superior Court, before *Shipp, J.*

The proceeding was instituted to compel the defendant, Whitted, as administrator *de bonis non* with the will annexed of Isaac Wright, deceased, to sell certain lands which had been devised by the testator, to make assets for the payment of debts.

The petition was filed by the plaintiffs, as executors of D. Murchison, deceased, who had obtained a large judgment against Hugh A. Monroe, as administrator with the will annexed of said Isaac Wright who died in 1865. Monroe was appointed administrator in November, 1866, and he died in October, 1874, without having finished his administration, and the defendant, Whitted, on the 11th of October, 1875, was appointed administrator *de bonis non* with the will annexed of said Isaac Wright, whose will, among other things, contained the following clause (4th item), which is pertinent to the questions presented by this appeal:

"I give to the children of my deceased daughter, Lucy G. Monroe, to wit, Adolphus, Isaac Wright, William Clement, and Eliza Jane Monroe, all the land I own on the south side of the river, situated on either White's Creek or Hammond's Creek, and as it lies on the river and extends out from the same, embracing all the McDougald or other pieces or tracts; but if either should die leaving no child or children, nor child of the deceased to represent him or her, then to go to the survivors, to them and their heirs. The plantation on which their father lives, I have given him only during his life; after his death I give it to my deceased daughter, Lucy G. Monroe's, children already named, subject to the limitation before recited."

Eliza J. Monroe died childless in the lifetime of the testator; Adolphus died childless in 1875; Isaac W. died childless in 1876.

(467) W. V. B. Smith, one of the defendants, purchased from Isaac W. Moore for full value and without notice of plaintiff's claim, on January 20th, 1873, more than two years after the qualification of Hugh A. Monroe, the interest of said Isaac in the "Walker's bluff" tract —the land described in the deed of January 20th, 1873.

The interest of Adolphus Monroe in said tract, and also his interest and that of his brother, Isaac, in some "back lands" on White's Creek, were sold by the sheriff under execution, and bought by Hedrick Ryan. This sale and purchase were within two years from the qualification of said Monroe as administrator.

Hedrick & Ryan sold to Daniel Miller within two years from the qualification of Monroe, and the executor of Miller sold the "back lands," mentioned above, to the defendants, Clark and Sutton, for full value and without notice of plaintiffs' claim, on March 3, 1873, more than two years after the qualification of Monroe. The other lands devised to Adolphus and Isaac were conveyed by them to Hugh A. Monroe, by mortgage, on July 29th, 1867, and said mortgage was foreclosed by suit in the superior court, and the lands sold by a commissioner for full value, on April 10th, 1876, and bought by W. A. Savage.

William C. Monroe sold his interest in the "back lands" to James Gardner, and his one-third interest in the "Walker's bluff" and the whole of the plantation referred to in the will, to H. A. Monroe, for full value, more than two years after the qualification of said administrator.

It was conceded that the lands sold by W. C. Monroe, more than two years after the qualification of the first administrator, were not liable to the plaintiffs' claim of the balance set forth in their complaint, and alleged to be due them from the estate of Isaac Wright, deceased.

Upon this state of facts, the court adjudged:

1. That the devisees took an estate defeasible upon their (468) death without issue—substantially a life estate; and that upon the death of all of them without issue, except W. C. Monroe, the whole estate survived to him.

2. That the conveyances of W. C., made more than two years after the qualification of the said administrator, are good and valid against the debt of plaintiffs.

3. That the conveyance of the interest of Adolphus and Isaac, though made more than two years after the qualification of the former administrator, are not valid against the debt of plaintiffs, inasmuch as any estate that may have passed to the purchasers from or under them, was defeated by their death without issue, and their estate then passed under the will to W. C. Monroe, the survivor.

4. That the conveyance of the estate of Adolphus, in "Walker's bluff" tract, being within two years, and still remaining in the hands of the defendant, Miller, is liable to plaintiffs' debt.

5. That the estate of Isaac in the "Walker's bluff" tract, though conveyed to defendant, Smith, more than two years after the qualification of the former administrator, is also liable to plaintiffs' debt.

6. That the title to such of the lands as were conveyed by purchasers from the devisees, more than two years after the qualification of the former administrator, for valuable consideration and without notice, is good and valid, against the plaintiffs' debt, in the hands of the defendants holding such conveyances.

The defendants excepted to the first, third, and fifth rulings of the court. The second, fourth and sixth are conceded to be correct.

Messrs. T. H. Sutton and B. Fuller, for plaintiffs.

Mr. C. C. Lyon, for defendant.

(469) ASHE, J. The first question raised by the defendant's exceptions is, was there error in his Honor's ruling, that the devisees under the will of Isaac Wright took an estate defeasible upon their death without issue, substantially a life estate, and that upon the death of all the devisees, without issue, except W. C. Monroe, the whole estate survived to him.

In our opinion, this ruling is erroneous. The will of Isaac Wright was proved, and administration taken on his estate prior to the act of 1869; and the act of 1868-69 (Bat. Rev., ch. 46, sec 156) does not apply. The estate is to be dealt with and settled under the law as it existed prior to the first of July, 1869.

The clause which has given rise to this contest is set out in the statement of the case, and the proper construction of the will is, that it gives to the devisees an estate in common in fee, defeasible upon the death of either of them in the lifetime of the testator, without a child, and upon the death of either before that of the testator, his or her interest goes to the survivors.

We are fully sustained in this construction by the decision in *Hilliard v. Kearney*, 45 N. C., 221. The clause in the will for construction in that case was, "I give to my wife for her life, etc., and after her death, the said negroes and their increase to be equally divided among my five daughters (naming them), and if either of them die without an heir, her part to be equally divided among her other sisters." Chief Justice PEARSON delivered a long and elaborate opinion in the case, and announced the doctrine that "if there be no intermediate

period, and the alternative is either to adopt the time of the testator's death, or the death of the legatee, generally, at some time or other whenever it may happen, as the period when the estate is to become absolute, the former will be adopted, unless there be words to forbid it, or some consideration to turn the scale in favor of the latter."
(470) And this decision was cited and approved in *Davis v. Parker*, 69 N. C., 271. The Chief Justice seems to have overlooked the fact that there was an intermediate period in the *Hilliard-Kearney* case, but that does not affect the principle announced, nor did it effect the result in that case, for the legatee about whose interest the contest arose, died childless after the death of the testator's wife.

In our case it can make no difference whether the contingency of dying *without child* is referable to the death of the testator or that of H. A. Monroe, the tenant for life of one of the tracts of land, for all of the devisees except Eliza J., survived him, and the estates of the three survivors became absolute at his death, if not at the death of the testator; and the interest of Eliza, who died in the lifetime of the testator, survived to them instead of lapsing to the heirs of the testator, for the devisees took the estate devised, as tenants in common; and when that is so, and a clause of survivorship is inserted, by legal construction it must be considered as having been added to prevent a lapse, in case any of the legatees should happen to die during the life of the testator or the tenant for life, as the case may be. *Cox v. Hogg*, 17 N. C., 121; *Hilliard v. Kearney, supra.*

The construction we have given to the clause of the will in question, disposes of the other exceptions, and leads to the conclusion that there is error in the third and fifth rulings of his Honor.

Our conclusion upon the whole case is, that none of the lands devised to the children of Lucy G. Monroe, which were sold by them more than two years after the qualification of the first administrator, H. A. Monroe, and none of such as were sqld by said devisees within the two years, and sold after that time by their vendees to purchasers for value and without notice, are liable to be sold by the administrator to make assets for the payment of the debts of the testator. *Badger v. Daniel*, 79 N. C., 372.

This construction exempts from liability to be sold by the ad-
(471) ministrator, the lands purchased by W. V. B. Smith from Isaac W. Monroe; those purchased by Hedrick & Ryan at execution sale, as the property of Adolphus and Isaac Monroe, and afterwards sold by their vendee to Clark and Sutton; and the other lands of Adolphus and Isaac, which were mortgaged by them to H. A. Monroe and sold under a decree of foreclosure to W. A. Savage.

This leaves the land sold by Hedrick & Ryan to Daniel Miller, and remaining in the hands of his heirs at the time of the institution of this proceeding, liable to be sold by the administrator.

Of course if there are any of the lands devised to the children of Lucy G. Monroe, which have not been disposed of by them or their heirs, or were conveyed by them within the two years, and are remaining in the hands of such vendees, who purchased within that time, they are liable.

The cause is remanded to the superior court of Bladen County, that further proceedings may be had according to law and in conformity to this opinion.

Error. Modified and cause remanded.

Cited: Price v. Johnson, 90 N.C. 597; *Rowland v. Rowland,* 93 N.C. 217; *Buchanan v. Buchanan,* 99 N.C. 313; *Galloway v. Carter,* 100 N.C. 121; *Trexler v. Holler,* 107 N.C. 622; *Sain v. Baker,* 128 N.C. 259; *Whitfield v. Garris,* 134 N.C. 31; *Patterson v. McCormick,* 177 N.C. 454, 459; *Westfeldt v. Reynolds,* 191 N.C. 808; *Johnson v. Barefoot,* 208 N.C. 802.

JAMES MULLEN, EX'R, v. SARAH D. HELDERMAN.

Wills—Evidence.

1. On trial of an issue *devisavit vel non*, the caveators alleged that the wife of the deceased exerted undue influence over him, and thereby procured the making of the will in the sole interest of herself and her children; *Held* competent to show that no foundation existed for the exclusion of one class of testator's children from participation in the estate.
2. And evidence of a conversation between the wife and a witness after the making of the will and on the day of testator's death, is also competent to show a continued influence over him up to his death; nor can her subsequent dissent to the will and renunciation as executrix have the effect to deprive the caveators of the benefit of this testimony.
3. The other exceptions to the evidence in this case tending to show undue influence, are untenable.

ISSUE of *devisavit vel non* tried at Fall Term, 1881, of LINCOLN Superior Court, before *Avery, J.* (472)

Plaintiff appealed.

Messrs. Hoke & Hoke and Battle & Mordecai, for plaintiff.

Messrs. Schenck & Cobb, Bynum & Grier and Fowle & Snow, for defendant.

SMITH, C. J. Upon the propounding of the script purporting to be the will of Valentine Helderman for probate, before the probate judge, by James Mullen, the executor therein nominated, Sarah F. Helderman, the associate executrix and surviving wife of the deceased, renounced her said office and caused her dissent to the alleged will to be entered of record. Thereupon the heirs at law and next of kin appeared and filed their *caveat* thereto, and the cause was transferred to the superior court, where an issue was prepared and submitted to the jury in these words:

Is the paper writing, or any part thereof, and if so what part, the last will and testament of Valentine Helderman, deceased?

Upon the trial, and after the testimony was heard, the proof of formal execution and sufficient mental capacity in the deceased was not controverted, but conceded by the contestants, who resisted the probate upon the ground of undue influence exerted over the mind and volition of the deceased, by his wife, in procuring the making the instrument in the sole interest of herself and her own children, to the exclusion of the children of the deceased by a former marriage, and in the impairment of that freedom essential to the validity of a dispositive testamentary act.

(473) It appeared in evidence that eight children were born of the first wife, and that soon after her death, which occurred near the close of the late civil war, the deceased, then sixty years old, intermarried with the defendant, Sarah D., who had then attained the age of twenty. There were four children, the fruit of the second marriage, with an interval of two and a half years between the birth of the youngest, of the first and oldest of the last marriage.

In the spring of 1880 the deceased was striken with fever, and from that time gradually declined until his death in July of the same year.

The will was written by the executor and signed by the testator, then passed 74 years of age, on June 29th, a little more than three weeks before.

The executor on his examination in support of the will, among other things stated that the deceased assigned as his reason for giving his property to the last children, that he had paid money for the others and some of them had tried to break him up.

Frank Helderman, the oldest of the children, introduced by the caveators, testified that during his minority he worked with his father upon the old farm, had never received from him any property and had not tried to break him up. He was then asked at what time his father bought the land devised in the will. To this, objection was made and overruled, and the witness answered that it was bought

sometime between the years 1850 and 1858 and that himself, his brother Robert, and sister Ann were then in the service of their father.

The first exception is to the admission of this testimony.

The three next exceptions are to the reception of evidence of the personal relations and intercourse between the deceased and his wife, to her harsh conduct and violence towards the older children and especially towards Rebecca, the youngest of the class, and at the trial but 18 years of age, in the presence of the father and his (474) submission to such treatment, introduced to show the controlling influence and authority possessed and exercised over the deceased and the entire household. These acts it is needless to recite with greater particularity, since their force and effect belong exclusively to the consideration of the jury.

The fourth exception is to the proofs offered of the wife's repeated efforts to induce the deceased to make his will, and give his property wholly to her children.

The fifth exception is to the testimony of what transpired at the house on the night of the confinement of the said Sarah D., when one Ballard was seen at the bed-side, smoothing her hair and taking other improper familiarities, while the deceased sat at the fireside in the same room troubled and wringing his hands without the utterance of a word in remonstrance.

The sixth and last exception is to proof of declarations of the wife on the evening of the night of his decease. A witness testified to her calling him to the kitchen and there saying, "I suppose you heard about the will. When they saw Mullen coming, they tried to run me out of the house but I guess I seed to it. I am an old coon." And again being asked about the condition of the deceased, she replied "he is sinking fast," adding that she had inquired of the attending physician if her husband was going to die, and upon his answering "I advise him to fix up his affairs," said, "I went back and had things fixed up."

We think it was not inadmissible in answer to the reason given for the exclusion of one class of the testator's children from any participation in his estate, except in the paltry sums to each which add indignity to wrong and which indicate a hostile feeling towards them, to show that no foundation for such exclusion existed, and the natural parental sentiment had been perverted, if he used the language imputed to him, or the misrepresentation of his meaning by the executor. It was competent as impeaching if not as original (475) evidence. But if it were irrelevant, unless its admission was calculated to mislead, or may have misled the jury, this would not constitute an error fatal to the verdict.

The testimony covered by the three next exceptions is so clearly pertinent to the inquiry as to the possession of a controlling influence and its unresisted exercise over the deceased's volition and acts, and her temper and hostile disposition developed in acts and words towards her stepchildren, and resulting, as the contestants insist, in the unnatural disinheriting of a part of his own blood, and from which evidence the jury declare the vitiating influence, that no suggestions can add force to the argument contained in the statement of the proposition. The proof of the improper liberties and indecent behavior of the stranger at the bed-side of the wife, and the anguish which it seemed to have wrung from an enfeebled and helpless old man, was forcible and direct upon the over-mastered and unresisting temper of the deceased, and the objection to it is wholly untenable.

The last and remaining exception is to the reception of the conversation between the wife and one Cleminger, and her declarations to him after the making of the will, and on the day of the testator's death. The script offered for probate gives the entire estate, real and personal, to the wife "so long as she remains a widow," restricting her "to take a child's part" in the event of marriage, with remainder at her death or marriage to be equally divided among her four children named, and with a general power in her to dispose of such parts as she may choose in payment of debts. It further provides that when the estate in remainder is divided among them, the eight children of his first marriage (one being dead and represented by issue) shall have,
(476) three of them each $2.50, one of them $1.25 and the others $1 severally.

The said Sarah F. by her dissent surrenders all rights devised under the will and, thus claiming only as in case of an intestacy, becomes no party to the present contest, and personally has no pecuniary interest in the determination of the issue. But she had such, and a predominating interest at the time when the declarations were made. It is through her persevering efforts and by means of her self-assumed agency for all that, as the contestants insist, the will was put in its present form expressing her own instead of the volition of the deceased, and for their common benefit. The same vitiating influence infects and pervades all the dispositions which it contains, and, if it exists as to one, is fatal to all the others. But for the dissent, it would be the common source of title to each beneficiary still.

Again, the introduction of the declarations may be defended upon the same ground as those proved to have been made about and before the time of executing the instrument, as showing a continued exercise of influence up to the time of its consummation by death. It was not a finished and effectual act of disposal until that event, and was mean-

while capable of being revoked. As the influence was used or may have been used in bringing the will into existence, so was it necessary to be kept up until it became an operative and irrevocable conveyance.

The declarations were more than narrative; they attach to and become part of the fact, in furtherance of the ultimate purpose of securing the property to herself and others, made *dum fervet opus*, and as evidence, are supported by considerations as strong as those that admit declarations of a former period. If its effect would be to annul the gifts to the wife, so should it annul the gifts to others procured by one and the same illegal interference, and inseparably united as the offspring of a common origin.

Again, it may admit of question whether the dissent and re- (477) nunciation after work is done, can be allowed to prejudice the rights of the caveators to the introduction of such testimony as would otherwise have been competent, and was competent when the testator died. If so, it might open wide the door to fraud and prevent its discovery and repression.

But we prefer to sustain the ruling upon the ground of identity of interest among the beneficiaries and its common origin in an act by which that of each is secured, and when the mother bears to her children a relation not unlike that of agent to principal, and admitting the rule that when the latter claims the benefit of what the former has done without previous authority, he must submit to the conditions and attending incidents of the act itself.

There is no error, and this will be certified.

No error. Affirmed.

Cited: In re Stephens, 189 N.C. 273, 274.

O. P. BOST AND OTHERS v. J. L. BOST AND OTHERS.

Wills—Judge's Charge—Evidence—Practice.

1. Where no response appears in the case as being made to an alleged improper question put to a witness, it does not constitute ground of exception, which can only be taken to the evidence elicited by the improper question.
2. Upon trial of an issue *devisavit vel non*, it was held no error to allow a question to be put to a witness, as to whether in his opinion, the testator had mind enough to enable him to have a reasonable judgment of the kind and value of the property he proposed to will.
3. And a charge to the jury, that if the testator had, at the time of executing the will, sufficient mental capacity to understand the nature of the prop-

erty disposed of, and how and to whom he was giving it, then he was capable of making a will, is in harmony with the decisions upon the subject.

4. Evidence of kindly relations existing between the testator and members of his family, is admissible to show that the unnatural exclusion of a legatee (grandson) from a fair share of the estate, resulted from alleged mental incapacity; for although such evidence may not be entitled to much weight upon the question of sanity, it is not for that reason incompetent.

5. An exception to the entire charge of a judge to the jury, without specifically pointing out the alleged error, will not be entertained.

(478) ISSUE of *devisavit vel non*, tried at Fall Term, 1882, of CATAWBA Superior Court, before *Avery, J.*

Plaintiffs appealed.

Messrs. M. L. McCorkle, Hoke & Hoke, and Folk and Cline, for plaintiffs.

Messrs. Haywood & Haywood, for defendants.

SMITH, C. J. The rulings presented for a review upon this appeal, are made upon the trial of the issue as to the execution and validity of the script offered for probate as the last will of Joseph Bost, deceased, and opposed by the caveators. The jury returned a verdict against the propounders, finding the script not to be the will of the decedent, and from the judgment thereon they appeal.

1. The first exception appearing on the record is to the allowance of the following question, put by the caveators to a witness, who had interviews with the deceased during his last illness, and opportunities for ascertaining his mental condition:

In your opinion did Joseph Bost, at the time the will was executed, have mind and intelligence sufficient to enable him to have a reasonable judgment of the kind and value of the property he proposed

(479) to will, and to whom he was willing it?

It does not appear what answer, if any, was made to the inquiry, and as objection only lies to the evidence elicited by an improper question, as tending to influence the verdict, when no response is given the question becomes harmless and the exception to it without force. If, however, it be assumed that an answer favorable to the contestants was returned, and an opinion expressed that the deceased did not possess the mind and intelligence described, and that this was considered the legal measure of testamentary capacity, the question pursues the very words of the charge on this point delivered to the jury in *Lawrence v. Steel*, 66 N. C., 584, and which, upon exception of the propounders, was sustained on an appeal to this court.

It will be noticed, moreover, that the instruction was given in answer to a prayer for a charge in the words used, and approved in *Horne v. Horne*, 31 N. C., 99, which was refused.

But if the degree of intelligence described is beyond that required in a testamentary act, the principle laid down in the charge to the jury is entirely free from complaint or criticism coming from the appellants. They were directed that if the deceased had at the time of executing the paper-writing sufficient mental capacity to understand the nature and character of the property disposed of, who were the objects of his bounty, and how he was disposing of the property among the objects of his bounty, then he was capable of making a valid disposition of his property by will. This definition of testamentary capacity is in harmony with former adjudications. *Horne v. Horne, supra; Moffit v. Witherspoon*, 32 N. C., 185; *Paine v. Roberts*, 82 N. C., 451; *Barnhardt v. Smith*, 86 N. C., 473.

