NORTH CAROLINA REPORTS

VOL. 93

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER TERM, 1885

REPORTED BY

THEODORE F DAVIDSON

ANNOTATED BY

WALTER CLARK

REPRINTED BY THE STATE.
EDWARDS & BROUGHTON PRINTING CO., RALEIGH.
1908.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA.

OCTOBER TERM, 1885.

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WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

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ATTORNEY-GENERAL:

THEODORE F. DAVIDSON.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

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GEORGE E. WILSON, Solicitor.....Mecklenburg.

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OCTOBER TERM, 1885.

JEFFERSON DAVIS BARDIN.....Wilson.
ALBERT LUCIEN COBLE.....Alamance.
HENRY LILLY COOK.....Cumberland.
BURGESS GAITHER CRISP.....Pender.
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SIDNEY ALBERT WOODARD.....Wilson.

CASES REPORTED.

CASES CITED.

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NORTH CAROLINA

AT RALEIGH

OCTOBER TERM, 1885

JERRY GREGORY v. MOSES HOBBS and wife et al.

Pleading—Former Action—Joinder of Causes of Action.

1. The present system of pleading *permits* but does not *compel* the joinder of separate causes of action arising out of "the same transaction, or transaction connected with the same subject of action." The Code, sec. 267.
2. The prosecution to a successful result of a former action against the defendants therein, to declare them trustees of the legal title, for the conveyance and the recovery of the possession of certain lands, is no bar to a subsequent action for the recovery of the rents and profits whilst the defendants were in possession.

APPEAL from *Graves, Judge,* at Fall Term, 1885, of CHOWAN.

The plaintiff brought a former action against the present defendants in the Superior Court of the county of Chowan, the purpose of which was, to have them declared to be trustees holding the legal title to a house and lot situate in the town of Edenton for the plaintiff; to have such title conveyed to him; and for the purpose of recovering possession of the house and lot.

At the Spring Term, 1882, of that Court, a decree was entered in that action declaring the defendants to (2) be such trustees; the legal title to the house and lot was conveyed to the plaintiff, and he took possession of the property.

This action was brought in the same Court, on 13 September, 1882, to recover the "rents" of the house and lot mentioned that accrued while the defendants had possession of and controlled the same.

The defendants by their answer and on the trial insisted, that the plaintiff could not recover in this action, because his claim for such rents ought to have been made and properly set forth as a cause of action, and judgment demanded in that respect in the former action mentioned, and the right thereto determined in that action.

The Court intimated an opinion favorable to the defendants, whereupon the plaintiff submitted to a judgment of nonsuit, excepted and appealed to this court.

Messrs. Reade, Busbee & Busbee for the plaintiff.
Messrs. Pruden & Vann (by brief) for the defendants.

MERRIMON, J., (after stating the facts). The defendants do not plead in the present action that the cause of action alleged in the complaint was alleged or litigated at all in the former action; but they insist that the cause of action now declared upon ought to have been properly set forth and insisted upon in the former action, and as it was not, it is lost, and the plaintiff has now no remedy as to it.

This contention of the defendants rests upon one of two assumptions: First, that the cause of action of the present action is essentially a part of that of the former one; or secondly, that the cause of action in the present one, not only *might* have been united with that of the former one, but *must* have been, otherwise it ceased to be actionable.

(3) In our judgment neither of these assumptions has any foundation. The purpose of the two actions and the causes of actions alleged in them respectively, are not the same, but entirely different. The object of the former was two-fold: First, to obtain the equitable relief of having the defendants declared to be trustees holding the legal title to a lot of land for the plaintiff, and to have such title conveyed to him; and secondly, to obtain possession of the land.

These causes of action are different in their natures—the character of the allegations necessary to be made in declaring

upon them—the character of the defense made to them—in the issues of fact and law raised by the pleadings and in the proofs, from the like things in respect to the cause of action in the present action. The former action in respect to the causes of action set forth in it, had distinctiveness, oneness and completeness, without adding the cause of action in the present one; indeed, if the cause of action in the present one had been included, it must have been done by adding new and distinctive allegations, thus raising additional and different issues, both of law and fact, not at all necessary to a determination of its merits.

This action was brought to recover the rents and profits of the land mentioned for the period the defendants had unlawful possession of it. The cause of action has, if well founded, such distinctive nature and completeness in itself, as that it is capable of being litigated and completely determined alone. This makes it a separate cause of action. The mere fact that it is a result of the causes of action of the former action, does not make it necessarily a part of them.

It is not questioned that the present cause of action *might* have been united in the same complaint with the causes of action alleged in the former action. Indeed, the Code Civil Procedure (The Code, sec. 267, paragraph 5), recognizing the distinction we have pointed out, provides that, "claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same," *may* be united in the same complaint, whether they be legal or equitable. But this does not imply that such (4) claims or causes of actions *must* be so united. The statute is permissive—it provides that such causes of action *may* be so united—the language employed is, "the plaintiff *may* unite in the same complaint" the different classes of causes of action specified.

The purpose of this provision is to enable and encourage a plaintiff to avoid a multiplicity of actions by uniting several causes of action of certain classes in the same action without encountering the danger, arising from the common law rule in respect to duplicity in pleading. But it does not compel the plaintiff to do so—it is left discretionary with him. It would seem that generally, he would, on the score of economy and convenience observe such practice, especially when the

causes of action are simple—not attended with complexity; but there might be good reasons why he would not in some cases, as where the causes of action are of different natures, of great moment, present numerous issues and involve voluminous and complicated facts. The common law does not generally allow such union of causes of action of different natures, because, it leads to prolixity, the multiplication of issues and confusion. In cases where it is very important to have the issues of fact thoroughly tried by a jury, it is not well to submit a multiplicity of them together—the plain minds of jurors do not readily lay hold of and get a steady and clear perception of several submitted together. The statute has, therefore, wisely and on purpose, left it optional with the plaintiff whether or not he will unite in the same action two or more different causes of action of the classes designated.

This construction of the statute referred to, it seems to us, comports not only with its terms, but as well with its spirit and purpose. It is a literal copy of the New York statute on the same subject, and the courts of that State construe it as we have done. *Livingston v. Turner,* 12 Barb., 486; *Vanderoot v. Gould,* 36 N. Y., 645; *Larned v. Hudson,* 57 N. Y., 153; Bliss on C. P., sec. 132; Pom. P. & R., sec. 494.

There is error. The judgment of nonsuit must be
(5) set aside.

ERROR.

Cited: *Roper v. Wallace, post,* 26; *Asher v. Reizenstein,* 105 N. C., 217; *Tyler v. Capeheart,* 125 N. C., 68; *Austin v. Austin,* 132 N. C., 267; *Winders v. Hill,* 141 N. C., 703; *Shakespeare v. Land Co.,* 144 N. C., 521.

JOHN P. LEE v. M. H. EURE and others.

Bankruptcy — Counterclaim — Parties — Judgment Liens Against Land of Deceased Debtor.

1. In a proceeding under secs. 318, 324, C. C. P., to subject the lands of a deceased debtor to sale to satisfy a judgment lien thereon, the vendees in an alleged fraudulent conveyance made by the judgment debtor before the attachment of the lien, are not necessary or proper parties, and if they have been joined as defendants, the plaintiff may be permitted at any time to enter a nonsuit, or *nol. pros.* as to them, notwithstanding they may have filed answers asserting counterclaims and asking for affirmative relief.
2. These provisions of the C. C. P. not being brought forward in The Code, *all* creditors are now required to seek payment from the personal representative, who will apply the assets according to the respective priorities of the demands.
3. The plea of "discharge in bankruptcy," being a personal defence to be set up by the debtor or his representative, may be withdrawn at any time.
4. The defendant may set up as a counterclaim, any claim in his favor, arising out of the transaction set out in the complaint whether it be tort or contract, but not a tort unconnected with the transaction.

(*Lee v. Eure*, 82 N. C., 428; *Bevers v. Park*, 88 N. C., 456; *Whedbee v. Leggett*, 92 N. C., 469; *Walsh v. Hall*, 66 N. C., 233; *Bitting v. Thaxton*, 72 N. C., 541; *Hogan v. Kirkland*, 64 N. C., 250; *Murchison v. Williams*, 71 N. C., 135; and *Mauney v. Holmes*, 87 N. C., 428, cited and approved.)

PROCEEDINGS to enforce a judgment lien, heard before *Gudger, Judge,* at Spring Term, 1884, of GATES.

There was judgment for the plaintiff, from which the defendants, M. H. Eure, B. L. Sanders and John R. Jones appealed.

The facts are fully stated in the opinion.

Mr. John Gatling for the plaintiff.
Messrs. Grandy & Aydlett for the defendants.

SMITH, C. J. This action is prosecuted under the (6) provisions contained in sections 318 to 324 inclusive, of C. C. P., by the plaintiff, as assignee of a judgment recovered in the Superior Court of Gates at Fall Term, 1867, by certain infant creditors of William H. Lee, upon which execution issued and was levied on lands of the debtor; and

its object, the debtor having since died intestate, is to enforce the lien against his heirs-at-law to whom the lands thus charged have descended. Previous to the rendition of the judgment the intestate debtor executed a deed, dated in September, 1867, to Mills H. Eure for the same lands, and he has conveyed to Benjamin Sanders. These parties are alleged to claim under conveyances fraudulent and void, and were made defendants with the administrator and the heirs-at-law of said Lee. The plaintiff in his complaint demands an adjudication declaring said deeds fraudulent, and that a writ of *venditioni exponas* issue to the end that the said lands be sold and the proceeds applied in satisfaction of his debts. Pending the action, the defendant Sanders died, and his son and only heir, Benjamin L. Sanders, has been made defendant in his stead.

Among other defenses set up, the administrator relies upon an adjudication in the bankrupt court discharging his intestate from his debts, which afterwards, with leave of the court, he was permitted to withdraw.

The incongruous union in one suit of the separate and distinct remedies sought to be administered, the one at law in subjecting the property as still belonging to the debtor, for the payment of his debts by sale under execution—the other in an equitable proceeding to establish the nullity of the deeds, and then sell the land with no cloud upon the title, becoming apparent, the plaintiff, with leave of the court, was allowed to enter a *nolle prosequi* as to all the defendants other than the administrator and heirs-at-law of the debtor, and that all the allegations made as to them, be stricken from the complaint, and this without prejudice to them.

(7) The defendants embraced in this order excepted to this action of the court, the defendant Benjamin L. Sanders, who in his answer had averred an invasion by force of the premises, and his dispossession by the plaintiff since the institution of the suit, to-wit, in November, 1883, and damages thence sustained, for which a counterclaim is set up, insisting on his right to remain a party in the cause and to claim compensation therefor.

There being no other exception, the court gave judgment that execution issue to the sheriff directing him to make sale of all the interest of the deceased debtor subsisting in said

lands at the time of his death, for the satisfaction of the plaintiff's judgment.

From these rulings and the consequent final judgment the excluded defendants appeal, and these alone will we consider.

1. We can see no just reason for the appellants' objection to the action of the court in permitting such amendment and correction of the complaint as strips from it the extraneous and needless, if indeed permissible, matters relating to the appellants and their claim of title, and thus making the action simple and single, as a process to consummate what was begun in the debtor's lifetime and interrupted by his death, and appropriate by sale the descended and charged lands to the payment of the encumbering judgment. This reformation in the structure of the complaint, which separates from it the controversies raised with the appellants and severs their connection with the action, can result in no harm which would not have come if the original complaint had been in its amended form, and leaves them equally unaffected by its termination. Every right and claim which they possess under the deeds remains in full force and may be asserted as if they had never been made parties, even without an express reservation. Why shall they be allowed then to obstruct the plaintiff's only means of asserting his claim against the debtor's estote by final process, so as to permit a purchaser to call in question in another action the validity of the debtor's deed as against the debt? And if the title derived thereunder is effectual the appellants have no interest whatever in the issue of the suit.

2. The objection to the withdrawal of the defense resting upon the alleged discharge in bankruptcy is (8) equally unfounded. In the former case between the conflicting claimants—*Lee v. Eure*, 82 N. C., 428—it is said that "the discharge in bankruptcy is a personal defense to be set up by the debtor or his personal representative; and if, when opportunity is offered, it is not brought forward, the case stands as if it never had been granted." Assuredly as the administrator was at liberty to forego this defense in his answer, so must he be free to recall it when he deemed proper, with leave of the court. Moreover, it is set up in the answer of the defendant Eure, and if available to him, as grantee of the debtor, in like manner as to the heir who may interpose

the statutory bar when the descended land is sought to be subjected to a creditor's demand as ruled in the recent case of *Bevers v. Park,* 88 N. C., 456, the withdrawal of the defense by the administrator can not injuriously affect the said Eure, for as to him it remains. The point we are now considering is not the validity of the defense as offered by the grantee, but the effect of the withdrawal of it by the administrator as an objection proceeding from him of which he can not complain.

3. The appellants further except to the plaintiff's entry of *nol. pros.* whereby they have been prevented from pressing their other matters of defense, and especially the counterclaim of the defendant B. D. Sanders.

The asserted counterclaim is wholly inadmissible. The action is the continued assertion of a right to procure and subject the debtor's lands levied on under a *fieri facias* to the payment of the judgment debt.

Strictly there is no "transaction" between the parties "set forth in the complaint" out of which the defendants' cause of action arises, nor is it in any proper sense connected with the subject of the plaintiff's action. The Code, sec. 244.

The counterclaim is for an independent tort upon land claimed by the defendant Sanders, wholly personal to him, and open to redress in his action against the plaintiff for injury to *his real estate.* The Code does not contem-
(9) plate the enforcement of such counterclaims, and they are not within its terms. If the plaintiff was seeking to recover the land, it might be otherwise under the decision of *Whedbee v. Leggett,* 92 N. C., 469, where the distinction is plainly drawn between the cases where a plaintiff may and may not, at his election, enter a nonsuit as to his own demand, or, for like reasons, enter a *nol. pros.* as to some of the defendants and abandon his claim as to them. But in this case the plaintiff's sole purpose is to secure payment of an adjudged debt out of the debtor's lands upon which the levy has created a lien, and he is pursuing the statutory remedy therefor. The objection is untenable.

We do not concur in the suggestion of plaintiff's counsel that a tort can not under any circumstances constitute a counterclaim although "connected with the subject of the action" contained in the complaint. The contrary is decided in

Walsh v. Hall, 66 N. C., 233, and *Bitting v. Thaxton,* 72 N. C., 541, and it may admit of question whether the counterclaim ought not to exist at the time of bringing the action. *Hogan v. Kirkland,* 64 N. C., 250.

The suit having been reduced to the simple form of demanding an order of sale, and after the removal of the appellants from the record as parties, there being no defense, judgment was properly rendered that the writ issue.

The sections in the C. C. P. under which this proceeding was instituted, not being brought forward in The Code indicates the intention of the Legislature to compel all creditors, with or without liens, to seek payment from the personal representatives, who will dispose of all the assets, whether derived from realty or other sources, among the creditors of the deceased according to their respective priorities in the mode pointed out in *Murchison v. Williams,* 71 N. C., 135; *Lee v. Eure, supra; Mauney v. Holmes,* 87 N. C., 428.

NO ERROR. Affirmed.

Cited: Jones v. Britton, 102 N. C., 178; *Egerton v. Jones,* 107 N. C., 290; *Smith v. French,* 141 N. C., 7.

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(10)

JOHN WOZELKA v. JOHN P. HETTRICK.

Slander—Pleading—Mitigation of Damages.

1. An honest belief in the truth of a slanderous charge may be considered by the jury in mitigation of damages. It can not justify nor exonerate from the consequences of the false accusation.
2. In an action for slander it is material only to aver in the complaint that the slanderous words were spoken of the plaintiff, the facts which point them and convey to the hearer the sense in which they are used, are matters of proof before the jury. The Code sec. 265.
3. The words set out in the complaint in this case are actionable *per se.*

(*Burns v. Williams,* 88 N. C., 159, cited.)

ACTION tried before *Shipp, Judge,* at Spring Term, 1885, of CHOWAN.

The defamatory words alleged in the complaint to have

been spoken by the defendant concerning the plaintiff, and for the redress of which this action is brought, are contained in sections 5, 8 and 11, as follows:

Sec. 5. "That on or about 15 August, 1883, at about daybreak, the defendant met one Robert D. Bunch, a citizen of said town, on one of the public streets thereof and in reply to an inquiry of said Bunch, 'What are you doing out so soon this morning?' said 'Here! let me tell you—some venomous thief (or that venomous thief) has gone in my place—had a ladder and went to my window—got my pants, but didn't succeed in getting them out—something heavy in them fell and awoke me—it was my trusses. I found my pants were off my trunk, and on the floor—come with me one minute.' He, the said Hettrick, then went in front of this plaintiff's house and examined the gate—pointed over the fence into plaintiff's yard and said: 'There was a ladder lying here, where is it now? I don't see it now.' He then went to the next gate to plaintiff's yard and stopped and said to Bunch, 'Say nothing.'"

Sec. 8. "That subsequently in the early morning of
(11) the same day at the store of Edward F. Waff, and in the presence of said Waff and of the aforesaid Bunch and in their hearing the defendant used the following language: 'Some one has taken a ladder and gone up to my window to get my money, but he was badly mistaken, because there was but seven or eight dollars in my pocket. I was in bed asleep, there was something in my pocket, and when it fell, it awoke me—my wife said "what's that?" I said "I didn't know, I heard something fall." I got up and went to the window which was a little raised and hoisted it—and saw something which was all doubled up—I took it to be some spreads my folks had left out—I saw him then run and called him by name and said, "I know you!"'" At the same time in reply to Bunch's inquiry as to whether the party took the ladder away or left it, Hettrick said, 'Of course he took it with him.' And in reply to Waff, who asked, 'Do you suspicion any one?' he said, 'I do; I called him by name and told him I knew him—he was a white man—furthermore there was a dog in the yard and he seemed to be familiar with the man and kept quiet—while a few nights before when Jake Skinner had gone there to clean out the

back-house he had raved and raved at him—it was one who knew all about the premises.' He further said, 'It was one of my near neighbors, and one who was well acquainted with the house, and a white man'—that it was the same one that went in before—that he (the defendant) had asked him (meaning the plaintiff) if he had locked the door? and he replied yes—but he didn't take the key out—he (Hettrick) had thought that strange proceedings—that there used to be a ladder there (meaning at plaintiff's house), but he didn't think it was there now—he was going to see."

Sec. 11. "That on Sunday next after 15 August, 1883, in the town of Edenton, in reply to Thomas Thompson, who said to the defendant, 'I understand John Wozelka tried to get in your window (meaning the window of said dwelling and bakery), to rob you—is it so?' The defendant said 'Yes.' And in reply to the further question by Thompson, 'Did you see him?' he said, 'No, I was in (12) bed asleep with my wife—and I heard something fall in the room. I jumped up expecting it was some one after my pants. I found my pants on the floor—I went to the window and saw him on the outside crouched under the side of the house, he started to run, and ran towards the front of the house—I said, you needn't run, I know you.'

"And in reply to said Thompson, who asked why he did not succeed in getting the pants, he said he reckoned the ladder was not high enough for him to grasp them, he was simply able to reach them and knock them down. In reply to the further question from Thompson if Wozelka did not have a key to the house, he said 'Yes; but there are three rooms he can't get in.' He further said, 'This occurred between 3 and 4 o'clock in the morning.' "

It was alleged in the complaint:

"That by the said language, acting and conduct, the said defendant meant to charge, and did charge and was understood to charge this plaintiff with the crime, 1st, of larceny, and 2d, of entering the dwelling and bakery of the defendant in the night time with the intent to commit a felony."

Each and all of the above sections and allegations were denied by corresponding sections and allegations of the defendant's answer.

The following issues on the above sections were submitted to the jury who found thereon as hereinafter stated.

Issues: 1st.—Did defendant speak to R. D. Bunch the words set out in section five of the complaint, or words of the same substance? "Yes."

2d.—Did defendant speak to R. D. Bunch and E. F. Waff the words set out in section eight of the complaint or words of the same substance and meaning? "Yes."

3d.—Did the defendant speak to Thomas Thomp-
(13) son the words set out in section —— of complaint or words of the same substance or meaning? "Yes."

4th.—What damage has the plaintiff sustained? "Twenty-five hundred dollars."

On the trial the appellant admitted that he spoke the words set out in the complaint, and denied only that they were spoken of the plaintiff. Issues 1, 2 and 3, were discussed before the jury both by the plaintiff's and defendant's counsel in that view only, who told the jury that they should answer those issues "yes," if they found the words were spoken of the plaintiff, and "no" if they were not spoken of him.

The defendant relied upon the plea of justification, and asked the court to submit this issue to the jury—"Was there in the mind of the defendant an honest belief that the words spoken by him were true?"

The court declined to submit that issue to the jury, but instructed them that they should consider it in making up their verdict as to damages, and if they found that the defendant had used the language of the plaintiff as alleged in the honest belief that it was true, they should consider that in mitigation of the plaintiff's damages.

That proposition was conceded by the plaintiff's counsel in their argument to the jury.

After the Judge had charged the jury and they were about to retire, the defendant asked this charge: "If the defendant spoke the words of the plaintiff as alleged in the *bona fide* belief that they were true, the jury would consider that in mitigation of any damages they might give in their verdict."

The Court declined to charge the jury further on the subject, and said that he had already charged them that in sub-

stance, and that the plaintiff had not disputed the proposition. The defendant excepted.

The jury having returned the verdict as set out, the defendant moved for a new trial, because:

1st—The Court refused to submit the issue ten- (14) dered by the defendant as above.

2d—The Court refused to give the instruction as set out above.

The Court refused the motion and defendant excepted.

Counsel for defendant then moved in arrest of judgment upon the grounds that the words charged in the complaint are not actionable *per se,* and that as no special damage is alleged, or if so too indefinitely; and as no special damage was proved, the plaintiff can not recover.

The Court refused the motion and defendant excepted.

Thereupon judgment was rendered by the Court for the plaintiff for the damages found by the jury and the cost. From which the defendant appealed to the Supreme Court.

Mr. John Gatling for the plaintiff.

Messrs. Geo. V. Strong, E. C. Smith and *Pace & Holding* for the defendant.

SMITH, C. J., (after stating the facts). It can scarcely be necessary, to sustain these rulings of the Judge, to refer to adjudged cases or the authority of elementary writers. The utmost effect that could be given to the *bona fide* belief by the defendant of the plaintiff's guilt, if the language was thus uttered, was in mitigating the damages, and he had full benefit of this presentation of excuse. It could not justify or exonerate from the consequences of the false accusation. Certainly no wrong was done to the defendant.

After verdict on a motion in arrest of judgment, objection was taken to the sufficiency of the complaint in that the words charged were not actionable *per se,* and further, that no special damage was averred and none proved.

In our opinion the words in their plain import charge the plaintiff, perhaps, not with larceny, for the reason that there was no such dominion acquired over the goods, upon the statement of facts, as made an asportation an essential element in that offense, but with the more serious crime

(15) of burglary or that akin to it, described and made infamous by statute.

The facts shown in the defendant's imputations are consistent with the entry of the plaintiff's arm through an open window, yet the hearer is not thus informed, and if he were the statutory crime is fully charged.

The other alleged defect is removed by our ruling that the words are themselves defamatory and admit of a claim for damages. But it is not very clear that special damages are not charged in article 17, on which we express no opinion.

Before concluding the opinion we advert to the narrative and conversational form in which the defamatory language is represented to have been used, obnoxious though in less degree to the criticism made on the complaint in *Burns v. Williams,* 88 N. C., 159, instead of pursuing the provisions of the statute intended to simplify the pleading. It is not "now necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose." Code, sec. 265.

The circumstances which point the words and convey to the hearer the sense in which they are used are proved before the jury, and it is only material to charge that they were spoken concerning the plaintiff.

There is no error, and the judgment should be

AFFIRMED.

I. N. TILLETT, Administrator v. E. F. AYDLETT, et als.

Wills, Construction of—Sale of Land for Assets—Jurisdiction of Judge and Clerk.

1. In the construction of a devise in the following words: "Should my wife survive my daughter Alice, and also all children born of my daughter, in such event I give to my wife and her heirs all my town property of every class. But should my daughter Alice survive my wife Margaret, and die without leaving issue of her body begotten, in such even my said daughter shall have power to devise and bequeath after her own death, unto or upon whosoever she will, all my estate not hereinbefore devised in fee. Nevertheless should

my daughter Alice have children of her body begotten, any, or any one of which survives my wife Margaret and my daughter Alice, I give and bequeath to them, or the one, as the case may be, after the death of both my wife and daughter, all my town property of every kind to them, him or her as may be, and their, or his or her heirs forever;" *It was held*, that the daughter took a life estate in the town property.

Rules for the construction of wills discussed by ASHE, J.

2. In a proceeding to sell lands for assets the Court, in its discretion, may direct the sale of any portion thereof, and the order in which the sale shall be conducted. The Code, sec. 1444.

3. On an appeal, in special proceedings, from the ruling of the clerk upon a question of law, to the Judge, it is the duty of the latter to transmit his decision to the former with directions to proceed in conformity therewith. The Code, sec. 255.

(The opinion in *Moore v. Ingram*, 91 N. C., 376, modified and corrected. *Proctor v. Pool*, 15 N. C., 370; *Tillett v. Aydlett*, 90 N. C., 551; *Brittain v. Mull*, 91 N. C., 498, cited and approved.)

SPECIAL *PROCEEDING* by plaintiff, as administrator (16) *cum test. annexo* of N. Overman, deceased, upon petition to sell lands for assets, begun before the Clerk of the Superior Court of PASQUOTANK, and heard on appeal at Spring Term, 1885, before *Shipp, Judge.*

Nathan Overman died in 1877, leaving a last will and testament. He appointed his wife, Margaret Overman, his executrix, who died in 1879, and the plaintiff then, during the same year, qualified as administrator *cum test. annexo.* Nathan Overman left only one child, the defendant A. A. Overman, who intermarried with the plaintiff and has by the plaintiff one child, the infant defendant Malvin Overman.

The plaintiff and his wife, A. A. Tillett, executed a deed of trust on 16 May, 1882, to the defendant E. F. Aydlett and Walter F. Pool, who is now dead, trustees for certain real estate as therein described, a part of the lands belonging to said N. Overman's estate, to secure debts due by them to Fields, Thayor & Co.

The following is a copy of the material portions of the will: (17)

"I appoint my beloved wife Margaret, executrix of this, my last will, directing her first to select from my household and kitchen furniture such articles for her own use and comfort as she may think proper and necessary, and sell the residue thereof, if any; and also all my wares, goods and

merchandise, and all of my personal property. Collect all my notes and sums of money due me by account or otherwise, and rent out from year to year during her natural life, my store-house and all other of my town lots and buildings (except the dwelling-house and lot where I now live), and from the sales, collections and rents as aforesaid, pay all my debts, and the balance thereof, including rents of my said houses, even unto the death of my wife, I give and bequeath unto my wife Margaret and my daughter Alice A. Overman, jointly and equally, share and share alike.

"I give and bequeath unto my wife Margaret and my daughter Alice A. Overman, and their heirs forever, jointly and equally, share and share alike, my farm in this county, near Salem, known as the Thomas Harvey farm, including all the lands I own in Bluff Point.

"I leave to the use and enjoyment of my wife during her natural life, the lot of land and buildings thereon, where I now live, also such of my household and kitchen furniture as she may find necessary for her convenience and comfort. Should my wife survive my daughter Alice, and also all children born of my daughter, in such event I give to my wife and her heirs all my town property of every class. But should my daughter Alice survive my wife Margaret, and die without leaving issue of her begotten, in such event my daughter shall have power to devise and bequeath after her own death, unto or upon whomsoever she will, all my estate not hereinbefore devised in fee. Nevertheless should my daughter have children of her body begotten, any, or any one of which, survives my wife Margaret and my daughter Alice, I give and bequeath to them, or the one, as the case may be, after the death of both my wife and daughter, all my town property of every kind to them, him or her as may be,
(18) and their, or his or her heirs forever."

In the complaint of the plaintiff, filed with the Clerk, it was alleged in the first article thereof, "That Nathan Overman, late of said county, died therein in the year 1877, having made a last will and testament, by which he devised certain real estate lying in Salem Township in said county to his wife Margaret, and his daughter Alice, the defendant, as tenants in common, and having also devised certain other real estate lying in E. City to the said Alice A.,

the defendant, for life, with remainder to the child or children of the said Alice."

The defendants, Alice A. Tillett and Malvin Tillett, by his guardian, severally answered the complaint, and the defendants Aydlett and Pool, filed a joint answer, and each defendant in said answer admitted the truth of the first article of the complaint.

In the fourth article of the complaint it was alleged that the testator died seized of a tract of land containing 350 acres, the Harvey tract, and a tract of about 175 acres lying at Bluff Point, both in Salem Township, and which were devised by the testator to his wife Margaret and his daughter Alice A., who, by the death of her mother, is the sole owner of said two tracts of land, and that he was also seized at the time of his death of a store-house and several other lots, including the dwelling-house where he resided in the town of Elizabeth City, and that all these last mentioned premises were devised by the testator to his daughter Alice A. for life, and after her death in remainder to her children. All of these allegations were admitted by the defendants Alice A., Aydlett and Pool, and not denied by the defendant Malvin, answering through his guardian *ad litem*. A reference was made by consent to state an account. The referee in his report finds, as a conclusion of law, that Alice A. Tillett was a legatee (meaning devisee) for life of the town property of N. Overman, deceased. The defendant Aydlett excepted to the finding of the referee that A. A. Tillett was a devisee for life of the town property.

The clerk overruled the exception and confirmed the report of the referee declaring she was a tenant (19) for life either by devise or inheritance. The defendant Aydlett excepted and moved the Court to sell the life estate of Alice A. Tillett in the real estate of the town property; first, to pay the indebtedness, on the ground the said Overman died intestate as to the said life estate. The clerk refused the motion and the defendant excepted.

Thereupon the clerk rendered judgment directing the lands of the testator to be sold in a different order from that contained in the motion of the defendant Aydlett, and from said judgment the defendant Aydlett appealed to the Judge of the Superior Court, who, at Spring Term, 1885, of Pasquo-

tank Superior Court, pronounced judgment in the case overruling the said exceptions of the defendant Aydlett, sustaining the ruling of the clerk, and after confirming his judgment proceeded to order a sale of the lands described in the complaint in different order and on different terms from those prescribed in the judgment of the clerk. From which judgment the defendant Aydlett appealed to this court.

Messrs. Starke & Martin for plaintiff.
Messrs. Grandy & Aydlett for defendant.

ASHE, J., (after stating the facts). A question is raised by these exceptions as to the proper construction of the will of Nathan Overman upon the point "whether A. A. Tillett took an estate in the town property of the testator by devise or by inheritance?" The defendant contended she took an estate for life in said lands by descent, and thereupon, under the statute, these lands should be first sold for the debts of the testator.

This contention makes it necessary to construe the will of Nathan Overman, not so much because it is absolutely necessary to do so in determining this case, for there is another point in it which is fatal to the defendant's appeal, but to put that question out of the way in the controversies that may arise after the sale, with respect to contributions, etc.

A. A. Tillett is the only heir of N. Overman, de-
(20) ceased, and it is a well-known maxim of the law that an heir can not be disinherited except by express devise or necessary implication, and that implication has been defined to be, such a strong probability that an intention to the contrary can not be supposed. Hence it has become a settled distinction, that a devise to the testator's heir after the death of A will confer on A an estate for life by implication; but that under a devise to B, a stranger, after the death of A, no estate will arise to A by implication. And the reason of this distinction is, it is absurd to suppose that the testator intended to devise real estate to his heir at the death of "A, and yet that the heir should have it, in the meantime, which would render the devise nugatory." Jarman Wills, 465. But this is only a rule of construction

adopted to effectuate what is supposed to be the will of the testator, and must yield to other rules of interpretation which more appropriately apply. For Chief Justice RUFFIN, in *Proctor v. Pool,* 15 N. C., 370, said "that no positive rule can be laid down for ascertaining the intention of the maker of a deed or other instrument, *but his intention is to be collected from the whole instrument taken together.*"

If the rule above quoted from Jarman should be adopted in the construction of this will, then we concede that A. A. Tillett would take an estate for life by descent, for the ulterior remaindermen are not the heirs of the testator at the time of his death, and she could take no estate for life under the will by implication. But that rule must yield when it comes in conflict with another rule which is held to be the safest guide in the interpretation of wills, which is, that the intention of the testator, when it can be indisputably ascertained, shall prevail; and the intention may be collected either from the particular provision or the general context. In other words, as said in *Proctor v. Pool, supra,* the whole instrument is to be looked at, and then the inquiry made, "can it be found out from this what the party means?"

In looking at the will under consideration, it is manifest that the testator did not intend to die intes- (21) tate as to any of his property, and it is no less evident, that his daughter, A. A. Tillett, was one of the main objects of his bounty.

In the first paragraph of his will he disposes of all of his personal estate; in the second, he gives the Harvey farm and the lands on Bluff Point to his wife and daughter, which upon the death of her mother she took by purchase, the one moiety by descent from her mother and the other by devise from her father.

The third paragraph gives the house and lot where he resided in town to his wife, and, in case she should survive her daughter and her children, all his town property. But should his daughter survive his wife and die without leaving issue of her body begotten, in such event his daughter should have power to devise all his estate not before devised; but should she have children at her death, then to such of them as may survive her.

We think there can be no question as to the construction of this devise to his daughter and her children.

It is evident it was the intention of the testator to give to his daughter, Alice, all his town property of every class for life, and after her death, to such of her children as might survive her—and to show that an estate for life was only intended to be given her, the testator proceeds to give her *power* to devise and bequeath all his estate not before devised in fee, in the event of her dying without leaving children. Why should he have conferred upon her such a power, if he had not intended and supposed that he had given her only a life estate in the town property? If, then, she took an estate for life by devise, as we hold she did, the clerk had the right to exercise his discretion in the order of selling the lands; for he is authorized by section 1444 of The Code, to order a sale of the whole or any specified parcel thereof that may be most advantageous to the estate. *Tillett v. Aydlett,* 90 N. C., 551. But, as we have intimated, there is a point taken by the defendant in this court which is fatal to the appeal.

(22) Here, the defendant Aydlett excepted to the judgment rendered by the Judge. In case of appeals like this to the Judge of the district from the ruling of the clerk upon a question of law, it is the duty of the Judge to transmit his decision to the clerk, that he may proceed with the case according to law. The Code, section 255; *Brittain v. Mull, supra;* and very clearly intimated in *Moore v. Ingram, Ibid,* 378.

Our conclusion, therefore, is, that the judgment rendered in the court below by his Honor must be reversed, except so far as it overrules the exceptions of the defendant and confirms the ruling of the clerk; and the case is remanded that the clerk may proceed with the case according to law.

Before concluding we take the opportunity of correcting an inadvertence into which this Court fell in the case of *Moore v. Ingram, supra,* where it is said, "the Judge in term has no jurisdiction over the settlement of the intestate's estates," etc. That was a special proceeding like this, instituted before the clerk to sell land to make assets for the payment of debts, and the Judge of the Superior Court, as here, rendered a final judgment. The expression was used with reference to his powers in such a case, not adverting to the Act

of 1876, The Code, sec. 1511, which gives the right of action in the Superior Court in term against executors, etc.

REVERSED IN PART, AND REMANDED.

Cited: *S. c.*, 94 N. C., 35; *Ledbetter v. Pinner*, 120 N. C., 458.

THE JOHN L. ROPER LUMBER CO. v. JOHN G. WALLACE, et al.

Code Practice—Joinder of Causes of Action—Counterclaim —Injunction—Receiver.

1. Under the Code system of practice, equitable relief may be granted in every civil action where it shall be made properly to appear that any of the parties thereto are entitled to it.

(23) 2. The distinction between the *principles* of law and equity are not abolished, nor are those systems blended; only the distinctions in the *forms* of procedure, and in the *tribunals* in which they were formerly administered, are abrogated.

3. Causes of action distinctly legal and causes of action purely equitable may be united in one complaint, if they have reference to the same subject-matter and arise out of the same transaction. It is not necessary, however, that they should be so united. The Code, sec. 267.

4. In certain respects, particularly with regard to the remedies by injunction and appointment of receivers, the powers of the courts have been enlarged by the provisions of The Code, secs. 338 and 379.

5. Where, in an action to recover land, the plaintiff applied for and obtained an injunction against the cutting and removing timber by the defendant, and the latter in his answer denied the plaintiff's title, averred title in himself, and alleged that the plaintiff was cutting and carrying away timber which was of peculiar value for manufacturing purposes; *It was held*, (1) That while the courts should be reluctant to interfere with *bona fide* industries and interprises by injunction, they would require the plaintiffs to give bonds to answer the defendants in possible damages, and would also appoint a receiver who should take and state accurate accounts of the timber cut and removed by the plaintiffs until the cause should be heard on its merits, notwithstanding the plaintiffs are solvent; (2) That the defendants' answer raised a counterclaim proper for the consideration of the court. The Code, sec. 244.

6. It is not now necessary, in an application for an injunction to enjoin a trespass on land, to allege the insolvency of the defendant when the trespass is continuous in its nature, or is the cutting and destruction of timber trees. (Ch. 401, Laws 1885.)

The Code system of practice discussed by MERRIMON, J. Const., Art. IV, sec. 1.

(*Gregory v. Hobbs, ante* 1; *Erwin v. Davidson*, 38 N. C., 311; *Deep River Mining Co. v. Fox*, 39 N. C., 61; *Gause v. Perkins*, 56 N. C., 177; *Horton v. White*, 84 N. C., 297, cited and approved.)

ACTION pending in CAMDEN, heard upon an application for an injunction, before *Shepherd, Judge,* at Chambers on 30 May, 1885.

From the order of the Judge enjoining the plaintiffs, they appealed.

The plaintiffs allege in substance that they are the owners of the land described in the complaint—that it is valuable mainly for the timber on it—that at great expense and trouble they have prepared themselves to cut and manufacture the timber into lumber for market—that the
(24) defendants forcibly entered upon the lands and interfered with their rights and property, and threatened to continue to do so. They demanded equitable relief by injunction, and this the Court granted.

In their answer, the defendants deny that the plaintiffs are the owners of the most, if not all of the land described in the complaint; they allege that they are the real owners of the land, or such part thereof as they describe and specify in their answer; they allege that the land is mainly valuable for the timber on it—that the timber is peculiar and generally scarce—that it is particularly valuable to them as manufacturers of wooden-ware made of it, and they suffer damage in not being able to use it—that the plaintiffs are unlawfully in possession of it, and have placed upon it large machinery and a great number of laborers, who have cut and transported to market great quantities of the timber, and threaten to continue to do so—that before the action can be tried upon its merits, the plaintiffs will have cut and taken from the land all the valuable timber on it, and thus leave them without adequate remedy.

Some of these allegations were made in a supplemental answer and in a petition filed in the action, in which they demand that the plaintiffs be restrained by injunction from cutting any more of the timber on the land, and forbidden to remove such timber as may be cut and remaining on it pending the action.

The plaintiffs filed their replication, in which they denied that the defendants had any title or right to or in the land—aver their title to the same—they admit that the land is mainly valuable for the timber on it—admit that they have cut and removed large quantities of it, and aver their purpose to continue to do so—they aver that they are abundantly solvent and able to answer in damages ofr any supposed wrong they have or may do the defendants in any degree.

The defendants moved before the Judge at Chambers for an injunction as prayed for in their answer, and supported their motion by their verified answers and petition and sundry affidavits—the plaintiffs opposed their motion and supported their opposition by numerous affi- (25) davits.

The Court, at the hearing of the motion, granted an injunction as prayed for, requiring the defendants to give bond in that respect; the plaintiffs excepted, and appealed to this Court. They contended:

"1. That the facts set out in the supplemental answer did not constitute a counterclaim under The Code, and that the motion for an injunction on the part of the defendants could not be maintained in this action.

"2. That the pleadings fail to disclose such apparent title, right of property or possession, as would justify the interposition of the equitable powers of the Court, and that the defect could not be aided by the separate affidavit of Wallace or others.

"3. That upon the whole case made out by the pleadings, affidavits and counter-affidavits on both sides, the injunction ought to be refused."

Mr. John Gatling for plaintiff.
Mr. George H. Brown, Jr., for the defendants.

MERRIMON, J., (after stating the case as above). Under the Code system of procedure as it prevails in this State, equitable relief may be granted in every civil action wherein it appears by proper averments and proofs that the parties, or any of them, are entitled to it. The Constitution (Art. IV, sec. 1) provides that, "the distinction between actions at law and suits in equity, and the forms of all such actions and

suits, shall be abolished; and there shall be in this State but one form of action, for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action," etc.

This provision does not imply that the distinctions between law and equity are abolished, or that the principles and doctrines of law and equity are so blended as to constitute one embodiment of legal science, without the differences that have heretofore existed between them and been recog-
(26) nized by courts of judicature in their application. Principles of law, principles and doctrines of equity, remain the same they have ever been—the change wrought is in the method of administering them, and in some degree, the extent of the application of them.

Under the common law method of procedure, the principles of law were applied and enforced in courts of law according to methods and forms of action peculiar to them—the principles of equity were applied and administered in courts of equity according to forms and methods of procedure peculiar to them.

Such differences were distinctive, well understood and treated as essential. The constitutional provision cited abolishes such distinctions as to actions and their forms, and to a very large extent—not wholly—the method of procedure in directly applying principles both of law and equity.

Causes of action distinctively legal in their nature, and like causes purely equitable in their nature, although in respect to the same matter in different aspects of it, need not necessarily be united in the same action, though they may be, if they come within any of the classifications prescribed in The Code, sec. 267. *Gregory v. Hobbs, ante* 1.

But, when a single cause of action has both legal and equitable elements, and also, when the equitable relief sought is merely incidental, or ancillary in the action—in such cases, the principles both of law and equity must be applied in the same action—as in case of application for relief by injunction, or the appointment of a receiver in the course of the action. And this is so as well, when two or more causes of action are united in the same action.

The purpose and effect of the constitutional provision is to abolish the distinctions between actions of law and suits in

equity, and the forms of such actions—not the difference in respect to principles—and to establish a single form of action applicable in all cases, whether the cause of action be legal, or equitable, or both. The end sought to be attained is to obviate circuity and multiplicity of actions, variety of forms of action and complications incident thereto, (27) and to facilitate the application of the principles of law and equity where they apply to a greater or less extent to the same causes of action.

The Code of Civil Procedure prescribes the method of applying both law and equity in one form of action. By it is established a system of pleading, the purpose of which is to effectuate the intention of the constitutional provision under consideration.

This method of procedure is, in some respects, imperfect, particularly in respect to the trial of issues of fact arising in cases purely equitable, and that sometimes arise in cases involving both legal and equitable elements.

Because of this imperfection, the courts oftentimes find it difficult to grant the full measure of equitable relief as contemplated by the doctrines of equity. The trial of issues of fact by a jury is generally ill-suited to the settlement of the facts in equity cases.

But in some other respects, it facilitates and enlarges the scope of equitable relief that may be granted. This is so especially as to relief by injunction and the appointment of receivers. The provisions of The Code, secs. 338 and 379, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject-matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief.

It is not, however, to be understood, that the court will administer both law and equity in the same action upon the mere suggestion of the parties, or some of them. Of course,

the cause of action, or the defense thereto, whatever may be its nature—whether legal or equitable, or both—must
(28) be set forth in the action as required by the method of pleading established by the Code, and in such intelligent way as to enable the court to see what principles apply and how they must be administered. The pleadings should develop the nature of the relief sought.

Such relief may be granted in the same action in respect to the same cause of action, not only to the plaintiff, but as well to the defendant, either temporarily in the course of the action, or by the final judgment, accordingly as it may appear that he is entitled; and this is especially so, when the defendant pleads a counterclaim that he may be entitled to plead. Indeed, a counterclaim is generally, practically and in effect, a counter-action brought by the defendant against the plaintiff.

Such being the scope and purpose of the method of civil procedure in this State, we think there can be no doubt that the defendants are entitled to equitable relief, not exactly in the way the Court allowed it, but in a way that will adequately protect their alleged rights until the action shall be tried upon its merits.

The defendants' answer is informal, but it in substance and effect denies, *first,* that the plaintiffs are the owners of the land, and that they trespassed upon the same as alleged in the complaint, and they also deny most of the other material allegations. They thus put the plaintiffs to prove their title and establish their cause of action. With this they might have stopped.

But they did not simply make defense, and thus put in issue the plaintiffs' alleged rights—they alleged that they were the owners of the land—that the plaintiffs were trespassers in possession of it, cutting and removing the timber from it, for which it was mainly valuable, and were continuing to cut and remove it, etc. The plaintiffs denied that the defendants had title; they denied the alleged trespass, and they put them to prove title, and establish their cause of action.

In our judgment, the defendants thus alleged a counterclaim. The Code, sec. 244, defines what shall constitute a *counterclaim,* and that part of the section material here, pro-

vides that "the counterclaim * * * must be one existing in favor of a defendant, and against a (29) plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1.) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim, or *connected with the subject of the action.*"

The defendants' alleged claim comes within the meaning of this provision; it is alleged to exist in their favor and against the plaintiffs—a several judgment may be had in the action—that is, a judgment for the plaintiffs or the defendants accordingly, as the Court may decide in favor of the one or the other, and it arises out of and is "connected with the *subject of the action,*" that is, the defendants allege title to the same land; that the plaintiffs have trespassed upon and are in possession of it, etc. The title to the land and the alleged trespass upon it by the defendants constitute the plaintiffs' cause of action.

But if it were granted that the subject-matter of the allegations of the defendants failed to constitute a counterclaim, still they would be entitled to relief. The real subject in controversy is the timber on the land. The defendants show apparent title to the land and the timber on it—their claim is not unreasonable. The allegations of the answers and the affidavits satisfy us that the claim of the defendants is made in good faith, and that it is not merely vexatious. The plaintiffs admit that they have taken from the land large quantities of the timber, and frankly aver their purpose still to do so. If they shall be permitted to do so, it will be difficult for the defendants to ascertain the quantity, character and value of the timber removed, if indeed, they can do so at all. Under the liberal provisions of The Code, to which reference is made in this opinion, they are entitled to relief.

It is true, the plaintiffs allege that they are abundantly solvent, and can answer in damages. This is not sufficient—the defendants may and probably would suffer detriment if the plaintiffs should be permitted to remove the timber without being required to render any account of (30) it under the supervision and direction of the Court.

Besides, the plaintiffs are to be treated as if the defendants

had alleged their insolvency. If they had so alleged in their answer, and it had so appeared there, it had been clear that the defendants were entitled to relief by injunction, or in some other adequate way. It is not now necessary to allege the insolvency of the party complained of. The statute (Laws 1885, ch. 401), provides, "That in an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." Manifestly, this statute was intended to apply to a case like the present one. The purpose of it is to obviate in some measure, the trouble of ascertaining the extent of trespass on land, especially where the timber is cut and removed, or is destroyed.

While we are of opinion that the defendants are entitled to relief, we think that the plaintiffs ought not to be restrained from cutting and using, or selling the timber until the action shall be heard upon the merits. No special or peculiar cause is alleged why the timber may not be cut and sold. This is not a case wherein a party aggrieved alleges irreparable injury. We can see no adequate reason why the defendants, if they succeed in the action, may not be fully compensated in damages, if adequate means shall be offered them for ascertaining the reasonable value of the timber. This may be done.

It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, unless in extreme cases, and this is not such an one.

The Court made its order granting an injunction until the hearing. This order must be so modified as to require the plaintiffs to execute a bond with approved security in such sum as the Court may deem proper, payable to the defendants claiming the property, conditioned that the plain-
(31) tiffs will pay to them all such damages and sums of money as the Court may adjudge against them and in favor of the defendants upon the final determination of this action; and so also to appoint a receiver, who shall take, state and keep an accurate account of the timber that the plaintiffs shall now have on hand, and such as they shall cut henceforth until the final hearing of the action upon its

merits, and make report to the Court of his action as such receiver; and further so as to restrain the plaintiffs from removing such timber, or any part thereof, until the receiver shall take the account thereof as required by the order of the Court appointing him. But if the plaintiffs can not or will not give such bond, the Court shall make such further order as to it may seem meet and just.

The object of the Court should be to so mould its orders and decrees as to afford relief to the defendants as is indicated in this opinion, and also permit the plaintiffs to prosecute their industry under just restraint for the benefit of the defendant in case of their recovery.

Irwin v. Davidson, 38 N. C., 311; *Mining Co. v. Fox,* 39 N. C., 61; *Gause v. Perkins,* 56 N. C., 177; *Horton v. White,* 84 N. C., 297.

The order of the Superior Court must be modified as directed in this opinion.

MODIFIED.

Cited: *Frink v. Stewart,* 94 N. C., 486; *McNair v. Pope,* 96 N. C., 506; *Durant v. Crowell,* 97 N. C., 374; *Lewis v. Lumber Co.,* 99 N. C., 13, 15; *Ousby v. Neal, Ibid,* 148; *Stith v. Jones,* 101 N. C., 366; *Bond v. Wool,* 107 N. C., 153; *Roberts v. Lewald, Ibid,* 311; *Nav. Co. v. Emry,* 108 N. C., 133; *Hood v. Sudderth,* 111 N. C., 222; *Comrs. v. Lumber Co.,* 114 N. C., 508; *Whitehead v. Hall,* 118 N. C., 605; *McKay v. Chapin,* 120 N. C., 160; *Sharpe v. Loane,* 124 N. C., 2; *Tyler v. Capeheart,* 125 N. C., 68; *Featherstone v. Carr,* 132 N. C., 802; *Moore v. Fowle,* 139 N. C., 52; *Winders v. Hill,* 141 N. C., 703; *Lumber Co. v. Cedar Co.,* 142 N. C., 418.

M. J. DES FARGES v. HENRY P. PUGH.

Contract—Fraud—Intent—Insolvency.

1. One who being insolvent, induces another to sell him property on a credit, concealing the fact of his insolvency and having the intent not to pay, is guilty of fraud, and the vendor may, at his election, disaffirm the contract of sale and recover the goods if no innocent person has acquired an interest in them.

(32) 2. The facts of insolvency and its concealment, alone, are not sufficient to enable the vendor to annul the contract; they must be coupled with the *intent* not to pay for the goods.

3. The fraud may be practiced by signs, by silence, by words or by acts. It is sufficient if it was reasonably calculated to and did induce the seller to part with his property.

(*Wilson v. White*, 80 N. C., 280, cited and approved.)

APPEAL from *Avery, Judge,* at Spring Term, 1884, of BERTIE, upon the following complaint and demurrer, viz:

1. That plaintiff is now, and was at the date hereinafter stated, engaged in the business of a bookseller in the city of Baltimore, Maryland.

2. That the defendant, fraudulently contriving and intending to deceive and defraud plaintiff of the following law books, to-wit: Ten volumes of Wharton's Criminal Law, one volume of Wharton's Criminal Evidence, one volume of Wharton's Pleading and Practice, and five volumes of Bouvier's Law Dictionary, of the value of thirty-nine dollars, did on 27 August, 1883, write to plaintiff a certain letter, a copy of which, marked "A," is herewith filed, as a part of this complaint, and in which said letter, he represents himself to plaintiff as mayor of the city of Windsor, North Carolina, and as an attorney at law, practicing in the counties of Bertie, Martin, Washington and Northampton, and ordered of plaintiff the law books hereinbefore named, at the price of thirty-nine dollars, and which said books were duly forwarded to the said defendant, as in the said letter directed, and by him were duly received. That the defendant in the said letter substantially stated that he would remit promptly for said books within thirty days.

3. That the contents of said letter were untrue, as plaintiff is informed and believes, in that the representations that he was at said aforesaid date the mayor of Windsor, or that he practiced law in the counties therein named, other than that of Bertie, and that he intended to pay for the said goods as stated and that plaintiff's ground for such belief
(33) is that she has since delivering the same to the defendant learned that the defendant is utterly insolvent, and has for five or more years almost wholly supported himself by ordering different articles of merchandise from strangers in the same manner as he ordered the said goods from

this plaintiff, and then, upon their receipt, selling the same at a very heavy discount, and using the money without paying for any of the goods so purchased.

4. The plaintiff avers that the defendant was an utter stranger to herself, and that she was induced to give him the possession of the said goods by reason of his said representations to her that he was mayor of Windsor.

5. Plaintiff further avers that the defendant, by means of the said fraudulent representations and writings as aforesaid, deliberately intended to cheat, defraud and trick her out of the said property, and submits, as a matter of law, that by reason of said defendant's fraudulent and evil practices, that no title passed to him of the said property, and that she is still the owner of the same.

6. That the price of the said law books amounted to the sum of thirty-nine dollars, no part of which sum has been paid.

Whereupon, plaintiff demands judgment for the possession of the aforesaid law books, and for such other and further relief to which she may be entitled, and for costs of the action.

The complaint was duly verified.

"A." (34)

HENRY P. PUGH,
Mayor of Windsor, and Attorney and Counsellor at Law.
Practices in the Courts of Bertie, Martin, Washington and Northampton Counties.
All business promptly attended to.

WINDSOR, N. C., 27th August, 1883.

Mr. M. J. Des Farges, Baltimore, Md.:

DEAR SIR:—Please send me

Wharton's Criminal Law (Last Ed.), at.....	$12 00
Wharton's Criminal Evidence, at.....	6 00
Wharton's Pleading and Practice. at.....	6 00
Bouvier's Law Dictionary (Last Ed.), at.....	15 00

I will remit promptly within thirty days.
Send by Adams Express.
Respectfully yours, HENRY P. PUGH.

The defendant demurs to the complaint of the plaintiff, for that the said complaint does not state facts sufficient to constitute a cause of action. For the reasons—

1. That complaint and affidavit and pleading of plaintiff do not show fraud.

2. That they do not allege such fraud, if any, as entitles her to the remedy she seeks.

3. No such fraud is alleged as to prevent the title to the property passing to defendant.

Thereupon the following judgment was rendered, to-wit:

This action coming on to be heard on complaint and demurrer, the demurrer is sustained.

From the judgment of the Court the plaintiff appealed.

Mr. R. B. Peebles for the plaintiff.

No counsel for the defendant.

(35) ASHE, J. The action is Claim and Delivery, and the demurrer filed by the defendant raises the only question for our consideration, which is: does the complaint state facts sufficient to constitute a cause of action? and the special grounds assigned are:

(I). That the complaint and affidavit and pleading of plaintiff do not show fraud.

(II). That they do not allege such fraud, if any, as entitles her to the remedy she seeks.

(III). No such fraud is alleged as to prevent the title to the property passing to the defendant.

We are of the opinion his Honor committed an error in sustaining the demurrer.

The first ground assigned, that the complaint does not show fraud, should not have been sustained, for the reason that the demurrer for the purpose of the action admits all the allegations of fact contained in the complaint; and it is alleged that the defendant, in his letter ordering the books, represented himself as mayor of Windsor, and that he practiced law in the counties of Bertie, Martin, Washington and Northampton, which representations were untrue, and that he was utterly insolvent; that by such fraudulent representations and writings he deliberately intended to cheat, defraud and trick the plaintiff out of her said property, and

that she was induced to give him possession of said goods by reason of his said representations to her that he was mayor of Windsor. These facts taken to be true, as they must be under the pleadings, are certainly some evidence of fraud.

The second and third grounds of the demurrer may be considered together, for if there was such fraud as entitles her to the remedy she seeks, there was such fraud as prevents the title to the property from passing to the defendant.

It is well settled that property in goods does not pass by a sale which the vendor has been fraudulently induced to make, unless he declines to assert his right to disaffirm the contract—in which case the property does pass—for the sale is voidable, and the vendor has his election to sue for the price, or being trover or detinue, under the former practice, or claim and delivery under the present (36) system. Benjamin Sales, pp. 342-349; *Donaldson v. Farwell,* 93 U. S., 631; *Wilson v. White,* 80 N. C., 280.

It is held, and we think the current of authority is to that effect, that the *mere fact* that the buyer of property is to his own knowledge insolvent at the time of his purchase and conceals that fact from the vendor, is not ground for relief to the vendor, but it is otherwise if he actually misleads the vendor. "Mere insolvency can not be treated as fraud; there must be fraudulent intent." Bigelow Frauds, pp. 36-37.

A leading case on this subject is that of *Donaldson v. Farwell,* 93 U. S., 631, where Justice *Davis,* speaking for the court, says: "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent party has acquired an interest in them, to disaffirm the contract and recover the goods." And he cites a number of authorities, both English and American, to support his position. This decision does not militate against the doctrine as laid down by Bigelow, *supra,* for Justice *Davis* does not hold the mere concealment of

the buyer's insolvency is sufficient for the vendor to annul the sale, but the concealment must be coupled with the *intent* not to pay for the goods. The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it. In the cases just cited, the buyer bought the goods and went into bankruptcy very soon thereafter, and that fact was left to the jury to be considered by them in determining upon the question of fraudulent intent. To the same effect is the case of *Wilson v. White, supra.*

We think the principle to be deduced from the authorities is, that in addition to the mere fact of concealment of his insolvency on the part of the buyer, he must be shown
(37) to have done some act attending the sale or soon thereafter, as tends to show that at the time of the sale he had the preconcerted design of not paying for the goods—*Wilson v. White, supra,*— or to have practiced some deceit which put the vendor off his guard and induced him to part with his goods.

It matters not, it is held, by what means the deception is practiced—whether by signs, by words, by silence, or by acts —provided that it actually produce a false and injurious impression, of such a nature that it may reasonably be supposed that but for such deception the vendor might never have entered into the contract. Story Sales, 154 and note to 153.

Now, apply these principles to our case. The vendor resides in Baltimore and the defendant in North Carolina. He was an entire stranger to her. He ordered a small number of books and falsely represented himself as the mayor of a town and a lawyer practicing in three or four counties. She alleges that she was induced to send him the books by reason of his representation to her that he was a mayor. He promised to pay in thirty days—was insolvent and concealed that fact from her. It is true, the fact of his being mayor or even a practicing lawyer, was no evidence of his ability even to pay so small an amount as that sued for, but it was some evidence of his social standing in the community where he resided, and that he was at least a man of integrity, for

it is hardly to be presumed that any community would appoint a man to the respectable position of mayor who was tricky and dishonest. The fact, then, that he was mayor of Windsor, if true, would raise a presumption that he was an honest and upright man, and it is, we know, not unusual for credit, for moderate amounts, to be given to impecunious persons merely upon the ground of their honor or supposed integrity—the vendor trusting to their honesty rather than their ability to pay.

We are of the opinion the facts as stated in the complaint were sufficient to raise a question of fraudulent intent, that constituted a proper case for the determination of the jury, and the demurrer should therefore have been (38) overruled.

The demurrer is overruled and the judgment rendered by his Honor in the court below reversed, and the case is remanded that the defendant may answer the complaint if he should be advised so to do.

ERROR. Remanded.

Cited: Wallace v. Cohen, 111 N. C., 106; *Hill v. Gettys,* 135 N. C., 376; *Troxler v. Building Co.,* 137 N. C., 62; *Joyner v. Early,* 139 N. C., 50; *Carpenter v. Duke,* 144 N. C., 294.

J. B. FLORA v. AUGUSTIN ROBBINS.

Homestead—Allotment of.

1. Where a judgment debtor owned several town lots, some of which—including that whereon was his dwelling and he resided—were encumbered by prior liens (mortgages) to the extent of their full value, and the others were unencumbered; *Held,* that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling and other buildings.
2. The homesteader should make his selection at the time of the appraisal and assignment, and give notice of any exception to the action of the appraisers then, or within a reasonable time thereafter and before sale.

(*Shepherd v. Murrill,* 90 N. C., 208, cited and approved.)

FLORA *v.* ROBBINS.

CONTROVERSY presented by exceptions to an assignment of homestead, heard before *Gudger, Judge,* at Fall Term, 1884, of BERTIE.

From the judgment of the court overruling the defendant's exceptions and confirming the action of the appraisers, the defendant appealed.

The sheriff of the county of Bertie had in his hands on 17 September, 1884, an execution in favor of the plaintiff and against the defendant, for the sum of $85.25, with interest thereon from 11 December, 1882, founded upon a judgment docketed in that county on 1 February, 1883.

(39) The defendant was a resident of that county and entitled to a homestead. The sheriff summoned appraisers to value and assign the homestead of the defendant.

Accordingly, on the day first above mentioned, the appraisers valued and laid off to the defendant his homestead, and made return of their proceedings.

The defendant objected to the homestead so laid off to him, and filed his exception, whereof the following is a copy:

"The defendant, Augustin Robbins, in the above-entitled case objects to the homestead heretofore allotted to him by the appraisers summoned under the execution in this case, for this: That the real estate set apart for him by the appraisers is under mortgage, and the legal title to said lands so allotted as his homestead is not in him, and that he has only an equity of redemption in said lands. The assignment made, a copy of which is hereto annexed marked "A," has the effect to defeat the defendant in obtaining a homestead."

The return of the appraisers simply recited the appraisal of the parcels of land—one at $700, the other at $300, and that the same were laid off as the defendant's homestead, and no reference was made therein to the fact that both parcels were encumbered by mortgage. It was recited that the first tract and buildings thereon were owned and occupied by the defendant as a homestead; that the second was a lot of land in the town of Windsor, and the buildings thereon were owned and occupied by him.

It is stated in the case, settled upon appeal by the Judge, that "No question was made as to the facts of the exception,

but said facts were admitted, and upon the hearing, the Court overruled the exception filed by the defendant, and confirmed the report of the appraisers."

It appeared from the return of the sheriff, entered upon the execution mentioned, that he levied upon the "excess" of the homestead—"a lot in the town of Windsor, adjoining the lot in said town assigned and allotted the said Robbins as homestead, bounded," etc.

The defendant excepted to the order and judgment of the Court, overruling his exception and confirming (40) the return of the appraisers, and appealed to this court.

Mr. R. B. Peebles for the plaintiff.

No counsel for the defendant.

MERRIMON, J. (after stating the facts.) It is admitted as a fact that the allotment made by the appraisers "has the effect to defeat the defendant in obtaining a homestead."

How this effect is wrought does not, in terms, appear, but the plain implication, from the facts stated in the exception of the defendant, is that the land allotted as homestead will not more than discharge the two mortgage debts that, as is admitted, constitute a first lien upon it.

If this is so, the appraisers ought not to have set apart the land embraced by the mortgage, especially as the defendant had other land unaffected by any lien, so far as appears, except the lien of the judgment upon which the execution of the plaintiff issued. The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him for that purpose, and this without reference to whether it embraces the dwelling house or not. Generally the dwelling house and buildings used therewith, must be embraced, but there may be reasons why this can not be so, as when the land on which they are situated is encumbered for all or more than its value. This is the spirit, if not the letter of the constitution and the statutes in execution thereof.

A judgment debtor may have homestead in lands that he has mortgaged, whether he has the legal right of redemption or the equity of redemption, but it does not follow, if such

lands embrace his dwellings and buildings used therewith, that he must have homestead in *such* lands and none other, although he may have other lands free from encumbrance, or subject to only partial encumbrance. Indeed, in
(41) the absence of any encumbrances, it is optional with him whether he will select a lot in a city, town or village, owned and occupied by him, not exceeding in value $1,000, in lieu of the homestead embracing the dwelling house and other buildings. In this case, the land of the defendant levied upon, and which the plaintiff seeks to sell to satisfy his judgment, is a lot situate in a town, and he had the right to select that, or a part of it not exceeding in value $1,000, in lieu of the land on which was situate his dwelling house and other buildings, even though these had been free from encumbrance. But as this land was encumbered to the extent of its full value, he had the right to have homestead set apart to him in any land he had other than that. This is so, because the law favors the homestead. The debtor, when need be, may have it allotted to him in any land owned by him available for the purpose.

It does not appear affirmatively, as regularly it ought to do, that the defendant at the time the appraisers proceeded to lay off the homestead informed them of the encumbrance upon the land, and selected other land that he desired to have laid off to him, but we think, if this were really necessary, that it sufficiently appears by implication that he did. He excepted to their action, and upon the ground that the land laid off to him as and for his homestead was encumbered by mortgages for its full value. He had other land—a lot in the town of Windsor—and the reasonable inference is that he selected that, or so much of it as would not be of greater value than $1,000.

But if he failed for any cause to give notice at the time the allotment was made, he gave notice of his objection and excepted shortly afterwards, as it appears from the fact recited in the sheriff's return on the execution, that notice of the appeal was served upon him on 27 October, 1884, and he did not make sale of the land levied upon as the excess of the homestead. The defendant objected and excepted before the sale of the land was made, and when it appeared

to the Court that the allotment of the homestead was practically nugatory—that it was a hollow form—it should have set it aside.

The appraisers, following the words of the statute, may have thought that they were required to lay off (42) the homestead in such way as to embrace the dwelling-house and the buildings used therewith, but no matter what consideration controlled their action, it deprived the defendant of his homestead, and he applied within time to obtain relief. *Shepherd v. Murrill,* 90 N. C., 208.

There is error. The judgment of the Court confirming the report and return of the appraisers must be reversed, and the exception of the defendant sustained.

ERROR. Reversed.

Cited: McCracken v. Adler, 98 N. C., 403; *Fulton v. Roberts,* 113 N. C., 425.

WILLIAMS, BLACK & CO. v. THE WILMINGTON AND WELDON RAILROAD CO.

Common Carrier—Liability on Bill of Lading—Agency.

A comman carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment, and the principal is not estopped thereby from showing, by parol, that no goods were in fact received, *although the bill has been transferred to a bona fide holder for value.*

(*Brown v. Brooks,* 52 N. C., 93, and *Smith v. Brown,* 10 N. C., 580, cited and approved.)

Appeal from *Gudger, Judge,* at Fall Term, 1884, of EDGECOMBE.

The action was founded on the facts embodied in the following "case agreed":

One L. G. Estes on 10 May, 1882, delivered to the local station agent of the defendant corporation, at Enfield, N. C., the said defendant being a common carrier, engaged in transporting cotton from Enfield to New York, ten bales of cot-

ton, and took from said agent a bill of lading there-
(43) for to Hilliard & Co., Norfolk, Va.; that on the next day the said L. G. Estes went to the said agent and stated to him that he desired to ship the said cotton to the plaintiffs, Williams, Black & Co., at New York, and thereupon the said agent, without taking up or canceling the first aforesaid bill of lading, issued to said L. G. Estes another bill of lading for said cotton (ten bales), to be shipped to the plaintiffs at New York. The said L. G. Estes forwarded the said bill of lading to both parties and drew upon the plaintiffs a draft for the value of said cotton, which was paid by the plaintiffs, they reposing confidence in said bill of lading. There was no cotton delivered to said agent other than the ten bales for which bill of lading had been issued to Hilliard & Co. The said cotton was sent to Hilliard & Co., and never delivered to the plaintiffs. There were only ten bales of cotton delivered to said agent by said Estes, and no cotton actually delivered on the bill of lading issued to plaintiffs.

On 17 May, 1882, the said L. G. Estes carried to the said agent of the defendant, at Enfield, N. C., a bill of lading filled up for eight bales of cotton to be sent to the plaintiff at New York, which bill of lading said agent signed and delivered to the said L. G. Estes, who forwarded the same to the plaintiffs, drawing draft for the value thereof, which draft was paid by plaintiffs, they reposing confidence in said bill of lading. That only two bales of cotton were in fact delivered to the said agent; that the plaintffs never received any notice from the defendant that the aforesaid cotton had not been delivered and shipped as purported by the said bill of lading, but paid the said drafts, believing that said cotton had been forwarded as set forth therein.

That the plaintiffs had never received any payment for the amounts advanced on said draft from said L. G. Estes or any one else, and the said L. G. Estes is insolvent. The plaintiffs have demanded of the defendants payment for the said cotton, which has been refused.

If upon the foregoing facts, the Court shall be of
(44) the opinion that the defendant is liable to the plaintiffs for the value of said cotton, judgment is to be

rendered in favor of the plaintiffs and against the defendant for the sum of $800 with interest thereon from 10 May, 1882, and for cost; otherwise judgment shall be rendered against the plaintiffs for the cost of this action.

Judgment for the plaintiffs, from which defendant appealed.

No counsel for the plaintiffs.

Mr. John L. Bridgers, Jr., for the defendant.

SMITH, C. J. (after stating the above facts). The action is prosecuted for the recovery of the value of the undelivered cotton mentioned in the two bills of lading, upon the faith of which and under an arrangement with the consignor they made full advancements in honoring his drafts. It does not proceed upon an allegation of fraud practiced through the instrumentality of the defendant's agent, and made successful by means of the false bills of lading. We must therefore consider the case as resting upon contract or the common law liabities of carriers of goods for their safe transportation and delivery to the consignees and the failure of the defendant to do so.

The authorities cited and discussed in the well-prepared brief of defendant's counsel seem to sustain his proposition that the authority to issue such bills depends upon the actual delivery of goods, and if issued without delivery they do not bind the principal, and that this defense is open to the latter. Some of the authorities to this effect we propose to refer to.

"Except as against a *bona fide* transferee of the bills of lading for value," remarks a recent writer, "the carrier may contradict it as *to the delivery to him of the goods,* or as to their description, quality or condition." Abbott Trial Ev., 537, sec. 45.

Carrying the rule still further, Mr. Daniel, in his excellent work on Negotiable Instruments, vol. 2, sec. 1733, states it thus: "Although the bill of lading is signed by the master of the ship, his subscription is as agent for (45) the owners, and the contract is binding upon them. But the master has no authority to grant a bill of lading unless the goods be *actually received on board the ship;* and if he transcends his authority in this respect, and the goods

be not on board, the ship owners will not be bound by the bill, *although it be transferred to a bona fide endorsee for value.*"

So it is said by the Supreme Court of the United States that the general owner is not "estopped from showing the real character of the transaction by the fact that libellants advanced money upon the faith of bills of lading." *Freeman v. Buckingham,* 18 How., 182; *Pollard v. Vinton,* 105 U. S., 7.

In like manner Mr. Justice *Davis,* delivering the opinion of the court in the *Lady Franklin,* 8 Wall., 327, and reiterating the doctrine, says: "The attempt made in the prosecution of this libel to charge this vessel for the non-delivery of a cargo which she never received and, therefore, could not deliver because of a false bill of lading, can not be successful, and we are somewhat surprised that the point is pressed here."

He adds: "In this case the bill of lading acknowledges the receipt of so much flour and is *prima facie* evidence of the fact. It is, however, not conclusive on this point, but may be contradicted by oral testimony."

Upon similar grounds are the rulings in this court which declare written acknowledgments of money received liable to contradiction by parol proof when no contract is formed by them, as in *Brown v. Brooks,* 52 N. C., 93; *Smith v. Brown,* 10 N. C., 580, and other cases.

When no goods are placed in custody of the carrier's agent to transport, there is no subject-matter to support a contract, and hence no obligation is imposed by the receipt put in the form of a contract. There can be no conveyance unless there be something to convey, and therefore no breach of obligation or duty.

The result is that the defendant company has incurred no liability in this form of action by the bill of lading for eight bales given in May. Of them only two were deliv-
(46) ered to the agent and they were consigned to the plaintiffs and received by them.

But the company is responsible for the failure to carry and deliver the ten bales mentioned in the bill of May preceding. These did pass into the possession of the agent, and although their first destination was fixed in the contemporary

bills at Norfolk to a consignee there doing business, it was competent for the consignors to change this and direct transportation to the plaintiffs in New York. This new, superseded the first contract and annulled all liability under it. The cotton being then in possession of the company it was competent to issue the second bill and undertake to transport the goods to the plaintiffs at New York. This was a valid contract and was broken by the failure to carry to the plaintiffs, and, instead, conveying to the consignees at Norfolk under the superseded contract.

There is error in entering up judgment for six bales of cotton described in the last bill of lading, and the plaintiffs should have received only the value of the ten first delivered.

The form of the case agreed will not permit of a reform of the judgment, for it requires us to sustain it in its entirety or render judgment for the defendant. The aspect of the case as considered by us seems not to have been contemplated by the parties, and, therefore, reversing the judgment, we remand it for further proceedings in the Court below.

ERROR. Judgment accordingly.

Cited: *Burwell v. R. R.*, 94 N. C., 456.

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(47)

J. R. THIGPEN, trustee v. F. M. LEIGH.

Agricultural Liens — Contract — Cropper — Landlord and Tenant.

1. A lien is the right to have a demand satisfied out of the property of another.
2. Every agreement between the owner of lands with a cropper for their cultivation, is a special and entire contract. If the cropper abandons it before completion he can not recover for a partial performance, and his interest becomes vested in the landlord, divested of any lien which may have attached to it. for agricultural advances, while it was the property of the cropper.
3. Every person who makes advancements of agricultural supplies to a tenant or cropper, does so with notice of the rights of the landlord, and the risks of the tenant or cropper abandoning, or otherwise violating his contract.

(*Niblett v. Herring*, 49 N. C., 262; *Dula v. Cowles*, 52 N. C., 290; *Winstead v. Reid*, 44 N. C., 76, and *Dail v. Freeman*, 92 N. C., 351, cited and approved.)

ACTION originally begun before a Justice of the Peace, and brought by appeal to the Superior Court of EDGECOMBE, where it was tried before *Gudger, Judge,* at Fall Term, 1884.

It was in evidence that one Van Riddick, a cropper on the lands of the defendant, made an agricultural lien to one F. L. Thigpen, in January, 1882; and in May following said Thigpen made an assignment to J. R. Thigpen as trustee. That in the trial had, in the Superior Court, it was in evidence that about the 10th of June of the same year, Riddick, of his own accord, abandoned his crop in the hands of defendant, the crop being at the time in bad condition.

It was further in evidence that Leigh at once notified plaintiff of the abandonment, and told him that he must cultivate the crop as he, Leigh, could not do it. Plaintiff said he would if defendant would furnish him with a house for his laborers. Defendant at first promised he would, but upon reflecting that the cropper, Riddick, did not live in his own house, but lived in a house with his father, he told the plaintiff he could not furnish him with a house as Riddick had none. Plaintiff told defendant to go ahead then, and cultivate the crop and pay himself his rent and the
(48) expense in making and housing it, and pay the balance to plaintiff; and defendant then replied: "If I do, you shall not have one cent of it." Plaintiff answered: "We will see."

It was in evidence that the defendant, after the abandonment by the cropper, cultivated the crop and marketed it, and, after taking out his rent and expense for cultivating and housing, there remained in his hands, after paying all expense, the sum of fifty-six dollars. This amount the defendant claimed for his time in looking after, furnishing and having the crop worked and housed.

The defendant requested the court to charge: "If Leigh offered to Thigpen to put him in Riddick's place to carry on the crop, and Thigpen declined to take and carry on the crop, such refusal is an abandonment on the part of Thigpen, and he can not recover. If Riddick, the cropper, having

of his own accord, and against the consent of his landlord, abandoned his crop, and the landlord having gathered the same, Riddick, or no one claiming under him, can recover any of the crop from the landlord."

This his Honor refused to charge, and instructed the jury that plaintiff was entitled to recover what remained in defendant's hands after paying all expenses.

Verdict for plaintiff; motion for new trial; motion disallowed; judgment for the plaintiff. Defendant appealed.

Messrs. Batchelor & Devereux for the plaintiff.
Mr. J. L. Bridgers, Jr., for the defendant.

ASHE, J., (after stating the case). We think that the plaintiff had no right to this balance. We are unable to find any authority in point, and the learned counsel who appeared before us for the defendant, expressed their inability to find any. We are therefore compelled to decide the case upon general principles of law and justice.

We start out with the proposition that Riddick, the cropper of the defendant, having abandoned the (49) crop in violation of his contract, was without remedy against the defendant. For "where there is an entire contract, and the plaintiff has performed a part of it, and without legal excuse and against the consent of the defendant has refused to perform the remaining part, he can not recover anything for the part performed." *Niblett v. Herring,* 49 N. C., 262; *Dula v. Cowles,* 52 N. C., 290. Every agreement made by the owner of land with one to cultivate his land as a cropper, must necessarily be a special contract, and when that is so, neither party to the contract, under the former practice, could recover on what was called in the former system a *quantum meruit,* when it is made to appear that he has, against the consent of the other party, willfully refused to perform his part of the agreement. *Winstead v. Reid,* 44 N. C., 76.

These authorities go to show that Riddick, by the willful abandonment of the crop in the month of June, against the consent of the defendant, lost all right to it. To whom, then, did it belong? Of course to the defendant, the land-

lord, who was entitled to his rent, and who cultivated the crop to its maturity, unless J. R. Thigpen, by his advancement to Riddick, the cropper, acquired such a lien on the crops as would entitle him to be paid thereout, subject to the superior lien of the defendant as landlord.