But aside from these considerations, it was certainly competent to probe and ascertain by this and other germane inquiries, the scope and extent of the intellectual faculties of the deceased, and whether they come up to the measure demanded for effectual (480) disposition of property by will, and this is all that was permitted by the court. The question and response do not determine the standard, but extract such information as may be needed in its application. The exception was properly overruled.

2. The next exception is to the admission of the testimony of the widow of the deceased, who had been introduced by the caveators and testified to conduct indicating an impaired and unsound mind in her husband. On her cross examination she had been asked, and, after objection from the propounders, been permitted to speak of occasional interruptions in the relations of the deceased towards the legatee, John F. Bost, his grandson, and to explain the reasons for giving him only the small legacy of $1.00. There had been evidence of kind and parental relations subsisting between the parties. This, and that received in rebuttal, were offered upon the point of testamentary capacity.

In connection with this evidence, and upon the re-examination of the witness, she was allowed to testify after objection from the propounders (and this is the subject matter of the exception we are now considering), that the father of the legatee, who was killed during the late civil war, was dutiful to the deceased and the deceased affectionate towards his son.

The proof previously offered, in our opinion, authorized an extension of the inquiry into the relations between the grandfather and father of the legatee, as of the same nature and accumulative on the

point of the alleged unnatural exclusion of the legatee from a fair share of the estate, as the result of a decay of the mental and moral faculties. The evidence, from its remoteness in time from the act on which it bears, may have and perhaps should have but slight weight in determining the asserted and controverted fact of sanity, and is not for this reason rendered incompetent, requiring its rejec-
(481) tion. This exception must also be overruled.

3. The propounders requested the court to give certain instructions, in relation to mistakes in law and fact, which we understand were given, and to lay down the rule governing testamentary capacity in the words used in *Horne v. Horne,* just as the court was asked to do in *Lawrence v. Steel,* and refused, delivering instead the charge already mentioned that was sustained on the appeal. The record does not distinctly state whether the court complied with the request of counsel, unless it be inferred from the statement in the case "that the propounders did not except to the charge after the instruction was given to the jury." But if the court declined, it laid down the rule properly for the guidance of the jury, and there is no error in the refusal, when the law has been properly administered. *Burton v. March,* 51 N. C., 409; *State v. Scott,* 64 N. C., 586; *State v. Hargett,* 65 N. C., 669.

After the trial was concluded, and while the case was being prepared to be transmitted with the record proper to the supreme court, the appellants requested and insisted upon their right to have an exception entered to the entire charge of the judge, and in consequence he has sent up, *in extenso,* what he said to the jury.

We cannot recognize this method of assigning errors and bringing them up for review. It is neither just to the appellee, nor to the trying judge, to remain silent until the final result of the trial is reached, and then seek for error, which if brought to notice might have been corrected at once. Still less can a single exception be taken and entertained in the appellate court to an entire charge, traversing perhaps the whole case and consisting of a series of propositions, to none of which is it specifically addressed. Such a practice cannot be tolerated without doing violence to the Code and subverting fundamental
(482) and long established rules.

He (the appellant) shall cause to be prepared a concise statement of the case, embodying the instructions of the judge, as signed by him, if there be any exception thereto, and the requests of the counsel of the parties for instructions, if there be any exception on account of the granting or withholding thereof, and *stating separately in articles numbered the errors alleged.* C. C. P., Sec. 301; *Sampson v. R. R. Co.,* 70 N. C., 404.

This provision, which is but a legislative expression of a pre-existing rule of practice, evidently contemplates a specific and special assignment of errors, and the direct pointing out of the rulings in which they are alleged to exist. This rule so conducive to fair trials cannot be relaxed without letting in the most serious inconveniences, and most manifest injustice. So far has the principle been carried in the supreme court of the United States, in a review of the rulings of the court below, that under a written rule, itself but an enunciation of a pre-existing practice, a single exception to a series of instructions and not directed to any particular one, will be overruled unless each of the series is erroneous. *Johnson v. Jones,* 1 Black., 209; *Lincoln v. Claflin,* 7 Wall., 132.

In the latter case Mr. Justice FIELD uses this language: "But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill, *contrary to the proper practice, as repeatedly stated in our decisions,* and contrary to an express rule of this court."

We have ourselves said that an exception to a mass of testimony of which some was, and other not, competent, could not be entertained, as its office is to point out the particular testimony to which the objection was intended to apply. *Barnhardt v. Smith,* 86 N. C., 473. The present mode of asking a revision of an entire charge (483) without any designation of error, and this too after verdict and appeal is wholly irregular under our system of practice.

There is no error and this will be certified.

No error. Affirmed.

Cited: Horah v. Knox, 87 N.C. 485; *Perry v. Jackson,* 88 N.C. 106; *McRae v. Malloy,* 93 N.C. 157; *Worthy v. Brower,* 93 N.C. 347; *McDonald v. Carson,* 94 N.C. 508; *Williams v. Johnston,* 94 N.C. 637; *Pleasants v. R.R.,* 95 N.C. 197; *McDougald v. Coward,* 95 N.C. 376; *Boggan v. Horne,* 97 N.C. 271; *Caudle v. Fallen,* 98 N.C. 414; *Leak v. Covington,* 99 N.C. 569; *Tobacco Co. v. McElwee,* 100 N.C. 153; *S. v. Brown,* 100 N.C. 524; *S. v. Cross,* 101 N.C. 787; *Battle v. Mayo,* 102 N.C. 437; *McKinnon v. Morrison,* 104 N.C. 362; *Morris v. Osborne,* 104 N.C. 612; *Driller Co. v. Worth,* 117 N.C. 522; *Cecil v. Henderson,* 119 N.C. 423; *In re Will of Burns,* 121 N.C. 338; *S. v. Ledford,* 133 N.C. 722; *Jones v. Warehouse Co.,* 137 N.C. 341; *Sprinkle v. Wellborn,* 140 N.C. 181; *Bond v. Mfg. Co.,* 140 N.C. 384; *Beard v. R.R.,* 143 N.C. 139; *In re Thorp,* 150 N.C. 492; *Rollins v. Wicker,* 154 N.C. 563; *Brazille v. Barytes Co.,* 157 N.C. 457; *Daniel v. Dixon,* 161 N.C. 379, 381; *Buie v. Kennedy,* 164 N.C. 300; *S. v. English,* 164 N.C. 508; *Sig-*

mon v. Shell, 165 N.C. 586; *In re Craven,* 169 N.C. 567; *In re Will of Rawlings,* 170 N.C. 61; *Quelch v. Futch,* 175 N.C. 695; *In re Ross,* 182 N.C. 481; *Hyatt v. Hyatt,* 187 N.C. 116; *In re Creecy,* 190 N.C. 302; *Michaux v. Rubber Co.,* 190 N.C. 619; *In re Will of Casey,* 197 N.C. 348; *Mangum v. Brown,* 200 N.C. 299; *Carland v. Allison,* 221 N.C. 123; *In re Will of York,* 231 N.C. 71; *In re Will of Kemp,* 234 N.C. 500; *Powell v. Daniel,* 236 N.C. 494; *In re Will of Kemp,* 236 N.C. 684.

FRANK HORAH AND WIFE V. SAMUEL KNOX AND OTHERS.

Wills—Fraud—Remarks of Counsel.

1. Upon trial of an issue *devisavit vel non,* opinions of witnesses, as held in *Bost v. Bost, ante,* 477, are competent evidence in ascertaining the degree of mental capacity of the testator.
2. Where the will was made under alleged fraudulent influences practiced by those in confidential relations to the testator, *it was held* that the inference of fraud, unless rebutted, should be drawn by the jury from the evidence, and is not a conclusion of the law.
3. Counsel have the right "to argue to the jury the whole case, as well of law as of fact," and to that end may read and comment on reported cases, but the facts contained in them cannot be read to the jury as evidence of their existence in another case. An exception to remarks of counsel will not be entertained after verdict.

ISSUE of *devisavit vel non* tried at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

Judgment for plaintiffs, appeal by defendants.

Messrs. Bynum & Grier, for plaintiffs.
Messrs. Jones & Johnston and Wilson & Son, for defendants.

(484) SMITH, C. J. The exceptions contained in the appeal are taken to the rulings of the court on the trial of the issue, raised by the caveat to the script propounded as the will of Ann Sterling, and submitted to the jury. "Is the said paper writing, or any part thereof, and if so, what part, the last will and testament of Ann Sterling, or not?"

The script is in few words, was executed in March, 1877, in the presence of two attesting witnesses, and gives all the estate of the deceased, real and personal, to the propounder, Margaret Horah, as due for her kindness and attention during the long affliction of the deceased.

The formal execution of the instrument, proved by the subscribing witnesses, was not controverted, but its legal efficacy was impeached upon the ground of a want of mental capacity, and the exercise of undue influence by the sole beneficiary under it.

There was much evidence offered on the question of the sanity of the deceased before and up to and at the time when the script was made, and of the relations between the legatee and the deceased, the latter being under the care and in the custody of the other for a considerable period preceding the death. The testimony is needlessly set out at full length, and this brief reference to its general character and import is sufficient for an intelligent apprehension of the point of law to be considered.

First Exception. The caveators, appellants, introduced William Sloan as a witness, who stated that he was a physician and practiced his profession for many years before the late war, but had ceased to do so; that he knew the deceased, saw her frequently when an inmate in the Asylum at Raleigh, and since on the streets of Charlotte, and thus had many opportunities of knowing her mental condition.

The caveators then proposed to offer the following interrogatory, which on objection was ruled out, and this is their first exception:

In your opinion, based upon your knowledge and observation (485) of the condition of her mind, was Ann Sterling, when you last saw her before the date of the alleged will, competent or of sufficient capacity to transact business or make a will?

But in lieu thereof the following question was allowed to be put and answered by the witness, the propounder's objection thereto being overruled.

Was Ann Sterling in your opinion, based upon your knowledge and observation of her mind, competent, or had she sufficient capacity when you saw her, to transact business involving a disposition of her property? The witness responded "no."

The ruling of the court in rejecting the first form of inquiry, seems to rest upon the misconception that it embodies a rule for measuring and testing the legal capacity of the deceased to make a valid disposition of her estate by will; while, as we have said in passing upon a similar exception in *Bost v. Bost, ante,* 477, this is but a method of ascertaining the degree and extent of the mental capabilities of the person, and the vigor and strength of his will. The information elicited by such inquiry may be, and is, important in enabling the jury, when instructed as to what is necessary in constituting a disposing mind and memory, and freedom in disposing of property, to bring the facts as they shall be found to the test of the prescribed rule, and render an intelligent verdict upon the issue.

The concluding clause in the rejected interrogatory may be obnoxious to the objection, that the witness is asked to determine for himself what in law constitutes testamentary capacity, before any rule has been laid down by the judge for his guidance in framing an answer. But aside from this, and deeming the question pertinent and proper in gauging the intellectual faculties of the deceased, preparatory to the application of the law to the facts, we think the error, if it
(486) be such, is cured, and every proper object attained by the substituted and answered inquiry.

The witness was permitted to testify from his own knowledge and observation, and express the opinion that the deceased did not possess sufficient capacity to make any effectual disposition of her property, including as well a disposition by will as by gift *inter vivos*, thus affording the jury the results of the witness' observation, and his own general estimate of the mental infirmities of the deceased, without invading the province of the jury in determining the issue itself. If her intellectual faculties were so enfeebled and impaired as to disable her to make any valid disposition of her estate, she could not of course dispose of it by will, and so the caveators have all the benefit of a direct negative answer from the witness to the question as first proposed. The exception cannot therefore be sustained.

Second Exception: In the opening argument the propounders read and commented on the case of *Lee's Heirs v. Lee's Executors*, as reported in 13 Am. Decisions, 722, as showing, in the maker of the impeached will, hallucination and delusion, in a much greater degree than had been proved in the present trial, and yet the will had been sustained. The caveators objected to the use of the reported case, and requested the court to interpose and arrest this cause of remark on the part of the propounders' counsel. The court declined to interfere.

We are unable to see upon grounds the course pursued in the argument of counsel, in the particular made the subject of exception, can be deemed an abuse of the right expressly given by statute "to argue to the jury the whole case as well of law as of fact," (Rev. Code, ch. 31, sec. 57, par. 15), and more especially under the enlarged privilege conferred by a more recent statute, (Acts 1874-75, ch. 114) as interpreted in *State v. Miller*, 75 N. C., 73.

It is true that the statement of facts contained in an adjudi-
(487) cated case cannot be read to the jury as evidence of their existence in another cause, as pertinent to a pending inquiry, as is declared in *Mason v. Pelletier*, 82 N. C., 40; nor can the writings and opinions of medical experts contained in a written treatise be used as evidence before a jury. *Melvin v. Easley*, 46 N. C., 386; *Huffman v. Click*, 77 N. C., 55.

But the reading of the reported case was not for such purposes, but to illustrate a principle of law based upon the supposed, though they may have been, actual facts, decided by a court of high authority. Without the facts, the principle expressed in an abstract form would be of little value in instructing the judicial mind. All treatises upon the law illustrate a legal proposition and challenge its acceptance as correct, by reciting the facts and material circumstances under which it has been held, and the practice of reading from them, as from the report of adjudged cases, is universal and unquestioned in an argument upon a point of law arising in the course of the trial.

Tho privilege of counsel may be abused, but unless grossly abused, the corrective must be left in the hands of the judge who presides and conducts the trial, in the exercise of his sound discretion.

Third, Fourth and Fifth Exceptions: These three exceptions relate to the comments of propounders counsel upon other matters, to wit: the unreliableness of expert testimony, the neglect of the deceased by her contesting relatives and their earnest effort to defeat her will, and certain numerous illustrations drawn from life—in reference to all of which it is only necessary to say, that no objection to these remarks was made until after the rendition of the verdict. *Morgan v. Smith*, 77 N. C., 37; *Harrison v. Chappell*, 84 N. C., 258; *Knight v. Houghtalling* 85 N. C., 17. In the latter case it is said:

"A party cannot be allowed thus to speculate upon his chances for a verdict, and then complain because counsel were not ar- (488) rested in their comments upon the case."

Sixth Exception. The caveators except to the refusal of the court to give certain tendered instructions submitted to the court in writing, but not read in the hearing of, nor known to the propounders' counsel until after verdict, which divested of unnecessary verbiage and avoiding repetition, were in substance as follows:

1. If when the script was executed the deceased had not sufficient mental capacity to understand the nature of the transaction, or the effect of her act, the verdict should be for caveators.

2. If the deceased lived with the propounders, Horah and wife, the latter being sole devisee and legatee, in their care and custody, the relation thus formed raises a presumption of fraud and undue influence practiced in procuring the execution of the script by them, sufficient to annul the act, unless rebutted, and the jury should so find.

3. Sanity is presumed until the contrary is shown, and insanity being proved at any previous period to exist, is presumed to continue to the doing the alleged testamentary act, unless restored reason be shown, and if the jury are satisfied of the insane mental condition of

the deceased at any antecedent time, the propounders are required to show that the instrument was made during a lucid interval.

4. If the will was prepared at the instance of the legatee, and not submitted to the deceased until the morning of and just before its execution, this is a strong badge of fraud and should be so considered by the jury.

5. If the deceased was old, of weak mind and feeble body and at times deranged, and if the will was drawn by a lawyer of the legatee and under her direction, was not read over to deceased until the time when it was executed, and the subscribing witnesses were sent for by the legatee, and the alleged testatrix was under the control of
(489) the propounders, the law raises a presumption of fraud, and unless disproved, the jury should find against the script.

The charge given to the jury so far as material to an understanding of the exception was substantially this:

If the alleged testatrix had, and the jury so believe upon the evidence, testamentary capacity, that is, capacity to make a will, when the script was executed by her, then the issue must be found in favor of the propounders; if on the contrary, she then had not the requisite capacity, the verdict must be for the caveators. Sanity is the natural and usual condition of the human mind, and every person is presumed to be sane. The presumption may be rebutted. If the deceased was insane at any time before the alleged testamentary act, she is presumed to continue insane down to and including the act. The presumption of a continuance of an ascertained pre-existing insanity, may itself be rebutted by proof of an actual sane condition of mind, when the script was executed. The sufficiency of the evidence to remove the presumption must be judged by the jury, who alone can determine its force and credit. In order to an effectual disposal of property by will, the person making it must know what he or she is doing at the time; must understand the nature of the act in which he or she is engaged, and its full extent and effect. If the deceased had such capacity, it was a valid execution of the instrument; if she did not have it, then it was not her will; and that it was not necessary to a valid dispositive testamentary act, that the party should be able to dispose of the property with judgment and discretion.

The caveators' exception extends to the refusal to give their tendered instructions and to those that were given to the jury.

The refused instructions, of which the appellants complain, may be condensed and expressed in the single proposition, that from the confidential relations subsisting between the testatrix and lega-
(490) tee, and the authority over the person of the former committed to the latter and her husband, accompanied with the facts in

evidence touching the preparation and execution of the will, the law raises the inference, to prevail unless disproved, that the will was the offspring of a fraudulent influence exercised by them over the testatrix, which vitiates and avoids the instrument; and this is a rule of law to be declared by the court for the guidance of the jury.

We think his Honor properly refused to lay down such a rule of law, and that he would have committed error in doing so. The inquiry before the jury was as to the testamentary capacity of the testatrix and the legal freedom of her act. Formal execution and a knowledge of the contents of the writing being shown, the caveators impeaching its validity must affirmatively show the want of capacity, or the exercise of a fraudulent influence, which is defined in *Wright v. Howe*, 52 N. C., 412, to be "an influence by fraud or force, or by both, and in its application to the making of a will, signifies, that through one or both of these means the will of the decedent was perverted from its free action or thrust aside entirely, and the will of the influencing party substituted for it." This infectious influence must be shown by those who allege that it has been successfully exerted in procuring the making of the will, and while it may be inferred from circumstances attending the transaction, the inference must be drawn by the jury from the evidence before them.

The rule governing in our system of a jury trial of issues of fact, and the reason, why the decisions of the probate judge in passing himself upon both the law and fact in testamentary proceedings before him have not the weight and authority of a precedent, are so forcibly and clearly stated in the opinion of the former Chief Justice in the case of *Downey v. Murphrey*, 18 N. C., 82, that little more is required of us than to reproduce some portions of what is there (491) declared. "After proof of capacity and execution," he remarks, "the common law lays down no rule upon the subject, but submits the general question to a jury for a decision according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper and assent thereto, under the comprehensive inquiry *whether a fraud has been practiced.* Where the testator's situation is such as to render the perpetration of a fraud, easily practicable, the jury may say they are not satisfied one has been practiced, and thence infer its existence, unless the contrary be clearly shown. * * * But those are conclusions of fact arising from evidence given or withheld. A defect of proof, unless it be a total defect, is for the consideration of a jury wherever the law requires the intervention of a jury."

After a further reference to the relation between the testator and beneficiary, he proceeds to say: "These considerations must satisfy

the mind, that upon such a subject the law cannot lay down as a test that a will is or is not valid, when executed under one or more of the particular circumstances mentioned, but necessarily refers the facts, upon which its validity legally depends, *to the decision of the jury under evidence as to all the circumstances attending its preparation or execution, the condition, mental and physical, of the testator, the contents of the instrument and the benefits provided in it for those actively concerned either in the preparation or execution.* * * * This question is one of fact to be decided by the jury upon evidence, which in the opinion of the judge is competent as tending to establish any of those facts. Its tendency, it is the province of the judge to explain, by stating what conclusions may be drawn from it; but whether it establishes a fact or whether a conclusion deducible from it is or is not rebutted by other evidence, is the province of the jury to say."

(492) So in *Wright v. Howe, supra,* where the decedent and legatee stood in the relation of attorney and client, *patron* and *dependent* (the italics are in the original), the jury were charged "that dealings between persons bearing these relations, one to the other, are to be suspected and scrutinized more closely and carefully than dealings between others," this court declared that "these relations as facts pertinent to the issue with the other facts in the cause, bearing upon the point, were submitted to the jury with proper instructions. This is all we think the court was authorized to do by the law of the land. * * * Altogether, these form a body of facts from which undue influence may or may not be inferred. *But this inference should be drawn by the jury and not by the court.*"

A similar distinction is taken in other cases, where a judge tries both facts and law, and himself lays down general rules for his own consistent government, and those in which he submits facts to a jury, and leaves them to act upon evidence according to their estimate of its import and weight. *State v. Williams,* 47 N. C., 257; *State v. Smith,* 53 N. C., 132.

The instruction that certain detailed facts, if believed, were a badge of fraud, stands upon the same footing and were left to the jury to be considered with other evidence in determining the question of fraudulent influence.

There is no error. Let this be certified.

No error. Affirmed.

Cited: Wessell v. Rathjohn, 89 N.C. 383; *McRae v. Malloy,* 93 N.C. 160; *Holly v. Holly,* 94 N.C. 99; *S. v. Speaks,* 94 N.C. 876; *S. v. Powell,* 94 N.C. 971; *S. v. Potts,* 100 N.C. 462; *S. v. Tyson,* 133 N.C. 696; *Sprinkle v. Wellborn,* 140 N.C. 179; *Bond v. Mfg. Co.,* 140

N.C. 384; *Beard v. R.R.*, 143 N.C. 139; *In re Thorp*, 150 N.C. 492; *Harrington v. Wadesboro*, 153 N.C. 442; *Brazille v. Barytes Co.*, 157 N.C. 457; *Chadwick v. Kirkman*, 159 N.C. 263; *Daniel v. Dixon*, 161 N.C. 381; *Betts v. Telegraph Co.*, 167 N.C. 81; *In re Craven*, 169 N.C. 569; *Byrd v. Spruce Co.*, 170 N.C. 435; *Tilghman v. R.R.*, 171 N.C. 657; *Cashwell v. Bottling Works*, 174 N.C. 329; *In re Hinton*, 180 N.C. 213; *S. v. Steele*, 190 N.C. 509; *Mangum v. Brown*, 200 N.C. 299; *Jernigan v. Jernigan*, 226 N.C. 208; *In re Will of York*, 231 N.C. 71; *In re Will of Kemp*, 236 N.C. 684.

W. S. HILL AND OTHERS v. J. M. TOMS, ADM'R.

Wills—Pecuniary Legacies.

Testator died in 1865, having previously made a will, in which he directs a certain pecuniary legacy to be paid out of money arising from the sale of slaves, and appropriates certain land and the proceeds into which it is to be converted to be equally divided between other legatees; *Held* that the land is not chargeable with the loss of the legacy caused by the emancipation of the slaves.

CIVIL ACTION for construction of a will tried at Spring Term, (493) 1882, of RUTHERFORD Superior Court, before *Gudger, J.*

J. P. Mauney died in the year 1864 or 1865, having previously made his will in which are contained the following clauses:

"I give and bequeath to my beloved wife, Charlotte Mauney, twelve hundred dollars in money," and slaves and other enumerated articles of personal property not necessary to be set out in detail; and the testator adds, "I also give her the use of my entire plantation, including the mill, to use as she pleases during her natural life, and at her death to be sold in the usual way and the proceeds of the sale to be equally divided among my children now living and the children of Drusilla Hill, deceased, that is to say, the children of Drusilla Hill are to have one-sixth part."

"I give and bequeath to the children of Drusilla Hill, deceased, my negro woman, Hannah Adeline, and her increase, now in possession of Abel Hill, and fifteen hundred dollars."

After several other legacies in slaves and in money, which the testator declares the respective legatees have already received, except a legacy of six hundred dollars to one Lawson P. Eaves, which is charged

upon and to be paid out of the legacy to a daughter of the testator (Eliza Hamilton) the testator proceeds thus:

"I will that the balance of my negroes, to wit, Alfred, Lawson, Sam, Lizzy and her child Julia, be sold in the usual way, except
(494) Lizzy and her child Julia, and I direct that they be sold together, and the money arising from the sale thereof to be applied, first, to the payment of bequests herein made, and the balance to be equally divided between my children, now living, and the children of Drusilla Hill, deceased, that is, the children of Drusilla Hill are to have one sixth part."

"I will that all the property I may have at my death not disposed of in this will, be sold in the usual way, and the proceeds of said sale applied as directed in the last foregoing clause of this will."

The testator then appoints the plaintiff, W. S. Hill, trustee, and confers upon him authority "to receive and distribute the money and property willed to the children of Drusilla Hill, deceased, as directed in the will."

The life tenant being dead, the administrator has made sale of the devised land under the directions of the will, and the fund provided for the discharge of the pecuniary legacies has been lost by reason of the extinction of property in slaves, before they could be converted into money for that purpose.

In the present action, requiring a construction of the foregoing clauses of the will, the plaintiffs, the children of Drusilla Hill, and the testamentary trustee claim that the bequest of the $1,500 shall be raised out of other personal property bequeathed by the testator by a *pro rata* distribution with the other legatees; and if this be insufficient, that it be paid from the money derived from the sale of the lands.

During the progress of the proceeding, the administrator of Jacob G. Mauney, deceased, is made a co-plaintiff and asserts his right as such to the share of the fund accruing to his intestate, had he still been living.

Upon the hearing, the court was of opinion and so ruled that the plaintiffs' legacy of $1,500 was lost in the destruction of the fund provided for its payment, and no part of the proceeds of the sale of the land could be thus appropriated; and further, that as
(495) the legatee, Jacob G. Mauney, survived both the testator and the devisee for life, he acquired a vested interest which was transmitted to his personal representative. From this ruling and judgment the plaintiffs appealed.

Mr. M. H. Justice, for plaintiffs.
Messrs. Hoke & Hoke, for defendants.

SMITH, C. J., after stating the case. We concur with his Honor in his interpretation of the will and the legal effect of the clauses on which the controversy depends. Where there is a residuary disposition of both personal and real estate, while the former is primarily liable in exoneration of the latter, yet both are chargeable with the payment of the money legacies. "This, however, is not on the footing of a charge on land like the annuities in this case," remarks PEARSON, C. J., in *Robinson v. McIver,* 63 N. C., 645, and repeated in *Johnson v. Farrell,* 64 N. C., 266, "but on the ground that in order to ascertain what is embraced in the residuary fund, it is necessary to take out the specific legacies and then to deduct the pecuniary legacies, and only what remains is the rest or residue of the estate."

A recent writer also remarks: Legacies are charged on the land, when the residue of the realty and personalty is bequeathed in one mass. But a charge of legacies on all the real estate of the testator does not charge lands specifically devised. O'Hara on Wills, 241.

The testator specifically designates the portion of his estate from which his representative is to derive the means of discharging the bequests, and appropriates the land and the money into which it is to be converted after the death of his wife, with equal clearness in the direction that it "be equally divided among my (his) children now living and the children of Drusilla Hill," the children taking a sixth part.

There is no principal upon which these beneficiaries can be (496) deprived of the specific gift of the proceeds of the sale of the land to make up the losses of a money legacy caused by the emancipation of the slaves, from which source alone the payment is to be made, any more than if they had died a natural death. *Johnson v. Osborne,* 62 N. C., 59.

The cases which seem to have been relied on by the appellants for disturbing the dispositions made of his estate by the testator, (*Lassiter v. Wood,* 63 N. C., 360; *Macon v. Macon,* 75 N. C., 376; and *Alexander v. Summey,* 66 N. C., 577,) are put on the ground of effectuating a manifest general intent to which certain special dispositions inconsistent therewith must yield, and do not warrant a subversion of the dispositions and appropriations in the will under review; and as was said in *Holman v. Price,* 84 N. C., 86, "this principle" (subordinating the particular to the predominant intent) "was pressed into service and carried to its extreme limits" in the two first cited cases.

No necessity here exists for a departure from the plain provisions

of the will. Slaves are included in all the legacies, and all the legatees share in the loss of this form of property, as well as those whose bequests in money were to be derived from it. The land when sold is given as well to the plaintiffs as to the children of the testator, and no fancied equality intended in the distribution can justify the manifest and obvious dispositions of the estate being disturbed.

The gift over of the proceeds of the sale of the land is to the "children now living" and certainly the intestate son, Jacob G. Mauney, living at the time of the death of his mother, is included, and, notwithstanding his subsequent death, transmitted a vested interest in the fund to his administrator, and the latter is entitled to share with the others therein.

No error. Affirmed.

Cited: Howerton v. Henderson, 88 N.C. 602; *University of Borden,* 132 N.C. 490; *Pigford v. Grady,* 152 N.C. 181; *Litaker v. Stallings,* 200 N.C. 8.

(497)

IN ENGLISH v. ENGLISH, FROM PENDER:

Excusable Neglect.

The ruling in *Griel v. Vernon,* 65 N. C., 76, in reference to neglect of attorney, approved.

RUFFIN, J. This is an application for relief under Sec. 133 of C. C. P., and to have set aside a judgment on the ground of surprise.

As found by the judge in the court below, the facts are that plaintiff commenced his action on the 7th day of September, 1880, by summons returnable to fall term of Pender superior court of that year, the object of the action being to procure an injunction and have declared void a mortgage, which the plaintiff had given to the assignor of the defendant.

A temporary restraining order, and an order to show cause why an injunction should not issue, were granted, and made returnable at Snow Hill, in Greene County, on the 5th day of October, at which time and place the defendant, though served with notice, failed to attend, and the plaintiffs' attorney of his own accord procured the matter to be adjourned to the ensuing term of Wayne court, when by consent between the attorneys of the parties, it was again adjourned to Pender superior court.

The defendant retained as his attorney, J. D. Stanford, Esq., who together with himself attended Pender court at Fall Term, 1880. While

there, his said attorney attempted to effect a compromise of the matters in dispute with the plaintiffs' attorney, but failed to accomplish it, and then told the defendant that he might return home as nothing more would be done in the cause at that term, and accordingly he did depart. Mr. Stanford having marked his name as an attorney for the defendant on the docket, and erroneously supposing that a practice of the Bar similar to one that prevailed in Duplin court, obtained in (498) Pender, according to which a party, on merely entering an appearance was as a matter of course allowed sixty days to file his answer, left the court at the end of the second day of the term, without filing an answer or putting in any other defence. For want of such defence, judgment was rendered against the defendant at said Fall Term, 1880, declaring the deed under which the defendant claims, to be void, and directing the same to be cancelled.

In an affidavit filed in support of his motion, the defendant alleges that he purchased the mortgage, the validity of which is assailed, for a valuable consideration and without any notice of the fraud alleged to have been practiced in procuring its execution, and that he is advised that such facts constitute a meritorious and valid defence to the plaintiff's action.

His Honor directed the judgment to be set aside and from that ruling the plaintiff appealed.

Under the circumstances, it does not seem to us possible seriously to impute negligence to the defendant. Whatever fault there was—and really it appears to have been very slight—must be attributed to the defendant's attorney and not to himself. So that the case falls strictly within the principle established in *Griel v. Vernon,* 65 N. C., 76, and *Deal v. Palmer,* 68 N. C., 215.

Nor can we give our assent to the proposition that before setting aside the judgment, it was the judge's duty to have ascertained as a fact, whether there existed a meritorious defence to the action, since, that would necessitate a trial by the court, of all the issues involved, and be to anticipate the very purposes of the motion. The affidavit of the defendant sets forth facts which establish a *prima facia* defence, and that is all the law requires.

No error. Affirmed.

Cited: Mauney v. Gidney, 88 N.C. 203; *Churchill v. Ins. Co.,* 88 N.C. 208; *Pickens v. Fox,* 90 N.C. 372; *Jeffries v. Aaron,* 120 N.C. 170; *Phifer v. Ins. Co.,* 123 N.C. 409; *Miller v. Curl,* 162 N.C. 5; *Gaylord v. Berry,* 169 N.C. 736; *Schiele v. Ins. Co.,* 171 N.C. 431; *Bank v. Duke,* 187 N.C. 390; *Garner v. Quakenbush,* 187 N.C. 606; *Sutherland v.*

Wicker, 199 N.C. 350, 351; *Gunter v. Dowdy,* 224 N.C. 524; *Pierson v. York,* 227 N.C. 578; *Moore v. Deal,* 239 N.C. 229.

(499)

IN WIGGINS V. MCCOY, FROM LENOIR:

Amendments—Appeal.

The motions of defendant in this case involve matters addressed to the discretion of the court, with regard to amendments, and the rulings thereon are not the subject of appeal.

ASHE, J. The action was brought on a bond, and at the trial before the justice, the plaintiff filed said bond and an affidavit that it was given for the purchase money of land described in the affidavit.

The justice gave judgment for the plaintiff, and found as a fact that the bond was given for the purchase money of the land, and from this judgment the defendant appealed.

The return by the justice of the appeal to the superior court shows that the defendant admitted the execution of the bond, and put in no answer to the allegation in plaintiff's affidavit that the bond was given for the purchase money of land.

The return by the justice was made to Spring Term, 1881, of the superior court, and no answer was ever filed by the defendant to plaintiff's complaint.

On the first day of the court to which the return was made, the defendant's counsel moved the court to allow the defendant to file an answer denying that the bond was given for the purchase money of land. The motion was refused by the court, and the case was set for trial in the calendar for the following Friday, and when called up for trial on that day, the defendant's counsel renewed his motion to be allowed to file an answer, and read in support of said motion an affidavit of the justice who tried the action, which was to the effect that the defendant had, in an oral answer to the action on trial before him, denied that the bond sued on was given for land.

(500) The defendant also moved the court to allow the justice to amend his return, and insisted that if allowed to set up his defence, he could show that the bond was not given for land, but for money borrowed to buy land.

The motions were all refused by the court and judgment was given for the plaintiff, and the defendant excepted.

Afterwards, and on the last day of the term, the defendant's counsel moved to set aside the judgment and re-open the case, on the ground that the court ought to have considered the foregoing affidavit of the justice as a substituted return of the justice. But the court finding as a fact that the affidavit of the justice was not offered, at the trial, as the justice's return, but to support the motions as above set forth, refused the motion and the defendant excepted and appealed.

All the motions made by the defendant's counsel on the trial in the superior court were matters addressed to the discretion of the court, which are not reviewable, and adds another case to the long catalogue of adjudications upon the discretionary powers of the court with regard to amendments, etc. *Henry v. Cannon,* 86 N. C., 24, and cases there cited.

The motion made after judgment was for a new trial, and as the fact was found by the court that the affidavit of the justice was not offered at the trial as the justice's return, but to support the motions for leave to answer, etc., that was also a matter of discretion, and the refusal to sustain the motion was no such error as entitled the defendant to a *venire de novo,* and therefore no ground for an appeal. *State Bank v. Hunter,* 12 N. C., 100; *Reed v. Moore,* 25 N. C., 310; *Hinton v. Deans,* 75 N. C., 18.

There is no error. The judgment must be affirmed.

No error. Affirmed.

Cited: Levenson v. Elson, 88 N.C. 184; *Brooks v. Brooks,* 90 N.C. 144; *Sheldon v. Kivett,* 110 N.C. 411; *Simmons v. Jones,* 118 N.C. 474.

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(501)

IN LEAK v. COVINGTON, FROM RICHMOND:

Reference—Appeal.

1. A compulsory reference may be ordered where the taking of an account shall be necessary for the information of the court before judgment.
2. The order appealed from in this case does not effect a "substantial right," and the appeal is therefore dismissed.

SMITH, C. J. The plaintiff, as executrix of John W. Leak, on behalf of herself and all other creditors of William L. Covington, deceased, brings this action against the defendants, his executors, legatees and devisees, to enforce contribution from his estate for moneys paid by the plaintiff upon the liability of her testator, as a surety upon the admin-

istration bond of one James A. Covington, to whom had been committed administration on the estate of John W. Covington, to which bond the testator William L., was the only solvent co-surety, and the plaintiff seeks to recover judgment for his moiety of the money so paid, and to follow and subject his estate in the hands of the defendant executors, legatees and devisees, personal and real, to the payment of his debts.

The plaintiff demands the appointment of a receiver to take charge of the funds as they may be recovered, that an account be taken of the funds which are or ought to be in the hands of the said executors, and which have been delivered to the legatees of the testator's estate, to the end that the same be applied to the discharge of the indebtedness to the plaintiff and others; and in the event of a deficiency of such assets, that the devised lands be charged therewith.

The defendants in their answer, not denying the material allegations upon which the plaintiff's claim rests, as a defence to the action, say,

(502) that the estate of the testator has been fully administered without notice of this asserted liability of the testator, and rely upon this and the statutory bars limiting the time for bringing actions against representatives of deceased debtors, to two and seven years respectively, provided in the Revised Code, ch. 65, secs. 11, 12, and 13, as also upon the long and continuous adverse possession of the several legatees and devisees of the bequeathed and devised estates.

At Spring Term, 1882, an order of reference was entered in these words: "In this cause, it is ordered, that D. Stewart and R. A. Johnson be, and they are hereby appointed referees to take and state an account of the administration of the estate of W. L. Covington, deceased, by his executors E. P. Covington and A. A. Covington, under the plea of no assets and fully administered set up in the answer, and make their report to the next term of this court."

From this order the plaintiff appeals, assigning as error that the defences to the maintenance of the suit should first be disposed of by a jury trial, and that the reference is premature and irregular.

It is true, as we have often said, that the regular and orderly mode of procedure is to have those defences set up in bar of the action first tried and settled, since if valid, they dispense with the necessity of a reference, and are in their nature preliminary to taking an account. *R. R. Co. v. Morrison,* 82 N. C., 141; *Commissioners v. Magnin,* 85 N. C., 114. At the same time a compulsory reference may be ordered by the judge, "when the taking of an account shall be necessary, for the information of the court before judgment." C. C. P., Sec. 245. And in *McPeters v. Ray,* 85 N. C., 462, it is said that "we are not prepared to say that the order is not within the scope" of this provision of the Code. In such case it would be of course, whether so stated or

not in the order, without prejudice to the defences relied on to defeat the action.

But we are at a loss to understand what objection the appel- (503) lant can take to an order he himself asks for in his complaint, and which cannot impair any of his rights, while it may perhaps facilitate a final determination of the cause in settling the whole controversy at once. The order certainly does not "affect a substantial right" claimed in the action or proceeding by the appellant, but rather is in furtherance of his demand.

The appeal cannot be sustained and must be dismissed, and the cause be allowed to proceed as if no appeal had been attempted.

Let this be certified.

PER CURIAM. Appeal dismissed.

Cited: Lutz v. Cline, 89 N.C. 188.

IN McDANIEL v. POLLOCK, FROM JONES:

Practice—Certiorari.

1. The appellant must assign and show error in the ruling of the court below, or the judgment will be affirmed.
2. An application for *certiorari* must be made before the case is gone into upon the merits.

SMITH, C. J. The complaint alleges that under a writ of *venditioni exponas* issued in 1869, upon a judgment recovered in 1863, against one Lewis Koonce, the plaintiff, and others by one Roscoe Barrus, the sheriff of Jones, sold and conveyed for the consideration of $430, to one Amyett a large tract of land belonging to the plaintiff and whereon he resided, which is described in the complaint, and that the sale was made subject to his homestead. That the defendant, C. M. Pollock, then living with the plaintiff in March, 1870, at his request, purchased from the said Amyett for the sum of $450, his interest (504) in the land, and the same was duly conveyed to said Pollock by deed executed by said Amyett and wife. That in 1869 another execution issued upon the same judgment, revived before the clerk in the name of the defendant C. M. Pollock, by virtue whereof the sheriff levied on, and in September sold the interest of the plaintiff in said land, and conveyed the same by deed to the defendant E. R. Page, who had married a niece of the plaintiff, for the sum of fifty dollars, and

that it was bid off by said Page at the request of the plaintiff and for him.

The object of the action is to set up and enforce a parol trust, attaching to the estates so conveyed to the defendants, C. M. Pollock and E. R. Page, and against the other defendant who claims under said C. M. Pollock.

The separate answers deny the facts charged and out of which the trusts are alleged to arise, and insist that the said conveyances were absolute, uncoupled with any contract for the benefit of the plaintiff, and vest the title in them respectively. Upon four issues made up and submitted to the jury, they find that neither did the defendant, C. M. Pollock, purchase the land in his possession from Amyett, nor the defendant E. R. Page buy at the sheriff's sale that in his possession, *in trust* for the plaintiff; that the defendant E. R. Page owns it; and that the plaintiff is not the owner nor is he entitled to the land in possession of the defendant Lewis Pollock.