This brings us to the inquiry, what interest in the crop does the lien of agricultural advancements give to him who makes them? What is the definition of a lien? It is simply the right to have a demand satisfied out of the property of another. The lien for advancement differs nothing in its nature and operation from that of a judgment which has been held to constitute no property in the land of the debtor, only a right to have the judgment satisfied out of the land to which the lien had attached. *Dail v. Freeman,* 92 N. C., 351, and the authorities there cited in support of the principle. The principle must apply to personalty as well as to realty, whenever a lien is created.

Apply the principle to our case. Thigpen, by his
(50) advancements to Riddick, who was a cropper, acquired no right of property in the crop planted and cultivated by him, but only the right to have his advances repaid out of that part of the crop that might fall to Riddick's share thereof, on a division between him and the defendant. But Riddick, by his abandonment of the crop and his failure to perform his part of the contract, had lost his interest in and all right to a division of it. There was then nothing left upon which the lien of Thigpen could operate, and out of which his demand could be satisfied. Riddick's right to a share of the crop having ceased, Thigpen's lien on the share necessarily ceased with it.

Every person making agricultural advancements to a cropper, must rely in a great measure upon his good faith in carrying out his contract with his landlord, for he must know that the cropper has it in his power to desert his crop and leave it uncultivated, and therefore, in taking the lien he knowingly assumes the risk.

Aside from this view of the law, the justice of the case is with the defendant. Upon the abandonment of the crop by the cropper he informed the plaintiff, who, as assignee, stood in the shoes of him who made the advances, and in-

formed him of the fact and told him to go on and make the crop, which he refused to do, and threw the trouble and burden of finishing it upon the defendant, who expressly advised him, if he did so, *he should not have one cent.*

ERROR. *Venire de novo.*

Cited: Lawrence v. Hester, 93 N. C., 81; *Chamblee v. Baker,* 95 N. C., 101; *Brewer v. Chappell,* 101 N. C., 254; *Thigpen v. Maget,* 107 N. C., 46; *Arnold v. Porter,* 122 N. C., 244; *Beacom v. Boing,* 126 N. C., 138; *Parker v. Brown,* 136 N. C., 284; *Tussey v. Owen,* 139 N. C., 462.

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(51)

JOHN A. MOORE et. al. v. P. C. CAMERON et. al.

Pleading—Contract—Interest—Usury—Penalty.

1. Under the present system of practice, there being but one form of action, it is the office of the complaint to set forth *the facts* upon which the plaintiff's *right* to relief is based, and if they are adjudged sufficient the court will direct the appropriate *remedy.*
2. P borrowed from C $5,000, to be repaid at the expiration of five years, and bearing interest at 8 per cent, payable semi-annually. He executed his bond for the principal sum, and at the same time ten other bonds representing in amounts and dates of maturity the successive installments of interest. It was provided in the principal bond that a failure to pay any one of the interest bonds when due should make the principal demandable *eo instanti.* These bonds were further secured by mortgage, and default having been made in the payment of one of the interest bonds, the lands were sold, and a controversy having arisen between C and junior mortgagees as to the application of the proceeds; *It was held,* that the contract was not usurious, nor were the interest bonds in the nature of a penalty, but being a provision for the prompt payment and convenient collection of the interest, the moment the principal sum and accrued interest were satisfied, the remaining bonds were discharged.

(*Cheatham v. Hawkins,* 80 N. C., 161; *State v. Voight,* 90 N. C., 741; *Jones v. Mial,* 82 N. C., 252, and *Moore v. Hylton,* 16 N. C., 429, cited and approved.)

APPEAL from *Graves, Judge*—a trial by jury having been waived—at Spring Term, 1885, of the Superior Court of HALIFAX.

This action is for an account of the trust funds received by the defendant Peebles, upon a sale by him as trustee of

land conveyed by plaintiffs, Mungo P. Purnell and wife Mary, to secure an indebtedness due to Mildred C. Cameron, intestate of the defendant Paul C. Cameron, and to recover an alleged excess above the sum necessary therefor, by the plaintiffs, Angelo Garibaldi, assignee, and the said Mary, who are secured in subsequent assignments of the same land to secure debts due by said Mungo P. to them.

The facts which, by consent of counsel of both parties, were submitted to the Judge for his finding, a trial by jury being waived, are ascertained and stated, so far as material to the controversy, to be these:

1. On 22 March, 1881, one Mildred C. Cameron
(52) loaned to the plaintiff, M. P. Purnell, five thousand dollars, for which he executed and delivered to her the following described bonds.

One bond in the sum of five thousand dollars payable 1 January, 1886. Said bond reads as follows:

"$5,000.00.

On 1 January, 1886, we and each of us owe and promise to pay to Mildred C. Cameron, or order, the sum of five thousand dollars, it being for money loaned, the interest on which is evidenced by coupon bonds of even date herewith, and if said interest bonds, or any one of them are not paid at maturity, then this bond shall *eo instanti* become due and payable. As witness our hands and seals, this 22 March, 1881.

M. P. PURNELL, (seal).
W. T. PURNELL, (seal)."

Witness,
R. B. PEEBLES.

One bond for			$200.00	payable	22 September, 1881.
"	"	"	110.00	"	1 January, 1882.
"	"	"	200.00	"	1 July, 1882.
"	"	"	200.00	"	1 January, 1883.
"	"	"	200.00	"	1 July, 1883.
"	"	"	200.00	"	1 January, 1884.
"	"	"	200.00	"	1 July, 1884.
"	"	"	200.00	"	1 January, 1885.
"	"	"	200.00	"	1 July, 1885.
"	"	"	200.00	"	1 January, 1886.

All of said bonds bearing date 22 March, 1881, and, with the exception of the five thousand dollar bond, were given as coupon bonds for interest at eight per centum accruing semi-annually upon the aforesaid loan of five thousand dollars. Said coupon bonds read as follows:

$200.00.

On 1 January, 1883, we and each of us owe and (53) promise to pay to Mildred C. Cameron, or order, the sum of two hundred dollars, it being the interest on five thousand dollars at the rate of eight per centum per annum from 1 July, 1882, to 1 January, 1883. If this bond is not paid at maturity it is to draw interest from then till paid at the aforesaid rate. As witness our hands and seals this 22 March, 1881.

M. P. PURNELL. (Seal.)
W. T. PURNELL. (Seal.)

Witness,
R. B. PEEBLES.

To secure the payment of said bonds, the said Mungo P. Purnell and wife, at the time of their execution and as a part of the same contract, made and delivered to the defendant Peebles, a deed in trust, conveying to him in fee the tract of land before mentioned of twelve hundred and seventy-five acres therein described and called the "Marshland" tract, with power of sale in case of default in the punctual payment of each bond as it became due, containing, among others not needful to mention, the following clause:

"But if either one of said bonds is not paid at the time it becomes due, then, *eo instanti,* all the rest of said bonds shall become due and payable and the said R. B. Peebles shall be authorized and empowered to sell said land at public auction to the highest bidder for cash, either on the premises or at the court-house door in the town of Halifax, after advertising the same at the said court-house door and four other public places in said Halifax county for the period of thirty days, and convey to the purchaser a fee simple title, and out of the proceeds of sale retain five per cent. commissions on amount of sale, pay the principal and interest due on said

bonds, and the balance, if any, pay to the said M. P. Purnell, his heirs and assigns."

3. Thereafter and on same day, the plaintiffs,
(54) Mungo P. Purnell and wife, executed and delivered another mortgage or deed of trust, conveying the same tract of land to secure a debt of $3,339.22, evidenced by bond, payable one year after date (22 March, 1881), and with eight per centum interest from date, which bond, on 15 December, 1881, became the property of the plaintiff Angelo Garibaldi.

At the same time said Mungo P. Purnell executed and delivered another mortgage or deed of trust conveying the same tract of land, to secure a debt due the plaintiff Mary M. Purnell, for $730.00, with eight per centum interest from 22 March, 1881.

4. All of the aforesaid mortgages or deeds of trust were duly recorded, the one to the defendant Peebles first, and the other two thereafter and at the same time.

5. At Spring Term, 1883, an action was instituted to foreclose the two conveyances last above mentioned, and at said term it was, among other things, adjudged that the plaintiff Angelo Garibaldi recover of Mungo P. Purnell $4,049.49, with eight per cent interest on $3,339.32 from 19 March, 1883; that said M. P. Purnell was also indebted to Mary M. Purnell in the sum of $817.24, with six per cent interest from 19 March, 1883; that said amounts were secured by contemporaneous trusts upon the lands described in the aforesaid deeds of trust, and should share *pro rata* in the fund that should arise from the sale of said land; that the said M. P. Purnell pay the said Garibaldi and the said Mary M. Purnell their aforesaid debts on or before 1 August, 1883, and that in default of such payment the said M. P. Purnell and Mary M. Purnell should be forever barred of all estate or equity of redemption in and to said land, which should be sold at public auction for cash at the courthouse after due advertisement by John A. Moore, commissioner therein appointed for that purpose.

6. The defendant Peebles, by virtue of the powers conferred upon him in the aforesaid deed to him, and by reason of the failure of the plaintiff Mungo P. Purnell to pay the

coupon bonds aforesaid, maturing 1 January, 1883, and 1 July, 1883, the said Purnell having previously (55) thereto paid the coupon bonds aforesaid maturing 22 September, 1881, 1 January, 1882, and 1 July, 1882, sold the tract of land conveyed by said deed at public auction for cash, after due advertisement, on 30 July, 1883, at which sale the defendant Paul C. Cameron became the purchaser at the price of six thousand seven hundred and twenty-five dollars, but assigned his bid to one John T. Gregory. Gregory paid Peebles in settlement of said bid three thousand dollars in money, and for the balance thereof executed two bonds, one for $1,862.50, payable 30 July, 1884, with eight per cent interest, and one for $1,862.50, payable 30 July, 1885, with eight per cent interest. Said bonds were paid by said Peebles to the defendant Paul C. Cameron, as administrator of Mildred C. Cameron, deceased, and accepted by him as money, and are perfectly solvent; he also paid Cameron, administrator, $2,675.00 in money, retaining $325.00 himself in money, to pay his commissions (five per cent) and other costs and expenses of sale. His commissions, with the other costs and expenses, amounted to $350.00.

7. Mildred C. Cameron died prior to said sale, intestate, and the defendant Paul C. Cameron qualified as her administrator.

8. Immediately after the sale by the defendant Peebles, the plaintiffs demanded of him that he pay the plaintiffs Garibaldi and Mary M. Purnell or the plaintiff Jno. A. Moore, the surplus of the proceeds thereof, over and above what was required to pay off the aforesaid debt of Mildred C. Cameron, his commission and the other charges and costs of making said sale, and which surplus they claimed amounted to about $891.00, but he refused so to do, claiming that there was no surplus.

9. At the time of the sale the property would not have commanded at a cash sale more than $5,000.00 from any person present at the sale except from the purchaser, Paul C. Cameron.

10. The defendant Peebles paid over to his co-defendant Cameron, administrator, the notes and money proceeds of the

sale, less his charges for expenses and commissions,
(56) soon after the sale and before the institution of this suit; but after demand had been made upon him by the plaintiffs as aforesaid.

11. The making of the interest or coupon bonds was adopted not to secure usurious interest, but for the convenience of receiving the interest without entering credits upon the principal bond, upon payment of interest, by the payee, who was in ill health, and to compel prompt payment of interest as the same fell due.

It was adjudged by the Court:

1. That the amount paid by the defendant R. B. Peebles to the defendant Paul C. Cameron over and above the amount of the debt due his intestate at the time of the sale by said Peebles aforesaid was nine hundred and thirty-one dollars.

2. That of the $931.00 received by the defendant Cameron over and above the amount he was, as administrator as aforesaid, entitled to receive, the plaintiff Angelo Garibaldi is entitled to seven hundred and sixty-nine dollars and five cents ($769.05), and the plaintiff Mary M. Purnell is entitled to one hundred and sixty-one dollars and sixty-five cents ($161.65); and it is adjudged that said plaintiffs recover of the defendant Paul C. Cameron said amounts, that is to say, the plaintiff Angelo Garibaldi, the sum of $769.05, with interest thereon from 30 July, 1883, till paid; and the plaintiff Mary M. Purnell, the sum of $161.65, with interest from 30 July, 1883, till paid.

From this judgment the defendants appealed.

Messrs. Mullen & Moore and *Day & Zollicoffer* for the plaintiffs.

Mr. Thomas N. Hill for the defendants.

SMITH, C. J. (after stating the facts). The controversy is as to the disposition of the moneys produced by the trustee's sale of the encumbered land in excess of what is required to discharge the principal sum loaned and interest at the stipulated rate accrued to the sale and receipt of the purchase money.

The defendants contended that, by the terms of the
(57) contract as expressed in the larger bond and more

explicitly in the deed, each one of the bonds, those representing future interest as well as the other, became due and is to be paid out of the fund.

The plaintiffs insist upon their right to have the surplus after payment of the sum loaned and interest to the time of receiving the proceeds of the sale, applied to their debts which are secured in subsequent deeds of the same land, the expenses and costs of executing the trusts being of course retained by the trustee.

The solution of the dispute must be found in an examination of the agreement as an entirety, of which the making of the bonds and deed are in execution, and therefore ascertaining the intent of the parties to it.

The manifest and predominant purpose of both in making the loan was to provide ample security for the return of the money and the punctual payment of the successive installments of interest during the term of credit; and to this end the debtor's default is made a condition of its continuance at the option of the lender. The smaller bonds were executed not to create new obligations, but to put the interest in the form of an independent security, capable of transfer and separate enforcement by action. The relations of the one to the other are declared upon the face of each, and those for interest are intended to be of the nature and effect of coupons severed from the principal obligation. They represent and are meant to represent, as do proper coupons, the accruing interest as incident to the loan, and where a full payment is made of this, and its interest-bearing capacity is extinguished, there can be no interest as there can be no further forbearance of which it is the measure of value. Now, can the form in which the obligation to pay interest is put be allowed the effect of making the debtor pay interest, when as such none does or can accrue?

The defendants ascribe this result to the fact that bonds therefor are given, and the deed declares upon a failure to pay any one of them, that each shall become a present indebtedness without reference to their character as representing interest. This would be to sacrifice substance to (58) form and thwart, by literal interpretation of a few words, the clear intent and understanding of both parties, in

entering into the arrangement under which the securities were issued, and most oppressive in its operation on the debtor. The true and just construction is, in our opinion, that the lender reserves the right, in the contingency mentioned, to terminate the credit and recall what was then due of principal and interest without further indulgence or delay, and in order to do this, to require a sale of the land conveyed for its security. This election exercised involves the surrender of all the outstanding interest bonds not required for what was *then due,* and so will the Court adjudge.

The defendants' contention permits the enforcement of a contract for a much larger rate of interest than the law allows for the loan of money, since the interest for a period of little short of five years would be taken for the forbearance for less than one-half of that interval. This result the parties must be understood to have contemplated upon a construction of the contract, which admits it, and this is usurious, upon the principle that one can not be heard to say that he did not intend to do what is the inevitable consequence of the act done. *Cheatham v. Hawkins,* 80 N. C., 161; *State v. Voight,* 90 N. C., 741.

But assuming, as the Court finds that the putting the interest in bonds was not to secure usurious interest, but for convenience only, that the security might be surrendered as the payments were made, and the entry of successive credits upon the principal obligation obviated, we are constrained to put an interpretation on the transaction that avoids a claim for forbearance beyond the limits of the law.

But it is said that this is a penalty for the non-fulfillment of the contract to pay the stipulated interest with promptness; and if this be conceded it is plainly not recoverable, nor can it be retained against the debtor or his assignees. In penal bonds only the sum due, interest and costs, can be recovered. Code, sec. 934—a reenactment of 4 *Anne,* ch. 16, sec. 13.

(59) The defendants maintained that although the obligation is in effect a penalty for the nonpayment of money against which a court of equity will relieve, none can be sought in the present action, as one at law.

If this were so, it would not be a defense under the provisions of the act already referred to, since the equitable rule is

introduced into the action at law founded on the contract. But we do not deem this a legal, as distinguished from an equitable proceeding. The facts set out present a proper case under our former system for a bill in equity to bring a trustee to an account in order to ascertain what remained after a discharge of the trusts and to recover it.

The office of the complaint now is to show the facts upon which the plaintiff's cause of action and right to relief depend, and if sufficient, the appropriate relief is given.

This is the distinctive feature of the new practice which has but one form of action to be pursued. This is decided in *Jones v. Mial,* 82 N. C., 252, which adopts the views expressed in the dissenting opinion when the same case was before the Court upon a former appeal, *Jones v. Mial,* 79 N. C., 164.

The case does not fall within the principle which permits a vendor to contract for a sale upon a short credit for a smaller and upon a longer credit for a larger sum, the latter being greatly above the smaller sum and the intervening interest. There is no lending in such case, but a sale upon terms which the vendor is at liberty to make.

Nor would a contract to pay a larger sum, in case of failure to pay a smaller sum by which the obligation would be satisfied, fall within the condemnation of the usury law. This would be as the case before us is, a *penalty,* as held in *Moore v. Hylton,* 17 N. C., 429.

We are therefore of the opinion that the law is properly administered in the ruling of the Court below, and there is

NO ERROR.

Cited: State v. Jacobs, 103 N. C., 402; *Hood v. Sudderth,* 111 N. C., 222.

(60)

W. R. ABRAMS v. VA. FIRE INSURANCE CO.

Excusable Neglect.

Where the summons, returnable to the ensuing September Term of the Superior Court, was duly served upon the defendant's agent in June, and at the return term a judgment by default for want of an answer, was rendered; *Held*, that neither the letter of the plaintiff's attorney, written a few days before the return term, to the president of the defendant company, requesting a copy of a paper, material "to be used on the trial in March next, and * * * to insert in my complaint at present," nor that the president of the defendant company was a nonresident of this State, and had little or no knowledge of its judicial procedure or of the sittings of the terms of its courts, constituted such excusable neglect or surprise as would authorize the court to vacate the judgment by default. The Code, sec. 274.

(*Churchill v. Ins. Co.*, 88 N. C., 205, and same case in 92 N. C., 485, cited and approved.)

The summons in this action, which is founded upon a policy of insurance against fire, issued by the defendant company, whereof a copy is annexed to the complaint, was served upon its agents at Wilson on 15 June, 1883, returnable and returned to the term of PITT Superior Court, held on the 3d Monday in September following.

At that term a verified complaint was filed, and the defendant failing to appear and answer the same, judgment for want of an answer was entered up against the company, with an order for the assessment of the plaintiff's damages by a jury at the succeeding term.

At the ensuing term the defendant made a motion to set aside and vacate the judgment upon the ground and for the causes contained in an affidavit of W. L. Cowardin, the president of the company, upon the hearing whereof the Court rendered judgment as follows:

"It appearing to the Court that the facts set forth in the affidavit and exhibits herein do not constitute a case of surprise or excusable neglect, it is ordered and adjudged that the motion to set aside the judgment herein be overruled."

From this ruling the defendant appealed.

Besides the affidavit of the president of the com-
(61) pany, with the letters of another of the plaintiff's

counsel, attached to and accompanying it, as exhibits, there was evidence in opposition, offered by the plaintiff, which may be disregarded in passing upon the motion, since the Judge ruled that, taking as true all the facts stated in the affidavit, the defendant fails to bring its case within the provision of the statute as one of "surprise" or "excusable neglect," calling for the interposition of the Court for its relief.

The affidavit and exhibits upon which the decision is predicated are as follows:

1. That on 15 October, 1882, the plaintiff above named applied to the defendant through its agent, Messrs. Daniel & Nicholson, Wilson, N. C., by written application, signed in his own proper handwriting, for insurance, against loss or damage by fire from 1 October, 1882, to January, 1883, upon his gin-house, which he represented to be worth five hundred dollars, upon which he asked an insurance, two hundred and fifty dollars upon his gin, situated in said Gin House, which he valued at one hundred dollars, and upon which he asked fifty dollars insurance, and upon his gin-gearing in said gin-house, which he valued at three hundred dollars, and upon which he asked one hundred and fifty dollars insurance. That, in said application, he represented that the values stated were the actual cash values of the property referred to, and that he was at that time the sole and undisputed owner, absolutely and in fee simple, of the property mentioned and of the land on which it stood, and that there was no lien or encumbrance on, or any claim whatever against said property.

2. That, believing the truth of said representation, the defendant corporation, on 2 October, 1882, delivered to the plaintiff its policy, whereby it agreed to insure the plaintiff for the consideration of fourteen dollars, according to the plaintiff's application, against loss or damage by fire from 1 October, 1882, to 1 January, 1883, to his gin-house in the sum of $250.00, to his gin therein $50.00, to his gin-gearing therein $150. (62)

3. Affiant is informed and believes, and states the fact so to be, that neither on 1 October, 1882, nor at any time was plaintiff Abrams the owner in fee of an unencum-

bered estate of the gin-house, gin and running gear, insured by the defendant company.

That, about 1 December, 1879, the plaintiff contracted with one R. R. Cotton for the purchase of the tract of land on which the gin-house was situated; that, under that contract he received a deed from one Howell and immediately executed a mortgage to the said Cotton, to secure the purchase price, which was fifty four-hundred-pound bales of cotton, which was to be paid in five equal installments of ten bales each, with interest at 8 per cent, from date of mortgage, upon the value of the cotton; that, before 1 January, 1882, the plaintiff had erected for the use of the plantation the gin-house, which was destroyed, and had paid upon the purchase price but 4,773 pounds of lint cotton, and had during that month entered into a written agreement with said Cotton, whereby he agreed to hold possession of the premises, thereafter, as the tenant of said Cotton, at the annual rental of seven bales of cotton, which was to be entered as a credit upon the purchase price. That the time the plaintiff made application to this company for insurance, there was due upon the purchase price forty-eight (48) bales of cotton. Affiant is informed and believes, and states the fact so to be, that the value placed by the plaintiff upon the gin-house was greatly in excess of its actual value, and that at the time of the insurance it was not worth half the sum, and that the gin-gearing and the gin itself were not worth half the value placed upon them by the applicant in his application.

Affiant is informed and believes that there was no lint cotton in the gin-house when it was burned, though the plaintiff, in making claim for loss in January, 1883, made oath of his loss of five hundred pounds of loose lint cotton burnt in his gin-house. That statement is not true.

4. That on or about 27 Dec., 1882, the gin-house
(63) and its contents, whatever they were, with gin and gearing, were destroyed by fire; that correspondence was had between the defendant company and plaintiff's attorney, in respect thereto, until early in September, 1883, when affiant was informed by letter from one of plaintiff's attorneys, which is annexed and made part hereof, which contained the first information affiant had received of the institution of this action.

That he is a citizen of Virginia, has little or no knowledge of judicial procedure in North Carolina, or of the sittings of the terms of its courts, and that, upon reading the said letter, concluded and believed that no action would be taken in the suit commenced against his company until March, 1884, and that he rested in that conviction until the receipt of the letter from one of the plaintiff's counsel hereto appended, dated 10 Oct., 1883; whereupon he applied by counsel to plaintiff's counsel to agree to strike out the default in the cause and let the cause be tried on its merits at the approaching Special Term of Pitt Superior Court. The same was declined.

This affiant desires and asks for opportunity to present his defense of the company, as aforesaid, which defense he had, at time he received notice of the default, intended to make, and was engaged in correspondence touching the same, and would have been ready to maintain the same at the March Term, when he believed from the statement of the plaintiff's counsel, in his letter of 13 Sept., 1883, the trial would take place.

WILSON, N. C., 13 September, 1883.

COL. COWARDIN, PRES. VA. F. & M. INS. CO.:

Dear Sir:—Some time ago I wrote you in reference to 101107 issued to W. R. Abrams, of Pitt County, N. C., asking a settlement of his claim. You answered, stating that you would take the matter into consideration, and advise me of your final resolution. Failing to hear from you, I was compelled to bring the action now pending. (64) What I now desire is the original application to be used on the trial in March next, and a copy of it to insert in my complaint at present. As a former agent and also attorney of yours, in important litigations here, I hope you will do me the favor of furnishing the copy at once and have the original ready for trial in March, 1884.

Bobbitt v. Ins. Co., in 66 N. C. Reports will show you the necessity of our having a copy. As the same may be in the hands of your State agent, I have sent a letter of similar import to Mr. Hay, at Raleigh.

Truly yours, H. F. MURRAY.

WILSON, N. C., 10 Oct., 1883.

W. L. COWARDIN, ESQ., PRES. VA. F. & M. INS. CO.:

Dear Sir:—It becomes my duty to notify you that, at last term of Pitt Superior Court, we took judgment against your company "by default and inquiry" on the claim of W. R. Abrams, under No. 101107, and that all now left open is the amount of his loss. No question of misstatement in application, fraud, imperfect or irregular proof of loss or any defense of that kind can now be made.

That goods of the value of $495.00 claimed were lost by the fire is certain; to put us to the proof of this only question left open for you will only multiply costs, and I respectfully advise, as a sometime attorney of yours and late agent of your company, that you save the same by an immediate payment. Hoping to hear from you by return mail, I am,

Very truly yours, HUGH F. MURRAY.

Mr. H. F. Murray for the plaintiff.

Messrs. Gilliam & Son and *Batchelor & Devereux* for defendant.

SMITH, C. J. (after stating the facts). We en-
(65) tirely concur in the opinion of the Court that sufficient excuse was not offered for the defendant's inattention to the suit for the three months after it was constituted and the summons served preceding the entering up of the judgment by default. The only pretext for the delay is furnished in the two letters of plaintiff's counsel. The first of these letters, written on 13 September, a few days before the sitting of the court, requests a copy of the policy to accompany the complaint, in order that the trial may come off in March, after issue joined upon the expected answer at the term held in September, according to the requirements of section 400 of The Code. The letter conveys no intimation of the departure from the rules of law which, when no defense is made, authorize a judgment for want of it at the return term after process duly served. It is evident that there was to be controversy between the parties, yet the defendant company, for more than three months, paid no attention to the suit, nor employed counsel to protect their

interest. Nor is any extenuation for the defendant's indifference and correspondent inaction to be found in their alleged want of information as to the laws of this State. This should rather have prompted the company to an immediate consultation with counsel in order that it might know what was needed in the protection of its interests, than lulled it into a false sense of security. The case made in the affidavit falls directly within the ruling in *Churchill v. Ins. Co.*, 88 N. C., 205, and in the second appeal *Churchill v. Ins. Co.*, 92 N. C., 485.

The judgment only establishes the plaintiff's right to recover upon the contract of insurance, but leaves his damages to be still ascertained; so that much of the defensive matter alleged in the answer may be still set up when that inquiry is made before the jury.

NO ERROR. Affirmed.

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(66)

W. H. FURMAN v. R. H. TIMBERLAKE.

Clerks, Liability of for Moneys Received—Statute of Limitations—Demand.

1. A demand is necessary before bringing an action upon the bond of a clerk for moneys, payable to private individuals, received by color of his office, and the statute of limitations will not begin to run in his favor until after such demand is made.
2. If he has converted the money no demand is necessary, and the statute begins to run in his favor from the time of the conversion.
3. If the moneys are public moneys, it is his duty to pay them over at once to the proper authorities, and his failure to do so is a breach of his bond, and an action may be commenced without demand. In such case the statute begins to run from the date of the receipt of the moneys. The Code, sec. 159.

(*Little v. Richardson*, 51 N. C., 305; *Com'rs v. Magnin*, 86 N. C., 285; *State v. McIntosh*, 31 N. C., 307; *State v. Woodsides*, 9 Ired., 496; *Robertson v. Dunn*, 87 N. C., 191, and *Bryant v. Peebles*, 92 N. C., 176, cited, distinguished and approved.)

Appeal from *Shepherd, Judge,* at Spring Term, 1885, of FRANKLIN.

The plaintiff in his complaint alleged that he had been clerk of Superior Court of Franklin County, from 1868 to 1874, in which latter year the defendant succeeded him in the office. That there were fees and costs to a considerable amount, to-wit: "——— dollars," due him when he went out of office, and which were afterward received by the defendant in his official capacity.

The statute of limitations was relied on by the defendant, and it was admitted that the plaintiff demanded this money from the defendant on 30 September, 1878, and the action was begun in February, 1881—less than three years after the demand, but more than three years after the receipt of the money.

There was judgment for the plaintiff, from which the defendant appealed.

Mr. B. B. Massenberg for the plaintiff.
Mr. Jos. J. Davis for the defendant.

(67) ASHE, J., (after stating the case). The defendant's counsel insisted that the action was barred by the statute of limitations; that the statute began to run from the time of the receipt of the money, and not from the demand, because no demand was necessary to give the plaintiff a right of action against a clerk for money received by him in his official character, and he relied upon the following cases to support his position—*Little v. Richardson,* 51 N. C., 305; *Com'rs v. Magnin,* 86 N. C., 285; *State v. McIntosh,* 31 N. C., 307; *State v. Woodsides,* 31 N. C., 496; *Robertson v. Dunn,* 87 N. C., 191; *Bryant v. Peebles,* 92 N. C., 176.

The first four cases cited by the defendant's counsel were actions brought by public officers to recover public moneys, and in each of these cases it was held that no demand was necessary. *State v. McIntosh,* was the first case in this State where the point was decided, and it was there expressly held that no demand was necessary, before bringing an action against the sheriff for money collected by him, because as NASH, J., said,"the money here collected is *public money,* and for it no demand was necessary." A ruling which, no doubt,

was predicated upon the maxim, *"nullum tempus,"* etc., a maxim which is said to have been founded upon *the great public* policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers. But the maxim is no longer in force in this State having been abrogated by the provisions of The Code, sec. 159.

The other cases cited by the defendant's counsel apply exclusively to agents and trustees and have no application to a case like this, where the defendant is in office, clothed with high public trust, among others, to pay over according to law, all moneys and effects which have come or may come into his hands by virtue or color of his office, a duty for the performance of which he is required to give a bond with security in a high penal sum.

When he has received money by color of his office, the person for whose benefit it is received may bring an action against him alone for his demands, or may bring an action upon the bond, assigning as breach thereof the (68) nonpayment of his money. But the clerk would not be liable unless there was a breach—and there would be no breach unless he was in default: and this brings us to the question—when is he in default? Can it be on the receipt of the money and nonpayment of it immediately, or within a reasonable time to him who is entitled to it without any request or demand for its payment? If that was the law, then all the parties, witnesses and others—hundreds in number, whose fees and costs are constantly coming into the hands of a clerk, might each sue upon his bond and recover. It is not to be supposed that the law intended to impose such a liability upon the clerk. When he receives money in his official capacity, it is his duty to hold it, but not to withhold it, and he can not be said to withhold it unless he is put in default by *refusing* to pay it to the party to whom it is due, and that necessarily implies a demand.

To say nothing of the inconvenience, it would be ruinous to clerks to be required to look up every person who has money in his office, most generally small sums, and tender them the amounts due them, and upon default to do so, incur a breach of his bond. For these reasons, we hold that a demand is

necessary before bringing an action upon the bond of the clerk, unless he has appropriated the money, for then no demand is necessary, and the reasons must apply with a great appositeness when the action in nature of *assumpsit* is brought against the clerk. It is somewhat remarkable, that no case involving the question directly has been brought before the Court. If it has, after a careful search through the Reports, we have been unable to find it.

But the very question was decided in *McDonald v. Bank*, 22 Ala., 313. It was an action like this, to recover money collected by a clerk by virtue of his office, and it was held where a clerk has collected money on a judgment, the statute of limitations does not begin to run in his favor until he is guilty of some default with respect to it; if he is
(69) shown to have converted it, a demand is unnecessary, and the statute begins to run from the time of the conversion; but if no conversion is shown, the statute begins to run from the time of the refusal to pay on demand.

NO ERROR. Affirmed.

PRISCILLA LITTLE et als. v. C. R. THORNE and wife.

Jurisdiction—Wills—Trusts—Construction.

1. The advisory jurisdiction of the courts in respect to the construction of wills and trusts is limited to those cases where it is necessary for the present action of the court, and upon which it may enter a decree, or direction in the nature of a decree; but it will never be exercised to give an abstract opinion.
2. The only exception to this rule is where, the court having properly acquired jurisdiction of the case, a question of construction incidentally arises, and it is necessary to the determination of the cause to consider it.

(*Tayloe v. Bond*, 45 N. C., 5; *Alsbrook v. Reid*, 89 N. C., 151; *Simpson v. Wallace*, 83 N. C., 477, cited and approved.)

Appeal from judgment of *Gudger, Judge*, at Spring Term, 1885, of WILSON, upon the following "case agreed:"

This is an action brought by the plaintiffs, claiming as legatees and devisees, under the will of Gray Lodge, against

the defendants, who also claim in the same character under said will, for a construction of certain trusts and devises therein contained.

Rebecca Lodge, wife of Gray Lodge, to whom certain devises and bequests were made, having died before the constitution of the action, her executor was made a party defendant, and the administrator of Gray Lodge a party plaintiff, after the commencement of the action.

Gray Lodge, of the county of Wilson, died in January, 1881, leaving a will dated 3 Nov., 1866, which (70) was duly proven and admitted to probate, that portion of said will which is material to this cause being in these words: "After all my just debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my beloved wife all the land I now possess, known as the Odom tract of land, lying on Frank's Branch, adjoining the lands of Benjamin Simpson and Bartley Deans and others, together with all my stock and other property of any kind whatever, as I am now possessed of, during her lifetime, and after her death for my sister Prissy Little, her or her heirs, to share and to share equally with my wife's heirs."

Rebecca Lodge, wife of Gray Lodge, died without issue in January, 1885, devising by will all her estate of every description to Louisa Shavers, now Louisa Thorne, wife of the defendant C. R. Thorne.

Rebecca Lodge on 28 March, 1881, executed this paper-writing: "Received of George W. Blount, administrator with the will annexed of Gray Lodge, eight hundred dollars, together with the personal estate of all kinds belonging to the estate, and which under the will was given to me during my life, consisting of 21 head of hogs, 2 horses, 1 milch cow, 2 oxen, and a yearling, poultry, household and kitchen furniture and farming utensils, and which I am to account for." At the time of executing this receipt, Rebecca Lodge was informed by the administrator that she would have to account for one-half of the personal property mentioned. The eight hundred dollars mentioned in this receipt was a note which Gray Lodge held against Rountree, Barnes & Co., and was turned over to Mrs. Lodge by Blount, administrator, and by

her subsequently surrendered to R., B. & Co., she taking their note payable to her in place thereof.

Priscilla Little, one of the plaintiffs in this action, is the Prissy Little named in Gray Lodge's will. Elizabeth Mills, the other plaintiff, is one of the heirs-at-law of Rebecca Lodge, being Rebecca's niece and Priscilla's daughter.

(71) At the date of Gray Lodge's will, he was sixty years old and Rebecca fifty. George W. Blount, administrator of Gray Lodge, was duly made a party plaintiff, and Moses Rountree, executor of Rebecca Lodge, was duly made a party defendant in this action.

The Court is asked to decide:

1. Whether, under the will of Gray Lodge, his wife became entitled to an undivided one-half interest in the land in fee, or whether she was entitled merely to a life estate therein.

2. Whether she was entitled to the use of the personal property named in the will of Gray Lodge during her life, or whether she was the absolute owner thereof.

The defendants admit that Priscilla Little is entitled to one-half the land mentioned in fee.

His Honor gave judgment expressing his opinion upon the construction of the several clauses of the will upon which his construction was asked, and the plaintiffs appealed to this Court.

Mr. W. P. Williamson (by brief) for plaintiffs.
Messrs. Woodard & Bruton for defendants.

ASHE, J., (after stating the facts). The action seems to be predicated upon the general idea that a court of equity has a sweeping jurisdiction in reference to the construction of wills, which Chief Justice PEARSON said, in the case of *Tayloe v. Bond,* 45 N. C., 5, was an erroneous idea. In that case, the learned Judge, in his well-considered opinion, has given a very clear exposition of the jurisdiction of a court of equity, in the construction of wills, and from it we deduct the following rule as established: That the jurisdiction in matters of construction is limited to such as are necessary for the present action of the Court, and upon which it may enter a decree or direction in the nature of a decree. It will

never give an abstract opinion upon the construction of a will, nor give advice, except when its present action is involved in respect to something to be done under its decree. That it will not entertain an action for the construction of a devise, for the rights of devisees are purely (72) legal, and must be adjudged by the courts of law.

The only exception to this is where a case is properly in a court of equity, under some of the known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the Court will determine it, it being necessary to do so in order to decide the cause—as for instance, in actions for partition, or for the recovery of legacies 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; because the Court having jurisdiction over legacies must take jurisdiction over all matters necessary to its exercise.

The advisory jurisdiction of the Court is primarily confined to trusts and trustees, *Alsbrook v. Reid,* 89 N. C., 151, and cases there cited. Hence the Court will advise executors who are regarded as trustees, as to the discharge of the trusts with which they are clothed, and as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented where the action of the Court is invoked as distinguished from an *abstract opinion. Simpson v. Wallace,* 83 N. C., 477; *Tayloe v. Bond, supra.* But in the latter case it is said there is no ground upon which to base a jurisdiction, to give advice to an executor in regard to his future conduct or future rights or to allow him to "ask the opinion of the Court as to the future rights of a legatee," as, for instance, "who will be entitled when a life estate expires?" But the advice is only given upon an existing state of facts, upon which a decree or some direction of the Court in the nature of a decree is solicited.

In the case presented by the appeal for our consideration, the executor does not invoke the aid of the Court with respect to any of his duties arising under the will of the testator, but the action is constituted by some of the legatees and devisees under the will against others, for the abstract opinion of the Court, with regard to their several rights under the

will. The executor is made a party, *pro forma,* after
(73) the institution of the action, and he who is a trustee, and is the only party to the action who could ask the aid of the Court, asks nothing. And then there are no pleadings in the case, no complaint, no answer, no order, or decree asked—nothing but a summons and a *case agreed* between parties, who have never been recognized as persons who might invoke the advisory aid of the Court. It is a case of the first impression, and is not authorized by any decision or *dictum* of any court that we are aware of.

The action is therefore dismissed, and each party will pay his own costs.

ERROR. Appeal dismissed.

Cited: Tyson v. Tyson, 100 N. C., 368; *Farthing v. Carrington,* 116 N. C., 325; *Balsley v. Balsley, Ibid,* 476; *Rogerson v. Lumber Co.,* 136 N. C., 269.

H. H. BURWELL and others v. THE BOARD OF COMMISSIONERS OF VANCE COUNTY.

Jail—Nuisance—Injunction—Public Officers—Construction of Statute.

1. A jail is a public necessity, and is not a nuisance, *per se,* though by its erection and management property and residence in its vicinity may be rendered less valuable and comfortable.
2. An injunction will not be granted to restrain or supervise the exercise of the discretion conferred by law upon public officers in the discharge of their duties.
3. Under the provisions of the act establishing the county of Vance, and directing the erection of the necessary public buildings (ch. 113, Laws 1881), the board of commissioners were not required to have the jail erected upon the same lot upon which they had located the court-house; but in that respect they were invested with all the powers of the other counties of this State.

(*Hyatt v. Myers,* 73 N. C., 232, and *Dorsey v. Allen,* 85 N. C., 358, cited and approved.)

ACTION to enjoin the commissioners of VANCE County from erecting a jail, heard before *Shepherd, Judge,* on Spring Circuit, 1885.

The county of Vance was formed and organized under an Act of the General Assembly, ratified and (74) taking effect on 5 March, 1881 (Laws 1881, ch. 113) and was, by section 2, invested "with all the rights, powers and privileges of the counties of this State, except as hereinafter provided."

Section 8 directs the commissioners immediately upon their election and qualification to "select a site for a court-house and other necessary county buildings for said county, within the corporate limits of the town of Henderson."

Section 14 is in these words: "The said commissioners are hereby authorized to purchase a site for the court-house and necessary buildings specified in section eight, and to build thereon, in addition to said court-house, a public jail for said county, and they may lay a tax for raising the amount of money necessary to the same."

Pursuant to the authority conferred, the commissioners secured by donation a lot in said town, eligibly situated, rectangular in form, the equal opposite sides being respectively in length 205 and 180 feet, which was conveyed to them by deed of John S. Young and his wife Sallie J., on 18 July, 1881, as therein declared, "for the purpose of erecting a court-house and such other public buildings as to the board of commissioners may seem meet," following substantially the language of the statute.

On 1 August, thereafter, the commissioners, in consideration of the gift covenanted personally with the donors so to locate the said court-house as to make it front or face Young street in the town of Henderson, and in conformity with this agreement it has been located and built.

Deeming it an unsuitable place for the jail, the commissioners purchased from A. C. Zollicoffer a lot on Breckinridge street, some several hundred yards distant from the court-house, whereon they proposed to erect, and were about to erect the public jail when this action was begun by the plaintiffs on 30 May, 1885, to restrain them from proceeding with the work.

The plaintiffs uniting in the action, own lots near that on which the jail is to be put, the plaintiff Allen, (75) a lot with a dwelling house on the opposite side of the

same street, the plaintiffs H. H. and J. S. Burwell, a lot next to that of the plaintiff Allen, and the plaintiff Lord, a lot 100 yards distant, whereon he operates a tobacco house and employs about seventy-five workmen.

They allege in their complaint that the erection of the jail is required in the act to be on the lot where the court-house is, and to put it elsewhere is *extra vires* and unwarranted; and further, that it would, by reason of the emission of noxious vapors and gases and in other ways render residences on their several grounds unhealthful and uncomfortable to the occupants, and thus impair the value of their properties. To this end, they demand that the commissioners be enjoined from carrying out their purpose in the location of the jail at the designated place. After notice, and upon hearing the numerous affidavits offered by the parties, the plaintiffs moved for a preliminary restraining order, which was denied by the Judge, and they appealed.

Messrs. D. G. Fowle and *E. C. Smith* for the plaintiffs.
C. M. Cooke, Esq., for the defendant.

SMITH, C. J. (after stating the case as above). Two inquiries arise out of the contention of the parties which may be considered in determining the controversy.

I. Is a public jail a nuisance in a legal sense that persons residing on lots near or adjoining thereto may obtain an order to prevent its construction from the Court; and,

II. Are the board of commissioners restrained by the act creating the county from putting it anywhere else than upon the court-house lot?

1. A jail being a public necessity, indispensable in the administration of justice, and therefore required to be built, can not in itself be a nuisance in the sense of the law, *per se,* though its mismanagement may render it obnoxious
(76) to those who live or do business near it, since in such case private convenience and comfort must yield to the common good. Assuming a discretion reposed in the commissioners in fixing the location of this house and their use of all proper means to render it, as far as practicable, inoffensive and not injurious to surrounding and near residents and places of business, those who occupy such could

not rightfully claim the interposition of the Court to prevent its being built. For if they could thus have the aid of the Court, so could residents of any other part of the town, for the same and perhaps stronger reasons, because more thickly settled, as well as contiguous proprietors could prevent the erection elsewhere. The special damage in such case is incidental to what the general interest of the community requires and becomes *damnum absque injuria.* Otherwise no jail could be built within the town, if parties interested as these plaintiffs choose to object. All that can reasonably be required is, that the construction, and management afterwards be such as to occasion as little inconvenience and discomfort to those living near as is consistent with the public purposes to be subserved, and nothing of the kind is suggested in the statement of grievances in the complaint. They are such as would be objected with equal force to prevent any other location of the structure. In the forcible language of the late Chief Justice, in *Hyatt v. Myers,* 73 N. C., 232, quoted upon a somewhat similar application in *Dorsey v. Allen,* 85 N. C., 358: "If a man instead of contenting himself with the quiet and comfort of a country residence choose to live in a town, he must take the inconveniences of noise, dust, flies, rats, smoke, soot, cinders, etc., and he can not complain if the owner of an adjoining lot, by reason of the smoke, soot and cinders, * * * caused in the use and enjoyment of his property, provided the use of it be for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors."

The structure complained of is not merely a public necessity, but is required by the act to be built within (77) the corporate limits of the town, and unless restrained in the act, its location is left to the sound discretion of the commissioners over which the Court has no control, and if it had, the wisdom with which it has been exercised seems to have been fully sustained by the testimony.

While it is conceded that the present action could not be maintained if the selection of the place was within the authority conferred, or if not, aside from the alleged special damage threatened, the commissioners could only be re-

strained from going beyond its limits by a proceeding instituted by the State and its agents for the public, it is contended that, being not only in excess of power but in disregard of the statutory mandate, the erection of the jail where it is proposed to be put, is a tort, attended with positive and direct injury to the plaintiffs, for which the law does afford them the redress demanded in the action. We are thus brought to an examination of the statute to see if its terms are thus mandatory and restrictive.

If the "other necessary buildings" associated with and following the designation of a court-house, as mentioned in both sections 8 and 14, are to be understood in their most comprehensive import, it would require to be crowded upon one lot, the poor-house, house of refuge and a public hospital, should these latter two be deemed necessary, and it is quite manifest this was not within the contemplation of the act, nor were they intended to be built *only* in the town, so unsuitable in the attainment of the beneficial fruits of such structures. Code, sec. 707, subsecs. 17, 21, 22.

The counsel for appellants restricts these words so far as to confine them to such buildings as may be needed, as offices for county officers whose business is more immediately connected with that for which the court-house is built; but insists that the jail designated by name in section 14 must be on the same lot with the court-house, and this by force of the words "to build thereon," that is, on the site for the court-house and necessary buildings, a public jail for said county. In our construction of the act and in furtherance of its manifest intent, the term used, "site," must
(78) be understood in a disjunctive sense and as applying separately to the different county buildings to be constructed, and which must not be outside the town limits. The section should be read as directing the selection of a *situs* or place for the court-house and a site or place, one or more, for the other public buildings embraced in it, as the public convenience may require, and this is left to the judgment of the commissioners. As they could accept and use contiguous lands or land just across the public street, so may they select a more distant lot when demanded by a due regard to the public welfare. This construction is fortified by the

bestowal of all the powers possessed by other county commissioners, not restricted in the act itself. So in section 14 they are required to build a jail on the site selected for that purpose in the town and not necessarily on the court-house lot. No new restraints are here imposed and it only confers *authority* to purchase the site or sites required by section 8, and to erect the houses required for the public use thereon according to their judgment.

The plaintiffs also insist upon their right to preserve the present *status* until a final hearing and adjudication of their case. To this a ready answer is suggested in the necessity of having a jail and the mandate for its construction. Delay would be a dereliction of duty, and to this the Court ought not, by its needless intervention in the controversy, to become a party.

Besides, the supposed injury, at least in its extent, is largely conjectural, as the various opinions expressed in the affidavits show, and, if entitled to relief, it can be obtained when they become facts. But our construction of the sections conferring power removes the objections arising upon the alleged want of it.

If we were at liberty to revise the discretion reposed in the commissioners in selecting the site for the jail, as we are not, the evidence largely preponderates in showing that it has been exercised wisely and in a proper regard to the interests of the property owners and residents of the town.

As we refused in *Dorsey v. Allen, supra,* to arrest the work commenced in the erection of a planing mill (79) and cotton-gin because of its apprehended annoyance and increased danger of fire, upon consideration of public policy, so for stronger reasons must we refuse to arrest the action of the defendants in their discharge of a public enjoined duty.

NO ERROR. Affirmed.

Cited: Greenleaf v. Comrs., 123 N. C., 33.

J. W. LAWRENCE, Admr., v. J. C. HESTER et al.

Contract, Special and Implied—Variance—Pleading—Evidence—Verdict.

1. Where there is a *special* contract there can be none *implied* by law between the same parties in respect to the same subject-matter.
2. A variance between pleadings and proofs is immaterial unless it has actually misled the adversary party. The Code, sec. 269.
3. The objection that the proof offered in support of a cause of action is insufficient to warrant the jury in finding a verdict therein, should be taken at the close of the testimony by asking instructions to that effect, and if such objection is not then taken, but the case is allowed to go to the jury, the court will not disturb the verdict, if there was any evidence tending to support it.

(*Carter v. McNeely*, 23 N. C., 448; *Dula v. Cowles*, 47 N. C., 454, and 52 N. C., 290; *Niblett v. Herring*, 49 N. C., 262; *Ducker v. Cochran*, 92 N. C., 579; *Thigpen v. Leigh*, *ante*, 47; *Greensboro v. Scott*, 84 N. C., 184, cited and approved.)

ACTION tried before *Shepherd, Judge*, at the Spring Term, 1885, of VANCE.

The plaintiff's action is to recover judgment for a debt due his intestate secured by a conveyance of land, and for a foreclosure by sale thereof. The defendants assert a counterclaim against the deceased for $2,000, or more, as due the *feme* defendant for board and services rendered dur-
(80) ing a series of years to the intestate, and for which it was understood and agreed between them he should make provision by his will.

He left no such will, and the only controversy at the trial was as to the existence and validity of the alleged contract. The only issue tendered by the defendant was in this form:

"Were the services, if there were any, performed by defendant or plaintiff's intestate under a contract or mutual understanding and agreement that compensation to the amount of $2,000 was to be provided in the will of the plaintiff's intestate?"

To which the jury responded in the affirmative.

At the close of the evidence the plaintiff tendered the following issues:

"Did the defendant Lucy A. Hester render service to Turner Lawrence under an agreement or mutual understand-

ing that she should be compensated therefor by his will? If so, what was the reasonable value of such service?"

These issues were objected to by defendants, who stated that they relied entirely upon the special contract as alleged.

The Court declined to submit the issues and the plaintiff *excepted.*

There was no prayer for special instructions on either side and no exceptions to the charge. After the verdict the plaintiff moved for a new trial because the verdict was against the weight of the testimony, and also because the Court declined to submit the issue tendered by him. The motion was overruled and the plaintiff *excepted.*

The plaintiff opposed a judgment for defendant:

1. Because no issue was submitted as to the actual value of the services performed.

2. Because the defendant is entitled to only nominal damages.

3. Because there is a variance between the pleading and the issue as submitted to and found by the jury. Because there was no evidence to sustain the verdict.

The Court gave judgment for the defendants, and the plaintiff appealed to the Supreme Court. (81)

Mr. E. C. Smith for the plaintiff.
Mr. D. G. Fowle for the defendants.

SMITH, C. J. (after stating the case). 1. The refused issue was rendered immaterial by the declaration of counsel that no claim was made for the unascertained value of the services and supplies, but that it was based upon a special contract, and the affirmative finding of the jury upon that submitted to them. Where there is a special contract there can be none implied by law. The one when complete excludes the others, and the defendants had the right to ask a recovery upon their ability to prove what they alleged.

"The law presumes a promise," is the language of Mr. Greenleaf in sec. 103 of the 2d volume of his treatise on the Law of Evidence, "only where it does not appear that there is any special agreement between the parties. For if there is a *special contract* which is still open and unrescinded, embracing the *same subject-matter* with the *common counts,* the

plaintiff, though he should fail to prove his case under the special count, will not be permitted to recover upon the common counts." And so have been the adjudications in this State. *Carter v. McNeely,* 23 N. C., 448; *Dula v. Cowles,* 47 N. C., 454, and 52 N. C., 290; *Niblett v. Herring,* 49 N. C., 262; *Ducker v. Cochran,* 92 N. C., 597; *Thigpen v. Leigh, ante* 47.

2. The second exception rests upon an alleged variance between the pleading and the finding of the jury upon the proofs offered of the contracts, the answer averring a mutual understanding between the intestate and *feme* defendant, that adequate compensation should be provided in the former's will, "to the extent of $2,000 at least," while the verdict establishes a fixed and definite sum.

(82) The variance falls directly within the correction and remedial provision contained in section 269 of The Code, which declares that "no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action."

The counterclaim, which is but a cross action, is governed by the same rule. *Greensboro v. Scott,* 84 N. C., 184.

3. The last exception is to the sufficiency of the evidence to warrant the jury in finding that there was a special contract, or in other words, that there is no evidence of it.

The proper mode of taking this objection was, when the testimony was all in, to ask the Judge to charge the jury that there was no evidence of the contract embodied in the issue, and their verdict should be in the negative. This was not done, and the inquiry was left to be made by the jury without instructions, as if there was evidence to be considered. There was no prayer for directions asked by either party, and there were no exceptions to the charge as delivered.

But aside from this omission to make the exception in apt time before the rendition of the response to the issue, we think it would have been made untenable even then. The evidence is contained in the testimony of two witnesses examined by the defendant. In answer to a question put to the witness Gardner, he answered as follows:

"I have heard Turner Lawrence say frequently that he was not a sponger; that he proposed paying his board; that there

was no other place that he could pleasantly live; that he was getting old and had to be cared for by some one; that Mrs. Hester had always been acting a child's part by him and that he proposed to compensate her liberally for her kindness and attention, and that her not requiring him to make regular payments would make no difference except to make the compensation more liberal; that he (Lawrence) would leave her well provided for; that she was certainly casting her bread upon the waters in extending kindnesses to an old, forlorn man; that he (Lawrence) had already commenced to make arrangement to build a house on her lot, said (83) house to cost $2,000; that if anything happened to prevent this that he would leave her $2,000 in his will. I heard him say this several times. I signed his will as a witness, January, 1882. The will was executed by intestate. He (Turner Lawrence) left to Mrs. Hester $2,000 and freed her home lot. He left a granddaughter something. The will was executed in the winter before he died. He died in 1882. I have heard him make remarks like these at other times before this. He (Lawrence) made them frequently in the presence of her husband and the entire family; they were received by them as satisfactory. I heard Mrs. Hester say once, "Of course, uncle, I expect you to compensate me; suppose you were to drop off and leave me unprovided for." He (Lawrence) said, "Never mind, I will arrange that; you shall be paid." I am a sister of defendant, Mrs. Hester; the other witness to the will, Mrs. Hamlet, is the wife of Mrs. Hester's brother. Mrs. Hester's brother wrote the will and he also witnessed it. Mr. Lawrence did not want any one to know about his business. In his will he said in consideration of kindness and attention he wished to remunerate her to the extent of $2,000. The factory was on the same property. In his will there was a provision that there was no debt on the place; she had already paid all except $50. I heard her uncle, Mr. Lawrence, say to her, I only hold this to secure you, and I think it best to do so. John wants to go off and I hold this (mortgage) so as to protect you. Mr. Hamlet was a citizen of Arkansas.

Another witness testified upon the subject as follows:

"Mrs. Hester is my sister-in-law. Mr. Hamlet drew the will, which was signed in the dining room. The will said

that she (Mrs. Hester) was to have the amount of $2,000 for kindness to him. It was declared in the will that there was no indebtedness on the lot. He said several times he (Lawrence) would remember her (Mrs. Hester) at his death for her kindness to him. He (Lawrence) said if she would agree to sell the factory lot that it would relieve her place from indebtedness. When Mr. Lawrence said he in-
(84) tended to provide for her in the will for her services to him, Mrs. Hester assented, and it was understood between them that he was to so provide for her for her services."

Now it must be conceded that the evidence tends rather to indicate a strong sense of obligation for gratuitous services and kind treatment, for which the deceased meant to make some substantial remuneration in the voluntary disposition of his estate after his death, than an admission of legal indebtedness to his relations, and but slender proof of the alleged contract is furnished in the intestate's declarations and acts as testified to. But they furnish some evidence of contract, acquiesced in by the plaintiff's failure to insist upon the absence of such evidence and an instruction to the jury so to find. Of its sufficiency to establish the agreement or understanding the jury alone are competent to determine, and their deductions are not within the supervision and control of this Court.

NO ERROR. Affirmed.

Cited: Chamblee v. Baker, 95 N. C., 101; *Parker v. Morrill,* 98 N. C., 235; *Sugg v. Watson,* 101 N. C., 192; *State v. Kigor,* 115 N. C., 751; *State v. Harriss,* 120 N. C., 578; *Watkins v. Mfg. Co.,* 131 N. C., 539; *Burton v. Mfg. Co.,* 132 N. C., 20; *Tussey v. Owen,* 139 N. C., 462.

UNIVERSITY v. J. W. HARRISON.

Petition to Rehear—Evidence—Affidavit.

1. The rule, stated so frequently in numerous recent cases, in respect to the rehearing of causes, is approved.
2. Where an affidavit, or other writing, is permitted to be given in evidence, every part thereof having reference to the subject-matter must be admitted.

(*Watson v. Dodd*, 72 N. C., 240; *Lockhart v. Bell*, 90 N. C., 499; *Ruffin v. Harrison*, 91 N. C., 76, cited and approved.)

This was a PETITION TO REHEAR the same cause. The facts are stated in the opinion.

Messrs. Fowle, Hinsdale and *T. P. Devereux* for (85) the plaintiff.

Messrs. Flemming, Battle & Mordecai, Lewis & Son and *Pace & Holding* for the defendant.

MERRIMON, J. This is an application on the part of the plaintiff to rehear the case of *University v. Harrison* (90 N. C., 385), decided at the February Term, 1884. That case was argued at great length and very thoroughly. We listened attentively to the able arguments of counsel on both sides, examined carefully the numerous authorities cited, and in addition many not cited, and gave the case much consideration. We are very sure that we understood the case as it appeared in the record, in all its bearings, and decided it correctly. After hearing and considering the protracted argument of counsel in support of the petition to rehear, we are unable to discover any reason why we should disturb the decision made, or modify in any respect the opinion of the Court as delivered by the Chief Justice. *Watson v. Dodd*, 72 N. C., 240; *Lockhart v. Bell*, 90 N. C., 499; *Ruffin v. Harrison*, 91 N. C., 76.

The defendants, who were the appellants, made an application in this Court in connection with the appeal for a new trial, upon the ground of newly discovered evidence. This application was supported by affidavits. The plaintiff resisted the same and supported its opposition by counter affida-

vits. The affidavit of one of the counsel of the defendants was filed, in which, among other things, he stated in substance that before the trial of the action in the Superior Court, he had made diligent search for the heirs of the Micajah Muckelroy, deceased, from whom the plaintiff claimed to derive title to the land in question; but he further stated that such heirs had been discovered by him since the trial, and that one of the counsel of the plaintiff at and before the time of the trial, knew of such heirs and would not make the fact known, but concealed the same, etc.

At the present term, the plaintiff was allowed to amend its petition to rehear, so as to allege that the defendants had admitted in the record in this Court, that diligent search
(86) had been made by them for the heirs referred to, and none could be found. They then in support of this allegation, contended that the affidavit of the counsel of defendants referred to was a part of the record in the appeal, and that his statement to the effect that he had made diligent search for the heirs mentioned and could not discover them, must be treated as an admission of record in this Court by the defendants that there were none such, and that if the Court below erred in its charge to the jury as alleged by the appellants, such admission effectually cured the error complained of.

It is proper to state here that this Court did not act upon this application for a new trial, because it appeared that there was such error as entitled the appellants to a new trial.

This astute contention of the petitioner is without substantial merit and can not be allowed to prevail. If we should hold that the affidavit of counsel referred to became a part of the record in this Court, in the sense contended for, as we do not, it would not help the case of the petitioner. Because the affidavit must be taken as a whole, and according to its true meaning in all its bearings, and as well with regard to the purpose for which it was offered. If it contained an admission, this must be taken with all the qualifications and explanations connected with it. Now, the part of it material here, is to the effect that the counsel had made diligent search and inquiry for the heirs of the deceased person mentioned, before the trial of the action in the Superior Court, without success —that, however, there were heirs at and before that time, as

he has since learned, and was, at the time of making the affidavit, able to prove. This amounts to no more than saying there were heirs at and before the time of the trial, but the appellants were then not able to prove the fact, but they now are. This in no way, that we can see, affected the question before the Court presented by the appeal. It only went to show the fact, immaterial on the appeal, that if there was error, as we decided there was, the appellants would be able on the new trial to prove facts material for their defense.

We, therefore, did not err in failing to take notice of and give the effect contended for to the ground of (87) error so assigned.

We have thus adverted to this alleged ground of error, because it was not taken into consideration when the case was decided by us. There is no error, and the petition to rehear must be dismissed.

NO ERROR. Appeal dismissed.

Cited: Fisher v. Mining Co., 97 N. C., 97; *Comrs. v. Lumber Co.*, 116 N. C., 745; *Weisel v. Cobb*, 122 N. C., 69; *Weathers v. Borders*, 124 N. C., 611.

JNO. S. REESE & CO. v. WILLIS COLE.

Agricultural Advancements—Liens—Registration—Contract.

1. Where the agreement to advance agricultural supplies is confined to a single transaction and to the delivery of articles or money, to be used in making the crop, it is immaterial which act is done first—the delivery of the supplies or the reduction of the agreemnt to writing—if both acts are done at the same time and in execution of the contract.
2. The requirements contained in the proviso to section 1799 of The Code, are for the protection of creditors and others who may have dealings with the debtor.
3. As it has been held that the *registration* of the agreement is not essential to the validity of the lien, as *betwten the parties thereto*, whether a compliance with the other requirements contained in the statute is necessary, *as between the parties; Quœre?*

(*Gay v. Nash*, 78 N. C., 100; *McKay v. Gilliam*, 65 N. C., 130; *Womble v. Leach*, 83 N. C., 84, cited and approved; *Clark v. Farrar*, 74 N. C., 686, and *Patapsco v. Magee*, 86 N. C., 350, distinguished.)

ACTION tried before *Clark, Judge,* at Fall Term, 1885, of JOHNSTON, to enforce a paper-writing purporting to be an agricultural lien, which is in these words, to-wit:

BENTONSVILLE, Johnston Co., N. C., 1 May, 1884.

(88) $225.00.

On or before 1 November next, I promise to pay to John S. Reese & Co., of Baltimore, Md., or order, two hundred and twenty-five dollars for value received in fertilizers delivered to me by L. Richardson, agent for said John S. Reese & Co. It is agreed that payment may be made in cotton, on basis of middling at twelve and a half cents per lb., if paid by 1 November, 1884.

45 Sacks Soluble,
.. Pacific Guano,
.. Sacks Acid Phosphate,

In consideration of the contract made by John S. Reese & Co. to deliver said fertilizers, and of said advances, and as security for this obligation, the maker of this note hereby gives them a lien on all crops raised on lands owned or rented by me during the present year, pursuant to the provisions of the Acts of the Legislature in such cases made and provided; and also agrees to pay all costs and charges incurred in enforcing this lien and collecting the amount due.

Witness my hand and seal, this 1 May, 1884.

WILLIS COLE, (Seal).

Signed in presence of L. RICHARDSON.

The plaintiff sued out a writ of claim and delivery and thereunder seized certain crops belonging to the defendant, and the case coming on for trial, the plaintiff offered to put in evidence the said instrument of writing, which was objected to by the defendant upon the ground that it was neither a mortgage nor a valid agricultural lien; which was overruled by the Court and the defendant excepted. The plaintiff then introduced their agent, L. Richardson, who testified that the fertilizers were delivered and furnished before the execution of the said paper-writing. Whereupon the defendant asked the Court to instruct the jury that the plaintiff could not recover for the property claimed, because the

supplies were furnished before the execution of the written agreement; which was refused by the Court, (89) and the defendant excepted and appealed from the judgment pronounced against him.

The errors alleged are:

1. The admission in evidence, against defendant's exception, the said paper-writing:

2. The instruction to the jury that plaintiffs had the right to recover the property claimed, notwithstanding the fact that the supplies or fertilizers were furnished and delivered before the paper-writing was executed.

Messrs. J. H. Abell and *Reade, Busbee & Busbee* for the plaintiffs.

Messrs. Pou & Massey and *Samuel H. Wilder* for defendant.

SMITH, C. J. The only question before us is as to the legal efficacy of the sealed instrument, executed by the defendant in conferring a right to the property or to the possession of it.

The section of the statute which gives the lien for advances to be used in making the crop, contains the following proviso: *Provided,* an agreement in writing shall be entered into *before any such advance is made,* in which shall be specified the amount to be advanced, or in which a limit shall be fixed, beyond which the advances, if made from time to time during the year, shall not go; which agreement shall be recorded in the office of the register of the county in which the person to whom the advances are made resides, within thirty days after its date. Code, sec. 1799.

Now the prescribed conditions upon which the lien becomes effectual, are the previous reduction of the contract for it to writing, setting out its terms, and registration within thirty days thereafter; these provisions being manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrance upon the crop. And so it has been held that registration is not essential to the validity of the in- (90) strument as between the parties to it. *Gay v. Nash,* 78 N. C., 100.

If registration is not necessary in a controversy between them, which is enjoined in as imperative terms as the committal of the lien contract to writing before advances are made, it would be reasonable to consider such requirements as intended for the protection of acquired rights of others to the property and not as indispensable to the agreement where the parties alone are concerned.

While the statute requires the writing to precede in the order of time the advances made as separate transactions, so that it should not be operative as a security for an existing debt, its construction does not require this when the delivery of the articles or money is to be used in the making the crop; and the agreement is a single transaction between the parties, executed by one in making the advances, and by the other in providing the statutory security for their payment. In such case it is indifferent which act is first done, if both are done at the same time and in execution of their contract and understanding. The purpose is to enable the former to obtain the means of making his crop by creating a lien upon it when made, and the proviso is for the protection of others who may deal with him.

It does not allow this to be done to secure a preexisting debt, but only to provide for the making of the crop through supplies furnished for the purpose. This interpretation fulfills all the useful ends intended in the enactment and is in consonance with its terms.

A similar method of construction was pursued in ascertaining the meaning and giving effect to a section in the act of 11 September, 1861, which declares that "all deeds of trust and mortgages hereafter made and judgments confessed to secure debts shall be void as to creditors," unless providing for the payment *pro rata* of all the debts and liabilities of the maker.

It was held in *McKay v. Gilliam,* 65 N. C., 130, that notwithstanding the broad terms of the act, its purpose was "to take from debtors the right to give preference to some
(91) creditors to the exclusion of others," and its operation was confined to preexisting debts, and did not include a loan contracted at the time of the execution of the deed and secured by it.

The cases cited in the argument are not in conflict with this view.

In *Clark v. Farrar,* 74 N. C., 686, the instrument in form proposed to secure future advances, while in fact it was to secure a debt contracted the previous year. This was declared to be a fraudulent deed, not authorized by the statute, and BYNUM, J., lays down, as the fundamental condition required by the statute, that "the advances must be in money or supplies to the person engaged or about to engage in the cultivation of the soil; after the agreement is made; to be expended in the cultivation of the crop made that year; and the lien must be on the crop of that year made by reason of the advances so made."

The same strictness in interpreting the act is reiterated in *Guano Co. v. Magee,* 86 N. C., 350, and we do not relax the rule when we declare that when the furnishing the supplies and the making the securing instruments are contemporaneous, constituting one transaction of which these acts are parts, it is not material which precedes in *actual time,* for in contemplation of law both are done at one and the same time. This view is suggested in the opinion in *Womble v. Leach,* 83 N. C., 84, as a reasonable construction which accomplishes the substantial purposes intended.

We have some difficulty in understanding the statement of facts. In the defendant's covenant, which undertakes to affix the lien on the crops, the consideration therefor is recited to be the plaintiff's agreement to deliver the fertilizer, and not the value of fertilizers already delivered, an act to be done in the future, and not an act already done, while the testimony of the witness is that they had been furnished when the defendant executed his covenant—but how long before, and whether in fulfilling the parts of a reciprocal contract made at the same time, does not appear.

These discrepancies admit of reconciliation only upon the supposition that the undertakings were con- (92) temporaneous, and while the execution of that of the plaintiff was prior in time to execution of that of the defendant, both were in fulfillment of a common contract as an entirety. We assume this to have been the case upon the meager statement in the record, and if otherwise, the defendant should have made it appear, as it devolves upon an appel-

lant to assign error, in the rulings of which he complains, and the facts upon which the error depends.

We affirm the ruling of the Court, because it does not appear that the sale and delivery of the goods, as an advance, was, in the sense of the statute, not before but coincident with the giving of the statutory security therefor upon the crops.

NO ERROR. Affirmed.

Cited: Woodlief v. Harris, 95 N. C., 213; *Butts v. Screws, Ibid,* 218; *Knight v. Rountree,* 99 N. C., 394; *Farthing v. Carrington,* 116 N. C., 324; *Meekins v. Walker,* 119 N. C., 49; *Nichols v. Speller,* 120 N. C., 79.

HERBERT MURRAY v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Infants—Negligence.

1. The rule of law in regard to the degree of care which an adult must exercise before he can recover damages for injuries resulting from the negligence of another, is different from those in respect to infants of tender years. The former is required to employ that care and attention for his own safety which is ordinarily exercised by persons of intelligence; the latter is held to such care and prudence as is usual among children of his age and capacity.
2. Where the plaintiff, an infant of eight years of age, in disobedience of the commands of his mother and the warnings of defendant's agents and servants, and, unobserved by the engineer, jumped upon a "shifting" engine about to move, took a position where he could not be seen by those in charge and operating the engine, and remained there until becoming alarmed at the speed he attempted to jump off and received severe injuries; *It was held,* that he was not entitled to recover though no whistle was blown or other signal given.

(*Manly v. R. R.,* 74 N. C., 655, cited and approved.)

(93) ACTION by the plaintiff, through his mother as guardian *ad litem* and next friend, against the Richmond & Danville Railroad Company and the North Carolina Railroad Company, for damages for being injured by falling from an engine of the Richmond and Danville Company. There was no evidence offered or verdict asked

against the North Carolina Railroad Company, and a judgment was entered in its favor without objection. It was tried before *Graves, Judge,* and a jury at February Term, 1885, of WAKE.

In April, 1882, the plaintiff, residing with his mother near the depot or station of the defendant company, at the city of Raleigh, and then not quite eight years of age, was seen by the engineer in charge, upon the shifting engine, and made to get off, being told that he could not ride on it. Soon after, watching his opportunity and seeing the engine about to move toward the water-tank, the plaintiff, unobserved by the officer, again got on the engine, placing himself on the plow or "cow-catcher," which goes in front, in such a position that he could not be seen by the engineer, when standing and operating the machinery, until moving it attained a speed of four miles an hour, he became alarmed and attempted to jump off. In so doing his leg was caught between the bars of the plow, and he sustained the injury for which, in this action, he demands compensation in damages.

He was, however, seen in his perilous position by a colored man, who directed him to get off, to which he made no answer, but, as he himself described it, "wuggled his back at him." The plaintiff had before been warned by his mother, and on this very morning been forbidden to go there. The engine was used in shifting cars at the station and not in general transportation. No whistle was blown, or other signal given of the starting, and this, owing to the frequency of its movements in one direction and another, was not deemed necessary for the protection of persons who were about. The engineer testified that when standing at the place where he was and ought to be for the management of the engine and in controlling its action, he could not see the plaintiff and did not see him until in his attempt to get off he (94) was caught between the bars, and it was too late to prevent the injury. He could, however, if in his seat, and looking out through the window of his cab, have discovered the plaintiff. His mother, as shown by an attending physician, had before expressed her apprehensions that her son would be killed or hurt on the road, but did not anticipate such an accident as befell him.

These are the general facts developed in the testimony and

attending the accident upon which negligence is imputed to the servants of the company, and the claim for compensatory damages rests.

Mr. D. G. Fowle for the plaintiff.

Messrs. Reade, Busbee & Busbee and *T. R. Purnell* for the defendant.

SMITH, C. J., (after stating the case as above). There can be no question that an adult, thus exposing himself to peril, would be held to have brought the injury upon himself by his own act, and if his own negligence and want of care for his own safety were not the direct and immediate cause of the injury, they were so contributory to it as to take away any just ground of complaint against the company. The plaintiff's case is, however, distinguished by his counsel upon the ground that his extreme youth required much greater vigilance and strict attention from the company for his protection than if of more mature years. While this is true it does not dispense with the exercise of such regard for his own safety, as may be expected in one of such age, and certainly does not excuse the reckless disregard of repeated warnings given the plaintiff, and his persistent purpose to ride on the engine and hazard the consequences.

The principle to be extracted from the most approved adjudications in the United States is thus announced in a recent work: An infant, so far as he is personally concerned should be held to such a degree of care only, as is
(95) usual among children of his age; though if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury, the latter can not recover damages. Shear. and Red. Negligence, sec. 49.

"The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years," remarks Mr. Justice *Hunt,* delivering the opinion in *R. R. v. Gladmon,* 15 Wall., 401, "is quite different. By the adult must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and can not be visited upon another. Of an

infant of tender years, less discretion is required, and the degree depends upon his age and knowledge."

The same rule is repeated in *R. R. v. Stout,* 17 Wall., 657; Whart. Neg., 314.

"All that is necessary to give a right of action to the plaintiff," is the language of the Supreme Court of Missouri, in a case where a child ten years of age was killed, "for an injury inflicted by the negligence of the defendant is that he should have exercised care and prudence equal to his capacity." *Roland v. R. R.,* 36 Mo., 484.

A child of six years was permitted by his parents to use the roadway for a playground, and he would sometimes unattended lie down upon the track. He was seen in this condition by the engineer of an approaching train, who, however, could not tell whether the object seen was a bush or a human being, until the engine was so near that every effort to stop it and avoid the injury was unavailing. It was held that no recovery could be had for the injury. *Meek v. R. R.,* 52 Cal., 602. In *Conley v. R. R.,* 4 Am. and Eng. R. R. Cases, 533, the action was brought by an infant of seven years, for an injury attributed to the negligence of the defendant company, on the trial of which it appeared that he, with other boys but little older than himself, was playing upon a car loaded with sand, which was in motion to be put (96) on a switch when he and they were ordered to get off. In doing this, the plaintiff suffered the injury for which damages were sought, but he was not permitted to recover. The ruling rests upon the opinion that there was no hazard in leaving the moving car from which care on his part would not have fully protected him. While we do not intend to express our concurrence in the ruling that the order given under such circumstances and without stopping the car showed no negligence involving liability for the consequences to one so young, we refer to the case to show that reasonable vigilance and care, such as one of the plaintiff's age is expected to give for his own safety, is required to sustain a claim for damage.

In harmony with the doctrines announced in the Supreme Court of the United States is this ruling by this court in *Manly v. R. R.,* 74 N. C., 655, wherein BYNUM, Judge, referring to what is said in *R. R. v. Gladmon, ante,* remarks:

"If by the proposition of the counsel of the plaintiff that if

there was negligence on the part of the children" (one of whom had been killed by a passing train while asleep on the track), "it is not imputable to the parent who is the plaintiff, is meant that the plaintiff is entitled to recover, notwithstanding any degree of negligence on the part of the children, we can not assent to the proposition. It has no foundation in reason and would be disastrous to commercial life."

In the present case, the plaintiff, willfully, after being ordered off, again secreted himself in such a place on the plow of the engine, as it was about to start, where he could not be seen—disregarding the admonition of the colored man who saw his danger—and then alarmed, made an effort to spring to the ground. The accident was the result of his own rash conduct, and the injury he brought upon himself.

Wherein can neglect be imputed to the company or its agents? Was it in not sounding the whistle?

(97) The plaintiff did not need the warning. He knew the engine was about to move, and the signal for starting was wholly needless to him, as he already knew what that would have indicated. The omission was in no sense the cause of his misfortune or contributory to it. The engineer was at the post of duty, and the plaintiff had occupied a place so that he should not be again ordered off and lose his ride, and at last he perhaps would have escaped if he had remained where he was and not rashly attempted to get off. We do not discover any evidence of negligence in the undisputed facts of the case, and we think the defendant was entitled to an instruction that upon them no negligence in the company was shown, and that the plaintiff could not recover.

ERROR. *Venire de novo.*

Cited: Walker v. Reidsville, 96 N. C., 385; *Haynes v. Gas Co.,* 114 N. C., 209; *Bottoms v. R. R., Ibid,* 712.

JOHN MUNDEN v. MATTHEW CASEY, JR.

Discretion of Judge—New Trial.

1. The exercise of the discretion conferred upon the Judge who presided at the trial, to grant or refuse a new trial for newly discovered evidence, is not the subject of review on appeal.
2. The Supreme Court will not entertain a motion for new trial for newly discovered evidence which is merely cumulative and obtained since the appeal.

(*Carson v. Dellinger*, 90 N. C., 226; *Sanderson v. Daily*, 83 N. C., 67, and *Mabry v. Henry, Ibid.*, 298, cited and approved.)

ACTION tried before *MacRae, Judge,* at Spring Term, 1885, of JOHNSTON.

The complaint charges the defendant with uttering certain malicious and defamatory words, specifically set out in several articles, imputing to the plaintiff the taking a false oath in a judicial trial, wherein he was examined (98) and testified as a witness. The answer admits the speaking the words, believing them to be true, but denies that they were spoken maliciously, or had injuriously affected the plaintiff's reputation. Upon issues submitted to the jury and considered under instructions, to which no exception was taken, they found in favor of the plaintiff, and assessed his damages at one thousand dollars. After verdict, and during the term, defendant's counsel asked for a new trial upon the ground of newly discovered evidence of the unsoundness of the mind of the defendant, and read several affidavits in which such opinion was expressed, in support of the application, the information of his mental condition not being received until after the trial. Some of the affiants express the belief that the defendant, when in a state of excitement, was not responsible for his acts.

The Court declined to interfere with the verdict and the defendant appealed. In this court he proposes to offer a further affidavit of additional testimony which has come to the knowledge of counsel since making up of the appeal, of the same general import as the others.

Messrs. Reade, Busbee & Busbee for the plaintiff.