Thereupon the plaintiff moved for judgment "on the pleadings and findings of the jury," which being refused and judgment rendered for the defendants, he appeals to this court.

The case prepared by the appellant's counsel and sent up in the transcript showing upon its face a want of compliance with the requirements of section 301 of the Code, must be discarded as forming no part
(505) of the record, and the sole question we have to consider is the denial of the motion for judgment.

We find no support whatever in the admitted or undenied allegations of the complaint for the motion, and the averments upon which the equity is asserted (if indeed, being true, they are sufficient to raise an equity for the plaintiff) are expressly disproved by the verdict of the jury.

It is a settled rule in this court that the appellant must assign and show error in the ruling of the court below or the judgment will be affirmed; and upon the record itself the only exceptions we can notice is the want of jurisdiction or that the complaint contains no sufficient cause of action. *Williamson v. Canal Co.*, 78 N. C., 156; *Bryant v. Fisher*, 85 N. C., 69, and cases therein referred to; *Williams v. Council*, 65 N. C., 10; *Hardin v. Murray*, 68 N. C., 534; *Simpson v. Summey*, 74 N. C., 551.

The suggestion of counsel that, if against the appellant, we award him a writ of *certiorari* in order that a case may be properly prepared and sent up, cannot be entertained when the merits of the case are presented for adjudication. The application should be made before the trial, and if the appellant fails to make it and goes to trial, he must abide the consequences.

It must be declared there is no error and the judgment be affirmed.
No error. Affirmed.

Cited: Neal v. Mace, 89 N.C. 171; *Mott v. Ramsay,* 91 N.C. 253; *S. v. Marsh,* 134 N.C. 195; *Gorham v. Ins. Co.,* 215 N.C. 199.

IN MOORE v. HINNANT, FROM JOHNSTON:

Practice.

This cause is remanded at appellant's costs, for the reason that an appeal was attempted to be taken before the rendition of judgment.

SMITH, C. J. This is a controversy submitted without action (506) (to the superior court of Johnston County) upon an agreed statement of facts under C. C. P., Sec. 315.

The defendant, sheriff of Johnston County, under several writs of attachment sued out against one H. L. Watson by creditors, had levied upon certain goods of the debtor, which the plaintiff held under a prior assignment to himself in trust to secure all the creditors.

The object of the suit is to have a decision of the court upon the sufficiency in form, and legal efficacy of the deed, in vesting the title in the plaintiff against the attaching creditors.

It is agreed that if the validity of the conveyance be sustained, judgment shall be rendered requiring restitution of the goods; if not, judgment shall be entered against the plaintiff for costs.

His Honor filed an opinion declaring that the deed of assignment is not fraudulent and void, and without any judgment rendered, so far as the record discloses, the defendant appeals.

When a case is heard under this summary method authorized by the Code, the statement should embrace all the facts material to a final and complete determination, with nothing further to be done, except to carry the judgment into effect. The present statement seems to be defective in not specifying any goods attached, and to be restored, in case of a decision favorable to the plaintiff.

But an insuperable difficulty is interposed to our entertaining the appeal, in the fact, that it is attempted to be taken in the midst of a trial and before the rendition of judgment. Appeals are not authorized under such circumstances, but only from a "judgment, order or determination of the judge," (C. C. P., Sec. 299) and then only when a trial

entered upon is concluded. For this imperfection in the record
(507) the cause must be remanded at the costs of the appellant.

Since the opinion was filed the parties propose by consent to file the record of the judgment as an amendment, and if this shall be done, the order remanding will be withdrawn, and the cause will remain on the docket for a future hearing in the amended form.

PER CURIAM. Order accordingly.

Cited: Lutz v. Cline, 89 N.C. 188; *Overman v. Sims,* 96 N.C. 454; *Rogerson v. Lumber Co.,* 136 N.C. 269; *Privette v. Privette,* 230 N.C. 53; *Veazey v. Durham,* 231 N.C. 362.

STATE v. WRIGHT DANIEL.

Assault With Intent to Commit Rape.

Defendant proved that the general character of prosecutrix was bad, but the witness stated on cross-examination that he had never heard anything against her reputation for "truth"; *Held* competent for the defendant then to show her reputation for "virtue."

INDICTMENT for assault with intent to commit rape, tried at Fall Term, 1882, of PITT Superior Court, before *MacRae, J.*

On the trial the state introduced the prosecutrix as a witness, and rested its case; and the defendant then introduced one Forbes who testified that he was acquainted with the general character of the prosecutrix, and that it was bad; but on cross-examination the witness stated he had never heard anything against her reputation for truth. The defendant's counsel then proposed to ask the witness, "what is her reputation for virtue?" This question was objected to on the part of the state, objection sustained, and defendant excepted. The jury returned a verdict of guilty, and from the judgment pronounced the defendant appealed.

(508) *Attorney General, for the State.*
No counsel for defendant.

ASHE, J. The only question presented by the appeal, is, was it competent for the defendant to ask the witness the question—what is the reputation of the prosecutrix for virtue?

That the moral character of the prosecutrix may be put in evidence, is too well settled to admit of a doubt, whether it is ordered to impeach her testimony as a witness, or, as in this case, to show that the act in question had not been committed.

That proof of the bad moral character of a witness may be adduced for the purpose of impeaching his testimony, has been so often decided in this state, as to have become an established rule of evidence. It was so held as far back as the case of *State v. Stallings,* 3 N. C., 300; and also in *State v. Boswell,* 13 N. C., 209.

In *State v. Jefferson,* 28 N. C., 305, which was an indictment for rape, when it was proposed that the prosecutrix, who was a witness for the state, had permitted other negro men to kiss her and take other liberties with her, Chief Justice RUFFIN said: "That familiarities had occurred, indicative of habitual criminal connexion between these persons, as proved by the prisoner's fellow servants, was properly left to the jury, as tending to disprove the probability of the use of force or fear by the prisoner, and to discredit the witness for the state. No doubt too that it would have been proper to receive evidence that the woman was a prostitute upon similar grounds, and particularly that she had criminal intercourse with other negroes. But that ought only to be done upon general evidence." In concurrence with this decision is Taylor on Evidence, Sec. 336, where it is held that on indictment for rape, or an attempt to commit that crime, while evidence of general bad character is admissible to show that the prosecutrix, like any other witness, ought not to be believed upon her oath, proof that she is a (509) reputed prostitute would go far towards raising an inference that she yielded willingly to prisoner's embraces. Therefore, general evidence of this kind is admissible, though the woman be not called as a witness. See also *State v. Murray,* 63 N. C., 31.

There is error. Let this be certified, etc.

Error. *Venire de novo.*

Cited: S. v. Hairston, 121 N.C. 582; *S. v. Connor,* 142 N.C. 706; *S. v. Pearson,* 181 N.C. 589; *S. v. Nance,* 195 N.C. 49.

STATE v. WILLIAM SKIDMORE.

Assault and Battery—Evidence—Maim—Judge's Charge.

1. In assault and battery, evidence of previous threats of personal violence against the defendant by the prosecutor, is inadmissible—*State v. Norton,* 82 N. C., 628, approved.

2. Upon trial for an indictment for maim, it appeared that while the parties were engaged in a fight, the defendant bit off a part of one of prosecutor's ears, and the judge charged it was incumbent on defendant to satisfy the jury that the act was done in self-defense; *Held* no error.
3. *Held further:* It was not error to refuse to charge that, if the severance of the ear while in defendant's teeth resulted from the violent manner in which the parties were separated, it would not be a maim done "on purpose and with intent to disfigure"—for this the law presumes when the act is proved.

INDICTMENT for maim tried at Spring Term, 1882, of GASTON Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal of defendant.

Attorney General, for the State.

Messrs. Hoke & Hoke, for defendant.

(510) SMITH, C. J. The defendant is charged with the offence of biting off the ear of L. B. Rankin without malice, but on purpose and with intent to disfigure him, and upon the evidence was convicted by the jury. The indictment was framed under a statute which enacts, that,

If any person shall on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off a nose, or lip, or ear, or disable any limb or member of any other person, or cut off, maim or disfigure any of the privy members of any other person with intent to kill, maim, disfigure, disable or render impotent such person; in any such case the person so offending shall, on conviction thereof, be imprisoned at least six months and fined at the discretion of the court. Bat. Rev., ch. 32, sec. 48.

The previous act of 1791, which describes the maim therein intended as done "of malice aforethought," had been interpreted to include the case of a maim perpetrated without any preconceived malicious purpose, if intentionally perpetrated by the accused, the malice being necessarily involved in the act of maiming, in the case of *State v. Crawford,* 13 N. C., 425. The words introduced in the revised act of 1837, "with malice aforethought," were, say the court in *State v. Girkin,* 23 N. C., 121, doubtless with the view of giving to this latter act the same sense in which the former had been received by judicial construction; in other words, the legislature approved of the interpretation adopted by the court and meant to incorporate it as a distinct and express enactment of the statute.

The evidence heard on the trial, needlessly diffuse as set out in the record, was in substance as follows:

The parties began an altercation about money due to the prosecutor by the defendant and the demand of payment, which progressed in the interchange of angry words until the prosecutor swore he could whip the defendant, and the latter in response said "all right." Thereupon both rose up, the defendant walking off and followed by the (511) prosecutor who just before had a knife in his hands with which he was whittling, but was not seen then with it. The defendant said to him, "don't come at me," and the prosecutor continuing to advance, the defendant gave him a blow with a stick and then with his fist, when they clinched in fight, fell to the ground, and were pulled apart by others who were present and witnessed what took place. It was then discovered that a portion of the prosecutor's ear had been bitten off and was lying on the ground.

The defendant's own version of the affair, given upon his examination on his own behalf before the jury, differs not materially from the testimony of his other witnesses, except that he stated the prosecutor held a knife while following him up and first struck at him, whereupon the defendant gave the successive blows with the stick and with his fist, and they clinched and in the scuffle fell and he bit the prosecutor.

During the trial the defendant proposed to show the previous utterance of threats of personal violence against himself by the prosecutor, of which he had received information, but the evidence was ruled out as incompetent, and the first exception is to this ruling.

The counsel for defendant in argument contended, as we infer to be the import of the expression used by his Honor—"the theory of the defendant was," that the mutilation of the ear was an act of self-defence, or that in the excitement of the fight it was not done "on purpose," and the severance of that part of the ear was brought about by their violent separation.

The jury were instructed that inasmuch as the mutilation of the ear by the defendant was admitted, it was incumbent on him to satisfy them that it was done in self-protection, and they must determine whether the act was necessary in defence of his own person, and if such necessity did not exist the defendant should be (512) found guilty.

The court refused to charge, when so requested, that if the defendant in the midst of the fight seized the ear in his teeth with a view to his own defence, and while so holding it he was jerked away from his adversary and by this means the part of the ear was separated, the defendant would not be guilty of the offence imputed.

These are the errors assigned in the record for our consideration.

1. The rejection of antecedent and communicated menaces of personal violence uttered by the prosecutor, is fully warranted by the ruling in *State v. Norton,* 82 N. C., 628. There, the state was not permitted to show threats made by the defendant two weeks before committing the assault, for the reason as stated by the court that the inquiry is into a charge of assault and battery, and that "the guilt or innocence of the defendant depended upon the facts and circumstances immediately connected with the transaction." If incompetent to fix the guilt of the accused, still less would threats proceeding from the stricken and injured party (*res inter alios actæ*) be admissible to excuse the criminal misconduct of the defendant in committing the maim upon his person.

2. While the specific instruction requested was denied, the jury were directed to inquire and say whether the seizure of the prosecutor's ear in the teeth of the defendant was required for his own defence, in a fight which, upon all the testimony, except so far as modified in that of the defendant himself, was begun by a blow from a stick, and then from his fist upon the person of the prosecutor then pressing forward towards the defendant; and this, at least, was quite as favorable as could be asked for the defendant. There was no proof as to the condition of the parties struggling upon the ground, beyond the fact of the fight itself, from which it can be seen that such
(513) necessity pressed upon the defendant; and he certainly cannot complain that the jury were left at liberty to infer that biting the ear off was or might be an act of self-defence.

3. Nor was their error in omitting an instruction that if the ear was severed while in the defendant's teeth by the violence of those who pulled him away, it would not be a maim "done on purpose" and "with intent to disfigure," within the sense of the enactment. If the biting was intentional and the severance resulted from the manner in which the combatants were parted, it would be none the less the act of the defendant, and no more less excusable than if it had been effected by the struggling efforts of the prosecutor to escape from his grasp. The primary and essential cause of the personal mutilation is the intentional biting of the defendant, and upon him devolves the responsibility for its consequences.

When the act itself is proved, the law will presume it was done on purpose and with intent to maim, as it actually was a maim till the evidence showeth the contrary. *State v. Evans,* 2 N. C., 281; 2 Whar. Cr. Law, Sec. 1173 and cases cited.

Undoubtedly, if, in striking with a sharp instrument or shooting at the person without any distinct aim or intention directed to the member, the mutilation of which when intentionally done would con-

stitute maim, such member should be hit and severed, this would be not considered a maim committed on purpose in the words of the statute, to which some force must be given. But if the member was the object of the assault, and was in fact cut off and severed, it could in no proper sense be said to be accidental, and the defendant would fall under the condemnation of the act.

We discover no error in the record, and this must be certified to the end that the court may proceed to judgment upon the verdict.

No error. Affirmed.

Cited: S. v. Goff, 117 N.C. 763; *S. v. Kimbrell*, 151 N.C. 704, 706, 707.

(514)

STATE v. EPHRAIM DAVIS.

Common Design—Evidence—Judge's Charge—Accessory Before the Fact to Murder.

1. Where there is proof of an agreement between parties to commit a criminal offence, any statement made afterwards, and before the commission of the offence, by one of them in furtherance of the common design, is subject to proof and evidence against the others; so also, are the attending circumstances, such as appear in this case and constituting a part of the *res gestæ*.
2. The exceptions to the general rule that a party is bound by the answer of a witness as to a collateral matter, are; first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties; and secondly, where the cross-examination is as to matter tending to show the motive, temper, disposition, conduct or interest of the witness towards the cause or parties.
3. If prisoner procures C to commit a robbery, and C kills the deceased to conceal the robbery, the prisoner is guilty as accessory before the fact to the murder.
4. The bill of indictment here is in the usual form, and sufficient.

INDICTMENT for murder (removed from Alexander) tried at Spring Term, 1882, of CATAWBA Superior Court, before *Eure, J.*

The prisoner is indicted as an accessory before the fact to the murder of Caroline Thompson, as charged in the bill to have been committed by one Elijah Church.

Bill of indictment in substance: The jurors, etc., present that Elijah Church (now dead) late of the county of Alexander, not having the fear, etc., on the 10th of June, 1881, with force and arms, etc., in

and upon one Caroline Thompson, in the peace of God and the state then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said Church with a certain axe, which he held in both hands, then and there had and held,
(515) the said Caroline Thompson, in and upon the head of her, the said Caroline Thompson, then and there feloniously, wilfully and of his malice aforethought did strike and beat, giving to her the said Caroline Thompson with the axe aforesaid in and upon the head of her, the said Caroline Thompson, several mortal wounds and bruises, of which said mortal wounds and bruises the said Caroline Thompson then and there instantly died. And further, that Church, the said Thompson in manner and form aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder, contrary, etc. And further, that Ephraim Davis, late of the county of Alexander, before the said felony and murder was committed in form and manner aforesaid, to wit, on the 9th of June, 1881, etc., did feloniously, unlawfully, wilfully and maliciously incite, move, procure, did counsel, hire, and command the said Church the said felony and murder in manner and form aforesaid to do and commit, contrary, etc.

It was shown in evidence that Church, prior to this trial, had been taken from the jail by parties and executed.

The state introduced James Thompson (father of deceased) as a witness, who testified, that when he returned from his work about sunset on the 10th of June, 1881, he found the dead body of his daughter lying in the yard, very bloody, and her head crushed in several places, apparently cut in by an axe, and the axe was lying by her; that a chest in his house was broken open, and his money to the amount of six hundred dollars gone—$400 of which being in gold and silver coin, the residue in "greenbacks." Some of the silver taken was very old and of rare kind, such as is not now in circulation. One piece exhibited to him, (which, another witness testified, had been passed to him by Church after the murder) he said he believed was among his silver, for he had never seen another piece like it. The silver had been on hand a long time, and had become dark.
(516) Thomas Adams had paid him one hundred dollars in silver, some time before, all of which was dated prior to the late war, and the most of it was in eagle-half-dollars. Some of the money which had been recovered from Harrison Dockery, (a confessed accomplice with Church in the robbery of the house) was exhibited to the witness, and it was eagle-half-dollars, dated before the war, and dark; and he said he believed it was his money. About two weeks before the homicide, he found a haversack near his fence with biscuits in it.

Thomas Adams was then put upon the stand by the state and testified that he was the brother-in-law of Miss Thompson, the deceased; that Church, when he was being carried to the penitentiary, stayed all night at his house, and the deceased was there; lives three miles from James Thompson's; had paid him one hundred dollars about four years before, in silver money, dated before the war, and eighty dollars of the amount were half-dollar-pieces. The witness also testified that Church had made his escape from the penitentiary, or from the guard who had him and other convicts in charge, and was at large at the time of the homicide.

Harrison Dockery was then examined as a witness for the state, and that portion of his testimony material to the questions raised by the prisoner's exceptions, is as follows: The first time he ever heard anything said about the robbery of James Thompson was about one week before the robbery and murder, when he and the prisoner (Davis) and Elijah Church were together, and after they had talked about some meanness, the prisoner said to Church, "when will you be ready to take that trip" Church replied, "most anytime." Prisoner said his leg was sore, he could not go, but would give the witness fifty dollars to go in his place and watch the house, and he the witness should not be hurt. The agreement was made between them; and they agreed it should be done by the 10th of June, 1881; and on Thursday the 9th of June, 1881, the witness and Church started (517) from his house in the county of Wilkes, and went to George Thornburg's, but Church did not go up to the house.

Witness got some rations, and after dark he and Church went to Thornburg's spring-house and took a crock of milk and drank it, and then went on towards Thompson's, arriving there about day-break. After day, Church went to watch Thompson, returned between twelve and one o'clock, and said Thompson had got his horse and gone to ploughing, and now was the time. They went up to the house, witness stopping at the fence about ten feet off; Church asked the deceased for her father's money; she told him he had no business with his money; Church said, damned if he wouldn't have it; he came for it; she let him go into the house. Witness heard her ask him his name, and he said, "my name is Lige Church," and she then said, "you are the man that stayed at Tom Adams' when they carried you to the penitentiary." Church came out of the house with a large roll of "greenback" money, and a satchel of silver money.

They started off, and after going about twenty five yards Church said, "it will not do to leave the thing undone, I told her my name," and after handing witness the things and telling him to go on, he went back to the house. In the meantime the witness went back to the

fence, and Church had then knocked the deceased down and was hitting her on the head with an axe. As they went off, Church took out a twenty dollar gold piece, and said, "It is the prettiest I ever saw." They travelled mostly in the woods until they come to the "graded road" on which, about a mile distant, lived John Adams, the way to whose house they inquired of parties they had met. They reached Adams' late at night, and after Adams came out, Church said, "by God I raised him," and Adams replied, "that's a fine thing."

Witness understood John Adams to ask Church what had
(518) become of the woman, and said to him, "you may be caught,"
and Church replied "the woman will never bother any one," Adams gave them some meat, and they went into the road, laid down their sacks of money and built up a fire, and Adams picked up one of the sacks and left. Witness never saw Adams before, but took a good look at him while he and Church were talking, and knew him the next time they met. He had a peculiar voice which the witness recognized. After leaving Adams', they reached their old neighborhood about noon on the next day (June 11th) and hid their clothes in the woods, and of the fifty-five dollars of the money which the witness got, he hid nine dollars in half dollar pieces in a hole under the root of a tree.

On the following Friday (June 17th) they passed over the Brushy Mountain and went to rob an old man by the name of Erastus Redman. In the fork of a white oak near Redman's fence, they hid a satchel, cup and large needle. They robbed his house and got one hundred and sixty-eight dollars. When they went off, the witness forgot the cup and needle, and left them. On the Sunday after this robbery, witness and Church went to Virginia, and on their way they called at a Mr. Smith's store, near Ore Knob, and bought a pair of pants, traded a pair of boots they had for a pair of shoes, and Church bought a coat and a pistol with a white handle, and some other goods. They also went to the store of one Weaver and bought goods, Church buying a brace and bit. The articles were paid for mostly in silver money, and Church paid Weaver the old coin (which had been shown to the witness, James Thompson,) asking him if he ever saw anything like it.

On their return from Virginia, witness started for Watauga County, and met the prisoner, Davis, at the store of one White, and the prisoner asked the witness "if he had got his pay all right," he replied that
he had, and then asked a similar question of the prisoner, to
(519) which an affirmative answer was also given.

This witness testified to many other matters, and said that when in jail he made a free confession of all the statements given

in his testimony, and gave information where his and Church's clothes were hid, and where his money was concealed—under the root of the tree.

All of the above testimony was given in without objection.

The witness was then asked by the state solicitor, if before the murder of the deceased he heard Church say anything about his and the prisoner's (Davis) going to James Thompson's. The prisoner's counsel objected to evidence of any statement of Church or of anything Davis did, on the ground of the want of proof of a common design.

The judge held there was proof of a common design to commit the robbery, and any statement in furtherance of the common design was evidence against the prisoner, and overruled the objection.

And the witness then testified that when Church and he were on their way to Thompson's, Church said that he and Davis had been there about two weeks before, "and got all the ropes about it." Prisoner excepted. He further stated that Church told him that when he went there on the last mentioned occasion he lost his satchel with some bread in it.

There was much evidence offered by the state to corroborate this last witness (Dockery, the accomplice,) and among the witnesses introduced for that purpose was Erastus Redman, who testified as to the kind of money taken from his house on the said 17th of June. During his examination he was asked, if in consequence of what Dockery said about the cup and needle, he made any search for them, and he stated that he went to the white oak and found the cup and needle where Dockery said, in his confession in jail, he had left them. Prisoner objected to the question, and upon its being overruled, excepted.

This witness also testified that the old and rare piece of coin (520) which Thompson said he believed to be his, was not like any money that was taken from his house, and that he had never seen a piece like it.

Julius Smith and W. C. Weaver were introduced by the state and testified that the witness, Dockery, and a man, who said his name was Elijah Church, came to their respective stores in Alleghany County, about the 20th of June, 1881, and bought the articles mentioned in Dockery's testimony, and that they seemed to have plenty of money.

While the witness, Weaver, was under examination, and naming the articles which Church bought of him, the prisoner's counsel objected to his stating that Church bought a brace and bit; objection overruled, and he was allowed to state the articles bought by Church and the quantity and kind of money he paid witness for them. Pris-

oner excepted. He also testified that Church passed to him the old rare piece of coin, dated in 1793, which Thompson said he believed to be his.

The prisoner among other witnesses introduced John Adams, who testified that Dockery and Church did not go to his house on the night of the day when the deceased was murdered, nor did he receive any silver money from Church on that night, as testified to by Dockery.

On the cross-examination of this witness, he was asked by the state where he got certain old Spanish and Mexican silver dollars, which he had passed to certain persons since the murder of the deceased, and he replied that he had some of this money before the war. The state then, for the purpose of affecting his credit, handed him the memorandum of his taxable property for the years 1880-81, which purported to be signed by him, and asked him if he signed it and if he listed for taxation any money for those years. The witness answered that he did not sign it, he could not write, and did not know that he authorized any one to sign for him; and the
(521) state asked permission of the court to call one J. M. Mitchell to prove that the witness had authorized his name to be signed to the memorandum; prisoner objected, but the court allowed Mitchell to be examined; and he stated that he signed Adams' name to it at his request and in his presence, and that it was read over to him at the time. Prisoner excepted.

The prisoner's counsel prayed the following instructions:

That if prisoner procured Dockery to go and assist in the robbery of James Thompson, and after they had completed the work for which he had been hired, and had left and gone some distance away, and then Church returned and murdered the deceased contrary to the wishes of Dockery, the jury cannot convict the prisoner, Davis, under this bill of indictment.

The judge charged the jury that he would give this instruction, provided they found from the evidence that the prisoner procured Dockery to go and assist in the robbery, but did not procure Church; that the jury must be satisfied that the prisoner procured Church. That the state contended there was a combination and agreement between Church and the prisoner, and that the hiring of Dockery by the prisoner to go with Church, was one of the means of procuring Church to commit the robbery, and then to commit the murder to conceal the robbery; it was incumbent on the state to satisfy them upon the evidence that such was the case. That if Church after the robbery left the house twenty five steps and then returned and murdered the deceased through his own malice and not to conceal the

robbery, the prisoner, though the jury should believe he procured Church to commit the robbery, would not be guilty as accessory to the murder; but if they should believe that the prisoner procured Church to commit the robbery, and that Church murdered the deceased to conceal the robbery, then the jury should find the (522) prisoner guilty as accessory to the murder. Prisoner excepted.

Verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the State.
Messrs. D. M. Furches and M. L. McCorkle, for the prisoner.

ASHE, J. The first exception taken by the prisoner on the trial was to the ruling of the court in permitting the question to be put to the witness, Dockery, "whether before the murder of the deceased, Church said anything about his and the prisoner's going to James Thompson's."

In this there was no error, for the witness had testified that in a conversation between him and Church and the prisoner, the latter had procured him to go with Church to commit the robbery, and the agreement was then made between them that it should be done by the 10th of June. This was some proof of a common design, and any statement after that, that might be made by Church in furtherance of the common design, is evidence against the prisoner. 3 Russell on Crimes, 280.

The second exception was to the admission of the testimony of Redman in regard to his finding the "cup and needle" of Dockery at the place where the latter had said he left them. We can see no objection to this evidence. The witness Dockery had been permitted to testify without objection in regard to the stealing of the witness Redman's money in a few days after the murder, and in giving an account of the transaction he had stated that he left his cup and needle at the white oak where he and Church had stayed the night before the larceny. The testimony was immaterial, except so far as it served to corroborate the testimony of Dockery, in which respect it is not inadmissible.

The third exception was to the ruling of the court in allowing the witness, Weaver, to testify about the pistol and other articles bought of him by Church on the 20th of June. The objection (523) was properly overruled. If there was anything in it, it came too late, for the witness had stated before the objection was raised, that Church had bought the articles, as testified to by Dockery, in the enumeration of which by him, the "brace and bit" was mentioned. But aside from that, the testimony of Weaver was very pertinent and

important; for he testified to the passing to him by Church in payment for the articles purchased, the old rare piece of money of the coinage of 1793, which was identified by Thompson as of the money stolen from him on the day of the murder. Whatever was said or done by Church at the time of passing the coin, made a part of the *res gestæ* and was admissible. The purchase of the brace and bit, and the payment for it and the other articles, was a continuous and contemporaneous transaction, and that constitutes the *res gestæ*. Taylor on Ev., Sec. 538.

The fourth exception was to his Honor's ruling in permitting the state solicitor to prove by Mitchell that John Adams, a witness for the defence, had authorized his name to be signed to the memorandum of his taxable property for the years 1880 and 1881. The witness, Adams, was introduced by the prisoner for the purpose of contradicting the statement by Dockery of the fact of the reception, by Adams from Church, on the night after the murder, of a part of the stolen money. The witness denied that he had received any silver money from Church on that night, as testified to by Dockery. And on the cross-examination he was asked by the solicitor, where he got certain old Spanish and Mexican silver dollars he had passed to certain persons since the murder of the deceased. The witness answered he had some of this silver money before the war. The solicitor then exhibited to him his lists of taxables for the said years, and asked him if he signed them. He answered that he did not and did not
(524) know that he authorized any one to sign them.

It was important for the state to contradict the witness (Adams); for Dockery, the state's witness, had been corroborated in every material particular of his testimony, and if Adams' testimony had been permitted to pass uncontradicted, it would have left Dockery obnoxious to the charge of *"falsum in uno, falsum in omnibus."*

But it is insisted by the prisoner's counsel, that the question propounded to Adams in regard to his having old Spanish and Mexican dollars in his possession, since the murder of the deceased, was as to an irrelevant or collateral matter, and the state concluded by the answer of the witness, and should not have been allowed to go into evidence *aliunde* in order to contradict the witness. As a general rule this is true. But there is an exception, where the question put to the witness on cross-examination tends to elicit testimony which directly connects him *with the cause or the parties. State v. Patterson,* 24 N. C., 346; Taylor on Ev., Sec. 1298. Another exception is, where the cross-examination is as to matters, which although collateral tend to show the motive, temper, disposition, conduct or interest of the witness towards the cause or parties. *Ib.* And we

cannot conceive of a stronger motive to swear falsely than that which operated upon the mind of the witness, Adams, for if Dockery was to be believed, he was not only guilty of receiving stolen goods knowing them to be stolen, but was an accessory after the fact to the murder of the deceased.

The next exception was to the refusal of his Honor to give the special instructions asked by the prisoner's counsel—"That if the prisoner procured Dockery to go and assist in robbing James Thompson, and after they had completed the work for which he had been hired, and had left and gone some distance away, and then Church returned and murdered the deceased contrary to the (525) wishes of Dockery, the jury cannot convict the prisoner."

His Honor committed no error in declining to give the instruction, or in the charge which he gave the jury. He instructed them that if they believed Church after the robbery left the house twenty or twenty five yards, and returned and murdered the deceased through his own malice and not to conceal the robbery, the prisoner, though they should believe he procured Church to commit the robbery, would not be guilty as accessory to the murder. But if they believed that the prisoner procured Church to commit the robbery, and that Church murdered the deceased to conceal the robbery, then the jury should find the prisoner guilty as accessory to the murder.

The charge is fully sustained by the authorities. In Foster's Crown Law, 370, the principle is laid down, "that if A adviseth B to rob C, and he doth rob him; and in so doing, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, he killeth him, A is accessory to the murder." See also Roscoe's Crim. Ev., pp. 170, 171.

After the return of the verdict, the prisoner's counsel moved to arrest the judgment, on an alleged defect in the bill of indictment. The counsel contended, or rather *suggested,* that the bill was defective because the prisoner, indicted as accessory for a substantive felony, ought not to be joined in the bill with the principal. But the bill is in the usual form of an indictment for a substantive felony. In such indictments, it is essential to aver the guilt of the principal, and that was all that was intended to be done in this bill.

There is no error. Let this be certified, etc.

No error. Affirmed.

Cited: S. v. Mills, 91 N.C. 598; *Kramer v. Light Co.,* 95 N.C. 279; *Burnett v. R.R.,* 120 N.C. 519; *S. v. Jordan,* 207 N.C. 461; *S. v. Carden,* 209 N.C. 413; *S. v. Triplett,* 211 N.C. 107; *S. v. Spaulding,* 216 N.C. 540; *S. v. Hart,* 239 N.C. 712.

(526)

STATE v. EPHRAIM WOODFIN.

Concealed Weapon.

If one carry a pistol off his own premises, concealed about his person, for the purpose of hunting, he is guilty of a violation of the statute.

INDICTMENT for carrying a pistol concealed, in violation of the act of 1879, ch. 127, tried at Spring Term, 1881, of BUNCOMBE Superior Court, before *Bennett, J.*

On the trial the defendant's counsel requested the court to charge the jury that if they believed the defendant carried the pistol only for the purpose of hunting with it, and that he carried it openly and not concealed on his person for the purpose of hunting merely, he could not be convicted.

His Honor declined to give this special instruction and charged the jury, that it matters not for what the defendant carried the pistol, whether to hunt or for other purposes, yet if he carried it off his own premises concealed about his person, he is guilty. If it was not concealed, of course he is not guilty.

Verdict of guitly, judgment, appeal by defendant.

Attorney General, for the State.

Mr. Johnstone Jones, for defendant.

ASHE, J. The facts of the case are not set forth in the statement made up by his Honor, and we are left to infer what they were from the special instructions asked by the defendant, and the charge to the jury.

From these we infer the defendant went hunting with a pistol in his pocket, or concealed about his person. If so he was clearly guilty of a violation of the statute.

(527) There is no error in the refusal of the court to give the instructions asked; and while we think he laid down the law somewhat too broadly in his charge to the jury, yet so far as it applied to the supposed facts of the case, it was not erroneous.

No error. Affirmed.

Cited: S. v. Erwin, 91 N.C. 549; *S. v. Dixon,* 114 N.C. 852; *S. v. Simmons,* 143 N.C. 617; *S. v. Woodlief,* 172 N.C. 888; *S. v. Mangum,* 187 N.C. 479.

STATE v. C. F. GILBERT.

Concealed Weapon.

The *prima facie* evidence of concealment raised under the statute by the fact of possession of a pistol, may be rebutted—as in this case by an express finding of the jury, that the same was done without any criminal intent.

INDICTMENT for carrying a pistol concealed, in violation of the act of 1879, ch. 127, tried at Fall Term, 1882, of BUNCOMBE Superior Court, before *Shepherd, J.*

The jury returned a special verdict, in which, after finding that the defendant was off his own premises, and that he did not belong to any of the excepted classes of officers, they say:

That within two years next before the finding of the indictment against him, the defendant, while in the streets of Asheville, had upon his person a pistol which was in his over-coat pocket, and concealed from view; that he had no criminal intent in carrying the pistol concealed in his pocket, but bought the same as a sample, he being a merchant living near Asheville, and was carrying it from the store where purchased, to another, some three hundred yards distant, for the purpose of having it packed with other goods bought at that place,
and thereupon they submitted the question of the guilt or inno- (528)
cence of the defendant to the court.

His Honor being of opinion against the defendant, gave judgment accordingly, and thereupon he appealed.

Attorney-General, for the State.
Mr. J. H. Merrimon, for defendant.

RUFFIN, J. This court can but think, that it was paying too great a regard to the letter of the law, and too little to its spirit, to hold the defendant to be guilty after such a verdict as was rendered in this case.

The offence with which he is charged, forms no exception to the general rule that to constitute a crime there must be a criminal intent, and we can perceive no good reason why it should do so.

The statute declares that the having of a deadly weapon upon one's person shall be *prima facie* evidence of its concealment, and this of itself seems necessarily to imply that it *may* be done under such circumstances as will not amount to an offence. If not so, and the presumption arising from the possession of a weapon be irrebuttable, why declare it to be *prima facie* only?

To conceal a weapon, means something more than the mere act of having it where it may not be seen. It implies an assent of the mind, and a *purpose* to so carry it, that it may not be seen.

It is true, it will always be presumed to be a man's intention to do what in fact he does, and that he must contemplate the natural consequences of his conduct. But when the jury expressly find the contrary, and that, notwithstanding the act done, there was no criminal intention connected with it, that must put an end to the prosecution.

In this instance, their only other meaning could have been (529) that the act proceeded from accident or inattention, or some such like cause. And to hold that a merchant, who, having just purchased a pistol with a view to his trade, and in carrying it from one store in a town to another for the purpose of having it packed with other goods, thoughtlessly puts it in his pocket, not caring and not thinking whether it could be seen or not, is guilty of a criminal violation of the laws of his country, is more, we think, than was ever contemplated by those who framed the law upon the subject, and very certainly seems far removed from the mischief that it was intended to remedy.

The law is a wholesome one, and its constant enforcement according to its true spirit and intention, meets the desires and expectations of every well disposed and peaceable citizen; but some care should be used, lest by pushing its requirements too far, it may result in a reaction of sentiment against it.

Our opinion is, that the defendant was entitled upon the terms of the special verdict to be discharged, and it is so ordered, and to that end this will be certified.

Error. Reversed.

Cited: S. v. McManus, 89 N.C. 558; *S. v. Broadnax,* 91 N.C. 544; *S. v. Erwin,* 91 N.C. 548; *S. v. Harrison,* 93 N.C. 607; *S. v. McBrayer,* 98 N.C. 626, 628; *S. v. Dixon,* 114 N.C. 852; *S. v. Barrett,* 138 N.C. 635; *S. v. Parker,* 152 N.C. 792; *S. v. Silkerson,* 164 N.C. 443.

STATE v. J. W. WILBOURNE.

Criminal Law—False Pretence—Judge's Charge.

1. The prosecution must establish the truth of every averment, affirmative or negative, necessary to constitute the offence charged.
2. Therefore in false pretence, where it was alleged that the defendant obtained money from the prosecutor upon the representation made that he

owned certain bonds, which were deposited with a third party but never exhibited, and the court charged the jury that the burden was upon the defendant to produce the bonds or account for them to their satisfaction; *Held* error.

INDICTMENT for false pretence, tried at October Term, 1882, (530) of NEW HANOVER Criminal Court, before *Meares, J.*

The defendant was tried upon a charge of obtaining goods under false pretenses. The proofs were, that the defendant came to the city of Wilmington, a stranger, and soon thereafter made the acquaintance of the prosecutor, one Amey, to whom he represented that he had come directly from New York by railway, but that a brother of his was coming by water. That he was a member of a commercial house, dealers in cotton in Liverpool, England, which had sent out another agent to purchase cotton, but finding him unfaithful, had sent the defendant in person. That he had eighteen thousand dollars of United States bonds, which together with some important telegrams, were at the express office in the city, but that he had no money to pay the express charges, and thereupon he requested the prosecutor to lend him twenty dollars, so as to enable him to procure the possession of the bonds and telegrams—which loan the prosecutor made to him, upon the strength of these representations and his promise to return the money the next day. The defendant failed to return the sum borrowed at the time agreed, and the prosecutor going in search of him, found him handling some cotton, and he immediately apologized for his failure to return the money by saying that he had been busy all day, buying cotton, of which he had purchased during the day six hundred dollars worth, but promised to return the twenty dollars the following day, upon which assurance the prosecutor was induced to lend him two other sums of money. The defendant also represented to one Hooper, at whose house he stayed for nine nights, that the aforesaid amount of bonds was contained in two packages, which he had, and which he gave to (531) Hooper to hold for him until he had occasion to use them—the packages being sealed. Hooper took them in charge and kept them locked up for several days, though without ascertaining their contents. On a certain occasion the defendant asked for the package, but when handed to him said, "never mind, I have six hundred dollars in my pocket, and I will make that do for the present." After the lapse of several days the defendant took the packages from Hooper, and carried them to the register of deeds for the county, and requested him to take charge of them, saying they were valuable, but without specifying their contents. One package was marked "Dr. J. W. Wilbourne, No. ...., King Street, Liverpool."

On one occasion, the prosecutor and the said register went together to Hooper's house (the defendant's boarding house) for the purpose of demanding an inspection of the bonds, but before getting to Hooper's the said register found defendant at another place and delivered the package to him; the prosecutor expressed a belief that the defendant intended to run away, and insisted that he must either pay him the amount borrowed, or secure it in some way, and he also demanded to see the bonds, to all of which the defendant replied that he would prove to him, the next morning, that he was a gentleman—though he did not then or at any other time exhibit the bonds.

It was also shown in evidence that the defendant informed the teller of one of the banks that he had eighteen thousand dollars worth of said bonds which he wished to sell, and was advised to send them to New York, and that about a week thereafter, he said that he had so disposed of them.

The defendant introduced no evidence, but his counsel insisted that the burden rested upon the state to show that he did not have in his possession the bonds as alleged by him, and that in the absence
(532) of such proof on the part of the state, he was entitled to an acquittal.

His Honor after stating to the jury the general rule as to the burden of proof resting upon the state, and its being incumbent on the prosecutor to establish the falsity of the alleged representations, instructed them, that, "in a case like this, where the bonds in question were never exhibited to any one by the defendant, and if they ever had any existence at all, are either in his possession, or have been disposed of by him, the burden of proof is shifted, and it is incumbent upon him to produce them, or to account for their disposition to the satisfaction of the jury, to which instruction the defendant excepted. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
No counsel for defendant.

RUFFIN, J. It is conceded to be necessary in order to complete the charge against the defendant, that the bill of indictment should contain an averment to the effect that he did not own the bonds in question, or have them in his possession, as he pretended to the prosecutor, and upon the strength of which pretence he obtained the prosecutor's money.

The only question then is, as to the burden of proof, whether it rested with the state to prove this negative averment, or whether as the judge instructed the jury it was so shifted, under the circumstances of the case, as to make it incumbent upon the defendant to exculpate himself,

by producing the bonds or giving a satisfactory account of the manner in which he had disposed of them.