Messrs. Pou & Massey and *Geo. V. Strong* for the defendants.

SMITH, C. J., (after stating the case as above). It is settled by the ruling in *Carson v. Dellinger,* 90 N. C., 226, in which case the subject underwent a careful and full consideration, that the refusal to grant a new trial upon the ground of evidence since discovered and made known, or the granting of it by the Judge, rested in his sound discretion and was not subject to review.

The authorities therein discussed and the principles deduced, from which we have no disposition to depart, are decisive of the present appeal.

(99) Nor can we entertain the same motion, made originally in this Court, because additional evidence, merely cumulative, has been obtained since the appeal. This might lead to the anomalous result of a judgment here in direct conflict with an unreversed judgment in the Superior Court.

The defendant should have produced his evidence upon his motion in that Court, and must abide the result of his application there.

The matter is *res judicata,* and can not be reopened here. *Sanderson v. Daily,* 38 N. C., 67; *Mabry v. Henry, Ibid,* 298.

We do not comment on the singular fact that the client's mental unsoundness was not detected in his communications with counsel, nor in his giving his testimony on the trial, since this was for the consideration of the trying Judge, whose conclusions are final.

NO ERROR. Affirmed.

Cited: Redmond v. Stepp, 100 N. C., 220; *Estes v. Jackson,* 111 N. C., 150; *Flowers v. Alford, Ibid,* 250; *Black v. Black; Ibid,* 303.

MARY L. BRANTON v. CALVIN O'BRIANT.

Facts Found by the Court—Depositions—Judge's Charge—Landlord and Tenant—Notice to Quit.

1. The finding of the facts by the Judge, when he is authorized by law or the consent of parties to pass upon them, is as conclusive as the verdict of a jury upon issues submitted, *if there be evidence;* if there be *no evidence*, it is an error in law, open to correction, in either to find them.
2. The finding by the trial Judge that a witness, whose deposition is offered, was not within the State, there being some evidence of these facts, will not be reviewed in the Supreme Court. The Code, secs. 1357, 1358.
3. The omission of the court to give a charge, to which a party would have been entitled, is not error, unless the same was requested in apt time and refused. The Code, sec. 412.
4. It was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over for several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days notice to quit.

(*State v. Norton*, 60 N. C., 296; *Flynt v. Bodenhamer*, 80 N. C., 205; *State v. Secrest, Ibid.*, 450; *State v. Sanders*, 84 N. C., 728; *State v. Efler*, 85 N. C., 585; *State v. Burgwyn*, 87 N. C., 572; *Cardwell v. Cardwell*, 64 N. C., 621; *Bushe v. Turner*, 85 N. C., 500; *State v. O'Neal* 29 N. C., 251; *Harrison v. Chappell*, 84 N. C., 258; *Tayloe v. Steamboat Co.*, 88 N. C., 15; *Frye v. Currie*, 91 N. C., 436; *Bynum v. Bynum*, 33 N. C., 632; *Burton v. R. R.*, 82 N. C., 504; *Pierce v. Alspaugh*, 83 N. C., 258, cited and approved.)

ACTION to recover damages for an assault, alleged (100) to have been committed on the plaintiff at her residence in Durham, and was tried before *Shepherd, Judge,* at Spring Term, 1885, of ORANGE.

The defendant denied the charge and averred that he, owning the house, had leased it to the plaintiff from month to month for the preceding ten months; that the tenancy had been put an end to by her failure for four months to pay the rent and his giving the notice required by law to surrender the premises; that he had leased the premises to a new tenant, and was there to put him in possession; and that he used no more force than necessary to protect his own person from an angry and violent attack, made on him by the plaintiff, and in the exercise of his proprietary rights. Upon issues sub-

mitted to the jury as to the assault and damages sustained, the plaintiff testified that she had occupied the premises at a monthly rent of five dollars from 1 January, 1881, to the first day of November after, when the assault was made, and had paid the rent up to the preceding month, and had received no notice to quit; that a short time before, one of her children informed her that the defendant had been at the house and wanted it, in consequence of which she had rented another and intended to move into it on the day next after the assault was made.

The testimony of the plaintiff and of the defendant, as to the assault and attending circumstances, essentially differed, though the statement of each had corroborative support. It is not needful to set it out in order to present the exceptions, since the jury passed upon it and rendered a verdict for the plaintiff.

In rebuttal of the evidence offered by the defend-
(101) ant, the plaintiff proposed to read the deposition of Lula Williams, taken on 1 July, 1882, at Durham, to which defendant objected, "because it did not appear that the witness was not within seventy-five miles of the Court," as required by The Code, sec. 1308, par. 9, in order to its being read. Upon the question of competency, the plaintiff swore in substance, that the witness had lived in Durham, and when last seen by her, the witness said she was going to Virginia, and did not leave and had never returned. Subpœnas to the sheriffs of Durham and Person for the witness were produced, and both of which were returned that she was not to be found in their counties—the sheriff of the former adding, "her brother says she is in Virginia," in his return made within a week before the trial.

The only evidence offered by defendant to support his objection is contained in an affidavit of the plaintiff, made at a former term, to obtain a continuance, so much of which as has any bearing upon the matter before the Court, and was relied on by the defendant, is as follows:

Mary L. Branton, the plaintiff in the above entitled action, being duly sworn, says: "she can not safely go to trial in the above-entitled action, because of the absence of Miss Lula Williams, a material witness for her; that a subpœna was duly served on Miss Williams on 1 April, 1882; that on

22 March, 1883, she caused another subpœna to issue to the sheriff of Durham County, the former home of the witness, which subpœna was returned with the endorsement: 'Served on all but Miss Lula Williams, who is not to be found in my county; her father, C. H. Williams, says she is in the State of Virginia,' and signed by the sheriff of said county; that prior to 20 June, 1882, learning from Miss Williams that she was going shortly to reside in the State of Virginia, she caused her deposition to be taken, to be used in this action, on 1 July, 1882; that she is now informed since coming to the town of Hillsboro to attend this term of the Superior Court, that Miss Williams is probably within seventy-five miles of the Court, and in the county of Person; (102) that she did not know or have reason to believe that Miss Williams was within seventy-five miles of said Court, till so informed this day after coming in said town; that said deposition was read at the trial of this action at the last term of this Court; that she has had no opportunity to issue a subpœna to Person County for said witness; that said witness is not absent with her procurement or counsel."

Upon this evidence, the Court found as a fact that the witness was not in the State, and admitted the deposition, to which the defendant excepted.

The Court, in response to an instruction prayed for on the part of the plaintiff, charged the jury that if plaintiff rented the house at five dollars per month, and had held over for several months, paying the same rent without any new agreement, that she would be a tenant from month to month, and would be entitled to fourteen days' notice to quit; that if such was the case, and such notice was not given, the defendant could not take possession and eject the plaintiff or her property by force and violence, she being present and forbidding the same; and if defendant went into the adjoining room and was about to throw plaintiff's trunk out, and that she did nothing more than warn him not to do so, and that thereupon defendant shoved and kicked her, so that she fell out of the door, that they should find the first issue in favor of the plaintiff. But that if the defendant entered peaceably, went into the adjoining room and invited Cash to bring his things in, and that Cash declined to do so, and that thereupon the plaintiff assaulted him, that the defendant would have a right to

use sufficient force to protect himself; and that if he used no more force than was necessary to protect himself, the first issue should be found in his favor. But that if he used force for the purpose of protecting himself against her assault, and used more than was necessary, then the jury should find the issue in favor of the plaintiff.

No instructions were asked for by the defendant.

(103) There was a verdict for the plaintiff on both issues, and the defendant moved for a new trial on the following grounds:

1. Because the Court improperly admitted the deposition of Lula Williams.

2. Because the Court should not have charged the jury in reference to the tenancy, without also stating that the plaintiff was a tenant by sufferance, and that the defendant had a right to the possession of the house.

3. Because the Court should not have given the charge in reference to excessive force on the part of defendant without stating that if defendant entered peaceably into the house, and plaintiff made an assault upon him, the defendant had a right to use such force as was necessary to protect his own person, and also to eject the plaintiff from the house, and that unless the defendant was guilty of excessive force, he would not be liable.

The motion for a new trial was overruled.

There was a judgment for plaintiff, and defendant appealed.

Mr. W. W. Fuller for the plaintiff.
Messrs. Ruffin & Graham for the defendant.

SMITH, C. J., (after stating the case). The application for a new trial upon any of the grounds assigned, was properly denied:

1. The exception to the admission of the deposition is untenable, since the finding of the facts by the Court, in cases where the Judge is authorized by law or consent of parties to pass upon them, is as conclusive as when found by a jury upon issues submitted to them, *if there be evidence;* when there is none, it is alike an error in law, in either to find

them, open to correction. So it has been repeatedly ruled in past adjudications, referred to by appellee's counsel.

Thus the Court has been called on to ascertain and determine, whether a witness was of negro blood, within the prohibited degrees, when in certain cases this disqualification existed. *State v. Norton,* 60 N. C., 296. (104)

Whether, as an expert, he was competent to testify. *Flynt v. Bodenhamer,* 80 N. C., 205; *State v. Secrest, Ibid,* 450.

Whether confessions of one accused of crime proceed from undue influence, acting upon his hopes or fears; *State v. Sanders,* 84 N. C., 728; *State v. Efler,* 85 N. C., 585; *State v. Burgwyn,* 87 N. C., 572, and numerous other cases.

And whenever the finding of facts devolves upon the Judge, by law or by consent, substituted for the jury; *Cardwell v. Cardwell,* 64 N. C., 621; *Burke v. Turner,* 85 N. C., 500.

2. If instructions were desired, they should have been asked before the rendition of the verdict, and in strictness, before the retirement of the jury. One can not be allowed to remain silent, speculating upon the result, and when it is adverse, complain that the instructions were not given. Proceedings in court must be controlled by rules prescribed, and tending to secure fair trials and prevent surprise. An omission in the charge delivered is the fault of counsel, not a reviewable error in the trying Judge. This is too well settled to require comment, alike under the old and new practice. *State v. O'Neal,* 29 N. C., 251; *Harrison v. Chappell,* 84 N. C., 258; *Tayloe v. Steamboat Co.,* 88 N. C., 15; *Fry v. Currie,* 91 N. C., 436.

In the last cited case, the Court, quoting and construing sec. 412, par. 3, of The Code in its present form, thus speaks: "It is obvious that an omission to give a charge, to which a party would have been entitled, will not be a reviewable error, *unless requested and refused.* And it is equally manifest that the expression "in his instructions generally," is meant to embrace such instructions as involve an erroneous statement of the law. When the Judge undertakes to lay down the law, he must lay it down correctly, that is, *the legal proposition must be in itself correct.* The enactment is but the affirmation of previous rulings. *Bynum v. Bynum,* 33

N. C., 632; *Burton v. R. R.*, 82 N. C., 504; *Pierce v. Alspaugh*, 83 N. C., 258.

No error is pointed out in the charge, and we dis-
(105) cover none. The renting was from month to month, as the defendant in his answer admits, and had subsisted since the beginning of the year, and could be legally terminated only by a preceding notice of fourteen days. The Code, sec. 1750. This is not shown to have been given before the defendant's entry upon the premises in the assertion of his proprietary right, and consequently it was unlawful. Force employed in expelling the plaintiff under such circumstances finds no legal justification in the defendant's ownership of the property. There is no error, and the judgment is affirmed.

NO ERROR. Affirmed.

MERRIMON, J., did not sit.

Cited: Jones v. Call, post, 179; *King v. Blackwell,* 96 N. C., 326; *State v. Potts,* 100 N. C., 461; *State v. Hinson,* 103 N. C., 377; *McKinnon v. Morrison,* 104 N. C., 364; *Blackburn v. Fair,* 109 N. C., 465; *Simmons v. Jarman,* 122 N. C., 198; *Matthews v. Fry,* 143 N. C., 385.

W. C. RENCHER v. A. L. ANDERSON.

Constitution—Supreme Court—Rules—Printing Records—Appeal.

1. The Supreme Court is established by and derives its jurisdiction from the Constitution, and in these respects, as well as that of its methods of procedure, it is not subject to legislative control. Constitution, Art. IV, secs. 8 and 12.
2. The enforcement of paragraph 6 and 7, section 11, of Rule 2, in relation to the printing of records, is necessary to the administration of justice.
3. Where the appellant does not appeal *in forma pauperis* (sec. 553, The Code,) the rule requiring the record to be printed will not be relaxed upon his affidavit that he is unable to raise the money necessary to print.

MOTION to redocket an appeal at this Term.
The facts are stated in the opinion.

Mr. A. W. Graham for plaintiff.
Messrs. Ruffin & Graham for defendant.

MERRIMON, J. When this appeal was called for (106) argument at this present term the appellee moved to dismiss it upon the ground that the record had not been printed as required by Rule 2, sec. 11, pars. 6 and 7. It appeared that the record had not been printed, and the motion was allowed.

On a subsequent day, the counsel for the appellant, after notice, moved, upon affidavit, to reinstate the appeal on the docket, and assigned as cause for the motion, that the appellant was, because of his extreme poverty, "unable to raise the sum required for printing the record by the Rules of this Court."

The parts of the Rule cited above, material here, provide as follows: "Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned in the record in each civil action shall be printed. * * *

"If the record on appeal shall not be printed, as required by this and the next preceding paragraph, at the time it shall be called in its order for argument, the appeal shall, on the motion of the appellee, be dismissed; but the Court may, after five days' notice, at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals, *provided nevertheless,* that this and the next preceding paragraph shall not apply to appeals in criminal actions, or appeals *in forma pauperis.*"

In view of the greatly increased and constantly increasing number of cases that come into this Court, and the consequent increased labor of the Court, we have deemed it necessary to establish the Rule thus requiring certain parts of the record in an appeal to be printed. We have found it to be a wholesome one in very many respects. It promotes greatly the administration of public justice in this Court. It helps greatly to an intelligent understanding and the determination

of the appeal. It contributes materially to the convenience and lessens the labors of the Court and counsel. It saves time and expedites the decision of causes. The cost to litigants is trifling, and their interests as individuals are subserved. Of this there can be no reasonable question.
(107) The Rule is important alike to litigants and the public, and ought to be upheld and adhered to.

The power of the Court to establish this Rule seems not to be questioned. Indeed, it could not be successfully. This Court has all the power inherent in courts to regulate the practical methods of conducting their business and hearing cases, after they come within its jurisdiction and control. It and its jurisdiction are established by the Constitution—it has all the powers that by general principles of law appertain to such a court. While the Legislature has the power to allot and distribute that portion of judicial power and jurisdiction which does not belong to this Court, among the other courts prescribed by the Constitution, or which may be established by law, and to provide a system of appeals, and regulate the methods of proceeding in the exercise of their powers, so far as this *may* be done without conflict with the provisions of the Constitution, it has no such power as to this Court. It will be observed that this Court is expressly omitted from the power so conferred, and such omission was obviously intended to aid in upholding the independence of the Judicial Department as a coordinate department or branch of the government. Const., Art. IV, secs. 8 and 12.

It seems to us that the Rule under consideration is very reasonable in its requirements. It expressly reserves the right to an appellant, in case his appeal is dismissed for the cause mentioned, to have it reinstated upon the docket for good cause shown, and it provides further, that it shall not apply to appeals in criminal actions, or where the appellant is allowed to appeal *in forma pauperis.*

The appellant in this case does not appeal as a pauper. He might have done so if he were too indigent to pay the costs. As he did not, there is no just reason why he should not stand upon the same footing with the appellants who are required to pay costs upon appeal. He does not ask to have the case reinstated and be allowed to print the record as required by the Rule—he simply suggests that he is unable to

raise the sum of money required to pay for the print- (108) ing. This does not bring his case within the saving provisions of the Rule. Obviously no good cause for the motion is shown; it must therefore be denied.

MOTION DENIED.

Cited: *Barnes v. Easton,* 98 N. C., 119; *Walker v. Scott,* 102 N. C., 490; *Horton v. Green,* 104 N. C., 403; *Edwards v. Henderson,* 109 N. C., 84; *Turner v. Tate,* 112 N. C., 457; *Brinkley v. Smith,* 130 N. C., 225; *Calvert v. Carstarphen,* 133 N. C., 27.

WALTER M. OAKLEY v. MALISSA ANDERSON, et. al.

Processioning—Arbitrators—Award—Costs.

Where a processioner and five freeholders were proceeding to establish disputed lines, under sec. 1928 of The Code, when the parties agreed that the freeholders be constituted arbitrators to settle the dispute in all things, their award to be final, and entered as the judgment of the court, and *three* of the freeholders signed and filed a paper dividing the disputed lands, and the costs between the parties; *It was held,* 1. This action could not be upheld as a report of freeholders under the Processioning Act, as it did not appear that the freeholders were sworn, and did not contain the boundaries of the lands, the names of the claimants, and was wanting in other essential requirements under the statute. 2. It could not be enforced as an award, only three of the arbitrators having concurred in it. 3. Where a reference is made to several persons, the agreement of all is necessary to an award, unless it is expressly agreed that a less number may make it. 4. Arbitrators have an implied authority to determine the question of the costs of causes submitted to them.

(*Norfleet v. Southall,* 7 N. C., 189; *Mackey v. Neill,* 53 N. C., 214.)

ACTION heard upon exceptions by *Gilmer, Judge,* at August Term, 1885, of PERSON.

The facts are fully stated in the opinion.

Messrs. Graham & Ruffin for the plaintiff.

No counsel for the defendants.

ASHE, J. The action was commenced under the "Processioners' Act." The Code, Vol. 1, ch. 48.

The processioner went upon the lands on 16 July,
(109) 1885, and being forbidden by the defendant Anderson to proceed further, made his report to the clerk. A jury was then summoned by the sheriff, under a proper order, consisting of five freeholders, viz: B. A. Thaxton, C. C. Cozart, C. C. Townsend, R. A. Stanford and A. S. Moore, all of whom met upon the lands in dispute, with C. A. Whitfield as surveyor, on 6 August, 1885, when the parties entered into the following contract, viz: It is agreed by the parties to this action that the jury be constituted arbitrators, and, as such, they settle the dispute in all things, and their award to be final and a judgment of the Court in the cause, this 6 August, 1885, upon a penalty of five hundred dollars for failure on the part of either one who may refuse to abide thereby.

On the same day the following paper-writing was filed as the award:

We find as our award in this cause, that the lands between the disputed lines be divided into equal parts, giving plaintiff one-half thereof and defendant one-half thereof, by a line running half-way between the two disputed lines, south 88½° east, to the creek; and that plaintiff pay one-half the costs and the defendant the other half the costs, to be taxed by the clerk.

B. A. THAXTON,
R. A. STANFORD,
C. C. COZART.

To which award the appellant filed exceptions, and insisted:

1st. That said submission was not made under a proper order of the Court, and therefore no judgment can be entered thereon.

2d. That said submission was made to five persons and that only three of said persons have signed the award, and for that reason no judgment can be entered upon said award.

The clerk overruled the exceptions and confirmed the report of the jury as arbitrators, from which ruling of the clerk the defendants appealed to the Judge of the Superior
(110) Court, who, at the August Term of the Superior Court for the county of Person affirmed the judgment

of the clerk, and from that judgment the defendants appealed to this Court.

The plaintiff contends that the report of the three freeholders was a compliance with sec. 1928 of The Code, and their report was made by them as freeholders appointed to procession the land in controversy under that section.

The defendants on the other hand insist that it was not a report of freeholders under that section, but a submission by agreement of the parties to the five persons named as arbitrators, and the report was the award made by them under the submission, and this difference, in their contentions, presents the first question for our consideration.

We are of opinion that it can not be upheld as a report of freeholders under the processioning law, for the one reason, if no other that they were not sworn. But besides, the law, sec. 1927, requires that the report shall contain the claimant's name, the quantity of acres, the courses, length and course of each line, which shall be accompanied by a plat. The return of the freeholders to this Court was wanting in all these requirements. It does not pretend to give the boundaries of the land of the petitioner, and that was the very object of the law, but only to establish a line between the lands of the disputants, and give each the land on his side up to that line, and then it undertakes to decide how the costs should be paid, which was no part of the duty of the freeholders in the processioning act.

But the report does contain many of the characteristics of an award of arbitrators. In the first place, when the five persons summoned by the sheriff met on the land on 6 August, 1885, before they were sworn to act as freeholders, for the record does not show that they were ever sworn, the parties entered into a contract by which it was agreed "that the jury" (that is the five persons summoned as freeholders) "be *constituted* arbitrators, and as such, they settle the dispute in all things, and their *award* to be final, and a judgment of the Court in the cause, upon a penalty of (111) five hundred dollars for the failure of either one who may refuse to abide thereby."

It is expressly agreed that the five persons named, without any oath being administered to them, should be constituted

arbitrators, and they are not only to establish disputed lines, but *settle the dispute in all things.* That is within the power of arbitrators, but never of *freeholders,* under the law of procession. And then the report of these doings is called an *award,* it was agreed that it shall be the judgment of the Court, the parties evidently supposing that such an award might be made a rule of court. And then a penalty is fixed, which is to be incurred by the party who should fail to abide by the award. This is often resorted to in submissions to arbitration to secure a compliance with their awards, but such a thing is unheard of in the report of freeholders under the procession law. And lastly, the three persons who undertook to act as the arbitrators, in their award, adjusted the costs between the parties. Arbitrators have an implied authority to adjudicate concerning the costs of the cause—Morse Arbitration and Award, 623; Watson Arbitration and Award, 98. But the freeholders have nothing to do with the question of costs, and the very fact that they should have awarded the payment of the costs, shows that they believed they were acting as arbitrators under the submission of the parties, and not as freeholders, acting with the processioner. They themselves called it their *award.* They say, "we find as our award in this cause," etc. Our opinion is the freeholders acted as arbitrators, and the paper-writing filed by them with the clerk, was their *award.*

This brings us to another question: as an award of arbitrators, was it such, as a judgment of the Court might be rendered thereon? We think it was not, for the reasons set out in the two exceptions taken by the defendants. If the second exception should be sustained, it renders it unnecessary to consider the first, for if the award was void, of course no judgment could be rendered thereon.

(112) The submission in this case was to five persons as arbitrators, and only three concurred in making the award. In *Norfleet v. Southall,* 7 N. C., 189, it was held that when a reference is made to several persons the concurrence of all is necessary unless it is expressly agreed that a less number make the award; and to the same effect is *Mackey v. Neill,* 53 N. C., 214. And these decisions are by

no means affected by the provisions of sub-div. 2, sec. 3768 of The Code, for that section has reference only to the construction of statutes and has no application to the private agreements of parties, such as the submissions to arbitrators and the like.

Our opinion is, there is error, and that both the exceptions taken by the defendants should here be sustained. The judgment of the Superior Court is therefore overruled.

ERROR. Reversed.

JASPER HICKS et al. v. H. S. GOOCH et al.

Fragmentary Appeals—Issues—Trial.

1. The trial of an action should embrace and determine all the matters at issue, so that a *final* judgment may be entered and any errors committed may be corrected upon one appeal. "Fragmentary appeals" will not be tolerated.
2. *Therefore*, in an action to recover land with damages for its detention where the issue as to the title and right to possession was tried, but the issue as to damages was reserved to be afterwards tried if it should be adjudged that the plaintiff was entitled to recover; *It was held*, that the Supreme Court would not entertain an appeal for reviewing alleged errors on the trial of the issue submitted.

(*Hines v. Hines*, 84 N. C., 122; *Commissioners v. Satchwell*, 88 N. C., 1; *Lutz v. Cline*, 89 N. C., 186; *Jones v. Call, Ibid.*, 188; *Grant v. Reese*, 90 N. C., 3, and *Arrington v. Arrington*, 91 N. C., 301, cited and approved.)

ACTION, one of the issues of which was tried before *Shepherd, Judge,* at Spring Term, 1885, GRANVILLE. (113)

The facts are stated sufficiently in the opinion.

Messrs. Batchelor & Devereux and *Armistead Jones* for the plaintiff.

Mr. John W. Hayes for the defendant.

SMITH, C. J. This action is brought upon a claim of title to an undivided moiety of the lands in the complaint

mentioned, with a demand for a large sum as damages for the withholding of possession by the defendants. The plaintiffs' title is controverted by the defendants, who allege themselves to be owners in fee of the property. At Spring Term, 1885, of the Superior Court of Granville, an amended complaint was filed, in which is a supplemental demand for an account of the rents and profits, followed by an entry upon the record in these terms:

"And thereupon an issue is made up by and under the direction of the Court, to be submitted to the jury, it being agreed between the parties that the question as to the amount of damages and mesne profits to which the plaintiffs would be entitled, if the issue should be found in their favor, should be reserved and tried hereafter, which said issue is as follows, to-wit:

"Are the plaintiffs the owners and entitled to the possession of one undivided half of the land in the amended complaint mentioned and described?"

To this inquiry the jury, under the instructions of the Court, returned an affirmative response, and, after a motion for a new trial made and denied, it was adjudged "that the plaintiffs recover of the defendants one undivided half of the tract of land described by metes and bounds in plaintiffs' amended complaint, and that a writ of possession issue," etc., with this concluding sentence: "It is further ordered by the Court that the amount of damages and mesne profits, to which the plaintiffs are entitled, be submitted to
(114) a jury for trial at the next term of this Court, unless the parties hereto shall otherwise agree."

In this status of the case, with one material issue passed upon by the jury, and the other reserved for trial at the next term, and so far as the record shows, with no adjustment of the claim for damages and profits between the parties, the appeal is taken to this Court for a review of the rulings of the Court upon the one issue tried. We had supposed the rule too well settled and understood by the profession from repeated adjudications, extending as far back as January Term, 1881, when *Hines v. Hines,* 84 N. C., 122, was decided, in which we refused to recognize what is there properly termed a fragmentary appeal, to require

its enforcement now. In that case the counsel undertook to separate a question of law from the other matters in controversy, leaving them to be tried and disposed of afterwards, and have it passed upon in this Court after a decision by the Court below; and in dismissing the appeal, ASHE, J., speaking for the Court, says: "The law involved is, by a *pro forma* judgment sent to this court, while the facts and merits of the case are retained in the Court below to await the opinion of this Court upon the question of law. Such a proceeding is an innovation upon the practice of the Court; and to entertain the appeal would be establishing a bad precedent to which this Court can not give its sanction."

The general principle is, that when a trial is entered upon, it should embrace and determine the whole subject-matter in controversy, so that a final judgment may be entered, any errors committed in its progress being open to revision and correction in one appeal, while the Court could not tolerate a succession of appeals upon separate and fragmentary parts. The ruling has been frequently since recognized and acted on. We refer to but a few of them, the most recent: *Commissioners v. Satchwell,* 88 N. C., 1; *Lutz v. Cline,* 89 N. C., 186; *Jones v. Call, Ibid.,* 188; *Grant v. Reese,* 90 N. C., 3; *Arrington v. Arrington,* 91 N. C., 301.

The practice thus established, upon its intrinsic merits, and to avoid useless and prolonged litigation, must be upheld.

The appeal is dismissed, and the parties left to proceed with the unfinished cause in the Superior (115) Court as if uninterrupted by an attempted appeal.

DISMISSED.

Cited: Welch v. Kinsland, post, 282; *Emery v. Hardee,* 94 N. C., 792; *Leak v. Covington,* 95 N. C., 195; *Blackwell v. McCaine,* 105 N. C., 463; *Hilliard v. Oram,* 106 N. C., 467; *Emry v. Parker,* 111 N. C., 267; *Myers v. Stafford,* 114 N. C., 233; *Rogerson v. Lumber Co.,* 136 N. C., 270.

C. W. OGBURN, Admr., v. N. H. D. WILSON, Guardian, et al.

Deed, Construction of—Creditors—Guardian and Ward—Preference—Subrogation.

W was partner in the banking house of W & S; he was also the guardian of three infants, and, as such, lent to the banking firm a portion of his wards' funds, taking a certificate of deposit to himself as guardian. Upon the arrival at majority of the oldest ward he was paid off, but before the others became of age, the firm and guardian failed and made assignments, to secure creditors. In the individual assignment of the guardian, it was provided that any balance due to him, as guardian of his two remaining wards, upon the certificate aforesaid, after being credited with its share of the firm assets, should be paid. Subsequently he paid off another of his wards, upon its arrival at majority, and thereafter he received the dividends from the firm assets, applying two-thirds to his own use, and one-third to the credit of the sole remaining ward. The representative of the latter brought suit against the trustees and subsequent preferred creditors, claiming the entire sum of the certificate; *It was held,* 1. That the plaintiff was only entitled to a moiety of the certificate thus secured. 2. That the effect of the settlement of the guardian with the other wards, was to discharge the indebtedness *pro tanto*, and he will not be allowed to come in and share in the dividends of his own estate. 3. Had the sureties of the guardian paid the wards they would have been entitled, by subrogation, to participate in the dividends.

(*Whitford v. Foy*, 65 N. C., 273, cited and approved.)

ACTION tried before *Gilmer, Judge,* at August Term, 1885, of GUILFORD, involving the construction of a deed in trust to secure creditors, and the application of assets thereunder.

A jury trial having been waived, the facts were (116) found by the Court, who gave judgment for the plaintiff, and directed that his demand should be paid in full.

From this judgment the defendant Mary J. Wilson appealed. The defendant N. H. D. Wilson, by virtue of his appointment as guardian to William, Ella and Charles Barringer, in 1873, came into possession of funds belonging to them in the amount of six thousand dollars, with their respective shares of which he charged himself in separate accounts with each. Of this sum, in August, 1874, he received thirteen hundred and seventy-six dollars and eighty-two cents, which he deposited in the banking house of Wilson & Shober (in which he was himself the

senior partner) taking therefor an interest-bearing certificate of deposit in his own name as guardian, without designating his wards, and forthwith gave each a money credit for their respective parts. On 9 October, 1876, William, having attained his majority, had a settlement with his guardian, and the whole of his estate was paid over to him, inclusive of that due on the deposit.

On 9 October, 1876, both the firm and Wilson becoming insolvent, made assignments of the partnership and individual property of Wilson to the defendants R. M. Sloan and F. E. Shober and W. P. Bowman, intestate of the defendant Julius A. Gray, in trust to secure, the one the joint liabilities, the other the individual liabilities of the partner Wilson. The deed of the latter, in its declarations of trust, provides for the payment, first, of such bills and accounts as may be due to merchants in Greensboro, and then, in the words of the instrument, for "2d, any balance, if any, that may be found due and payable to N. H. D. Wilson, guardian of Charles and Ella Barringer, upon a certificate of deposit issued by Wilson & Shober, after said certificate has been credited with *full share* and *pro rata* of the assets of said Wilson & Shober."

The next indebtedness, to which preference is given, is a note described as due to R. R. Gwynn, for about six or seven hundred dollars, originally, since assigned and now belonging to the defendant Mary, wife of the said N. 117) H. D. Wilson, and then the proceeds of the trust estate are directed to be apportioned *pro rata* among the other creditors.

On 1 October, 1879, the infant Ella became of full age, and had also a settlement with her guardian, in which she received her estate in full, including her part of the sum due on the certificate of deposit.

Charles, the remaining ward, died under age in July, 1880, and the plaintiff took out letters of administration on his estate in March, 1882, and in January, 1884, commenced the present action. He had previously sued on the guardian bond, and at Fall Term, 1883, recovered twelve hundred dollars, the balance due his intestate upon the administration of the trust estate, no part of which can be made out of the guardian by reason of his insolvency.

The trustees, out of the firm assets, have paid over to Wilson three dividends on the certificate, each of one hundred and eighty dollars, the first being received 13 December, 1880, for the intestate Charles; the other two, 12 September, 1882, and 2 January, 1884, for himself he claiming the right to receive these because of his having paid off the full amount of his liabilities to the other wards.

The trustees have paid over upon the certificate, out of assets derived from the joint estate, the sum of two hundred and fifty dollars, and have in hand enough to satisfy the amount due on the judgment, if so directed by the Court, in preference to the claim of the defendant Mary, as assignee of the Gwynn note, rendering the taking of an account unnecessary for the use of the plaintiff.

Messrs. Graham & Ruffin, J. A. Barringer and *Scott & Caldwell* for the plaintiff.

Mr. J. T. Morehead for the defendant.

SMITH, C. J., (after stating the facts as above). (118) The matter in controversy is as to the contesting demands of the plaintiff and the assignee Mary, upon the funds in the hands of the trustees, and this depends upon the construction of the second declaration of trust in the assignment, which has been recited.

The plaintiff contends that inasmuch as the claims of the two older wards have been extinguished, the certificate representing the joint property, in its entirety, belongs to the intestate, and as such must be paid to him.

The defendant Mary insists that the interest of the infants in the money represented in the certificate are several and distinct, each beng entitled to his ratable part only; and hence that the interests of two have been extinguished and their shares fall into the *residuum* of the trust fund and belong to her as next in priority; and further, if this be not so as to two-thirds, it is as to a moiety, as the security of the deed is for Ella and her deceased brother.

Now the argument for the plaintiff would be difficult to combat, as to the right disposition of the money, if the whole case depended on the form of the certificate and pay-

ment was coerced out of the debtor. But the question is as to the appropriation, under the trust deed, of the money in the trustees' hands, now that two of the infants have been settled with, and one only remains to assert his claims. Is he entitled to *all* which the certificate calls for or *his part only?*

Now it is manifest that it is secured in the assignment for the sole benefit of Ella and Charles and to Wilson as *their guardian,* excluding the older brother from participating in what may be received. They only are named as the beneficiaries for whom the guardian proposes to act, and their interests he protects out of his own estate. But a moiety only belongs to the intestate and a moiety only is secured to him.

The other moiety would belong to Ella, but that she has received all her estate and can now assert no right to a share of the fund. If Charles had also been paid, the indebtedness evidenced by the certificate would cease to exist altogether and would be put out of the way (119) of the assignee Mary, in her asserting her claim next after the bills due in Greensboro.

As this would be true of all, so it would be true of any extinguished share of either. The intestate's right was, when the deed was executed, confined to one-half of the debt, and it remains undisturbed by subsequent changes.

If a surety upon the guardian's bond had paid the judgment recovered on it, he might by subrogation claim the fund distributable to Charles, as he might that belonging to Ella if he had paid her. But the payment by the principal debtor is a discharge of the debt and he is not allowed to come in and share in the division of his own estate and thereby diminish the trust fund created by his own act to the prejudice of the more remotely secured creditors.

This separation of interest seems to be indicated in what fell from RODMAN, J., delivering the opinion in *Whitford v. Foy,* 65 N. C., 273.

"These wards," he proceeds to say, "were equally interested in a common fund and must bear all losses affecting it equally. So long as all remained infants, each was entitled to have his share of the fund bearing compound interest,

but when any one ceased to be entitled to this privilege of an infant, by death or marriage, the share of that one becoming immediately demandable, ceased to bear any more than simple interest, although if the guardian receive more, he would be liable to pay it."

The controversy hinges upon an interpretation of the deed, and the intention of the parties to it. Does it upon a fair rendering of the second declaration of trust secure to the intestate, more than a moiety of the deposit—and is there any just reason for allowing him to succeed to what is secured to his sister? It is not a question of survivorship, but of construction and purpose in reference to the application of the trust fund, and we think the intestate entitled to one-half of what would have been distributed if Ella had not received her full estate.

The plaintiff has no interest in the alleged wrong-
(120) ful payments to Wilson, since they are only injurious to creditors of the third class, and no controversy is made in this action by them.

There is error in the judgment and it will be entered for one-half of the sum due under the certificate against the trustees.

ERROR. Reversed.

Cited: *S. c.* 96 N. C., 213; *Pleasants v. R. R.,* 121 N. C., 495.

G. F. DEMPSEY et al. v. ALBERT RHODES.

Defense Bond—Action to Recover Land—Counterclaim Filing of Pleadings—Discretion of Judge—Judgment—Trusts and Trustees.

1. While the courts have the discretion, they should not encourage the practice of permitting pleadings to be filed at periods subsequent to the term, when in the regular course of the action they should have been filed, as it is calculated to produce delay, confusion and dissatisfaction.
2. In an action for the recovery of real property, the defendant, upon filing the affidavit and certificate of counsel, prescribed in the

proviso in sec. 237 of The Code, is entitled, *as a matter of right*, to answer, and the court has no discretion in the premises, and whether even a formal order is necessary; *Quære?*

3. In such cases the defendant is not relieved from paying costs, or from recovering them if so adjudged, the statute simply relieving him from giving the undertaking.

4. An equitable counterclaim may be asserted in an answer to a complaint containing a purely legal cause of action, and if not denied by reply or demurrer in apt time, the defendant is entitled to judgment for such relief as the facts therein set forth may warrant, though it be not the relief he demands. The Code, secs. 244, 249, 268.

5. Where one advances money to pay the balance on purchase of land for another, and takes title to himself, he and those who claim under him hold the legal title in trust for the original vendee, and when these facts sufficiently appear from the pleadings or proofs, the court will administer the appropriate remedy, though it may not be in response to the specific prayer for relief. The Code, sec. 245. (121)

(*University v. Lassiter*, 83 N. C., 38; *Deal v. Palmer*, 68 N. C., 215; *James v. Fortune*, 69 N. C., 322; *Taylor v. Apple*, 90 N. C., 343; *Corn v. Stepp*, 84 N. C., 599; *McMillan v. Baker*, 92 N. C., 100; *Pearsall v. Mayers*, 64 N. C., 549; *Johnson v. McArthur*, *Ibid.*, 675; *Welburn v. Simonton*, 88 N. C., 266; *McKesson v. Mendenhall*, 64 N. C., 286; *Bonham v. Craig*, 80 N. C., 224; *Barnhardt v. Smith*, 86 N. C., 473; *Dunn v. Barnes*, 73 N. C., 273; *Jones v. Mial*, 82 N. C., 252; *Knight v. Houghtalling*, 85 N. C., 17; *Lambert v. Kinnery*, 74 N. C., 348; *Justice v. Eddings*, 75 N. C., 581, cited and approved.)

ACTION tried before *Gudger, Judge,* at February Term, 1885, of DUPLIN.

This action was brought to the Fall Term, 1882, of the Superior Court of the county of Duplin, to recover possession of the land described in the complaint, which was filed at that term. The plaintiffs claimed that the land was devised to them by the will of Frank Brice, deceased.

It appears that by leave of the Court, the defendant filed his answer in February of 1883, as of the appearance term, and that it has been on file ever since that term.

Before filing the answer, an attorney practicing in that Court, certified to the Court that he had examined the case of the defendant, and was of the opinion that the plaintiff was not entitled to recover; and the defendant filed an affidavit made before the Clerk of the Court, in which he stated that he was unable to give the bond required of him in that behalf, and the Clerk made an order allowing him to answer without giving bond.

In the complaint, the plaintiffs allege that they are the owners in fee of the land, and entitled to have possession of the same, and that the defendant is in possession thereof, and wrongfully refuses to surrender the possession to them. They demand judgment for possession, damages for detention and costs.

The defendant denies the first allegation of the complaint, and alleges that, in the year 1874, he purchased the land in question from John J. Brice, at the price of $550, to be paid at the end of two years next thereafter, and delivered to him two notes, each for $275, to be paid, one at the end of one year, the other at the end of two years, bearing interest at the rate of eight per cent *per annum;* and
(122) the said John J. signed and delivered to him a bond, conditioned that he would make title to the defendant for the land when the purchase-money should be paid; that he paid the first of the notes and the interest thereon at its maturity, and upon the second one, he paid before it was due, $118; that he was unable and failed to pay the balance of the latter note at maturity, whereupon, the said John J. notified him that unless such balance should be paid, he would insist that the defendant had forfeited his right under the contract of sale; that thereupon, Frank Brice, under whose will the plaintiffs claim the land as devisees, agreed to advance the balance of the purchase money, take the title to the land from the said John J., and convey it to the defendant when he should pay such balance and the interest thereon to the said Frank Brice; that in the Fall or Winter of 1877, he paid to Frank Brice $130, and demanded a deed, but he refused to execute the same, upon the ground that the defendant must pay him interest at a much highr rate than that allowed by law; that being ignorant of his legal rights, he yielded to the demands of the said Frank, and executed to him another note for a considerable amount, and the next year thereafter he paid him on that account $175, and 1,000 pounds of seed cotton at 3 1-2 cents per pound, and the said Frank still refused to execute a deed for the land to the defendant; that he again yielded to the demands of the said Frank, and executed to him another note, which he has not paid, except

the sum of $48 in seed cotton; that the said Frank Brice devised the land in question to the plaintiffs; that he is in possession of the land, but denies that he wrongfully withholds the same from the plaintiffs, and that he has paid about the sum of $200 more than he justly owes the said Frank as usurious interest. He demands judgment for $400, for costs, and for general relief.

The plaintiff filed *no replication* to the answer. The material part of the case settled upon appeal for this Court, is as follows:

"The jury was empaneled in the cause, the plaintiffs read the complaint, and the defendants read their answer (copies of which are set out in the record accompanying this statement). The presiding judge asked if there was (123) a replication; the counsel for plaintiffs said they had not filed a reply. The Court thereupon stated that there being no reply to the answer, the allegations of the answer were thereby admitted, and the defendant was entitled to a verdict.

Counsel insisted that they had not seen the answer till it was read in court. The Court thereupon instituted an inquiry and found from the statement of the clerk and the record of the court that the answer had been filed in February, 1883, under leave of the Court given at Fall Term, 1882, and that the answer had been on file ever since.

Exception 1. Plaintiffs excepted. Counsel for plaintiffs then moved for leave then and there to file a reply to the answer. This motion was denied and plaintiffs excepted.

Exception 2. During the colloquy that ensued between the counsel for plaintiffs and defendant on the motion to allow plaintiffs to file a reply and take issue on the answer, the Court remarked to counsel for the plaintiffs that the Court thought that indulgence ought not to be extended to them; that here was a poor ignorant negro who had put his answer on record two years ago, and that plaintiffs had not during all that time joined issue with him on the statement contained in his answer, and that now after the jury was empaneled the answer should be accepted as true. And the Court thereupon directed the jury to return a verdict in favor of the defendant.

Exception 3. The plaintiffs excepted to the directions of the Court to render the verdict for defendant, and also to the remarks made by the Court.

Judgment for the defendant on the verdict in his favor as directed by the Court.

Exception 4. The plaintiffs except to the judgment rendered in favor of the defendant for costs, as he had been allowed by order of the clerk to defend without giving bond."

The Court gave judgment, whereof the following is a copy:

"This cause coming on to be heard, and being (124) heard by the Court and jury, and the jury under the directions of the Court having found all isues in favor of the defendant, it is ordered, adjudged and decreed that the plaintiffs and all persons holding under them, be and they are hereby foreclosed forever from all power, right, title or interest in and to the lands mentioned and described in the pleadings in the above-entitled action, and it is further adjudged and decreed that the plaintiffs convey in fee the said lands to the defendant and his heirs, and that this decree be registered on the books of the Register of Deeds of said county and operate as a deed of conveyance to the said defendant, the said Albert Rhodes, as provided by law.

"It is further adjudged that the defendant do recover the costs of this action against the plaintiffs."

The plaintiffs appealed to this Court.

No counsel for the plaintiffs.

Messrs. Faircloth & Allen for the defendant.

MERRIMON, J. (after stating the facts). The answer appears in the record as having been filed regularly at the appearance term—it was, however, in fact, by permission of the Court, filed in February, 1883, as of that term. It was competent to allow this to be done, though such practice ought not to be encouraged. It generally engenders dissatisfaction, sometimes serious irregularity and unnecessary contention. So that the answer had been on file with the permission of the Court, for two years next before the trial. The plaintiffs can not be heard to say that they did not see

it—they were before the Court, and were all that time charged with notice of what was done in the course of the action, and the papers pertinent to it on the file. It was their own neglect if they failed to see it. Every action is important—it requires prompt and orderly attention in the whole course of its progress, and the Court will not tolerate, much less encourage neglect of it by the parties to it. The careless litigant must accept the consequences of his unnecessary default. *University v. Lassiter,* 83 N. (125) C., 38, and cases there cited.

It was insisted on the argument, that the answer could not be treated as having been filed at the appearance term, or at all, because the defendant had not given bond as required by the statute (C. C. P., sec. 382; Bat. Rev., 238) then in force. Nor had the Court made an order allowing the defendant to answer without giving such bond, as allowed by the same statute, sec. 382*a*. This objection is without force, because, as allowed by the statute last cited, an attorney practicing in the court certified that he had examined the defendant's case and was of opinion that the plaintiff was not entitled to recover, and the defendant made affidavit before the Clerk that he was unable to give the bond, and the certificate and affidavit were placed on file with the answer among the papers in the action. This being done, the defendant had the right to answer, and it did not rest in the discretion of the Court to refuse to allow him to do so. Notice of such certificate and affidavit was not necessary, and it may be questioned whether it is necessary in any case that the Court should make an order allowing the defendant, upon filing such certificate and affidavit, to answer, because he answered as of right under the statute. *Deal v. Palmer,* 68 N. C., 215; *Jones v. Fortune,* 69 N. C., 322; *Taylor v. Apple,* 90 N. C., 343.

But if such order was necessary, and objection in that respect might have been made in apt time, it was unquestionably waived by the defendants. The certificate of counsel and the affidavit of the defendant fully meet the requirements of the statute, and they and the answer, as we have seen, were on file without objection for two years and until the trial. They must be treated as having waived the ab-

sence of any such order. *Corn v. Stepp,* 84 N. C., 599; *McMillan v. Baker,* 92 N. C., 110.

2. The answer of the defendant is informal, and particularly the relief specially demanded is not such as the court granted, nor is it such as the defendant is entitled to have; but it contains a prayer for general relief. No ex-
(126) ception was taken on this account--certainly not in apt time. It in effect admits that the legal title to the land described in the complaint is in the plaintiffs; but it alleges with tolerable clearness, that the defendant contracted to purchase the land from John J. Brice for a stipulated price in 1874, and took from him his bond conditioned that upon the payment of the purchase money, he would convey the title to the defendant; that he paid a large part of the purchase money, but failed to pay the whole of it at the time the second note given for part of it matured; that it was then agreed, that Frank Brice would pay the balance of the purchase money, take the title from John J. Brice, and the defendant would pay the said Frank the sum advanced for him with interest, and when he paid the same Frank Brice would convey the title to the defendant; that the defendant paid the money due and more, to Frank Brice; that afterwards Frank Brice died leaving his will by which he devised the land in question to the plaintiffs, and they claim title to the land under that will.

Some question was made on the argument as to whether it sufficiently appeared that it was alleged that the whole of the purchase-money was paid to Frank Brice; but we think it is sufficiently alleged—the sums of money alleged to have been paid to him is more than the balance of the purchase money alleged to have been advanced by him, and there is a general allegation that the defendant paid him about $200 more than he owed him, as ususrious interest. It is alleged sufficiently by the tenor of the answer, that John J. Brice conveyed the title of the land to Frank Brice, and the latter agreed in writing to convey the same to the defendant, although there is no specific allegation to that effect.

The defendant thus manifestly—in effect he alleges an equitable *counterclaim*—an equitable cause of action "con-

nected with the subject of the action"—the land—against the plaintiffs' devisees under the will of Frank Brice, who held the naked legal title to the land in question in trust for the defendant. The devisees, the plaintiffs, (127) took nothing under the will but the naked legal title, charged with the trust, and they hold it for the defendant just as the testator under whom they claim held it in his lifetime. The claim as alleged, exists in favor of the defendant and against the plaintiffs, and between the plaintiffs and defendant there may be had a several judgment in the action. The Code, sec. 244. At law, under the common law method of procedure, the plaintiff would be entitled to recover; the defendant, however, would have his right to assert his equity in a Court of Equity and compel the plaintiffs to convey the legal title to him.

Under the Code method of procedure as it prevails in this State, the plaintiff may allege his legal causes of action, and the defendant may in his answer allege his equitable *counterclaim,* which is, in effect, a counter action on the part of the defendant against the plaintiff. The Code, sec. 245; *Pearsall v. Mayers,* 64 N. C., 549; *Johnson v. McArthur, Ibid.,* 675; *Welborn v. Simonton,* 88 N. C., 266; Clark's Code, sec. 99 *et seq.*

3. The *counterclaim* is not alleged merely as a matter of defense. The defendant seeks by it substantial relief. The plaintiffs failed to file any reply to the material allegations of new matter in the answer constituting the *counterclaim;* they are therefore to be taken as true. The Code, sec. 268; *McKesson v. Mendenhall,* 64 N. C., 286; *Bonham v. Craig,* 80 N. C., 224; *Barnhardt v. Smith,* 86 N. C., 473.

4. As "every material allegation of new matter in the answer constituting the *counterclaim*" was, for the purpose of the action, to be taken as true, the defendant was entitled to such judgment as such allegations warranted. The Code, sec. 249, provides that, "If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fail to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement, and, if the case require it, an order for an inquiry of damages by a jury may be made."

The plaintiffs, however, contended that the de-
(128) fendant had not demanded proper relief, nor the judgment granted by the Court.

And he did not specially, but he demanded generally, such relief as the Court could grant, and this was sufficient. Indeed, in the absence of any formal demand for judgment, the Court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs. *Dunn v. Barnes,* 73 N. C., 273; *Jones v. Mial,* 82 N. C., 252; *Knight v. Houghtalling,* 85 N. C., 17.

It is obvious that we can not review the action of the Judge in refusing to allow the plaintiffs to file a reply at the trial. Whether he would or not, rested in his discretion, and his exercise of it can not be reviewed here.

The jury was improperly empaneled—there was no issue of fact for them to try; indeed, it does not appear in the record that any issue was submitted to them. What was called their verdict was immaterial, and went for nothing. The Court ought to have proceeded to give judgment upon the facts in the answer taken as true. The exceptions in respect to what the Court said to and in the presence of the jury, are therefore groundless.

The Court properly gave judgment in favor of the defendant for costs. When, in an action to recover possession of land, the defendant is allowed to defend without giving an undertaking to secure costs and damages to the plaintiff, he is not relieved from paying costs, if he shall be cast in the action, and he may recover costs, if he succeeds. The statute simply relieves him from giving the undertaking, and leaves him to pay or recover costs, just as if there was no such statute. *Lambert v. Kinnery,* 74 N. C., 348; *Justice v. Eddings,* 75 N. C., 581.

Accepting the material allegations of new matter in the answer constituting the counterclaim as true, we are of opinion that the judgment of the Court was substantially correct, and it must be

AFFIRMED.

Cited: Harris v. Sneeden, 104 N. C., 375; *Wilson v. Fowler, Ib.,* 472; *Presson v. Boone,* 108 N. C., 87; *Griffin*

v. Light Co., 111 N. C., 438; *Kruger v. Bank,* 123 N. C., 17; *Timber Co. v. Butler,* 134 N. C., 52; *Staton v. Webb,* 137 N. C., 42.

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GEORGE W. BECK et al. v. MARSDEN BELLAMY, Exr., et al.

Attorney and Client—Excusable Negligence—Judgment, Setting Aside—New Trial—Judge, Discretion of—Appeal.

1. A new trial can be granted only at the term at which the trial was had. The Code, sec. 412.
2. The power of the courts to set aside judgments on the ground of "surprise, inadvertence, mistake or excusable neglect," is confined to those cases specifically mentioned in the statute, and does not embrace such as necessarily follow the verdict, and the vacating of which, without disturbing the verdict, would be of no advantage to the party.
3. While the Supreme Court has jurisdiction, on appeal, to determine what constitutes "mistake, inadvertence, surprise or excusable neglect," under sec. 274 of The Code, it has no authority to review or interfere with exercise of the discretion vested in the Judge of the Superior Court by that section, *in refusing to set aside judgments.*
4. But should the Judge set aside a judgment upon a state of facts which did not bring the case within the scope of the statute, his action would be subject to correction on appeal.
5. The remedy against a judgment procured by the fraudulent collusion of opposing counsel, is by an independent action to impeach the judgment.
6. A party to an action is bound by every act of his attorney, done without fraud or collusion, in the regular course of practice in the conduct of the cause, however injudicious the act may be.

(*England v. Duckworth,* 75 N. C., 309; *Hudgins v. White,* 65 N. C., 393; *Foley v. Blank,* 92 N. C., 476; *Greenlee v. McDowell,* 39 N. C., 485, cited and approved.)

MOTION to set aside a judgment, heard before *Gudger, Judge,* at Spring Term, 1885, of NEW HANOVER.

The motion being denied, the plaintiffs appealed.

At Fall Term, 1884, of the Superior Court of New Hanover, upon an issue of *devisavit vel non* submitted to the jury, the script purporting to be the will of Thomas Beck and propounded for probate as such by the executor therein

named, to which a caveat had been entered by George W. Beck and the other brothers and sisters and next of kin of the deceased, a verdict was rendered declaring it to be his will, and judgment entered, remanding the case and
(130) the finding of the jury to the probate court for further proceedings.

At the ensuing term of the Superior Court, upon an affidavit filed by some of the caveators on behalf of all, stating the grounds thereof, they moved the Court to set aside said judgment and relieve them therefrom under sec. 274 of The Code.

The case transmitted with the record to this Court is as follows:

Motion to set aside a judgment rendered in this case at Fall Term, 1884, of said Court. The following are the facts upon which the action of the Court is based, refusing to set aside the judgment in said case.

That Thomas Beck died on Tuesday, 20 November, 1883, at Wilmington, N. C., having first made and executed a last will and testament, bequeathing and devising all his property to one Frances Mitchell, and having appointed therein Marsden Bellamy, Esq., as his executor; that Thomas Beck died without having wife or children, and Frances Mitchell is a woman of color. Thomas Beck was a white man.

Said will was admitted to probate in the proper court of New Hanover County, on 22 November, 1883, in common form, and letters testamentary issued to the said Bellamy.

That afterwards on 22 August, 1884, a caveat was filed by the plaintiffs in this motion, who are the brothers and sisters of said Thomas Beck, and an issue was made up, to try whether the said paper-writing was or was not the last will and testament of said Beck, and Messrs Russell & Ricaud, of Wilmington, N. C., and Sebastian Brown, Esq., of Baltimore, were retained as counsel to test the validity of said will.

That at Fall Term, 1884, of New Hanover Superior Court the case was set for trial on Monday, 9 December, 1884, and said Brown was duly informed thereof as early as December 6th.

It was suggested in the letter of Russell & Ricaud, of

2 December, to the said Brown, that owing to older cases, the day for hearing might be changed. On 4 December, Russell & Ricaud informed the said Brown, counsel in Baltimore of the plaintiffs, that they had filed the (131) caveat in the hope that a case might be developed or a compromise effected, but after examination of all parties in a situation to know, they discovered no testimony to stand upon in court, and no witnesses at all, and that they could effect no compromise. These letters were received by the said Brown on or before 6 December.

That neither Brown nor any of the plaintiffs attended the Court during its session of Fall Term, 1884, nor did they furnish any evidence whatever, or give the names of any witnesses to Messrs. Russell and Ricaud; that said cause was not tried on 9 December, but was put to the end of the calendar, and was pressed for trial at a later day of the term, and was tried during said term, and a verdict and judgment rendered sustaining said will; that Messrs. Russell and Ricaud were not furnished with any witnesses nor evidence of any kind with which to contest the validity of said will; that on the 18th of December, Russell and Ricaud wrote Brown informing him that the case had been tried, and they found themselves entirely without evidence, not even a scintilla, and from the beginning they had never been able to show the slightest circumstance against the will, except the color of Frances Mitchell; that after various efforts to compromise with defendants' counsel, Messrs. Russell and Ricaud agreed that the plaintiffs might call their witness and they, Russell and Ricaud, would cross-examine, and if they could find no defense, the defendants might have a verdict, for that they, Russell and Ricaud, had no witnesses, and knew of no human being who could prove one fact, however trifling, in their (Russell and Ricaud's) favor, and that they came to this agreement in consideration of defendants' paying the bill of Mr. Beck (one of the caveators), for $322.50, of which amount they, Russell and Ricaud, said not more than $100 could be collected. (This bill was for burial expenses.) The will was executed 19 June, 1882.

The plaintiffs are nonresidents, being residents of Baltimore, Md.

That Thomas Beck died on the night of 20 No-
(132) vember, 1883, having been in apparent good health until a few hours before his death; that as soon as his illness was known, a physician, Dr. Love, was sent for, but he did not arrive till after the death of the testator.

That said physician made a *post mortem* examination of the remains, and gave as his opinion that the said Thomas Beck died of heart disease. That information of the testator's death was on the same night telegraphed to one of his brothers in Baltimore.

That accordingly said cause was tried, and the verdict and judgment rendered as above set forth.

That none of the plaintiffs nor their counsel Brown, of Baltimore, gave the names of any witnesses, nor any evidence to the said Russell & Ricaud, to enable them to contest in any way the said will, nor did any of them attend the trial, nor the term of the court at which said cause was tried, and that Messrs. Russell & Ricaud used all reasonable diligence to discover evidence with which to contest said will.

Mr. Thomas W. Strange for the plaintiff.

Messrs. Geo. Davis and *Marsden Bellamy* for the defendants.

SMITH, C. J., (after stating the case as above). It was difficult to discover in the facts ascertained and established at the hearing, any evidence, or indication even, of "mistake, inadvertence, surprise or excusable neglect," the statutory condition for the exercise of the invoked power, either in the verdict or rendition of judgment. Both were the result of deliberation and fully understood by caveators' counsel and entered upon the supervision of the Court, in a proceeding *in rem,* where it is the duty of the Judge to see that everything is regularly and properly done in establishing the testamentary paper.

But the act in conferring power, confines its exer-
(133) cise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without

at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in conformity to the jury findings. To vacate both is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place. The Code, sec. 412, par. 4; *England v. Duckworth,* 75 N. C., 309.

But assuming the remedy sought to be appropriate, the refusal of the Judge in the exercise of an admitted discretion, is not the subject of appellate revision.

In *Hudgins v. White,* 65 N. C., 393, READE, J., says: "After hearing the evidence and finding the facts, it is discretionary with the Judge to set aside the judgment or not, and *from the exercise of his discretion there is no appeal.*"

This is said in a case where the Judge below refused to vacate, while it is manifest if he had done so, upon facts which did not bring the case within the scope and meaning of the act, his ruling would have been erroneous and open to correction on appeal.

Somewhat similar language is used by BYNUM, J., who says that "under the section of the C. C. P. cited (133), the application was addressed to the discretion of the Court and his decision thereon was final, whether refusing or allowing the motion."

In a more recent opinion, MERRIMON, J., thus reasserts the same proposition: "This Court has authority to determine what constitutes 'mistake, inadvertence, surprise or excusable neglect,' under The Code, sec. 274; but it has no authority to review or interfere with the discretion exercised by the Judge of the Superior Court under this section." *Foley v. Blank,* 92 N. C., 476.

But the complaint preferred in the application, and supported by oath, rests upon an imputed mismanagement of caveators' own counsel, and their want of authority to assent to what was done. This is not sustained by the facts, for they show that resistance was not made, only because there were no grounds upon which it could be offered, and would have been unaviling, if offered. If there (134) had been fraud alleged in the agreement of opposing counsel, (and this the appellants disclaim, and say they im-

pute nothing wrong to their counsel in conducting the defense), the redress would have been open only in an action to impeach the judgment of the Court. Still, the conduct of the case by caveators' counsel would, in the absence of connivance, be binding upon their clients, and it would be a dangerous innovation in judicial proceedings to hold otherwise.

In the words of NASH, J., in reference to the authority of counsel retained in a case: "By his acts and agreement made in the management of the cause, the plaintiff was bound." *Greenlee v. McDowell,* 39 N. C., 485.

Not less explicit is the language of MERRIMON, J., in *Branch v. Walker,* 92 N. C., 89, where he says of an attorney that "as soon as he is duly retained in an action or proceeding, he has, by virtue of his office *authority to manage and control the conduct of the action,* on the part of his client during its progress, and subject to the supervision of the Court," etc.

"As between the client and opposite party, the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be." Weeks on Att., sec. 222, and cases cited.

The ruling of the Court must remain.

NO ERROR. Affirmed.

Cited: *Winborne v. Johnson,* 95 N. C., 48; *Clemmons v. Field,* 99 N. C., 402, 3; *Weil v. Woodard,* 104 N. C., 98; *Taylor v. Pope,* 106 N. C., 270; *Lewis v. Blue,* 110 N. C., 423; *Flowers v. Alford,* 111 N. C., 250; *Brown v. Rhinehart,* 112 N. C., 777; *Harrill v. R. R.,* 144 N. C., 544.

J. W. COVINGTON et al. v. TOWN OF ROCKINGHAM.

Corporation, Municipal — Taxation — Injunction — Assessment.

1. The town of Rockingham is not authorized either by its charter (Private Laws 1872-73, ch. 51), or by the General Statutes on the subject (The Code, vol. 2, ch. 62), to assess property for taxation. (135) Towns and cities are required to base their levies upon the assessments made for State and county purposes.
2. A tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid.
3. Remedy for errors in imposing taxes should be first sought by application to the taxing body, upon whom ample powers are conferred for this purpose. The Code, sec. 3823.
4. The collection of proper revenues for the support of municipal corporations will never be interfered with by injunction for mere irregularities, particularly where the irregularities are the result of the negligence of the taxpayer.
5. It is a settled rule of law, that an injunction will not be granted to restrain the collection of a tax, a portion of which is legal and a portion illegal, until the applicant has paid that which is legal— (if it can be separated and distinguished from the illegal), and the complaint must point out what part is valid and what invalid, so that the court may discriminate between them.

(*R. R. v. Wilmington*, 72 N. C., 73; *Kyle v. Fayetteville*, 75 N. C., 445; *London v. Wilmington*, 78 N. C., 109, cited and approved.)

Application for an Injunction to forbid the collection of taxes in the town of Rockingham, heard by *MacRae, Judge*, and who found the following facts:

1. The town of Rockingham was incorporated by ch. 51 Pr. Laws 1872-73, and its limits extended by ch. 83 Pr. Laws 1873-74, the latter act dated 12 February, 1874.

2. By sec. 10, ch. 106 Pr. Laws 1873-74, ratified 14 February, 1874, an act to incorporate the Pee Dee Manufacturing Company in the county of Richmond, another municipal corporation is created, part of the same within the boundaries of Rockingham. The five commissioners were appointed under said section, but no election was ever held thereunder, nor any tax ever levied by said commissioners.

4. At a called meeting of the mayor and commissioners of Rockingham, on 27 August, 1884, W. S. Fowlkes, one of the commissioners, was "appointed to advertise and take the tax list for 1885 from 1 November to 1 November, 1885," and on 30 August, 1884, in a newspaper published in Rocking-

ham, notice was given to all persons liable to list their polls and property before him, before 1 November, 1884.

5. At a called meeting of said board on 15 Novem-
(136) ber, 1884, an order was made, but the clerk being absent was not entered upon the minutes, but a memorandum thereof was kept by one of the commissioners, who was acting as clerk of the meeting; and on 9 March, 1885, at a called meeting of said board, the order was entered upon the minutes as of 15 November, 1884, as follows:

"It appearing to the board, that the minutes of the meeting held 15 November, 1884, were not recorded at the time said meeting was held, but taken on scrip, on motion, it is ordered that said minutes be, and they are hereby entered on the record. That a tax of three-tenths of one per cent be collected on all real and personal property within the corporate limits of said town of Rockingham, and ninety cents on each taxable poll, for the year beginning 5 November, 1884, ending 5 November, 1885; that whereas, the holders or owners of the taxable property have failed to list their property, ordered that the clerk, W. S. Fowlkes, be and he is hereby instructed to proceed to take the list of the taxable property from the tax books of Richmond County."

9. No publication was made of any of said orders, except the ordinances of 1 December, 1884, which were printed in hand-bill form, and the "Notice to Taxpayers," published in the *Spirit of the South,* a newspaper of said town, 13 Dec., 1884, as follows:

NOTICE TO TAXPAYERS.

All persons residing within the corporate limits of the town of Rockingham, and subject to town tax, are hereby notified to go before the town clerk before the 20th inst, and render a sworn list of his or her taxable property, or they will be charged with double tax.

By order of the Board of Commissioners.

A. B. NICHOLSON, Mayor.

W. S. FOWLKES, Town Clerk.

10. No notice was given to the public of the time
(137) and place of the called meetings hereinbefore referred

to, and the same were held at night, not in any place specially set apart and designated as the place of meeting of the board.

Few persons gave in their lists of taxables in pursuance of either of said notices, and the list taker copied from the State and county tax lists of 1884, the names and taxables he deemed subject to town tax, but left out a large amount of bank stock and factory stock, the property of residents and taxpayers of Rockingham, which ought to have been placed upon the town tax list, but which said list taker supposed were not taxable in said town. He did not list the real estate and personal property situate within the limits of the village of Pee Dee, and which is also within the lines of the town of Rockingham.

And some changes in the valuation of real estate were made on account of improvements placed thereon since the last assessment.

12. The plaintiffs have not paid or tendered to the said constable and tax collector the same, which they admit to be due and owing by them as taxes for the year 1884-85, but deny the validity of any of the tax so attempted to be levied and collected.

Upon the foregoing facts, it was adjudged that the injunction be refused. From which the plaintiffs appealed to the Supreme Court.

Mr. John D. Shaw for the plaintiffs.
Mr. F. McNeill for the defendant.

MERRIMON, J. The defendant is a municipal corporation, created by statute (Pr. Laws, 1872-73, ch. 51), and by sec. 1 thereof, it is provided "that it shall be subject to all the provisions contained in the one hundred and eleventh chapter of the Revised Code" (The Code, ch. 62). The last mentioned chapter contains the general statutory provisions and regulation of this State in respect to towns and cities, except as the same may be changed or modified by particular statutes, applying to particular towns and cities. The (138) thirteenth section thereof, (The Code, sec. 3800), prescribes and defines the powers of commissioners of towns and cities, and especially it so operated as to confer upon the

commissioners of the defendant, power and authority, very ample in their scope, to levy a tax, not oftener than once a year, on real and personal property, and certain specified subjects of taxation, within the limits of the defendant for municipal purposes. They were authorized also to appoint necessary officers and agents to enforce their by-laws and regulations, and as well, to enforce the same by proper penalties.

The authority of the commissioners of the defendant, to levy a tax upon the taxable property, real and personal, within its limits subject to taxation, for ordinary municipal purposes, is too manifest to admit of question. They were not required to send out commissioners to assess the real estate and other property for taxation. Indeed, they were not authorized to do so; it was their duty to accept and act upon the assessment of the property within its limits for the purpose of county and State taxation, as made by the proper authorities of the county of Richmond in which the defendant is located. *R. R. v. Wilmington,* 72 N. C., 73; *Kyle v. Fayetteville,* 75 N. C., 445.

It appears that the current tax year in question began on 5 November, 1884, and that notice was given through a newspaper published within the limits of the defendant, on 13 December, to all taxpayers to appear before the town clerk before 20 December of that year, and render each, a sworn list of his taxable property. This, in a small town like the defendant, was not unreasonable in point of length of time. It was the duty of the taxpayers, in pursuance of it, to render such list. Very few of them, however, did so. Those who did not, were in default, and the commissioners were left to ascertain the taxes due from each, as they might be able. Exactly how they did so, does not certainly appear, but it must be presumed that they acted upon reasonable and proper data, in the absence of a sworn list rendered by the taxpayers.

(139) The tax was laid on 1 December, 1884, and a tax list was made up under the direction of the commissioners and placed in the hands of the proper officer for collection. The mere fact that the person who made up this tax list was not a commissioner—that it was not made up in the immediate presence of the commissioners, did not

render it void; it was not the list of him who made the calculations and set it out in form; he was the mere agent of the commissioners and did as they directed—the list was theirs, and had their official sanction.

Nor were the tax proceedings void, because they were not set down in the permanent record or minutes of the commissioners, at the time action was given. They were then set down in writing, on loose papers, to be transferred to the regular minutes, and were afterwards so transferred under the order of the commissioners. This was sufficient. The orders were made—that they were, was not questioned on the argument—and that was the material thing to be done. It is not uncommon to keep rough minutes of such proceedings, and have them entered on the record afterwards, in a fair hand, under the supervision, and, of course, the sanction of the body taking action.

If the tax list as made up contained errors, as it may have done, especially, as most of the taxpayers failed to render a proper list of their taxable property, as they were notified to do, and ought to have done, they were nevertheless not without remedy. They, or any one or more of them, including the plaintiffs, might have applied to the commissioners to readjust and correct any errors in the taxes charged against them respectively. They had power to correct errors. The settlement of the tax list, is always more or less a summary proceeding, and ought to be subject to correction upon proper application, and the Legislature, having an eye to this necessity, has wisely provided by statute (The Code, sec. 3823), the largest reasonable opportunity for correcting errors in it, even after it has passed into the hands of the collecting officer. This statute expressly embraces municipal corporations such as the defendant, as well as counties. It does not, however, appear that the plaintiffs sought such re- (140) lief. If they had done so, any errors might have been corrected.

And so, likewise, as to the property which it is alleged ought to have been taxed, but was not, because, as the commissioners say, they were of opinion it was not subject to be taxed. The plaintiffs might, after the list was made up, have insisted that that property should be taxed, and if it

had turned out that there was error in omitting it from the tax list, such error might have been corrected, and the plaintiffs might thus have succeeded in some measure, in reducing the tax against themselves and others. They did not choose to do so.

The collection of the just revenues of the defendant can not be delayed or defeated by injunction for mere irrgularities, in some degree occasioned by the taxpayers themselves. It was matter of serious public moment that these revenues should be collected, in order to pay its current expenses, and thus keep up its effective organization and efficiency; they were necessary to preserve the peace, health and good order of the people living and having property there. Every taxpayer was interested in these things, and he ought, if he thought there were some irregularities in the tax levy, to have paid what he was in reason bound to admit he owed. The plaintiffs could have approximately ascertained what each justly owed. They admit that they were taxpayers. They owed something, and this they ought to have paid, or offered to pay. If they believed that certain property had been omitted from the tax list, they could have ascertained what they would have owed, if that had been included. It appears that they had the data that would have enabled them to do so.

It is a settled rule of law, that "when complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered, and which can be easily distinguished from the illegal, the injunction will be denied, since the collection of a legal tax will not be restrained to prevent the enforcement of an illegal one—(16 Wis., 185)—and the bill itself must show what portion of the tax is legal and what is illegal, in order that the Court may properly discrimi-
(141) nate between them. High Inj., sec. 363; *London v. Wilmington,* 78 N. C., 109. We think this rule properly applies in this case. The commissioners obviously had the power to levy the tax. The plaintiffs admit that they were taxpayers, and it is manifest that they each owed some part of the tax charged against him. They might have ascertained, at least proximately, what they each owed. But they did not pay, or offer to pay any part of the same, and as they did not, they can not maintain this action. They must pay

so much of the taxes as are due, as appears by their own showing, before they can ask for an injunction to restrain the collection of so much as may be reasonably in question. The judgment must be

AFFIRMED.

Cited: Wiley v. Com'rs., 111 N. C., 400; *Wilson v. Green,* 135 N. C., 351.

DAVID BETHEA v. LEMUEL BYRD.

Appeal—Record—Transcripts.

1. The Supreme Court will not hear arguments on appeal until the transcript of the record is perfected, but will remand the cause to the end that a proper record may be certified.
2. The transcript should *always* show that a court was held at the time and place and by the Judge prescribed by law; and it should also set forth with certainty the matters in controversy upon which the appellate court will be called upon to deliberate and determine.
3. The irregular practice of sending up, by piecemeal, essential portions of the record will be no further tolerated.

(*State v. Butts,* 91 N. C., 524; *Rowland v. Mitchell,* 90 N. C., 649, cited and approved.)

ACTION tried before *Shepherd, Judge,* at Fall Term, 1884, of HARNETT.

There was judgment for the plaintiff, and the defendant appealed. (142)

Messrs. W. E. Murchison and *J. W. Hinsdale* for the plaintiff.

Messrs. A. M. Lewis & Son for the defendant.

SMITH, C. J. This suit, begun by the issue and service of the summons on the defendant in November, 1878, was brought to trial upon issues as to the plaintiff's title to the land in dispute, the wrongful withholding of possession by the defendant, and the consequent damages suffered.

During this long intermediate period the record takes no

notice of the filing of any complaint or answer, to show the purpose of the action or the subject-matter in controversy. There can be no issues where there are no pleadings, since they spring out of contested allegations thus appearing. Such was the state of the record when the cause came on to be heard and was argued.

Since, papers purporting to be the complaint and answer, and certified as such, have been laid before the Court to correct the omission and perfect the record. We are not disposed to indulge this irregular mode of proceeding. The transcript should be complete before the hearing, and any defects should be corrected by consent of counsel, or by an application for a proper writ to supply what may be wanting. Where the cause has proceeded to argument and the record in its imperfect condition has passed into the hands of the Court for final adjudication, amendments or additions must be the result of an application to the Court for leave to withdraw it in order that corrections may be made as suggested. Unless this is done, the appeal will be disposed of in accordance with the established practice in such cases.

The papers now offered find no appropriate place *in the record,* which is entirely silent in regard to them, and except in their caption we should not know to what term they belonged or where to insert them. We can not tolerate the loose practice of filing additional papers as part of the record,

(143) which is still left imperfect, and repeat the remark of MERRIMON, J., delivering the opinion of the Court, in a recent case: "It must appear," is his language, *"in the record,* with reasonable certainty that a Court was held by a Judge authorized by law to hold it, and at the place and time prescribed by law." *State v. Butts,* 91 N. C., 524.

Following the course pursued in disposing of a case with similar imperfections, *Rowland v. Mitchell,* 90 N. C., 649, we remand the case with leave to the appellant to bring up a perfected record, if he shall be so advised, for a hearing of the matters set forth in their case agreed.

REMANDED.

Cited: Cox v. Jones, 110 N. C., 311.

W. I. BUSBEE et al. v. COMMISSIONERS OF WAKE COUNTY

Injunction—Stock Law—Fences—Assessment, local—Taxation—County, necessary expenses of.

1. The court will not interfere by injunction to arrest the action of public officers in the performance of a public duty—such as the construction of a county fence—unless it clearly appears that it is in violation of the constitution or without legal warrant.
2. Local assessments upon property for its peculiar and special benefit, do not fall within the restraint on taxation in Art. V, sec. 3, of the constitution, but the principle of *uniformiy* governs both.
3. The provisions of The Code, sec. 2824, apply both to the cases where the adoption of the stock law is dependent on a popular vote, and where it is made absolute by an act of the General Assembly.
4. Local assessments are burdens imposed upon land for the benefit of the property to be benefited, while taxes are *personal* burdens imposed upon and for the benefit of all alike.

(*Norfleet v. Cromwell*, 64 N. C., 16; *Simpson v. Commissioners*, 84 N. C., 158; *Cain v. Commissioners*, 86 N. C., 8; *Newsom v. Earnhart, Ibid.*, 391; *Commissioners v. Commissioners* 92 N. C., 180; *Evans v. Commissioners*, 89 N. C., 154, cited and approved.)

Motion for an Injunction heard before *Clark, Judge,* at chambers in Raleigh on 30 June, 1885, pursuant to an order to show cause made by Judge Gudger on 13 (144) June, 1885, to restrain the defendant from applying any money in the hands of the Treasurer of Wake County, levied and collected, or to be levied and collected to meet the ordinary and necessary expenses of said county of Wake, to defray the expenses of erecting and building a fence around said county.

His Honor, upon hearing the sworn complaint in said action as an affidavit, and also the affidavit of the defendant, rendered judgment that the said motion be not granted, and plaintiffs excepted and appealed to Supreme Court.

The General Assembly at its session in 1881 passed an act to abolish fences in the county of Wake, and therein required the county commissioners to erect a good and lawful fence around the entire county and to erect gates on all highways leading into said county, and to keep the same in good repair. Chapter 126.

The act provides for the payment of the expenses incurred

in executing the work out of the funds of the county treasury, on the order of the county commissioners; for the condemnation of a space not exceeding twenty feet for the proposed structure upon the lands of recusant and unwilling owners, where it may become necessary in running which a tract shall not be divided unless already separated in parts by a highway, or the owner assents thereto, but the boundary of the tract shall be followed; and further, that "the act shall not go into effect until the same shall be ratified by the qualified electors of said county," for ascertaining whose will an election is directed to be held. Sections 9, 10, 12, 16.

No steps were taken under this enactment to give it operation, and at the next session, section 16, which directs the taking of the popular vote, upon the result of which it was dependent, was repealed and the following substituted in its place: "That wherever a majority of the qualified voters of any township in said county, as compared with the registration books of said township, shall petition the board of commissioners thereof, the said board shall declare
(145) said ch. 126, Laws of 1881, in full force and effect in the said township making the petition. Chapter 329. Again, 28 February, 1885, an act was passed and went into effect, repealing that last mentioned, as also sec. 16 of that just enacted, and declaring all of its other provisions to be in full force and effect. Laws 1885, chap. 163. Later in the same session, on 11 March, the General Assembly postponed the operation of the preceding act of February, until the first day of September thereafter. Chapter 381.