The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged must be established by the prosecutor. The rule itself is but another form of stating the proposition, that (533) every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice; and so forcibly has it commended itself by its wisdom and humanity to the consideration of this court, that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it.

In *State v. Morrison,* 14 N. C., 299, it was held that upon a charge for unlawfully retailing spirituous liquors, it was incumbent upon the defendant to prove the license, in case he relied upon one for his defense, and we were referred to that case, by the Attorney-General, in his argument here, as an instance, in which the court had shifted the burden, when the proof lay peculiarly in the knowledge of the accused party, and such most certainly does seem to be its import.

But the decision came under review in the latter case of *State v. Woodly,* 47 N. C., 276, and it was then construed as meaning, not that the burden of proof was shifted in such a case, from the prosecutor to the defendant, but that a failure of the latter to produce a license might under certain circumstances become a cogent fact to be considered by the jury, in connection with the other facts of the case, tending to support the averment of the indictment. As thus understood, it ceases to be an exception to the general rule stated, but rather becomes a support for it, and as BATTLE, J., declares, "the great conservative principle so essential to the security of those charged with crime, that they shall be presumed to be innocent until the contrary is shown, is preserved in all its integrity."

As we had occasion to say in *State v. McDaniel,* 84 N. C., 803, it is manifest from the tenor of the decision in *State v. Woodly, supra,* and also in *State v. Evans,* 50 N. C., 250, that the court has never been satisfied to go to the length of the argument made in *Morrison's* case, and though not willing expressly to overrule it, have been (534) at great pains to limit its authority, as a precedent, strictly to the facts of the case, and to deny that any general principle could be drawn from it for general application.

Accordingly in both those cases, it was held that the *want of a license,* in a prosecution for dealing with slaves, must be proved on the part of the state.

We were also referred to *Rex v. Stone,* 1 East., 639; *Rex v. Turner,* 5 M. and S., 206, and *Bower v. Mississippi,* 41 Miss., 470, as other instances in which the courts had departed from the general rule, but in all these cases it will be found upon examination, either, that the negative averments had reference to some *personal qualification* peculiar to the defendants, or that the proof thereof depended upon the *contents of some written document,* committed to the sole custody of the person accused, and consequently they can have but little or no application to a case like the present.

So far as our researches go, there is no case to be found in which such a doctrine has been so far extended as to dispense with proof, on the part of the state, of an averment connected with the transaction out of which the prosecution grew, and forming, as it does in this instance, so essential and substantive a part of the charge against the defendant. So to extend it, BATTLE, J., declares in *Woodly's* case, would be to do violence to the fundamental principle that every person accused of crime is presumed to be innocent until shown to be guilty; which principle, he says, has no limit, but applies to the whole charge, and embraces every averment necessary to constitute the alleged offence.

As was wisely said in *Commonwealth v. Thurlow,* 24 Pick., 374, it will not do to allow the difficulty of obtaining proof to dispense with the necessity of it altogether, so as to enable a party upon whom the burden should rest, to succeed without proof.

(535) His Honor, in this case, might with much propriety have instructed the jury, that they might consider the defendant's failure to produce, or account for, the bonds, as a circumstance to be weighed with the other testimony in the case, in determining the truth of the averment, which negatived such possession on his part; and had the jury, acting under such instructions, pronounced the defendant guilty, we can see no possible grounds upon which their verdict could have been justly criticised.

But when his Honor instructed the jury that they should accept as true that averment in the indictment, and hold it to be such, until the defendant should conclusively disprove it (and such we understand to be the purport of the instructions given) we are constrained to say that he went beyond the law as we understand it, and overlooked for the moment the humane presumption of innocency, with which it clothes every person accused of crime, and consequently there must be a *venire de novo.*

Error. *Venire de novo.*

Cited: S. v. Crowder, 97 N.C. 433; *S. v. Emery,* 98 N.C. 670; *S. v. Smith,* 117 N.C. 810; *S. v. Holmes,* 120 N.C. 576; *S. v. Connor,* 142 N.C.

704, 705; *S. v. R. R.*, 149 N.C. 474; *S. v. Bean*, 175 N.C. 750; *S. v. Falkner*, 182 N.C. 796, 797, 806; *Speas v. Bank*, 188 N.C. 527; *S. v. Johnson*, 188 N.C. 594; *S. v. Hammond*, 188 N.C. 607; *S. v. Redditt*, 189 N.C. 178; *S. v. Simmerson*, 191 N.C. 615; *S. v. Gibson*, 196 N.C. 394; *S. v. Carver*, 213 N.C. 152.

STATE v. A. A. LANEY.

Forcible Trespass.

Forcible trespass is the high-handed invasion of the *actual* possession of another, he being present; the title is not in question. There must be something done *at the time of the entry*, which tends to a breach of the peace. (Distinction between forcible trespass and forcible detainer pointed out by RUFFIN, J.)

INDICTMENT for forcible trespass tried at Spring Term, 1882, (536) of UNION Superior Court, before *Gudger, J.*

The charge made against the defendants, Laney and others, is, that with force and arms, violently, forcibly, and with a strong hand, they did break and enter the premises of one Gay, there situate and being in his possession, and he being then and there actually present and forbidding them so to do.

The proof was that during year 1881, the prosecutor and the defendant, Laney, had cultivated distinct portions of a field surrounded by a common enclosure—the prosecutor planting corn, and the defendant, cotton.

In consequence of certain information received, the prosecutor went to the field in September of that year, and found the defendants, Frank Laney, (son of the defendant A. A. Laney) and Carlock (his servant) cutting down the corn with hoes. He forbade them, but they continued, saying that they had been instructed to cut it by the other defendant. The prosecutor thereupon left, making no effort to put them out of his field, because he did not wish to be involved in a breach of the peace, and the defendants continued to cut the corn.

There was a verdict of guilty and the defendant appealed from the judgment pronounced.

Attorney General, for the State.

Messrs. Payne & Vann, for defendants.

RUFFIN, J. This court is of opinion that the evidence offered does not support the charge of forcible trespass, and that the defendants were improperly convicted and sentenced.

To constitute that offence, the act complained of must be done *presenti domino,* and must involve a breach of the peace or tend thereto.

The injury done to the prosecutor by the loss of his corn, the law
(537) will redress by a civil action. But before it can amount to a public wrong to be punished by indictment, there must be something done, *at the time of the entry,* to put the prosecutor in fear, or incite him to force either to resent his wrongs or protect his property; and as none of these things can happen in his absence, so neither can the offence be committed in his absence.

The title to the property is of no moment in forcible trespass. But it is the invasion of the *actual* possession of another and not his constructive possession, done in his presence and under such circumstances as endangers the public peace, that makes the offence.

"The very gist of the offence," says Judge PEARSON in *State v. McCauless,* 31 N. C., 375, "is the high-handed invasion of the actual possession of another, *he being present;* title is not in question." The facts of that case were, that the prosecutor had let his house and field to one Mitchell to make a crop, and, after the expiration of the term, entered and resumed possession, staying in the house all night with Mitchell. The next morning he went for his goods for the purpose of putting them in the house, and during his absence the defendant, claiming to have sub-leased from Mitchell, entered with his permission, and, when the prosecutor returned with his goods, refused to let them be taken into the house, and a fight ensued. It was held, while the defendant might have been guilty of a forcible detainer, he was not guilty of a forcible trespass, because his entry, having been made in the absence of the owner, was peaceable; and though, when the owner returned and entered the house, the law presumed possession to be in him because of his better title, still, it could not *by relation* make the defendant guilty of a forcible trespass. To the same effect are *State v. Mills,* 13 N. C., 420; *State v. Love,* 19 N. C., 267, and *State v. Smith,* 24 N. C., 127.

In the case at bar, the defendants may likewise have been
(538) guilty of a forcible detainer, and probably are. But it is impossible for them to have been guilty of the offence charged, since their entry upon the premises was made in the absence of the prosecutor. And even admitting the better title to be in him, so that upon his coming into the field the law would presume the possession to be in him, still, it could not by relation affect the original entry of the defendants, and make that forcible, when in fact it was without force.

To sustain this prosecution upon such proof as was given of the possession, would be to convert an action of trespass into an indictment, as was said in *State v. McDowell,* 8 N. C., 449.

Error. *Venire de novo.*

Cited: S. v. Davis, 109 N.C. 813; *S. v. Leary,* 136 N.C. 578; *Saunders v. Gilbert,* 156 N.C. 475; *S. v. Davenport,* 156 N.C. 603; *S. v. Jones,* 170 N.C. 755; *S. v. Oxendine,* 187 N.C. 663; *S. v. Tyndall,* 192 N.C. 560; *S. v. Stinnett,* 203 N.C. 832; *S. v. Baker,* 231 N.C. 139.

STATE v. CEPHAS KEMP AND ANOTHER.

Fornication and Adultery—Evidence.

In fornication and adultery, proof of acts anterior to the time in which the adultery is alleged to have been committed, may be made in corroboration of evidence of other acts of like nature within the time.

INDICTMENT for fornication and adultery, tried at Spring Term, 1882, of NASH Superior Court, before *Gilmer, J.*

Attorney General, for the State.
No counsel for the defendant.

SMITH, C. J. The defendants (Cephas Kemp and Kate Kemp) (539) are charged with committing the offense of fornication and adultery, and upon trial of plea of not guilty, were convicted. From the judgment rendered against the defendant, Cephas, he alone appeals. Such is the statement in the record, while the accompanying case and the recital in the undertaking on appeal show that the appeal was taken by both.

Among the proofs of illicit sexual relations maintained between the parties during the two years preceding the finding of the grand jury, and in corroboration, the state was allowed, after objection made by the defendants and overruled, to show that, before Fall Term, 1877, of the court at which an indictment for the same offence had been preferred, and of which the defendants afterwards on their trial were acquitted, "the children of the female defendant had been heard in her presence to call the male defendant papa." The exception to the admission of this evidence raises the only question to be considered by us.

It is not stated upon what grounds the introduction of the testimony is resisted, and consequently any valid objection may be assigned in this court. *State v. Parish,* 44 N. C., 239; *State v. Secrest,* 80 N. C., 450; *Gidney v. Moore,* 86 N. C., 484.

It is always more satisfactory to us, and in fairness it is due to the judge, that he may make an intelligent ruling upon the point, that the grounds of objection should be stated when the objection is made to the reception of evidence; and in such case, our review would be confined to the legal sufficiency of the grounds assigned for the exclusion. *Bridgers v. Bridgers,* 69 N. C., 451; *Gidney v. Moore, supra.* In the latter case it is said, "that the ground of exception is to be deemed on appeal a part of the exception itself." No counsel has appeared for the appellant in this court, and we discover but two grounds on which the objection rests, and these are in substance one and the same:

(540) 1. The language used by the children in addressing the male defendant, testified to by the witness, ante-dated the finding of the first bill, and the acquittal precludes an inquiry into the alleged unlawful relations preceding that time; and

2. The inquiry should be restricted to acts done during the two years next before the action of the grand jury upon the present indictment.

It is true the imputed offence must have been committed within this limited interval in order to a conviction, and of this, evidence has been offered. The word used by the children in addressing one supposed parent in the presence of the other, tends to show an admission of their paternity by both. The evidence indicates habitual illicit relations extending back to the time when the oldest child was begotten, and certainly sheds light upon their present relations if kept up. The acquittal at most establishes their interruption or suspension during the interval to which the first prosecution was confined; but admitted continuous unlawful intercourse before, tends to confirm evidence of its resumption and renewal since.

"When the fact of adultery is alleged to have been committed within a limited period of time," remarks Mr. Greenleaf, "it is not necessary that the evidence be confined to that period, and proofs of acts anterior to the time alleged may be adduced in explanation of other acts of the like nature within that period. Thus, where the statute of limitations was pleaded, the plaintiff was permitted to begin with proof of acts of adultery more than six years preceding, as explanatory of acts of indecent familiarity within the time alleged." 2 Greenl. Ev., Sec. 47.

No error. Affirmed.

Cited: S. v. Pippin, 88 N.C. 647; *Tobacco Co. v. McElwee,* 100 N.C. 153; *S. v. Guest,* 100 N.C. 413; *S. v. Wilkerson,* 103 N.C. 341; *S. v. Wheeler,* 104 N.C. 894; *S. v. Dukes,* 119 N.C. 783.

(541)

STATE v. J. R. WALKER.

Indictment—Sufficiency of.

An indictment must show upon its face a *substantial* defect, to ground a motion in arrest of judgment. The omission of the word "year," nor the other exceptions taken in this case, do not vitiate it.

INDICTMENT for misdemeanor in removing crop without leave, tried at Fall Term, 1882, of TRANSYLVANIA Superior Court, before *Shepherd, J.*

The indictment upon which the defendant was tried is as follows:

The jurors for the state present that on the 24th of April in the year of our Lord one thousand eight hundred and eighty-one, at and in the county of Transylvania aforesaid, by contract between them, one W. S. Ashworth demised to J. R. Walker, late of said county, for agricultural purposes, a certain messuage and parcel of land therein situate, to have and to hold the same, to the said J. R. Walker for a certain term of years, to wit, for the term of one [omitting the word "year"] then next ensuing, yielding and paying therefor to the said W. S. Ashworth the yearly rent of eighty-two bushels of corn, and in and by said contract of lease it was not agreed by and between the said parties thereto, that the crop which might be raised, grown and made on said messuage and parcel of land during said term by the said J. R. Walker, should not be deemed and held to be vested in possession in the said W. S. Ashworth, before and until the said rent was satisfied and paid to him; and by virtue of said demise, the said J. R. Walker, then and there entered into said messuage and parcel of land and was possessed thereof from thenceforth until the 24th day of April, one thousand eight hundred and eighty-two, in the county aforesaid, and during the (542) period of time last aforesaid, raised, grew and made on said messuage and parcel of land, a certain crop of corn and had the same in his possession. And afterwards, and before satisfying the lien of his aforesaid rent, which the said W. S. Ashworth had on said crop of corn, on the 24th day of April, in the year of our Lord one thousand eight hundred and eighty-two, at and in the county aforesaid, the said J. R. Walker did unlawfully and wilfully remove from and off and outside of said messuage and parcel of land, fifty bushels of corn then and there being found, the same then and there being part of the crop aforesaid which J. R. Walker had raised, grown and made on said messuage and parcel of land, during the aforesaid term, while the said messuage and parcel of land was in his possession as aforesaid, without having first obtained the consent of W. S. Ashworth to such removal, and without first having given the said W. S. Ashworth, or any agent of his, notice

of such intended removal of said fifty bushels of corn, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state.

After the jury returned a verdict of guilty, the defendant's counsel moved in arrest of judgment upon the grounds.

1. That inasmuch as Ashworth was not the owner of the land, the bill improperly charged that the lien was in him, but it should have charged that the same was vested in Gash the owner in fee.

2. That the indictment did not sufficiently charge a lease for a year between Ashworth and the defendant, for that the omission of the word "year" after the word "one," was a fatal defect.

3. That the bill is defective in not alleging that the defendant failed to give five days' notice of his intended removal of the crop.

(543) The motion was overruled by the court and judgment was rendered against the defendant, for which he appealed.

Attorney General, for the State.

Mr. Charles A. Moore, for defendant.

ASHE, J. The only exceptions taken by the defendant were to the form of the indictment, and were made the grounds of his motion in arrest of judgment.

The first ground is without any foundation. A judgment is never arrested except for some substantial defect appearing upon the face of the indictment.

The name of Gash is not mentioned in the bill. There is nothing in it to show that any one by the name of Gash was the owner in fee, or had any interest whatever in the land. If there was anything in the objection, it should have been taken before the jury. The bill states with sufficient certainty that Ashworth was the landlord, and that the lien given by the statute was in him.

The second ground, that the omission of the word "year" after the word "one," is *fatally defective,* is equally untenable. The omission does not vitiate the indictment. It is one of the informalities cured by the act of 1811, Bat. Rev., ch. 33, sec. 60. In *State v. Rinehart,* 75 N.C. 58, which was an indictment for murder, the bill read, "giving, etc., to the said Joseph Turner one mortal wound of the depth of six inches, and of the breadth of one inch, of which said mortal (omitting the word, wound) he the said Joseph Turner then and there instantly died," it was held the omission of the word "wound" was cured by the act of 1811, and was no ground for the arrest of the judgment, and in *State v. Lane,* 26 N. C., 113, the averment was, "on the 3rd day of August, 1843," without saying "the year of our Lord," or even using the word,

"year," it was held that although this defect would have been fatal at common law, it was cured by the act of 1811.

The remaining ground, that the bill does not allege that the (544) defendant failed to give the five days' notice of his intended removal of the crop, cannot be sustained. The bill charges that the defendant removed the crop "without first having given the said Ashworth, or any agent of his notice, of any intended removal." This averment negatives the *five days' notice* required by the statute as conclusively as if it had followed the very words of the statute. If the defendant gave no notice whatever, of course he did not give *five days' notice.*

There is no error. Let this be certified to the superior court of Transylvania County that further proceedings may be had according to law.

No error. Affirmed.

Cited: S. v. Craige, 89 N.C. 479; *S. v. Powell,* 94 N.C. 923; *S. v. Smith,* 106 N.C. 655; *S. v. Van Doran,* 109 N.C. 867; *S. v. Ratliff,* 170 N.C. 709; *S. v. Efird,* 186 N.C. 484; *S. v. Cochran,* 230 N.C. 525.

STATE v. JULIUS REYNOLDS.

Judge's Charge—Larceny—Recent Possession.

1. The court in its charge did not advert to the evidence elicited on cross-examination, but told the jury "to base their verdict upon all the evidence;" *Held* no error. It is the duty of counsel in such case, if evidence important to the defence has been overlooked, *then* to call the judge's attention to it.
2. Defendant was charged with stealing tobacco and silver money on Saturday, and the proof was that the store of the prosecutor had been entered, and tobacco like his (together with the identified silver money) was found in defendant's possession on the following Monday; *Held* there was some evidence of the larceny of the tobacco.
3. Whether the rule of presumption from recent possession applies in a case where money is alleged to have been stolen—*Quœre.*

INDICTMENT from larceny tried at Spring Term, 1882, of GUILFORD Superior Court, before *Graves, J.*

The defendant is charged with stealing a pound of tobacco and (545) money of the value of one dollar from J. L. Harden and was found guilty of the offence. On the trial it was in evidence that the store of the prosecutor was entered and money left in the drawer on

Saturday taken. Tracks, corresponding with those of the defendant, were found near the place on Monday following, and the defendant had in his possession a piece of sleek silver coin identified as having been in the drawer on Saturday, and also several plugs of tobacco of the same kind as was in the box in the store, neither of which did the defendant have on Saturday, and most of this day he had spent at the store. The tobacco was not further identified than by its similarity to that of the prosecutor.

It was also in proof that the defendant, after examination before the committing magistrate on the charge, said, that the prosecutor "had sworn to a sleek piece of money before the magistrate, and that he (defendant) could not see how he (prosecutor) could swear to a piece of sleek money; that there were three or four pieces of sleek money in the drawer or box."

Upon this evidence the solicitor in his argument insisted that the possession of the stolen goods so recently after the theft, raised a presumption of guilt, and made it incumbent on the defendant to account for and explain his possession; while the counsel for defendant contended that the presumption did not apply to money, which was constantly passing from hand to hand, as a circulating medium in trade, and asked the court so to instruct the jury.

The court made no comment and gave no instruction as to the force and effect of presumption arising out of the possession of stolen goods, but submitted the evidence to the jury for them to pass upon its credit and weight in arriving at a verdict.

The court was also asked to charge that there was no evidence
(546) of the larceny of the tobacco, which his Honor declined to do, but recapitulated the evidence given by the witnesses, not adverting to such as was elicited upon the cross-examination, and submitted the case to the jury.

Verdict of guilty, judgment, appealed by defendant.

Attorney General, for the State.

No counsel for the defendant.

SMITH, C. J. The case presented on the record seems to assign three errors which we are called on to examine and decide.

1. The omission to recall the attention of the jury to the evidence extracted from the witnesses on their cross-examination:

The court was not asked to do this, and we must assume did present all that was material and pertinent to the inquiry as to the defendant's guilt, closing with the remark that the jury "must base their verdict upon *all the evidence.*"

It is only necessary in disposing of the exception to repeat what has been recently said in another case. "It was the duty of counsel if evidence important to the defence had been overlooked, *then* to call it to the attention of the judge and have the omission supplied. It would be neither just to him, nor conducive to a fair trial to allow this neglect or oversight, attributable to the counsel quite as much as to the judge, to be assigned for error, entitling the accused to another trial, whatever force it might have in influencing the court in the exercise of an unreviewable discretion to grant it." *State v. Grady,* 83 N. C., 643.

2. The omission of the court to qualify the rule of presumption from the recent possession of stolen goods as inapplicable to the currency in use:

The court gave no directions nor adverted to this rule of evidence, and of course could not be called on to annex the qualification. So far as we can see, the whole matter was left to the jury to draw such inferences as the evidence warranted, and this was certainly not (547) prejudicial to the defendant's case. The state had no benefit of the rule under the charge, and the arguments of each party on the point were made to the jury.

3. The last exception is to the omission to tell the jury that there was no evidence of the larceny of the tobacco:

There was some evidence in support of this charge, in that, the defendant had no tobacco on Saturday and had some like that of the prosecutor on Monday, and had the identified silver money, thus having access to each and equal opportunities of taking both.

But if the point had been well taken, the refusal so to charge has not been prejudicial to the defendant. But one criminal act is imputed, and the felonious taking and removing either of the articles mentioned constitute the crime; and it is not changed in grade or aggravated in the imposed punishment by the larceny of both. No harm has therefore come to the defendant by his conviction of stealing both, that would not have resulted from his conviction of stealing either.

We advert to the use of the term *"money"* in the bill as descriptive of the coin taken, only to say that it is made sufficient so to charge in the bill by the act of 1876-77, ch. 68.

There is no error, and this must be certified that judgment may be rendered on the verdict.

No error. Affirmed.

Cited: S. v. Gould, 90 N.C. 662; *Holly v. Holly,* 94 N.C. 101; *Boon v. Murphy,* 108 N.C. 192; *Cathey v. Shoemaker,* 119 N.C. 428; *S. v. Murray,* 139 N.C. 545; *S. v. Cox,* 153 N.C. 644; *S. v. Steele,* 190 N.C. 510; *Barnes v. Teer,* 219 N.C. 835; *Morris v. Tate,* 230 N.C. 32.

STATE v. ROBERT JONES.

Judge's Charge.

1. A charge to the jury, in which the judge deals in generalities and abstract propositions of law, (merely reading "head-notes" of reported cases) without making any application of them to the facts of the case, does not meet the requirements of the statute, and furnishes sufficient grounds for a new trial.
2. He should not recapitulate the evidence in detail, but eliminate the material facts, array the state of facts on both sides, and apply the principles of law to each, that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence.

(548) INDICTMENT for murder, removed from Union County, and tried at Spring Term, 1882, of MECKLENBURG Superior Court, before *Gudger, J.*

The material portion of the evidence offered on the part of the state is as follows: On the 23rd of September, 1880, the deceased (Spencer Phillips) and some other persons came to the town of Monroe in Union County, late in the evening and drove into Stewart's lot. Soon after their arrival, the prisoner and his father (Charles Jones) drove their wagon into the same lot, where there was a fire. The prisoner left, and after an absence of an hour or two, returned about eleven o'clock and asked the deceased for supper, and the deceased said if he had any corn bread with bran in it, he would give him some. Thereupon a quarrel ensued; the prisoner having a pistol in his hand was carried out of the lot by his father, but returned and the quarrel was renewed, and he was again carried out by his father, and they went to the camp of one Johnson, not far off, where the prisoner got his supper.

While there, as testified to by witnesses, the prisoner made a threat against the life of the deceased. This however was contradicted by one of the witnesses for the defence.

On the return of the prisoner to the camp fire in the lot, after being carried off a second time by his father, he threw some fodder out
(549) of his wagon, and also a quilt which he placed on the fodder, and quietly sat down upon it. The deceased asked him what he had come back for—was he going to make acknowledgments—to which the prisoner made no reply. Deceased then told prisoner he intended to "law" him the next morning for carrying a pistol—prisoner said he did not have one—deceased said he did, and the prisoner gave him the lie. The prisoner's father took him by the arm and was carrying him away, when he was followed by the deceased with his coat off as if he wanted to engage in a fight, and when he came within a few steps of prisoner, a

pistol was fired twice in rapid succession, and the deceased exclaimed he was shot and killed, and after walking a short distance fell and expired. A piece of a fence rail was found near him when he fell.

When the shooting took place, the parties were fifty or sixty yards from the street, and nearer the street than the fire. The prisoner made his escape, but was arrested the next morning about eight miles from Monroe. A pistol was found on his person, with only one chamber empty, and no cartridges were found about him.

The evidence offered by the prisoner consisted of his own testimony, that of his father, and such facts in his favor as were testified to by the state's witnesses in their direct examination, or were elicited on cross-examination.

The father of the prisoner, after stating the conversation between prisoner and deceased about the "rations," which led to the quarrel, testified, that the deceased rose up, and he put his hand on him and said, "don't get mad;" deceased drew his knife, kept it in his hand, and said "I'll fight him in a fair fight," and jumped across the fire; witness took the prisoner by the arm, and said "follow me," and carried him off; prisoner left his hat, and staid away for some time at another camp where he got supper, and getting sleepy he went back to the wagon-yard, and threw some fodder and a quilt out of his wagon. The deceased said, "what in the hell have you come back for?" and (550) told prisoner "he must make it up or he would law him about the pistol," and the deceased then advanced upon the prisoner with his knife in his hand; prisoner retreated, followed by the deceased who struck him two blows with a piece of rail which he broke at the second stroke, when he picked up a pine pole and knocked the prisoner down; then some one shot from behind, and the prisoner also shot; only about three seconds intervening between the two shots.

The prisoner's testimony was substantially the same as that of the preceding witness.

Another witness for the defence testified that he saw the deceased, while quickly following the prisoner, make a motion as if he was shutting a knife, and that he got an axe and said before the prisoner "shall stay here, I'll hew him down with this axe;" he also had a knife which one of the state's witnesses testified he waved and said if the prisoner came back he would cut him, and also asked one of his party to give him a pistol; that while he was following prisoner, he stooped down, but whether he picked up anything, the witness did not know. Some of the state's witnesses said the deceased did not stoop down, and they saw nothing in his hand. The threats made with the axe and knife were not in the presence of the prisoner.

Several exceptions to the ruling of the court upon points of evidence were taken by the prisoner's counsel, but it is not necessary to an understanding of the opinion that they should be stated.

His Honor, after telling the jury that murder is a killing of malice; manslaughter, a killing of provocation; and excusable homicide, a killing from necessity, charged substantially as follows:

1. When it is proved or admitted that one killed another intentionally with a deadly weapon, the burden of showing justification, etc.,
(551) is on the accused, who must show the same, not beyond a reasonable doubt nor by a preponderance of evidence, but to the satisfaction of the jury, unless it appear in the evidence against him. Upon such killing being proved or admitted, nothing more appearing, the law presumes it to have been done in malice, and to be murder. *State v. Willis*, 63 N. C., 26.

2. If jury find that prisoner killed deceased, to make it excusable on the ground of self-defence, the prisoner should not only have reasonable grounds to apprehend, but should also actually apprehend that his life was in imminent danger or the deceased was about to do him some enormous bodily harm; there must be a necessity for taking life, from the fierceness of the assault, either real or reasonably apparent to the prisoner; and the jury, not the prisoner, are the judges of the reasonable apprehension.

3. If prisoner did not begin the fight but was assaulted by deceased and a combat ensued, he cannot excuse himself, as for a killing in self-defence, unless he quitted the combat before the fatal shot was fired, if the fierceness of his adversary permitted, and he retreated as far as he could with safety, and then killed the deceased to save his own life.

4. If jury find that prisoner voluntarily went to the place, the camp of deceased, armed with a pistol, for the purpose of provoking a difficulty, it would make no difference who commenced the affray; the plea of self-defence would not avail, unless after the fight commenced the prisoner in good faith abandoned it.

5. If they find that the deceased commenced the fight, and struck prisoner with a rail or pole, and prisoner, smarting under the provocation, the *furor brevis*, took the life of deceased, without necessity to save his own, or to protect himself from great bodily harm, the prisoner would be guilty of manslaughter.

(552) To all of which, the prisoner excepted, and requested the court to charge as follows:

1. Even if prisoner showed a willingness to fight, yet, a fight being imminent, if he began to withdraw as far as the fierceness of his adversary permitted, so that to continue the retreat would have endangered his life or subjected him to great bodily harm, and under these circum-

stances slew the deceased, it is excusable homicide. Declined, and the following substituted: Although one may enter into a fight willingly, yet if in its progress he be sorely pressed, that is, put to the wall, so that he must be either killed or suffer great bodily harm unless he kill his adversary, and if under such circumstances he does kill, it is excusable homicide. *State v. Ingold,* 49 N. C., 216.

2. If while retreating he was attacked with the rail in such a manner as furnished reasonable grounds for apprehending a design to take his life, or do him great bodily harm, the prisoner had the right to act upon appearances and kill his assailant; and if under these circumstances he killed the deceased, it is excusable homicide, although the appearances were false. To this the court added: But of the reasonableness of his grounds of belief, the jury are the judges, not the prisoner.

3. If prisoner, followed by deceased with a rail or other deadly weapon, retreated to a point beyond which he reasonably believed he could not go without incurring imminent danger to life or limb, or serious bodily harm, and under these circumstances slew the deceased, he is not guilty; and it is the duty of the jury in ascertaining the reasonableness of his belief to consider the formation of the ground—the ditches, fences and avenues of escape, and the prisoner's knowledge of them all. Given by the court.

4. If deceased knew that prisoner had in his possession a pistol, and prisoner was aware of this knowledge, and knowing this fact the deceased assaulted the prisoner, this is a circumstance to be considered by the jury favorably to the prisoner's theory of self- (553) defence, as going to show the reasonableness of his belief that deceased intended to kill him, or inflict great bodily harm, and that the danger thereof was imminent. Refused.

5. Neither gestures nor words, however grievous, are a sufficient provocation to justify an assault, much less an assault with a deadly weapon; therefore any language used by prisoner should not be regarded by the jury as justifying the deceased in assaulting the prisoner with a deadly weapon, and does not lessen the right of prisoner to strike in self-defence to prevent death or great bodily harm. The first part given, the balance refused.

6. If the lot where prisoner was camping was a public yard, and he had gone there for the purpose of camping, he had the right to be there; and if deceased assaulted him in the lot with a rail, which is a deadly weapon, with the intent to drive him therefrom, or failing in that to kill him or inflict serious injury, or if prisoner reasonably believed such to be the case, he was not obliged to retreat, but had the right to stand his ground and oppose force by force, and to slay his assailant if necessary to save his own life. Given.

7. A blow is a sufficient provocation to reduce a homicide to manslaughter; therefore if prisoner went to the camp where the homicide was committed, for the purpose of spending the night there, and the difficulty arose under the circumstances narrated by the witnesses, in which the prisoner received a blow, and thereupon he killed the deceased, the killing cannot be attributed to malice, but at most was the result of passion suddenly aroused, and is manslaughter; and this is so, whether a weapon was used or not, and even if the blow was not dangerous. Refused in the language used, and the following substituted: A blow is a legal provocation sufficient to reduce a homicide to manslaughter; therefore if prisoner went to the lot where the killing
(554) took place, for the purpose of spending the night there, and the difficulty suddenly sprung up, in which the prisoner received a blow and thereupon killed deceased, the killing is to be attributed to the passion suddenly aroused, and is nothing greater than manslaughter; and this is so, whether a weapon was used or not, and even if the blow was not dangerous.

8. If deceased was rushing upon prisoner with a rail in such a manner as reasonably to induce the prisoner to believe that an immediate blow would be dealt him, and prisoner might have retreated further, and did not, but drew his pistol and shot the deceased, it is but manslaughter; but if he could not have retreated further, or reasonably believed he could not, then it is excusable homicide. Refused, the court holding that prisoner had the benefit of all he was entitled to under the evidence, in the instructions already given.

9. Even if the prisoner, prior to the fatal encounter, entertained malice towards the deceased, if there was provocation sufficient to arouse the prisoner's passion, as by an assault with a fence rail, then the jury must find that the killing was done upon the provocation and not through malice, unless it clearly appears that the prisoner would have carried into effect a determined purpose to kill anyhow, notwithstanding the provocation, or that the prisoner sought the deceased for the purpose of provoking him to make the assault that he might use it as a cover to the wicked intent previously formed and acted on. Refused, and in lieu thereof the court charged as follows: A mere grudge, or malice in its general sense, is not sufficient to bring a case within the principle that refers the motive to antecedent malice, rather than an immediate provocation; to have that effect there must be a particular and definite intent to kill, as if the weapon with which the party intends to kill is shown, or the time and place are fixed on, and the party
(555) goes to the place at the time for the purpose of meeting his adversary and with an intention to kill him; but where A bears malice against B and they meet by accident, and upon a quarrel B

assaults A and thereupon A kills B, the rule of referring the motive to the previous malice will not apply. *State v. Jacob Johnson,* 47 N. C., 247.

The prisoner excepted, and after a verdict of guilty appealed from the judgment pronounced.

Attorney General, for the State.

Messrs. Covington & Adams and A. W. Haywood, for the prisoner.

ASHE, J. In the view we take of this case, we deem it needless to inquire whether there is any error in the principles of law laid down by his Honor in his numerous instructions to the jury. The question is: has he given those instructions in the manner the law has made it his duty to do. The law prescribes and defines this duty. It declares that a judge in delivering his charge to the jury shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon. Rev. Code, ch. 31, sec. 130; C. C. P., sec. 237.

Our jurors are plain, practical men, who, to their credit be it said, most uniformly have intelligence and judgment sufficient to deal with the facts of a case, but they are not versed in the law, and must look to the presiding judge for the principles of law governing the case, and for his aid in making their application to the facts. The judge, who in his charge to the jury simply lays down certain abstract propositions of law, however correct and applicable to the facts of a case, does not comply with the requirements of the statute. "He is not required to recapitulate the evidence in detail, but he is required to put the case to the jury in such a way, as to make it appear by the record what facts the jury find and what is his opinion as to the law, so that (556) his opinion may be reviewed by this court." *State v. Summey,* 60 N. C., 496; *Gaither v. Ferebee,* 60 N. C., 303; *State v. Norton, Ib.,* 296.

So in *State v. Dunlop,* 65 N. C., 288, it is held, where instructions are asked for upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented, and to instruct the jury distinctly what the law is if they shall find the assumed state of facts; and so in respect to any state of facts which may be reasonably assumed upon the evidence. "Upon a demurrer to a pleading, or a special verdict, or case agreed, or when, in whatever way, certain facts are ascertained, it becomes the duty of the judge to apply the law to the facts and pronounce a judgment. In close analogy to those cases, is the case where, upon issue joined and a trial by jury, there is evidence proving one or another state of facts according to the

credibility and weight of the evidence. In such a case, the judge cannot apply the law to any ascertained state of facts, for the facts are to be ascertained by the jury; but he must do what the circumstances of the case admit of. To that end, he must tell the jury, if they find the facts thus, the law is thus," etc. And in the same case it is held that it is the duty of the judge in charging the jury to eliminate the material facts of the case, array the state of facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the "credibility of the witnesses and the weight of the evidence."

In the case before us, the record states that the judge, after telling the jury that murder was a killing of malice; manslaughter, a killing of passion; and excusable homicide, a killing from necessity, proceeded to give his charge.

(557) We cannot conceive what definite idea of the different grades of homicide the jury could gather from these definitions, and there is nothing in the record to show they were given with more particularity. A man may bear malice towards another, and yet kill him upon provocation, or even from necessity, without being guilty of murder; so he may without express malice kill upon provocation, and yet be guilty of murder.

In his Honor's main charge to the jury, there is no pretence of an array of the facts, and therefore, no application of the propositions of law laid down, to the different state of facts. In the first instruction given, there is no specific reference to any fact whatever; and in the last two, there is but a bare allusion to some isolated facts which could not have given much aid to the jury. But from first to last, the charge deals in generalities, expressed in technical language, hardly possible to be understood by the jury, or understandingly applied by them to the facts. And then, as was suggested to us by the prisoner's counsel and complained of by him, when requested to give certain specific instructions bearing upon the facts in the case, as for instance, in the first and ninth instruction asked, his Honor responds by merely reciting from the reports the "headnotes" of two cases, *Ingold's* and *Johnson's*, without making any sort of application of their principles to the facts of the case in hand, so as to enable the jury to apprehend and appreciate their consequences and effect.

The prisoner's counsel insists that this is not a compliance with the requirements of the statute, and we concur with him in that view. We therefore award the prisoner a new trial.

Error. *Venire de novo.*

Cited: Ruffin v. Overby, 88 N.C. 374; *S. v. Kennedy*, 89 N.C. 590; *S. v. Jones*, 90 N.C. 379; *S. v. Gould*, 90 N.C. 662; *S. v. Rogers*, 93 N.C.

531; *Holly v. Holly,* 94 N.C. 99; *S. v. Jones,* 97 N.C. 474; *S. v. Thomas,* 98 N.C. 606; *S. v. Boyle,* 104 N.C. 822; *Bank v. Sumner,* 119 N.C. 593; *S. v. Groves,* 121 N.C. 568; *S. v. Boode,* 132 N.C. 988; *S. v. Connor,* 179 N.C. 757; *S. v. Friddle,* 223 N.C. 261; *Fish Co. v. Snowden,* 233 N.C. 271.

(558)

STATE v. HENRY WEBB.

Larceny—Landlord and Tenant.

1. An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. *Copeland's case,* 86 N. C., 691.
2. In such case, he commits a trespass upon the landlord's possession in taking the property, and is guilty of larceny in secretly carrying it away, notwithstanding his interest in the same.

INDICTMENT for larceny tried at Fall Term, 1882, of DURHAM Superior Court, before *Shipp, J.*

The defendant, together with one Thomas, was indicted for stealing wheat, the property of one Cannady. The wheat was grown upon the land of the prosecutor, with whom the said Thomas worked as a cropper, and was to have an interest in the crop. After the wheat had been harvested and threshed, and before any division took place, it was stored by the prosecutor in a house on the premises, the door locked and the key kept by him. On the next day a portion of it was taken secretly by the defendant and Thomas and carried to a mill in the neighborhood, where it was found and identified.

The defendant's counsel asked the judge to instruct the jury that, inasmuch as Thomas was a cropper and had an interest in the wheat, he could not be guilty of larceny, although he may have taken it with a dishonest intent, and neither could the defendant be guilty of that offence for aiding and assisting him in taking it, as he was only assisting the owner of the property to take the possession thereof.

The judge declined to give this instruction and the defendant excepted. Verdict of guilty, judgment, appeal of defendant.

Attorney General, for the State.
No counsel for the defendant.

RUFFIN, J. In *Copeland's case,* 86 N. C., 691, the court held (559) that a cropper, while in the actual possession of the crop made

upon the premises, could not be guilty of larceny by secretly appropriating a portion thereof to his own use. We felt driven to this conclusion by the consideration of the well established principle, that to constitute a larceny, the *taking* must be such as amounts to a *trespass.*

Every larceny includes a trespass; and if there be no trespass in taking the goods, there can be no felony committed in carrying them away. 2 East., P. C. 554; 1 Hawk., P. C. ch. 33, sec. 1; 1 Russell, 95.

When therefore the statute known as the "Landlord and Tenant Act" (1876-77, ch. 283) enacted that, though the crops raised on the land should be deemed to be vested in the landlord, the *actual possession* thereof should be in the cropper, and, in case of its being taken away, gave him a remedy by claim and delivery, it seemed to us impossible to determine otherwise than we did, without doing violence to every analogy of the law. It is not utterly incongruous to say that one can commit a larceny of goods already in his actual possession, and which the law recognizes as his, so far as to give him a remedy, even against the landlord, should his possession be disturbed?