Besides this special legislation applicable to the county of Wake, a general law on the subject, operative over the whole State, was passed and is contained in secs. 2799 to 2830, inclusive, of The Code, which authorizes a county, township or district, whether formed by township lines or not, whose electors may so desire and make their will known by an election, to dispense with fences in such county, township, or other territory constituting a district, on the terms and conditions presented therein. Secs. 2812, 2813, 2814. Sec. 2824 is in these words: "For the purpose of building such stock law fences, the board of commissioners of the county may levy and collect a special assessment upon all real prop-

erty taxable by the State and county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property."

These are the series of acts of legislation by virtue of which the commissioners were proceeding in the discharge of the public duty imposed upon them, under contract, to put up the fence around the county boundary, and to use the appropriate county funds for that purpose, when the suit was instituted 10 June, 1885, and the commissioners were arrested in their work by a restraining order issued by *Gudger, Judge,* three days later, and obtained upon an *ex parte* application in which the complaint was used as an affidavit in its support. The rule granted against the commissioners commands them to appear before the resident Judge of the district, at the court-house in Raleigh, 30 June, and show cause why they should not be enjoined and restrained from collecting * * * the assessment of one-fourth of (146) one per cent on the value of the real estate in the county, whether it had been levied by them on the first Monday of that month for the purpose of constructing the fence under the provisions of the act of 1881, as subsequently modified, or from taking any steps to that end, and from applying any moneys of the county levied to meet its necessary expenses, to defray the expenses of the work and from putting up the fence—and that, meanwhile and until the matter can be heard, the defendants be restrained from using the county funds in the erection of the fence. In accordance with the rule and in answer to the complaint, the defendants put in their answer as an affidavit; and upon this evidence the plaintiff's motion for a preliminary injunction was heard at chambers in the said city, 6 July, it having been, as we infer, postponed, though the record is silent on the point, from the day designated in the order to that day, when it was refused at plaintiff's costs.

Messrs. G. V. Strong and *A. M. Lewis & Son* for the plaintiffs.

Messrs. Pace & Holding and *E. C. Smith* for the defendants.

SMITH, C. J., (after stating the case). The restraining intermediate order having served its purpose, and any further restraint being refused, the commissioners proceeded with their work, and, as appears from their sworn affidavits, produced before us since the argument, have caused to be built under contract, all but a small part of the entire enclosing structure, as reported to them by the finance committee, the cost of which remaining part will not exceed three hundred dollars; that the portion so built has been accepted by the commissioners, and paid for in orders on the county treasurer, taken up by him. The counter affidavits show gaps in the structure at different points, but do not directly impugn the statements of the commissioners in regard to the extent to which the work has progressed. Arresting the further prosecution of the work under such circumstances, and preventing its completion, might entail serious loss and
(147) damage upon the landowners who, relying upon this common enclosure for the protection of all, may have failed to keep up and repair their own separate fences, while no substantial and practical good would accrue from preventing the completion of the work, the remaining cost of which is such an inconsiderable part of the entire cost. We should not feel called upon, therefore, at this preliminary stage of the action, to put a stop to the work, unless we were fully satisfied that it was being prosecuted in violation of the constitution, and with no legal warrant therefor. But as it is of public importance that the validity of the legislation under which the commissioners are acting should be settled before the moneys levied under its authority are taken from the tax-paying landowners, upon whom an assessment has been made, we proceed to examine that question, pressed with so much earnestness upon us in the argument of appellants' counsel. This is the only inquiry that we propose to consider.

There have been several cases before the Court since the inauguration by the Legislature of the policy of substituting a single barrier around a large territory for the protection of the cultivated lands therein, erected at the expense of those reaping its benefits, for the far more costly barriers which individual proprietors engaged in cultivating the soil, would be otherwise compelled to erect at their own separate expense

for the security of their crops, and to escape the penal consequences of a violated law. Such legislation for local and special improvements, beneficial to one species of property, and for the expenses of which, local, as distinguished from general and public assessments for the common good, are made upon the property so benefited, has been repeatedly held not to be under all those constitutional restraints found in article five, section three, though the principle of uniformity runs through both. The principle underlying local assessments conferring special advantages upon land, is but an application of the maxim illustrated and applied in *Norfleet v. Cromwell,* 64 N. C., 16; *qui sentit commodum, debet sentire et onus.* Without examining them in detail, the rule will be found to be vindicated in many, if not all (148) the cases decided in this Court. *Simpson v. Commissioners,* 84 N. C., 158; *Cain v. Commissioners,* 84 N. C., 8; *Newsom v. Earnhardt, Ibid.,* 391; *Ibid.,* 552; *Comrs. v. Comrs.,* 92 N. C., 180; *Bradshaw v. Comrs., Ibid.,* 278.

The right to levy and collect assessments upon lands to meet the costs of constructing a boundary barrier against the inroads of stock, enclosing them, being conceded upon the authority of decided cases, the plaintiffs deny that any such power, though possessed by the Legislature, has been conferred upon the defendants, and hence it can not be exercised. The argument is, that they are directed to take the moneys needed for the purpose out of the county treasury, and the case is not within the terms of sec. 2824 of The Code, which is confined to cases in which a favoring and approving popular vote has been taken, by force of the qualifying words "within the county, township or district which may adopt the stock law."

It is true this language has reference more immediately to the preceding sections in which the sanction of the electors is required, but it can not be less applicable to the present case, when no vote is necessary, and the authority to build the fence is given without any such condition, and must convey the right to use the appropriate means of payment. It is an essential condition in the cases where an approval by the electors must be first obtained; it is put out of the way when the Legislature dispenses with the approval, and commands

the work to be done absolutely. In our construction of this clause, the defendants may assert and exercise the right to levy and collect the assessment authorized by it. Again, it is objected that the tax is in excess of constitutional limits and can not be raised except by a vote, it not being for any necessary county expense. Article 7, sec. 7. Nor for "a special purpose with the special approval of the General Assembly." Article 5, sec. 6. We can scarcely conceive a case in which this special approval is given more clearly than in its positive command to the commissioners to do the work and providing the means for its being done. But (149) these local assessments are not under all the restraints put upon the taxing power. They stand upon a different footing, and rest upon the equitable and just consideration, that lands rendered more valuable by the improvement, ought to contribute to the expenses of making the improvement, and that these expenses ought not to fall upon the entire body of the taxpayers; as well those not benefited as those who are benefited. The advantage is to the land and to the persons only as owners of the land.

In answer to a suggestion comparing the benefits of a school established in a district, with that received by land for a local improvement, a careful writer on the subject thus speaks:

"In the theory of local assessments, a benefit received is not of the same kind as the benefit contemplated in taxing a county or school district. In the latter cases the benefit inures to all the inhabitants; in the local assessment it is a benefit not to persons but to land. Such a benefit must necessarily be a pecuniary benefit to the land adjacent to the improvement, arising from increased facilities for travel which increase the market value of the land; and if this be the character of the benefit, then the conclusion follows irresistibly that the tax ought to be only to the extent of the benefit. Beyond that benefit or increased value, the owner of the land receives no more benefit from the improvement than any other inhabitant of the city. This is in accord with the universally recognized theory of local assessments, and these are a class of cases which require the practice and theory to be consistent." Burroughs Taxation, 406.

Reiterating the language employed in adapting the rule to the facts presented in *Cain v. Commissioners, ante,* which are essentially the same as in this before us, we say: "We can scarcely conceive a case more clearly within the compass of the rule than that now under consideration. * * * The enactment proposes to dispense with separate enclosures for each man's land, and substitute a common fence around the county boundary, to protect all agricultural lands from the inroads of stock from abroad, and the fencing in of stock owned within the limits. It creates a com- (150) munity of interest in upholding one barrier in place of separate and distinct barriers for each plantation; and thus in the common burden, lessens the weight that each cultivator of the soil must otherwise individually bear. As the greater burden is thus removed from the landowner, he, as such, ought to bear the expense by which this result is brought about." It is to be observed that the policy embodied in this form of legislation is growing in public favor, of which no stronger proof can be given than that furnished in the numerous enactments on the subject to be found upon the statute book. Should it prevail over the whole State it would be attended with a large reduction in expense, and, perhaps, pass out of the domain of local improvement and become of public utility, but of this we express no opinion, as our duty is to expound and enforce such laws as the General Assembly may possess the power and choose to enact for the general welfare. It is not easy to discriminate between an enactment that compels every farmer to keep a sufficient fence around his land in cultivation, at his own expense, under the penalty of exposure to a public prosecution, and that which directs a single fence to be constructed around the boundaries of a county at the common expense and for the common benefit of all. Nor is it plain that such a fence is not one of the necessary expenses of a county, as much so as an expensive bridge, such as we held the commissioners could deem such, in *Evans v. Commissioners,* 89 N. C., 154.

Our consideration leads us to the conclusion reached by his Honor, and we find no error in his refusal to award the injunction asked for.

No ERROR. Affirmed.

Cited: Puitt v. Comrs., 94 N. C., 716, 717; *Raleigh v. Peace,* 110 N. C., 38; *Harper v. Comrs.,* 133 N. C., 110; *Asheville v. Trust Co.,* 143 N. C., 369

(151)

S. D. BRAGG et al. v. E. B. LYON et al.

Partition—Jurisdiction of Clerk.

1. The courts have no power to order a sale of land for partition where one of the parties interested is a tenant by the courtesy and objects to the sale.
2. Nor have they the power to direct an *actual partition* as to some of the shares, and a *sale* and *partition* of the remainder.
3. The clerks of the Superior Courts have no equity jurisdiction in respect to partition, except that which is specially conferred by statute. The Code, secs. 1903 and 1904.

(*Parks v. Siler,* 76 N. C., 191, cited and approved.)

SPECIAL PROCEEDING for Partition, heard before *Gilmer, Judge,* at Fall Term, 1885, of GRANVILLE, upon an appeal from the order of the clerk directing a partition of some and a sale of the other lands mentioned in the pleadings.

The petition alleges that the land described in the petition, embracing nine acres, on which there was situate a grist-mill, sawmill, carding machine and water-power, was owned by William Bragg, James B. Floyd and Amanda, wife of Edward B. Lyon, as tenants in common; that William Bragg having died, the plaintiffs are his heirs-at-law, and Edward B. Lyon, tenant by the courtesy, his wife being dead, and their children and the said James B. Floyd are defendants.

The petitioners pray that the land be sold for partition, for the reason that there are so many parties interested in the partition, and such was the nature of the property that an actual partition can not be made without material injury to some or all of the parties concerned, and that the interests of all would be materially promoted by a sale for the purpose of partition.

It appearing that Pattie N. Lyon, one of the defendants, was a minor, her father, Edward B. Lyon, was appointed her

guardian *ad litem,* who, answering, admitted the statements in the petition, except that the interest of all parties would be promoted by a sale, which was denied.

The defendant Edward B. Lyon, answering for himself, making similar admissions and denials, and (152) for a further defense he said, that he was a tenant by the courtesy of his wife's (Amanda A. Lyon) one-third part of said land and mills, and that he would be greatly injured by a sale thereof, and he further declared and maintained that it would not be legal, and not within the power and authority of the Court to order a sale of his interest which he has as tenant by the courtesy.

The Court being of opinion that it had no power or authority to order a sale of the interest of Edward B. Lyon in the land, dismissed the petition as to him, with costs, and ordered a sale of the other two-thirds. From that ruling the petitioners appealed to the Judge of the Superior Court, who, at chambers on 25 September, 1885, adjudged that the order of the clerk of the Superior Court be affirmed and remanded the case to him to be proceeded with as directed in his said order.

From this judgment the petitioners appealed to this Court.

Mr. John W. Hays for the plaintiff.
No counsel for the defendants.

ASHE, J., (after stating the case). There was no error in the ruling of his Honor, that the clerk of the Superior Court had no legal power or authority to order a sale of the estate of the defendant Edward B. Lyon, who was a tenant by the courtesy, when objection to such sale had been made by him. The decision in the case of *Parks v. Siler,* 76 N. C., 191, is decisive on the point. It was there held, "The Courts have no power to order a sale of land for partition, when one of the defendants interested therein is a tenant by courtesy, and objects to the sale." "That the Court had no such power at common law and there is no statute which confers it," and the true reason, aside from that assigned by the late Chief Justice in the above-cited case, is that the Court, upon a sale of the estate of a tenant by the courtesy, would not have the power

to set aside and secure out of the proceeds of the sale
(153) a sum proportionate to his share in the same, and direct the interest to be paid him for life, or to pay to him a sum in gross ascertained as the value of his life estate, as might be done when a widow entitled to dower joins in the petition for sale for the purpose of partition.

But it is contended that there was error in the ruling that the petition should be dismissed as to the interest of Edward B. Lyon, and that the residue of the land, being two-thirds thereof, should be sold. This presents the only question for our consideration.

When there is a tenancy in common, each claimant has the right to a partition, and to have his interest apportioned to him in severalty if the estate be susceptible of divison, but if not or it shall be made appear upon the application of any one or more of the claimants by satisfactory proof, that an actual partition can not be made without injury to one or more of the parties interested, the Court shall order a sale of the property. The Code, sec. 1904.

The Courts of Equity have always had the power to make partition as one of its known and accustomed heads of jurisdiction, but it had no power to order a sale of land for that purpose before such jurisdiction was conferred upon it by statute. After it was invested with that jurisdiction, it possiby had the power to make a decree directing a partial sale such as was ordered by his Honor in the Court below. But this proceeding is not in a Court of Equity, but in the Superior Court before the clerk who had no equity jurisdiction; and besides, the statute giving jurisdiction to Courts of Equity over sales for partition, has been repealed by sections 1903 and 1904 of The Code, which confers that jurisdiction upon the Superior Courts to be exercised by the clerk, who is not vested with any equity powers, except where specially conferred by statute.

It would seem, therefore, that as the right to decree a partial partition was a power incident to an equity jurisdiction, the clerk could have no power as was exercised by him in this case, to order a sale of a part of the land and leave the
(154) residue unsold. The Legislature, we think, in enacting the above-cited section of The Code, contemplated a sale of the whole land, and the clerk had no right to order a partial sale.

Our conclusion therefore is, that there was error in the judgment rendered by the clerk, and also in that of his Honor in affirming the judgment of the clerk, and as Edward B. Lyon, the tenant by the courtesy, objected to the sale, we can not do otherwise, under the decision in *Park v. Siler, supra,* than dismiss the petition.

The petition is dismissed, with the costs to Edward B. Lyon to be paid by the petitioners.

ERROR. Dismissed.

Cited: Vance v. Vance, 118 N. C., 868; *McCauley v. McCauley,* 122 N. C., 292.

PETER McRAE, Admr., v. CHARLES MALLOY.

Evidence—Exception—Witness—Opinion—Surprise.

In an action brought by an administrator to enforce a contract made with his intestate by the defendant, wherein the latter alleged that the execution thereof had been procured by surprise, undue influence, etc.; *It was held,* 1. The defendant was competent to testify to the condition of his mind and the circumstances surrounding him at the time of his execution of the agreement; 2. Declarations made by the defendant shortly after the execution of the contract, were competent as showing the condition of his mind and in corroboration of his evidence on the trial; 3. A witness attacked may himself be examined as to the corroborating statements; 4. The opinion of a witness—though not an "expert,"—founded upon observation of the character of a person, is competent evidence of the condition of the mind of that person; 5. Exceptions to the admissibility of evidence must specifically point out the objectionable matter—a general exception embracing competent and incompetent testimony will not be entertained; 6. If a witness on the cross-examination, in reply to a legitimate inquiry, makes a statement of incompetent matter, the proper course is to apply to the trial Judge to have it withdrawn, or to direct the jury to disregard it. Otherwise, it will not be treated as a valid ground of exception on appeal; 7. To entitle a party to relief on the ground of surprise, the circumstances must be such as demonstrate that he had no opportunity for suitable deliberation or consultation, and that in consequence
(155) thereof he was influenced to act in a hasty and improvident manner.

(*Barnhardt v. Smith,* 86 N. C., 473; *Bost v. Bost,* 87 N. C., 477; *Lockhart v. Bell,* 90 N. C., 504; *State v. George,* 30 N. C., 324; *Clary v. Clary,* 25 N. C., 78; *Barker v. Pope,* 91 N. C., 165; *Horah v. Knox,* 483, cited and approved, and *Woodhouse v. Simmons,* 73 N. C., 70, cited and distinguished.)

Action tried before *MacRae, Judge,* at Special Term, 1885, of Richmond.

There was judgment for the defendant, from which the plaintiff appealed.

The defendant, who had been guardian to Alexander Malloy during his minority, and held a large trust estate in his hands, some years after his ward arrived at full age executed to him the following instrument in writing and under seal:

State of North Carolina,
Richmond County.

For and in consideration of paying and discharging the balance due Alexander Malloy, of whom I was guardian, I do hereby promise and agree to pay to said Malloy annually, one-third of the net profits to be made at the factory of Malloy & Morgan during my life. C. Malloy. (Seal)

8 March, 1878.

The present action was commenced by the plaintiffs, the administrator of said Alexander Malloy and his heirs-at-law, by the issue of a summons against the defendant, returnable to Spring Term, 1879, of the Superior Court of Richmond, to enforce said covenant, and to have an account taken of the operations of the factory during the next ensuing year, to the end that the share due the intestate be ascertained and recovered.

The defendant put in his answer at the same term, and afterwards an amended answer, setting up, among other defenses not material in determining the present appeal, that the covenant or contract was obtained from him by surprise and undue influence.

(156) Two issues only were submitted to the jury, which, with the responses to each, are:

I. Was the contract sued upon obtained by surprise or undue influence? Yes, by surprise.

II. Was defendant induced to execute said contract by false representations made by intestate or his attorneys? No.

The plaintiffs demanded judgment upon the finding under the second issue, insisting that they were entitled thereto, not-

withstanding the finding upon the first, which was refused, and judgment being rendered upon the verdict for the defendant, they appealed.

Mr. Frank McNeill and *Messrs. Reade, Busbee & Busbee* for the plaintiff.

Messrs. Burwell & Walker for the defendant.

SMITH, C. J., (after stating the facts). The exceptions to be considered are to the rulings of the Court upon questions of evidence, to the refusal of instructions asked, and to such as were given to the jury.

The execution of the contract being admitted and the burden in impeaching its validity thus devolving on the defendant, he was first examined as a witness on his own behalf, and testified in regard to the circumstances attending the making of the contract thus:

The contract was signed at Alex. Malloy's house—Messrs. Shaw, McNeill, Morgan and myself being present. Messrs. Shaw and McNeill are lawyers and were Alex. Malloy's attorneys, not mine. It was about 12 o'clock. I live three-fourths of a mile from the house; I got there about 8 o'clock —after breakfast; I was not notified before that day that the transaction was to occur and had no knowledge of it.

The plaintiffs here interposed an objection which was disallowed, and they excepted.

The objection is in a very general form and it does not appear to how much and what portions of the pre- (157) ceding testimony it is intended to apply. If all are embraced and some portions are competent while others are not, the exception is too broad to be sustained. As was said in *Barnhardt v. Smith,* 86 N. C., 473, "it is not erroneous to refuse to rule out a volume of testimony when a portion of it ought to be received, and therefore the statutory rule of practice prevails which requires that the obnoxious evidence shall be specially pointed out and brought to the notice of the Court in order to a direct ruling on its exceptions," etc. The same principle is recognized in regard to the Judge's instructions before the change in The Code since introduced. Sec. 412, par. 3. *Bost v. Bost,* 87 N. C., 477.

If the exception was intended to be restricted to the concluding sentence, the absence of information of what was about to take place—it does not fall under the condemnation of sec. 590 of The Code.

It may include the intestate, but it is of much wider scope and takes in every possible source from which information might come, and thus encounters the very same difficulty already adverted to.

The preliminary question was first to be determined by the Judge, that the evidence involved a negation of what may have been said by the intestate, and then the testimony would have been confined to the want of information from others. *Lockhart v. Bell,* 90 N. C., 504.

The case is not like that of *Woodhouse v. Simmons,* 73 N. C., 70, since there the living party was not permitted, after the statutory presumption of payment had arisen, to repel it by proving that, in fact, the note had not been paid. This necessarily related to an inter-communication between the parties and was ruled out, as within the inhibitions of the statute, since it was possible the deceased might sustain the presumption by proving an actual payment of the debt.

II. The seecond objection to the detailed account
(158) of the loss of trust funds by the burning of his house by the invading armies under Sherman—of his inability to collect the notes, solvent when taken and rendered worthless by the destruction of the property of the debtors—his seeking and acting under advice of counsel—and his delivery of what funds he still held to the plaintiff—must be disposed of in the same way as the preceding exception. The objection is not pointed to any portion of the testimony, nor do we discover any against which, if so directed, it would be available.

III. The plaintiff objects also to the witness saying "I was very much excited when I signed the paper;" "I felt very much depressed;" "I would not have signed it, if I had had proper time for reflection." These were facts capable of proof by others, and must be equally provable by the plaintiff. They indicated the state of mind of the witness when he signed the contract, and his repugnance to the act. The inquiry is, whether the instrument was procured by surprise

and pressure which could scarcely be resisted, and is explanatory of the act of execution.

IV. The plaintiff further excepts to the witness being allowed to say—"An hour or two afterwards," on the road home, "I expressed to Mr. Morgan my regret that I had signed it"—"I told him I was forced to sign it or I would have to sign it," just before its execution;—"I considered I did not owe Alexander Malloy a cent."

These are indications of the state of mind just before and after the signing, as he says it was at the time of doing the act—and are corroborative of his testimony in this particular. Concurrent declarations are competent to support as well as to contradict, and these may be shown by an impeached witness, as this witness is by his very relation to the cause and controversy, as well as by others who heard them. *State v. George,* 30 N. C., 324.

The witness was certainly competent to say that he did not consider that upon a just settlement of the trust estate, he would be found indebted to his ward, for this is the obvious meaning of the declaration, based upon the (159) destruction of funds in his hands which he could not by any rule of fiduciary diligence prevent. But it is a harmless estimate, perhaps an erroneous one, not calculated, so far as we can see, to prejudice the plaintiff's case.

V. The next exception is to testimony delivered on cross-examination not responsive to the question "what became of the notes you saved?"

The witness, after a brief recital of his efforts to preserve the trust funds and their seizure by the Federal soldiers, says, "What they did not get I gave to Alex. Malloy."

The witness was not stopped in giving his narrative nor until he had said what is now the subject of exception. The concluding words are in direct response. The plaintiff, if opposed to the giving in of the testimony, should have interposed and arrested the examination, or if this could not be done in time, should have asked the Judge to require its withdrawal or to direct the jury to disregard it, so that it would become harmless.

But it is not admissible for counsel to be quiet and allow the evidence to come out and take advantage of it, if favor-

able, and if not, to ask that it be stricken out and not considered. It is not subject to exception as is testimony in itself incompetent and not extracted upon examination of the witness by the complaining party.

VI. The next and remaining exception to evidence received (unless some have been inadvertently overlooked) is to a portion of that of the witness Morgan, wherein he says: "I didn't consider him in a condition of mind to transact business—that sort of business." "I didn't consider him at that time in condition or state of mind to act as he would have done if he had had time to reflect about it, not at that time."

And further, the plaintiff excepts to the witness testifying to what the defendant said to him on their way home, substantially the same as the defendant's testimony already considered.

The objections to the clauses we have extracted from the testimony seems to rest upon the ground that these ex-
(160) pressions of opinion of the defendant's state of mind and capacity to transact business are not receivable upon the present inquiry.

We do not acquiesce in this view of the law. The opinion is but a condensed and summary method of stating the result of personal observations and communications with the party, and its competency is recognized in an able opinion of Judge GASTON in *Clary v. Clary,* 25 N. C., 78, in which, after an elaborate discussion of the subject, he says: "Mere opinion as such is not admissible. But when it is shown that the witness has had an opportunity of observing the character of the person or the handwriting which is sought to be identified, then his judgment or belief *formed upon such observations,* is evidence for the consideration of the jury; and it is for them to give to this evidence that weight which the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony, may in their judgments deserve." In this case the testimony of a witness whose deposition had been taken—"but deponent was impressed with the belief that as to her mental faculties, she was in that state called childish"—was held to be competent. The same ruling is made in the late case of *Barker v. Pope,* 91 N. C.,

165, and recognized in *Horah v. Knox,* 87 N. C., 483, though the point was not brought up by appeal to this Court.

Upon the conclusion of the evidence, the plaintiff asked for the following instructions:

1st. That there is no evidence that the contract sued on was obtained by surprise or undue influence as alleged in the answer.

2d. That there is no evidence that the defendant was induced to execute the contract sued on by reason of the representations stated in the defendant's answer.

3d. That if said representations were made there was no evidence they were false.

4th. That if the contract sued on was given by defendant as compromise of doubtful rights between Alex. Malloy and defendant, neither party knowing their full rights, and even if it was afterwards ascertained that Charles Malloy was not indebted as much as he supposed, this would (161) not affect the contract and cast suspicion on its integrity.

5th. That even if Charles Malloy, guardian of Alex. Malloy, took notes which at the close of the war he thought solvent, this would not relieve him from liability to his ward, Alex. Malloy, unless he took surety to said notes, who were solvent at the time the notes were taken.

His Honor gave the second and third instructions as prayed for, and declined to give the first, fourth and fifth, and proceeded to charge the jury as follows:

"The plaintiffs seek to enforce the performance of a contract alleged to have been made by the defendant with Alex. Malloy, now deceased. The signing and delivering of the contract is admitted, but defendant says that it was obtained from him by surprise and undue influence, and that it was obtained from him by the use of false representations of the attorneys for Alexander Malloy who were present at the execution of the contract. There are other questions involved in this action, but for the present purpose nothing is presented to you but these two issues:

"'Was the contract obtained by surprise?' Was there such conduct on the part of Alex. Malloy and his attorneys, or either of them towards the defendant Chas. Malloy, as so surprised him and took away from him his own volition, and

took him unawares and confused him, and so enabled them to procure from him the execution of the contract, not of his own free will, but because his will was overpowered by their will, and so the deed, or contract as it is called, was not his contract, not his deed, but in reality the act of those so operating upon him?

"'Was he of sound mind?' Not was he of very strong mind nor of very weak mind, but did he know what he was doing, and did he have capacity to act for himself; or were the circumstances such, that for the time being he lost his right mind and reason, and could not act for himself; if such was his condition, produced by the surrounding circumstances, such circumstances of distress as to entirely
(162) overcome his free agency, you will be justified in responding to the first issue, 'Yes, by surprise.'

"The burden is upon the defendant to satisfy you of this, by the preponderance of evidence, and the evidence to satisfy you of the truth of this defense should be clear and convincing.

"As to the question as to whether it was obtained by reason of undue influence, this undue influence is an overpowering and controlling influence, exercised by one occupying a confidential relation to another, one who occupied the position of the stronger over the weaker, or some confidential relation which enables him to exert an influence arising from such relation, for his own benefit, and there are no circumstances in the testimony which would warrant you in finding that the execution of the contract was obtained by reason of undue influence. While the phrase, 'undue influence,' is used, it is more properly a charge of duress, or compulsion, and is embraced in the allegation of surprise, so that you may consider only the allegation of surprise in this issue.

"'Was it obtained by false representations, etc?' The allegation is, and to this you are confined, 'that it was represented to the defendant for the purpose of inducing him to sign the said deed and said contract, that if he did not sign them it would ruin him,' one of the intestate's counsel remarking that on account of the loss of papers destroyed by Sherman's army, and the length of time that had elapsed, it would be difficult for him to exonerate himself from liability to his ward. There is no evidence that the first words were

used. It would not warrant you in finding a verdict on this issue in the affirmative."

The exceptions pressed most earnestly on our attention, to the charge and ruling of the Court, are that the allegations of surprise and undue influence, upon the facts stated in the answer, are insufficient to invalidate the contract and relieve the defendant of his assumed undertaking, nor is the restricted finding a warrant for the setting the contract aside.

Recurring to the seventh section of the amended answer, it will be seen under what circumstances it represents the act of signing the deed and contract to have been brought about; that, without counsel himself, he was told, (we (163) give the substance rather than the words used), that a refusal to execute them would ruin him, one of the plaintiff's counsel suggesting his loss of papers and the difficulty he would experience in the effort to exonerate himself from liability to the plaintiff, and that, in consequence of said *threat* and *representation, he was induced to sign both.*

Such are the averments in the answer, and the evidence indicates great excitement and mental disturbance while the matter was in progress—so great that the plaintiff's intestate, in his version of the occurrence given to his cousin Archibald Malloy, said "he never saw anybody hardly in such a fix, and felt sorry for the defendant." These were certainly matters for the jury to consider in determining the character and effect of the act.

Again, it is objected that the finding that there was a surprise only upon the defendant, can not be allowed to have the effect of rendering the instrument null and inoperative, and therefore, upon the other findings, the plaintiff ought to have judgment.

There might be some force in this contention if the word *"surprise"* stood unexplained, for *per se* it might not be sufficient to vitiate and avoid the act done. The term is used, however, as a ground for equitable relief, and classed with fraud, undue influence and the like.

The "surprise" which furnishes a reason for the interposition of the court of equity, in the words of Judge *Story,* "must be accompanied with fraud and circumvention; or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation; or that there was

some influence or mismanagement to mislead him. If proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends, or counsel, before he is called upon to act in circumstances of sudden emergency, or unexpected right or acquisition. In these and many like cases, if there has been great inequality in
(164) the bargains, courts of equity will assist the party upon the ground of fraud, imposition or unconscionable advantage." 1 Story Eq. Jur., sec. 251.

The charge of the Court as to what is meant by surprise, to which part of the issue he directed and confined the attention of the jury, is certainly not unfavorable to the plaintiffs, for he describes it as taking away the defendant's volition—overpowering his will, so that the contract was not his, but the act of those cooperating upon him. In this sense of the word, the jury are directed to inquire if the instrument was procured from the defendant by *surprise,* and the verdict responds that it was thus procured.

There are very many forms of exception taken by the plaintiff, but the substance of them all is comprised in the propositions we have considered, and they do not require further comment. Our conclusion, therefore, upon a full and careful examination of the record is that there is no error in the rulings. The judgment must be affirmed.

NO ERROR. Affirmed.

ASHE, J., did not sit.

Cited: Deming v. Gainey, 95 N. C., 532; *Wiggins v. Guthrie,* 101 N. C., 676; *Faulcon v. Johnston,* 102 N. C., 269; *Blake v. Broughton,* 107 N. C., 229; *Burnett v. R. R.,* 120 N. C., 518; *Whitaker v. Hamilton,* 126 N. C., 471; *Cogdell v. R. R.,* 130 N. C., 326; *Beaman v. Ward,* 132 N. C., 69; *State v. Ledford,* 133 N. C., 722; *Taylor v. Security Co.,* 145 N. C., 392, 396.

L. L. LUNN v. PERRY SHERMER.

Deceit—False Representations—Defects, Latent and Patent —Demurrer—Answer—Warranty—Damages, Measure of—Parties.

1. A defect of parties apparent on the face of the complaint must be taken advantage of by demurrer; when it is not so apparent, it should be averred in the answer, and if it is not presented in one or the other of these methods it will be deemed to have been waived. The Code, secs. 239, 241, 242.
2. Fraud or decit in the sale of personal property may be perpetrated either by *false representations*, or by *concealment* of unsoundness.
3. To constitute a good cause of action for *false representations*, three elements must coexist: (1) the falsity of the repre- (165) sentation, (2) the knowledge of the maker of its falsity, and (3) that the false representation induced the purchaser to buy.
4. But when the action is based on the *concealment* of unsoundness, the defect must be *latent*, for if it is such as may be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is not sufficient to establish deceit, although he knew of the unsoundness; *Therefore,*
5. Where the vendor of a mule represented that it was "sound so far as he knew," and the jury found that the mule was affected by a latent disease, and the vendor knew or had good reason to believe this fact; *Held*, the plaintiff was entitled to recover, both upon the ground of deceit practiced in the *concealment* of the defect, and false representations.
6. The measure of damages in such cases is the difference between the value of the article at the time of the sale, if sound, and its value, if unsound, at that time, and it can make no difference what disposition the purchaser made of it afterward.
7. There are cases in which it is competent to show the price for which the vendee sold the unsound article, but this is only for the purpose of aiding the jury in assessing damages.

(*Houston v. Starnes*, 34 N. C., 313; *Ferebee v. Gordon*, 35 N. C., 350; *Brown v. Gray*, 51 N. C., 103, cited and approved.)

ACTION tried before *McKoy, Judge,* and a jury, at the Spring Term, 1885, of ROWAN.

The plaintiff in his complaint alleged that he purchased a mule from the defendant on —— August, 1882, and the defendant falsely and fraudulently represented to him that the said mule was sound so far as he knew, and that he was thereby induced to purchase for the sum of one hundred and seventy-five dollars.

That the said representations were false, in that the mule was then diseased with "farcy," or some other incurable disease, and the defendant well knew that fact at the time of the sale.

The defendant in answer to the complaint admitted that he sold the mule to the plaintiff and told plaintiff at the time that the mule was sound as far as he knew, but denied all the other allegations of the complaint.

The following issues were submitted to the jury:

1. Was the mule sold by defendant to plaintiff unsound at the time of sale?

2. Did the defendant represent the mule to be (166) sound as far as he knew?

3. Did he at the time know or have good reason to believe that the said mule was not sound?

4. How much damage is plaintiff entitled to receive for the unsoundness of said mule?

Defendant excepted to third issue, and offered the following issue:

"If not sound at the time of the sale, did the defendant know of his unsoundness and falsely and fraudulently represent him to be sound, with the intent to induce the plaintiff to buy?"

The Court declined to insert the issue; defendant excepted.

On the trial, L. L. Lunn, plaintiff, testified that he bought the mule from defendant at one hundred and seventy-five dollars; that defendant only knew the plaintiff in the trade; that he bought the mule with the money of Payne, Lunn & Co., manufacturers of tobacco at Salisbury; that the firm had a contract to deliver certain mules to a party in Charleston, S. C.; that he exchanged the mule bought from the defendant with his father, B. F. Lunn, and the mule he got from his father was delivered, with four others, in Charleston, S. C., at eight hundred and fifty dollars for the five mules, and mule he got from B. F. Lunn was the best in the lot; that he did not warrant the mule to his father, but told him Shermer, the defendant, said the mule was sound; the unsoundness appeared two or three weeks after B. F. Lunn got the mule; B. F. Lunn had never threatened him with suit, but that his father was claiming damages on account of the unsoundness of the mule.

The defendant's counsel objected to the plaintiff's recovering upon his own testimony, in his own name, as the trade was made with the firm of Payne, Lunn & Co., and on the firm account.

The Court held that, from the face of the pleadings, no such question was raised; that the Court would permit them to amend their answer so as to raise the question. Defendant declined to amend. Defendant asked the Court to charge the jury that plaintiff could not recover damages as, according to his own evidence, he had sustained no loss. (167) The Court, leaving that question to the jury, charged them: That the measure of damages was the difference between the value of the mule at the time of the purchase, if sound, and the value of the mule if diseased at that time, to which charge defendant excepted.

The jury responded in the affirmative to each of the three first issues, and on the fourth issue, assessed the plaintiff's damages at one hundred and seventy-five dollars. There was judgment in behalf of the plaintiff, for the amount of damages assessed by the jury, and the defendant appealed.

Mr. Charles Price for the plaintiff.
Mr. Armistead Jones for the defendant.

ASHE, J., (after stating the case as above). That the Judge refused to charge the jury that the plaintiff could not recover in his own name was made a ground of exception, because the purchase of the mule was made with the money of Payne, Lunn & Co., and on the firm's account. In this there was no error. The complaint expressly alleges, and the answer expressly admits, that the mule was sold to plaintiff by defendant.

A defect of parties is a good ground of demurrer when the defect appears upon the face of the complaint. The Code, sec. 239, sub-sec. 4. And "when the matter alleged as ground of demurrer does not appear on the face of the complaint, the objection may be taken by answer." *Ibid,* sec. 241. But "if no such objection be taken, whether by demurrer or answer, the defendant shall be deemed to have waived the same. *Ibid,* sec. 242.

The alleged defect of parties here did not appear on the

face of the complaint. The defendant, therefore, could not demur; nor did he raise an objection to the complaint for that defect, in his answer, but in fact admitted it; consequently he is deemed to have waived the objection, and the plaintiff, for all the purposes of the action, must be considered as the real party in interest.

(168) The defendant excepted to the third issue, and offered as a substitute the following, to-wit: "If not sound at the time of the sale, did the defendant know of the unsoundness, and falsely and fraudulently represent him to be sound, with the intent to induce the plaintiff to buy?" We think there was no error in declining to submit the issue.

The issues submitted to the jury were such as were legitimately raised by the pleadings, and such as entitled the plaintiff upon a finding in the affirmative to recover such damages as he may show he has sustained.

Fraud or deceit in the sale of a personal article may be perpetrated either by false representations or by a concealment of unsoundness in the article. When the action is brought for a deceit by false representation, three circumstances must combine: 1st, that the representation was false; 2d, the party making it knew it was false; and 3d, that it was the false representation which induced the contracting party to purchase. Broome Com., 348. But when there are no representations made by the vendor, a deceit may equally be practiced by his silence, but in such case an important distinction must be observed. For whether a cause of action for deceit will arise from mere silence and a knowledge of the defects in the article sold, will depend upon the fact whether the defect is patent or latent. In *Brown v. Gray,* 51 N. C., 103, the distinction is thus stated: "When the unsoundness is patent, that is, such as may be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is not sufficient to establish the deceit, although he knows of the unsoundness, because *the thing speaks for itself,* and it is the folly of the purchaser not to attend to it." But "when the unsoundness is latent, that is, such as can not be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is sufficient to establish the deceit," provided he knows of the unsoundness.

In this case it is not stated whether the disease of the horse is latent or patent, but as it is alleged that the horse had "farcy," or some other disease, we take it that it was a latent disorder, as there was no proof offered on the (169) part of the defendant that the unsoundness was a patent defect and no error assigned in that particular. *Brown v. Gray, supra.*

Upon this authority, the finding of the jury on the first and third issues would have been sufficient to show the deceit and entitle the plaintiff to a judgment thereon; for the finding on them established the facts that the mule was unsound at the time of the sale and that the defendant knew it. This was all that the plaintiff was required to establish by his proof. Whether there was a fraudulent intent on the part of the defendant in suppressing the fact found to be within his knowledge was a question for the jury, to be inferred from the facts and circumstances of the transaction.

But the jury also found in the second issue, that the defendant represented the mule to be sound *as far as he knew.* The case of *Ferebee v. Gordon,* 35 N. C., 350, was a case very similar in its facts, and we think decisive of this case. There was evidence in that case tending to show the unsoundness of the negro, who was the subject of the action, at the time of the sale, and of the defendant's knowledge of the fact, and it showed also the assertion of defendant that the negro was *sound so far as he knew.* The Court held that if the statement made by the defendant as to the soundness, was false within his knowledge, he was responsible for it as a false and fraudulent representation. So it is immaterial in our case whether the fraud was practiced by a *suppressio veri* or *suggestio falsi,* he is equally responsible.

The only other exception taken by the defendant was to the refusal of his Honor to instruct the jury that the plaintiff, upon his own evidence, had sustained no loss and was entitled to no damages.

The defendant is precluded by his answer from contending that the plaintiff is not the party in interest. Therefore, he is entitled to recover such damages as may be the legal consequence of the fraud practiced upon him, which as his Honor held, was the difference between the value of the mule at the time of the purchase, if sound, and its value, if (170)

diseased, at that time, and it can make no difference what disposition the purchaser made of the mule afterwards —whether he practiced a fraud upon some one else and got more than the actual value of the mule, or gave him away. There are some cases where the evidence of the price obtained by the vendor has been admitted, not to establish the value of the property, but as a fact proper to be laid before the jury to *aid* them in assessing the damages. It is a fact the party may prove, but it may or may not assist them in the assessment of the damages. *Houston v. Starnes,* 34 N. C., 313.

There is no error. The judgment of the Superior Court is therefore affirmed.

NO ERROR. Affirmed.

Cited: McKinnon v. McIntosh, 98 N. C., 91; *Mining Co. v. Smelting Co.,* 99 N. C., 463; *Wilson v. Pearson,* 102 N. C., 314; *Kornegay v. Steamboat Co.,* 107 N. C., 117; *May v. Loomis,* 140 N. C., 356.

E. P. JONES v. MANFRED CALL et al.

Evidence — Lost Paper—Case on Appeal — Contract — Co-partnership—New Trial—Judge's Charge—Agency.

1. The evidence of the destruction or loss of a paper, preliminary to letting in proof of its contents, is addressed to the court, and its finding, when there *is any* evidence, is conclusive, and not reviewable on appeal.
2. The rule requiring the production of the writing itself as the best proof of what it contains, does not extend to mere notices which persons are not expected to keep.
3. The admission of irrelevant evidence, if it does not appear to have misled or prejudiced the jury, will not be deemed erroneous.
4. If an appellant sends up with the case on appeal exceptions thereto which prove not to have been passed on by the Judge who settled the case, they will be considered as having been accepted.
5. Where a party to a special contract is prevented by the other party from performing his part, he may bring his action upon a *quantum meruit.*
6. Where there is *any* evidence upon a controverted issue, it should be submitted to the jury.

7. What constitutes a copartnership is matter of law, and a participation in profits and losses of a business in which (171) persons jointly engage is the ordinary test.

8. A material instruction to the jury upon an immaterial issue will not be considered material unless it prejudiced the action of the jury in passing upon the other issues.

(*State v. Efler*, 85 N. C., 585; *State v. Credle*, 91 N. C., 640; *Bridgers v. Bridgers*, 69 N. C., 451; *Kidder v. McIlhenny*, 81 N. C., 123; *Williams v. Kivett*, 82 N. C., 110; *Gidney v. Moore*, 86 N. C., 404; *Carrier v. Jones*, 68 N. C., 130; *Bank v. McKeithan*, 84 N. C., 582; *Commissioners v. Lash*, 89 N. C., 159; *State v. Arnold*, 35 N. C., 184; *Gaylord v. Respass*, 92 N. C., 553; *Owens v. Phelps*, 92 N. C., 231, cited and approved.)

ACTION tried before *McKoy, Judge,* at Spring Term, 1884, of GUILFORD.

There was a verdict and judgment thereon for the plaintiff, from which the defendant Call appealed.

The plaintiff's action is to recover compensation for services rendered in an agency undertaken and prosecuted to introduce to public favor, and make sale, of certain machines used in the manufacture of tobacco, which had been invented by, and patented to the defendant J. L. Jones, and by him assigned to the defendant Call, to secure an indebtedness due to him.

The complaint alleges that at the time of the transfer of the patent rights, it was agreed between the parties thereto, that the assignor might still manufacture and sell the machines as before, and pay over to the assignee Call, the net proceeds, which were to be applied in reduction of the secured debt, until it was paid off, when the patents were to be restored; that accordingly the said Jones entered upon the business in Richmond, and by and with the knowledge and consent of Call, employed the plaintiff for the purpose of advertising and selling the machines as they were made, and he at once set out in the execution of the assumed agency; that the defendant Glenn afterwards acquired under contract with Jones, an interest in the patents; and in February, 1878, associated himself with the other defendants, assuming all outstanding liabilities of the common concern with them; that the plaintiff, with the knowledge and consent of defendants Call and Glenn, and at the request of the (172) said J. L. Jones, who had authority from them to re-

tain him in their service, continued in the work of his agency with great success and profit to them, until the last of November, 1878, when his operations were put an end to and his agency revoked by Call, whereby he was prevented from securing an interest in the patents, which he was to have as soon as the profits were sufficient to discharge the debt and exonerate the patents from liability therefor; that the net proceeds of the sales were duly accounted for and paid over to the defendant Call by his associates, the plaintiff only receiving an inconsiderable sum, not in excess of two hundred dollars in remuneration for his services.

At Fall Term, 1881, when the complaint was filed, the defendant Call put in a demurrer thereto, assigning certain specified causes, which were overruled, as was stated on the argument here, but on this point the record is silent, and at the same term his answer was filed, which in legal sequence supersedes the demurrer.

The answer controverted the material allegation of the complaint upon which the plaintiff's right of action depended, and issues were eliminated therefrom and submitted to the jury, twelve in number, whereof those numbered from 1 to 7 were offered by the plaintiff, and five numbered from 8 to 12 by the defendant.

1st. Was the plaintiff employed by the defendant John L. Jones and the defendant Call, to sell, advertise and introduce upon the market the machines referred to in the complaint?

2d. Did the plaintiff render services to the said defendants according to his said contract with them, and if so, what was the value of his services so rendered?

3d. Was the plaintiff employed by the said defendants and R. W. Glenn, so to sell, advertise and introduce said machines, after the last named became interested in the patents?

(173) 4th. Did the plaintiff render services to said defendants and Glenn according to his undertaking with them, and if so, what was the value of such services?

5th. Was there a contract between plaintiff and the defendants Jones and Call, or either of them, whereby the plaintiff was to acquire an interest in the patents referred to in the complaint?

6th. Was such interest damaged, and if so, was it by conduct of defendant Call?

7th. If so, to what amount?

8th. Was defendant Call a partner with defendant J. L. Jones?

9th. Was defendant Call a partner with R. W. Glenn?

10th. Was defendant Call a partner with J. L. Jones and R. W. Glenn?

11th. If employed, and plaintiff rendered service to said J. L. Jones and Call, how much has been paid plaintiff for such services up to 5 February, 1878?

12th. If employed, and plaintiff rendered services to J. L. Jones and Call and Glenn to October, 1878, how much had been paid plaintiff for said service?

The Court, by consent, wrote the answer to the 5th issue thus: "Statute of frauds pleaded by defendant. The jury need not answer." And, with like consent, answers to issues 6 and 7 were dispensed with.

The defendant Call moved to submit the following issues, to-wit:

1st. Did Manfred Call, the defendant, employ E. P. Jones, the plaintiff, as his agent to advertise and sell the machines during any portion of the years 1877 and 1878?

2d. If so, did the plaintiff render the services, and what were such services worth?

3d. If he was so employed and rendered such services, was he paid for the same out of the proceeds of the sales of the machines or otherwise?

The Court refused the motion, and defendant Call excepted.

The defendant Call, who alone seemed to contest his (174) liability to the plaintiff, insisted before the jury in substance, that no contract had been shown by which he had employed or was bound to pay for the plaintiff's services, and if any such was entered into between him and the other defendants, it was not with his sanction or concurrence; nor were there any such partnership relations formed between them as in law would authorize them, or either of them, to contract for and bind him in the premises.

The defendant Call asked the following instructions in writing to be given to the jury:

1st. That if the jury should believe from the evidence that E. P. Jones was not employed as an agent to sell machines,

but rendered such services voluntarily and not intending to charge for same at the time, expecting to receive for such services an interest in the patents and real estate in Greensboro, then he can not recover in this action of defendant Call.

2d. That if the jury should believe from the evidence, that E. P. Jones was employed as a sub-agent for the sale of machinery, and was to be paid out of the gross sales, then the plaintiff can not recover of the defendant Call in this action.

The Court gave these instructions as requested, but added after the second instruction as follows, to-wit: "Unless the defendant Call violated his agreement, and wrongfully prevented him from getting pay for his services in accordance with the first understanding and agreement, that if Call should have violated his contract and destroyed his chances of getting pay, the plaintiff could recover what his services were reasonably worth." To this addition of the Court to the instructions prayed the defendant Call excepted.

The Court, among other things, charged the jury: If there was a copartnership, then the employment of an agent to transact the business of the copartnership, by one partner, will bind all the partners. If employed by the authorized agent of Manfred Call, while acting within the scope of the authority conferred by said Manfred Call upon said agent, then Manfred Call would be bound by the act and
(175) employment of said agent just as if employed by Call himself.

Whether there was a copartnership or not, depended upon the question, whether it is shown to the jury that Manfred Call did share or participate in the profits of the manufacture of the tobacco machines described in the complaint, for the ordinary test of a person being a partner, is his participation in the profits of the business, and there can be no instance in which there can be a participation in them "as profits," in which every person having a right to share in them, is not thereby rendered a partner.

The jury found all the issues in favor of the plaintiff.

The defendant Manfred Call moved for a new trial and a *venire de novo.*

Motion was overruled, and the Court gave judgment upon the verdict. The defendant appealed.

The following are the grounds of appeal:

1. That the Court allowed the witness E. P. Jones to speak of the contents of a written notice of date 11 December, 1877, purporting to revoke his agency, in the absence of the paper itself, no sufficient ground having been laid for the same by giving notice, so that parol evidence might have been given of the contents.

2. That the Court allowed copies of two letters dated 11 October, 1878, addressed by Call to Tanner & Co., to be read in evidence to the jury after objection, without requiring the production of the originals on notice to produce them.

3. The introduction of letters dated May 3, 1878, addressed to R. W. Glenn, in reference to sale of patents in Europe, on the ground that it was irrelevant to the issues.

4. The exclusion by the Court of a portion of the deposition of Moses Call, as set out in the fourth exception to the evidence in the case.

5. That the Court added to the second of the written instructions asked for by the defendant Call, the words "unless the defendant Call violated his agreement and wrongfully prevented him from getting pay for his services in accordance with the first understanding and agreement. That if Call should have violated his contract and destroyed (176) his chances for getting pay, the plaintiff could recover what his services were reasonably worth."

6. That the Court refused the motion of defendant to strike out the issues which had theretofore been drawn up under the direction of the Court as the proper issues of the case, and submit in lieu thereof the three issues then proposed by the defendant, set out in the case.

7. That the Court did not charge the jury as requested by the defendant Call, that there was no evidence of any contract, expressed or implied, between the plaintiff and himself by which he became liable to pay for plaintiff's services.

8. Exceptions to Judge's charge to the jury:

1. Defendant excepts to Judge's charge as a whole, as it tended to mislead the jury.

2. The Court left it to the jury to say from the evidence whether or not there was a copartnership between John L. Jones and Manfred Call in 1877, or one between Call and

R. W. Glenn and John L. Jones in 1878, whereas there was no such evidence to be left to the jury.

3. That the Judge erred in leaving it to the jury to find upon a *quantum meruit,* the value of plaintiff's services.

4. That his Honor erred in recapitulating to the jury after he had withdrawn the second cause of action and excluded the evidence bearing thereon, the following allegations of the plaintiff, to-wit: "The plaintiff alleges that he was employed as the sub-agent of defendant Manfred Call to advertise and sell the said machines, and he was not to receive money for his services, but to receive his pay in an interest in the property after it was paid for, and that if he was employed and complied with his part of the agreement and performed his part of the contract, and by the conduct of Manfred Call (and his conduct was in violation of the agreement and in wrong of the plaintiff), then as he held the title and control of the patent and could stop the work under the patent and destroy the business for which E. P. Jones was employed, then Call,

(177) having refused the opportunity to procure his pay by the payment of the debt through the sale of the machines, and pleading the statute of frauds to the second cause of action, the law would permit him to recover the reasonable value of his services rendered, and whether employed by Call or his father, Moses Call, his agent, or by John L. Jones, his partner, or by Glenn, his partner, the defendant Call is bound by the contract."

5. That the Court, after reciting the allegation contained in the preceding paragraph charged the jury as follows: "Now you are to inquire, has the plaintiff shown you that he was employed under a contract to advertise and sell machines? Has he shown you that he had complied with his part of the contract? Has he shown you that he was deprived of the opportunity of carrying out his contract after October, 1878, by the wrongful conduct of Manfred Call? If he has been so deprived, has he shown you what his services were worth? If he has so satisfied you, he will be entitled to recover whatever his services rendered were reasonably worth, and is entitled to your verdict for said services, also to your finding as to how much has been paid him for said services."

6. That the Judge erred in leaving it to the jury that they might find that there was a copartnership by which defendant Call would be bound by any act of J. L. Jones or R. W. Glenn, under the decision of the Supreme Court of North Carolina, the proof in the case showing to the contrary, whereas, he ought to have charged that there was no evidence of any partnership.

7. That the Judge recited in full to the jury all the allegations and contentions of the plaintiff, but did not recite the allegations and contentions of defendant Call.

Messrs. Jno. N. Staples and *Graham & Ruffin* for the plaintiff.

Messrs. Scott & Caldwell and *J. A. Barringer* for the defendant Call.

SMITH, C. J., (after stating the case). I. The (178) first exception, apparent in the record but not urged in the argument, is to the refusal of the Court to submit the three additional issues proposed by defendant to the jury.

These present in a more summary form the inquiries contained in the others, and their rejection can be in no manner prejudicial to the defense. The elements in the controversy with Call are, his employing the plaintiff directly or through an agent, and his having entered into such relations with J. L. Jones as in law confers upon the latter the authority to contract for both.

These are embodied in the issues upon which the jury have passed.

II. It was in evidence that the revocation by Ball of the agency exercised by the plaintiff was in writing, and defendant objected to parol evidence of its contents in the absence of the original. Thereupon, the plaintiff, who was on examination for himself, then stated that on receiving it, he was provoked and threw it down on the floor in Cardwell's machine shop in Richmond, and his impression is that he tore it in pieces; that he has never seen it since, and does not know where the paper now is, but that he has not made any search.

The witness was then allowed to speak of the contents, and to this ruling the defendant excepted.

The evidence of the destruction or loss of a paper prelimi-

nary to letting in proof of its contents, is addressed to the Court and not to the jury, and the finding when there is any evidence is equally conclusive upon this Court.

"The object of the proof," is the comment of a learned author, "is merely to establish a *reasonable presumption* of the loss of the instrument, and this is a preliminary inquiry addressed to the Judge. If the paper was *supposed to be of little value* or account, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which these circumstances afford." 1 Greenl. Ev., sec. 558.

The examination discloses evidence, we might say cogent evidence, of the destruction of the writing, but if ever
(179) so slender, the judgment of the Court that it establishes the fact, is conclusive upon the appeal. *State v. Efler,* 85 N. C., 585; *Branton v. O'Briant, ante,* 99, with numerous references in the opinion.

Again: the writing was but a notice, and the rule requiring the production of the writing itself as the best proof of what it contains, does not extend to mere notices, which persons are not expected to preserve. 1 Greenl. Ev., sec. 561; *State v. Credle,* 91 N. C., 640.

The suggestion of the absence of proof of the letter being in the handwriting of the defendant Call, or bearing his signature, can not be entertained, since manifestly the objection to the receiving the parol proof rests upon a supposed insufficient showing of the loss, and this objection alone is before us. *Bridgers v. Bridgers,* 69 N. C., 451; *Kidder v. McIlhenny,* 81 N. C., 123; *Williams v. Kivett,* 82 N. C., 110; *Gidney v. Moore,* 86 N. C., 484.

Besides, the writing seems only to show a revocation of agency, a fact not in dispute, nor the subject of just complaint.

III. The exception to the introduction of two letters written and signed by the defendant Call, addressed to W. E. Tanner & Co., and bearing the same date, 11 October, 1878, has been withdrawn, and will not be considered.

IV. The objection to the admission of a letter from defendant to R. W. Glenn at Richmond on 3 May, 1878, is based upon its alleged irrelevancy and tendency to mislead the jury.

This letter represents the interest taken by the writer in the machines, and his desire to extend the sales, and the distinct

recognition of the agency in these matters of his father, Moses Call, and so far sheds some light upon the transactions under investigation. But if the statements are irrelevant, we discover nothing in them tending to mislead or prejudice the jury, and where these do not coexist, the admission of irrelevant evidence does not become an assignable error. *Carrier v. Jones,* 68 N. C., 130; *Bank v. McKeithan,* 84 N. C., 582; *Commissioners v. Lash,* 89 N. C., 159; *State v. Arnold,* 35 N. C., 184; *Gaylord v. Respass,* 92 N. C., 553.

V. The defendant proposed to read to the jury a portion of the deposition of Moses Call taken in the (180) cause, and detailing a conversation between the witness and the defendant J. L. Jones, which, on objection, was held to be incompetent, and the defendant excepted.

The case prepared and sent up by the appellant is accompanied with several exceptions, which do not seem to have been passed on by the Judge. These must be consequently deemed to have been accepted and the case modified accordingly, as is held in the case of *Owens v. Phelps,* 92 N. C., 231.

In those exceptions, it is stated that after the ruling out of the evidence, and upon certain explanations of the purpose of its introduction, "the plaintiff withdrew his objection and the evidence was admitted."

VI. The two instructions asked were given—the first in the form proposed, and the other, to-wit: "If the jury should believe from the evidence that E. P. Jones, the plaintiff, was employed as sub-agent for the sale of machinery, and was to be paid out of the gross sales, then the plaintiff can not recover of the defendant Call in this action,"—with the subjoined qualification: "unless the defendant Call violated his agreement and wrongfully prevented him from getting pay for his services," etc., as stated more particularly in the record. There is no error in this addition to the charge, and it would have been improper without it. If the plaintiff, as a sub-agent, was in the active performance of duty, and was to look to the gross sales of the machines for his compensation, the interference of the defendant whereby he was prevented from carrying on his work, and thus providing the means for his compensation, would remit him to his claim upon a *quantum meruit,* or otherwise he would be without remedy.

VII. The objection to the issues as made up by both par-

ties, and the refusal to admit those proposed in substitution, is equally untenable. The first are more in detail, but they present the questions of fact upon the affirmative finding of which, as offered by the plaintiff, his action depends,
(181) while those offered by the defendant, embody his matters of defense.

VIII. The point most earnestly pressed was, that while there was no evidence of a direct contract of the defendant with the plaintiff for his employment, nor of any one else with his authority, it was left to the jury to find such contract.

This exception makes it necessary to look into the evidence, and if there was any to be left to the jury, for if there was, they alone were to determine its sufficiency to establish the fact.

The plaintiff testified: "I was employed by Moses Call, father of defendant, who Manfred Call told me was his agent to attend to his business. Manfred Call told me in Greensboro, and told me his father was his agent; he only came out to see what you gentlemen were doing, but his father was the agent who would attend to the matters."

The witness also testified that "some $11,000 went to pay Call on the debt in about 17 months."

That after the recalling the agency, the defendant received Glenn as an interested associate with them in the continued prosecution of the business of making and selling the machines, under an agreement for the same appropriation of the net proceeds of sale, and the plaintiff then went on selling up to 2 December, 1878, Glenn saying, "if you are going to quit, I will not have anything to do with it."

It is true, that the testimony of the defendant directly conflicts with that of the plaintiff, and he explicitly denies that he ever employed the plaintiff or authorized his employment as agent by any one else, while it is not disputed that defendant did notify the plaintiff not to make or sell the machines, thus to some extent exercising the rights of a principal in the matter.

These considerations were properly for the jury, and with them, they were left in the charge.

The next exception is to the instruction which submitted to the jury the question of copartnership between the defendant and J. L. Jones, and afterwards, upon the admission of Glenn between them and him.

Now the second series of issues were all framed by the defendant's counsel, and do not arise out of the (182) allegation of the complaint, while those of the plaintiff were directed to an inquiry as to the joint employment of the plaintiff by Call and the others, during his alleged association with Jones, as with Glenn when he became interested in the business.

The affirmative finding upon these issues, imposed an equal obligation growing out of contract upon each, and this result is irrespective of the question whether their relations, *inter sese*, were those of partners or not. They had a common interest in advancing the business—rendering it successful and remunerative—and in securing an agency to this end. Besides this, according to the plaintiff's testimony, a large sum in receipts from sales passed into the hands of Call, without deduction in payment of plaintiff's services, through which the moneys were earned, and to which Call was not entitled until those services were paid for.

If all the issues relating to the partnership relations of the parties were found for the defendant, it would not affect the findings upon the joint contract, nor impair the right of action and recovery of what is due the agent, which are independent of the supposed firm relations, which become material only, when the employment is the contract of one partner and is to bind the others, in the absence of their direct assent.

This view renders unimportant the instructions asked and those given, upon the question of partnership, unless they may have influenced the jury in their verdict responsive to the issues submitted for the plaintiff. What is required to constitute a copartnership—and what facts make members of it, are matters of law—while the jury find the constituting facts by which the relation is formed. A participation in the profits and losses of a business in which persons engage is the ordinary test. We are not prepared to say there was *no evidence* of these underlying conditions, so that error is imputed to the Court in leaving the question under explanation, to be passed on by the jury. But if an error, does it enter into and vitiate the finding of the contract?

In a careful review of the case, though not without (183) some hesitancy, we have come to the conclusion that

as the inquiry does not arise out of the complaint nor is essential to the cause of action set out, and comes from the defense, even an erroneous ruling upon the point, which can not be seen to have prejudiced the action of the jury in passing upon the other issues, ought not to be allowed to disturb the result reached as to them.

Without protracting the discussion further, already and necessarily pursued to great length, our opinion is that there is no error that warrants the setting aside of the verdict and awarding a *venire de novo*. The judgment is therefore

AFFIRMED.

Cited: *McCanless v. Flinchum,* 98 N. C., 364; *Leak v. Covington,* 99 N. C., 564; *State v. Eller,* 104 N. C., 856; *Fertilizer Co. v. Reams,* 105 N. C., 297; *State v. Parker,* 106 N. C., 712; *McMillan v. Bailey,* 112 N. C., 586; *Cummings v. Hoffman,* 113 N. C., 268; *Lyman v. Ramseur, Ibid.,* 504; *Jeter v. Burgwyn, Ibid.,* 159; *Roberts v. Partridge,* 118 N. C., 357; *Webb v. Hicks,* 123 N. C., 247.

D. H. STARBUCK Exr., et al., v. T. C. STARBUCK et al.

Wills, Construction Of—Ademption—Legacies.

1. A specific legacy is a bequest of personal property so designated and identified, that particular thing, and no other in its stead, can pass to the legatee.
2. A specific legacy is *adeemed*, when in the lifetime of the testator, the property bequeathed is lost, destroyed, disposed of, or so changed that it can not be identified when the will goes into effect.
3. *Therefore*, where the testator devised that "portion of the purchase money of my old home plantation which I sold to my son Clarkson, as may be still owing me at my death, and any of this money then on hand shall be equally divided among my children," etc., but received this money in his lifetime, deposited it in bank, withdrew it and invested it in bonds, whch he subsequently sold and with the proceeds purchased bank stocks; *Held*, that the legacies mentioned were specific and were "adeemed."

(*Noel v. Vannoy*, 59 N. C., 185, cited and distinguished; *Snowden v. Banks*, 31 N. C., 373; *Tayloe v. Bond* 45 N. C., 5; *Anthony v. Smith, Ibid.*, 188, cited and approved.)

The executor of Reuben Starbuck filed his petition (184) in the Superior Court before the Clerk of Guilford county, for the final settlement of the estate, alleging that on account of the disagreement of the legatees, as to the proper construction of the will, that it was necessary that the Court shall construe the will, and direct his distribution of the fund amongst the legatees.

The executor asked for several instructions on several points. Defendant, T. C. Starbuck, answered, alleging that the legatees in item 4th were adeemed by the testator.

The defendants Wheeler and wife and Horney, answered, denying the ademptions, and claiming one-third of the fund in item fourth, or so much thereof as the law allows.

The issues of law and fact were certified to the Superior Court at Term, and came on for trial before *Shepherd, Judge,* at Spring Term, 1885, of GUILFORD, on the question of law raised on the complaint by the executor himself, as to the construction of the will, as set forth by him and by the answers.

The fourth item of the will of the testator of the plaintiff, provides as follows:

"*Item Fourth.*—I will and devise that such portion of the purchase-money of my old home plantation which I sold to my son Clarkson as may still be owing me at my death, and any of this money then on hand, shall be equally divided between my said children Elihu, Darius, Lewis and Benjamin, or their representatives, share and share alike. I have left Clarkson out of this division, because in the sale of the land to him I let him deduct from it his share."

This was changed and modified by a *codicil* dated 22 February, 1875, as follows: * * * "and that the division in said fourth item of said will shall be made into five shares instead of four shares, so that my son Uriel's said children shall come in for one-fifth part of the division in said item four."

It appeared that the testator in his lifetime received the whole of the purchase-money mentioned in the *item* of the will above set forth prior to the year 1875, and deposited the same in the First National Bank of Salem; that afterwards, in 1879, he withdrew the deposit and invested the money in four per cent United States bonds; and af- (185)

terwards he sold these bonds, and with the proceeds of the sale purchased bank stock of the Wachovia Bank.

His Honor, upon consideration, held that the legacies in item fourth were not adeemed, and that they were payable out of the Wachovia Bank stock. Defendant T. C. Starbuck excepted. His Honor then rendered a judgment construing the will, from which judgment defendant T. C. Starbuck appealed to the Supreme Court.

Messrs. Scott & Caldwell for the appellants.
Mr. J. H. Dillard for the appellees.

MERRIMON, J. A legacy is *specific* when the thing bequeathed is personal property specified and so designated as that that particular thing, and no other in its stead, must pass to the legatee. The legacies referred to were specific. The money designated by definite terms was itself bequeathed—that identical money and no other; they were not each for a sum fixed, to be paid out of the fund called "the purchase money of my old home plantation," etc., but they give and embrace that, and only that, money.

Specific legacies are said to be adeemed, when in the lifetime of the testator, the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect in specie, to pass to the legatees. If the subject-matter of such legacies ceases to belong to the testator, or is so changed as that it can not be identified as the same subject-matter, during his lifetime, then they are adeemed—gone—and never become operative. This is so, because the thing given is gone, and nothing remains in that respect upon which the will can operate. *Snowden v. Banks,* 31 N. C., 373; *Tayloe v. Bond,* 45 N. C., 5; *Anthony v. Smith, Ibid.,* 188; *Walton v. Walton,* 7 John Ch., 258; Williams Exrs., 1132; Redfield Wills, Pt. 2, 528.

There has been much diversity of judicial decision as to what disposition of, or change or modification of the sub-
stance or form of the subject-matter of a specific
(186) legacy will work its ademption; but applying to this
case any reasonable views of the rule pertinent, we think the legacies in question were adeemed.

There is nothing in the will of the testator that can be construed as indicating any intention on his part that it should take effect at any time before his death. It therefore took effect just as if it had been executed immediately before he died. The Code, sec. 2141.

Obviously, at the time of his death, the testator did not have "the purchase-money of my (his) old home plantation," or any part of it, "on hand;" on the contrary, he had received the whole of it years before his death, had at first deposited it and other moneys in a bank, without designating it as arising from any particular source, and afterwards, in 1879, he withdrew it from the bank and purchased with it United States bonds; and afterwards he sold the bonds, and with the proceeds, or, perhaps, with the bonds themselves, purchased the bank stock. It may be that the mere deposit of the money at first intended to be bequeathed, would not of itself work the ademption of the legacies, as the exact sum of money might be received from the bank on demand, according to the course of business; but if this be so, the withdrawal and use of it in the purchase of the United States bonds, disposed of, exchanged it for another species of property, as certainly as if the testator had purchased with it a tract of land, a stock of goods, a horse, or any other property; by such a purchase he ceased to have the money—he parted with it absolutely. The bonds were not money—they were evidence of the current public indebtedness of the government, put upon the market to be bought and sold, sometimes at one price, sometimes at another, just as any other species of property might be.

The same may be said of the bank stock. It did not represent so much money—it was evidence of the right of the owner to share in the dividends that might from time to time be declared by the bank, and to share in its assets when it should expire or be dissolved, and its business affairs wound up—it was bought and sold like other property. Money is not so bought and sold: its sole office, as money, is to serve the purpose of making exchanges of value—it is (187) useful as the representative of value. The bonds and bank stock are useful as articles of trade in the course of business.

It was insisted on the argument, that the testator *intended*

that the bonds and the bank stock should represent and stand in the place of the money intended to be given, and that the clause of the *codicil* to the will above quoted was evidence of such intent. The plain answer to this contention is, he did not say so, nor did he say so in a subsequent *codicil,* executed on 12 February, 1880, in which he merely excluded one of his sons from sharing at all in his estate. He may or may not have so intended. But it is not sufficient that a testator intended to make a particular bequest—he must have done so according to the established rules of law, else his purpose must fail. We must construe the will as it comes to us. We have no authority to add to, take from, or modify it by conjecture founded on remote and vague inference as to the testator's intention; it must be interpreted by what is said and appears in its, according to well-settled rules of construction.

The counsel for the appellees relied upon the case of *Noel v. Vannoy,* 59 N. C., 185. That case is essentially different from the present one. There, the language employed by the testator was very broad and comprehensive, and embraced within its compass the fund specifically bequeathed, although it might undergo considerable alteration. The decision is based upon the comprehensiveness of the language used. The testator gave the "*proceeds of the sale* of his town property," etc., that is, whether the same be money, or notes taken and remaining at the time of his death. In view of the wide compass of the words, the notes taken were treated as preserving the *corpus* of the subject-matter of the bequest. In the present case, simply the money designated was given—it was received by the testator in his lifetime and used in the purchase of other property; and hence the legacies were adeemed. *Snowden v. Banks, supra.*

The judgment of the Superior Court must be so
(188) modified as to conform to this opinion.

ERROR. Reversed.

Cited: Eller v. Lillard, 107 N. C., 490.

BRYANT BROWN v. DAVID L. HALE.

Discretion of Judge—Vacating Judgment—Negligence—Attorney and Client.

Where, in an action to recover land, at the appearance term, an order was made allowing the defendant ninety days within which to file answer and bond, and no answer or bond was filled within that time, but at the trial term an answer and order allowing the defendant to defend without bond was found among the files, the court adjudged that there was no answer, and gave judgment for the plaintiff, and at a subsequent term a motion was made to vacate the judgment, which was denied; *It was held*, 1. The rule that the failure of counsel to file pleadings in apt time will entitle the client to have relief on the ground of excusable neglect is not without exceptions, and the fact that there existed among the members of the bar an understanding that leave to file pleadings after appearance term and during vacation, should extend to the next term, is not sufficient excusable neglect to authorize the court to vacate the judgment and allow defendant to plead, particularly as no application was made at the trial term to be then allowed to file answer. 2. The exercise of the discretion conferred upon the Judge, to whom an application to vacate a judgment is made, by The Code sec. 274, can not be reviewed on appeal.

(*Simonton v. Lanier*, 71 N. C., 498; *Bank v. Foote*, 77 N. C., 131; *Foley v. Blank*, 92 N. C., 476; *Kerchner v. Baker*, 82 N. C., 169; *Norwood v. King*, 86 N. C., 80, cited and approved.)

Motion to set aside a JUDGMENT, heard before *Gudger, Judge*, at Fall Term, 1885, of PENDER.

The action was brought to recover possession of land. In the Superior Court at the appearance term, the plaintiff filed his complaint. The defendant did not at that term file an answer, or otherwise plead, but the Court made an order, of which the following is a copy:

"By consent of counsel * * * it is ordered that the defendant be allowed ninety days to answer and file the bond as of this term. A copy of answer to be served on plaintiff's counsel." (189)

No answer, however, was filed, nor any undertaking given, as allowed by that order within ninety days.

At the next succeeding term—the trial term—when the action was called for trial, an answer was found among the papers, and an order allowing the defendant to defend *in forma pauperis*. These papers "were put in the papers of the case by one of the counsel."

The Court decided that no answer had been filed, nor undertaking given, as allowed by the order mentioned, and that the plaintiff was entitled to a judgment for want of an answer, and gave judgment accordingly. No appeal was taken from this judgment, the counsel, as the case states, relying on the right of the defendant to obtain relief by an application to set the judgment aside for excusable neglect, or inadvertence, etc.

At a subsequent term, within twelve months, the defendant moved to set the judgment aside because of "surprise or excusable neglect," and assigned as ground of his motion that his counsel had failed to prepare and file his answer and the other papers within the time allowed, because "there had grown up among the members of the Wilmington Bar a liberal rule of practice by which, when leave was granted to file a pleading after the term and in vacation, it was understood that if the pleading was filed by the next succeeding term, it would be a substantial compliance with the order allowing time to file such pleading, and that counsel understood this liberal rule to apply also to the county of Pender," and accordingly, at the next succeeding term the answer had been lodged among the papers in the action. The Court held that no sufficient cause had been shown, and denied the motion, whereupon the defendant excepted and appealed to this Court.

Mr. Marsden Bellamy for the plaintiff.
No counsel for the defendant.

MERRIMON, J., (after stating the case as above). (190) It appears that the defendant and his counsel were fully informed at the time the judgment was granted, as to the excuse for failing to file the answer within the time allowed by the order of the Court. The Court had authority to allow or refuse to allow it to be then filed. Application for leave to file it should then have been made; indeed, it seems that such application was made and the Court refused to grant it. If so, such refusal was conclusive, certainly, as the defendant failed to except and appeal. It does not appear very clearly in the record that such application was then

made, but it should have been; if it was not then made such failure was negligence, that might have warranted the action of the Court in refusing the motion now under consideration. Parties to actions are required to be watchful and reasonably prompt and active in doing what they may be, or are required to do in and about them.

If the application for leave to file the answer was not made, as it ought to have been, at the time the judgment was given, and if it be granted that the present motion was properly entertained by the Court, and in some possible aspect of the facts, the Court might have properly set the judgment aside, it was in the discretion of the Judge to allow or deny it; and such exercise of his discretion is not reviewable here. The defendant was not entitled to have his motion allowed as of right without regard as to whether he had been diligent or otherwise. It seems to us that there was evidence of neglect that might well have led the Court to deny the motion. If ordinarily, the neglect of counsel to file a pleading in apt time, may entitle the client to have relief on the ground of "surprise or excusable neglect" in that respect, it is not so in every case, and this case is exceptional. *Simonton v. Lanier,* 71 N. C., 498; *Bank v. Foote,* 77 N. C., 131; *Foley v. Blank,* 92 N. C., 476; *Kerchner v. Baker,* 82 N. C., 169; *Norwood v. King,* 86 N. C., 80.

NO ERROR. Affirmed.

Cited: Gwinn v. Parker, 119 N. C., 19; *Stith v. Jones, Ibid,* 431; *Cowles v. Cowles,* 121 N. C., 275; *Marsh v. Griffin,* 123 N. C., 667; *Morris v. Ins. Co.,* 131 N. C., 213.

(191)

BREM & McDOWELL v. J. A. LOCKHART, Assignee.

Conditional Sales—Mortgages—Deeds in Trust—Creditors Purchasers for Value—Registration—Delivery.

1. The effect of the recent act requiring all conditional sales of personal property to be reduced to writing and registered, is to render inoperative, as against creditors and purchasers for value, so much of the contract as reserves the title in the vendor unless and until the contract is registered. The Code, secs. 1275, 1254.
2. A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable consideration, within the provisions of the 13th and 27th Elizabeth. The Code, sec.
3. Deeds in trust and mortgages are, as between the parties thereto, when registered, effectual from their delivery.

(*Clayton v. Hester*, 80 N. C., 275; *Vasser v. Buxton*, 86 N. C., 335; *Potts v. Blackwell*, 57 N. C., 58; *Moore v. Ragland*, 74 N. C., 343; *Freeman v. Lewis*, 27 N. C., 91; *McKoy v. Gilliam*, 56 N. C., 449; *Leggett v. Bullock*, 44 N. C., 283; *Roberson v. Willoughby*, 70 N. C., 358, cited and approved, and *McKoy v. Gilliam*, 65 N. C., 130, disapproved.)

ACTION pending in the Superior Court of ANSON, and heard by *Avery, Judge,* at chambers, on Spring Circuit, 1885, upon a case agreed.

There was judgment for the defendant, from which the plaintiffs appealed.

Messrs. Little & Parsons for the plaintiffs.
Mr. John D. Shaw for the defendant.

SMITH, C. J. On 27 February, 1884, in pursuance of an application in writing made by G. J. Redfearn to the Barn Safe Company, the latter sold and delivered to him a Number 6 Iron Safe, at the price of one hundred and ten dollars, in which is contained the following stipulation:

"It is agreed that the title of said safe shall not pass until notes are paid, or safe paid for in cash, but shall remain your (the vendor's) property until that time." The pur-
(192) chase-money has not been paid, nor has the contract been proved and admitted to registration.

On 16 December, 1884, Redfearn becoming insolvent, made an assignment of his stock of goods, including the safe, which is specially mentioned, and other property, to the de-

fendant James A. Lockhart, in trust to secure debts, large in amount, and in the order therein mentioned—the debt for the safe among them, and in a remote class—under which the trustee took possession.

On or about the first day of October of the same year, prior to said assignment, the plaintiffs, for value, became the owners of the claim due the company, with notice of all the rights, title and equity appertaining thereto under the said contract; the trustee had no notice at the time of the conveyance to him of the said contract, or of its provisions and conditions.

These facts are agreed to, and submitted as a controversy without action, as authorized by sec. 567 of The Code, for the determination by the Judge of the question, in whom rests the legal title in the safe and for whom judgment shall be rendered.

The Judge, being of opinion against the plaintiffs, gave judgment accordingly, and therefrom they appealed.

Previous to the act of 1883, conditional sales of personal property with a retention of title until the purchase-money was paid, were upheld as valid without registration, notwithstanding they partook very much of the nature of those securities which are required to be registered. *Clayton v. Hester,* 80 N. C., 275; *Vasser v. Buxton,* 86 N. C., 335, are the later cases on the subject. But to avoid the similar mischiefs arising from the unknown separation of title from possession which such contracts were apt to produce in deceiving creditors and purchasers, in that year the General Assembly enacted that "all the conditional sales of personal property, in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees, and with the same legal effect as is provided for chattel mortgages." The Code, ch. 27, sec. 1275.

The statute applicable to chattel mortgages or deeds conveying personal property in trust to secure (193) debts, to facilitate the making of which a form is given, thus extended to conditional sales or contracts in which the title remains in the vendor as a security for the purchase-money, declares them to be "good to all intents and purposes

when the same shall be duly registered according to law." Sec. 1274.

These instruments are thus brought under the operation of the previous general law, which refuses any validity to deeds of trust or mortgages of real or personal estate as against creditors and purchasers for a valuable consideration from the bargainor and mortgagor until they are registered. Sec. 1254. The effect produced by this legislation upon conditional sales of personal goods is to render inoperative so much of the contract as undertakes to reserve property in the vendor as a security for the purchase-money, unless and until the contract is registered, and, so far as creditors and purchasers for value are concerned, the transfer must be absolute and unconditional.

Now while there is some diversity of opinion on the question whether an assignment to secure existing debts is a conveyance to a purchaser "for money or other good consideration" within the meaning of the statute of 27 Elizabeth; or "for the full value thereof" and without notice, as modified by the Act of 1840-41, as it is admitted such purchaser is, to whom an assignment may have been made to secure an indebtedness created at the same time, the distinction is expressly denied by this Court after an able and exhaustive argument from Mr. Rodman, since a member of this Court, to the contrary in *Potts v. Blackwell,* 57 N. C., 58. In this case BATTLE, J., speaking for the Court, says: "Whatever distinction there may have formerly been supposed to exist between conveyances, either in trust or by way of mortgage to secure these different classes of debt, it must, we think, be regarded as now exploded."

Again: "A deed in trust executed *bona fide* for the security of actual creditors, *whether for debts old or new,*
(194) must then, in our opinion, be regarded as a conveyance for value under the statute 27 Elizabeth."

In *Moore v. Ragland,* 74 N. C., 343, RODMAN, J., who made the argument in the preceding case, delivered the opinion of the Court, and uses this language: "It is admitted that a mortgagee by mortgage to secure a present loan, is a purchaser for value under 27 Elizabeth—*Freeman v. Lewis,* 27 N. C., 91—and it must be held to be settled in this

State by the case of *Potts v. Blackwell,* 57 N. C., 58, that there is no difference between such a mortgagee and one who takes a mortgage to secure a preexisting debt," quoting the words already recited.

Yet, in an intermediate case, *McKoy v. Gilliam,* 65 N. C., 130, before the Court at January Term, 1871, when it became necessary to determine the meaning of the act of 1861, and whether the provision in it which required deeds in trust and mortgages to provide for the *pro rata* payment of all debts due by the maker, was applicable to such conveyance when made to secure a contemporaneously created obligation, the Chief Justice, outside of the necessities of the decision, says: "The distinction between preexisting debts and a debt growing out of the very transaction is well settled. The former do not constitute a valuable consideration in favor of a purchaser under 27 Elizabeth, the latter does."

Evidently, in this inadvertent recognition of a distinction between the two classes of deeds in trust in which in *Potts v. Blackwell,* 57 N. C., 58, the Court declares, *"as now exploded,"* the attention of the Chief Justice seems not to have been called to the ruling in that case, and what is more singular, to have overlooked what he himself said when the same case was before the Court at the previous term, on an original hearing. *Potts v. Blackwell,* 56 N. C., 449.

He then thus answers the inquiry: "Is a deed of trust or a mortgage made to secure an existing debt a conveyance for valuable consideration?"

"It is a settled principle, acted upon every day, that the trustee or mortgagee is a *purchaser for a valuable consideration within the provisions of* 13 *and* 27 *Elizabeth;* but it would seem that they take subject to any equity (195) that attached to the property in the hands of the debtor, and can not discharge themselves from it on the ground of being purchasers without notice," etc.

The ruling of the Court in the case of *Potts v. Blackwell* must be deemed to have conclusively settled the law in this State upon the before mooted point, and a different interpretation can not be allowed to be put upon the words—"purchased for a valuable consideration"—and in the act that requires registration.

While unregistered deeds in trust and mortgages are inoperative against creditors and purchasers for value until registered, and from the time of registration, like other deeds that are required to be registered, they are, when registered, effectual as between the parties from the delivery. *Leggett v. Bullock,* 44 N. C., 283; *Roberson v. Willoughby,* 70 N. C., 358. The contract, the effect of which is now in dispute, has never been admitted to registration, and as the defendant is an assignee for a valuable consideration and without notice of the contract of sale, his title must prevail. We therefore affirm the judgment.

NO ERROR. Affirmed.

ASHE, J., did not sit.

Cited: Empire Drill Co. v. Allison, 94 N. C., 553; *Butts v. Screws,* 95 N. C., 218; *Millhiser v. Erdman,* 98 N. C., 298; *Branch v. Griffin,* 99 N. C., 184; *Francis v. Herren,* 101 N. C., 507; *Glasscock v. Hazell,* 109 N. C., 148; *Kornegay v. Kornegay, Ib.,* 190; *Wallace v. Cohen,* 111 N. C., 107; *Moore v. Sugg,* 114 N. C., 294; *Bank v. Adrian,* 116 N. C., 548; *Thomas v. Cooksey,* 130 N. C., 151; *Carpenter v. Duke,* 144 N. C., 293; *Whitlock v. Lumber Co.,* 145 N. C., 127.

W. W. HAILEY v. GRAY & GRAY.

Appeal—Judgment, Final and Interlocutory.

The Supreme Court will not entertain an appeal from a judgment which is not final, or from an interlocutory order or decree which does not deprive the appellant of a substantial right.

(*Lutz v. Cline,* 89 N. C., 186; *Jones v. Call, Ibid.,* 188; *Arrington v. Arrington,* 91 N. C., 301, cited and approved.)

Claim and Delivery, tried at Chambers, Tall Term, 1885, of MONTGOMERY, before *Montgomery, Judge.*

On 17 February, 1881, R. C. Gray and M. F. (196) Gray executed to the plaintiff an agricultural lien and mortgage in which they conveyed the following personal property, to-wit: "One bay horse, named John, and

one dark colored mare, named Lucy, with the understanding that if said R. C. Gray and M. F. Gray shall well and truly pay said Wm. W. Hailey for the advances aforesaid on or before the 1st day of November next, the said lien and mortgage shall be discharged, and the said property revert to R. C. Gray and M. F. Gray, otherwise said Wm. W. Hailey shall have power to take into possession all of said crop and property, and to sell the same for cash, or so much thereof as may be necessary to pay for the advances aforesaid and all other expenses."

After the execution of the aforesaid agreement, the defendants exchanged the "dark colored mare, named Lucy," mentioned in the mortgage, for a mule, for which this action was brought, and at Fall Term, 1882, the following issue was submitted to a jury, to-wit: "Did the defendants exchange the bay mare mentioned in the alleged mortgage for the mule described in the complaint, and was the exchange made by the defendants with the consent and agreement of plaintiff, with the understanding that said mule shall be substituted in lieu of the said bay mare in the mortgage?" To which issue the jury responded in the affirmative, and that said mule was the property of the plaintiff subject to the question as to whether said lien and mortgage had been discharged.

At the same term it was ordered by the Court, the defendant objecting thereto, that it be referred to the clerk to take an account of the advancements made by the plaintiff to the defendants under the lien and mortgage, and the payments thereon by the defendants.

Upon the coming in of the report of referee, the defendants filed numerous exceptions, a jury trial was waived, and by consent, all questions of fact raised by the exceptions, were left to the decision of his Honor, who sustained defendants' second exception to-wit: "That the defendants are charged with $41.24, obtained before the execu- (197) tion of said lien," and overruling their other exceptions. The judgment of the Court was, "that the $41.24 account was made before the lien and mortgage were executed, and the same is not in law an advancement under the statute and is not secured by the lien, also the same should

not be charged against the defendants under the mortgage, for the reason that the mortgage only secures advances covered by the lien as an additional security; that the plaintiff was indebted to the defendants in the sum of $23.36, after reforming the account; that the cause be retained and that an issue be submitted to a jury at next term of Court to ascertain the amount of damages to which defendants are entitled, in case the mule be not returned to defendants, and for such other damages as defendants are entitled to for any cause."

From which ruling and findings the plaintiff excepts and appeals, and assigns as errors alleged as follows:

1. That his Honor committed an error in holding that the $41.24 was not an advancement under the statute and secured by the lien.

2. In holding that the $41.24 could not be charged against the defendants under the mortgage.

3. That his Honor committed an error in sustaining defendant's second exception, viz: "That defendants are charged with $41.24 obtained before the execution of said lien."

4. In holding that plaintiff was indebted to defendants in the sum of $23.36.

5. In ordering the cause to be retained for assessment of damages sustained by defendants.

6. In ordering that all costs, including the $25.00 allowed referee, be paid by plaintiff.

Mr. J. M. Brown for the plaintiff.

No counsel for the defendant.

(198) MERRIMON, J. The appeal in this case was prematurely taken. The judgment appealed from was not final, nor was it such as, in any aspect of the case, would deprive the appellant of a substantial right by delaying the appeal until the final judgment shall be granted.

The Court directed an issue to be tried by the jury at the next term, preparatory to a final judgment. The plaintiff's exceptions were taken, and will remain on record to be brought up by appeal from the final judgment, if he shall

be dissatisfied therewith, when they may be heard just as well as at the present stage of the action.

It may turn out that the Court will yet correct any possible errors into which it may have fallen, so that an appeal will be obviated.

It is settled that the case can not be tried piecemeal by successive appeals. *Lutz v. Cline,* 89 N. C., 186; *Jones v. Call, Ibid.,* 188; *Arrington v. Arrington,* 91 N. C., 301.

APPEAL DISMISSED.

Cited: Blackwell v. McCaine, 105 N. C., 463; *Bain v. Bain,* 106 N. C., 241; *Hilliard v. Oram, Ib.,* 467; *Emry v. Parker,* 111 N. C., 261; *Sinclair v. R. R., Ib.,* 509; *Warren v. Stancil,* 117 N. C., 113; *Harding v. Hart,* 118 N. C., 840; *Goode v. Rogers,* 126 N. C., 63.

JAMES A. BARKER v. JOHN C. OWEN et al.

Betterments—Homestead—Limitations.

1. Although the statute bars a recovery of rents and profits which have accrued more than three years before the bringing of the action, yet if the defendant sets up a claim for betterments, the bar is removed and such rents and profits are available against the valuation for improvements, so far as is necessary to extinguish such claim.
2. Under The Code, sec. 474, the proper inquiry for the jury on the question of damages is the annual value of the property, exclusive of the improvement put on it by the defendant and those under whom he claims.
3. The plaintiff has the right to relinquish his estate in the land, upon payment to him by the defendant of its value unimproved.
4. If the plaintiff does not exercise this election, but elects to take the land, the sum adjudged to the defendant for the improvements is a lien on the land, and if not paid, an order may be made to sell the land for its payment.
5. A defendant is entitled to an allowance of the value of improvements put by him on land, whether the plaintiff's claim (199) be equitable or legal.
6. The act allowing the defendant for improvements made on land (The Code, secs. 474 *et seq.*) is constitutional.

7. As the improvements put on land by a defendant belong to him in equity, the plaintiff is not entitled to a homestead in the improved lands, against a judgment for the improvements.

(*Merritt v. Scott*, 81 N. C., 385; *Wharton v. Moore*, 84 N. C., 479; *Justice v. Baxter, Post*, 405, cited and approved.)

INQUIRY to ascertain the rents and damages claimed by the plaintiff, and the value of the improvements made by the defendant on land recovered in an action of ejectment, tried before *Montgomery, Judge,* and a jury, at Fall Term, 1885, of RANDOLPH.

The plaintiff, suing *in forma pauperis,* recovered judgment against the defendants for the land in controversy, which on their appeal, no error being shown, was affirmed in this Court at October Term, 1884. The defendant Owen, who had been put in possession by the defendant Pope, who held a deed for the premises, under a bond for title executed by him to the former, applied by petition to the Court to be allowed the enhanced value of the land from improvements put upon it in good faith, and under color of title believed to be good, according to the Act of 1871-72. The Code, sec. 473, *et seq.*

The plaintiff made answer controverting the claim, and thereupon certain issues eliminated from the pleadings and set out in the records, were submitted to the jury, whose findings will be hereafter stated. On the trial the plaintiff proposed to show the annual rental value of the premises in their improved condition. To this inquiry the defendant objected, and his objection was sustained upon the ground that the rental value, exclusive of that imparted by the improvements, was to be estimated under the provisions of the act. The Code, sec. 474. To this ruling the plaintiff excepts.

Upon the rendering of the verdict, the defendant Owen, the defendant Pope having died, moved for judgment, which was allowed, and with the recital of the facts upon (200) which it was founded is as follows:

"This cause coming on to be heard, and the same being submitted to the jury upon the issues, and the jury having found,

1. That at the time the improvements were put upon the

land and the premises mentioned in the complaint by the defendant Owen, he had reason to believe his title to the land good.

2. That at the time the improvements were made, the defendant Owen had no notice in writing of the title under which the plaintiff, Barker, claims.

3. The improvements made by the defendant prior to Feb. 1880, enhanced the value of the land the sum of five hundred and fifty-seven ($557) dollars.

4. That the annual rental value of the land is forty dollars; and

5. That the damages, waste and other injuries to the land is the sum of $12.50.

And it being agreed by the parties hereto, that upon this finding by the jury, his Honor may ascertain the aggregate amount of rentals for the period of six and one-half years, that is to say, from 24 August, 1878, to 24 February, 1885; and his Honor having found as a fact that the rentals from the said period of six years and six months, at the sum of $40 per annum, amounts to the sum of $260.00; and it being further agreed by the parties hereto, that his Honor after deducting the said sum of $260 for rents, and the sum of $12.50 damages for waste, etc., as aforesaid, from the amount of $557.00, the enhanced value of the land as aforesaid, should strike the balance. And his Honor having struck said balance by deducting the said amounts as aforesaid from the said amount of enhanced value, etc., and finds as a fact that the difference in favor of the defendant Owen, is the sum of $284.50.

It is thereore ordered, adjudged, and decreed by the Court, that the said sum of $284.50 is a lien upon the land mentioned and described in the complaint in favor of the defendant Owen, and that the land is bound therefor, and that he recover the same in this action, and it is further ordered, adjudged and decreed by the Court, that if the (201) said sum of $284.50, with the costs of the proceeding for betterments and improvements, is not paid into the office of the Clerk of this Court, on or before 1 January A, D. 1886, by the plaintiff, the Clerk of this Court is hereby directed and ordered to sell the said land at the court-house door in

Ashboro, after first having given thirty days' notice of sale at the court-house door in Ashboro, and four other public places in the county of Randolph, at public outcry, to the highest bidder for cash, and upon the payment of the purchase-money execute to the purchaser a title to the same, and out of the proceeds arising from such sale, after first paying the costs of sale, including the sum of $20 to the Clerk for making sale, (1) pay to the defendant Owen the said sum of $284.50 with interest from this term; (2) pay into the Clerk's office the costs of the proceeding for betterments, and (3), the balance, if any, pay over to the plaintiff, James A. Barker."

From this judgment the plaintiff appealed.

Messrs. Scott & Caldwell and *J. T. Morehead* for the plaintiff.

Messrs. M. S. Robins and *John N. Staples* for the defendant.

SMITH, C. J. (after stating the facts). The ruling upon the inquiry to be made by the jury, is in accord with the directions of the statute, which is in these words: "The jury in assessing such damages, should estimate against the defendant the clear annual value of the premises during the time he was in possession thereof, *exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims;* and also the damages for waste or other injury to the premises committed by the defendant." Sec. 474 of The Code.

The plaintiff excepts to the judgment on two grounds:

1. That the act is the taking of property from the owner, and giving it to a trespasser, and is unconstitutional and void.

2. That so much of the judgment as directs a sale
(202) in case of nonpayment of the sum which the statute undertakes to put upon the land as a lien, is unwarranted by law.

Statutes very similar to ours have been passed in many of the States, but none with more equitable provisions for the protection of the interest of the owner.

As the statute bars a recovery for damages accruing more than three years before the bringing of the action, the bar is removed, and they are made available against a valuation of improvements above the damages that are not barred, so far as necessary, if sufficient to extinguish the claim for improvements. Sec. 477.

So, if the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. Sec. 484.

If the payment is not made to the plaintiff or into court for his use within a time to be fixed by the Court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. Sec. 485.

If the plaintiff does not exercise his right of election, the sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid without, by a sale of the premises. Sec. 479.

Provision is also made when the plaintiff's estate is not a fee simple, for an equitable apportionment of what is to be paid to the defendant, between him and those who own the remainder or reversion in the land.

As this Court said in the opinion in *Merritt v. Scott,* 81 N. C., 385, the owner of land who recovers it, has no just claim to anything but the land itself, and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements, made under the belief that one was the owner, *the increased value* he ought not to take, without some compensation to the other. *This obvious* equity is established by the act."

So, Mr. Justice ASHE, delivering the opinion in *Wharton v. Moore,* 84 N. C., 479, expresses the rule (203) thus: "The right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many of the States, it is not recognized in others. But it may now be considered as an established principle of equity, that whenever a plaintiff seeks the aid of a court of equity, to enforce his title against an innocent person, who has made improvements on land without

notice of a superior title, believing himself to be the absolute owner, aid will be given to him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity."

As there are now no separate courts in which the rule can be enforced, and all relief must be sought in one tribunal, the Legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinctions.

We have recognized the validity of this legislation in the case of *Justice v. Baxter, post,* 405, when the value of the improvements, upon the testimony, seemed to constitute a very large portion of the premises as improved, and we have no hesitation in expressing our conviction that the act contravenes no part of the organic law, Federal or State.

We have met in our researches but a single case (there may be others which have escaped us), where the validity of such a statute has been contested on the ground of its repugnancy to the Constitution, and it is there held that the reimbursement for the expense of improvements, made by one in possession, in good faith, and who is evicted, "is not unconstitutional nor inconsistent with equity or the civil law." *Saunders v. Wilson,* 19 Tex., 194. The case relied on by plaintiff's counsel, *McCoy v. Grandy,* 3 Ohio St., 463, by no means impugns, but affirms the validity of such legislation. The ruling there, as given in the syllabus, which for brevity we quote, is thus expressed in two propositions. "The
(204) option which this law gives to the owner of land after a recovery in ejectment, either to take the land on paying for the improvements, or to take the amount of its value in money, without the improvements, secures to the owner the property in the land, and at the same time protects the occupying claimant in his *equitable claim* to a compensation for his improvements."

"But the amendatory act of 1849, giving to the *occupying claimant* the option which the original act gave to the owner of the land, thus taking the property away from the owner after the solemn form of a recovery and judgment in ejectment, and transferring it to his unsuccessful adversary, who

is ordered to be ejected as an intruder upon the land, is a palpable invasion of the right of private property."

This ruling is clearly right in both particulars, and meets our full approval. The former act, like our own in the feature adverted to, is free from objection, while the amendment is little less than a direct confiscation of the property of one person for the use of another, which can find sanction in no just form of constitutional government.

It was also urged that this enactment interferes with the right of homestead, by withdrawing from it a part of the estate which it might become necessary to set apart to an insolvent debtor, but the debtor had only the unimproved land to which the right of homestead could attach. The improvements are in equity, and under our statute, the property of another. They constitute an encumbrance upon the land. The statute in the cases provided for, only separates these united interests, securing the land to the owner, its increase in value from the labor and expenditure upon it, to him who made them. The owner's estate thus ascertained may be subject to the exemption—it is unabridged by the disjunction.

NO ERROR. Affirmed.

Cited: Johnston v. Pate, 95 N. C., 71; *Bryan v. Alexander,* 111 N. C., 144; *Perry v. White, Ibid.,* 199.

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(205)

L. E. JOHNSON v. JOHN W. FINCH.

Malicious Prosecution—Pleading—Aider—Amendment.

1. In an action for having the defendant arrested maliciously and without probable cause, the complaint should allege that the action in which the arrest was made has been terminated.
2. Where it appears in the complaint that a cause of action is alleged, although imperfectly and defectively, the defect is waived unless pointed out by demurrer.
3. Where the facts set out in the complaint fail to show any cause of action, the objection can be taken at any time, and no averments in the answer will cure it, for a plaintiff can not abandon the allegations of the complaint, and rely upon the facts set out in the answer.

4. Where the facts stated in the complaint do not wholly fail to state a cause of action, but some material allegation is omitted, and the answer sets out facts from which the court can see that a sufficient cause of action appears in the record to warrant the judgment, the defect in the complaint is aided by the answer.

5. An amendment in order to insert omitted allegations may be allowed, even after a demurrer to the complaint for the defect has been sustained.

(*Howell v. Edwards*, 30 N. C., 516; *Hewitt v. Wooten*, 52 N. C., 182; *Hatch v. Cohen*, 83 N. C., 602; *Love v. Commissioners*, 64 N. C., 706; *Tucker v. Baker*, 86 N. C., 1; *Garrett v. Trotter*, 65 N. C., 430; *Pearce v. Mason*, 78 N. C., 37; *Wilson v. Sykes*, 84 N. C., 215; *Halstead v. Mullen*, *post*, 252; *Rand v. Bank*, 77 N. C., 152; *Grant v. Burgwyn*, 88 N. C., 95; *McLaurin v. Crowly*, 90 N. C., 50, cited and approved.)

ACTION tried at September Term, 1885, of DAVIDSON, before *Montgomery, Judge.*

The complaint alleged in substance that on or about 18 July, 1883, the defendant maliciously intending to injure the plaintiff, and falsely pretending that he, the defendant, held a certain debt against the plaintiff, which was due and unpaid, at a time when plaintiff was upon the eve of removing with his family to another State, willfully and maliciously caused to be issued a certain order of arrest, and caused the plaintiff to be arrested.

That plaintiff at the time of the suing out of said (206) order of arrest against him, owed defendant nothing, but was by said order of arrest forced unjustly to pay the defendant money.

That portion of the answer material to an understanding of the opinion was as follows: This defendant, for further answer to the allegations contained in paragraph 1st of said complaint, says that a short time before the plaintiff was about leaving the State, he was informed by his attorney that there was a docketed judgment pending in the Superior Court of Davidson County in favor of defendant against the plaintiff for about .... dollars and costs, and that his said attorney got a copy of said judgment signed by the Clerk of the said Superior Court of Davidson County, and that upon said docketed judgment there was no entry of an assignment to any one or that the same was satisfied, and this defendant *bona fide* supposing that said judgment was still due and owing to him by plaintiff, had process duly taken out and

served on plaintiff for his arrest, as he was then about leaving the State with the view of changing his residence and acquiring citizenship elsewhere, and that in pursuing the said course he acted *bona fide* and not maliciously, but solely with the view of securing the payment of the judgment due to him as he then supposed; that the plaintiff was not under arrest for longer than one hour, when he was released and discharged, and that the morning after plaintiff's arrest, the defendant ascertained that he had seven or eight years prior to said arrest, assigned said judgment to John H. Welborn; that said assignment did not appear on the docketed judgment referred to, on the said docket of the Superior Court of Davidson County, and that defendant was misled thereby, and by the writing of the Clerk of the Superior Court of Davidson, that said judgment was still due plaintiff and unpaid, and plaintiff further says that he had forgotten that he had transferred said judgment to John H. Welborn, and in all that defendant did in regard to said arrest, he was actuated by no malice nor from a wanton disposition to injure the plaintiff in any way, but that he acted *bona fide,* and upon reasonable cause as he is advised and believes, and without the slightest disposition on his part to injure in the least the plaintiff, (207) and defendant says that the said arrest caused no injury to the plaintiff, occasioned no loss, expense or inconvenience to the plaintiff, and that plaintiff is entitled to no damages; and

2d. For a further defense, this defendant says that he has tendered to plaintiff full compensation as required under the provisions of law for any inconvenience and expense the plaintiff may in any way have sustained, including the costs of this case occasioned by the honest mistake of defendant.

When the case was called for trial, and after the jury had been empaneled, the defendant's counsel moved the Court to dismiss the action upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

His Honor dismissed the action, and the plaintiff appealed.

No counsel for the plaintiff.

Mr. M. H. Pinnix for the defendant.

MERRIMON, J. The plaintiff brought this action to recover damages from the defendant for maliciously and with-

out probable cause, having him arrested under a warrant of arrest granted by a Justice of the Peace in a civil action, wherein the present plaintiff was defendant, and the present defendant was plaintiff.

The complaint is not only very informal, but it is defective in respect to a matter of substance. It fails to allege in terms or in effect, that the action in which the warrant of arrest was granted was terminated before this action was begun. It is necessary that such allegation should be made in alleging such a cause of action. *Howell v. Edwards,* 30 N. C., 516; *Hewitt v. Wooten,* 52 N. C., 182; *Hatch v. Cohen,* 84 N. C., 602.

It is to be observed that the facts stated in the complaint do not wholly fail to disclose a cause of action—indeed, they informally constitute a good one, except in the respect mentioned above. The case is therefore quite different from one in which the facts stated, wholly fail to state or consti-
(208) tute a cause of action. In the latter case, the plaintiff can not maintain his action at all—he states no cause of action, either perfectly or imperfectly, defectively, or otherwise; there is nothing alleged of which the Court can take jurisdiction, and touching which a judgment or relief can be granted, and therefore, the defendant may demur, or at any time, even in this Court, move to dismiss the action. It is, therefore, that The Code, after prescribing specifically in sec. 239, sundry causes for which the defendant may demur to the complaint, further prescribes in sec. 242 that "if no such objection be taken by *demurrer or answer,* the defendant shall be deemed to have waived the same, *excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute cause of action.*" As to the two exceptions thus specified, there can be no waiver, and in these respects objections made be made at any time. In such cases there is an absence of jurisdiction, or an absence of anything to which the jurisdiction of the Court can attach. *Love v. Commissioners,* 64 N. C., 706; *Tucker v. Baker,* 86 N. C., 1.

But it is otherwise, when it appears in the complaint that a cause of action is alleged, though imperfectly or defectively, in one or more respects. Regularly, such defect ought as soon as discovered to be corrected by amendment, whether or

not objection on that account be taken in any way by the defendant, and after demurrer sustained, as well as after the answer has been filed; otherwise, when the defect is in respect to a matter material that must be alleged; it will be fatal on the trial, or a motion in arrest of judgment, except in the cases when such defect shall, as above indicated, be waived by failing to demur, or take the objection in the answer. Generally, however, if the defendant shall allege or admit in his answer the material matter or facts omitted in the complaint, this will aid the complaint and cure the defective statement of the cause of action. This is so, because it will thus appear in, and the Court can see from, the pleadings, that a sufficient cause of action is presented in the record to warrant a proper judgment, and as well, because the defendant admits, not necessarily the cause of action, but does admit the (209) matter or facts omitted from the complaint. *Garrett v. Trotter,* 65 N. C., 430; *Pearce v. Mason,* 78 N. C., 37; *Wilson v. Sykes,* 84 N. C., 215; *Halstead v. Mullen, post,* 252.

It may be added, that if the defendant fails to take advantage of formal defects in apt time, the answer will be treated as a waiver thereof. *Wilson v. Sykes, supra.*

By what has been said, it is not to be understood that statements and omissions of facts by the defendant in his answer, can aid a defective statement of a cause of action in the complaint, however defective. The nature and purpose of the action must appear in the complaint itself—only defects of statements, omissions of minor matters—of something in detail and essential in completeness—can be cured by the answer in the way indicated.

Much less can the answer supply the plaintiff with a cause of action. Hence, Chief Justice PEARSON said, in *Rand v. Bank,* 77 N. C., 152: "The plaintiffs can not abandon the averments of the complaint and fall back upon a collateral statement of facts set out in the answer," and this was afterwards approved in *Grant v. Burgwyn,* 88 N. C., 95, and *McLaurin v. Cronly,* 90 N. C., 50. The plaintiff must allege a cause of action, such as the Court can see in the pleadings, to be admitted in the answer, or proven on the trial.

The answer of the defendant in this case, as was admitted on the argument, was very informal, and was incautiously

prepared. But, it in effect admits, that the action in which the warrant of arrest was granted was terminated before this action was brought. It states in terms that the defendant, (the present plaintiff), was not under arrest for longer than one hour, when he was released and discharged; and, after much cumulative explanation, the defendant admits in the answer that he had no cause of action against the plaintiff, that he brought the action by inadvertence and mistake, and he tenders compensation for any inconvenience the plaintiff may have sustained, including costs, etc.

(210) The spirit and drift of the answer amount to an admission that the defendant's action against the plaintiff, including the warrant of arrest, was unfounded—that he had abandoned it, and it was terminated at once, upon his discovery of the error into which he had fallen by inadvertence and mistake. It must be taken that he admitted that the action was ended before the present one was begun. He thus aided the complaint and cured the defect in the statement of the cause of action therein alleged.

The Court below ought not, therefore, to have dismissed the action, but on the contrary, ought to have proceeded to try it upon its merits.

ERROR. Reversed.

Cited: Willis v. Branch, 94 N. C., 147; *Warner v. R. R., Ibid.,* 257; *McKinnon v. McIntosh,* 98 N. C., 92; *Planing Mills v. McNinch,* 99 N. C., 520; *Bowling v. Burton,* 101 N. C., 181; *Barfield v. Turner, Ibid.,* 358; *Knowles v. R. R.,* 102 N. C., 63; *Warlick v. Lowman,* 103 N. C., 126; *Norris v. McLain,* 104 N. C., 160; *Harris v. Sneeden, Ibid.,* 375, 7; *Baker v. Garris,* 108 N. C., 225; *Conley v. R. R.,* 109 N. C., 697; *Loughran v. Giles,* 110 N. C., 425; *Wiggins v. Kirkpatrick,* 114 N. C., 301; *Lockhart v. Bear,* 117 N. C., 302; *Mizzell v. Ruffin,* 118 N. C., 71; *Shute v. Austin,* 120 N. C., 442; *Harrison v. Garrett,* 132 N. C., 178; *Williams v. Smith,* 134 N. C., 253; *Wright v. Ins. Co.,* 138 N. C., 491.

*PETER SMITH et al., Trustees, v. G. E. HEADRICK et al.

Ejectment—Evidence—Declarations—Color of Title—Boundary.

1. Evidence of the declarations made *ante litem motum* to show private boundaries, proceeding from aged and disinterested persons since dead, are admissible.
2. It is not necessary to show the knowledge or means of information of such deceased declarant to make the declaration admissible. If such knowledge or means of information are not shown, it goes to the weight and not to the admissibility of such evidence.
3. Where the defendants' deed called for the south line of the plaintiffs' land, it must stop when such line is reached, although the distance called for in the deed would go beyond, and this is so, although the line called for is not a marked line.
4. In such case, the deed is not color of title for any land beyond the line called for.

(*Harris v. Powell*, 3 N. C., 349; *Fry v. Currie*, 91 N. C., 436; *Williams v. Kivett*, 82 N. C., 110; *Gilchrist v. McLauchlin*, 29 (211) N. C., 310; *Cain v. McCrary*, 48 N. C., 496, cited and approved.)

ACTION tried before *MacRae, Judge,* and a jury at Fall Term, 1884, of DAVIDSON.

The facts appear in the opinion.

There was a verdict and judgment in favor of the plaintiffs, and the defendants appealed.

Mr. M. H. Pinnix for the plaintiffs.
Mr. F. C. Robbins for the defendants.

SMITH, C. J. The plaintiffs, trustees, alleged themselves to be owners of the land described in their complaint, and entitled to recover possession of the small portion held by the defendants, under a claim of title thereto. The action was begun against Geo. Headrick in his lifetime, and is prosecuted since his death against the defendants, his executors, widow and heirs-at-law. The plat prepared by the surveyor and produced in evidence at the trial, represents the location of the respective tracts as claimed by the contesting parties, and the lines of the part in dispute between them.

*The Reporter does not think it necessary to print the plat accompanying the record, as the opinion is entirely intelligible without it.

The plaintiffs derive title under a grant for a tract of fifty-three acres, issued on 4 November, 1784, to John Billing and David Smith, whose location, as they contend, is represented in the plat as bounded by Pounder's Creek and the dark lines FH, HI, IG. The defendants claim under a grant for fifteen acres, issued 12 December, 1882, to Daniel Suring, which begins, as the case on appeal discloses, "at a point directly south of plaintiff's grant of 1874, and runs thence north to the line of the grant of 1784, and thence west on said line." The lines run by the surveyor commence at a stone, a corner formed by the dark and red lines, and then proceed by course and distance to I, K, and B, and along the red line to the point of starting. The controversy then is confined to the narrow strip lying between the red line AB and the dark line DE.

(212) In locating the grant of 1784, the plaintiffs proposed to prove the declaration of one John Young, made when he was eighty years of age, and who was then dead, "that a certain hickory tree was one of the corners of that tract," pointing out its position, we infer, while it is not so stated in the record, since the declaration would be otherwise unmeaning. It was not shown where the declarant lived, nor what means or opportunities he had ever possessed for knowing the boundaries of the land.

The defendant objected to the reception of the offered evidence, "on the ground that it did not appear that the said Young ever had an interest in the said lands." The evidence was received, and this ruling presents the first exception to be considered.

A series of decisions commencing at the end of the last century—*Harris v. Powell,* 3 N. C., 349—and running through the intermediate interval, to *Fry v. Currie,* 91 N. C., 436, determined at October Term, 1884, has fully established the doctrine of the admissibility of parol declarations to show private boundaries, when they proceed from aged and disinterested persons, since deceased, and are made *ante litem motam.* These are the three essential conditions to the competency of this form of hearsay, or traditionary evidence, in questions of disputed boundaries, as is said in *Williams v. Kivett,* 82 N. C., 110.

The objection that it must affirmatively appear before such

declarations are received, that the person making them had such knowledge or opportunities of obtaining information of the location and boundaries of the land as would enable him to speak of them as facts, finds no warrant in the adjudications. The declaration itself presupposes such knowledge or information, for how could he say where a boundary was, unless he did have personal knowledge or the means of arriving at the fact declared?

The opportunities which the declarant had, may be inquired into in determining the *value,* not the competency of the declaration, and, as such, properly furnish a subject for comment before the jury, and in this the counsel was not restricted.

II. This exception is of the same kind and requires no further comment.

III. During the argument before the jury, the defendants' counsel having introduced testimony of de- (213) fendants' occupation of the disputed part of the land for more than seven years, insisted that they had acquired a perfect title by means of such continued possession under color of title.

The Court, interrupting the course of the argument, "informed the counsel that the case was narrowed down to the location of the fifty-three acre tract, and the other tract embraced in defendants' deed,"—(a deed from the administrator of the grantee Suring for a tract of 128 acres, whereof the grant for fifteen acres forms a part)—that the fifteen-acre tract calls for the line of the fifty-three acre tract, and there can be no such thing as possession under color of title by defendants, if the land in controversy is inside the boundaries of the fifty-three acre tract.

The jury were thus left to inquire and ascertain where lies the land granted in 1784, the burden of showing location devolving on the plaintiffs, under instructions such as were intimated to counsel. The jury found for the plaintiffs, and from the judgment the appeal is taken which brings defendants' exceptions up for review.

Unquestionably, if the proper position of the plaintiffs' boundary is the line DE, as they contended and the jury found, the line of the fifteen-acre tract which calls for it, must stop when it is reached, although measured by distance

that line would go beyond—*Gilchrist v. McLaughlin,* 29 N. C., 310—and this is so whether the line called for be marked or not. *Cain v. McCrary,* 48 N. C., 496.

Assuming, then, that defendants' north boundary is coincident with plaintiffs' south boundary, there is no overlapping, and the fifteen-acre grant not covering the disputed part in possession of the defendants, there is no color furnished to support the possession of seven years, and perfect the title thereunder—this being a naked possession without deed.

NO ERROR. Affirmed.

Cited: Fry v. Currie, 103 N. C., 204; *Bowen v. Gaylord,* 122 N. C., 820; *Yow v. Hamilton,* 136 N. C., 359.

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(214)

B. G. ROWLAND et al. v. JOHN B. ROWLAND.

Construction of Deeds — Survivorship — Joint Tenancy — Uses—Habendum.

1. The act of 1874, does not abolish joint tenancies. It only takes away the right of survivorship from joint tenancies in fee, but has no application to joint tenancies for life.
2. Construction of deeds must be made upon the entire instrument, and so that every part and word of it may have effect, if possible, the pose of the court being to ascertain the intention of the parties, and to carry such intention into effect, so far as it can be done consistently with the rules of law.
3. The office of the habendum in a deed, is to lessen, enlarge, explain or qualify the premises, but not to contradict or be repugnant to the estate granted in the premises.
4. Where, by deed, an estate is given to A and B, and to the heirs of each of them in the premises, *habendum* "to the said A and B and their heirs as aforesaid, as tenants in common, and upon the death of either one of them to the survivor and his heirs"; *It was held,* that the deed was a covenant to stand seized to uses, and its effect was to transfer the use to the two donees in fee, and upon the death of one, to shift the use of his half of the land to the other and his heirs.
5. By a shifting use, a fee may be limited after a fee.

(*Vass v. Freeman,* 56 N. C., 227; *Powell v. Allen,* 75 N. C., 450; *Motley v. Whitmore,* 19 N. C., 537; *Southerland v. Cox,* 14 N. C., 394; *Mur-*

chison v. Whitted, 87 N. C., 465; *Kea v. Roberson*, 40 N. C., 373; *Smith v. Brisson*, 90 N. C., 284; *Hogan v. Strayhorn*, 65 N. C., 279; *Love v. Hurbin*, 89 N. C., 249; *Ivy v. Granberry*, 66 N. C., 223, cited and approved.)

SPECIAL PROCEEDING for partition commenced before the Clerk of the Superior Court of ROBESON, and carried by appeal to the Superior Court, where it was tried before *MacRae, Judge,* at Spring Term, 1885.

The plaintiff complained as follows, to-wit:

1. That on 25 August, 1865, John S. Rowland, the father of the plaintiffs, B. G. Rowland and Eliza W. Fuller, and of the defendant John B. Rowland, conveyed to John B. Rowland, the defendant, and his sister, Ophelia Rowland, also a daughter of said John S. Rowland, five hundred acres of land in said county on the west side of Lumber River, the same tract on which said John S. Rowland then re- (215) sided, and the same lands on which the defendant now resides, by deed, a copy of which is hereto annexed, marked "Exhibit A," which plaintiffs ask may be taken as a part of this complaint.

2. That on the .... day of November, 1867, the said Ophelia Rowland died in said county intestate, leaving as her only heirs-at-law her brothers and sisters, B. G. Rowland and Eliza W. Fuller of the plaintiffs, the defendant John B. Rowland and Susan S. Rowland.

3. That on the .... day of May, 1872, the said Susan S. Rowland died intestate, leaving as her only heirs-at-law the said B. G. Rowland, John B. Rowland and Eliza W. Fuller.

4. That the said A. W. Fuller and Eliza W. Fuller intermarried on 22 July, 1858.

5. That the defendant has been in the sole and exclusive enjoyment of the rents and profits of said lands since the death of the said Ophelia, to-wit: in 1867.

6. That plaintiffs and defendants are tenants in common of said lands, the said plaintiffs B. G. Rowland and Eliza W. Fuller, being entitled each to one-sixth thereof, and the defendant to two-thirds, or the remainder, and that the plaintiffs desire to hold and enjoy their parts of said land in severalty.

Wherefore they pray that commissioners may be appointed

by the Court for the division of said lands, and for such and further relief as to the Court will seem meet and proper.

The deed was as follows:

"This indenture, made and entered into this 23 August, 1865, between John S. Rowland of the one part, and his two children, John B. Rowland and Ophelia Rowland of the other part, all of the county of Robeson and State of North Carolina: Witnesseth, that the said John S. Rowland, for and in consideration of the natural love and affection which he has and bears to his said two children, John and Ophelia, and for their mutual advancement in life, and for the

(216) further and special consideration to provide a certain home for his said daughter Ophelia, who is blind and helpless, has given, granted, bargained, sold, remised, released and forever quitclaimed, and does hereby give, grant, bargain, sell, remise, release and forever quitclaim unto the said John B. Rowland and Ophelia Rowland, and to the heirs of each of them forever, a certain piece or parcel of land in the county of Robeson aforesaid, on the west side of Lumber River and on both sides of Aaron Swamp, situate and bounded as follows: on the north, by Richard Townsend's line; on the west, by said Townsend and John Thompson's line; on the south, by William Price's (now Martha Ann Inman's) and McKellar's lines; and on the east, by McMillan and John Taylor's line, containing five hundred acres, more or less, and being the same tract on which the said John S. Rowland now resides, and which was conveyed by Edmund P. Ashley to said John S. Rowland by deed dated 22 December, 1855, and duly registered in Book D. D., page 604, of the records of deeds in the Register's office of Robeson County. To have and to hold the same to the said John B. Rowland and Ophelia Rowland and their heirs as aforesaid, as tenants in common; and upon the death of either one, then to the survivor and his or her heirs forever."

To which complaint the defendant demurred in the following words:

The defendant demurs to the complaint herein for the ground that it appears upon the face of the complaint—

1. That the said defendant is seized in fee simple of all the land described in the said complaint.

Wherefore the defendant prays the judgment of the Court that this action be dismissed at the plaintiff's cost.

The following proceedings were had before the Clerk: "This cause coming on to be heard on the complaint and demurrer, both parties being represented by counsel, the demurrer was sustained. Judgment accordingly. Appeal craved by the plaintiff, which was granted; notice waived. By agreement of counsel original papers to (217) be sent up."

From this judgment the plaintiffs appealed to the Judge of the Superior Court, who at the Spring Term, 1885, of said court, rendered the following judgment:

"Judgment of the Clerk reversed. Demurrer overruled. Defendant demurs, *ore tenus,* upon the ground that the plaintiffs in their complaint failed to state that they were tenants in common, and in possession of the land described in the complaint. Demurrer overruled, and Clerk directed to proceed, from which judgment the defendants appealed to the Supreme Court."

Mr. Frank McNeill for plaintiffs.

Messrs. French & Norment and *John D. Shaw* for defendant.

ASHE, J., (after stating the facts as above). The first point presented for our consideration, is the proposition contended for by the plaintiff's counsel, "that the act of 1784 abolished the *jus accrescendi* in joint estates, and that there is no such thing recognized by our law, as survivorship." But this is a mistake. Joint tenancies were not abolished by the act of 1784. *Vass v. Freeman,* 56 N. C., 227, and *Powell v. Allen,* 75 N. C., 450—454.

In the latter case, it was held that the act did not abolish joint tenancies, but only took away from such estates, held in fee, the right of survivorship, and that the act had no application to joint estates for life, nor did it have any application to estates given to husband and wife—*Motley v. Whitemore,* 19 N. C., 537—and the reports are full of cases where this Court has given effect to the term *survivor* in numerous cases, and especially in *Vass v. Freeman, supra, Southerland v. Cox,* 14 N. C., 394; *Murchison v. Whitted,* 87 N. C., 465.

We have cited these cases, and we might refer to others, where the word *survivor* is used, without being affected by
(218) the act of 1784. The term has all the signification and effect since that act that it had before, except in its application to joint tenancies held in fee.

We would not have noticed this subject, if it had not been seriously argued before us, for we think it has no application whatever to this case. The estate created by the deed of J. S. Rowland to Ophelia and John B. Rowland, created in them, by its express terms, a tenancy in common, and the Court can not in their construction of deeds, do violence to these clearly expressed terms, even for the purpose of effectuating the known intentions of the grantor.

We must assume that the deed was duly registered, as there was no objection to its being offered in evidence.

In the deed in question, the estate is given to John B. and Ophelia Rowland, and to the heirs of each of them; and then follows, after a description of the land, the words "to have and to hold the same to the said John B. Rowland and Ophelia Rowland and their heirs as aforesaid, as tenants in common; and upon the death of either one, then to the survivor and his or her heirs."

In the interpretation of a deed, the first thing to be considered is, to ascertain the intention of the parties, and give it such a construction as will carry out their intention, so far as it can be done consistently with the established rules of law. In *Kea v. Roberson,* 40 N. C., 373, this Court said, "Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow. It is so just and reasonable that it should be so, that it has long grown into a maxim that favorable constructions are put upon deeds."

"Intentio inservire, debet legibus, non legis intentioni," and as far as it may stand with the rule of law, it is honorable for all Judges to judge according to the intentions of the parties, and so they ought to do—1 Coke, 19—and Justice Blackstone in the rules of Interpretation laid down by him, 2 Com., 286, says: "That the construction be made upon the entire deed, and not merely upon the disjointed
(219) parts of it. *Nam ex antecedentibus, et consequenti-*

bus fit optima interpretatio, and therefore that every part of it (if possible), be made to take effect, and no word but what may operate in some shape or other—*Nam verba debent intelligi cum effectæ ut res magis valeat quam pereat.*" And in *Jackson v. Blodgett,* 16 Johnson, 172, the same rule is announced, "that the construction must be made on the entire instrument, after looking, as the phrase is, at the four corners of it." See also, 2 Smith Leading Cases, 466, where numerous authorities are cited upon the subject.

Construing the deed, then, according to the intention, it would seem to follow, that it should be read as giving the land to Ophelia and J. B. Rowland and the heirs of each, as tenants in common, and if either should die, then to the survivor and his or her heirs. This would be effectuating the intention of the donor; for the declared purpose of the deed was to provide a home for his blind and helpless daughter, and for the benefit of his son John, to the exclusion of his other children.

In any event, the estate was secured to her for life, and if she had survived John, she would have had the entire estate in fee, if the limitation to the survivor can be sustained upon any principle of law.

The plaintiff contends it can not, and insists that whatever may have been the intention of the donor, it is controlled by the wording of the instrument, and that the construction contended for by the defendant, would contravene a well-established rule of construction, that when an estate is given in fee in the premises, it can not be affected by an *habendum,* which is repugnant to the premises, and that there is such a repugnancy in this case, between the premises and *habendum,* and that being so, the *habendum* is nugatory, and an absolute estate in fee in common was vested in J. B. Rowland and Ophelia, and upon her death her moiety went to John B. Rowland and her other brothers and sisters.

In this view of the effect of an *habendum* in a deed, we do not concur, and although Judge KENT has said it has degenerated into a useless form, there are other very high authorities who sustain its operation. For instance, (220) Judge BLACKSTONE, 2 Com., 298, has said: "That the office of the *habendum* is to lessen, enlarge, explain, or qualify the premises, but not to contradict or be repugnant to

the estate granted in the premises." And to illustrate what is meant by the repugnancy which will render the *habendum* nugatory, he puts the case where, in the premises, the estate is given to one and his heirs, *habendum* to him for life, for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away and divested by it.

But in Shepherd's Touchstone, 200, it is laid down, that "if the *habendum* is to the grantee, to him for the life of another, there would have been no repugnancy, for then the *habendum* is consistent with the grant, and explains it, since the word heirs still has effect." For where an estate is given to one and his heirs for the life of another, the heir may take and hold after the death of his ancestor as a special occupant. The rule of construction in such cases is held to be, that when the estate is given in the premises to one and his *heirs* generally, *habendum* to him and other heirs, the *habendum* may be used to explain the premises, by showing what *heirs* are meant by the grantor, and will not be repugnant—for such explanation is held not to retract the gift in the premises, because the word heirs has still its operation, and by construction, is more conformable to the will and intentions of the donor. This rule of interpretation is clearly announced in 1 Bacon's Abridgement, 434-5, citing in support of the position, Rolle Abr., 838; Coke Lit., 21a, Bro. Tit. Fact, 20; Shepherd's Touchstone, 200.

But after giving effect to the operation of the *habendum* as maintained by the authorities cited, the question is still presented, does the estate, upon the death of Ophelia, pass to the *survivor,* or go to her heirs generally ?

We are of the opinion it did pass to John B. Rowland as *survivor,* by the operation of a shifting use.

The deed is a covenant to stand seized to uses. Its
(221) effect was to transfer the use to the two donees in fee, and upon the death of Ophelia, to shift the use of her moiety to John and his heirs. By a shifting use, a fee may be limited after a fee. 2 Blackstone, 334; *Smith v. Brisson,* 90 N. C., 284, and cases there cited, especially, 2 Minor Inst., 265, and Hargrove's note "A," 2 Coke, 271b.

But it may be objected, that as the deed is one operating under the statute of uses, no further use can be raised by it,

for a use can not be limited on a use. To this, we have to say, that since the year 1715, our courts have been gradually receding from the rules of the common law in the construction of deeds.

By the act passed that year, it was enacted that the registration of deeds should pass lands without livery of seisin. The construction first put upon this act was, that it only applied to such deeds as operated at common law by livery of seisin. *Hogan v. Strayhorn,* 65 N. C., 279. But our courts, in their policy of relaxing the rigid and technical rules of the common law, have since extended the construction so as to bring all of our deeds of conveyance within the purview of that statute. Thus it has been held, that deeds of bargain and sale and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seisin, the declaration of uses thereon, and the consideration. *Love v. Harbin,* 89 N. C., 249, and *Ivy v. Granberry,* 66 N. C., 223.

Prior to that statute, and the more recent interpretation upon it, if there was a deed of bargain and sale upon a consideration, the consideration raised a use for the bargainee, and then the statute transferred the legal estate to the use, that is, to the bargainee, but no further use could be declared by the deed, for it was held a use could not be mounted upon a use. But there is no reason now why it may not be done, since the registration of the deed has all the effect of livery of seisin.

Our opinion is, a defeasible fee in common was given to Ophelia Rowland and John Rowland, and (222) upon the death of Ophelia, the absolute fee vested in John as survivor, because such was the manifest intention of the donor, and because that construction is not in violation of any principle of law or rule of construction.

There is error. The judgment of the Superior Court is reversed. The demurrer must be sustained, and the case remanded, that further proceedings may be had, if the parties shall be so advised.

ERROR. Remanded.

Cited: Gray v. Hawkins, 133 N. C., 4; *Wilkins v. Norman,* 139 N. C., 42; *Gudger v. White,* 141 N. C., 514.

R. B. THOMPSON v. BAXTER SHEMWELL, Admr., et al.

Partition—Judge's Charge.

1. Where three commissioners are appointed to partition land, as prescribed by sec. 1892 of The Code, the action of any two of them is valid.
2. Where, in an action to recover land, the defense was a mistake made by the commissioners appointed to make partition, the court properly charged the jury that they must determine what the commissioners, as a body, and not what one of them intended.

(*Simmons v. Foscue*, 81 N. C., 86, cited and approved.)

ACTION tried before *Montgomery, Judge,* and a jury, at September Term, 1885, of DAVIDSON.

The plaintiff brought this action to recover possession of the land described in the complaint.

The defendants in their answer, relied upon the defense that the plaintiff, the *feme* defendant, and others, were tenants in common of a tract of land; that partition thereof had been made between them, and that by mistake, the commissioners appointed to divide and apportion the land, had so settled a line between the plaintiff and the defendant as
(223) to allot to the plaintiff the land in question—one acre and one-fifth of an acre—when, in fact, they intended to allot, and ought to have allotted the same to her. They demanded judgment that the division of the land made by the commissioners, and particularly the line in question, should be changed and corrected, so as to apportion the land in question to the *feme* defendant, and that she have the benefit of such correction in making her defense to his action.

An issue was submitted to the jury, of which the following is a copy, and to which they responded in the negative:

"1. Did the commissioners appointed to divide the land of J. H. Thompson intend to allot the land in controversy to Mrs. Shemwell, and was the same in the report of the commissioners, by mistake allotted to the plaintiff?"

Philip Sowers, one of the commissioners who divided and apportioned the land, was examined as a witness for the defendants, and he testified that the line in question was fixed and settled adversely to the *feme* defendant, by mistake.

Another witness testified that he was present when the commissioners divided the land, and he contradicted the witness Sowers, and there was other evidence bearing upon the issue submitted.

The following is a copy of that part of the instructions of the Court to the jury, necessary to be stated here:

"The Court charged the jury that in passing upon the question as to what the commissioners intended, and whether there was a mistake or not in drawing the report of the commissioners, the burden was on the defendants to satisfy them by a preponderance of the evidence that a mistake had been committed in drawing the report, and that the report was not what the commissioners intended; that the question was not what Sowers, one of the commissioners intended, and whether he had made a mistake, but what the commissioners intended." The defendants excepted to this part of the charge. The Court charged upon other matters which was not excepted to, and there was other evidence in the case, but the above is all that is material to the question (224) raised by the appeal.

There was a judgment for the plaintiff, and the defendant appealed.

Mr. M. H. Pinnix for the plaintiff.
Mr. Emery E. Raper for the defendants.

MERRIMON, J., (after stating the facts). No objection was made by the plaintiff to the character of the defense set forth and relied upon in the answer of the defendants. If it be granted that it might be upheld as an equitable counterclaim, we are of opinion that the single exception to the instructions of the Court to the jury can not be sustained.

The inquiry was, whether the commissioners who divided and apportioned the land, had, as a body, made a mistake as alleged against the *feme* defendant. The statute (The Code, sec. 1892), provides that three commissioners shall be appointed, upon proper application, to divide and apportion real estate among tenants in common, and two of them (The Code, sec. 1896), may make and sign the report required to be made to the Court. *Simmons v. Foscue,* 81 N. C., 86.

The Court, therefore, properly instructed the jury, "that the question was not what Sowers, one of the commissioners (who testified), intended, and whether he had made a mistake, but what the commissioners intended"—that is, what the commissioners, as a body—a majority of them, if one dissented—intended. If two, understanding their purpose and making no mistake in that respect, concurred, that was sufficient although the third made a mistake as to his purpose, because the concurrence of the majority is sufficient to render the division and partition operative and valid.

NO ERROR. Affirmed.

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(225)

SUSAN BRUNER et al. v. S. H. THREADGILL et al.

Costs—Mortgagor and Mortgagee.

Where a mortgagor brought an action against the mortgagee for foreclosure and an account of the balance due on the secured debt, and of the rents and profits received by the mortgagee while in possession, which the latter resisted, but it was ascertained that there was still a balance due the mortgagee, and a decree was made directing the land to be sold, if the said balance was not paid within a time prescribed; *Held*, 1. That the plaintiffs were entitled to recover their costs of the action. The Code, sec. 525. 2. That if the plaintiffs failed to pay, and thereby made a sale necessary, the costs thereof should be deducted from the proceeds of sale.

This case was heard at Rockingham, Richmond County, on 14 May, 1884, as of ANSON Superior Court, Spring Term, 1884, before *Philips, Judge,* upon a motion by the defendants to tax the plaintiffs with the costs of the action, and a counter motion by the plaintiffs for a decree of sale and adjudging the costs of the action against the defendants.

It appeared by the record and proceedings in the case, that upon the complaint and answer filed and the issues submitted to the jury, their findings, the decree of the Superior Court and the decision of the Supreme Court, there was a reference ordered to J. C. McLauchlin to take and state an account of the plaintiff's indebtedness to the defendants on account of

the notes secured by the mortgage, and of the rents, issues and profits of the land while in possession of the mortgagee and the defendants, and of the amount due the defendants after deducting all proper credits, including the rent, issues and profits, and payments made by the mortgagor or plaintiffs. The referee reported to the Fall Term, 1883, that after taking the accounts provided for by the decree, and after applying all just and proper credits and payments, to the indebtedness due by the mortgagor to the mortgagee on the notes secured by the mortgage, there is still due to the defendants by the plaintiffs on the said debt the sum of $320.26. No exceptions were filed to said report. Upon the report, both parties consented to a sale of the premises (226) unless the debt should be paid, as provided in the decree made at the term. The defendants moved to tax the plaintiffs with the costs of the suit, and that the said costs be paid out of the sum or proceeds realized from the sale of the premises. The plaintiffs moved for a judgment against the defendants for the costs. His Honor being of the opinion that the judgment decreeing a sale, and allowing the plaintiffs in that way to redeem the property, was a judgment for the plaintiffs within the meaning of the law, and that plaintiffs were the successful parties in the suit, refused the motion of the defendants for a judgment for costs against the plaintiffs, and directed a decree to be entered, ordering a sale of the premises and adjudging costs against the defendants, which was accordingly done.

From his Honor's refusal to tax costs against the plaintiffs, and denial of the defendants' motion in that behalf made, and from so much of the decree as taxed or adjudged the costs against the defendants, the defendants appealed.

Messrs. George V. Strong and *E. C. Smith* for the plaintiffs.

Mr. P. D. Walker for the defendants.

SMITH, C. J. The action was commenced against George W. Willoughby, the mortgagee, by the issue of a summons on 28 March, 1878, which was served on him in April thereafter, by the plaintiffs, the widow and heirs-at-law of Jacob

Bruner, the mortgagor, with the husbands of two of the married daughters. Soon after the service of the process, Willoughby died intestate, and a summons issued against the defendants, who are his administrators, surviving wife, a married daughter and her husband.

They resisted the plaintiffs' claim, and in their answer set up defenses to the action, thus rendering the suit necessary to the enforcement of the plaintiffs' rights as declared and established at the trial. In this way, and in taking the accounts of the rents and profits, which the defendants' ancestor in his lifetime, and themselves as maintaining the pos-
(227) session since, are chargeable with the costs which have been incurred in reduction of the mortgage debt. The costs, therefore, ought to fall upon the unsuccessful party to the controversy which springs out of the action, and so the statute adjudges. The Code, sec. 525.

Of course the ruling as to the taxation of costs made when the decree of sale is entered, is understood to have reference to such as then had accrued, and upon the supposition that the debt is paid within the limited time therein.

Should the sale take place in consequence of the plaintiff's default, it would seem reasonable that the costs of the sale should come out of proceeds of sale, and such we assume, will be the action of the Court when such exigency arises.

NO ERROR. Affirmed.

Cited: Patterson v. Ramsey, 136 N. C., 567; *Williams v. Hughes,* 139 N. C., 20.

B. F. LONG, Admr., v. J. S. MILLER et al.

Infancy—Ratification—Statute of Limitation.

1. Where, after reaching majority, an infant executes a mortgage to the sureties on a note executed by him during his infancy, to indemnify them, it is a ratification of the debt, and the plea of infancy will not avail.
2. Where one surety makes a payment on a note after the bar of the statute has arisen, it does not revive the debt against the co-sureties.

3. Where property is conveyed to sureties to indemnify them on account of their suretyship, the creditor may pursue the property in their hands and force them to apply it in satisfaction of the debt, although the personal remedy against them is barred by the statute of limitation.

(*Green v. Greensboro College*, 83 N. C., 449; *Capehart v. Dettrick*, 91 N. C., 344, cited and approved.)

ACTION, tried before *Montgomery, Judge,* and a jury, at August Term, 1885, of IREDELL.

The action, begun on 25 January, 1883, by T. S. Tucker, administrator *de bonis non* of Anderson (228) Mitchell, deceased, and, upon his death during the progress of the cause, prosecuted by his successor, the present plaintiff, B. F. Long, is founded upon a promissory note, executed by the defendants, John F. McKee, the principal, and the others as sureties, in the form following:

$1,500.00. One day after date, we promise to pay Anderson Mitchell fifteen hundred dollars, for borrowed money, bearing eight per cent interest.

JOHN F. MCKEE,
J. L. MCKEE,
J. S. MILLER,
S. A. SHARPE.

4 Jan., 1876.

Upon the note is an endorsement in the handwriting of the former administrator, Tucker, acknowledging a part payment of one hundred and five dollars, made on 12 May, 1881, the legal effect of which, in connection with the attending facts, as a payment thus appropriated, furnishes the main subject-matter of controversy in the suit.

The complaint, in asserting a second cause of action, alleges that the principal debtor, John F., had formed a copartnership with James L. Colvert, under the firm name of Colvert & McKee, for conducting and prosecuting the business of buying and manufacturing tobacco, which was dissolved by the death of the senior member in February or March, 1877, and, thereupon, the joint effects and joint liabilities devolved upon the survivor; that on 21 May and 31 August of same year, the said John F. made an assignment to the defendants Miller and Sharpe (the other surety being his father), for

their indemnity as such sureties, of a one-half interest in the machinery and implements and a large quantity of tobacco, manufactured and in leaf, the property of the firm; that the assignees hold some of the goods thus conveyed, and have sold other portions of them, and have the proceeds in their (229) hands, for which they are responsible, and this fund the plaintiff claims a right to subject to the payment of the debt.

The defendants McKee, in their answer, set up the statute of limitation as a bar to the recovery, in addition to which, the said John F. relies upon the defense of his infancy at the time of executing the note.

The other defendants also seek to protect themselves under the statutory limitation against personal liability, and in their answer admit their possession of the trust fund provided in the deeds, and their willingness and intention to apply whatever portion thereof the plaintiff may be entitled to, but they say the fund is claimed by partnership creditors who have instituted an action and are prosecuting it, to have the same applied to their demands, insisting that only what remains after satisfying the liabilities of the firm, can be appropriated to the debt in suit as a means of exonerating the assignees from their surety liabilities. The cause accordingly came on for trial upon the following issues, to-wit:

1. Was the defendant John F. McKee an infant under 21 years of age at the time of the execution of the note?

2. Has the defendant John F. McKee ratified the note since becoming of age?

3. Is the cause of action barred by the statute of limitation as to any of the defendants?

4. How much is plaintiff entitled to recover on his note?

The execution of the note was admitted, and the same was read in evidence. The plaintiff also put in evidence a credit of $105.00 endorsed on said note in the handwriting of T. S. Tucker, aforesaid, and proved that it was in his handwriting, and that he was, at the date of said endorsement, to-wit: 12 May, 1881, the administrator of said A. Mitchell, and it was in evidence that this payment, if made at all, was made by the defendant J. S. Miller, without the knowledge of any of the other defendants.

And as evidence for the plaintiff on the second issue as to the ratification by John F. McKee after his (230) majority, and on the third issue of the statute of limitation as against the defendants John F. McKee and S. A. Sharpe, the plaintiff put in evidence two mortgages made by the said defendant McKee to Sharpe and Miller, defendants, one dated 21 May, 1877, the other 31 August, 1877, conveying a large amount of valuable property to indemnify and secure them as his sureties on said note, with power to sell the property at public or private sale, and apply the proceeds to the payment of the Mitchell note, and also a written note or order of said John F. McKee, dated 22 November, 1877, and addressed to said Sharpe and Miller, to sell said property, publicly or privately, and apply the proceeds to the payment of said note.

It was also in evidence by defendant Sharpe, that he and said Miller had sold the said property and had the proceeds thereof in hand, subject to the order of the Court, since 1877.

It was in evidence that said John F. McKee was born 4 May, 1856, and became of age 3 May, 1877.

The plaintiff contended that the defendant John F. McKee, having made said mortgages after he was 21 years old, and having also given the note or order of 22 November, 1877, to Sharpe and Miller, these were acts of ratification to go to the jury on the 2d issue. His Honor charged the jury, that there was no evidence of the ratification, and directed the jury to respond to that issue, "No." Plaintiff excepted.

The plaintiff contended as to the 3d issue upon the statute of limitation, that said mortgages and order being made, executed and given by said John F. McKee, and accepted by Miller and Sharpe from him, and their having said property or its proceeds, ever since 1877, in hand as trustees, they were precluded in equity from setting up the statute of limitation at all, as unjust and inequitable, or that the statute would not run in their favor after the date of said mortgages.

His Honor declined so to hold, and instructed the jury that there was nothing proven to prevent the (231) statute of limitation from running in favor of McKee and Sharpe, and that there was no evidence to rebut the statute of limitation as to them, and his Honor instructed the jury to find that the statute of limitation barred the cause of

action as to John F. McKee and S. A. Sharpe, under the 3d issue.

The plaintiff excepted to the above rulings and instructions of his Honor.

The jury found the issues as follows: On 1st issue, by consent—"Yes."

On 2d issue, under the instructions of the Court—"No."

On 3d issue, under the instructions of the Court as to John F. McKee and S. A. Sharpe. (Ans.) "To all except J. S. Miller" [under other evidence and instructions].

On 4th issue, "$2,547.00" (which applies only to Miller).

There was judgment in favor of the plaintiff against Miller.

Plaintiff moved for a new trial as to said John F. McKee and S. A. Sharpe. Motion overruled. Judgment for said defendants McKee and Sharpe. Plaintiff appealed to the Supreme Court from this judgment.

Messrs. Scott & Caldwell and *W. M. Robbins* for plaintiff.
Messrs. R. F. Armfield and *D. M. Furches* for defendants.

SMITH, C. J., (after stating the facts). The plaintiff's first exception is to the Judge's charge that there was no evidence furnished, in the two deeds executed by John F. McKee to his sureties, and in the authority afterwards given to them to sell, after his attaining full age, of his ratification of indebtedness on the note.

In the first deed, made the same month in which he arrived at majority, this recital is contained: "Whereas, said Sharpe and Miller are sureties for the said J. F. McKee, on a note payable," etc., describing it accurately.

The second deed, made 31 August, after conveying certain personal property, proceeds thus: "Now, therefore, the parties of the second part" (the assignee's sureties) "shall
(232) hold and use all the above conveyed property, for the purpose of paying and discharging said note to which they are surety," and adds authority to sell, "and apply the proceeds of said sale to the discharge of said note."

The subsequent written direction, bearing date 22 November, 1877, has a provision that "when the note to which they are surety shall be fully paid off and discharged," then what remains, if anything, shall be returned to the mortgagor.

Thus, the debtor in both deeds recognizes the obligation of the note as resting upon his two sureties, and appropriates his own property to its payment, in order to their relief.

We are not willing to give our consent to the ruling that there is no evidence of ratification of the debt, if it were a material element in the cause, but it is rendered unimportant by the subsequent instruction, that as to both the said John F. and the surety Sharpe, the debt is barred by the statute.

2d. The exception to the direction given to the jury as to the effect of the lapse of time, in obstructing the recovery, can not be sustained.

The note, not being under seal, became due on the day after its date, and then the statute ran its full course, Code, sec. 155, before the alleged payment by Miller on 12 May, 1881, and this payment being made after the bar had been interposed, can not operate to revive the obligation, and restore the lost remedy against the others, under the ruling in *Green v. Greensboro College,* 83 N. C., 449.

While there is no error entitling the plaintiff to a new trial as to the three defendants, other than Miller, in so much of the action as seeks to recover upon the note as a subsisting debt, there is error in adjudging that they go without day.

The trust fund is undisposed of, and this the plaintiff has a right to pursue, and recover so much as may be applicable to his secured debt, and in the disposition of this fund all of them have, and are admitted to have, a direct interest.

They should therefore remain in the cause until the controversy in relation to it is settled. As to the (233) enforcement of the mortgage to secure it for the discharge of the note, and to the extent of what may be obtained from this source, there is no statutory bar. While the personal action is barred, the action to enforce the mortgage is not, as decided in *Capehart v. Dettrick,* 91 N. C., 344.

There is therefore error in the judgment in favor of the three defendants, that they go without day.

ERROR. Reversed.

Cited: Overman v. Jackson, 104 N. C., 8; *Taylor v. Hunt,* 118 N. C., 172; *Garrett v. Reeves,* 125 N. C., 540; *Hooker v. Yellowley,* 128 N. C., 300; *Menzel v. Hinton,* 132 N. C., 663; *Worth v. Wrenn,* 144 N. C., 662.

B. F. LONG, Admr., v. J. S. MILLER et al.

Evidence—Application of Payment—Statute of Limitation.

1. A debtor owing several debts has the right to apply a payment made by him to any of such debts, but this right must be exercised when the money is paid, otherwise the right to make the application devolves on the creditor.
2. Where the administrator of a creditor drew an order on two of the sureties to a promisory note, and credited the amount of such order on the note, which order was paid by one of the sureties; *It was held*, that this was a payment on the note and prevented the bar of the statute of limitation as to the surety making the payment; *Held further*, that the intention of the debtor, uncommunicated to the administrator, to apply the payment to another debt, can not affect the application.
3. Where the administrator of a creditor draws an order on a debtor to pay a certain sum, which will be credited on a certain debt, the debtor has no right, without the consent of the administrator, to alter the order so as to make the payment on another debt, and if he pays the order, it will be applied in law to the debt designated by the drawer in the order.
4. Evidence of a conversation after such payment, between the administrator who is dead, and the debtor, is not admissible in an action by an administrator *de bonis non*, to change the application of the payment.
5. *Quære.* Whether such conversation would fall under the pro-
(234) visions of sec. 590 of The Code.

(*Sprinkle v. Martin*, 72 N. C., 92; *Wittkowski v. Reid*, 82 N. C., 116; same case, 84 N. C., 21; *Vick v. Smith*, 83 N. C., 80, cited and approved.)

ACTION tried before *Montgomery, Judge,* and a jury, at August Term, 1885, of IREDELL.

There was a judgment for the plaintiff, and the defendant appealed.

Messrs. Scott & Caldwell and *W. M. Robbins* for the plaintiff.

Messrs. R. F. Armfield and *D. M. Furches* for the defendant.

SMITH, C. J. The appeal of the defendant Miller, from the judgment rendered against him, brings up for review the correctness of the ruling of the Court, upon the question of the effect upon his liability, to be attributed to the enter-

ing of the credit on the note under the circumstances detailed in the evidence. The plaintiff produced the note, bearing the endorsement of a payment of one hundred and five dollars, in the handwriting of the deceased administrator Tucker, then acting as such, bearing date 12 May, 1881, and an order, obtained from the appellant, on notice to produce, of the same date, in form as follows:

STATESVILLE, N. C., 12 May, 1881.

Messrs. J. S. Miller and S. A. Sharpe:

DEAR SIRS:—Please pay Milholland & Bell one hundred and five dollars, to be credited on your note due A. Mitchell's estate.

T. S. TUCKER,
Administrator of A. Mitchell.

The note showed a defacing mark in pencil drawn across the name of Sharpe.

The testimony of the appellant Miller, examined as a witness on his own behalf in reference to the transaction, is in substance, that he first saw the order drawn by the administrator, Tucker, when presented by the said (235) Milholland, about the time it bears date; that he remarked to Milholland that Sharpe had nothing to do with the matter, and the inserting of his name was a mistake, at the time running a pencil line through it; that he himself owed an individual note to the intestate's estate, and would pay the order on that; that he paid the order, and when asked by his own counsel, added that his intention was to make the payment of the order on his individual debt, and not on that of Miller and Sharpe.

Milholland testified in effect, that before he went to Tucker for the order, the appellant had told him that he owed the intestate an individual debt, and if he would get the order from the administrator he would pay it; that he did not communicate to the latter what appellant had said, when he presented his account for the monument erected in memory of the intestate and received the order from the administrator, nor was he requested to do so.

The appellant's counsel proposed further to prove by him that he told the administrator how he wanted the money ap-

plied, *not at the time of payment,* but how long afterwards he was unable to say. On objection, the evidence was ruled out, but on what grounds, it is not stated.

While it may be questioned whether this is a "communication," falling under the interdict of sec. 590 of The Code, it was inadmissible to change an application before made, if such is the effect to be given to the endorsement, or to vary the previously fixed relations of the parties thereto.

A debtor who owes several separate and distinct debts, has a right to direct the application of any payments he may make, to such of them as he chooses, but this right must be exercised at the time *when the money is paid;* otherwise, the right to make the appropriation devolves upon the creditor. This rule is well established in the adjudications of this Court, to which appellant's counsel have referred in their brief. *Sprinkle v. Martin,* 72 N. C., 92; *Wittkow-*
(236) *ski v. Reid,* 82 N. C., 116; *Vick v. Smith,* 83 N. C., 80; *Wittkowski v. Reid,* 84 N. C., 21.

The subject is thoroughly examined in Munfer App. Pay., 32, with numerous citations.

The inquiry, then, is whether under the facts shown, the debtor has exercised his right to make the application in the manner and at the time prescribed. The Court was asked by the appellant to charge the jury that if the appellant had the conversation detailed by himself and Milholland with the latter, and when he took up the order, intended to apply the payment to his individual, and not to the surety debt, the statute would not be arrested; and that it devolved on the plaintiff to show affirmatively that Miller intended the payment to be on the last named debt, in order to remove the statutory bar.

The Court charged the jury as follows: "If you find that Tucker, the administrator, drew the order exhibited in evidence, and entered the credit on the surety note; that Milholland presented it to Miller, who paid and took it up, then it was a payment on that note. Miller had no right to change the form of the order by striking out the name of the drawee Sharpe, and then paying the money without the consent of the drawer, Tucker. If he did not wish to pay the order and let the sum be placed as a credit on the note

described in it, he should have refused payment until the form of the order was changed, but having paid it without modification, the payment was *eo instanti* a payment on the note in suit, according to the testimony of both Miller and Milholland."

It will be observed that the refused instructions proceed upon the ground that the unexpressed intentions of the appellant, alone, were to control in determining how the money paid should be applied, ignoring the fact that there are two parties to the transaction, *a receiving* as well as *paying* party, who must concur in the act. While the debtor may elect when he makes a payment how the money shall be applied, the creditor must consent to receive it, as thus appropriated. But the true rule is laid down by the Court.

Here the administrator distinctly announces in the order how the money is to be applied. The debtor, (237) without making any objection which he may have to its form known to the drawer, takes it up, and thus assents to the appropriation intended and expressed in the face of the instrument itself.

The last exception based upon a supposed agency in Milholland to bind the administrator by his assumed assent to the appropriation of the money by Miller, has no support in the facts. There is no evidence of any such agency, and if there was, it is restricted in the terms of the order, to the receipt only of money to be paid on account of, and to be accredited on, the surety debt.

As the debtor chose to take up an order based upon a special indebtedness of Miller, the law determines the appropriation at once; and if it did not, the election of the creditor has made it, by his contemporary act in putting the credit upon the note.

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

The cause will proceed in the Court below as adjudged in the plaintiff's appeal in the case.

NO ERROR. Affirmed.

Cited: Young v. Alford, 118 N. C., 220; *Pruden v. R. R.,* 121 N. C., 512; *Kerr v. Sanders,* 122 N. C., 638.

SARAH A. DUPREE v. THE VIRGINIA HOME INSURANCE CO.

Petition to Rehear—Agent—Evidence—Newly discovered Evidence—Witness.

1. A petition to rehear should not be presented, unless the court has overlooked some material point, or some direct authority in the first opinion, and the rule is reiterated, that the court will not, on petition to rehear, reexamine the same authorities and the same course of reasoning, in order to reverse their judgment.

2. Where the agent of two insurance companies sends an employee to examine and value property offered for insurance, and a policy is issued after such inspection by one of the companies, and after it has lapsed, another policy is issued by such agent in the other company, but without any further examination: *Held*, that the
(238) fact that the property was examined by such employee is competent evidence to go to the jury, on an issue of fraudulent overvaluation in an action on the second policy.

3. Where the defendant has closed his testimony, it is discretionary with the trial Judge to allow him to examine a witness to contradict matters brought out on cross-examination of the plaintiff's witnesses examined in rebuttal. It is only the evidence which is brought out by the plaintiff, and which the defendant has had no opportunity to rebut, that is open to refutation.

4. A new trial for newly discovered evidence will be granted only, when, (1) the newly discovered witnesses will probably testify as alleged; (2) when such evidence is material; (3) when it is probably true; (4) when the party has used due diligence in discovering it, and (5) when it is not merely cumulative.

5. The evidence alleged to be newly discovered, was known to one member of a firm, which firm were the agents of the applicant for a new trial, but he had retired from the firm before the action was begun. It was known to the other members of such firm that the retiring member was principally conversant with the transaction out of which the litigation arose, but they did not consult with him about it; *Held*, that the party had not used due diligence, and the application was refused.

(*Watson v. Dodd*, 72 N. C., 240; *Hicks v. Skinner*, 72 N. C., 1; *Devereux v. Devereux*, 81 N. C., 12; *Haywood v. Daves*, 81 N. C., 8; *State v. Lemon*, 92 N. C., 790; *Holmes v. Godwin*, 69 N. C., 467; *Shehan v. Malone*, 72 N. C., 59; *Bledsoe v. Nixon*, 69 N. C., 81; *Matthews v. Joyce*, 85 N. C., 258; *Carson v. Dellinger*, 90 N. C., 226; *Simmons v. Mann*, 92 N. C., 12, cited and approved.)

PETITION TO REHEAR, by the defendant, filed at the October Term, 1885, of the Supreme Court. The case is reported in 92 N. C., 417. The facts appear in the opinion.

Messrs. Armistead Jones and *A. M. Lewis & Son,* for the plaintiff.

Messrs. D. G. Fowle and *J. W. Hinsdale* for the defendant.