But, as was said in that case, a different rule obtains whenever the actual possession of the cropper has terminated by a delivery of the property to the custody and keeping of the landlord. In such case, notwithstanding the cropper's interest in the property, he may still commit a trespass upon the possession of the landlord in taking the property, and consequently may be guilty of larceny in carrying it away, if done secretly and feloniously—as is clearly shown to have been done in the instance of this defendant.

There is no error. Let this be certified, etc.

No error. Affirmed.

Cited: S. v. McCoy, 89 N.C. 468; *S. v. King,* 98 N.C. 650.

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(560)

STATE v. WILLIAM PROPST.

Liquor Selling.

Retailers of liquors in the town of Hickory are required to comply with the general law, and obtain license from the county as well as from the town authorities. (Charter of town construed.)

INDICTMENT for retailing tried at Fall Term, 1882, of CATAWBA Superior Court, before *Avery, J.*

The defendant was charged with retailing spirituous liquors without license.

It was admitted that he sold whiskey in quantities less than a quart, in the town of Hickory, county of Catawba, at divers times between October, 1881, and the last of April, 1882. He had license from the town authorities, dated October 15th, 1881, authorizing him to retail spirituous, malt and vinous liquors for the year ending April 30th, 1882. He also had a license from the county authorities, dated the 14th of July, 1881, authorizing him to sell malt and vinous liquors for the year ending July 14th, 1882. The court instructed the jury that according to the admissions of the defendant, he was guilty of the offence charged, and after verdict and judgment, he appealed.

Attorney General, for the State.
No counsel for the defendant.

RUFFIN, J. The defendant was without counsel in this court, and we are not fully sure that we correctly apprehend the point intended to be made for him, but suppose it to be that under the charter of the town of Hickory, as amended by the act of 1879, ch. 52, the commissioners of the town had exclusive control over the sales of spirituous liquors within its corporate limits, and that their license was needed to justify his sales thereof. If this be the point, and we (561) can conceive no other that could arise upon the statement of the case, then we concur in the opinion of the judge below, and hold the defendant to be guilty.

The act referred to (section 13) provides that "the board of town commissioners shall have full control of the sale of spirituous liquors within the limits of said town, whether or not liquor shall be sold therein, in what quantities, and if by retail the amount of license tax, and the conditions to be specified in a penal bond in the sum of not less than five hundred dollars, payable to the town of Hickory, which may be put in suit to the use of any person injured by such sale, either in person or property, directly or indirectly; and the commissioners shall moreover have power to revoke such license and close up any bar room at their option, sufficient cause being shown, without refunding any part of the license tax, *and no license from the board of commissioners of sheriff of Catawba County shall be lawful in said corporation, without the license of the town corporation aforesaid.*"

Now we know that there is a general law under which all persons who sell, by retail, spirituous liquors anywhere within the state, are required to have license from the county authorities, and to pay a tax to both county and state therefor, and we ought not to conclude, unless driven to it by words that admit of no other construction, that

the legislature intended to make a single exception of the town of Hickory, and to permit the business of retailing to be conducted there freed of such state and county exactions as are elsewhere and universally enforced within the state.

The language of the section recited seems hardly to admit of, and much less to require, such an interpretation, and should therefore receive one more in consonance with the general law and universal usage.

It is true according to the fair meaning of the statute, the commissioners for the town are clothed with full authority to say
(562) whether spirituous liquors shall be sold within the corporate limits at all or not; and if so, in what quantities and for what length of time, and to determine the tax to be paid to the town for the privilege, and to fix the terms and conditions of a bond to be given for the indemnity of the citizens; and without the assent of such commissioners, neither the county commissioners nor sheriff can by their license confer the right to sell within the town upon any terms or conditions whatsoever.

But still, whenever the town authorities do act, and grant their license to retail, then the state law intervenes and exacts from their licensee the same taxes that are elsewhere demanded and paid. The last clause of the section itself imports this much; that a license from either county commissioners or the sheriff in addition to one from the town commissioners, is needed to authorize retailing to be carried on within the town.

This appears to be almost the only limit to the very ample powers conferred upon the town authorities, for the protection of its citizens. While they may altogether forbid the sale of spirituous liquor within the town, or regulate it at their discretion, they cannot legalize it, without its making to the public treasury the same contributions that are elsewhere required of it.

There is no error. Let this be certified, etc.

No error. Affirmed.

Cited: Commissioners v. Commissioners, 107 N.C. 337.

STATE v. WILLIAM BRIDGERS.

Practice—Preliminary Examination Before a Justice.

1. Where the records show that, upon preliminary examination of a charge of murder, the prisoner was brought before A. B., an acting justice of the peace, charged with the offence, it sufficiently appears that the justice was acting in his official capacity in conducting the inquiry.
2. In such case the magistrate is not required to write down the very words of a witness, and the examination may be used before the grand or petit jury if the witness be dead.

INDICTMENT for murder, tried at Spring Term, 1882, of WAYNE (563) Superior Court, before *Gilmer, J.*

Verdict—guilty of manslaughter, judgment, appeal by prisoner.

Attorney General, for the State.

Messrs. Strong & Smedes, for the prisoner.

SMITH, C. J. The prisoner and one McLean Lanier are charged in different counts of the indictment as principals in the first and second degree, each with the murder of one Jacob Best, by cutting and stabbing with a knife, and the prisoner alone being arraigned was tried upon his plea of not guilty. The jury in their verdict acquit of the murder and find him guilty of the felonious slaying, as charged in the bill. The only error assigned in the record is in the admission in evidence against the accused of the examination of the deceased taken before a justice on the day after the assault.

Preliminary to its introduction, the state examined the said justice who testified that the accused was brought before him, an acting justice of the peace of the county, charged with having cut the deceased, and upon an investigation of the charge, the deceased was examined for the state upon interrogations put by himself, and the answers written down by himself, as they were made; that the prisoner put some few questions to the deceased, which with the answers thereto were not put down, because not deemed to be material to the inquiry pending before him, and that these were but a repetition of (564) the testimony given in before and already written down, that the testimony of the deceased was then read over to him and assented to and signed, and it contains the substance of all that was said by the deceased in reply to both the direct and cross-interrogations, and that the prisoner was present during the whole time.

Upon this statement the solicitor offered in evidence the examination of the deceased identified by the justice, and upon objection of the prisoner, which was overruled, it was received and read to the jury.

The admissibility of the testimony is contested before us upon two grounds:

1. That it does not appear to have been taken during a judicial inquiry into the charge made against the prisoner; and

2. That it is not full, embodying the substance and not the words of the deceased.

We think neither exception is tenable.

It is quite apparent from the record that the justice entered into an inquiry as to the offence in his official capacity, and during its pendency took the examination of the deceased. He says in express terms that "the defendant was brought before him, an acting justice of the peace of said county, charged with said cutting," that is, the cutting of the deceased, and this point was not made in the court below. It sufficiently appears to us, if the exception could be entertained, made here for the first time, as under the settled rules of practice it could not, that the justice was acting officially, and making a judicial investigation of the alleged offence when the examination of the deceased was taken.

The examination seems to have been conducted in strict conformity with the provisions of the statute. The magistrate is not required to write down the very words of the witness as they are uttered. (565) It is sufficient if he puts down fully and accurately the testimony of the witness as he intends it upon the subject matter of inquiry. He must commit to writing in the words of the statute whatever the witness says "in regard to the offence charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent." Bat. Rev., ch. 33, sec 21. The correctness of the examination in the present case is further verified by reading it over to him and obtaining his approval. Such examination is authorized to be used before the grand jury, or upon the trial before the petit jury when the witness is dead. Sec. 34; *State v. King,* 86 N. C., 603.

We are unable to discover any error in the record, and before concluding we deem it proper again to advert to the possible consequences of a new trial, as we did in *State v. Grady,* 83 N. C., 643, where the conviction has been for the subordinate and included offence of manslaughter, without however expressing an opinion whether the new trial is of the offence charged on the bill or of that of which the accused has been convicted, about which the decisions and writers on criminal law widely differ.

There is no error. Let this be certified to the end that judgment be pronounced on the verdict.

No error. Affirmed.

Cited: S. v. Pierce, 91 N.C. 610; *S. v. Staton,* 114 N.C. 815; *S. v. Maynard,* 184 N.C. 656; *S. v. Correll,* 229 N.C. 642; *S. v. Gaston,* 236 N.C. 502.

STATE v. OWENS.

Prosecutor—Costs.

A judgment against a prosecutor for costs, is not irregular if rendered in his absence; and the judge who tries the case has the exclusive right to determine whether he shall be so taxed.

APPEAL from an order taxing the prosecutor with costs, made (566) at Fall Term, 1882, of TRANSYLVANIA Superior Court, by *Shepherd, J.*

At Spring Term, 1881, an indictment for perjury was preferred against one Alfred Cantwell, upon which John Owens, the defendant of record in this appeal, was marked as the prosecutor, at the time and before the finding of the bill.

At Spring Term, 1882, the cause was tried and the defendant, Cantwell, was acquitted, and the presiding judge (Gilliam), after declaring the prosecution to have been malicious, ordered that the defendant, Owens, so marked as prosecutor, should pay the costs of the prosecution and the fees of certain of the defendant's witnesses, whose materiality was certified by the attorneys.

At Fall Term, 1882, the costs not having been paid, and the defendant, being then in the custody of the sheriff, filed an affidavit, setting forth that though present at the trial of the indictment for perjury against Cantwell, he left the court before the judgment requiring him to pay the costs was rendered, and had therefore no opportunity to controvert the facts found by the court, either as to the malicious character of the prosecution, or the materiality of the witnesses who had been examined for the defence, and thereupon moved the court to set aside the judgment directing him to be taxed with the costs and fees of the defendant's witnesses. This the court refused to do, and the defendant appealed.

Attorney General and Mr. G. A. Shuford, for the State.
No counsel for defendant.

RUFFIN, J. The defendant's motion to vacate the order taxing him with the costs of the main prosecution and the fees of the necessary witnessess for the defence thereof, was properly overruled. Indeed,
(567) it is much to be questioned whether it was proper to entertain it at all, since the statute gives to the judge, who tries the cause, the exclusive right to determine these matters.

Of course, however, if he proceed irregularly and contrary to the course of the court, the party affected is entitled to be relieved, and he may be so at a subsequent term. We infer that in this case his Honor consented to hear the motion only upon this ground—that the absence of the defendant at the time the order against him was made might possibly render it irregular.

Viewing the case in this light, the ruling of the court, in refusing the motion is fully supported by the decision in *State v. Spencer*, 81 N. C., 519, where it is held, that the presence of a prosecutor on the trial of the defendant is in law a presence to answer a motion to tax him with the costs because of his false clamor, and that a judgment rendered against him for such costs is not irregular, though actually rendered in his absence.

No error. Affirmed.

Cited: S. v. Horton, 89 N.C. 583; *S. v. Dunn*, 95 N.C. 699; *S. v. Hamilton*, 106 N.C. 661; *S. v. Sanders*, 111 N.C. 703; *S. v. Jones*, 117 N.C. 772, 773.

STATE v. F. A. MCNINCH AND ANOTHER.

Towns and Cities—Public Place.

City ordinance against profane swearing and public drunkenness; *Held*, to constitute a misdemeanor for a violation of this ordinance, it is not necessary that the offences should be committed in a "public place." One may be publicly drunk in a private place.

INDICTMENT for an assault and false imprisonment tried at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves, J.*
(568) The evidence in the case disclosed the following facts:

The defendants arrested the prosecutor, Robert C. Mason, in the city of Charlotte, and caused him to be confined in the city

prison. The defendant McNinch was the chief of police of Charlotte, and the defendant Healy a policeman, acting under McNinch, and the prosecutor was drunk when arrested. The defendants sought to justify under the common law and an ordinance of the city, which declared *"public drunkenness and loud and profane swearing to be a nuisance and a misdemeanor,"* and prescribed punishment for the same, within the limit allowed by law.

The only question made by the defendants and presented by the appeal is, whether the place, in which the prosecutor was found in said city in a state of drunkenness and using loud and profane language, was a public place.

The evidence on this question is, that the prosecutor was in an open space or place in rear of Sneider's bar-room, which bar-room fronted on Tryon street, one of the principal streets of said city. That said open space was on three of its sides bounded by the said bar-room the Charlotte Hotel (one of the principal hotels of said city and having two stories) and a house occupied and used as a boarding house, overlooking the place where the prosecutor was found and arrested, which was about eight steps from the dining room of the Charlotte Hotel. Some of the upper windows, and two of the dining room and the pastry room windows, of the hotel fronted this place. It was during the dinner hour when the prosecutor was seen and arrested by the defendants, and the guests of the Charlotte Hotel and the boarding house were sitting at the dinner table. The hotel windows had blinds which are sometimes open and sometimes closed. There was a water closet in the rear of the place not far from where the prosecutor was. McNinch heard him using loud and profane language, and he was also heard by two other persons, and they also saw him in said place in a drunken condition.

The defendants put in evidence the acts of the general assem- (569) bly incorporating the town and city of Charlotte, and the amendments thereto.

His Honor charged the jury that if the prosecutor was arrested in a public place under the circumstances shown by the testimony, the acts of the defendants were lawful, as they had subsequently complied with the law; that as conceded by the state and the defendants, the only question was whether the place in which the prosecutor was arrested is a public place. In regard to this the court was requested by the defendants to charge, that if divers citizens were assembled near and in view of the place where the prosecutor was seen and arrested by the defendants, and said citizens so assembled had the opportunity to see him in his drunken condition, that then it would be a public place. To which the court responded by charging the jury:

"That this was true, but if in order to view or see the prosecutor it was necessary for the citizens then and there assembled to go to the windows, then it would not be a public place." The defendants excepted. Verdict and judgment against the defendants, and they appealed.

Attorney General, for the State.
Messrs. Burwell & Walker, for the defendants.

ASHE, J. The defendants justified their act of arresting the prosecutor under the common law and an ordinance of the city of Charlotte. His Honor charged the jury that the guilt of the defendants depended upon the question whether the place where the prosecutor was arrested was a public place, and that if in order to view or see the prosecutor, it was necessary for the citizens to go to the windows, then it would not be a public place. The charge is erroneous. His Honor in making it seems to have had in his mind the crime of nuisance at common law, but the ordinance of the city was evidently in-
(570) tended to create different offences from that. It was a police regulation adopted, not merely to secure the citizens of the city against annoyance, but to prevent the evil example of such immoral conduct.

The ordinance embraces two offences, loud and profane swearing and public drunkenness. To make these criminal offences, it is not necessary they should be committed in a public place. There is nothing in the ordinance about a "public place."

His Honor did not seem to consider the difference between public drunkenness and drunkenness in a public place. A man may be publicly drunk in a private place. If for instance the prosecutor had remained in Sneider's bar-room and had been seen there by several persons, he would be said to be publicly drunk. And when he went to the back-yard of the bar-room in a state of drunkenness, and in that state was seen by several persons and was in full view of the dining-room of the hotel, only about eight steps distant, and the windows of a boarding-house, on the opposite side of the small square while the guests were at dinner, and indulged in loud and profane swearing, it was a violation of the ordinance and according to its provisions a misdemeanor, and the defendants were justified by it in making the arrest.

There is error. Let this be certified to the superior court of Mecklenburg that a *venire de novo* may be awarded.

Error. *Venire de novo.*

Cited: S. v. Hunter, 106 N.C. 803; *S. v. Earnhardt,* 107 N.C. 790; *S. v. Taylor,* 133 N.C. 758; *S. v. Myrick,* 203 N.C. 9.

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STATE v. JOHN RANDALL AND OTHERS.

Transcript of Record—Power of Superior Court.

Omissions of material matter in the record of a trial for murder will be supplied by *certiorari*, and the superior court has the power to order such corrections as are necessary to make the record truthful.

MOTION of prisoners for a *certiorari* heard at October Term, 1882, of THE SUPREME COURT.

The prisoners are indicted for murder, and were tried at Spring Term, 1882, of BUNCOMBE Superior Court before *Bennett, J.*

The jury returned a verdict of guilty of manslaughter, and from the judgment pronounced, they appealed to this court.

No statement of the case accompanies the record, and the prisoners in their petition for the *ceritorari* state that numerous exceptions were taken during the progress of the trial, and ask that a transcript of the same, together with the record, be sent to this court, to the end that they may be reviewed.

Attorney General, for the State.

Messrs. Moore, McLoud, Carter and Johnston & Shuford, for prisoners.

SMITH, C. J. In the examination of the record, we discover that it makes no mention of the arraignment of the prisoners, nor of their putting in any pleas to the charge preferred in the bill of indictment. This omission may result from the inadvertence of the clerk to make the proper entry upon his record, or in making out the transcript therefrom, and presents a proper case for the award of the *certiorari*—the course pursued in *State v. Craton,* 28 N. C., 164, (572) for the correction of the name of the judge who tried the cause in the court below.

If the fact be that there was no arraignment, no opportunity afforded the prisoners to plead, and no pleas put in to make an issue for the jury, their verdict is a nullity as well as the judgment rendered thereon.

In this aspect of the case, and as the prisoners ask it, we shall direct the issuing of the *certiorari*, to the end that such corrections may be made in the superior court as are necessary to make the record truthful, of which the court has the undoubted power, as declared by Chief Justice RUFFIN in the case referred to, and that a transcript thereof be sent to this court.

PER CURIAM. Motion allowed.

Cited: S. v. Surles, 117 N.C. 723; *S. v. Sandlin,* 156 N.C. 627.

IN STATE v. BURGWYN, FROM HALIFAX:

Confessions.

The decisions in *State v. Andrew*, 61 N. C., 205, and *State v. Efler*, 85 N. C., 585, relating to confessions of defendants as evidence approved.

RUFFIN, J. The case discloses but a single exception, and that, in the opinion of this court, cannot be sustained.

The state proposed to give in evidence certain confessions of the defendant, and, upon objection being raised to their competence, examined two witnesses, both of whom testified that they were voluntary, and, free of any inducement of either hope or fear. Thereupon the court admitted the evidence and the defendant excepted.

After other evidence for the prosecution, the state rested (573) its case, and the defendant then introduced a witness who testified that the confessions deposed to by the witness for the state had been extorted by fear.

So far as we can see from the case, no request was made to the court to reconsider its ruling as to the admission of the confessions, after the conflicting evidence bearing on the point was heard. But we do not stop to consider that, for conceding that there had been such request, and that his Honor had declined, we do not see how it could affect our decision.

What facts amount to such threats or promises as to exclude confessions as not being voluntary, is a question of law, says PEARSON, C. J., in *State v. Andrew*, 61 N. C., 205. So too, whether there be any evidence tending to show that confessions were not voluntary is a question of law, and the decision of the court in regard to them may be reviewed in this court. But whether the evidence, if true, proves these facts, and whether the witnesses giving the testimony

in regard to the facts are credible or not, and in a case of a conflict of testimony, which witness should be believed by the court, are all questions of fact to be decided by the court, the decision of which cannot be reviewed.

To the same effect are *State v. Vann*, 82 N. C., 31, and *State v. Efler*, 85 N. C., 585.

No error. Affirmed.

Cited: Branton v. O'Briant, 93 N.C. 104; *S. v. Cole*, 94 N.C. 964; *Smith v. Kron*, 96 N.C. 396; *S. v. Crowson*, 98 N.C. 598; *Leak v. Covington*, 99 N.C. 564; *Blue v. R.R.*, 117 N.C. 647; *S. v. Brittain*, 117 N.C. 787; *S. v. Page*, 127 N.C. 513; *S. v. Whitener*, 191 N.C. 662; *S. v. Biggs*, 224 N.C. 26.

In *King v. Ellington*, from Wake:

ASHE, J. There was no exception taken by the plaintiff to the charge of the court or its ruling upon any point; and the plaintiff having shown no error, "it must be remembered that if the appellant fails to assign and prove an error, the judgment, although it *may* be erroneous must be affirmed." *Utley v. Foy*, 70 N. C., (574) 303; *Swepson v. Summey*, 74 N. C., 551; *Stephenson v. Jones*, 12 N. C., 15.

The judgment of the superior court of Wake must therefore be affirmed.

No error. Affirmed.

In *State v. Conway*, from New Hanover:

PER CURIAM.—This case is governed by *State v. Hughes*, 83 N. C., 665, and for reasons there given, the judgment is affirmed.

In *State v. Sheppard*, from Carteret.

There is no statement of the case accompanying the record, and the judgment below is affirmed.

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