SMITH, C. J. The argument upon the rehearing of the errors assigned, protracted over the entire period allowed by the rule, has been little more than the reproduction of that made upon the first hearing, which was full and exhaustive upon the numerous exceptions contained in the record, both orally and in the brief. With this aid, the case was then in all its details, carefully considered and decided. Our convictions produced by that discussion, and our examination of the authorities, as embodied in the opin- (239) ion then formed and believed, remain unchanged. We do not feel called upon to go over the same ground a second time to sustain the conclusions then reached, but shall, notwithstanding they have been called in question and assailed with earnest confidence by counsel, leave their correctness to the vindication furnished in the opinion. To do this in the absence of any important overlooked case, adjudged in the Courts or contained in any recognized elementary work, or any shown misconception of the facts, at the instance of dissatisfied counsel, against whose client the decision is made, and whose zeal does not admit of the calm, dispassionate consideration that belongs to the judicial mind, would be to invite a needless revision of the rulings of the Court, and impair confidence in them. Nor are such contemplated in the rule, that, under limitations, allows an application for a rehearing of a decided cause. As was said with great force by the late eminent Chief Justice, delivering the opinion in *Watson v. Dodd,* 72 N. C., 240, and reiterated in subsequent cases: "No case ought to be reheard upon petition to rehear, unless it was decided *hastily,* and some *material point* was overlooked, or some *direct authority* was not called to the attention of the Court." *Hicks v. Skinner,* 72 N. C., 1; *Devereux v. Devereux,* 81 N. C., 12; *Haywood v. Daves, Ibid.,* 8.

While we are ready and willing to correct any error which may have been committed, and will do so when it is pointed

out and made to appear, it is not in the contemplation or scope of the rule, to permit an adjudged case to be reviewed, and the rulings made therein controverted by the same course of reasoning and the reproduction of the same authorities, which were relied on in the former argument, and then, with due and careful deliberation, considered and disposed of.

We shall not, therefore, go over the entire ground covered by the present argument, and reexamine, as was done before, the nineteen enumerated errors set out in the defendant's petition, many of which present the same substantial proposition in modified forms, but we will confine ourselves to the two most prominent, in what we have now to say. These objections are, first, to the admission in evidence of the report of the agent who made the examination, upon which the first insurance was effected; and second, to the refusal to allow the defendant to introduce witnesses to falsify the statement of the witness Dupree, elicited upon his cross-examination by the defendant.

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1st. The report of the agent to the general agent of both insurance companies, Cameron, Hay & Co., sent out to inspect the premises.

Among the defenses set up in opposition to the plaintiff's demand of indemnity for the loss occasioned by the fire, is an averment that the execution of the policy was superinduced by the false and fraudulent representation of the value of the property, made in the plaintiff's application for insurance, which, entering into, vitiates and avoids the contract. In meeting this imputation, the plaintiff was allowed to show that an employee, at the instance of the general agents, Cameron, Hay & Co., had made an examination and report of the premises the year before, upon which an insurance was effected in another company, they being agents of both principals, and that with this information, they issued the policy upon which the present action is founded. The agency firm consisted of three members, one of whom, particularly conversant with the transaction, retired before the present policy was issued. It was certainly competent to show this source of information possessed by the agency firm, in regard to the property included in both policies, when

they issued the last, and as tending to rebut the charge that it was solely brought about by the fraudulent statements contained in the plaintiff's application. This agency may be understood, at least the evidence tending in this direction was proper to go before the jury, to have acted alike upon this information, as upon that furnished by the plaintiff, when each of the policies was issued.

We were referred to the case known as *The Distilled Spirits,* 11 Wall., 356, where it is supposed a contrary doctrine is maintained. So far from this, in our opinion, it sustains our view. Mr. Justice *Bradley* then says, (241) "that in England, the doctrine now seems to be established, if the agent at the time of effecting a purchase, has knowledge of any prior lien, trust or fraud, affecting the property, *no matter where he acquired such knowledge,* his principal is affected thereby." He then adds: "On the whole, however, we think that the rule as finally settled by the English Courts, with the qaulification above mentioned," (referring to information confidentially acquired, and which public policy does not permit to be disclosed) "is the *true one* and is deduced from the best consideration of the reason on which it is founded."

We have not undertaken to give any specific effect to the evidence, but only to declare that it was proper to be heard by the jury.

But it was urged that the trial Judge, in his charge, gave an unwarranted force to the evidence, in telling the jury that "the witness may be considered *as determining* the value of the other articles insured, but not as to the value of the merchandise"—which had not passed under his inspection.

This literal rendering of the words of the Judge does not, most assuredly, convey his meaning as he must have been understood.

He evidently intended to say, and this is in harmony with what precedes, that the jury might consider this evidence *in determining* the value of that property. In the beginning of the sentence of which the words quoted are the conclusion, his words are: "In determining the value of the property insured, the jury may consider and give such weight as they deem proper, to the testimony offered, to show that the firm

of Cameron, Hay & Co. were, during the years 1878 and 1879, agents both of the defendant company and the Virginia Fire and Marine Insurance Company that issued the policy offered in evidence, in July, 1878, and that an agent, acting under the direction of said firm, inspected and estimated the value of the storehouse and other articles insured in the policy sued on, at the prices set forth in the
(242) policy issued in 1879, and made out the application," etc. This language clearly shows that the Judge meant to leave, and was so understood, the force and effect of the evidence to the jury, untrammeled in acting upon it.

2d. The next assigned error is in the refusal of the Judge, the taking of the testimony on both sides being concluded, to allow the defendant to introduce a witness to contradict what had been sworn by P. C. Dupree, a witness for the plaintiff, upon his cross-examination by the defendant. He had testified in opposition to the reproduced testimony of a deceased witness for the defendant, who had been examined at a former trial, that he never had any conversation with the plaintiff about the cost of her house. In answer to a question from defendant, he stated that his own, and the testimony of the deceased witness at a former trial, were in conflict. The proposal now was to show that there was no such conflict. The Court refused to let the witness be examined, because the statement to be disproved, was not elicited by the plaintiff, but was in response to an inquiry from the defendant, and that the matter rested in the sound discretion of the Court.

The ruling was wholly misapprehended by defendants' counsel upon the first argument, as shown in his elaborate and carefully prepared brief. The Court is represented as holding that the testimony being brought out on the cross-examination, the witness could not be impeached or contradicted, and again, that it was not within the discretion of the Court to allow the question, and the argument proceeds to combat these supposed rulings, and to show that "the conduct of the trial, and the order of proof, is always under the discretionary control of the Court."

The Court did not so rule, but held according to the well-settled practice, the defendant having rested its case, had

only a right to controvert by calling other witness what was brought out in the plaintiff's replying evidence, and to impeach the new witness who testified, and this because no previous opportunity to do this had been afforded. The witness Dupree had been before examined, and his testimony was simply in conflict with that of the deceased wit- (243) ness.

It is an inaccurate statement of the ruling upon the exception. It was not held in general terms, as the argument assumes, that the testimony of Dupree was not open to disproof, for it undoubtedly was, during the orderly examination of the witnesses. The point decided is, that when both parties have been heard, and the defendant's witnesses have all been examined, only facts brought out in the plaintiff's reply to the evidence adduced by the defendant, are open to refutation, and not such as the cross-examination may elicit. Beyond this the application must be addressed to the discretion of the Judge, the refusal to exercise which is not a matter for review here. If it were otherwise, the plaintiff would have the right to call witnesses to sustain the witness, and thus a new and collateral issue would be opened up, and the trial indefinitely prolonged. Hence the rule is to be relaxed only, when in the opinion of the presiding Judge it was right and proper to do so. *State v. Lemon,* 92 N. C., 790.

In regard to this alleged error, the remark may be repeated that no overlooked material authority has been cited, and no aspect of the matter, before unnoticed, has been presented to us.

The entire reasoning of counsel has been directed against the conclusions before reached, and in controverting the principles of law there laid down. This is aside from the purview of the rule for rehearing, and if allowed, would tend to unsettle confidence in the adjudications of the Court as a final arbiter in disposing of controversies.

The facility with which our most carefully prepared adjudications and opinions are often pronounced erroneous in certificates of members of the bar, sustaining the application for a rehearing and review, has made it necessary to place further restrictions upon the practice, and render it what

it was intended to be, a mode of correcting inadvertences, or propositions of law announced in ignorance of some important case, which, if known, would probably have changed the result. Rule 12, section 2.

After argument heard upon the second ground as-
(244) signed in support of the application for a new trial, the discovery of new material evidence since the trial in the Superior Court, we resume the examination of this part of the case.

The witness from whom the testimony is expected to be obtained, J. J. Whitehead, the agent who received the plaintiff's application for insurance, on 15 July, 1878, and handed it to E. E. Gray, one of the partners in the general agency of Cameron, Hay & Co., with his endorsed approval, was first summoned for the plaintiff, but not examined on the first trial, and his attendance dispensed with at the last. His affidavit is, that he filled the blanks in the application at the plaintiff's dictation, was guided entirely by her valuations and figures, and "that he did not *carefully* examine the buildings or the fixtures, or the stock of goods at all, or the furniture," embraced in the policy which issued in response, and when he delivered the application to Gray, "giving him no information whatever concerning the same, or the property described, or even of the fact that he had been in the house."

It appears that the other partners never had any conversation with him on the subject-matter in controversy, nor was the retiring partner, Gray, conferred with in reference to the defense, which the application upon which he issued the policy for the firm remained in possession of the other partners, open to their observation until produced for the trial.

Certainly the failure to see and ascertain from the agent what information he possessed, and what aid his testimony might render to the defense, is not consistent with that diligence which ought to be exercised when the Court is asked to annul the trial, and take away the results secured by the successful issue to the plaintiff.

It is not necessary to go outside the adjudications in this State to determine the conditions requisite to the interference of the Court in cases of this kind.

The considerations that should enter into the determination of the Court on such an application, are (245) thus set out by RODMAN, J., in *Holmes v. Godwin,* 69 N. C., 467:

"1. Will the newly discovered witness testify as alleged?

"2. Is the new evidence material?

"3. Is it probably true?

"4. Has the party used due diligence in discovering it? to which may be added, is it independent, or cumulative, merely?"

Without commenting on the other indispensable conditions, has the applicant used diligence in finding out the witness, and what he will prove? Unless this appears, the motion will be refused in the Court when the jury trial was had. But a more stringent rule ought to be applied to an application made in this, the appellate court. It is said by READE, J., in delivering the opinion in *Shehan v. Malone,* 72 N. C., 59, where, as in *Bledsoe v. Nixon,* 69 N. C., 81, the application upon such ground was first made in this Court: "There is but one precedent for a motion in this Court, after judgment here, to set aside the judgment here, and grant a new trial in the Court below for newly discovered testimony, and that is the case of *Bledsoe v. Nixon, supra.* The necessity for it seems to arise out of our new system. It is an inconvenient practice and not to be encouraged; nor will it be allowed, *except in cases of necessity, to prevent manifest injustice.*"

Without a discussion of the case, we refer to *Matthews v. Joyce,* 85 N. C., 258; *Carson v. Dillenger,* 90 N. C., 226, and *Simmons v. Mann,* 92 N. C., 12, the last judicial utterance on the subject.

There have been two jury trials of this cause in the Superior Court, two hearings upon the appeal, inclusive of the present rehearing, and now we are asked to reopen the cause, and send it down for a new trial before the jury, for the only assigned reason that the defendant's agents never conversed with the witness most likely to give information about the manner of effecting the first insurance, and never knew the value and importance of his testimony until since the last trial in the Superior Court. Under (246)

such circumstances, we do not feel warranted in unsettling what has been done, and we adhere to that most salutary maxim: *"Interest reipublicæ ut sit finis litium,"*—it is full time for this litigation to come to an end—and the judgment must stand.

NO ERROR. Affirmed.

Cited: Fisher v. Mining Co., 97 N. C., 97; *Follette v. Accident Asso.,* 107 N. C., 244; S. c. 110 N. C., 380; *Dibbrell v. Ins. Co., Ib.,* 209; *Bergeron v. Ins. Co.,* 111 N. C., 47; *Black v. Black, Ib.,* 303; *Comrs. v. Lumber Co.,* 116 N. C., 745; *Weisel v. Cobb,* 122 N. C., 69; *Weathers v. Borders,* 124 N. C., 611; *Elmore v. R. R.,* 131 N. C., 576.

JOHN F. SPENCE and GEO. W. ROSS v. J. M. TAPSCOTT.

Bond—Negotiable Instrument—Endorsement.

1. A bond or sealed note is in its inception a deed, and although transferable as a negotiable instrument under the statute, the quality of negotiability does not attach to it until it is endorsed. Until endorsement, it remains to all intents a bond at common law.
2. The assignee of a promissory note or bill of exchange endorsed before maturity, takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a non-negotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between the original parties at the time of the assignment.
3. Bonds or sealed notes, not being negotiable until after endorsement, are on the same footing with non-negotiable instruments and bills of exchange and promissory notes transferred after maturity.
4. Where a bond payable to A B or bearer, was transferred for value by A B to the plaintiff without endorsement and before maturity; *It was held* subject in the hands of the plaintiff to any equities and defenses which existed between the original parties at the time of the transfer.
5. The only change in the law effected by sec. 177 of The Code, is to allow the action to be brought in the name of the transferee, but it does not prevent the obligor from setting up any defense which existed at the time of, or before notice of the assignment, and which would have been available against the obligee.

(*Parker v. Latham,* 44 N. C., 138; *Havens v. Potts,* 86 N. C., 31; *Marsh v. Brooks,* 33 N. C., 409; *Harris v. Burwell,* 65 N. C., 584, cited and approved.)

SPENCE *v.* TAPSCOTT.

ACTION tried on appeal from a Justice of the Peace, before *Shepherd, Judge,* and a jury, at Spring Term, 1885, of ALAMANCE.

The action was brought by the plaintiffs as holders of the following instruments, three in number: (247)

"GREENSBORO, N. C., 24 Aug., 1882.

Twelve months after date I promise to pay to W. H. McDaniel & Co., or bearer, fifty dollars, value received, payable at Bank of Greensboro, at eight per cent interest until paid.

J. M. TAPSCOTT, (seal)."

The other two are like this in every particular, except that one is payable in nine, and the other in ten months, for the same amount each, and same date.

It is admitted in the case, that the plaintiffs in the course of business, purchased for good consideration, in good faith, before they were due, the said notes from McDaniel & Co., who delivered them to plaintiffs, and that they had no notice of defenses set up, or any other.

The defendant set out in his answer as a ground of defense, that said notes were obtained by said McDaniel & Co., by deceit and fraud, in that they represented that this defendant was to have exclusive territory to operate in, in making sale of certain bee gums, of which the defendant had the patent right for North Carolina; that the territory was designated, but had before been disposed of; other representations were set out, "all of which were false and fraudulent, and by them defendant was induced to execute said notes."

To sustain this defense, the defendant introduced evidence, and plaintiffs objected, on the ground that plaintiffs could not be affected by any equities between the original parties to the notes. The evidence was admitted by his Honor, and the plaintiffs excepted.

There was a verdict and judgment in favor of the defendant, and the plaintiffs appealed.

Messrs. Scott & Caldwell for the plaintiffs.

Messrs. Graham & Ruffin for the defendant.

(248) ASHE, J., (after stating the facts). The only question presented by the record is, whether these notes with seals, payable to McDaniel & Co., or *bearer,* are negotiable and transferable by delivery merely, and without endorsement by McDaniel & Co., and are within the meaning of sec. 177 of The Code, as negotiable promissory notes.

The contention of the plaintiffs is, that the notes are negotiable by delivery merely, and that the plaintiffs acquired the legal, as well as the equitable titles, by the delivery of them by the obligee.

The contention of the defendant is, that the notes being under seal, were bonds, or deeds, and can not, as negotiable instruments, be payable to McDaniel & Co., or *bearer,* and that the seals which made them void at common law as negotiable instruments, make them under our statute negotiable only by the endorsement of the obligees McDaniel & Co., which was not done, and that the plaintiffs, as holders, have not the legal title, but only the equitable title, which is junior and secondary to defendant's equity.

By The Code, sec. 41, it is provided that "actions may be brought by persons to whom promissory notes are payable, in the same manner as they might upon inland bills of exchange," and the same as likewise all bonds, bills and notes for money, with or without seal, and expressed or not to be payable to order and for value received, may be assigned over in like manner as inland bills of exchange are by the custom of merchants in England." The effect of this statute upon sealed notes, is to make them transferable like promissory notes and inland bills of exchange, and to give the parties holding them the same actions as upon them, but it does not abolish the original distinction existing between bonds and promissory notes. A bond, in its inception, is a deed, and though it may be transferred as a negotiable instrument, the quality of negotiability does not attach to it until it is endorsed. Until then, it retains all the characteristics of a bond at common law, and its nature, in its inception, before endorsement, is not touched by the statute. *Parker v. Latham,* 44 N. C., 138.

When a promissory note or bill of exchange is en-
(249) dorsed before maturity, it passes to the endorsee free

from all the equities and defenses it was subject to in the hands of the payee, but a different rule applies to non-negotiable instruments. The assignee of such an instrument, who takes it *even before due,* and without notice, holds it subject to all equities or counterclaims between the original parties, existing at the time of assignment. *Havens v. Potts,* 86 N. C., 31. And bonds or sealed notes, not being negotiable paper until after endorsement, are on the same footing with non-negotiable instruments.

The bond in this case was made payable to McDaniel & Co. or bearer, and having been delivered to McDaniel & Co., it is a good common law bond, and the words "or bearer" must be rejected as surplusage. *Marsh v. Brooks,* 33 N. C., 409. If an action had been brought on this bond by the plaintiff before the adoption of The Code, he would have had to sue in the name of McDaniel & Co. to his use, and would have been subject to all the equities and defenses which subsisted between the original parties at the time of the assignment or before notice of the assignment. *Harris v. Burwell,* 65 N. C., 584. This would seem to put sealed notes before endorsement, upon the same footing with bills of exchange and promissory notes endorsed after maturity.

But the common law rule that an action by the assignee of an instrument that is not negotiable, must be brought in the name of the assignor, has been changed by The Code, sec. 177, so as to enable him to sue in his own name, but without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment. The section makes no change in the law, except to allow the assignee to sue in his own name instead of that of the assignor.

Our conclusion is, the evidence excepted to was admissible, and there was no error in receiving it. The judgment of the Superior Court is therefore

AFFIRMED.

Cited: Lewis v. Long, 102 N. C., 207; *Loan Asso. v. Merritt,* 112 N. C., 245; *Christian v. Parrott,* 114 N. C., 218; *Tyson v. Joyner,* 139 N. C., 73.

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JOHN F. SPENCE and GEO. W. ROSS v. J. M. TAPSCOTT.

Appeal Bond—Merger—Appeal.

1. When the Supreme Court remands a case, because the record is imperfect, the Superior Court has the power to make any proper order in the cause.
2. Where, upon such remanding, his Honor in the court below ordered an appeal bond to be filed to perfect the same appeal, it was held not to be error.
3. Where an appeal has been dismissed and a judgment for costs entered against the appellant and the sureties on his appeal bond, if another appeal is taken, a new bond must be filed.

(*Spence v. Tapscott*, 92 N. C., 576, cited and approved.)

ACTION tried before *Gilmer, Judge,* at the Fall Term, 1885, of ALAMANCE, where a judgment was rendered in behalf of the defendant, from which the plaintiffs appealed to this Court.

At the last February Term of this Court, there was a motion made by the defendant to dismiss the appeal on the ground that the undertaking on the appeal was not justified as required by the statute. The motion was not entertained by this Court, for the reason that the appeal was not here, and the papers sent up were remanded to the Superior Court, "that the proper steps might be taken to perfect the record and put the case in a shape to be heard and determined intelligently."

Thereupon a judgment was rendered in this Court against the plaintiff and his surety for the appeal for the costs in this Court incurred.

At the last Fall Term of the Superior Court for Alamance County, Gilmer, Judge presiding, made the following order, to-wit: "It is ordered that the clerk, upon the plaintiff's filing a bond in the sum of thirty dollars to secure the costs of the appeal, issue and send up a proper, full and complete transcript of the record and proceedings had in the case, to the end that said appeal of the plaintiff may be heard in the Supreme Court." From this order the defendant ap-

(251) pealed, and assigned as error, the making of said order by his Honor, and especially any direction to take a

new bond from the plaintiff, as the said cause is still pending in the Supreme Court upon the appeal first taken, and his Honor, Judge Gilmer, had no right to make any order in the cause, the clerk having taken the bond heretofore ordered by his Honor, Judge Shepherd, to be given upon the appeal. The defendant's counsel renewed the motion made at the last term of this Court to dismiss the appeal for the reason then assigned.

Messrs. Scott & Caldwell for the plaintiffs.
Messrs. Graham & Ruffin for the defendant.

ASHE, J., (after stating the facts). The motion of the defendant now made to dismiss the appeal for defects in the undertaking on appeal, sent up with the transcript to the last term of this Court, can not be entertained. That undertaking was to secure the costs of the appeal then attempted to be taken, but this Court held the appeal was not here, and remanded the papers. *Spence v. Tapscott,* 92 N. C., 576. If the appeal was not here, the case remained in the Court below, and if not here, of course no motion to dismiss could be entertained by this Court.

This fully meets and disposes of the objection made by the defendant to the order of Judge Gilmer, that the cause was still pending in the Supreme Court upon the appeal first taken, and his Honor had no right, while it was so pending, to make any order in the cause in the Court below.

The first bond has been extinguished by its merger in the judgment for costs rendered at the last term of the Court, and whether erroneous or not, the judgment stands until it is reversed.

That bond had answered its purpose, and if the transcript had been sent to this Court without another undertaking, there certainly would have been ground for dismissing the appeal for want of an undertaking on the appeal. It was therefore altogether proper and necessary, in order that the appeal might be perfected, that the last undertaking (252) should have been given. It ought to have been given whether it was ordered by the Court or not, and error can not be imputed to his Honor for ordering that to be done, which the law required to be done.

There is no error, and the defendant's motion to dismiss the appeal is denied.

NO ERROR. Affirmed.

Cited: Mfg. Co. v. Simmons, 97 N. C., 90; *Howell v. Jones,* 109 N. C., 103.

E. C. HALSTEAD, et al. v. F. H. MULLEN, et al.

Boundary—Evidence—Pleading.

1. The declarations of a deceased person in relation to the location of the line dividing his lands from those of another, are admissible on the trial of an issue between subsequent owners or claimants of such adjacent lands, involving their boundaries.
2. The new system of pleading in its whole structure and scope, looks to a trial of causes upon their merits, and discountenances objections which may be removed.
3. Objection to a *defective statement* of a cause of action must be taken advantage of by demurrer or will be deemed to be waived, while a *statement of a defective* cause of action may be taken advantage of at any time by motion to dismiss.

(*Mason v. McCormick,* 85 N. C., 226; *Fry v. Currie,* 91 N. C., 436; *Meekins v. Tatum,* 79 N. C., 546; *Williamson v. Canal Co.,* 78 N. C., 156; *Garrett v. Trotter,* 65 N. C., 430, cited and approved.)

ACTION tried before *Shepherd, Judge,* at Fall Term, 1885, of CAMDEN.

There was a verdict and judgment for the plaintiffs, from which defendants appealed.

The facts are stated in the opinion.

Messrs. Grandy & Aydlett and *E. F. Lamb* for the plaintiffs.

Messrs. Pace & Holding and *Geo. V. Strong* for the defendants.

SMITH, C. J. The complaint alleges the plaintiffs (253) to be the owners of the land, the boundaries whereof are given, the entry thereon of the defendants in June, 1882, and their cutting and removing the timber growing

thereon, to their damage two thousand dollars. The defendants deny the plaintiffs' title, or that they have ever trespassed upon their land. The only issues submitted to the jury were as to the alleged trespass on the plaintiffs' land, and by which of the defendants, if any, were they committed and the extent of the damage done. The verdict is for the plaintiffs, designating by name all the defendants charged, and ascertaining the damages.

Upon the trial, it appeared that the lands of the plaintiffs and of the defendants were adjacent, and the controversy was confined to the question of the proper location of the dividing line, and whether the timber was on the plaintiffs' land and within their boundaries. To ascertain the position of the disputed line, it became necessary to locate one of the lines in the plaintiffs' deed, which describes it as running "up to and along the Joab Overton line." A witness, who had been the slave of a former proprietor, under whom the plaintiffs claimed, testified, after objection made and overruled, that about forty years ago his master directed him not to cut timber beyond Overton's line, and that Overton would show where the line was. That soon after Overton pointed out to witness the division line, the place of which the witness then testified to. It was in evidence that Overton was then in the actual possession of this land, and has been dead for many years. The plaintiffs' deed, upon this location, places the disputed land within its boundaries. The admissibility of the declarations of Overton is the only question presented for consideration in the record brought up on the defendants' appeal.

The inquiry does not call for an elaborate examination, since it is substantially answered in two cases adjudicated in this Court.

In *Mason v. McCormick,* 85 N. C., 226, in answer to an objection to similar declarations of a deceased owner of an adjoining tract, the Court use this language: "The declaration, moreover, is not used to ascertain and fix the limits of the declarant's own land, but the corner of (254) an adjoining tract, to determine its location, and the evidence *is not rendered incompetent, because that corner is coincident with one of his own boundaries.*"

And more recently in *Fry v. Currie,* 91 N. C., 436, the deed of a deceased party was received as his declaration of the boundary line of an adjacent tract, and the Court, overruling an objection to the competency of the evidence say: "Would not his declaration, made when alive, be competent as hearsay, *not to locate his own, but the boundary of an adjacent tract that calls for and touches it?* The evidence does not come from an interested party to subserve some purpose and to secure some advantage to himself, but it is a concession in disparagement of his claim to a wider boundary for his own land."

These cases dispose of the exception.

The appellant's counsel here, for the first time, move in arrest of judgment for alleged imperfections in the statement of the plaintiff's cause of action, in that:

(1). The complaint fails to allege that the plaintiffs had title before and at the time of the defendants' entry;

(2). The entry is not charged to have been forcible or wrongful, and may have been permissive and lawful, so as not to be in conflict with any right in the plaintiffs.

The motion is based upon sec. 242 of The Code, as construed in *Meekins v. Tatum,* 79 N. C., 546; *Williamson v. Canal Co.,* 78 N. C., 156, and other decided cases. The section applies to complaints that fail "to state facts sufficient to constitute a cause of action," possessed by the plaintiff to be enforced against the defendant, or in other words, when it appears therefrom that the action will not lie. But imperfect statements, or omissions in the allegations, not of the substance of the cause of action, should be pointed out by demurrer, and not upon a fair rendering of the provisions of the prescribed pleading, and practice in connection with the section referred to, be allowed, after a trial upon the merits and an appeal to this Court, to defeat the action altogether, when first taken in this Court. Such objections ought
(255) to be taken at the appropriate time and in the mode directed, or be deemed waived, leaving such as enter into the essence of the action, alone the basis of a motion to dismiss the action.

In *Garrett v. Trotter,* 65 N. C., 430, the late Chief Justice thus expresses his own, and the opinion of the Court:

"When there is a defect in substance, as an omission of a material allegation in the complaint, it is a *defective statement of the cause of action,* and the demurrer must specify it, to the end that it may be amended by making the allegation; and when there is a statement of a defective cause of action, the demurrer must specify it to the end that, as there is no help for it, the plaintiff may stay his proceeding without a further useless incurring of costs."

The new system, in its whole structure and scope, looks to a trial of a cause upon its merits, and discountenances objections for defects which may be corrected and removed when made in apt time, and will not entertain them after trial and verdict. This is manifest from sec. 272 and 276, the latter of which, in positive terms, declares that "the Court and the Judge thereof shall, in every stage of the action, *disregard any error or defect in the pleadings* which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or be affected by reason of such error or defect." Accordingly, the interpretation put upon these clauses in the Courts of New York where they are the same, is that such defects as would be remediable by amendment that does not change substantially the claim or defense, will not sustain an application to dismiss the action. *Loundsbury v. Purdy,* 18 N. Y., 515.

In *Hoffheimer v. Campbell,* 59 N. Y., 269, Chief Justice *Church* uses this language: "If the objection had been taken at the trial, the complaint might have been amended, or the additional facts supplied. It is a general rule in the trial of actions, that defects which, if pointed out, may have been supplied or avoided, will not be assailable on the appeal."

The rule is thus announced by a recent author after an examination of the cases: "This defect" (that (256) the complaint does not state facts sufficient to constitute a cause of action), "and want of jurisdiction over the subject of the action, are the radical grounds of objection to a pleading, the only ones not waived by pleading to the merits, and were the defects of substance met by the old general demurrer. * * * Such demurrer should be interposed to a pleading or any of its counts or statements, when

it shows that no legal wrong has been done; or that the law will not redress it; or that the party has mistaken his remedy; or when there has been an omission of some material averment necessary either to establish the wrong, or to so connect the parties with it, as to entitle the plaintiff to redress." Bliss's Code Plead., secs. 413, 416. As explicit is the rule in Pomeroy on Rem. and Rem. Rights, sec. 548 *et seq.*

It seems to us, that the general terms in which the section under examination is expressed, require a construction consistent with the other provisions of the act, and such restrictions as we have suggested, in order thereto.

The wholesome rule thus indicated must be observed, and if appellants were permitted to make such objections when not made below, upon the hearing of an appeal, it would be subversive of fair trials and but a snare for the unwary. We can not allow it to be done.

The plaintiffs here allege their ownership of the land, the defendants' entry and the damages sustained. These are the essential elements in the action, and the imputed omissions are of the very kind, if substantial, to be met by demurrer and removed by amendment. The real subject of controversy was eliminated and passed on by the jury, and the defendants were not at all misled, and must abide the result. The Code, secs. 269 *et seq.*

NO ERROR. Affirmed.

Cited: Johnson v. Finch, ante 209; *Morgan v. Bank, post,* 357; *Warner v. R. R.,* 94 N. C., 257; *McElwee v. Blackwell, Ibid.,* 265; *Bethea v. Byrd,* 95 N. C., 311, 12; *Dugger v. McKesson,* 100 N. C., 10; *Roberts v. Preston, Ibid.,* 249; *Bowling v. Burton,* 101 N. C., 181; *Barfield v. Turner, Ibid.,* 358; *Knowles v. R. R.,* 102 N. C., 63; *Warwick v. Lowman,* 103 N. C., 126; *Fry v. Currie, Ibid.,* 204; *Mizzell v. Ruffin,* 118 N. C., 71; *Printing Co. v. McAden,* 131 N. C., 184; *Blackmore v. Winders,* 144 N. C., 216.

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KINDRED REEVES v. THE STATE OF NORTH CAROLINA.

Claims against the State—Jurisdiction of the Supreme Court.

The Supreme Court has jurisdiction only to pass on claims against the State, when questions of law are involved. If the claim only involves questions of fact, the Legislature is the proper place to get redress.

(*Bledsoe v. The State*, 64 N. C., 392; *Reynolds v. The State, Ibid.*, 460; *Sinclair v. The State*, 69 N. C., 47, cited and approved.)

CLAIM against the State, filed in the Supreme Court 7 March, 1885, in accordance with the provisions of Art. IV, sec. 9 of the Constitution, and heard at October Term, 1885.

The petition alleged that the claimant had furnished to one Troy, the agent of the State, for the purpose of providing for the convicts working on the Western Division of the Western North Carolina Railroad, firewood of the value of one hundred and fifty dollars, for the use of the convicts, and that no part thereof had been paid.

The State filed an answer to the petition, denying all of its allegations.

Messrs. Howell & Moody for the petitioner.
The Attorney General for the State.

MERRIMON, J. It seems to us that the alleged claim of the petitioner against the State is not such a one as the Court ought to take original jurisdiction of. As has been repeatedly said, the purpose of the Constitution, Art. IV, sec. 9, is not to impose upon it the duty of passing upon any and all claims that a party may prefer against the State, especially when such claims involve mainly questions or issues of fact, and no questions of law of doubt or serious importance; it contemplates that only such claims as present serious questions of law shall be heard here, and to facilitate this purpose, the Court has authority, as provided in The Code, sec. (258) 948, to direct issues of fact to be tried in the Superior Court. *Bledsoe v. The State*, 64 N. C., 392; *Reynolds v. The State, Ibid.*, 460; *Sinclair v. The State*, 69 N. C., 47.

It would be most unreasonable to interpret the section above referred to, as conferring on this Court original jurisdiction of all claims against the State, great and small alike, and whether or not they involve questions of law. Such an interpretation could serve no useful purpose, and would entail upon this Court an amount of additional labor, that would greatly tend to hinder and delay the discharge of its ordinary and appropriate duties. Such meaning has not been attributed to it by the Court, the Legislature, or the Executive branch of the government. If the claim is a plain one, only involving the questions of fact, it ought to be taken at once before the Legislature, unless its nature be such as that it may be presented to the Auditor, or some other appropriate authority, for adjustment and allowance.

The pleadings in the case before us present no question of law—only questions of fact. The petitioner alleges simply that he furnished the State, at the request of its agent, wood for fuel of the value of $150, and the State refuses to pay the debt. This the State broadly denies. There is nothing for the Court to decide—nothing so far as appears, that a Legislative committee may not decide as promptly as, and more satisfactorily than, the Court could do. The petiton must therefore be dismissed.

PETITION DISMISSED.

Cited: Garner v. Worth, 122 N. C., 257; *Miller v. State,* 134 N. C., 273.

GEORGE J. THORNBURGH v. R. A. MASTIN et al.

Abandonment—Tenants in Common—Taxation—Evidence.

1. When the facts are admitted, whether or not a claim or equity has been abandoned, is a question of law, but when the facts are disputed, they must be submitted to a jury.

2. It is not error for a Judge not to charge the jury upon a point
(259) which counsel did not make at the trial.

3. When a jury correctly decides a question of law, incorrectly left to them by the court, the verdict cures the error.

4. Where a party having an equitable title to land remains in possession, no presumption can arise of abandonment of his equity.

5. Listing and paying taxes on land, is very slight, if any, evidence of title.

(*Dula v. Cole*, 29 N. C., 290; *Blake v. Lane*, 40 N. C., 412; *Brown v. Blacknall*, 58 N. C., 433; *Devereux v. Burgwyn*, 40 N. C., 351; *Headen v. Womack*, 88 N. C., 468; *Gant v. Hunsucker*, 34 N. C., 254; *Higdon v. Chastaine*, 60 N. C., 210; *State v. Cobham*, 18 N. C., 374; *Glenn v. R. R.*, 63 N. C., 510; *State v. Craton*, 28 N. C., 164; *Farmer v. Daniel*, 82 N. C., 152; *Nash v. Tillett*, 89 N. C., 423, cited and approved.)

ACTION tried at Spring Term, 1885, of WILKES, before *McKoy, Judge,* and a jury.

The plaintiff asks to enforce the specific performance of an alleged contract to convey the lands described in the complaint.

One Mastin executed to plaintiff a paper-writing and receipt for $500 for the purchase-money of the land, which is as follows:

"Received, 21 April, 1863, of George Thornburgh five hundred dollars, on account of the sale of my interest in the Lenoir lands owned by myself and J. W. Transou.

W. MASTIN."

Mastin went into bankruptcy, and at his bankrupt sale J. H. Brown and James Calloway purchased from his assignee and took title therefor, and Isaac S. Call, one of the defendants, purchased the said land from said G. H. Brown and James Calloway, the purchasers at the assignee's sale. The present plaintiff instituted a bill in the court of equity at Spring Term, 1867, which was dismissed for the want of better security on the prosecution bond, at Spring Term, 1869, at which time he alleged, and offered proof to show that he was in possession of said lands.

The following issues were submitted to the jury:

1. Did Wm. Mastin contract in writing to convey by deed, in fee, the lands described? (260)

Answer. "Yes."

2. Are the defendants the heirs-at-law of Wm. Mastin, deceased?

Answer. "Yes."

3. Did the plaintiff George J. Thornburgh pay to Wm. Mastin the purchase-money according to the contract?

Answer. "Yes."

4. Did the plaintiff Thornburgh rescind and abandon his claim against the said Wm. Mastin under his contract of purchase?

Answer. "No."

5. Was the said land sued for in an action between plaintiff and William Mastin, and was there a judgment and decree, or retraxit, on the part of the plaintiff Thornburgh, in said suit?

Answer. "No."

There was evidence offered that for seven years after the date of the contract, and from 1877, up to the date of the summons in this cause, the plaintiff cultivated portions of the land or received rents for said land, while occupied by others.

Transou, a witness, testified, "that plaintiff had been in possession, he did not know how long. Thornburgh received rent after the trade with Mastin was made. It was while Mastin was living that Thornburgh got rent and in the time of the war."

Plaintiff, Thornburgh testified: "That he went into possession of the land in 1864, and cultivated it for seven or eight years; Transou, who owned one-half of the lands, agreed with me to divide the lands; I have had possession of it since five or six years ago; I had a cabin on it; I did not build the cabin; had it sowed year before last in rye; year before that I sowed wheat or rye, and then changed about; I rented it to Allen Hicks; Perkins built a house on the land; Transou, who owned an undivided interest, put Perkins there."

Irvin Reid testified: "I know Thornburgh tended
(261) the land in corn and grain; year before last I saw the land was sowed down in rye; Mastin told me during the war he had sold the land to Thornburgh for $500, and Thornburgh had paid him every cent of the money, and Thornburgh took possession of the land a year after that; I saw him hauling off crops as much as twice after the war."

Thornburgh did not return this land for taxation. No evidence was introduced to show who had listed the lands for taxation.

During the argument, defendant insisted that Thornburgh not listing the lands for taxation, was strong evidence of Thornburgh's abandonment of his equity. Plaintiff insisted that there being no evidence, it was to be presumed that Transou, the other tenant in common, had listed the land for taxation.

The Court charged the jury that a presumption of abandonment of his equity would arise in ten years, and so far as lapse of time was concerned, it had arisen, if the jury should find that he had abandoned. And it was for the jury to say, whether he had abandoned his equity, or from the proof, had the plaintiff rebutted the presumption by acts of ownership, or acts showing that he exercised such control over the land, and had set forth his claims and asserted them; so as to rebut the presumption that he had abandoned his equity in the land. To this charge the defendant excepted.

The Court also charged the jury that when there were several tenants in common of land, either of them could give in land for taxation, and if given in by one, that is sufficient.

To this defendant excepted. There was a judgment for the plaintiff, and the defendant appealed.

Messrs. Watson & Buxton and *Batchelor & Devereux* for the plaintiffs.

Messrs. Coke & Williamson for the defendants.

ASHE, J., (after stating the facts). There were only two exceptions taken by the defendants. The first was to the charge of the Judge in submitting the question of the abandonment of plaintiff's equity to the jury; and (262) secondly, to his charge that when there are several tenants in common of land, that either of them could give in the land for taxation, and if given in by one, that is sufficient.

We are of the opinion there was no error in the charge given as to the abandonment of the equity, and if there was, it was cured by the verdict.

The defendants' counsel relied chiefly in support of his first exception, on the decisions in the cases of *Dula v. Cowles* 52 N. C., 290; *Blake v. Lane,* 40 N. C., 412; *Brown v. Blacknall,* 58 N. C., 423; *Devereux v. Burgwyn,* 40 N. C., 351; *Headen v. Womack,* 88 N. C., 468. In the latter case,

the principle announced is, that the abandonment of a claim may become, and does become, *when the facts of the case are admitted, a conclusion of law* from the facts, to be applied by the Court, *and not left to the discretion of the jury.* But that case is distinguishable from this, for here the facts were not admitted, and there was some contradiction in the testimony as to the possession of the land by the plaintiff, and that was a question which was properly left to the jury.

In *Dula v. Cowles, supra,* it was held that what amounts to an abandonment of a contract, so as to enable the opposite party to sue on the common counts in *assumpsit* for the value of a part performance, is a matter of law to be determined by the Court, and it was error to leave it to the jury. But that was a question as to the construction of a contract, and there was no controversy about the facts. The main fact upon which that case turned, was how the balance of the purchase-money was to be paid, and the Court say, in the opinion, it was set out, *as admitted by the parties. Brown v. Blacknall, Blake v. Lane,* and *Devereux v. Burgwyn, supra,* are all equity cases, in which the Court had to pass upon the law and facts.

The case of *Devereux v. Burgwyn,* and one or two other cases, were cited upon another point. The principle there decided was, that a right can only be lost or forfeited by such conduct as would make it fraudulent and against con-
(263) science to assert it; as if one acts in such a manner as *intentionally* to make another believe that he has no right, or has abandoned it, and the other trusting to that belief, does an act which he would not otherwise have done, the fraudulent party will be restrained from asserting his right.

This case has no application to the one under consideration. For here there was no such defense set up in the answer, and if there had been, there was no issue upon that point tendered by the defendant, and no evidence to sustain such an issue, if it had been submitted. There was no exception upon that point in the Court below, and it can not be taken here for the first time—*Gant v. Hunsucker,* 34 N. C., 254—and it can not be assigned for error that the Judge did not charge the jury upon a point which the counsel did not make at the time. *Higdon v. Chastaine,* 60 N. C., 210; *State v. Cobham,* 18 N. C., 374.

The purport of his Honor's charge was, that there was a presumption of the abandonment of the plaintiff's equity, unless from the proof, the plaintiff had rebutted the presumption by acts of ownership, or acts showing that he had exercised such control over the land, and had set forth his claims and asserted them, so as to rebut the presumption that he had abandoned his equity in the land.

Conceding that the abandonment of the equity was a question of law, and should not have been submitted to the jury, we still hold there was no error.

The issue submitted to the jury, upon which the controversy turns in the case, was: "Did the plaintiff Thornburgh rescind and abandon his claim against the said Wm. Mastin, under his contract of purchase?" From the negative answer given by the jury to the issue, it must be inferred that they were satisfied with the correctness of the statement of the facts as deposed to by plaintiff's witnesses; which may be summed up as follows: That after the purchase of the interest of Wm. Mastin, in 1863, the plaintiff went into possession of the land, of which, in 1865 one Transou was the owner of a moiety; that they agreed to divide (264) the land, but never consummated the partition; that he cultivated it for seven or eight years; that he brought an action for specific performance of the contract against Wm. Mastin, in 1869, but the action was dismissed for the want of better security; that he held possession of a small part of the land, according to the testimony of Mrs. Mastin, and sowed wheat there after Mastin's death, which occurred in 1876; that he had had possession of the land for five or six years before the commencement of this action; that he had sowed rye and wheat there, alternately, up to the year preceding that in which this action was commenced, and had leased it to one Hicks; that one Perkins, under a contract of purchase from Mastin and Transou, which he soon abandoned, entered on the land in the lifetime of Mastin, built a cabin, and occupied it until about nine years before the institution of this action. The jury must have found these facts, for there was no conflicting testimony, except that of E. O. Mastin, who testified that he hauled off rent corn from there one or two years after the death of his father, rent probably paid by

Perkins, but the record does not show by whom it was paid; and that of Mrs. Mastin who testified that the plaintiff was not in possession at all, to her knowledge, but there was a small lot he was in possesion of after her husband's death, and he sowed wheat there, but made nothing. If his Honor had instructed the jury that if they should find the facts as above stated, they should then find that the presumption of abandonment was rebutted, there would have been no ground for the assignment of error. And there is none as it is, for the jury found, from the facts, as credited by them, that the plaintiff Thornburgh did not abandon his claim against Wm. Mastin, under his contract of purchase; and we are of the opinion the jury came to a correct conclusion of law from the facts of the case, and when a jury decides correctly a question of law, improperly submitted to them by the Court, the verdict cures the error of the Court. *Glenn v. R. R.,*

(265) 63 N. C., 510; *State v. Craton,* 28 N. C., 164.

We concur in the jury's conclusion of law, because the fact is made to appear that the plaintiff had had possession of the land almost continuously from 1865, when he took possession, until the commencement of the action—the only interval not accounted for is a year or two prior to the death of Mastin in 1876,—and it is held no presumption of abandonment or release can arise from lapse of time against parties who all the time stand upon their equitable title, and possess and use the property as their own. *Farmer v. Daniel,* 82 N. C., 152; *Nash v. Tillett,* 89 N. C., 423.

The defendant also excepted to what is set down in the statement of the case, as the Judge's charge, that when there are several tenants in common of land, that either of them could give in land for taxation; if given in by one, that is sufficient. And it was insisted, as there was no evidence that the co-tenant listed the land for taxation, that there was error. But the charge of a Judge is always taken with reference to the context, and it had been insisted by the defendant, as the tax book did not show that the plaintiff had listed the land, it was strong evidence that he had abandoned his equity —while on the other hand, the plaintiff insisted that it was to be presumed that Transou, the other tenant in common, had listed the land for taxation. The remarks of his Honor were

made, we think, in reference to this contention between the parties, and were not intended, and could not have influenced the jury. For in view of the *facts* of the case upon which the conclusion of the jury was evidently predicated, it was immaterial who had listed the land. Any one supposing he has a claim upon the land of another, may list it and pay the taxes, but that would be very slight, if any, evidence tending to establish his title; for two or more persons may give in the land for taxation, which is sometimes done, each thinking that it in some way tends to strengthen his claim. The tax book did not show who had listed the land for taxation since the plaintiff's bill was dismissed, but the plaintiff may have supposed, as he had only an equitable claim (266) upon the land, it was the duty of the owner of the legal estate to list it for taxation.

NO ERROR. Affirmed.

Cited: *Austin v. King,* 97 N. C., 341, 2; *Ellis v. Harris,* 106 N. C., 397; *Hinshaw v. R. R.,* 118 N. C., 1056; *Woodlief v. Wester,* 136 N. C., 168.

A. C. AVERY, Exr., et al. v. J. R. PRITCHARD et al.

Appeal—Docketing and Dismissing.

1. Where, after appeal taken, the appellant neglects to have a transcript docketed in the Supreme Court, the Superior Court may, upon proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken.
2. While the Supreme Court may take notice of an appeal as soon as it is perfected in the court below, for the purpose of bringing it up, it is not properly pending in the Supreme Court until it has been docketed.
3. Where an appellant neglects to prosecute his appeal, the appellee may either move to docket and dismiss under the rule, or he may proceed with the action in the Superior Court.

(*Wilson v. Seagle,* 84 N. C., 110; *Cross v. Williams,* 91 N. C., 496, cited and approved.)

MOTION by the plaintiff to docket and dismiss an appeal, heard at October Term, 1885, of the Supreme Court.

The facts appear in the opinion.

Mr. E. C. Smith for the plaintiffs.

No counsel for the defendants.

MERRIMON, J. On 27 March, 1884, the Court, at chambers, adjudged that the defendant—the appellant—was in contempt of the Court, and on that account he should pay a hundred dollars, and, also, made an order continuing the injunction before that time granted in the action, until the
(267) hearing of the case upon the merits.

The appellant failed to bring up his appeal to this Court, and at the present term, the appellees produced a duly certified transcript of the record of the action, and moved for leave to file the same, and docket and dismiss the appeal.

After the lapse of the time within which the appellant ought to have docketed his appeal in this Court, the Superior Court might, upon proper notice, have adjudged that the defendant—appellant—had abandoned his appeal, and proceeded in the action as if it had not been taken. While this Court, upon proper application, can take notice of an appeal as soon as it is perfected in the Court below, for the purpose of bringing it to this Court, it is not pending here until it is brought up and docketed as the law directs. If the appellant shall fail in this respect—if he abandons his appeal before it reaches this Court, there is no reason why the Superior Court may not so adjudge, and proceed in the action; indeed, it ought to do so, to the end, the appellee may promptly have the fruit of his judgment. The law prescribes methods of procedure, and allows parties to actions just opportunities to avail themselves of such methods, but it does not allow them to be perverted by one party to the prejudice of another.

As the appeal in this case was not brought up to the October Term, 1884, of this Court, as regularly it ought to have been if the appellant intended to prosecute it, the appellees might have filed a transcript of the record and docketed the appeal here at that term, and moved to dismiss the same as allowed by Rule II, sec. 8. This was not done then, but we

see no reason why it should not have been done. The appellees are certainly entitled to rid the action of the appeal taken and not prosecuted. They may do this in the Superior Court in the way above indicated, or docket it in this Court and move to dismiss it. *Wilson v. Seagle,* 84 N. C., 110; *Cross v. Williams,* 91 N. C., 496.

The motion to docket and dismiss the appeal must be allowed.

MOTION ALLOWED.

Cited: Fisher v. Mining Co., 105 N. C., 125; *Bailey v. Brown, Ibid.,* 128; *Causey v. Snow,* 116 N. C., 498; *Cline v. Mfg. Co., Ibid.,* 839; *State v. Hauser,* 130 N. C., 741; *Blair v. Coakley,* 136 N. C., 410; *Dunn v. Marks,* 141 N. C., 233.

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(268)

JOS. DOBSON et al. v. ROXANNA SIMONTON, EXRX., et al.

Statute of Limitation—Creditors' Bill.

1. Where an action is brought by one creditor, in behalf of himself and all other creditors, every creditor has an inchoate interest in the suit, and is in an essential sense, a party to the action. If a creditor institutes an independent action to recover his demand, he may be enjoined, and forced to seek his remedy in the creditors' bill, and if he declines to do so, he is bound by the decree in such action.
2. An action brought by one creditor in behalf of himself and all other creditors, stops the statute of limitation from running against any creditor who comes in and proves his debt under the decree, from the date of the beginning of the action.
3. So, where a creditors' bill was filed in 1877, and in 1880 a simple contract creditor offered to prove a debt contracted in 1876, to which the statute of limitation was pleaded; *It was held,* that the statute only ran to the day when he action was brought, and the debt was not barred.

(*Long v. Bank,* 85 N. C., 354, cited and approved; *Wordsworth v. Davis,* 75 N. C., 159, overruled.)

Creditors' bill, heard before *MacRae, Judge,* at Spring Term, 1885, of IREDELL.

It appears from the pleadings and the case settled on ap-

peal for this Court, that Robert F. Simonton died in the county of Iredell in February, 1876, leaving a last will and testament which was duly established; that his widow, the defendant Roxanna Simonton, is the sole legatee and devisee under the will and the executrix thereof duly qualified. The estate of the testator is insolvent.

The testator in his lifetime was the sole owner of what purported to be "The Bank of Statesville," a corporation, which, however, it seems, was never duly organized, but under the name and form of such supposed corporation, the testator did very considerable business, and incurred debts for large amounts.

On 1 March, 1876, the defendant Roxanna Simonton, supposing "The Bank of Statesville" to be indeed such Bank deposited therein $9,790, and this sum of money was
(269) placed to her credit.

This action was brought in the Superior Court of Iredell county by sundry creditors of the testator, "who sue for themselves and all other creditors of the Bank of Statesvile, and R. F. Simonton, who will come in and make themselves parties, and contribute to the expense of this suit, against Roxanna Simonton, executrix of R. F. Simonton, deceased," and others.

In pursuance of orders made in the course of the action, creditors respectively proved their debts against the estate of the testator, and among them the appellant Benjamin F. Long, administrator. The defendant Roxanna Simonton offered to prove her debt, created by the deposit made by her in the supposed bank. The appellant Long, administrator, objected, and pleaded that this debt was barred by the statue of limitation.

It appeared that the debt was created by the deposit mentioned, on the first day of March, 1876. The action was begun 21 August, 1877. The appellee offered to make proof of her debt on 5 December, 1879, but it was not allowed by the auditor taking proof of the debts, until 13 January, 1885. The appellant excepted to such allowance. At the hearing, the Court decided that the debt was not barred by the statute of limitation, overruled the exception, gave judgment for the appellee, and thereupon the defendant Long appealed.

Messrs. D. M. Furches and *W. M. Robbins* for the appellant.

Mr. M. L. McCorkle for the defendant.

MERRIMON, J., (after stating the facts). No question is presented as to the validity of the debt which the appellee seeks to have paid out of the assets of the testator, and the only question presented for our decision is, was this debt barred by the statute of limitation, that bars such debts after the lapse of three years next after the cause of action upon them accrued

We think that this question must be answered in the negative. It is to be observed, that this is an (270) action brought by several creditors in behalf of themselves and all other creditors, entitled to share alike in the assets of the estate of the testator, which it is admitted, is insolvent. It does not appear very clearly, whether the action is intended to be a "creditors' action," as authorized by general principles of equity, or one under and authorized by the statute; (Bat. Rev., ch. 45, sec. 73; The Code, sec. 1448); but it is not material to inquire how this is, as in either case, our opinion would be the same.

Such action is equitable in its nature. Its purpose is to ascertain what the assets of the testator are, and distribute the same among all the creditors entitled to share therein according to their respective rights. In order to effectuate such end, courts, in the exercise of equitable powers, and, in this State, in the exercise of the powers conferred by the statute cited above, allow a few creditors in a proper case, to bring an action in behalf of themselves and all other creditors having like demands against the executor or administrator, as the case may be, charged with the fund to be settled and distributed among them. This is not a mere empty ceremony. The action is not simply nominally and in form for the benefit of all the creditors not designated by their respective names in the summons or complaint. It implies more than that. The law does not trifle with parties, nor does it require the observance of meaningless forms; its methods of procedure carry with them effectiveness—they are always intended to serve an effective purpose. Hence, in an action of

this character, all, or any of the creditors, not designated by name at the time of bringing it, will, if they choose to do so, be at liberty to come in in apt time, and share the benefits arising from it. The decrees therein are intended for the benefit of all, but if there be those who decline to come in, as they may do, they will be excluded from the benefits of the decrees made, and yet, being in an essential sense parties to the action, they will be bound by them. Indeed, as soon as a decree for an account shall be passed, the Court may
(271) enjoin such creditors as do not choose to come in, against proceeding in separate actions. Having obtained jurisdiction of the fund, the Court will administer it; and besides, an important end of such actions is to put the creditors upon a just equality in respect to the fund; to prevent preferences and undue advantage, and, as well, to avoid the burden that separate actions would bring upon the fund. To this end, it will enforce its jurisdiction over the creditors as well as the fund; and while any contest in respect to the debt of the creditor that shall be questioned, will be distinct from other like contests, such contests will all be in, and incidental to the action, and under the supervision and direction of the Court, unless, in particular cases, it shall direct a separate action to be brought. Mitford Ch. Pr., 192, 193; Adams Eq., 288, 320; Story's Eq. Jur., sec. 890.

While the creditor having the right to share in the fund, but not designated in the action by his name, is not in the beginning of it completely a party to it, he is a party in an important sense. The action is brought for him, and with a view to render it unnecessary, indeed improper, that he should sue in a separate action; it is for the assertion and enforcement of his right, if he chooses to take benefit from it. It may be said, that he does not bring it; and so he does not by himself,—but in such case, the law allows another to bring it for him. It may be said that he might bring a separate action for himself; but if he should, he would do so at the peril of being interrupted in its prosecution by an injunction, and compelled to seek relief in the creditors' action. From the beginning of the action, such creditor has an inchoate interest in it; by it he demands the payment of his debt and begins to seek legal redress in that respect, and he

thus stops the running of the statute of limitation against it, and all controversy as to his debt, however it may arise in the course of the action, so far as the same may be affected by the beginning of legal proceedings on his part, must have relation to the beginning of the action. It would be a strange anomaly in the law, if it should thus allow an action to be brought for a party, and he should be thus encouraged to rely upon it, and not seek legal redress otherwise (272) than by it, and yet when he came, in the course of the action, to prove his debt, and share in the fund, to treat him as having, by such reliance, lost it by the lapse of time, happening after the bringing of the action! The law will not mislead—it is just and faithful, and will not tolerate, much less uphold, a rule of practice that works such injustice and absurdity.

The rule that the bringing of the action prevents the running of the statute of limitation as to the debt of each creditor, whether designated in the original process or the complaint, by name or not, is, it seems to us, just and reasonable. This is the English rule, and is sanctioned by judicial precedent and text writers recognized as high authorities by all Courts. In *Sterndale v. Hankinson,* 1 Simon, 393, (Cond. Eng. Ch. 197), the Vice Chancellor said: "I entertain no doubt that every creditor has after the filing of the bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff has not obtained a decree within the six years."

In Daniel Ch. Pr., 1409, it is said: "With reference to the effect of the statute of limitations in barring a claim brought by a creditor under a decree, it may be mentioned that in *Sterndale v. Hankinson, supra,* it was determined that where a bill is filed by a creditor on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed, and from that moment time does not run against him; so that a simple contract creditor, coming in under a decree made in such a suit, was admitted to prove, although there had been a lapse of more than six years between the filing of the bill and the decree."

In 2 Smith Ch. Pr., 315, it is said: "A bill filed by one creditor in behalf of himself and others, will prevent the

statute of limitation from running against any of the creditors who come in under the decree."

And also it is said in Adams Eq., 258, that "The (273) bill is treated as a demand in behalf of all the creditors who may come in and prove their debts under it, so as to prevent the statute of limitation from running against them; but in other respects, it continues, until decree, to be the actual suit of the plaintiff alone." There are other authorities to the same effect.

The counsel for the appellants, on the argument, cited and relied upon *Wordsworth v. Davis,* 75 N. C., 159. That was a creditors' action, and this Court held that the debt was barred by the statute of limitation, the time lapsing after the action was brought having been more than three years, but the Court in its opinion, did not advert to the nature of the action as having any bearing upon the application of the statute of limitation. No reason was assigned in that respect, nor any authority cited. It simply said in substance, that the debt was barred by the statute. The application to prove the debt was not made until about six years after the action was brought, and after an account had been taken and creditors had had opportunity, and that opportunity had been once extended, to prove their debts, and two dividends had been paid to those proving. The Court afterwards, in commenting upon that case in *Long v. Bank,* 85 N. C., 354, laid stress upon these facts as in some measure justifying the decision; but the point in this case was not directly before the Court, and there was no decision of it. But in any view of the case relied upon, we think it was inadvertently or incautiously decided, and for the reasons we have stated, and because of the authorities cited above, it ought not to be upheld and adhered to.

NO ERROR. Affirmed.

Cited: Warden v. McKimmon, 94 N. C., 390; *Speer v. James, Ibid.,* 424; *Smith v. Brown,* 101 N. C., 354; *Hester v. Lawrence,* 102 N. C., 324; *Hancock v. Wooten,* 107 N. C., 20; *Roberts v. Lewald, Ibid.,* 309; *Smith v. Summerfield,* 108 N. C., 286; *Goldberg v. Cohen,* 119 N. C., 72; *Shober v. Wheeler,* 144 N. C., 410.

(274)

J. M. TOMS, Admr., v. WM. J. FITE et al.

Homestead—Pleading.

1. The homestead interest is not exempt from sale under execution to satisfy a debt contracted for the purchase money of the land in which the homestead is claimed.
2. In an action on a note given for the price of land, it is not necessary to allege in the complaint that the plaintiff has a good title, or that he has tendered a deed to the defendant for the land. In such actions these are matters of defense only. *It seems* to be otherwise in actions for specific performance.

(*Durham v. Bostic*, 72 N. C., 353, cited and approved.)

ACTION tried before *McKoy, Judge,* and a jury, at Fall Term, 1884, of RUTHERFORD.

The complaint alleges that the plaintiff, administrator *cum testamento annexo* of J. P. Mooney deceased, sold a tract of land described, under the will of his testator, as he had authority to do; that the defendant Fite became the purchaser thereof, and he and the other defendants, as his sureties, executed to the plaintiff their single bond for $2,252.40, to be due, with interest, twelve months next after 6 February, 1882, for part of the "purchase-money not paid at the time of the sale;" that the bond is past due and has not been paid, except a part thereof; that the balance due is about $1,500. A copy of the bond is set forth in the complaint. The plaintiff demands judgment for the balance due on the bond, and that the land be sold, if need be, to satisfy the judgment.

The defendant answered, admitting the execution of the bond, but averring that the plaintiff could not make a good title for the parts of the land indicated in the answer.

On the trial, two issues were submitted to the jury, which involved the ownership of two parcels of the land. One of these was found for the plaintiff, the other for the defendant.

Thereupon, the defendant, before judgment was rendered, moved in arrest of the judgment, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, in this: That he did not allege in (275) his complaint that he was able to make a good title to the land for which the note was given.

"2. That he had not tendered to defendant a deed to the land before the commencement of this action."

The Court overruled this motion, and the defendants excepted; the Court gave judgment for the plaintiff, and the defendants appealed.

Mr. J. C. L. Harris for the plaintiff.

No counsel for the defendants.

MERRIMON, J., (after stating the facts). It is very obvious that the complaint alleges a cause of action. The action is not brought to compel the specific performance of a contract, but to recover the money due upon the bond specified in the complaint, and every material fact for that purpose is alleged.

The constitution, Art. X, sec. 2, establishes the right of homestead, and it provides that the homestead "shall be exempt from sale under execution, or other final process obtained on any debt;" but it further provides that it shall not be "exempt from sale for taxes, or for payment of *obligations contracted for the purchase of said premises.*"

At first there was some question as to how it ought to be made to appear of record, that the debt sued upon was for the purchase-money for land, specified and designated, and therefore not exempt from sale under execution to pay the debt, although it might constitute the homestead or part of it. The Courts experienced some difficulty on the subject, and in *Durham v. Bostic,* 72 N. C., 353, the late Chief Justice suggested the propriety of such statutory regulation in that respect as he then indicated. Afterwards, the Legislature, acting no doubt upon his suggestion, provided by statute, (Laws 1879, ch. 217; The Code, secs. 234, 235 and 236), that in such cases the plaintiff should set forth in the complaint that the consideration of the debt sued on was the pur-
(276) chase-money of certain lands, describing it, and if it should appear that the allegation was true, this fact should be embodied in the judgment, and it is made the duty of the clerk to set forth the same fact in the execution, to the end, the sheriff may, if need be, sell the land without regard to the homestead, to satisfy the judgment. Hence, the alle-

gation in the complaint in this case, that the consideration of the bond was part of the purchase-money of certain land; it was no part of the purpose to allege a contract in respect to land, and demand the specific performance thereof.

As the action was simply to recover the money due on the bond, it was not necessary to allege the tender of a deed for the land. It might be that the deed had already been made. If it had not been, or if the title to be conveyed was defective, these were matters of defense. And indeed, it seems that such defenses were set up, considered and determined by the Court. No question is presented by the record in these respects for our decision. We are only called upon to decide whether or not the complaint states "facts sufficient to constitute a cause of action," and as to this, there can be no doubt.

The exceptions are groundless, and the judgment must be

AFFIRMED.

Cited: Toms v. Logan, post, 277; *Durham v. Wilson,* 104 N. C., 597; *Steel v. Steel, Ibid.,* 638.

J. M. TOMS, Admr., v. GEO. W. LOGAN et al.

See preceding case for syllabus.

ACTION tried before *McKoy, Judge,* and a jury at Fall Term, 1884, of RUTHERFORD.

The facts are the same as in the preceding case.

There was a verdict and judgment for the plaintiff, and the defendants appealed. (277)

Mr. J. C. L. Harris for the plaintiff.

No counsel for the defendants.

MERRIMON, J. The complaint and answer in this case are in all material respects like the same in *Toms v. Fite, ante,* 274.

The defendants claimed that a portion of the land for which the note sued on in this action was given, was in possession of other parties, and claimed by them as defects in the title. Issues were submitted to the jury, all of which were found in favor of the plaintiff.

The defendants before judgment moved in arrest of the same upon the grounds that the complaint did not state facts sufficient to constitute a cause of action.

1. Because they did not allege that they had a good title to the land for which the purchase-money was demanded; or that they could make a good title to the same to the defendant.

2. That they did not tender to defendant a deed to the land sold before the bringing of this action; or allege in their complaint that they had tendered a deed before suit brought.

The motion in arrest of judgment was overruled by the Court, and there was judgment for the plaintiff.

For the reasons stated in the opinion of this Court in the case above cited, we think that the motion in arrest of judgment can not be sustained.

NO ERROR. Affirmed.

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(278)

J. H. GREENLEE, Trustee v. VIRGIL GREENLEE and ANDREW BURGIN.

Witness—Privilege of Counsel.

1. The court has power, after the evidence is closed, to refuse to allow a witness to correct his testimony before the jury, and to retain the matter to be heard on a motion for a new trial, if the correction be material.

2. It is not error for the Judge to say in the presence and hearing of the jury, that he will not allow such correction to be then made, but will retain the matter to be heard on a motion for a new trial.

3. Where there is an abuse of privilege by counsel in the address to the jury, the court may either stop the counsel, or caution the jury in the charge not to be influenced by the improper argument.

(*Wilson v. White*, 80 N. C., 280; *Kerchner v. McRae*, 80 N. C., 219; *Cannon v. Morris*, 81 N. C., 139; *State v. Wilson*, 90 N. C., 736, cited and approved.)

ACTION to recover land, tried before *Avery, Judge,* and a jury at Fall Term, 1885, of McDOWELL.

The plaintiff offered evidence tending to show that he had title to the two tracts of land in controversy, which were not adjacent, but lying not far apart. But it did not appear that he had had possession of either since 1865.

The defendant produced in evidence a grant from the State, covering the land in dispute, and offered evidence tending to show that he had been in the actual possession under his grant of parts of both the tracts claimed by the plaintiff for more than seven years prior to the commencement of the action in 1882.

One Burgin, a witness for the plaintiff, testified among other matters, that the defendant did not put his fence across the line of one of the tracts until three or four years before the commencement of the action, and after one argument had been made for the plaintiff and one for the defendant, the counsel for the defendant announced to the Court that the witness Burgin desired to correct his testimony in reference to the possession. He had not been examined as to any other matter, except the length of the defendant's possession of one of the tracts.

The counsel for the plaintiff objected to allowing the correction to be made at that time, and gave as a (279) reason that it might involve some change in the testimony for the plaintiff; that plaintiff might have met the matter proposed now to be shown by the witness, on the trial, with the testimony of witnesses dismissed without examination, and that plaintiff would not have introduced Burgin except upon information that he would testify as he had done.

The Judge then said that Burgin would not be allowed to make any correction now; that if the correction was very material or important, it might be heard by the Court on a motion for new trial, and counsel might understand that now.

After the refusal to allow the witness to correct his testimony, an argument was made to the Court and jury by one of the counsel for the defendant, and the argument was concluded by counsel for plaintiff.

In addressing the jury, counsel for the defendants said: "Gentlemen of the jury, the counsel on the other side refused

to allow Mr. Burgin to correct his testimony"—and was evidently proceeding to comment on the fact, when counsel for plaintiff objected.

The Court directed counsel to desist from any reference to the motion to allow Burgin to correct his testimony, and told the jury then that they need not be influenced in rendering their verdict by any remark made by counsel in reference to the matter, or by the fact that Burgin had not been allowed to make any correction. Counsel made no further remarks on that subject. Subsequently, in the charge to the jury, the Court told them that they would find the facts only from the testimony in the case.

There was no exception asked or entered for plaintiff to the charge of the Court, or to any ruling of the Court in the progress of the trial.

After verdict, counsel for plaintiff moved the Court for a new trial: 1st, because the remark of the Court in presence of the jury, that if the correction was very material or important, it might be heard by the Court on motion for
(280) new trial, etc.; 2d, on the ground that the comment of counsel on the refusal of plaintiff to agree that Alney Burgin should correct his testimony was a gross abuse of privilege.

A motion for new trial on the grounds mentioned was refused. Plaintiff excepted, and appealed.

Mr. E. T. Greenlee for the plaintiff.
Mr. J. F. Morphew for the defendants.

ASHE, J., (after stating the facts). There is no merit in either of the exceptions taken by the plaintiff. We are unable to perceive how the remark made by the Judge in the hearing of the jury, *that if the correction* was very material or important it might be heard by the Court on motion for a new trial, could possibly have influenced, in any degree, the minds of the jury, especially after the Court instructed them that they must not be influenced by the fact that Burgin had not been allowed to make any correction, and that they must find the facts only upon the testimony in the case, or in other words, that they must consider the testimony of Burgin as it had been deposed by him.

As to the other exception, upon the ground of abuse of privilege by the defendants' counsel in commenting on the refusal of plaintiff to agree that Burgin might correct his testimony, the Court did all that was required of it by law to do, under such circumstances. As soon as the counsel commenced the comment, he was promptly stopped by the Court, and in the charge to the jury, they were told that they were not to be influenced in rendering their verdict by any remark made by the counsel in reference to the matter. When there is an abuse of privilege by counsel, the Court may either stop the counsel or caution the jury against it in the charge. Here the Court did both; and it is no ground for a new trial. *Wilson v. White,* 80 N. C., 280; *Kerchner v. McRae,* 80 N. C., 219; *Cannon v. Morris,* 81 N. C., 139; *State v. Wilson,* 90 N. C., 736.

NO ERROR. Affirmed.

Cited: *Goodman v. Sapp,* 102 N. C., 484; *State v. Hill,* 114 N. C., 783; *State v. Ussery,* 118 N. C., 1179.

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(281)

JULIUS M. WELCH et al. v. DEKALB KINSLAND et al.

Appeal.

1. An appeal can not be taken from an order of the Superior Court, which does not terminate the action, and which does not deprive the appellant of any substantial right which he might lose if the order is not reviewed before final judgment.
2. Under such circumstances, the party can have his exception entered of record, and, if necessary, can have it considered by the Supreme Court on appeal after the final judgment.

(*Arrington v. Arrington,* 91 N. C., 301; *Hicks v. Gooch, ante,* 112, cited and approved.)

APPEAL from an order made in the cause by *Gilmer, Judge,* at Spring Term, 1885, of HAYWOOD.

At Spring Term, 1882, of Haywood, the Court made an order in the action, setting aside the report of a referee, and directing a survey with instructions as to how the same should

be made. This order did not have the effect in any aspect of it, to determine the action, or necessarily to affect the right of the plaintiff.

The Judge who made the order above referred to, out of term time, while he was holding Court in an adjoining county, directed the clerk to substitute for the order, one continuing the report set aside, for further consideration at a subsequent term, and directing a survey to be made in a way very different from that indicated in the displaced order. The substituted order is entitled as if it had been made during the term of the Court, and appears to take its place in the record.

(282) At the Spring Term, 1883, of the Court first above mentioned, the plaintiff moved to vacate and strike from the record the last-mentioned order, as having been made without authority. This motion was then denied, on the ground of want of power of the Court to grant it, and from the judgment in that respect the plaintiff appealed to this Court. This Court reversed the judgment, directing the Court below to entertain and hear the motion upon its merits.

At Spring Term, 1885, of the latter Court, it so heard and determined the motion adversely to the plaintiff, and gave judgment accordingly. The plaintiff, having excepted, appealed a second time to this Court.

Mr. Geo. A. Shuford for the plaintiff.
Mr. Theo. F. Davidson for the defendant.

MERRIMON, J., (after stating the facts). The action has not been determined upon its merits. The judgment appealed from is not a final, but an interlocutory one, that in no aspect of it, can put an end to the action, nor can it have the effect to deprive the appellant of a substantial right that he may lose, if the same shall not be reviewed at once and before final judgment; he can have the benefit of his exception, specified in the record, upon appeal from the final judgment, as well as at the present stage of the action. It may turn out that the plaintiff may be able to assert his alleged right successfully, notwithstanding the interlocutory judgment complained of.

The appeal was improvidently taken. It is settled by many authorities, that an appeal does not lie from such judgment. *Arrington v. Arrington,* 91 N. C., 301, and the cases there cited. *Hicks v. Gooch, ante,* 112.

APPEAL DISMISSED.

Cited: Emery v. Hardee, 94 N. C., 792; *Leak v. Covington,* 95 N. C., 195; *Blackwell v. McCaine,* 105 N. C., 463; *Emry v. Parker,* 111 N. C., 261; *Sinclair v. R. R., Ibid.,* 509; *Brown v. Nimocks,* 126 N. C., 810.

(283)

W. K. DAWKINS, et als. v. MARY J. DAWKINS, et als.

Parties—Irregular Judgment—Notice—Judicial Sales.

1. Where a tenant in common disposes of his interest in the common property, pending litigation in regard to it, his heirs are not necessary parties to such litigation.
2. Ordinarily, all parties to an action are presumed to have notice of all orders made therein, but this rule does not apply to an action pending before 1868, and which has never been transferred to the new docket.
3. Where, under an irregular judgment, land was sold and the money paid into office in 1874, and one of the tenants in common of the land left his portion of the proceeds in the office, it raises a presumption that he intends to waive his right to the money and claim his interest in the land.
4. A judgment which allows a surety on the bond of a purchaser of land at a judicial sale, who has paid the purchase-money, to be subrogated to the rights of the purchaser, and have title made to himself, is irregular, unless it appears that there was notice given to the parties to be affected by it.
5. Where land is sold by a clerk and master in equity, it is not the practice to order title to be made to a surety who has paid the purchase-money, unless it is shown that the principal is insolvent.
6. Where, under such circumstances, the court below ordered the judgment to be set aside and title made to the heirs of the original purchaser, held to be error, unless such heirs shall pay into court the amount paid by the sureties.
7. Although a judgment to sell land be irregular, yet it may be rendered valid by the parties interested receiving the fund raised by such judgment.

(*Egerton v. Alley,* 41 N. C., 188; *Green v. Crockett,* 22 N. C., 390; *Addington v. Setzer,* 63 N. C., 389, cited and approved.)

MOTION in the cause to set aside a judgment for irregularity heard by *MacRae, Judge,* at February Special Term, 1885, of RICHMOND.

W. K. Dawkins and wife, Mary Ann Dawkins, W. A. Campbell and wife, Anne Campbell, John R. Dawkins in his own behalf and as next friend of his infant daughter, Corrinna Dawkins, and D. Stewart, moved on affidavit filed, and notice, to set aside a judgment or order made by the Superior Court of Richmond County in the above-entitled action, at Fall Term, 1874, and for judgment directing and decreeing that title to the lands bought by George Dawkins in
(284) this cause, be made to the heirs and assigns of the heirs of said George Dawkins according to their respective interests.

Notice of motion was served on A. C. and D. C. Patterson, John A. McDonald, A. B. McDonald, Catharine McLean, John McPherson, John M. McPherson and D. M. McPherson, who by their counsel appear and move to dismiss:

1. "Because the heirs of Randolph McDonald and Miles Blue are not made parties.

2. "Because the heirs of George Dawkins do not offer to pay into Court the money paid by Randolph McDonald and W. K. Dawkins.

3. "Because A. C. and D. C. Patterson acquired title by virtue of conveyance, made 30 October, 1874, before the beginning of the term of Court 2 November, 1874, when the decree sought to be set aside was made."

The following were the facts found by his Honor:

1. The land was ordered to be sold at Fall Term 1862, by the court of equity.

2. That the land was sold and purchased by one George Dawkins, who gave bond for the purchase-money, with Randolph McDonald and M. Brown as sureties.

3. That the sale was confirmed at .... Term of the court of equity.

4. That the Clerk and Master was ordered at Spring Term, 1866, of said Court to collect the purchase-money and make title to the purchaser on payment of the purchase-money.

5. That the Clerk and Master brought suit on the bond for the purchase-money in the Superior Court, and recovered

judgment at Spring Term, 1874, and that the judgment was paid on 30 October, 1874. That all of said judgment was paid by Randolph McDonald except $193.10, which was paid by W. K. Dawkins.

6. That George Dawkins, the purchaser, died some time before the .... day of .... A. D., 1866, and that on the last named day the said W. K. Dawkins qualified as administrator on his estate. (285)

7. That the said George Dawkins died intestate, without leaving any children or the representatives of children, and that W. K. Dawkins was one of his heirs-at-law and entitled to one-fourth of the land.

8. Sarah Dawkins was one of his heirs and entitled to one-fourth.

9. Mary Jane Dawkins, who intermarried with E. P. Williams, was one of his heirs and entitled to one-fourth.

10. Effy Jane Caddell, who intermarried with Sam. Covington, Margaret Caddell, now Margaret Fry, and Flora Bell Caddell, who intermarried with John R. Dawkins, was entitled to the other fourth; each one being entitled to one-twelfth of the whole. Sarah Dawkins is now dead, leaving as her only heir-at-law a daughter, Anne, who intermarried with W. A. Campbell. Flora Bell Dawkins is now dead, leaving as her only heir-at-law a daughter, Corrinna. Sam Covington and wife Effy Jane, E. P. Williams and wife Mary Jane, and Margaret Fry, have sold and conveyed their interests to D. Stewart.

11. W. A. Campbell and wife Anne have sold and conveyed an undivided three-fourths interest of their share to D. Stewart.

12. W. K. Dawkins gave a mortgage to A. C. and D. C. Patterson on his interest, on 30 October, 1874, to secure a debt of $367.15, and the mortgage has been foreclosed and A. C. and D. C. Patterson have whatever interest was conveyed by the mortgage. W. K. Dawkins was married to Mary Ann McDonald in the year 1857, and their youngest child is now about eleven years old. All of the land owned by W. K. Dawkins since 1867 is not worth more than $1,000. W. K. Dawkins and wife Mary Ann were in the actual possession of, and living on, this land from 1867 to 1877. W. K. Daw-

kins and wife Mary Ann have sold and conveyed to D. Stewart an undivided one-half of their interest in said land by deed, dated .... day of ...., A. D., 1884.

13. At Fall Term, 1874, of the Superior Court of (286) Richmond County, an order appears on the minutes of the Court as follows: "It appearing to the satisfaction of the Court, that Geo. Dawkins, the purchaser of the lands mentioned in the pleadings, failed to pay the purchase-money and is now dead, and that Randolph McDonald, his surety, has come forward and paid the purchase-money into Court, under an execution against him, and asks the Court to substitute him in place of his principal: It is therefore ordered by the Court that D. Stewart, Clerk, be appointed commissioner to execute title for the lands mentioned in the pleadings to Randolph McDonald, his heirs and assigns in fee simple."

14. That none of the parties had legal notice of said order, and the cause was never legally transferred from the Equity to the Superior Court docket. That the order was never entered on the judgment docket. That the death of George Dawkins, who was a party to the suit as well as purchaser, was never suggested of record, and that neither his administrator nor heirs-at-law were made parties to the suit, and that no complaint or affidavit were filed, as a basis for said order.

15. That Randolph McDonald joined with Wm. W. Dawkins in the mortgage above mentioned, on 30 October, 1874, and that some time after the Fall Term, 1874, of the Superior Court of said county, Randolph McDonald sold and conveyed his interest in said land to W. K. Dawkins.

16. A. C. and D. C. Patterson took actual possession of said land on 5 February, 1877, and have had possession since that time.

17. That Effy Jane Covington was married to Sam Covington about 1876.

18. W. K. Dawkins is administrator of Randolph McDonald, who is now dead.

19. That Miles Blue was one of the tenants in common in the suit for partition, and that he has never received his share of the purchase-money.

20. That the Fall Term of the Superior Court in 1874, commenced on 2 November, in said year. (287)

21. That by virtue of legal proceedings, there was an actual ouster of Wm. K. Dawkins and wife, and A. C. and D. C. Patterson were thereby put in actual possession of said land.

22. That D. Stewart was Clerk of the Superior Court in 1874, and that said Stewart and W. K. Dawkins knew of the entry of the decree, now sought to be set aside, at the time it was made, and both knew that Randolph McDonald paid $367.00 of the purchase-money as surety.

23. That A. C. and D. C. Patterson have been in the exclusive possession of said land for more than seven years prior to institution of this motion, claiming them as their own, under their title derived from the said deed of W. K. Dawkins and Randolph McDonald.

24. That there is a special proceeding pending in this Court between D. Stewart, plaintiff, and A. C. and D. C. Patterson, defendants, for partition of the lands in dispute.

Upon the foregoing facts, his Honor rendered the following judgment: "It is considered that the order made in this cause at Fall Term, 1874, is irregular, and the same is vacated and set aside.

"And it appearing that the purchase-money of said land was paid, it is ordered that the Clerk of this Court make title to said lands to the heirs of the said George Dawkins and to the assignees of said heirs as hereinbefore set forth, according to their respective interests. Judgment for costs against the contesting respondents."

From which judgment the said A. C. and D. C. Patterson, and J. W. McDonald and other heirs of Randolph McDonald, who have been served with notice, appealed to the Supreme Court, and filed the following exceptions:

"The contesting respondents, A. C. Patterson and D. C. Patterson, and John A. McDonald, A. B. McDonald, Catharine McLean, John McPherson, John M. McPherson and D. M. McPherson, except to the finding of facts by the Court:

"1. That the Court finds that W. K. Dawkins gave a mortgage to A. C. and D. C. Patterson on his interest, on 30 October, 1874, and that Randolph McDon- (288)

ald joined in said mortgage, when the uncontradicted evidence shows that W. K. Dawkins and Randolph McDonald conveyed the whole land in dispute to A. C. and D. C. Patterson on that day.

"2. To the finding that Randolph McDonald sold and conveyed his interest in said land to W. K. Dawkins, because it is not supported by the testimony.

"3. Because the Court fails to find that William, James, Martin and Lovedy McPherson, are infants and heirs of Randolph McDonald, and have not been served with notice of this proceeding.

"4. Because the Court fails to find that Randolph McDonald was forced to pay the purchase-money of the land in dispute, as security for George Dawkins.

"5. Because the Court fails to find that A. C. and D. C. Patterson have been in the adverse possession of said lands, for more than seven years prior to the commencement of this action.

"6. Because the Court fails to find that the heirs of George Dawkins had notice of the motion to enter the decree of 1874.

"And excepts to the judgment of the Court and conclusions of law because the same are illegal and not warranted by the facts."

Messrs. Burwell & Walker and *Frank McNeill* for the plaintiffs.

Messrs. John D. Shaw and *Haywood & Haywood* for the defendants.

ASHE, J., (after stating the facts). This case is so incomplete in the statement of the facts, that we feel sensible of our inability to reach the justice of the case, trammeled as we are by the findings of facts and exceptions thereto. All we can do is to give a partial adjudication upon the case.

The first exception by defendants, that the Court
(289) found as a fact that the deed of John A. McDonald and W. K. Dawkins to A. C. and D. C. Patterson, conveyed only the interest of W. K. Dawkins in the land, is well taken, for the deed which accompanies the record as an exhibit, shows that the entire tract of land was conveyed. But that, in the view we take of the case, is immaterial.

The second exception to the finding, "that Randolph McDonald sold and conveyed his interest in the land to W. K. Dawkins, because it is not supported by the testimony"—can not be sustained. It is supported by the testimony of A. C. Patterson, who swore that the clerk made a deed to McDonald and McDonald conveyed to Dawkins.

The third exception—"Because the Court failed to find that the infant heirs of Randolph McDonald have not been served with notice of this motion." This exception is without merit, because it was shown by the testimony of A. C. Patterson, that McDonald had disposed of his interest, and his heirs having no interest were not necessary parties.

The fourth exception to the finding, "that McDonald as surety was forced to pay the purchase-money." We can not see what difference it could make whether the payment was voluntary or involuntary.

The fifth exception: "Because his Honor failed to find that the Pattersons have been in the adverse possession of the lands for more than seven years prior to the commencement of this proceeding." This exception is without foundation, for the Court did find that A. C. and D. C. Patterson took actual possession of said land on 5 February, 1877, and have had possession since that time.

The sixth exception: "Because the Court found that the heirs of George Dawkins had no notice of the motion to enter the decree of 1874." The exception can not be sustained. Ordinarily when an action is pending, all the parties are presumed to have notice of all orders, etc., made in the cause, because in our practice, the cause, while in progress, is continued from time to time; but no such presumption can arise when there is an old action depending in Court before the year 1868, and which has never been transferred to the new docket, and the motion, as in this case, is made twelve years after the final judgment or decree. (290)

The seventh exception was to the "judgment of the Court and conclusions of law, because illegal and not warranted by the facts."

Before we render an opinion upon this exception, it is proper that we should consider the grounds of a motion made by the defendant, *in limine,* to dismiss the motion of the

plaintiff. The first ground assigned for the dismission of the motion, was because the heirs of Randolph McDonald and Miles Blue are not made parties. We have already disposed of this ground, so far as relates to the heirs of McDonald, and as to Blue we do not think it is essential that he should be made a party. His Honor has found that he has not received his share of the purchase-money, from which it is to be inferred that he is one of the heirs of George Dawkins, and was a tenant in common with the other heirs. The fact that the money was paid into the office in 1874, and that he has not in all this time applied for his share of the money, is very strong evidence that he discards the order of the Court made in 1874, and is content to hold to his rights as a tenant in common of the land. If, then, that order should be set aside, it would not in any way affect his right—but rather subserve it.

The second ground, that the heirs of George Dawkins do not offer to pay into Court the money paid by Randolph McDonald and W. K. Dawkins, will be considered in connection with the judgment rendered by his Honor in the Court below.

The third ground, because A. C. and D. C. Patterson acquired title by virtue of a conveyance made 30 October, 1874, before the begining of the term of Court, 2 November, 1874, when the decree sought to be set aside was made. We do not think this a ground for dismissing the motion, for whatever interest he may have acquired by the said conveyance
(291) we are not called upon now to decide, as it will be a matter for future adjudication, in the event of the order of 1874 being set aside. But we do feel at liberty to say, that he has not, from what appears in the case, an absolute title to the whole land.

We now come to the consideration of the judgment rendered by his Honor in the Court below. We refrain at this time, under the circumstances of this case, from holding that his Honor committed no error in deciding that the order of Fall Term, 1874, was irregular, for it is obnoxious to objection: 1st, because it is a judicial procedure that is without authority or precedent to support it; 2d, because there was no notice given to the parties to be affected by it; 3d, because there was no affidavit or foundation laid for the motion show-

ing that the principal, George Dawkins, or his estate was insolvent.

For it is never the practice of the Court where the land is sold by a clerk and master in equity, to order the title to be made to the surety, upon the payment by him of the purchase-money, unless it is shown that the principal is insolvent. *Egerton v. Alley,* 41 N. C., 188; *Green v. Crockett,* 22 N. C., 390.

But we do hold, "that he erred in ordering the Clerk to make title to the lands to the heirs of George Dawkins, and to the assignees of said heirs as hereinbefore set forth, according to their respective rights," and here the second ground assigned by the defendant for dismissing the plaintiff's motion, to-wit, because the heirs of George Dawkins do not offer to pay into Court the money paid to Randolph McDonald and W. K. Dawkins, appositely applies to the latter part of his Honor's judgment.

For it is a well-established principle, both of law and equity, that no one can have a contract enforced in his favor, unless he has performed, or is ready to perform, his own part. Adams Equity, 88; *Addington v. Setzer,* 63 N. C., 389.

But we do not now decide that the order of 1874 shall be vacated, for however irregular it may be, it may yet be sustained as a valid order, if the heirs of George Dawkins have given their sanction to it by receiving their shares of the purchase-money paid into the office of Randolph (292) McDonald. If they have received their shares of the purchase-money, it would be a gross injustice to the heirs or assignees of McDonald to set aside the order of 1874 and have title made to them without a full indemnity to McDonald or his assignees. But if they had offered, or were still to offer the indemnity, we think their acquiescence in the irregular order would debar them from setting up any title to the land.

The facts of the case are imperfectly stated, and this is a matter so seriously affecting the rights of the parties, that we think the justice of the case and the rights involved, demand that the case should be remanded.

The case is therefore remanded, that a reference may be had to ascertain whether any of the heirs of George Dawkins have

received their shares of the purchase-money paid into the office by Randolph McDonald, and if so, who they are and what amounts they have recovered—whether in full or in part of their shares, and if in part, what part; and to the end that the parties may make application to the Court for leave to amend their pleadings, make parties, appoint guardians for infants, and file additional exceptions, and do any other matter or thing that may be deemed necessary to relieve the case of its present defects and imperfections.

ERROR. Remanded.

Cited: S. c., 104 N. C., 301; *Coor v. Smith,* 107 N. C., 431.

B. S. MODE v. ROBERT PENLAND.

Partnership—Negligence—Torts—Variance.

1. Partners are individually responsible for the negligence of the servants and agents of the partnership, and when one of the partners does an act in the course of the partnership business, he is considered in this respect, as the agent of the partnership, and the other partners are liable, even if they did not assent to the act.

2. All torts are joint and several, and where one partner commits
(293) a tort in the prosecution of the partnership business, the injured party may, at his election, sue all the parties, or any one or more of them.

3. Evidence should never be rejected on the ground of variance, unless it has misled the adverse party in making his defense. So, where the complaint alleged that the plaintiff had been injured by the negligence of the defendant's agent, and the evidence was that it was by the negligence of his partner, the variance was immaterial.

ACTION, tried before *Avery, Judge,* and a jury at Fall Term, 1885, of MCDOWELL.

The substance of the complaint is, that the defendant was the owner of a stallion which he kept, and as a business, let to mares, for hire and reward; that in October, 1883, in the course of his business, he, by his servant and agent, one Blackwelder, let his stallion to the mare of the plaintiff; that Blackwelder, as such agent and in the course of the business, so carelessly and negligently caused the stallion to serve the mare, as to severely wound and injure her, and that she afterwards died of such wounds and injuries.

This action is brought by the plaintiff to recover from the defendant damages for the loss so sustained by him.

On the trial, a witness testified that in September, 1883, he witnessed a contract between the defendant and the above-named Blackwelder, whereby it was agreed that the latter should keep and "stand" the stallion of the former, until the spring, next thereafter, and then pay to the defendant one-half of the money realized from "standing" the horse, and keep the residue himself.

Another witness testified that he saw Blackwelder taking the stallion around in the course of his business, and saw the mare when she was injured. The plaintiff "then proposes to show by the witness, that L. C. Blackwelder let the horse to a mare belonging to the plaintiff Mode, after said contract was executed, and in doing so, by his negligence, allowed the mare to be killed." The defendant objected on the ground that the testimony showed the existence of a partnership between Penland and Blackwelder and that Blackwelder was not the agent or servant of Penland. The objec- (294) tion was sustained, and the plaintiff excepted and submitted to a judgment of nonsuit and appealed.

Mr. J. F. Morphew for the plaintiff.

No counsel for the defendant.

MERRIMON, J., (after stating the facts). We think the Court ought to have received the evidence offered and rejected.

If it be granted that the evidence disclosed the existence of a partnership, as suggested by the Court, nevertheless, the defendant might be liable to the plaintiff for the negligence or tortious conduct of his partner acting in the course of the business of the partnership. Partners, as such, like individuals, are responsible for the negligence of their servants and agents in respect of the business of the agency, upon the maxim *qui facit per alium, facit per se*, and when one of the partners does acts in the course of the business, he is considered and treated in such respect, as the agent of the partnership, and the other partners. In such cases, the partners are all liable, even although the act complained of may not

be assented to by all of them. Hence, in *Moreton v. Hordern,* 4 Barn. & Cres., 223, which was an action brought against three defendants, proprietors of a stage coach, where the declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg, and it appeared in evidence, that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his *negligent* driving, the Court held, that the plaintiff might maintain *case* against all the partners, although he might perhaps have been entitled to bring trespass against the partner who drove the coach.

Although the partners are all liable in such cases and *may* be sued, it does not follow that all of them *must* be sued. The law treats all torts as several, as well as joint, and the party injured may, at his election, sue all the partners, or
(295) any one or more of them, for the injury done him. This rule of law is not peculiar to partnership—it extends to all cases of joint torts and trespasses at the common law, whether positive or constructive. Story Part., secs. 166 and 167; Collyer Part., secs. 457, 460 and 727.

So that the plaintiff, if he suffered the injury complained of, could maintain his action against the defendant alone, or against him and his partners, and the Court ought to have received the evidence.

It may be that the Court rejected the evidence because there was a variance between it and the allegations in the complaint. If so, still the evidence should have been received, because the variance was not such as misled the defendant to his prejudice in making his defense. The substance of the material allegations of the complaint was, that the defendant, by the negligence of his agent in the course of the business of his agency, injured the plaintiff. The evidence tended to show that the agent was not exactly such as alleged, but it went to prove that he was such agent in substance and effect, although he may have been the defendant's partner. And if it was material in some degree, it was such as the Court ought to have aided, as generally it had authority to do. The Code, sec. 269, provides that "no variance between the allegations in the pleading shall be deemed ma-

terial unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Judge may order the pleading to be amended upon such terms as shall be just." And sec. 270 further provides, that "where the variance is not material as provided in the preceding section, the Judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

The evidence offered was material. If it had been received, the slight variance, if at all material, might (296) have been cured as directly by the statute above cited. Its very purpose is to cure defects such as are presented by this case.

There is error. The judgment of nonsuit must be set aside.

ERROR. Reversed.

Cited: *Solomon v. Bates,* 118 N. C., 316.

AMOS WRIGHT, et als v. PATRICK H. CAIN.

Issues—Statute of Limitation—Trusts—Champerty—Par Delictum.

1. Only such issues as are raised by the pleadings should be submitted to the jury, and it is not error for the court to refuse to submit an issue which the pleadings do not present.
2. The question whether a claim is barred by the statute, is never exclusively for the court, unless the facts raising the question are alleged in the complaint.
3. Where there is an express trust, the statute only begins to run from a demand.
4. Where parties are *in pari delicto*, and one obtains an advantage over the other, courts of equity will not grant relief, but it is otherwise when they are not equally in fault.
5. The claimants of a tract of land agree with a third party, who was their near kinsman and adviser, and who had great influence over

them, to pay him a consideration if he would recover the land for them, and in pursuance of the bargin, at his instance, conveyed the land to him without consideration, so that he might bring the action in his own name, which he did and recovered the land. He refused to reconvey the land. In an action against him by the claimants, *It was held*, that the contract was not champertous.

(*McElwee v. Blackwell*, 82 N. C., 345; *Miller v. Miller*, 89 N. C., 209; *Overcash v. Kitchie*, *Ibid.*, 384; *Pinckston v. Brown*, 56 N. C., 494, cited and approved.)

ACTION tried before *MacRae, Judge,* and a jury, at Fall Term, 1884, of DAVIE.

The action was brought by Wright and wife and
(297) Richardson and wife, against Cain, to compel him to reconvey to the *feme* plaintiffs a certain tract of land, which it was alleged that plaintiffs had conveyed to the defendant, with a parol trust that he would reconvey the same to them, and for damages for possession of the land.

The complaint, in substance, alleged that the *feme* plaintiffs were the only heirs-at-law of one W. C. Powell, who died intestate in the county of Davie in 1851. That at the time of his death said Powell was possessed of considerable personal property, and also of a tract of land containing about one hundred and twenty-five acres. That at May Term, 1852, one Wyatt C. Powell was appointed and duly qualified as administrator of the estate of said W. C. Powell, and shortly thereafter filed a petition for the sale of the land of his intestate. That the plaintiffs were at that time minors and without guardian, and at the same term at which the petition for the sale was filed, an order of sale was made, and the land sold, when the said Powell himself became purchaser. That the defendant Cain is the grand-uncle of the *feme* plaintiffs, and had great influence over them. That he is a man of influence and standing in the county, having been for many years a justice of the peace, and, for several years before the war, a member of the county court, and was also one of the county commissioners. That on account of his kinship to them, and also on account of his reputation in the county as a man of probity and intelligence, the *feme* plaintiffs consulted him about their affairs, and he had great influence over them. That about 1872, the said defendant Cain intimated to the *feme* plaintiffs that their father's ad-

ministrator had not properly settled his estate, and that they could recover the land formerly belonging to their father. That the defendant Cain told the *feme* plaintiffs that he hated to see orphan children defrauded, and that if they would pay him something for his trouble, he would assist them in recovering the land. That the *feme* plaintiffs were very poor and unable to employ counsel, and were ignorant of their rights, and of the way to enforce them, and besides trusted implicitly in the good faith of the defendant, (298) and so agreed to entrust their interest to him. That the defendant informed them that it would be best for them to make a deed to him of the land, in order that he might bring the suit in his own name, which they did, the defendant agreeing to reconvey the land to them, if he should succeed in recovering it, upon the payment to him of a just compensation for his trouble. That the defendant brought suit for the land and recovered it, but now refuses to reconvey, although the plaintiffs have demanded a reconveyance, and and have offered to reimburse him for his expenses in the prosecution of the suit.

The defendant in his answer denied all the material allegations in the complaint, and alleged that he had purchased the rights of the *feme* plaintiffs for a full consideration. He also pleaded that the contract as set out in the complaint was champertous and illegal, and that the cause of action was barred by the statute of limitations.

The following issues, tendered by the plaintiffs, were submitted to the jury:

1st. Did the defendant P. H. Cain take the deed described in the pleadings from the *feme* plaintiffs for the purpose of carrying on a suit against Holman for their benefit, with a promise to reconvey after compensation to him for his trouble and expenses?

2d. Did P. H. Cain, before the execution of said deed, undertake to act in behalf of *feme* plaintiffs as their agent and confidential adviser in the expected litigation?

3d. To what amount are plaintiffs entitled against the defendant as rents and profits?

4th. Is plaintiffs' claim to relief barred by the statute of limitations?

5th. To what amount is defendant entitled for bringing and prosecuting suit against Samuel Holman?

The defendant Cain tendered the following issues, in addition to those submitted:

1st. What is the value of the improvements made (299) upon the land by defendant while in his possession?

2d. Was the transaction between plaintiffs and defendant, if as alleged by plaintiffs, champertous, against the policy of the law, and such as a court of equity would not enforce?

Which issues the presiding Judge declined to submit, and the defendant excepted.

Much evidence was offered in support of the allegation of the complaint, on the one side, and of the answer on the other.

It was in evidence by plaintiffs, that the deed from plaintiffs to defendant Cain was executed 27 November, 1872; that the *feme* plaintiff Margaret Wright was married in March, 1867, at the age of 19 years, to Amos Wright, co-plaintiff, who is still living; that her sister, Sarah D. Powell, was twenty-two years old when said deed was executed, and did not marry till she was twenty-eight years of age, in 1877; that the action prosecuted by defendant Cain against Samuel C. Holman, was terminated at Fall Term, 1877, by which Cain recovered possession of the lands in controversy; that in December, 1878, the plaintiffs Wright and Richardson, in behalf of their wives, demanded of defendant Cain a reconveyance of said land, and offered to pay any expense which he had incurred and to remunerate him for his services; that defendant Cain refused to reconvey said land as requested, and notified them that he held the land as his own; that this action was begun on 6 September, 1880.

Defendant Cain asked the following instructions, in writing: —

1. That any right that S. D. Powell and those claiming under her had, was barred by the statute of limitations, which was declined, and defendant Cain excepted.

2. That according to plaintiffs' allegation, the contract with defendant to institute and carry on the action of defendant against Samuel Holman was champertous, and a court of equity will not enforce the same. This was also de-

clined upon the ground that defendant could not be heard to set up such a defense in this action, and the defendant excepted.

There was a verdict and judgment for the plaintiffs, and the defendant appealed. (300)

Messrs. Watson & Glenn for the plaintiffs.

Messrs. D. M. Furches and *E. S. Gaither* for the defendant.

MERRIMON, J. The exception of the appellant can not be sustained.

The pleadings did not in any aspect of them raise any issue of fact in respect to the value of improvements placed on the land by the defendant; nor was there any issue of fact so raised, as to whether or not the parol contract alleged in the complaint was affected with champerty. The defendant, in his answer, simply insisted that the contract as stated in the complaint was so affected, and void.

Only issues of facts raised by the pleadings must be submitted to the jury, and therefore the Court properly refused to submit those tendered by the appellant. *McElwee v. Blackwell,* 82 N. C., 345; *Miller v. Miller,* 89 N. C., 209; *Overcash v. Kitchie, Ibid.,* 384.

It seems that the fourth issue, to-wit: "Is the plaintiffs' claim to relief barred by the statute of limitations?" was withdrawn from the jury, and no instructions were given them as to that; for it is said in the case settled for this Court on appeal, that the "counsel for both sides say it is a question for the Court." It could not be a question exclusively for the Court, unless the facts raising the question were alleged in the complaint. So, we must take it, that the defendant meant to insist, that taking the facts to be as alleged in the complaint, the action was barred by the statute.

The allegations in the complaint are not very definite in some respects, but it is alleged that the defendant, in pursuance of the judgment in his favor in the action brought by him to recover the land, took possession of it in the fall of 1878, and after that the *feme* plaintiffs made demand upon him that he execute the trust in question. This action

(301) was begun 23 August, 1880, manifestly less than three years next after the demand was made, so that the statute did not bar in this aspect of the case. If the trust was an express one, the statute would certainly only run from the date of the demand.

But, on the argument, the counsel for the appellant insisted that the appellee alleged in the complaint, at most, only an implied or constructive trust, and sought relief on the ground of fraud, and that the facts stated showed that they had knowledge of the alleged fraudulent transaction, ever after 1872, and more than three years next before the beginning of this action, and therefore they were barred by the statute.

We can not accept this view of the complaint. We think that it plainly alleges an express parol trust, an express agreement between the *feme* plaintiffs and the defendant, whereby the latter agreed in the contingency specified, that he would, upon being paid reasonable compensation for his services in recovering the land, hold the title thereto in trust for the *feme* plaintiffs and reconvey the same to them. The parol agreement providing the express trust is distinctly alleged, although there are also facts and circumstances alleged in support of the alleged purpose of the defendant to circumvent and defraud the *feme* plaintiffs. As an express trust is alleged, it is obvious that the statute did not bar the action of the plaintiffs.

It might well be questioned whether or not the parol agreement in question could, in any case or any view of it, be treated as tainted with champerty; but, as alleged, it is very clear it is not fatally so as to the appellees, because the *feme* plaintiffs were not in *pari delicto*—the parties were not equally culpable with the defendant; indeed, it is alleged that the *feme* plaintiffs were wholly ignorant of any illegal purpose—that they were poor, and ignorant of their legal rights—that the defendant was their kinsman, in whom they greatly confided—that he was a man of prominence—had been a justice of the peace, and for many years a member of the County Court—that he was a business man—that they were intimate with, and confided greatly in his knowl-

(302) edge and experience—that he advised and encouraged them to make the agreement, and they did so mainly

at his suggestion. Accepting the facts as alleged, the *feme* plaintiffs were poor, ignorant of business matters, confided greatly in the defendant, and acted upon his advice; he took a fraudulent and oppressive advantage of them, obtaining the same under the circumstances indicated above. A strong case of fraud indeed is alleged against the defendant.

Where parties are *in pari delicto,* and one obtains advantage over the other, a Court of Equity will not grant relief; but it is otherwise, where they are not equally in fault, as where the parties seeking relief were ignorant of their rights and the illegal nature of the transaction in question—were poor and dependent, and the advantage taken was oppressive, manifestly unjust and iniquitous. In such cases, the Court will grant relief, notwithstanding the illegality of the transaction in question. *Pinckston v. Brown,* 56 N. C., 494; Story Eq. Jur., sec. 300; 3 Pomeroy Eq. Jur., sec. 942.

NO ERROR. Affirmed.

Cited: Porter v. R. R., 97 N. C., 70; *Fortescue v. Crawford,* 105 N. C., 31; *McAdoo v. R. R., Ibid,* 151; *Maxwell v. Barringer,* 110 N. C., 83; *Tucker v. Satterthwaite,* 120 N. C., 121; *Norton v. McDevit,* 122 N. C., 759; *Dickens v. Perkins,* 134 N. C., 223; *Edwards v. Goldsboro,* 141 N. C., 72; *Sparks v. Sparks,* 94 N. C., 533.

C. A. CARLTON, Admr., v. WASHINGTON BYERS et al.

Parties—Administrators—Settlement of Estates.

1. Creditors are not proper parties to a proceeding brought by an administrator against the next of kin of his intestate for a settlement of the estate.
2. If an administrator should file a petition against the parties interested for a settlement before he has paid the debts, the remedy of the creditor is by a creditors' bill, in accordance with sec. 1448 of The Code, or a creditor may bring an action on the administration bond.
3. Creditors are proper parties to a special proceeding brought by a *legatee or distributee* against an executor or administrator for an account and settlement of the estate, for, in (303)

such case, the legatee or distributee has a right to have an account taken, to ascertain the balance, after providing for all the debts.

(*Southall v. Shields*, 81 N. C., 28, distinguished and approved.)

SPECIAL PROCEEDING, heard, on appeal from an order made by the Clerk, by *Montgomery, Judge,* at August Term, 1885, of IREDELL.

The plaintiff, who is the administrator *de bonis non, cum testamento annexo* of J. S. Byers, deceased, brought this special proceeding in the Superior Court of Iredell County, against the defendants, who, except the appellants, are the heirs-at-law, next of kin, devisees and legatees of his testator, for the purpose of having a final settlement and distribution of the estate of his testator in his hands.

The appellants are creditors of the estate of the testator, and they applied to be made parties defendant in the proceeding, for the purpose of insisting that the plaintiff administrator had not duly administered the estate in his hands, and having their debts paid out of the assets that had come or ought to have come into his hands as such administrator. The Clerk of the Court allowed them to be made parties defendant; they respectively filed answers to the petition; there was replication to the same; and issues of facts were raised by the pleadings and transferred to the civil issue docket to be tried. The plaintiff insisted before the Clerk, and afterwards before the Judge in Term, that the appellants were not proper parties to the proceeding. The Court in Term, upon hearing the motion to strike the names of the appellants from the record as parties, upon the ground that they were not proper parties, and that the Clerk had improvidently allowed them to be made such, allowed the motion, whereupon they excepted and appealed.

Messrs. R. F. Armfield and *Scott & Caldwell* for the plaintiffs.

Mr. D. M. Furches, for the defendant.

MERRIMON, J., (after stating the facts). We are (304) of the opinion that the Court properly allowed the motion. The appellants very clearly misapprehended the nature of this proceeding, and their rights as creditors of

the estate, seeking to charge the administrator with assets that came or ought to have come into his hands, to pay their respective debts.

Their remedy was to bring a Special Proceeding in their own behalf and that of all the creditors of the testator, to compel the administator to render an account of his administration and pay the creditors respectively what might be ascertained to be due them, as allowed by statue, (Bat. Rev., ch. 45, sec. 73; The Code, sec. 1448), or each creditor, in his discretion, might have brought his action against the administrator for the breach of his official bond, in that he failed to duly administer the estate and pay his debt.

The present proceeding contemplated a final settlement and distribution of the estate among those who are to take it after the debts against it are all paid or provided for as required by law. Regularly, the administrator should pay all debts before he begins such a proceeding. Hence, the statute under which this proceeding is brought, (Bat. Rev., ch. 45, sec. 147; The Code, sec. 1525) provides that "An executor, administrator, or collector, who has filed his *final account* for settlement may, at any time thereafter, file his petition against the parties *interested* in the due administration of the estate," etc.—that is, the heirs-at-law or devisees, or next of kin or legatees, or all of these accordingly as they may be interested. Indeed, if at the time the administrator brings a proceeding like the present one, if he had done his duty, all debts against the estate would have been provided for, if not paid. Such a proceeding, brought against the parties finally interested in the estate, and also the creditors thereof, would be attended generally with great multiplicity of conflicting and adverse interests and rights, giving rise to a variety of contests in respect thereto, and hence there would be more or less complication and confusion. There would be practically, in one proceeding, actions about many matters different in their nature, and the method of (305) treating them. Such confusion tends to cripple the administration of justice, and ought to be avoided as far as practicable. There is no necessity for such a course of procedure in cases like this, and as the statute has provided a remedy specially for the creditors, and a separate one for those finally interested in the estate, we think that the proper

interpretation of the statute in question is, that creditors are not proper parties to a proceeding like this. This construction can not work any prejudice to creditors. They would not be bound by proceedings and a decree to which they were not parties. The appellants, notwithstanding the proceeding, if their debts are well founded, and the administrator is in default as to them, might bring any appropriate proceeding or action against him, and he would be bound to account with them and answer for any such default.

As the Superior Court has general jurisdiction over the subject of the settlement of estates, a party interested in the final setlement might, in some cases, bring his special proceeding against the executor or administrator, as the case might be, and if the latter should suggest that the debts against the estate had not all been paid, the plaintiff, in such case, might have an account taken for the purpose of ascertaining the balance for himself and others interested like himself, and hence, might make the creditors parties. This was done in *Southall v. Shields,* 81 N. C., 28. That case, however, and like cases, are different from the present one. There the proceeding was against the administrator, and the creditors might be brought in, to the end that the plaintiff might have the relief demanded by him.

NO ERROR. Affirmed.

Cited: Garrison v. Cox, 99 N. C., 482; *Glover v. Flowers,* 101 N. C., 141; *Daniels v. Fowler,* 120 N. C., 18.

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(306)

MICHAEL RUFTY v. CLAYWELL, POWELL & CO.

Joint and Several Contracts—Statute of Limitation.

1. Under the former practice, if an action was brought on a joint contract, and the plaintiff took judgment against a part only of those liable thereon, there could be no recovery in a subsequent suit against those omitted, but it was different where, as in tort, the liability was several.
2. By sec. 187, of The Code, all contracts are several in legal effect, although joint in form.

3. Where a judgment was obtained against two members of a firm, and more than three years after the cause of action accrued, but within three years after obtaining such judgment, the creditor issued a notice, under sec. 223 of The Code, to another member of the firm who was not served in the action in which the judgment was obtained, to show cause why he should not be bound by the judgment, to which the statute of limitation was pleaded; *It was held,* that issuing such notice is the beginning of a new suit, that the action is open to every defense which could have been set up if there had been no previous recovery against the other partners, and is barred by the statute.

(*Merwin v. Ballard,* 65 N. C., 168, cited and approved.)

ACTION, tried before *MacRae, Judge,* and a jury at Spring Term, 1885, of CATAWBA.

The plaintiff commenced his action 10 February, 1880, by the issue of process against the three defendants constituting the partnership firm of Claywell, Powell & Co., for the recovery of the amount due on a promissory note given 30 September, 1878.

The summons was duly served on two of the partners, A. M. Powell and P. C. Shuford, but not on the partner J. A. Claywell, nor was any *alias* summons afterwards issued as to him. The complaint having been filed, and a contesting answer put in by the two former, the cause came on for trial, and at Spring Term, 1881, the following judgment was entered:

"It is by consent and on compromise, considered by the Court, that the plaintiff have and recover of the defendants, the sum of six hundred and eighty-seven dollars, with interest on six hundred dollars from date till paid, and costs to be taxed by the Clerk."

On 18 July, 1883, the plaintiff sued out a summons under sec. 223 of The Code, against the partner Clay- (307) well, upon whom process had not before been served, commanding him to appear at the next term, and show cause why the judgment rendered against the other partners should not be made absolute and bind him individually.

To this summons he made answer denying that he was a partner when the note sued on was executed, contesting the plaintiff's right to proceed against him otherwise than by a new action, and also setting up the bar of the statute to the demand.

Upon the trial, the plaintiff's counsel contended:

1. That the answer filed by defendant Claywell did not raise the plea of statute of limitations.

2. That the defendant Claywell was bound by the judgment against Powell and Shuford, and could not plead the statute of limitations.

It was agreed that if his Honor, on this state of facts, should be of the opinion that the statute of limitations would avail the defendant, and that it ran in his favor from the execution of the note sued on, viz: 29 September, 1878, until the issuing of the notice in this case in July, 1883, that the plaintiff could not recover.

His Honor being of the opinion that the statute ran in favor of the defendant from the date of the note in 1879, notwithstanding the suit against Claywell, Powell & Shuford, in 1880, instructed the jury to return a verdict for the defendant on the statute of limitations.

Plaintiff excepted. The other issues in the case were not passed upon by the jury. Verdict for the defendant, and from the judgment thereon, the plaintiff appealed.

Messrs. Batchelor & Devereux for the plaintiff.
Mr. Jno. G. Bynum for the defendant.

SMITH, C. J., (after stating the facts). The sole question presented in the appeal, is whether the running of the statute was arrested as to all the partners by the institution
(308) of the original action, or continued for the protection of the appellee, because not prosecuted by the issue of an *alias* summons against him

The preceding section of The Code, makes separate provisions for prosecuting the action on liabilities that are joint, and liabilities that are several; and it is to the former that the four following sections apply. Under the rules of pleading, according to our former system, if the action was upon a joint contract and the plaintiff took judgment against a part only of those liable, there could be no recovery in a subsequent suit against those omitted, for the reason that the contract was merged in the judgment, while not being parties to the judgment, they were not bound by its rendition.

It was otherwise as to contracts that created a several lia-

bility, and to such, as in case of torts, a judgment against one or more, left their separate liabilities in force, and them exposed to a subsequent action in like manner as if no judgment had been rendered against the others.

To obviate the legal consequences of a judgment against some of the joint obligors in extinguishing, through the merger, the cause of action against the others, is the manifest purpose of this innovating legislation introduced in the new system of pleading and practice. Such is the view taken by Mr. Freeman in his work on Judgments, and in our opinion it is a correct view. Secs. 231, 233, 234.

In this State, contracts whether made by copartners or other joint obligors, were made several by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against the others afterwards. Rev. Code, ch. 31, sec. 84. This enactment was not introduced in C. C. P., and hence, the principle governing contracts as construed at common law being restored, the necessity arose of providing the remedy contained in that Code. The omitted section, which in *Merwin v. Ballard,* 65 N. C., 168, was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, ch. 24, sec. 1, and now constitutes sec. 187 of The Code.

The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, (309) those provisions which operate only upon contracts that are joint, and pursuant to which the present proceeding is conducted.

That the contract possesses the two-fold quality of being *joint* as well as *several* in law, can not render available provisions which, in terms, are applicable to such as are *joint* only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the Courts of New York. *Stannard v. Mattin,* 7 How. Pr., 4; *Lakey v. Kingan,* 13 Abb. Pr., 192.

We are then constrained to regard the issue of the summons against the appellee as the beginning of a new suit, and

the action as open to every defense which could be set up if there had been no previous recovery of the other partners.

If sec. 224 is so construed as to cut off any defenses which the appellee might have, and, when he has had no day in Court and no notice of the suit against his associate partners, subject his individual property to the payment of the firm debt, it would be, to say the least, a harsh measure, which we should be reluctant to attribute to the Legislature as an intended result, without a very clear declaration of such intent in the statute. It permits, in cases where the proceeding may be authorized, the setting up any defense that may have arisen thereto, "subsequently to such judgment," and literally, such would be the statutory bar that since became, and was not when that action begun, a defense. But it is not necessary to pass upon this point.

NO ERROR. Affirmed.

Cited: Koonce v. Pelletier, 115 N. C., 235; *Davis v. Sanderlin,* 119 N. C., 87.

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(310)

G. W. SOUTHERLAND et al. v. HIRAM HUNTER et al.

Deeds—Privy Examination of Femes Covert—Registration.

1. A deed which conveys the estate of a married woman must be proved or acknowledged as to both husband and wife, before the private examination of the married woman is made, otherwise the deed will be inoperative to divest her estate.
2. The provisions of sec. 1256 of The Code, which provides that the deed must be proven and acknowledged as to both husband and wife, before it can operate to convey the wife's land, is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Sec. 1826 of The Code, only has reference to executory contracts, but does not apply to conveyance or executed contracts.
3. Registration is not merely for the purpose of dispensing with proof of the execution of the instrument, but, like livery of seisin at common law, is a fundamental condition of the operation of the conveyance, and is an inseparable incident to the efficacy of the deed.
4. A deed for a *feme covert's* land, admitted to registration upon an improper and invalid probate, does not create an equitable estate

in the grantee, for it is not, in law, the contract of the *feme* in any respect, until properly acknowledged and the private examination properly taken.

(*Ferguson v. Kinsland, post,* 337; *Hogan v. Strayhorn,* 65 N. C., 279; *Ivey v. Granberry,* 66 N. C., 223; *Triplett v. Witherspoon,* 74 N. C., 475; *McMillan v. Edwards,* 85 N. C., 81; *Hale v. Jernigan,* 76 N. C., 471; *Phifer v. Barnhardt,* 88 N. C., 334; *Howell v. Ray,* 92 N. C., 510, cited and approved. *Carrier v. Hampton,* 33 N. C., 307, cited, distinguished and approved.)

ACTION for the recovery of land, tried before *Gudger, Judge*, and a jury, at Fall Term, 1885, of MADISON.

It was conceded at the trial that the plaintiff Sarah A. E. Southerland acquired the estate in the land described in the complaint, under a deed made on 6 February, 1864, by Philip Hunter to her, then a *feme sole*, and that subsequently to 23 April, 1858, she became the wife of the plaintiff G. W. Southerland. The defense to the action rests upon an alleged conveyance of the plaintiffs to the defendant Hiram Hunter, executed 11 April, 1868, and which was offered in evidence in support of his title. This deed was admitted to registration upon a certificate of probate, bearing date (311) 12 April, 1873, and issued from the office of the probate judge, in these words:

Personally appeared before me, D. F. Davis, probate judge, S. A. E. Southerland, who, being duly examined, separate and apart from her said husband, she, on such examination, declared that she executed the same without any influence on the part of her said husband, or any other person. Therefore it is ordered and adjudged that the said deed and this certificate be registered. This 12 April, 1873.

D. F. DAVIS, *Probate Judge.*

The plaintiffs objected to the introduction of the deed upon the ground of an insufficient probate and registration under the statute. The Court thereupon allowed the attesting witness to the deed, and others, to be examined in proof of execution, and upon such proof, the deed to be read to the jury, who were instructed that the instrument did give the husband's assent to the action of his wife, and was legally effectual to transfer her estate to the grantee.

The jury returned a verdict for the defendants, and from

the judgment thereon the plaintiffs appeal, and bring up for review the correctness of the ruling in reference to the deed.

Messrs. McElroy & Morphew for the plaintiffs.
Mr. Theo. F. Davidson for the defendants.

SMITH, C. J., (after stating the facts). We have decided in *Ferguson v. Kinsland, post,* 337, not only that the deed which conveys the estate of a married woman, must be executed by both, but it must be proved to have been executed by the husband, or must have been acknowledged by him according to the act of 1869, which governs this attempted probate, or proved or acknowledged as to both parties, under the act now in force, The Code, sec. 1256, before the private examination of the wife is had. This has long been
(312) the settled law, and still remains, that the proof or acknowledgment of execution by one or both, must precede the examination in reference to the volition and freedom of the wife, or the act or deed will be ineffectual to divest her estate; nor is this enactment in conflict with the constitutional provision that secures to the wife her entire estate notwithstanding her marriage.

The section in The Code, 1826, to which we are referred in the brief of defendants' counsel, has reference only to *executory contracts* and the obligation they create, but is not applicable to conveyances or *executed contracts,* which are provided for elsewhere.

Nor is the position tenable that registration is only necessary in dispensing with other proof of execution, and admitting the original or a copy in evidence, when the deed upon *ex parte* probate has been transcribed upon the registry.

It is a substitute for livery of seisin, a fundamental condition in the operation of conveyances at common law, as explained by the late Chief Justice in *Hogan v. Strayhorn,* 65 N. C., 279, and is now held as an inseparable incident to the efficacy of the deed itself. *Ivey v. Granberry,* 66 N. C., 223; *Triplett v. Witherspoon,* 74 N. C., 475; *McMillan v. Edwards,* 85 N. C., 81; *Hale v. Jernigan,* 76 N. C., 471; *Phifer v. Barnhardt,* 88 N. C., 334.

The case of *Carrier v. Hampton,* 33 N. C., 307, is not in conflict with these adjudications, for it merely decides that

a deed incapable of being proved under the law as it then existed, so as to be spread upon the registry and render a copy admissible in evidence, might be registered upon proof competent at common law, and not being in the purview of the statute, it must again be proved on the trial. The principle involved, is discussed and explained in *Howell v. Ray,* 92 N. C., 510, and we are content with a reference to it.

It has occurred to us that perhaps the defense may be put upon the ground that the deed, without registration, like an executory contract to convey, may create an equitable estate in the defendant, which will equally (313) obstruct the plaintiff's recovery of possession. But the suggestion is without force and unavailable to sustain the ruling. It is not in law the contract of the *feme* in any legal sense, until after the execution is proved or acknowledged, the private examination has taken place, and her voluntary *assent thus ascertained and declared.* Until then, it is no more her *executory* than it is her *executed contract,* and is not binding upon her as such. The statutory requirements as to one, are not those applicable to the other. Besides, the Judge erred in his ruling that the instrument was sufficiently proved to be competent evidence and divested the estate of the *feme* plaintiff in the land and transferred it to the defendant.

For this erroneous ruling the verdict must be set aside, and a *venire de novo* awarded.

ERROR. *Venire de novo.*

Cited: Edwards v. Dickinson, 102 N. C., 522; *Lineberger v. Tidwell,* 104 N. C., 511; *Barrett v. Barrett,* 120 N. C., 129; *Slocomb v. Ray,* 123 N. C., 574; *Howard v. Turner,* 125 N. C., 109.

DOCK BRAZIL v. THE WESTERN N. C. RAILROAD CO.

Negligence—Judge's Charge.

1. Where the evidence is conflicting, the Judge should leave the question to the jury, with proper instructions on both aspects of the case.
2. It is not negligence, if a conductor requires a fireman, who is competent for that purpose, to work the engine while shifting cars at a depot, in the absence of the engineman.
3. In such case, whether or not there is negligence, depends upon whether the fireman is competent to do such work.

ACTION, tried before *Gudger, Judge,* and a jury, at Fall Term, 1885, of HAYWOOD.

The action was brought to recover damages for injuries suffered by the plaintiff by the alleged negligent management of the defendant's cars.

(314) The accident, resulting in the loss of the leg of the plaintiff, occurred at the depot at Asheville, and the evidence showed that a freight train had come up the road from Salisbury, and stopped six or seven of its cars on the east side of the county road that crossed the railroad at the depot, and that the remaining cars, about four in number, with the engine, were on the west side of the crossing, and were, at the time of the accident, "shifting," so as to leave some of these last cars on a side-track and to attach others, which were on the side-track, to the train, and then go on to Warm Springs.

The plaintiff testified that on or about 16 February, 1884, he was at the depot at Asheville for the purpose of going to Waynesville, but the train had left before he arrived, and that while yet at the depot the freight train arrived; that he had been employed before that time by the railroad company, but was not then working for them; that as he came out of the depot he met Mr. Hanger, the conductor of the freight train, who asked if witness would go with him, saying he was scarce of hands, and further asked if I had ever been a brakeman; I replied I had "broke" only on gravel trains on two roads; Hanger said to get up on the cars, (the ones west of the crossing), while he got on the cars that were then on the side-track and moving up (west), towards a switch, slowly; Hanger said, "Brake these cars when we get on the

main track, so as to stop them first west of the crossing;" I and Hanger got on the cars, and the cars were pulled on the main track; Hanger cut the two cars I was on loose from a gondola, (coal car), and shoved them down the track, (east), towards the six or seven cars composing the balance of the train, which stood east of the crossing; I broke these cars slowly, (*i. e.,* applied the brakes), and stopped them just west of the county road, and about ten or fifteen feet from the balance of the train, which stood on east side of the county road; this was all I had to do, and all that I had been requested to do; I remained on the cars; I had "broken" them; I did not get down, as I had been asked to get up on these cars; I was on the car next the train of same cars east of the crossing; I looked up the track towards the engine, and saw they had shifted the gondola to the side- (315) track, and the engine and two flats were coming towards me on the main track; the switch was about a hundred yards from me; when I left my brake the engine and flats had just started on the main track and were coming towards me slowly; when I got to the other end of the car I was on, I heard the engine puffing fast. I looked, and it seemed as if it would jump the track, and came towards me at the rate of a mile a minute; I then went back to my brake, but before I reached it, the car was knocked from under me, and I fell and was run over by the car and my leg cut off, except a piece of the skin, my other heel injured, and my shoulder also; when the two flats with the engine got on the main track, Shoemaker, the fireman, was in charge of the engine, and Hanger at the brake on one of the flats; some one asked how the engine came to back so fast, and Hanger said it was because the engineer had neglected to shut the injector.

Taylor Yarborough testified that he was present, saw the engine coming back with full power and full speed, as fast as cars run when going between stations. The engine struck the two flat cars, (gondolas), and they ran up against the car plaintiff was on, and knocked him off; at the time plaintiff was knocked off, he seemed making for the brake.

George R. Hanger, for the defendant, testified that when his train got to the depot, the plaintiff climbed up on a car on which I was standing, and asked for a job. I told him I did not want hands nor did I know that I would. At this

time one of my brakemen notified me he would quit work, and my other two went to breakfast, and I had the work of shifting to do. The track from the switch to the crossing is down grade, so that when a car is started from the switch, it will run without the aid of the engine to the crossing. I cut loose and started to the side-track, coupled up two box cars and an empty gondola, and pulled them out on the main track, and asked plaintiff, who was on one of the box cars, to ride the two box cars down to the crossing and stop them before they would hit the other cars. He rode them down
(316) and stopped them as I had directed. I then called to him to get down and come and ride one car down the side-track. I was 270 feet from him at the time; he was sitting on top of the brake-wheel, with his feet off the body of the car; he did not come; I rode the car on the side-track; I told him, using rough language, to get off; he still sat on brake-wheel; I then went on the main line, cut off another car, and told Shoemaker, who was in charge of the engine, to give it a push, which he did, and the car started down the main line, (this car was empty); I called out to plaintiff to get off that wheel or he would get hurt. I was on this car at the brake, the engine following; when I got in twenty or thirty feet of the car plaintiff was on, I called out emphatically to plaintiff to get off or he would be knocked off; he raised up, I applied my brake, and in doing so turned from looking towards plaintiff, and stopped the car as it hit the car plaintiff was on. I did not see plaintiff after I called to him the last time, till after he was hurt. I stopped my car where I wanted it to stop; the engine was driven as I wished it to be, and as it ought to have been run, and as it had been moved before. I have been running as brakeman and conductor five years; there was nothing the matter with the engine, and it carried the train from Asheville to Warm Springs that day. When the car I was on hit car plaintiff was on they were coupled, as I had wished and expected them to be. Plaintiff had time to have got off the car when I called to him from side-track before the accident happened. When the accident happened the engine was moving at four to six miles an hour. Plaintiff represented to me he knew all about the business of braking, and could make me a good hand. Shoemaker, the fireman, did the shifting, managing

the engine for the shifting; he is a careful man, and did the shifting carefully. Manning, the engineer, had gone to the water-closet at the time; he is a prudent, careful man. There was no unusual speed.

J. F. Shoemaker testified: I did the shifting, Manning saying he had to go to the water-closet; I shifted (317) the cars to the side-track, and then got on the main line; cut off two cars; they stopped; I struck the cars and started them; they went on; soon I heard hallooing; I stopped engine, got down, and saw plaintiff was hurt; I had been shifting for six months before; I was training for an engineer, and knew how to manage and control an engine; there was nothing wrong with engine that day.

Frank Haynes testified: Was a brakeman on Hanger's train, and was standing opposite the end of the car plaintiff was on when he fell; was there to couple these cars to the made-up train east of the crossing; I heard Hanger call out to plaintiff three times to get off the car, and he had time to have done so; before he fell, he was sitting on the brake-wheel, talking to some one on the other side of the car from me; plaintiff was in a dangerous place; a safe place would have been on the centre of the top of the car, or holding to the brake; the engine and cars did not approach with unusual speed.

Thos. Miller testified: I am a drayman in town of Asheville; was present at the time; plaintiff was sitting on the brake-wheel talking to some persons on the side opposite me; knew Hanger, heard him halloo, but did not understand what he said until the last time, when he said, "get down off that wheel;" I could have gotten down off the car twice after Hanger hallooed; I was opposite plaintiff; I halloed to him to get down, and motioned; he had time to have gotten down and hold to the brake, or to hold to the running-board on top the car; the engine did not come back at unusual speed; when I called to plaintiff, he got off the car and started to the other end of the car; I saw no more, as I had to hold my horses; the cars came back pretty fast; engine did not come back; cars made considerable noise when they struck.

A. G. Hallyburton testified: Am station agent at Asheville; Hanger is a careful, prudent man and of good charac-

ter; Shoemaker has a good character, and is a pru-
(318) dent, careful fireman; the accident occurred at about 9 o'clock a. m.

The Court charged the jury, that the plaintiff is not entitled to recover, unless he has shown by the preponderance and weight of the evidence, that the injury to himself resulted from the negligent and careless use by them [defendant corporation] of their engine and cars; that if at the time of the injury to the plaintiff, the engine and cars were moving at the rate of a mile a minute, or if they were moving at the rate of speed at which trains move when passing from one station to another station, this would constitute negligence in defendant company; but if at the time of the accident and injury to the plaintiff, the defendant company was using its engine and cars in shifting and making up its train, and were moving at a rate of speed not greater than four or six miles an hour, this would not be negligence on their part; that if the plaintiff had gone upon the cars at the request of Hanger, and had "broke" the two cars and stopped them at the place designated by Hanger, and if this was all the service he had been requested to perform, and if after the performance of this service he remained on the car and sat upon the brake-wheel, and if he was warned by Hanger and others to get down and he did not do so, but remained on the car, and if the car he was on was struck by the gondola or flat cars, and in consequence he was thrown to the ground and hurt, he could not recover for the injury he so received. To these instructions the plaintiff excepted.

The Court gave the following instructions, to which no exception was taken:

That if the jury finds that the conductor, Hanger, commanded or permitted the fireman to run the engine in shifting cars in the absence of the engineer, that this constitutes negligence, unless they shall find that the fireman was competent to perform the duties of an engineer.

The plaintiff requested the following instruction, which the Court refused, and he excepted: That if the jury find
(319) that the conductor undertook to run the train with the fireman on the engine and no brakeman, and undertook to do the braking himself, that these facts constitute negligence, for which the defendant is responsible.

At the request of the plaintiff, the Court gave the jury the following instructions: That if the jury find that "the engine or cars or gondolas were started by the power of the engine down the track towards and against the car on which the plaintiff stood, with rapid and unusual speed, and that plaintiff was knocked off and injured thereby, that then the defendant is responsible, unless plaintiff was at the time guilty of some act which contributed in producing the injury."

There was a verdict for the defendant on the first issue, and the others were not passed upon by the jury, as the Court instructed them, if they found the first issue in the affirmative, to pass on the others, but if they found the first issue in the negative, it would not be necessary to pass on the others.

Rule for a new trial; rule discharged; judgment in favor of defendant, and plaintiff appealed.

Messrs. Norwood & Smathers for the plaintiff.

Messrs. D. Schenck, Charles Price, and *Reade, Busbee & Busbee* for the defendant.

MERRIMON, J. The testimony was very conflicting—that produced on the part of the plaintiff, tending to prove that the injury sustained by the plaintiff was the result of gross negligence of the defendant—that produced on the part of the latter, tending to prove that such injury was the result of the gross negligence of the plaintiff himself. The Court, therefore, properly submitted the evidence to the jury in two aspects of the case—one favorable to the plaintiff; the other to the defendant. In applying the evidence to these aspects, it was the province of the jury to determine its weight, and be governed by a just preponderance one way or the other. The Court so in substance instructed them, and the plaintiff has no reasonable ground of complaint in (320) that respect.

The plaintiff's counsel insisted that "it was sufficient for plaintiff to show that he was injured by an act of defendant, which does not, with the exertion of proper care, ordinarily produce damage."

If it be granted that this is so, in this case the instruction given was that in effect. The Court, putting the plaintiff's

view of the case, told the jury in substance, that the plaintiff would be entitled to recover, if the cars were moving at the rate of speed as contended by him, because, in that state of the facts, there was negligence on the part of the defendant.

There was evidence tending to support this view of the case presented to the jury by the Court, favorable to the defendant, and in view of this evidence, it was not erroneous to tell the jury that it would not be negligence to move the cars at a rate of speed not greater than five or six miles an hour. That is not rapid speed—the movement in shifting the cars is short, and at a time when everybody about the cars and track are or ought to be on the alert, and careful to keep out of the way of danger.

If the evidence produced by the defendant was true, then, manifestly, there was negligence on the part of the plaintiff, and his misfortune was largely, if not wholly, attributable to such negligence. The Court properly told the jury, that if the plaintiff was negligent, as the evidence tended to show, he could not recover.

That the conductor requiring the fireman to work the locomotive, and acted as brakeman himself while shifting the cars, was not necessarily negligence on the part of the defendant. This would depend upon the competency of the fireman and the conductor for such service—they might be well fitted for it, and the Court gave the jury proper instructions in this respect.

Taking the charge of the Court to the jury altogether, we think the plaintiff has no just ground of complaint. In one aspect of the evidence, he was grossly negligent himself. The facts were fairly left to the jury, and they found
(321) against the plaintiff as they had the authority to do. The judgment must be

AFFIRMED.

ADAM SAWYERS v. TABITHA SAWYERS.

Judgment Liens—Execution.

1. Under The Code system, an execution which is issued after the death of the judgment debtor, although it bears *teste* before his death, confers no authority on the sheriff to sell, and a sale thereunder is void, but before The Code of Civil Proocedure was adopted, a sale under such an execution would have been valid.
2. Liens on real property are now governed by the docketing of the judgment, and not by issuing of process to enforce it.
3. When an execution is issued on an undocketed judgment, or one which has lost its lien on real estate by the lapse of time, it is a lien on both real and personal property from its levy.
4. Where a judgment debtor dies, the creditor can not enforce the judgment by execution, but must collect his debt in the regular course of the administration of the estate.
5. The provision in The Code of Civil Procedure, furnishing a remedy for enforcing the lien in case the administrator unreasonably delays settling the estate, has not been brought forward in The Code.

(*Aycock v. Harrison*, 65 N. C., 8; *Grant v. Hughes*, 82 N. C., 216; *Spicer v. Gambill, post*, 378; *Murchison v. Williams*, 71 N. C., 135; *Lee v. Eure*, 82 N. C., 428; *Mauney v. Holmes*, 87 N. C., 428, cited and approved.)

ACTION for the recovery of land, tried before *Graves, Judge,* at August Term, 1885, of SURRY.

The plaintiff, claiming to be the owner, brings this action to recover possession of the tract of land described in his complaint, and as he alleges, wrongfully withheld by the defendant. The defendant made answer thereto, which she afterwards withdrew and was permitted to enter her demurrer.

The material facts set forth in the plaintiff's complaint upon which the case was heard were: that on (322) 1 March, 1877, in a justice's court of Surry County, a judgment was rendered in favor of Adam Sawyers against Solomon Sawyers for $90.15 and $2.75 cost, which was docketed in the office of the Clerk of the Superior Court of said county on 4 February, 1878. An execution from said court issued on the same on 15 June, 1880, which was returned "not satisfied." After Fall Term of the Superior Court of said county (which was held 25 October, 1880), and before Spring Term, 1881, of said court, to-wit: on 16

November, 1880, the said Solomon Sawyers, the judgment debtor, died. After the death of the said judgment debtor, on the said 16 November, 1880, and before Spring Term, 1881, of the Superior Court of said county, towit: on 1 March, 1881, a writ of execution again issued out of the Superior Court of said county in favor of the said Adam Sawyers and against the said Solomon Sawyers on said judgment, tested of Fall Term, 1880, and returnable to Spring Term, 1881, of said court. By virtue and authority of said last named execution, the sheriff of said county levied on and sold the land claimed and described in the plaintiff's complaint, as the land of the said Solomon Sawyers, and the plaintiff became the purchaser of said land, and took the sheriff's deed for the same, under which the plaintiff claims. That the defendant, Tabitha Sawyers, is the widow of the said Solomon Sawyers, and there were no minor heirs. The defendant was in the wrongful possession of the land described in the complaint, and asked for the possession of the same, subject to the widow's dower, which was to be allotted to her in case the plaintiff recovered.

The defendant demurred *ore tenus* to the plaintiff's complaint, upon the ground that the facts set forth in the complaint do not constitute a cause of action; that the execution under which the plaintiff claimed, issuing after the death of the judgment debtor and tested before his death, on a justice's judgment, docketed in the Superior Court was
(323) void, and the plaintiff had no title under such deed of the sheriff, and ought not to recover the land described in the complaint. Upon the hearing of the case his Honor held that an execution issuing after the death of the judgment debtor, but tested before, on a justice's judgment docketed in the Superior Court, was void, and that the sheriff's deed under such execution gave the plaintiff no title, and therefore sustained the demurrer and gave judgment for the defendant, from which decision and judgment the plaintiff appealed to the Supreme Court.

Messrs. Coke & Williamson and *Watson & Buxton* and *John Y. Phillips* for plaintiff.

No counsel for defendant.

SMITH, C. J., (after stating the facts). The only question brought up by the appeal and requiring a response from this Court is, whether an execution issuing upon a judgment rendered by a justice of the peace, and docketed in the Superior Court, after the death of the debtor, but whose *teste* antedates the death, can confer upon the sheriff legal authority to sell and convey his real estate under the statutory lien

The affirmative has been held in cases that have occurred under our former system, and the rule is enunciated by READE, J., in *Aycock v. Harrison*, 65 N. C., 8, wherein the death took place, and most of the facts transpired, before the *Code of Civil Procedure* went into operation, and in reference thereto he uses this language: "Where there is a judgment, and a *fi. fa.* or *ven. ex.* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant died before the sale. And so he may when the *fi. fa.* or *ven. ex.* issues after the death, but is tested before."

And so in *Grant v. Hughes*, 82 N. C., 216, we upheld the validity of a sale under such process against the widow's claim for an allowance out of her husband's personal estate for her year's support. This ruling rests upon a recognition of the retroactive operation of the writ, as (324) declared in adjudged cases, on the act of 1869 amending sec. 261 of C. C. P., by annexing to paragraph 1 these words: "But no execution against the property of a judgment debtor shall be a lien on the personal property of such debtor, as against any *bona fide purchaser from him for value, or as against any other execution except from the levy thereof,*" thus by implication leaving undisturbed the relation to the *teste* as between the parties, when the rights of those mentioned are not invalid. The Code, sec. 448, par. 1.

But liens on real estate are now referable to the time of docketing the judgment, and adhere to such as the debtor then held, and such as he has since acquired during the statutory limitation, a much more substantial security, with a more efficacious remedy to enforce it, than was given by the common law. The reason for the adoption of the rule of relation was, to take from the judgment debtor the ability to transfer his property to others, and thus deprive the creditor of the fruits of his recovery when in the diligent use of the

means provided by law for securing them in satisfaction of his adjudged demand.

This reason no longer exists, for the judgment itself, when docketed, affixes a lien upon the debtor's land, and it is not now necessary for him in order to its preservation, as it was before, to press unremittingly the process by which payment was to be enforced.

This superseding legislation must, therefore, to no inconsiderable extent, dispense with many rules before in force, and especially that of relation of the execution to its *teste,* as unnecessary and inapplicable to the new procedure and practice. We have, therefore, in *Spicer v. Gambill, post,* 378, indicated an opinion that when final process is sued out and acted on after the judgment lien has been lost by efflux of time, or on a judgment rendered and not docketed, it affixes a lien as against purchasers and other attaching liens, alike upon real and personal property, only from the levy—upon the latter by virtue of the statute, upon the former to secure uniformity in the rule.

In *Murchison v. Williams,* 71 N. C., 135, READE,
(325) J., clearly intimates, if he does not distinctly say, that the creditor is not allowed to enforce his lien on the judgment debtor's land, by suing out and selling under execution after his death; and that it devolves on the personal representative to provide for this as for other debts of the deceased.

"The result is," are his words, "that when a debtor dies, against whom there is a judgment docketed, his land descends to his heirs or vests in his devisee, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the *whole estate is to be administered just as if there were no judgment*—that is to say, the personal property must be sold if necessary, and all the personal assets collected, and out of these personal assets *all* the debts must be paid, if there be enough to pay all, as well docketed judgments as others. If there is not enough to pay all, then they are to be paid in classes, docketed judgments being the fifth class, to the extent of their lien, which is the value of the land," referring to Bat. Rev., ch. 45, sec. 40, class 5.

This seems to have been recognized as settling the law, and the extract which we have recited is quoted in *Lee v. Eure,* 82 N. C., 428, with this subjoined remark: "The reason for this mode of administration is, that although a lien on land exists, the judgment should be paid out of the personal estate, if any, in exoneration of the land for the benefit of the heir or devisee."

Again the case of *Murchison v. Williams* is referrd to, with approval of its ruling, in *Mauney v. Holmes,* 87 N. C., 428, and this further portion of the opinion quoted: "The administration of the *whole estate is placed in the hands of the executor or administrator,* 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."

Moreover, the Code of Civil Procedure in the chapter consisting of secs. 318 to 324 inclusive, which fur- (326) nishes a remedy for enforcing the lien, in case of unreasonable delay by the personal representative, is applicable to the present case, while they seem not to have been brought forward in The Code.

Section 319, expressly confers upon the judgment creditor the right, after three years from the issue of letters testamentary or administration, "in case of the death of the judgment debtor, *after judgment,*" to proceed and enforce his lien, plainly indicating the absence of such right after the debtor's death, until the expiration of the period allowed the representative to pay the debt and relieve the land.

Such are the rulings in the State of New York, from which our new system is borrowed. In *Wood v. Moorhouse,* 45 N. Y., 368 (Court of Appeals), process had issued during the debtor's lifetime, and the sheriff proceeded to make sale after his death. This action was sustained as legal and warranted. ALLEN, J., in delivering the opinion and expressing the views of the Court uses this language: "The sheriff could lawfully complete the execution of the process *thus commenced.* At common law an execution against the goods of a judgment debtor was regular, if tested in the lifetime of the debtor, although actually issued after his death. *But an execution cannot be issued after the death of the defendant* which will

authorize the sale of the real estate which may be bound by the judgment." The same Judge, in a subsequent case, *Wallace v. Swinton,* 64 N. Y., 188, reaffirms the proposition, and referring to sec. 376 of the New York Code, which is sec. 319 of ours, to which we have adverted, says, "The statute prescribing the procedure for the issuing of an excution against real property affected by the judgment, after the death of the judgment debtor, *necessarily by implication excludes every other process and proceeding to accomplish the same purpose,* within the maxim *expressio unius est exclusio alterius.*" Without pursuing the subject further, we are of opinion, and so declare, that the execution issuing after the death of the judgment debtor was not warranted by law, and no
(327) title passed under the sheriff's deed to the plaintiff.

There is no error in the ruling of the Court in sustaining the demurrer and rendering judgment for the defendant.

NO ERROR. Affirmed.

Cited: Williams v. Weaver, 94 N. C., 136; *Lilly v. West,* 97 N. C., 278; *Jones v. Britton,* 102 N. C., 178; *Holman v. Miller,* 103 N. C., 120; *Tuck v. Walker,* 106 N. C., 288; *Gambrill v. Wilcox,* 111 N. C., 44; *Moore v. Jordan,* 117 N. C., 90; *Bernhardt v. Brown,* 122 N. C., 593; *Evans v. Alridge,* 133 N. C., 380.

S. W. WALL v. WILLIAMS & ROBBINS, Executors.

Maintenance—Contract—Support.

1. Where, for a valuable consideration, one contracts to support another, he can not recover in an action for services rendered such other party in nursing and attending to him in sickness.
2. So, where A leased B's farm for a term of years, and the lease provided that he should furnish B and his wife plenty to support them, and should have the excess made on the farm, and B was stricken with a lingering sickness, in which A nursed and tended him; *It was held,* that A could not recover in an action against B's estate for such services.

(*Wall v. Williams,* 91 N. C., 477, cited and approved.)

ACTION tried before *Montgomery, Judge,* at July Special Term, 1884, of RANDOLPH.

The plaintiff alleged in his complaint that Daniel Williams died in June, 1882, leaving a last will and testament, in which he appointed the defendants his executors, and they were duly qualified as such; that the testator was about eighty years of age when the plaintiff commenced rendering the services hereinafter stated, and was in feeble health and weak in body and mind; and after the death of his wife on 8 January, 1880, required constant care and attention, and was sick and afflicted with chronic diarrhœa and other offensive diseases, and was unable to care for himself; that after the first day of January, and until his death, the plaintiff, assisted by his wife, rendered to him all such (328) services as were necessary, such as daily nursing and daily waiting upon him, administering medicine, washing and cleansing his body, as well as his bedding and clothing, from the filth engendered by his loathsome disease.

B. Milliken became guardian after the disease had attacked the testator, and after the alleged services had begun.

The defendants deny the liability alleged by plaintiff, and set up, for a further defence, the following written contract, namely:

"STATE OF NORTH CAROLINA,
Randolph County.

"I, Daniel Williams, of said county, agree with S. W. Wall, to lease his farm to said Wall five years, and he is to furnish him and his wife plenty for to support them, and furnish them with fire-wood in their yard.

"Now the said Wall is to have possession on 1 October, 1879, and to have all he can make after we get our support. I, Daniel Williams, agree to keep what provisions that I have on hand 1 October, 1879, to support myself and wife and stock, and at the end of five years the said Wall is to furnish the same amount, or leave that much with us. The said Williams is to keep one milk cow and calf, one or two hogs, etc. The above agreement is to be in full force 1 October, 1879.

"Signed in the presence of B. Milliken and left in his possession, 9 May, 1879.

"DANIEL WILLIAMS, (Seal).
"S. W. WALL, (Seal).

"Witness: Benj. Milliken."

The defendants also set up a counterclaim against the plaintiff for cutting and carrying away timber from the land of the testator.

The plaintiff tendered the following issues to be submitted to the jury:

1st. Did the plaintiff render the services claimed (329) in the complaint?

2d. Were such services rendered at the request of the testator, or of any one authorized to make such request?

And the defendant tendered the following issues:

1st. Did the plaintiff cut and appropriate to his own use, during the testator's life, timber growing on the land?

2d. If so, what was the value of the timber so cut and appropriated?

The defendants' counsel referred the court to this case, *Wall v. Williams,* 91 N. C., 477, and especially to the intimation of this Court that the services rendered, and attention bestowed upon the testator, as charged in the complaint, are comprehended in plaintiff's undertaking to furnish him and his wife plenty to support them, during the lease, if they shall so long live.

The plaintiff admitted the execution of the undertaking, and that he did not expect to change the proof offered on the first trial.

The Court held that the services rendered, and the attention bestowed, if proved, were comprehended in the undertaking, and would not entitle the plaintiff to a recovery, and declined to submit plaintiff's issues, and submitted those tendered by the defendants, to which plaintiff excepted.

There was a verdict in behalf of the defendants, and judgment was rendered accordingly, from which the plaintiff appealed.

Messrs. Scott & Caldwell and *W. S. Ball* for the plaintiff.

Messrs. M. S. Robins and *J. T. Morehead* for the defendants.

ASHE, J. (After stating the facts). The only question presented for our determination, arises upon the construction of the contract between the plaintiff and the testator. The plaintiff contends that the word *support,* as used in the in-

strument, can only be interpreted as meaning *food* or *provisions,* and the defendant insists that the word is not to be construed in any such restricted sense, but the use of it in the contract was intended to comprehend a rea- (330) sonable and comfortable maintenance, suitable to the estate, the mode of living, and the habits of life of the person to be supported. When the case was before us at a former term, *Wall v. Williams,* 91 N. C., 477, it was then said in the opinion delivered by SMITH, C. J.: "Are not the service and attention incident to those being supported, though in the present case they were far more onerous than perhaps ever contemplated by either party? Would a total neglect of the most common wants, when living on the same farm, be consistent with the agreement for a support to be afforded by the plaintiff? Is the word to be construed as restricting the contract to the furnishing of food merely, and fuel for cooking and warmth?"

The point now involved did not necessarily arise there, but it will be seen from the above extract, that the Court leans to the construction now contended for by the defendants, and after further consideration of the subject, we think that is the proper construction of the instrument.

The plaintiff's stipulation in the contract, is to furnish *"plenty for to support"* Daniel Williams and his wife, and he, S. W. Wall, is "to have all he can make after we get our support."

It certainly was not contemplated by the parties that the land should be sown or planted in grain. Wall, under the contract, might have sown cotton or tobacco, in which case, he would be bound by the contract to furnish a *support* out of the proceeds of the crops. It is not a stipulation for a certain part of the crops, or for a *support* out of the premises—the corn or grain raised on the land. The defendant, by the contract, is entitled to a support—a plentiful support. What does that mean? According to Webster, it means "maintenance, subsistence, or an income sufficient for the *support* of a family," and maintenance means *"sustenance, support by means of supplies of food, clothing and other conveniences."* And this liberal construction of the word *support,* in its use with regard to persons who have been contracted with for

their maintenance, was held in the case of *Whilden v. Whilden*, Riley, Law and Equity, 205. There the property of a testator was directed to be sold, and the money invested in bank stock, for the *support* of his children, until the youngest should come to the age of twenty-one, and he left several children who were of age, and others minors; it was decided as the income was small, it should be applied to support and *educate* the minor children. We cite this case to show that support is held to mean something more than mere food.

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The only other case we have found bearing on the question, is another South Carolina decision, *Ellerbe v. Ellerbe*, Spears's Eq., 328. There a "reasonable and competent support" was provided for the testator's daughter and grandson. The Court held, that as she had an ample estate of her own, she could not get a support out of the estate of the testator, William Ellerbe. The Court held in its opinion, that a reasonable and comfortable support was such "maintenance as was necessary, suitable and proper, in the situation of the party," and in support of his position, the Chancelor who delivered the opinion, cited the case of *Whilden v. Whilden, supra.* The stipulation is to "furnish a *plenty* for to *support* Williams and his wife." Plenty is from the Latin *plenus*—full. Plenty of support must mean a full support—not merely sufficient provisions, but, according to the definition and the authorities cited, "in full;" such other conveniences and necessaries as were reasonable and suitable to make Williams and his wife comfortable. If it turns out that he made a bad bargain, which does not seem to have been the case, he had no right to complain. He went into it with his eyes open. He knew that he, Williams, was old and feeble, and had passed, by a decade, the Scriptural limit of human life, and was likely to be afflicted with the maladies incident to old age. If these maladies were greater, or more offensive than he had expected or hoped, he must be held to abide the consequences of his contract.

NO ERROR. Affirmed.

Cited: Gray v. West, post, 446.

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N. G. PENNIMAN v. JOHN H. DANIEL.

Amendment—Attachment—Discontinuance—Service of Process—Duty of the Clerk.

1. The Code gives to the Superior Courts the most ample power to allow amendments, and where an affidavit upon which a warrant of attachment was issued was defective, it may be amended.
2. A discontinuance results from the voluntary act of the plaintiff in not regularly issuing the successive connecting processes necessary.
3. Where a summons *which is to be personally served,* is ordered to be issued by the Court, it is not the duty of the Clerk to issue it until it is demanded by the plaintiff, but when *service is ordered to be made by publication,* after the expenses are paid by the plaintiff, it is the duty of the Clerk to obey the order, and make the publication.
4. So, where an order of publication was made, but by an oversight in the Clerk it was not done, and the defendant moved to dismiss the action on the ground that there was a discontinuance; *It was held,* that the Judge had the power to allow the publication to be made, returnable to a future term of the Court.

(*Brown v. Hawkins*, 65 N. C., 645; *Austin v. Clark*, 70 N. C., 485; *Price v. Cox*, 83 N. C., 261; *Bank v. Blossom*, 92 N. C., 695; *Church v. Furness*, 64 N. C., 659; *Penniman v. Daniel*, 91 N. C., 431; *Etheridge v. Woodley*, 83 N. C., 11; *State v. Wood*, 25 N. C., 23, cited and approved.)

MOTION to dismiss an action, heard by *Shipp, Judge,* at Fall Term, 1885, of CATAWBA.

This action was commenced 14 March, 1883, upon a warrant of attachment sued out at that time from the Superior Court of Catawba County, and a summons returnable to Fall Term, 1883, was issued on the same day, against the estate of the defendant. On the same day the sheriff executed the warrant by levying on a quantity of tobacco and other property.

On the 23d of same month, the plaintiff obtained an order of publication of the notice to the defendant of the sum demanded in the action, and of the issuing and levying of the attachment; and requiring him to appear at the next term of the Court and answer the plaintiff's complaint, or judgment would be taken in the case, by default, and the property condemned to satisfy plaintiff's debt and costs of (333) suit. Publication was made for six successive weeks, in the newspaper designated for that purpose, and in conformity with its terms.

On 22 June, 1883, counsel for defendant appeared and moved the Court for a discharge of the attachment and vacating the order for its issue.

In response to the motion of defendant's counsel, the Court (Clerk) declared that upon the face of the pleadings there were irregularities, and ordered the attachment to be vacated.

From this ruling of the Clerk the plaintiff took an appeal to the Superior Court. The sheriff endorsed on the summons, "due search made and the defendant not to be found in my county."

His Honor, *Graves, Judge,* sustained the ruling of the Clerk, from which ruling the plaintiff took an appeal to the Supreme Court.

The Supreme Court decided that the affidavit was sufficient to obtain the warrant of attachment, and reversed the decision of his Honor, *Graves, Judge.* See *Penniman v. Daniel,* 90 N. C., 150. At Fall Term, 1884, of the Superior Court of Catawba, the counsel for the defendant moved to dismiss the action, because, as he alleged, the cause had been discontinued.

His Honor, *Gilmer, Judge,* refused to dismiss the action, for the reason that while a case is pending in the Supreme Court, no action can be taken in the Court below, and directed an order of publication to be made, for the defendant to appear at the next term of the ensuing Court. From this order the defendant took an appeal to the Supreme Court. This Court affirmed the ruling of his Honor. See *Penniman v. Daniel,* 9 N. C., 431. At Spring Term, 1885, upon motion founded upon affidavit of plaintiff's counsel, an order of publication was made. No publication, however, was made, for the following reasons: A check was received from plaintiff to pay for this and past publications for the appearance of the defendant. Plaintiff's counsel went with the editor of the paper in which the notice was to be published, and (334) in the presence of the Clerk, paid the amount for publication, and a receipt was taken and filed by the attorney among the papers in the cause. The attention of the Clerk was not especially called to the fact, and no money was paid to him for a future publication, and no fees tendered to make publication. That the senior counsel supposed pub-

lication was made and knew nothing to the contrary, until a short while before the term, not in time to make publication to that term.

Upon the foregoing facts, his Honor, *Shipp, Judge,* ordered the Clerk to make the publication asked for by the plaintiff, returnable to the next term of the Court.

The defendant's counsel moved again to dismiss the action, suggesting a discontinuance. This was refused, and the defendant appealed.

Mr. M. L. McCorkle for the plaintiff.
Messrs. Coke & Williamson for the defendant.

ASHE, J., (after stating the facts). It is provided by sec. 273 of The Code that "the judge or court may, before and after judgment in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or *mistake in any other respect,* or by inserting other allegations material to the case, or where the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved." This section gives the court the most ample and liberal powers of amendment. The court has the power to allow the amendment of an affidavit upon which a warrant of attachment has issued, although the former affidavit was wholly insufficient. *Brown v. Hawkins,* 65 N. C., 645.

In *Austin v. Clark,* 70 N. C., 485, BYNUM, *Judge,* speaking for the Court said: "The Code of Civil Procedure invests the Court with ample powers in all questions of practice and procedure, both as to amendments and continuances, to be exercised at the discretion of the Judge presiding, who is presumed best to know what orders and what (335) indulgence will promote the ends of justice in any particular case."

In *Price v. Cox,* 83 N. C., 261, an exception was taken to the order of publication and to the affidavit upon which it was founded, to remove which the Court gave leave to the plaintiff to proceed with a new publication, and upon appeal the ruling was upheld, as within the power of the Court and as a proper exercise of judicial discretion.

In commenting on this case the Chief Justice, in *Bank v. Blossom,* 92 N. C., 695, said: "Why should it not be so? The purpose of publication is to give notice to the absent defendant, and if the plaintiff has made one ineffectual effort to give it, we see no adequate reason why upon *cause shown,* the Court in exercise of the liberal power of amendment conferred, may not allow a second and correct publication to be made that shall conform to the law."

In the case of *Church v. Furniss,* 64 N. C., 659, the action was commenced by a summons returnable 1 November, 1869, before a magistrate, and at the same time a warrant of attachment incident thereto, was issued, upon the allegation that the defendant had left the State.

The summons was returned "not to be found." On the next day the plaintiff, upon a suggestion that the advertisement, which had been ordered, had *by accident* not been duly made, obtained a continuance of the case for four weeks. On the 25th of December, the magistrate dismissed the action because the summons had not been duly returned. The plaintiff appealed to the Superior Court, and it was there held that the failure to make the return as above was no discontinuance, and then, on the appeal of defendant to this Court, the judgment of the Superior Court was affirmed, and in the opinion of this Court, it was said that *"the substantial process was the advertisement, and as this could not be made by* 1 *November, and by accident failed to be made by* 26 *November, we think the justice had the power and right not inequitably to extend the time."*

"A discontinuance results from the voluntary act
(336) of the plaintiff in not going on regularly with the successive connecting processes, and thereby producing a break or *hiatus,* to which such effect is ascribed." *Penniman v. Daniel,* 91 N. C., 431, and *Etheridge v. Woodley,* 83 N. C., 11.

But here there was no such voluntary act on the part of the plaintiff in not obtaining the publication. He obtained the order from the Court, paid the expense of the publication to the editor in the presence of the clerk, took a receipt for the sum and filed it with the papers. The failure to make the

publication was entirely owing to the misprision of the clerk, whose duty it was to obey the order of the Court.

We think there is a distinction between the issuing of summons to be served personally, and its service by publication. In the former case, it is not the duty of the clerk to issue a summons unless it is demanded by the plaintiff. In *State v. Wood,* 25 N. C., 23, DANIEL, Judge, speaking for the Court said: "We believe it has been usual for the clerks of the courts in this State to issue process, notices, copies of orders made in civil causes, and place them in the hands of sheriffs to be served and executed, but we are ignorant of any law *that makes it the official duty of the clerk to do so.*" It being the duty of the plaintiff to apply for a summons, if he should fail to do so, so as to make a *hiatus* in the regular issuing of the summons, it is held to be a discontinuance of his action, because the omission is ascribed to his own fault. But we do not think this principle applies to the service by publication, when an order is obtained, and the expense of publication paid, for there the plaintiff is in no default, because it is the duty of the clerk to obey the order of the Court.

We are of opinion the Court below had the power to order the publication, and the failure to make it under the circumstances of the case did not work a discontinuance of the action.

NO ERROR. Affirmed.

Cited: Cushing v. Styron, 104 N. C., 341; *Sheldon v. Kivett,* 110 N. C., 410.

(337)
T. J. FERGUSON, Gdn., v. WILLIAM KINSLAND et al.

Deeds—Execution of, by Feme Covert.

1. Deeds conveying the lands of *femes covert*, must be jointly executed by both husband and wife, and the acknowledgment of the deed by the husband must precede the privy examination of the wife.
2. The Act of the Legislature requiring the joint execution of deeds by husband and wife in order to pass the title to the lands of the wife, is not opposed to the constitutional provision which secures to the wife all of her property, and allows her to convey her lands, with her husband's written consent, as if she were unmarried. It is a legislative direction as to the manner in which this power must be exercised.
3. So where a *feme covert* executed a deed for her land without the joinder of her husband, who, however, at the time of the execution of the deed, executed a separate paper giving his consent to the execution of the deed by his wife, but this paper was not proved or registered until after the deed from the wife; *Held*, that the deed was invalid and did not convey the land to the grantee.

(*McGlennery v. Miller*, 90 N. C., 216, cited and approved.)

ACTION, tried before *Gilmer, Judge*, and a jury, at Spring Term, 1885, of HAYWOOD.

In deducing title to the land in controversy in the action, the plaintiffs exhibited in evidence a deed for the premises executed on 8 September, 1875, to their immediate ancestor, E. R. Ferguson, by Laura L. Chambers and J. A. Dotson and wife, L. C. Dotson. The said Laura L. was then a married woman, whose husband, Joseph Chambers, did not join in the deed, nor is his name mentioned in the body of it, but he gave his assent to the act of the said Laura L. by a contemporaneous execution of a writing in these words: "Joseph Chambers, husband of L. L. Chambers, the party to the above deed of conveyance from her to E. R. Ferguson, hereby consents and agrees to the execution of the same by her. Witness my hand and seal this 8 September, 1875.

"JOSEPH (His X Mark) CHAMBERS, (Seal).

"Attest: A. J. Fincher."

The same subscribing witness and another attest (338) the execution of the deed.

The deed being exhibited before the clerk, acting in his capacity of Probate Judge, on 6 June, 1876, he issued a

commission to one A. J. Davis, a justice of the peace, directing him to take the privy examination of the *femes covert,* L. C. Dotson and Laura L. Chambers, touching their voluntary execution of the deed, to which he made return as follows: "Personally appeared before me, A. J. Davis, justice of the peace of Haywood County, L. C. Dotson and L. L. Chambers, wives of J. A. Dotson and Joseph Chambers, and acknowledged the due execution of the deed of conveyance; and the said L. C. Dotson and L. L. Chambers, being by me privily examined, separate and apart from their said husbands, touching their voluntary execution of the same, do state that they signed the same freely and voluntarily, without fear or compulsion from their said husbands, or any other person, and that they do still voluntarily assent thereto.

"Witness my hand and seal, this 24 June, 1876.

"A. J. DAVIS, J. P. (Seal.)"

Upon this report, the probate was adjudged sufficient and the deed ordered to be registered, and it was accordingly registered with the probate.

The instrumnt giving the husband's assent and bearing his signature and seal, was proved on 13 April, 1885, by the subscribing witness, A. J. Fincher, before the succeeding clerk, J. K. Boone, and upon his adjudication and order admitted to registration.

Upon the trial the Court ruled that the deed and accompanying written consent, by reason of the non-joinder of the husband, was insufficient to divest and pass the estate of the said Laura L. in the land, and the plaintiffs thereupon submitted to a nonsuit and appealed.

Mr. Geo. A. Shuford for the plaintiff.
Mr. Theo. F. Davidson for the defendants.

SMITH, C. J., (after stating the facts). The Code of Civil Procedure provides that every conveyance, (339) power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments, *must be jointly executed by such married woman with her husband,* and due proof or acknowledgment thereof must be made as to the husband, etc. Sec. 429, par. 6.

The same words are contained in the amendatory act of 1869, ch. 279, sec. 429, followed by a clause extending the jurisdiction, before only exercised by the Probate Judge of the county wherein the real estate is situated, to the same officer in every county. Substantially the same provisions will be found in the Revised Statutes, ch. 37, sec. 9, and in the Revised Code, ch. 37, sec. 8, all of which, in positive terms, *require* the joint execution of the deed by the husband and wife in order to transfer her estate in land.

The only point made by the appellant's counsel, is that the constitution, art. 10, sec. 6, which secures to a married woman all the property acquired previous to and since her marriage, as her sole and separate estate, free from her husband's debts, and confers upon her power to devise and bequeath, and, with her husband's written consent, to convey it, as if she were unmarried, sanctions this mode. But it is for the General Assembly to provide the method by which this right may be exercised, as it has done heretofore when her real estate was not less her own, and when she was permitted to convey it only by observing a prescribed form. The requirement that the husband should execute the same deed with his wife, was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him. These have been deemed prudent safeguards to insure freedom of volition and action on her part when she is disposing of her real property, and these are none the less necessary now, when she retains her full real and personal estate. The statute in force when the deed was made, comprehends her sole and sepa-
(340) rate estate in land, retained under the Constitution, as well as that she held before, after entering into the marriage relation. It no more abridges her rights of property, and is but a legislative direction as to the manner in which it may be exercised. The consent necessary under the Constitution, must be given in the manner provided by law, and whether by the husband's writing in the deed, or by a separate writing as attempted here, it equally restricts her capacity of disposal, and is alike exposed to the imputation of being in conflict with the Constitution.

While this legal experiment of departing from established forms and introducing new methods of alienation for *femes covert,* fails of its intended object, the manner of probate is not less at variance with the law. The execution by the husband is an indispensable preliminary to the private examination, more especially when this is taken under a commission. Without further citations, we refer to a recent case for an authoritative declaration of the law, *McGlennery v. Miller,* 90 N. C., 216.

This was not done, perhaps could not be done, when the instruments are separate and disconnected. The *feme's* deed was registered in 1876; the husband's written assent in 1885, nine years later.

We concur in the ruling, that the deed was legally inoperative upon the estate of said Laura L., and the plaintiffs acquired no title to it thereby.

NO ERROR. Affirmed.

Cited: Southerland v. Hunter, ante, 311; *Lineberger v. Tidwell,* 104 N. C., 511; *Strouse v. Cohen,* 113 N. C,. 353; *Barrett v. Barrett,* 120 N. C., 129; *Green v. Bennett, Ib.,* 396; *Slocomb v. Ray,* 123 N. C., 573, 576; *Jennings v. Hinton,* 126 N. C., 57.

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(341)

J. TURNER et al. v. A. M. POWELL et al.

Certiorari—Appeal.

1. Ignorance of the legal requirements in executing and filing the undertaking upon appeal will not entitle an appellant to a writ of *certiorari* in lieu of an appeal.
2. The ignorance or carelessness of the appellant's counsel in preparing the appeal bond, will not entitle the appellant to a writ of *certiorari* in lieu of an appeal, where the appeal is lost because the bond is imperfect.

(*Winborn v. Byrd,* 92 N. C., 7; *Suiter v. Brittle, Ibid.,* 53, cited and approved.)

APPLICATION by the defendants for a *Certiorari* in lieu of an appeal, heard at October Term, 1885, of the Supreme Court.

The petitioners appealed from a judgment rendered against them in the Superior Court of the county of Catawba in the action of *J. Turner, et al., v. A. M. Powell, et al.,* pending therein, to the last Spring Term of this Court.

A motion was made at that term to dismiss the appeal, because there did not appear to be an undertaking upon appeal as required by law. That motion was allowed. Afterwards, during that term, it was made to appear that such undertaking had been given, but had been mislaid, and through oversight had not been sent up with the transcript of the record, as regularly it ought to have been, and a motion was made to reinstate the appeal upon the docket. This motion was resisted upon the ground that the affidavit of the sureties, or one of them, justifying the undertaking, failed to state that he was worth *double* the amount of money therein specified, and it so appearing, their motion was denied.

Thereupon the appellants filed their present petition, praying for the writ of *certiorari* as a substitute for their lost appeal. It sufficiently appears that there was reasonable cause for their appeal taken, and they assign as excuse for failing to perfect their appeal as required by law, that in perfecting it, they had employed an attorney "who
(342) wrote out an undertaking which was signed by each of the said appellants and by H. D. Abernathy and O. M. Royster, as sureties, before a notary public, or a justice of the peace of said county, as your petitioners were advised by their said attorney was sufficient, and the same was sent by mail (postage paid) to the Clerk of the Superior Court of Catawba County. * * * * That they have never abandoned their said appeal or intended to do so, but have always intended, and have done all in their power under the advice and supervision of their counsel, to prosecute the same."

Messrs. D. Schenck, L. M. McCorkle and *Batchelor & Devereux* for the plaintiffs.

Messrs. Geo. V. Strong and *F. L. Kline* for the defendants.

MERRIMON, J., (after stating the facts). It is plain that the petitioners fail to show any sufficient legal excuse for

their failure to perfect their appeal as required by the statute in such cases. It has been decided repeatedly that "mere ignorance of the legal requirements in executing or filing the undertaking upon appeal will not excuse and entitle him (the appellant) to the writ of *certiorari* as a substitute for the lost appeal." The appellant is always "*presumed* to know the law, and must inform himself in respect to what is required of him." "He must be diligent and careful in complying with its requirements;" "it will not excuse or help the slothful, the careless and negligent litigant; he sleeps upon his rights, forgets and neglects his duties at his peril." *Winborn v. Byrd,* 92 N. C., 7; *Suiter v. Brittle, Ibid.,* 53.

But the counsel for the petitioners earnestly insisted on the argument that they acted upon the advice of counsel and were advised or misled by him. We do not concede that such excuse, if it existed, would be sufficient. The ignorance or carelessness of counsel, certainly outside of the scope of his duty in the course of his action, could not be allowed to prejudice the opposing party. It is the misfortune or neglect of a party to employ counsel unskilled in the law, clearly so, in respect to matters about which there (343) can be no doubt. It is not the province of the Court to aid one party to the prejudice of another, simply because his counsel gave him bad advice.

If, however, this were so, it is not alleged in the petition, nor does it appear, by affidavit or otherwise, that the intelligent counsel named in the petition advised the petitioners that the affidavit made by the sureties to the undertaking was sufficient. The strong probability is, he did not. It is presumed that he knew the law and advised his client correctly, if at all. Besides, no affidavit of himself or any one else is offered to prove that he did. The undertaking now on file appears to be in one handwriting, probably that of the counsel, while the affidavit of the sureties appended to it is in a different one, purporting to be that of the justice of the peace.

From what appears, it seems that the counsel may have advised that it would be sufficient to make the affidavit before a notary public or a justice of the peace. If so, this was correct; but this did not imply that such affidavit as was made was sufficient.

This is the ordinary case of negligent mistake in such cases, such as we have no authority to correct or aid. The appellees in the appeal, who are the respondents here, insist upon their rights, and these are such under the statute, very explicit and mandatory in its terms, as we must observe and administer. The petition must be dismissed.

PETITION DISMISSED.

Cited: Griffin v. Nelson, 106 N. C., 238.

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(344)

STATE ex rel. K. H. WORTHY v. ALFRED BROWER.

Administrator—Devastavit—Reference—Evidence—Partship—Slaves, Emancipation of—Refunding Bonds.

1. The bond of a deceased administrator can not be charged, in an action by the administrator *de bonis non*, with solvent notes, which went into the hands of the administrator *de bonis non*, and could have been collected by him.
2. Where, in a series of findings by a referee, some are proper, an exception to the whole will not be allowed.
3. Where, in a book in which the administrator kept his account with the estate, a certain note due to the estate is marked "paid," but the entry bears date before the death of the intestate; *Held*, not a proper charge against the administrator, in the absence of evidence that the amount was paid to him.
4. Where, in his inventory, an administrator returned the receipt of a deputy sheriff for four bonds due the estate of his intestate as being in his hands, which receipt was found among the papers of the estate at his death; *Held*, that he was not chargeable with the amount of the bonds.
5. Where there is no evidence of the solvency of a note due the estate, found uncollected among the papers belonging to the estate, after the death of the administrator, and it is found by the court below, that even if solvent, the collection was delayed and impeded by the stay laws and the general disturbed condition of the country, the administration bond is not responsible to the estate for the amount of the note.
6. Where one partner dies, the surviving partner has the right, and it is his duty to settle up the partnership matters. So, where on the death of a partner, his administrator did not have a settlement with the surviving partner of his intestate's interest in the firm, his bond is not liable for the amount of such interest in an action

by an administrator *de bonis non*, in the absence of evidence that any detriment came to the estate by the failure of the first administrator to have a settlement. In such case the right to enforce the settlement, passed to he adminisrator *de bonis non.*

7. In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business.

8. Where an intestate was possessed of a large number of slaves at his death, and other real and personal property more than sufficient to pay all of his debts, and his administrator, who was one of the next of kin, had the slaves divided among the distributees, but took no refunding bonds; *Held*, 1st, that this was technically a *devastavit*, although the creditors of the intestate had a right to follow the property and subject it to their debts; 2d, that by the emancipation of the slaves by the Sovereign, the condition of the refunding bonds, had any been taken, would have been fulfilled, and therefore, that as the creditors have suffered no harm from the *devastavit*, they can not recover therefor out of the administration bond.

9. Where an administrator pays taxes out of the funds of the estate, assessed against his intestate as guardian, it is an (345) improper disbursement, and his bond is liable therefor.

10. Where an administrator pays debts of inferior dignity, he is liable, unless he had funds of the estate in his hands sufficient to pay all the debts.

(*Brumble v. Brown*, 71 N. C., 513; *Whitford v. Foy*, *Ibid.*, 527; *Meekins v. Tatem*, 79 N. C., 546; *Suit v. Suit*, 78 N. C., 272; *Barnhardt v. Smith*, 86 N. C., 473; *Bost v. Bost*, 87 N. C., 477; *Taylor v. Taylor*, 6 N. C., 70; *Hinton v. Whitehurst*, 68 N. C., 316, cited and approved.)

ACTION, tried before *MacRae, Judge,* on exceptions to the report of a referee, at December Special Term, 1883, of MOORE.

The facts are fully stated in the opinion.

Mr. E. C. Smith for the plaintiff.
Mr. M. S. Robins for the defendant.

SMITH, C. J. Robert W. Goldston died intestate early in October, 1861, and letters of administration on his estate issued to George W. Goldston, who entered into a bond in the penal sum of thirty thousand dollars, with the defendant and one Crabtree Siler, sureties, with the conditions prescribed by law, for the faithful execution of the trust assumed. Without completing administration, George W. Goldston died in July, 1863, and letters *de bonis non* on the intestate's estate issued to Noah Richardson. The latter also died in May, 1867, and letters *de bonis non* were then granted to one Alexander Holley, then public administrator, and

he having resigned his public office, the relator became administrator *de bonis non* of the original intestate. The present action is on the administration bond of the first administrator, George W., against the surety, in which maladministration, waste and negligence are charged, to recover the assets which are, or ought to be, in the hands of the said George W., as principal obligor therein, and was begun by the issue of a summons on 30 August, 1876.

To the complaint filed, a demurrer was interposed (346) by the defendant, which was overruled, and the defendant then answered, admitting some of the plaintiff's allegations, and controverting others for want of personal knowledge, or "information thereof sufficient to form a belief." At Fall Term, 1877, the clerk of the Superior Court of Moore, being a creditor of the estate, and interested in the result, an order was entered, of reference to C. C. Wade, clerk of the Superior Court of Montgomery, to take and state the administration account of the said George W. Under a ruling of the Court, the relator was required to furnish, and did submit, a statement of the trust funds that had come into his hands, a detailed list of which, verified by his oath, is contained in the record. The commissioner proceeded under the reference, and with accompanying evidence, made report to a succeeding term. To the report many exceptions were taken by each party, and the finding of the referee being deemed insufficient, with consent, it was recommitted to him with directions to ascertain from the evidence already taken, and report the facts responsive to a series of inquiries which are set out in the order. The referee accordingly made a second, or, as it is called, a supplemental report at Fall Term, 1883, to which further and additional exceptions were also taken by each party. In accordance with the rulings of the Court, the report was again referred to R. P. Buxton for correction and reformation, and he reported an account showing an excess of disbursements made by the intestate's first administrator, the said George W., above the value of the assets with which he is charged, of three thousand and ninety-six dollars and forty-four cents ($3,096.44), estimated with interest to 6 Febru-

ary, 1882, and reducing the excess as reported by the first referee by the sum of three hundred and ninety-seven dollars ($397.)

This preliminary statement of the action of the Court, is sufficient to enable us to enter upon an examination of the numerous exceptions contained in a record of nearly four hundred pages in manuscript, brought up by relator's appeal.

Plaintiff's exceptions:

1. The referee has not charged the administrator with all the claims, which, uncollected, passed into (347) the hands of Noah Richardson, his successor. We concur with the Court in overruling the exception for the reasons given:

1. That many of them were then solvent and could have been collected.

2. The plaintiff does not specify which of them ought to be charged, and we may add,

3. Because a single objection to a series, valid as to a part only, is not allowable.

The correctness of the ruling is sustained by the following adjudications: *Brumble v. Brown,* 71 N. C., 513; *Whitford v. Foy, Ibid.,* 527; *Meekins v. Tatem,* 79 N. C., 546; *Suit v. Suit,* 78 N. C., 272; *Barnhardt v. Smith,* 86 N. C., 473; *Bost v. Bost,* 87 N. C., 477.

2. The relator's second exception is to the omission to charge the administrator with one of the claims in a list found in a book wherein the administration account is kept, marked in pencil as paid. The entry bears date 14 June, 1861, four months before the death of the intestate. Many others are also marked paid with which he has charged himself. It does not appear whether this debt was paid during the intestate's lifetime or since, nor is there any other evidence that payment was made to the administrator, or that the entry was intended for any purpose except to designate it as a paid debt, no longer due, and relieve the debtor from a further demand. The Court upon these facts refused to sustain the charge, inasmuch as the administrator has charged himself with all others so marked, and his death deprives the defendant of all

means of explanation. We are not disposed to disturb this ruling of the Court.

3. The third exception is to the referee's refusal to charge the administrator with certain bonds, notes, and a judgment received and inventoried by the administrator, and specifically mentioned in the exception.

Of these, three of inconsiderable amount are with-
(348) drawn by the relator—the exception sustained as to the notes of Wilson and Phillips, whose aggregate principal is $36.53, and overruled as to the two bonds of Davis and the bonds of Short and Stutts, whose united principal is $204.53. This ruling rests upon these findings of facts:

The notes of Wilson and Phillips are returned in the inventory of the intestate's estate to April Term, 1862, of Moore County Court, and no mention is made of them thereafter.

The four bonds, the exception in reference to which is overruled, were returned in a receipt of one J. L. Curry, a deputy of the sheriff, entered in the inventory, and this receipt was among the papers belonging to the estate, at the death of the administrator in November, 1863. There is no error in this.

4. The relator excepts to the omission of the referee to charge the administrator with a debt of $349, due from G. W. I. Goldston to the intestate.

This exception is overruled upon the ground of the absence of any evidence of the solvency of the debtor. The Court says if the debt was good, the collection of it was so obstructed by State legislation in the enactment of a stay law, and by the general disturbed condition of the country, as to excuse the administrator for delaying an effort to enforce payment, and if the debt could not have been collected by reason of the debtor's insolvency, he is not, of course, responsible. The reasons assigned for not sustaining the exception seem sufficient.

5. The fifth exception is abandoned.

6. This exception is to the failure of the referee to charge the administrator with one-half of the value of a stock of goods belonging to the firm of Goldston & Hanner, in which the intestate was senior partner, and which remained in the

hands of the surviving member at his death. The findings upon which this exception is overruled are these:

The administrator and Hanner were partners of the firm named, and were carrying on the joint business when the former died. In the fall or spring preceding the late civil war, the intestate went North and purchased a (349) stock of goods, the unsold part of which, at his death, are estimated to be of the value of $6,000 or $7,000. There is no proof of the interests of the separate partners in the common property; nor of the extent of its indebtedness. The administrator appointed in October, 1861, was stricken with paralysis in August, and died on 3 November, 1863. The survivor had the right, and upon him devolved the duty of settling up the firm business, and he had a reasonable time in which to do so. No settlements seem to have been attempted, and the right of the survivor administrator to bring about this, passed unimpaired to him. It is not shown that any detriment has come to the estate in consequence, and we concur with the Court, that it would not be just to charge the half of this property to the deceased administrator.

We do not assent to the expressed opinion that the interest of the deceased is unascertained and indefinite, for in the absence of evidence to the contrary, the partners are presumed to be equally and alike interested in the joint business. *Taylor v. Taylor,* 6 N. C., 70.

7. The next exception is to the referee's refusal to charge the administrator with the value of the slaves that went into his possession. The facts found bearing upon this point are these: R. W. Goldston owned slaves valued at about $8,000; he also had a large real and personal estate, more than sufficient to pay all the debts and liabilities known to his administrator. He and his sister, Louisa A. Goldston, who were next of kin and distributees, at October Term, 1862, applied for, by petition to the County Court of Moore, and obtained a decree for the partition of the slaves, and they were so divided, and a share in severalty assigned to each, in November. The slaves afterwards became free by the results of the war, and the property in them was lost.

This partition vested a separate and several title in the respective co-tenants, and as no refunding bonds were given,

was in strictness a *devastavit,* and this notwithstanding the right of creditors in equity to pursue the property, and
(350) subject it to their debts. But if such bonds had been given, they would have afforded no security to the creditors under the rulings of this Court in *Hinton v. Whitehurst,* 68 N. C., 316, and consequently they have suffered no harm therefrom.

8 and 9. These exceptions relate to the same subject-matter, and are in like manner overruled.

10 and 11. These exceptions have reference to the hire of the slaves, and are sustained in the Court below.

12. This exception is withdrawn.

13. The relator objects to the allowance of divers sums paid for taxes in 1861 and 1862, on the ground that the personal estate is not liable for the taxes accruing on descended lands after the ancestor's death, nor the taxes due from the other named persons in the list. The exception is disallowed except as to $9.30, it not appearing, as the Court finds, from the tax receipts that the taxes on lands were paid, or that any assessments were made after the intestate's death. The exception is allowed as to such as were paid for the intestate, as guardian.

14, 15, 16. The 14th, 15th and 16th exceptions are surrendered, and not insisted on.

17 and 18. These are sustained in the Court below.

19. The nineteenth exception is to the allowance of payments made by the administrator, upon a series of specified open accounts, within two years after administration granted, while there were unsatisfied debts, of higher dignity, outstanding. The principal so paid on open accounts is $328.39 or thereabouts.

The Court overrules this exception on the ground that the estate was amply solvent, and so continued during the administrator's lifetime. But it is not found that the personal estate alone was sufficient. We do not agree in this view of the case, and the administrator had no right thus to apply the funds, nor is he excusable unless he had an amount sufficient, without touching the real estate. He ought to be charged with this amount, and we reverse the ruling of the Court in this particular.

We are next to consider the relator's exceptions to the supplemental report. (351)

The exceptions numbered from 1 to 9 inclusive, are withdrawn, and these, as well as those mentioned from 11 to 17, also inclusive, are based upon an averment that the findings referred to are "contrary to the evidence."

These have no place upon the hearing in this Court, and the decision of the Court below is conclusive.

20. This exception is sustained in the Court below.

Defendant's exceptions: These, six in number, are all but two disallowed, and the defendant not having appealed, the rulings thereon are not before us.

2. The second exception as to the charge against the administrator of the price of shingles, to-wit: $9, and $9.59 interest, bearing date April 26, 1864, after his death, was properly sustained.

5. The 5th exception to the administrator's being charged with certain household furniture divided, as were the slaves, between the distributees, allowed upon the ground of the sufficiency of the real and personal estate to pay all the debts, must be reversed, and the relator's exception thereto sustained. This is a part of the personal estate which did not perish, as did the property in slaves, and ought to be accounted for in this action.

We have thus considered the various matters involved in the relator's appeal upon the facts established before the Court, by which our examination of them is controlled, this being an action at law under our former system, and as the record, inclusive of evidence, approaches 400 pages in manuscript, it is manifest the already onerous labors of the Court would be greatly increased if we were to pass upon the appeal as a case *de novo*.

The report must be amended and corrected by the further credits allowed the relator, to which end, if the parties require, a reference must be made to the clerk, though it may prove of little practical value in view of the large credits allowed to the administrator.

ERROR. Modified.

Cited: *Gay v. Grant,* 101 N. C., 210; *Roper v. Burton,* 107 N. C., 540.

(352)

E. A. MORGAN v. THE FIRST NATIONAL OF CHARLOTTE.

National Banks—Jurisdiction—Usury—Waiver—Variance.

1. Where an Act of Congress contains no provisions in reference to the exercise of jurisdiction in enforcing a penalty provided by the act, the State courts have jurisdiction of an action to enforce such penalty.
2. Congress has the power to deprive the State Courts of jurisdiction of action brought to enforce a right arising under an act of Congress, and this may be done by implication as well as by express provision.
3. Prior to the Act of Congress of 1882, only the United States Circuit and District Courts, and the State, County or Municipal Courts in the county where a National Bank was located, had jurisdiction of an action to recover the penalty for taking usurious interest imposed by sec. 5198 of the Revised Statutes of the United States. Since the Act of 1882, any State Court has jurisdiction to which jurisdiction would have attached, had the action been against a State Bank.
4. Where, prior to the Act of 1882, an action was brought against a National Bank for charging usurious interest, in the Superior Court of the county in which the plaintiff resided, instead of in that in which the defendant was located, the objection to the jurisdiction must be taken before pleading to the merits, or the defect is waived.
5. The objection that the averments in the complaint are so vague and uncertain that no judgment can be rendered on it, comes too late after an answer has been filed denying the allegations.
6. Where a complaint in an action for usury specified the principal sum constituting the original debt, and the dates and amounts of the usurious payments of interest, it is sufficiently definite, as it furnishes the defendant with all the information necessary to make his defense.
7. Where on the trial below, the defendant's counsel alleged that there was a variance, but made no answer when asked by the Court if he had been misled thereby; *Held*, such variance, if any, is thereby rendered immaterial.
8. In an action against a National Bank for usury the complaint need not negative that there are no State banks of issue which by law are allowed to charge more than eight per cent.

(*Lafoon v. Shearin*, 90 N. C., 370; *Halstead v. Mullen, ante*, 252, cited and approved.)

ACTION tried before *Philips, Judge,* and a jury, at Spring Term, 1885, of CLEVELAND.

The facts appear in the opinion.

There was a verdict and judgment for the plaintiff, (353) and the defendant appealed.

Messrs. R. McBrayer and *Batchelor & Devereux* for the plaintiff.

Mr. W. P. Bynum for the defendant.

SMITH, C. J. The plaintiff's action, commenced on 19 June, 1882, in the Superior Court of CLEVELAND, against the defendant, a corporation formed and doing business as a banking association under the Act of Congress, at Charlotte, in Mecklenburg County, is to recover double the amount of usurious interest exacted and paid for several years upon loans of money, as set out in the complaint. To these allegations the defendant opposes a direct denial, and also relies upon the defense of the statute of limitations prescribed in the act, which requires the suit to be begun within two years. Banks organized under this law are allowed to take such interest on the loan of money as is authorized by the law of the State wherein such bank is located, and no more, except that if a greater rate is permitted to banks of issue organized under the laws of the State, the national associations may charge the same. Rev. Stat. U. S., sec. 5197. The plaintiff's claim is based upon the concluding clause of the next section, 5198, which is in these words: "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: *Provided*, such action is commenced within two years from the time the usurious transaction occurred."

This section, by the subsequent act of 18 February, 1875, was amended by adding thereto the following: "That suits, actions and proceedings against any association under this title, may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established, or in any State, County or Municipal Court, in the county or city in which (354) said association is located, having jurisdiction in similar cases." As the National Banking Act, in its original form, contained no provision in reference to the exercise of jurisdiction in enforcing the penalty incurred by the exaction of usurious and unlawful interest on loans, and the law was general and operative, as such, upon all judicial tribunals,

State as well as Federal, the Courts of the State could take cognizance of violations of the enactment and afford redress to suitors who sought their aid. This concurrent power when not committed, under the Constitution and laws of the United States, to the exclusive jurisdiction of their own courts, would be shared by the courts of the State, according to the measure of jurisdiction conferred upon them by the laws of the State, as decided in many cases, and upon an elaborate argument delivered by Mr. Justice *Bradley* in the opinion in *Clafton v. Houseman,* 93 U. S., 130, in support of the right of an assignee in bankruptcy to sue in a State Court for the recovery of part of the trust estate. The cases therein cited are demonstrative of the conclusion reached by the Court.

But the exclusion of the State Courts from participating in the administration of a law of the United States, and enforcing its commands and penalties, need not be in express and positive terms, but may be by clear and manifest implication; and when certain local State Courts are designated as the depositories of the power, the inference must be drawn of an intentional withholding of it from others not of that class. This implication of a purpose to confine the exercise of a general jurisdiction possessed by the Courts of the State over suits prosecuted for the imposed penalty of taking unlawful interest, is manifestly found in the amendment of 1875, which specifies the local Courts to whom the jurisdiction is confided, and none others therefore may rightfully exercise it. This conclusion unavoidably follows from the terms of the amendment. But the section was again modified by the "act to enable banking associations to extend their corporate existence and for other purposes," approved 12 July,
(355) 1882, which enlarges the sphere of jurisdiction of the State Courts by substituting for the former the following amendment:

"That the jurisdiction of suits hereafter brought by or against any association established under any law providing for national banking associations, except suits, etc., (not embraced in the present inquiry) shall be the same as, and not other than, the jurisdiction for suits by or against banks, not organized under any law of the United States, which do, or

might do, banking business where such national banking association may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso, be and the same are hereby repealed." Acts 47th Congress, 1st session, chap. 290, sec. 4.

This enactment opens the doors for the entry of suitors, aggrieved by oppressive usurious charges exacted, into the Courts of the State, competent to furnish redress, had the cause of action originated in the like lawless conduct of a bank chartered by the State. But the plaintiff's case takes no benefit under the change in the law, inasmuch as he began his suit in the month of June, previous to the approval of the act, and its operation is restricted to such suits as may be, using its own words, *"hereafter brought,"* and does not apply to such as were then depending."

In committing jurisdiction to the special courts mentioned in the amendment of 1875, it left that jurisdiction to be exercised under the State laws, which direct and govern their practice and mode of procedure. The assumption of cognizance of the cause by the Superior Court of Cleveland, instead of the same Court of Mecklenburg, stands upon the same footing as the assumption by the Court of a county, of jurisdiction of a matter of State law which it does not possess, and which is confided to the Court of a different county. The objection to the jurisdiction in such case must be made *in limine,* before putting in an answer, and, if well taken, the result is a transfer to the Court of a county which has jurisdiction. The Code, sec. 195. *Lafoon v. Shearin,* 90 N. C., 370. It is not a defect in the jurisdiction of (356) a State Court over the subject-matter in dispute, but the selection of the wrong local Court wherein it is to be exercised, the remedy for which is the transfer of the cause to the rightful Court, at the election of the defendant; and when, no such election being made, the Court proceeds to trial, it is a waiver, too late to recall, and it must abide the result. There is no analogy to be found in the rule applicable to Courts of limited and special jurisdiction, such as those of the United States possess, and which is delegated in its full extent by positive law.

In these, whenever upon the face of the proceeding a want

of jurisdiction appears, the Court of its own motion and without a formal exception taken, will refuse to proceed further. But the State Superior Courts possess general jurisdiction, and will be interrupted in a particular case, only when in apt time the objection is brought forward and passed on.

The appellant insists that the averments in the complaint are so vague and uncertain, that no judgment can be rendered upon them, and it should therefore be arrested.

The defendant, without making this exception, which, if maintainable, might have been removed by amendment making the allegations more specific, proceeded to answer and controvert the allegations of fact, as fully understood by it.

Testimony was not allowed to sustain any but the second and fourth counts or separate causes of action set out in the complaint, and the others were practically eliminated from it. In examining those which evidence was introduced to support, we think they do sufficiently describe the wrongful acts and exactions out of which the cause of action arises.

They specify the two separate principal sums constituting the indebtedness and the moneys exacted as usurious, at intervals of sixty days thereafter, the dates of each being given up to the institution of the suit on 13 June, 1882. All such as were received anterior to the two years immediately preceding, were rejected, and the jury allowed to render a verdict for double the sums thus taken during that period.

(357) The debt and usury are in each specified; the one in the second, the other in the fourth cause of action assigned; and the defendant is furnished in these allegations with all the information necessary to make his defense, and this is the office of the complaint, as it was of the old declaration in pleading.

The appellant again, upon the trial, alleged that there was a variance between the allegations in the complaint and the proofs offered, in reference to which the Court inquired of the defendant's counsel, if he had been misled thereby, without receiving any response, with a view to the correction, if necessary, under sec. 269 of The Code. We have had occasion to comment on this position in *Halstead v. Mullen, ante,* 252.

The appellant's counsel further, in support of his motion

in arrest of judgment, urges that the complaint is fatally defective in failing to negative that there are State banks of issue, which, by the law, are allowed a greater rate of interest than is allowed by the general law of the State. It is to be observed that the complaint avers a taking of interest for a forbearance of a loan of money, greater than at the rate of eight *per centum* per annum, and the Court judicially takes notice of the fact that this is the maximum allowed by contract under the general law of the State, and that no banking institution incorporated by the State, can legally take more. Why was it necessary to make the averment that the highest legal rate allowed by law was that mentioned, or that no more could be demanded and taken by a State bank? Each would have been a public law, and when the facts are stated which show its violation, and the incurring the penal liability therefor, this must be sufficient as a statement of a cause of action against the wrongdoer. It is not necessary, certainly, to say there is no law under which, if there was, the defendant can find shelter for its acts, when the Court knows there is none. It is not like the case of a statute which is itself qualified by an exception, resting upon facts, which facts must be negatived to bring the case under the operation of the law, as the Court has had several times occasion to remark, in considering public criminal accusations (358) in arriving at its meaning. Here the facts are set out which show the law has been violated, and this being known to the Court, relief will be granted and the wrong redressed.

Upon full examination of the exceptions in the light of the able argument of counsel in support, we find, and so declare, that there is no error of which the appellant can complain, and the judgment must be

AFFIRMED.

Cited: County Board v. State Board, 106 N. C., 83; *Cherry v. Lilly,* 113 N. C., 27; *Lucas v. R. R.,* 121 N. C., 508; *Bank v. Ireland,* 122 N. C., 576.

DENTON IJAMES v. E. L. GAITHER et al.

Mortgage—Registration—Notice—Surety—Subrogation—Consideration—Statute of Limitations.

1. Where a mortgage or deed of trust is registered upon a proper probate, it is notice to all the world, of the existence of the mortgage, of its contents, and of the nature and extent of the charge created by it.
2. When a party is put upon inquiry, he is presumed to have notice of every fact and circumstance which a proper examination would enable him to find out.
3. Where a mortgage was executed by a debtor to indemnify his surety, but who had not paid the debt; *Held*, to be notice to a purchaser after its registration, of the right in equity of the creditor to subject the land to the payment of his debt.
4. When a debtor executes a mortgage to his surety to indemnify him, the creditor has an equitable claim to the security, and upon the insolvency of both principal and surety, he may subject the mortgaged land to the payment of his debt, and this is so, not only when the mortgage stipulates that the mortgagor shall pay the debt, but also when it merely provides that the surety shall be saved harmless.
5. This right of the creditor is not lost, although the personal remedy against the surety is barred by the statute, or if the surety has never been damnified and is insolvent.
6. The debt due the creditor supplies the consideration to support the equity.
7. In such case, as soon as the deed of indemnity is executed, the equitable right of the creditor attaches, and it is not in the power of the surety to put it beyond his reach.

(*Flemming v. Burgin*, 37 N. C., 584; *Leggett v. Bullock*, 44 N. C., (359) 283; *Robinson v. Willoughby*, 70 N. C., 358; *Blackwood v. Jones*, 57 N. C., 54; *Wiswall v. Potts*, 58 N. C., 184; *Matthews v. Joyce*, 85 N. C., 258; *Capehart v. Dettrick*, 91 N. C., 344, cited and approved.)

ACTION tried, on a case agreed, by *Graves, Judge,* at Fall Term, 1885, of DAVIE.

The following facts were agreed upon between the parties to the action:

That on 7 April, 1874, the defendant W. B. Jones borrowed of the plaintiff the sum of one hundred dollars, and executed to him his promissory note for the payment of the same, with the defendant R. M. Austin as surety thereon, which is here attached, marked "A."

That on the same day, but after the said R. M. Austin had become surety, he being at the time solvent, Jones executed to Austin a deed of mortgage, dated 7 April, 1874, and duly recorded in the registry of Davie County, on 23 December, 1874, conveying to said Austin the lot of land situated in the town of Mocksville, in said county, and which is described in the pleadings in this action, and is as follows, to-wit:

"Know all men by these presents that I, W. B. Jones, of Davie County, North Carolina, for and in consideration of the fact that R. M. Austin has this day signed my note to Denton Ijames, agent, for the sum of one hundred dollars ($100) as surety, and to secure him in the same, bargain and sell to the said Austin all my right, title and interest in and to a certain lot in the town of Mocksville, and adjoining the lot now occupied by me, and known as the "Dr. Jesse Carter office," to have and to hold to him, the said Austin, and his heirs forever. The condition of this deed is, that if I pay off and discharge the said note held by the said Ijames, agent, on demand, the said deed to be void and of no effect, and if I do not, and said Austin should have the same to pay, then to be in full force and effect.

"Dated this 7 April, 1874.

"W. B. JONES. (Seal)

"Witness: C. Price."

That thereafter, on 19 July, 1876, the said Jones borrowed of the defendant J. M. Clement, who had (360) no actual notice of the mortgage from Jones to Austin, the sum of $288, and executed to him a deed of mortgage conveying to him the same lot of land as security for the repayment thereof.

That Clement advertised and sold the land under his mortgage at the court-house in Mocksville, on 19 May, 1884, at which sale the defendant E. L. Gaither became the purchaser at the price of $201, upon the payment of which, Clement executed to him a deed for the land; that plaintiff was present at the sale, and publicly forbade the same.

That the defendant Gaither is in the possession of the land, and has been since his purchase thereof, and has made permanent valuable improvements thereon.

That R. M. Austin has never paid anything on the note to Ijames, and now refuses to pay anything, and nothing can be made out of him, by reason of his insolvency.

This action was begun by issuing the summons 22 August, 1884. That plaintiff seeks in this action to be subrogated to the rights and benefits of the security taken by defendant Austin, as surety on said promissory note from Jones as the principal therein, and it is submitted to the Court to say upon the facts agreed whether the plaintiff is entitled to the relief.

The Court upon the above facts rendered judgment as follows:

"This cause coming on to be heard upon the pleadings, and a case agreed, before his Honor, J. F. Graves, Judge presiding, it is now, on motion of counsel for the plaintiff, ordered, adjudged and decreed, that the plaintiff recover of the defendant W. B. Jones, the sum of .... dollars, of which sum .... dollars is principal and .... dollars interest and costs. That said claim is barred by the statute of limitation as to the defendant R. M. Austin; and it is further considered that the plaintiff has an equitable right to have the said sum declared a lien upon the real estate described in the complaint; and it is therefore further adjudged, that in case the said
(361) sum above named, is not paid on or before 1 January next, then and in that case the sheriff of Davie County shall, after duly advertising the time and place of sale, in the same manner as sales under execution are required by law to be made, shall sell the real estate described in the pleadings, and of the proceeds of such sale, pay said debt and the cost of this suit, and pay any surplus over to the defendant E. L. Gaither.

"The plaintiff is not entitled to recover any personal judgment against J. M. Clement."

From the judgment the defendant E. L. Gaither appealed.

Messrs. Coke & Williamson for the plaintiff.
Messrs. Watson & Buxton for the defendant.

ASHE, J., (after stating the case). Formerly it was held by our Courts of Equity that notice of a prior unregistered

mortgage or deed in trust might be given by parol, and would give relief against a subsequent deed first registered. The consequence was, that many deeds were withheld from the registry, and were only used when the parties wished to do so.

It was found that many abuses and ills arose from this practice, and to obviate them, the Legislature passed the act of 1820, requiring all mortgages and deeds of trust to be registered within six months from their execution. But it was ascertained that the act only partially relieved the evil, and the act of 1829 was then passed, which provided that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property, as against creditors or purchasers for a valuable consideration from the bargainor or mortgagor, but from the registration," etc., and when a mortgage or deed of trust is registered upon a proper probate, it is held to have the effect of notice to all the world and attaches itself to the legal estate, and is notice to a subsequent purchaser from the mortgagor. *Flemming v. Burgin,* 37 N. C., 584; *Leggett v. Bullock,* 44 N. C., 283; *Robinson v. Willoughby,* 70 N. C., 358.

But it is insisted that the registration of the mortgage which the plaintiff seeks to foreclose, was a deed (362) of mortgage from W. B. Jones to R. M. Austin and not to the plaintiff, and that when the purchaser came to examine the register's books, he found no mortgage from W. B. Jones to the plaintiff, and the registration of the deed from Jones to Austin was no notice to him, of any equity in the plaintiff. But the deed on its face showed for what purpose it was given. It clearly stated that Jones, in consideration of the fact that Austin had signed his note to the plaintiff as security, executed the deed to secure the said Austin against loss or liability as such. It was notice to the world that Jones had conveyed the property in question to Austin as an indemnity to him as surety on his note payable to the plaintiff. If the registration is notice of the existence of the deed, it is notice also of its contents, and of the nature and extent of the charge. 1 Jones Mortgages, sec. 593. For whatever is sufficient to put a party on inquiry, he is presumed to have notice of every fact and circumstance which a

proper inquiry would enable him to find out. 1 Story Jurisp., sec. 400; *Blackwood v. Jones,* 57 N. C., 54.

Assuming, then, that the defendant is affected with notice of the mortgage, the question arises, did the mortgage inure to the benefit of the plaintiff Ijames?

The principle is so well settled, as not at this day to admit of controversy, that when a mortgage is given by a principal debtor to his surety to indemnify him as such surety, the creditor has an equitable claim to the securities, and upon the insolvency of both principal and surety may have the security subjected to the satisfaction of his debt, and this is so, not only when the condition is that the mortgagor shall pay the debt, but also when it merely stipulates that he shall indemnify the surety. Jones on Mortgages, sec. 387. In deeds of this character, it is held that the debt of the creditor supplies the consideration to support it, and consequently the creditor is considered the primary object of the trust, and the indemnity of the surety is secondary, to follow, as an incident, the payment of the debt to the creditor out of the funds which his debtor has provided." *Wiswall v.* (363) *Potts,* 58 N. C., 184. To the same effect is *Matthews v. Joyce,* 85 N. C., 258.

The principle is one founded in the clearest justice. The assignment of the security by the principal debtor to his surety is an implied appropriation of the property or funds to the payment of the debt. For it makes no difference whether the surety appropriates the funds at once to payment of the debt, or advances out of his own pocket the money, he would still hold it for his indemnity, *quacumque via data,* the security is ultimately applied to the payment of the debt. We think it clearly to be gathered from the authorities that as soon as such a deed of indemnity is given, the equitable right of the creditor attaches to it, and it is not in the power of the surety to put it beyond the reach of the creditor. If this were not so, the principal debtor, by collusion with the surety, or by providing against the contingency of his having the debt to pay, which might never happen—the creditor might be hindered and defrauded out of the collection of the debt.

The same doctrine is maintained in Vermont. In *Merrill*

v. Merrill, 53 Vt., 74, it was held that "when an assignment of securities is made by the principal to the surety for indemnity merely, an implied trust is raised in favor of the creditor, which he may enforce on the maturity of the debt, whether the surety has been damnified or not, and whether the principal or surety, either or both, are insolvent," and numerous cases are cited by the Court in support of the proposition.

The fact that the action upon the note in question is barred, after three years, as against Austin, the surety thereto, can not affect the plaintiff's remedy upon the mortgage, for the limitation provided by statute for the enforcement of liens by mortgage is ten years; and although the remedy upon the note may be taken away by the lapse of time, "the debt itself, which the mortgage is given to secure, remains unsatisfied, and the enforcement of the security to coerce the payment of the debt, is permitted upon equitable rules." *Capehart v. Dettrick,* 91 N. C., 344, and cases there cited, (364) and in Jones on Mortgages, sec. 387, the same doctrine is announced, with appropriate application to the facts of this case. There, the author, after laying down the broad proposition that when the principal maker of a promissory note gives a mortgage to his surety on the note, to save him harmless, it creates a trust and an equitable lien for the holder of the note, adds, "and even after the surety's liability to the holder of the note is barred by the statute of limitation, he holds the property subject to such trusts and liens."

NO ERROR. Affirmed.

Cited: Cooper v. Middleton, 94 N. C., 94; *Branch v. Griffin,* 99 N. C., 181; *Harper v. Edwards,* 115 N. C., 248; *Holden v. Strickland,* 116 N. C., 191; *Sherrod v. Dixon,* 120 N. C., 67; *White v. Fox,* 125 N. C., 547; *Blanton v. Bostic,* 126 N. C., 421; *Whitted v. Fuquay,* 127 N. C., 73; *Menzel v. Hinton,* 132 N. C., 663; *Hill v. R. R.,* 143 N. C., 566.

JAMES McNAIR v. THE BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY.

Practice—Amendment.

The court has no power, with or without amendment, to convert an action brought for the purpose of obtaining an injunction, into one for a *mandamus*.

(*Merrill v. Merrill*, 92 N. C., 657, cited and approved.)

ACTION, heard before *Gudger, Judge,* at chambers in Franklin, on 10 October, 1885.

The General Assembly at its last session, held in 1885, ch. 219, passed an act to dispense with individual separate farm-fencing, and to prevent live stock from running at large within the county of Buncombe, sec. 11 of which is in these words: "That upon the written petition of a majority of the registered voters of any township, district or territory with well-defined limits or boundaries, the county commissioners and justices of the peace in joint meeting may, (365) by resolution, suspend the operation of this act in such township, district or territory: *Provided,* such petition is presented to said commissioners and justices of the peace at their annual meeting on the first Monday in June, 1885, and, *provided further,* that this section shall not apply to the following townships, viz: number two, "Lower Hominy;" number four, "Leicester;" number nine, "Asheville;" number ten, "Reem's Creek;" number eleven, "Flat Creek," and number six, "Limestone," in which said townships, this act shall go into effect on 1 November, 1885.

A large number of the registered voters of Black Mountain Township, alleged in the complaint to be a majority, who are entitled to make application, under the section recited, to the commissioners and justices at the designated meeting, signed a petition in the form presented, and sent it by the hands of one of their number for presentation to the body, asking that their territory be not included in the proposed common boundary and the operation of the act be suspended in said township.

The petition was delivered to one of the said justices, who subsequently became presiding officer of the body, to be laid

before it at the proper time. This was not done, and after transacting the necessary and usual county business, and while opportunity was sought to bring up for the consideration of the body, this and similar applications from other townships, the agents for pressing which were present, some disorder occurred, and a motion to adjourn being made was put to the meeting and prevailed, so that none of the petitions were presented or acted on. The commissioners then proceeded under the law, in the construction of a fence to enclose the whole county, and while thus engaged were interrupted by the institution of the present suit on 5 September, 1885, and the service three days later of the restraining order issued upon the allegations contained in the complaint, used as evidence for the purpose.

The commissioners put in their answer, explaining some, and controverting others of the plaintiffs' alle- (366) gations; and the application for an injunction coming on to be heard before Gudger, Judge, at chambers, in Webster, Jackson County, upon the evidence, on 30 September the following judgment was rendered:

"Motion for injunction to the hearing. Motion refused. Plaintiffs except to the rulings of the Court both as to the facts and the law, and appeal to the Supreme Court. But in view of the ruling of the Court as to the alternative *mandamus,* it is ordered that the appeal of the plaintiffs may go up upon the hearing of the motion for *mandamus* without prejudice, and that the appeal bond may be filed at that time as of this time. Upon motion the plaintiffs are allowed to amend their complaint as they may be advised, and they are also allowed to amend their summons in this case so as to make it returnable before the Judge at a day to be named therein, and they may bring in the Justices of the Peace of Buncombe County as parties defendant; and it is agreed that service of the summons on C. B. Way shall be deemed sufficient service upon said justices. It is further ordered, that an alternative *mandamus* be issued to the defendant Board of Commissioners, commanding them to call a joint meeting of the county commissioners of Buncombe County and justices of the peace of said county, for the purpose of exempting by resolution Black Mountain Township from the opera-

tion of the act of the General Assembly known as the 'Buncombe County Stock Law,' or of at least acting upon the petition of the voters of said township (this part of the order not being intended to decide whether the said act is peremptory or merely permissive with regard to the exemption of certain townships named in the act.) Or to show cause before me at Macon Superior Court next ensuing, on Saturday, 10 October, 1885, why they shall not so do, and that said defendant Board and the justices of the peace aforesaid appear before me at the same time and place and show cause why at such joint meeting they shall not exempt Black Mountain Township from the operations of said act."

(367) A copy of this order was served on the several county commissioners while holding their session on the first Monday in October, transacting official business, and they appeared and made answer to the rule, which being adjudged insufficient, the following judgment was then entered:

"This cause coming on to be heard upon the return of the commissioners of Buncombe County to the alternative writ of *mandamus* heretofore issued, and being heard, and the returns of J. E. Rankin and others not being deemed good and sufficient, and it appearing that on the 1st Monday of June, 1885, a petition was delivered to C. B. Way, Esq., who was on said day chairman of the meeting of the joint board of magistrates and commissioners of Buncombe County, which petition, it is alleged, was signed by a majority of the registered voters of Black Mountain Township of said county, praying to be exempted from the operation of an act of the General Assembly of North Carolina, passed at its session of 1885, and known as the Buncombe County Stock Law act, and it further appearing that no action was had or taken by the joint board of commissioners and magistrates at this meeting on the said 1st Monday of June, 1885: It is now ordered and adjudged, that a peremptory writ of *mandamus* issue, commanding that forthwith and without any excuse or delay, the commissioners of Buncombe County and the board of magistrates, to-wit: the justices of the peace of said county assemble in joint meeting in the court-house in Asheville, and consider and determine:

"1st. Whether a majority of the registered voters of Black Mountain Township, had on the first Monday of June, 1885, signed a petition asking a suspension of the stock law act aforesaid, as to said Black Mountain Township; and

"2d. Whether (if a majority of the registered voters of said township have so petitioned), they, the said joint board of commissioners and magistrates, will by resolution declare the said act suspended as to Black Mountain Township of said county."

From this order the defendants appeal, and except thereto on the following grounds, to-wit:

I. For that his Honor had not jurisdiction to make such order in this action. (368)

II. For that the complaint in said action does not state facts sufficient to constitute a cause of action for *mandamus.*

III. For that said action is not an action or proceeding for a *mandamus.* No such relief is sought, asked for, or claimed in said action, and it was not competent for his Honor to grant a writ of *mandamus* in the same.

IV. The order allowing plaintiff to amend the summons and complaint, made by his Honor in this action at Webster, at chambers, was never availed of by the plaintiff, and the action still remains as originally instituted, and is in no sense an action or proceeding for a *mandamus,* and it was not competent for his Honor to treat said action as such.

V. That it was not lawful for his Honor to make the alternative writ of *mandamus* returnable before him at Macon Superior Court, but the same ought to have been made returnable to the Superior Court of Buncombe County.

VI. That the defendants were never served with any alternative writ of *mandamus,* nor was any such writ ever issued in this action.

VII. For that his Honor erred in granting leave to the plaintiff to change the action to an action for *mandamus.*

VIII. For that his Honor did not find the material facts in this case, to-wit: that there was the regular joint meeting of the board of commissioners of Buncombe County and the justices of the peace of said county, on the first Monday in June, 1885, and that no petition of a majority of the registered voters of Black Mountain Township was presented to

said meeting, by, or on behalf of a majority of the registered voters of Black Mountain Township was presented to said meeting, by, or on behalf of a majority of the registered voters thereof.

IX. That his Honor erred in granting said peremptory writ in any possible view of the facts alleged in the plaintiff's complaint, or established by any evidence offered in his behalf.

X. For that the said *mandamus* proceedings in this action are irregular from beginning to end; contrary to the course and practice of the Court in such cases, and not warranted by law.

(369) *Messrs. M. E. Carter* and *F. A. Sondly* for the plaintiffs.

Mr. George A. Shuford for the defendants.

SMITH, C. J., (after stating the facts). In the original complaint stating the grievances of the plaintiff, in that by the hasty adjournment, the application of the voters of Black Mountain District, for relief from the operation of the statute, was not heard and considered, the redress demanded was an injunction against carrying it into effect in that township, and that the commissioners and justices should again meet in joint convention, in order that such application might still be made. The injunction was refused, and thereupon, with no amendment, the action is converted into a suit for a *mandamus nisi* in form at first, and made absolute afterwards. This is not an amendment, but a new and altogether different and independent proceeding, which can not be upheld without subverting fundamental principles of pleading and practice, and introducing inextricable difficulties in the way of pursuing a remedy for a recovery. This wide departure from established rules, which are framed to eliminate the elements of controversy upon the allegations made and controverted by the contesting parties, can not be permitted, if we are to have and preserve any definite principles to guide in the conduct and defense of actions. *Merrill v. Merrill*, 92 N. C., 657.

The conversion of the action into one of a nature wholly different, and the proceeding under it, without any modifi-

cation in the form of the complaint, and, in our opinion, even with such modification, is an irregularity that finds no sanction in the power to amend and perfect, and is a just subject of complaint by the appellants.

There is error, and the action of the Court must be reversed in so far as it undertakes to make a wholly different case from that presented in the pleadings, and the cause will proceed from the point at which this departure took place.

ERROR. Reversed.

Cited: Ely v. Early, 94 N. C., 4; *Clendenin v. Turner,* 96 N. C., 422.

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(370)

JAMES McNAIR v. THE BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY.

Stock Law—Injunction—Discretionary Power.

An act of the Legislature providing a stock law for a county, enacted that upon the written petition of a majority of the registered voters of certain townships, presented to the commissioners and justices at their regular joint meeting in June, 1885, they might, by resolution, suspend the operation of the act in such townships. The registered voters of some of these townships prepared the petitions and sent them to the joint meeting, but on account of some disorder in the meeting, it adjourned without acting on them, and the commissioners proceeded to build a common fence around the entire county: *Held,* 1st. That the petitioners had a right to be heard, and as this had been denied, another meeting should be called for that purpose, although the petitioners had unnecessarily delayed bringing their action. 2d. That the words of the act do not make it obligatory on the justices and commissioners to exclude the townships on the filing of the petitions, but it is left to their discretion. 3d. That the restraining order should not put a stop to the work on the fence altogether, but only on such portions as would interfere with the rights of the petitioning townships, if the meeting should conclude to exempt them from the operation of the act.

(*Grady v. Commissioners,* 74 N. C., 101; *Buckman v. Commissioners,* 80 N. C., 121, cited and approved.)

This was the plaintiff's appeal in the preceding action.

Messrs. M. E. Carter and *F. A. Sondly* for the plaintiff.
Mr. Geo. A. Shuford for the defendants.

SMITH, C. J. The plaintiff's appeal is from the refusal of the Court to continue the restraining order until the final hearing.

From the voluminous evidence, in the form of affidavits, laid before the Court by the contestant parties, in support of, and in opposition to the motion, and not at all in harmony as to what transpired at the joint meeting in June, when, under the statute, application to suspend its operation as to the townships, is required to be made, it is manifest the petitioners were not allowed an opportunity of laying their case before the board, and having it considered and acted
(371) on. The adjournment was sudden and in the midst of disorder, not permitting the presentation of the petition, and thus the right to be heard, at the time designated for the hearing, was denied. In this a wrong was done that may still be corrected by the call of another joint meeting and action taken at it.

Some difficulty in now according this right, is met by the fact that the proviso in section 11 requires the petition to be presented at the June meeting, and acted on at that time; but as time is not so much an essence in the thing to be done, and the commissioners and justices gave no opportunity for its presentation, thus denying a legal right, the Court is warranted in seeing that the petitioners' right is not denied, and in order thereto that another meeting be called. This course is warranted by the decision in *Grady v. Commissioners,* 74 N. C., 101, where the time for holding the election had passed, in consequence of the issue of an erroneous restraining order. *Buckman v. Commissioners,* 80 N. C., 121. Besides, action on this, and similar applications, ought to precede the work of building the fence, since the territory to be surrounded in its extent and limits has not been ascertained.

Again, the plaintiff unreasonably delayed to bring his suit, and permitted the defendants to go on with their work, when he should have acted with promptness to prevent what may turn out to be a useless expenditure of public money. But this possible inconvenience ought not in view of the circumstances attending the conduct of the board, to debar the reg-

istered voters from availing themselves of the denied statutory right, and in our view does not.

The obvious and reasonable interpretation of the words used in the statute, "the county commissioners and justices of the peace in joint meeting, may, by resolution, suspend the operation of this act, in such township, district or territory," is to afford to the registered voters the opportunity of being heard, and their claim to exclusion considered and decided, as in the judgment of the board may be deemed just and proper, and not to confer a right to have such territory (372) exempted. The right to be heard is quite different from a right to have what is asked granted, and the interests of the county, as well as the interests of the township are involved in the determination.

It is suggested that the justices should be made parties, and so the interlocutory order, from which the plaintiff appeals, admits, but this furnishes no reason for withholding the injunction meanwhile, and allowing the work to go on. It may be, that upon the ruling of the Court, the justices, in discharge of a public duty, will meet the commissioners in joint session, and the result be attained, without the necessity of their being brought under the control of the Court, and coerced to act. However this may be, the same necessity remains for suspending operations, and this, by continuing the restraining order, as it before existed.

We do not mean to be understood as giving our approval to the restraining order in its broad and sweeping terms, but it should be confined to the forbidding to be done any of the work that would interfere with the interest of the petitioners and their township, until it shall be decided whether they are entitled to be placed outside the operation of the act. There is no reason why the commissioners may not proceed with their work, so far as it can be carried on without trenching upon the townships and territories which occupy the same relative positions, and are pursuing the same remedies as the plaintiff in this suit.

The restraining order should be thus limited, leaving the commissioners free to act in other respects.

ERROR. Reversed.

Cited: *Jones v. Comrs.*, 107 N. C., 251.

(373)

ROBERT SIMPSON and wife v. ZYLPHIA SIMPSON et al.

Execution Sale—Deeds, Probate of—Wills.

1. Where the maker and both subscribing witnesses to a deed are dead, proof of the handwriting of one of the witnesses thereto is sufficient to authorize its probate and registration.
2. An equity of redemption can not be sold under execution issued on a judgment rendered for the mortgage debt.
3. Where a power of sale in a will is conferred on two executors, one of whom dies, the power can be executed by the survivor.
4. Where a debtor executed a mortgage to his sureties to indemnify them, and afterwards the land was sold under execution issued on a judgment rendered against the principal debtor and one of the sureties, but the executor of one of the sureties was not served with process in such action, and he afterwards conveyed his testator's interest in the land, by virtue of a power conferred on him by the will, in which deed the other surety (mortgagee) joined; *Held*, that the grantee under such deed had the legal title to at least a moiety of the land, and it is intimated that the sale under the execution was inoperative, and the entire legal estate passed.

(*Barwick v. Wood*, 48 N. C., 306; *Davis v. Higgins*, 91 N. C., 382; *Camp v. Coxe*, 18 N. C., 52, cited and approved. *Carrier v. Hampton*, 33 N. C., 307, corrected.)

ACTION for the recovery of land, tried before *MacRae, Judge*, at August Special Term, 1884, of UNION.

The facts fully appear in the opinion.

There was a judgment for the defendants, and the plaintiffs appealed.

Messrs. J. W. Hinsdale and *W. P. Bynum* for the plaintiffs.

Messrs. J. J. Vann and *D. A. Covington* for the defendants.

SMITH, C. J. This action involves a controversy as to the title of the land described in the complaint, which the contesting parties respectively claim. By consent it was submitted to the Judge, in place of a jury, to ascertain and determine the facts, and his findings are as follows:

One Isaac Simpson owned the tract of 110 acres, (374) within whose boundaries are included the land men-

tioned in the complaint and in the various deeds hereinafter mentioned, and he, on 13 December, 1858, conveyed the same to Robert Simpson, and Robert Simpson, on 10 September of the succeeding year, reconveyed to his grantor Isaac.

Objection was made and overruled to the admission of the reconveying deed in evidence, on the ground of an alleged insufficient probate to authorize registration. The probate was in this form:

NORTH CAROLINA,
UNION COUNTY.

Be it remembered that on this, 4 August, 1884, personally appeared Zylphia Simpson, who, after being duly sworn, deposes and says, that she is acquainted with the handwriting of I. L. P. Simpson, a subscribing witness to the foregoing deed, and that his signature to said deed is in his own proper handwriting, and that said witness to said deed is dead, and that William T. Lemmond is also dead. It is therefore adjudged that said deed is sufficiently proven. Let it, with this certificate, be registered. This 4 August, 1884.

GEO. C. MCLARTY, C. S. C.

The exception was not pressed upon the hearing in this Court, and it is manifestly untenable under the rulings in *Barwick v. Wood,* 48 N. C., 306, and *Davis v. Higgins,* 91 N. C., 382, correcting the previous decision in *Carrier v. Hampton,* 33 N. C., 307.

Isaac Simpson on 12 September, 1859, conveyed the land by mortgage to William T. Lemmond and W. L. Simpson, who, by endorsement, had become sureties for him on a note for $312.50, due Robert Sipson on 11 September, 1859, one day after its date, to secure and indemnify them against loss or damage on account of their liabilities as such endorser, but without any power of sale conferred upon the mortgagees. Upon this note, suit was brought by the (375) payee against the principal debtor, the surety, William L. Simpson, and J. Q. Lemmond and E. A. Lemmond, executors of the other surety, William T. Lemmond, who had died since the making the mortgage, to Fall Term, 1869, of Union Superior Court, the summons having been served on

all except the executor last named, and judgment was entered for want of an answer. On this judgment a writ of *fieri facias* issued against all the defendants, including the executor upon whom no service had been made, on 20 November, 1869, to the sheriff, who proceeded to make a levy and sell fifty acres of land of the said Isaac Simpson for the inconsiderable sum of two dollars and a half, to one A. J. Hargett, as is shown in the official return to the writ, and on 4 April, 1870, conveyed the land to him by deed.

Some time in 1870, the precise date not being given, the mortgagee, W. L. Simpson, and J. Q. Lemmond, the surviving executor of the associate mortgagee—William T. Lemmond, the other executor, being dead—united in a deed conveying the land described in the mortgage to W. C. Ogburn, and he, the said Ogburn and wife, then executed their deed for the same to the *feme* plaintiff M. L. Simpson, who then was, and for eleven years previous had been, the wife of the plaintiff Robert.

It appears from the testimony of the said Robert, whose evidence reported by the Court, as understood, is accepted as proof of the fact testified, that the consideration of the last mentioned deed did not come from him, but was paid by his wife, to whom title was made; that he, the witness and plaintiff in the execution, knew nothing of the sale, and gave no directions concerning it, and told W. L. Simpson that Ogburn had settled with him for the $100; to make the deed to him, and credit that sum on the judgment.

Successive deeds were then exhibited for the premises as follows:

1. A. J. Hargett to H. P. Hargett, dated 1 January, 1871.

2. H. P. Hargett and wife to W. H. Simpson, (376) dated 27 March, 1872.

3. W. H. Simpson to E. A. Simpson, 28 October, 1875, the latter being the husband of the defendant Zylphia and the father of the other defendants who were in possession.

The surviving mortgagee and surety obtained his discharge in bankruptcy on 14 July, 1873, operating on his indebtedness as existing on 2 December, 1872, and the estate of the deceased mortgagee and co-surety, W. T. Lemmond, is

insolvent, and will be exhausted in payment of judgments rendered against him in his lifetime.

The other testimony, rather than the facts deduced from it, set out in the findings of the Court, is not material to the disposition of the appeal and is therefore not repeated.

In our opinion, upon the imperfect statements contained in the case, no estate, or, if any, only a moiety passed under the sheriff's sale and deed to A. J. Hargett, the purchaser, and consequently none other was transmitted through the subsequent deeds to E. A. Simpson, under whom the defendants claim.

The legal estate of Isaac Simpson had been divested more than ten years before that sale, and was in the sureties, mortgagees, when it took place; and while one of them, W. L. Simpson, was a defendant in the execution, the land was not levied on or sold as his, but as the property of the principal debtor, Isaac Simpson. The sheriff's return is, that he "levied on the *lands of the defendant Isaac Simpson, fifty acres,* more or less," and such interest only as he had in the premises was the subject-matter of the attempted sale and conveyance to the purchaser. If a wide scope be allowed to this official action and the sale be regarded as made of a specific tract of land, described in the return as that of said Isaac, only for the purpose of identification, and passing the estate of the defendant W. L. Simpson, as mortgagee possessing a moiety thereof, a construction hardly admissible, the effect would be only to convey that legal moiety and not the full title to the purchaser.

The debtor Isaac had only an equity of redemption in the land conveyed for the indemnity of his en- (377) dorsers, which, in legal effect, was to secure the payment of the debt, and thereby their discharge. His equity of redemption could not be sold under execution upon a judgment rendered for the mortgage debt, as is decided in *Camp v. Coxe,* 18 N. C., 52, for reasons clear and convincing.

The plaintiff's title is derived as follows:

1. A mortgage deed executed 12 September, 1859, by Isaac Simpson to William T. Lemmond and W. L. Simpson, to secure them on their liability as endorsers of his note.

2. A deed from W. L. Simpson, surviving mortgagee, and

J. Q. Lemmond, surviving executor of William T. Lemond, the other executor having died in 1870, to W. C. Ogburn.

3. A deed from said Ogburn and wife to M. L. Simpson, wife of the plaintiff Robert, and his associate in prosecuting the action, to whom she had been married for eleven years prior to the execution of the deed.

4. A copy of the will of the testator William T. Lemmond, and the minutes of the County Court of Union of April Term, 1864, showing the qualifications of the executors, one of whom, E. A. Lemmond, was dead at the time of making the deed to Ogburn.

The will is not before us so that we can see that a power to make sale of the land is vested in the executors, but such we must assume to be the fact of the case.

If the power is conferred, it could be exercised by the living executor in cooperation with the other mortgagee, if not at common law, by the express words of the statute, Bat. Rev., ch. 45, sec. 116, reproduced in The Code, sec. 1493.

If the entire legal estate vested in the mortgagees did not pass in the deed of 1870, to W. C. Ogburn, because of the execution sale, interrupted in the manner suggested—in which we are unwilling to concur—at least, that moiety did which was in the deceased mortgagee, and in either event the ruling which denies any title to the plaintiffs is erro-
(378) neous and entitles the plaintiffs to a new trial.

ERROR. Reversed.

Cited: McPeters v. English, 141 N. C., 494.

JOSHUA SPICER, et al. v. S. J. GAMBILL, et als.

Judgment lien—Execution.

1. Where an execution is levied on land before the expiration of the judgment lien, but the sale does not take place until after the expiration of such lien, the levy does not extend the lien to the sale, so as to defeat a purchaser or prior encumbrancer whose right attached during the existence of the lien, but before the levy.

2. If an execution issue more than ten years after the docketing of the judgment, a sale of both real and personal property under it is valid, but in such case it is only a lien on both real and personal property from the levy, and not from the *teste*, of the execution.

(*Fox v. Kline*, 85 N. C., 173; *Williams v. Mullis*, 87 N. C., 159, cited and approved. *Pasour v. Rhyne*, 82 N. C., 149; *Lyon v. Russ*, 84 N. C., 588, cited, distinguished and approved.)

ACTION for the recovery of land, tried before *Gilmer, Judge,* and a jury, at Spring Term, 1884, of WILKES.

The facts are stated in the opinion. The plaintiff appealed.

Messrs. R. F. Armfield and *Batchelor & Devereux* for the plaintiffs.

Mr. D. M. Furches for the defendants.

SMITH, C. J. The land sought to be recovered in this action, formerly belonged to William Gambill and on his death descended to his children Samuel J. Gambill, John Gambill and Catharine Vannoy, as heirs-at-law, under the first of whom both parties claim. The plaintiffs derive title under an execution sale and the sheriff's deed for the estate of said Samuel J., made on 2 August, 1880, which (379) execution issued on 14 April, previous, and was levied the next day, upon a judgment recovered at Spring Term, 1870, of Wilkes, said term beginning on 10 April, by one Hardin Spicer against the said Samuel J. and others, not including the defendants associated with him in this action. It does not appear that any process was sued out to enforce the judgment until after an order was obtained from the clerk, made on 3 March, 1880, pursuant to the execution issued under which revising order, the sale was made to the plaintiffs. The defendant Benjamin E. Gambill asserts title to the interest and estate of each of the tenants in common in the land, by deeds by them severally executed to him, and produced in evidence a deed from said Samuel J., for the recited consideration of five hundred dollars, made in 1878, and also deeds from the others, the date of which is not given, all of them purporting to convey an undivided one-fourth part of the premises. This would leave undisposed of in each, one undivided one-twelfth, unless there was another party

unnamed entitled to share in the inheritance, or this particular interest in some unexplained manner has passed from the bargainors.

The case on appeal does not, however, raise any question upon this point, and it does not enter into our consideration, nor was it adverted to in the argument.

These facts being made to appear, the Court expressed an opinion that the prior conveyance made in 1878, to the defendant Benjamin E., divested the estate out of the said Samuel J., and there was none to pass under the sheriff's sale and deeds. In submission to this ruling the plaintiffs suffered a nonsuit and appealed. The only question thus raised for our solution is whether the new life imparted to the dormant judgment by the order made in March, just before the expiration of the ten years next after its rendition, prolonged the lien given by the statute, so that the subsequent sale under execution after the lapse of that period, displaces the conveyance made two years previous and vests the title in the plaintiffs.

(380) In *Fox v. Kline,* 85 N. C., 173, the plaintiff, assignee of a judgment which had been rendered on 15 June, 1870, and had become dormant, after obtaining leave, caused an execution to issue to the sheriff one month more than ten years thereafter, under which the sheriff made advertisement, and, with another execution which came into his hands later, made sale of the debtor's land. It was declared that the lien given by the statute had ceased, and the plaintiff in the other writ, the sale being under both, was entitled to the proceeds of the sale.

In *Williams v. Mullis,* 87 N. C., 159, where, under similar circumstances, an execution issued and personal property of the debtor was seized and sold under it, it was held that the purchaser had acquired title thereby, and the Court refused to vacate or set aside the process.

While it is not so declared in direct terms, we see no reason for refusing the same effective operation to an execution when real property is sold under it, as between the parties, in disposing of the debtor's *estate then held* and liable to such process.

In the argument it was insisted for the appellant that an execution issued and levied during the continuance of the

statutory lien, prolonged its duration until the writ could be executed by a disposal of the land, and displaced in favor of the purchaser all liens and encumbrances attaching intermediately and since the rendition and docketing of the judgment, in support of which *Surrett v. Hulse,* 67 Mo., 201, is cited. This case does so decide, but in this particular, as defeating intervening purchasers and creditors, it is repugnant to the general current of adjudications elsewhere, and notably of one, *Isaac v. Swift,* 10 Cal., 71, determined upon full argument and in a well-sustained opinion of *Burnett,* Judge, concurred in by *Terry,* Chief Justice, and *Field,* Judge, now an able member of the Supreme Court of the United States. In that State the judgment lien lasts but two years, and the Court say: "If we hold that the lien of the judgment may be prolonged beyond the period stated, by the issue and levy of an execution within the time, then we can fix no definite and certain limits to the continuance of the lien. (381) Once we pass the limits of the statute, we open the door to the most vexatious litigation. The titles to real estate would become uncertain, and the useful end intended to be accomplished by our recording system would in fact be defeated. * * * The provisions of the Code give the judgment creditor ample protection. He can cause an execution to issue at any time; and under it the sheriff can advertise and sell within the period of twenty days. There is therefore no reason for allowing him the privilege of delaying the issue of execution until it is too late to sell before the lien expires." Most forcibly does this reasoning apply to the statute in this State, which gives the judgment creditor five times as long a period in which to enforce his lien by a sale of the premises to which it adheres.

In New York the judicial rulings conform to those of California, and it is held that the issuing of an execution does not protract the statutory lien beyond its assigned limits to the prejudice of *bona fide* purchasers or to defeat subsequent liens and encumbrances, while the lien remains undisturbed as against the debtor, and this by reason of the express words of the statute. *Scott v. Howard,* 3 Barb., 319; *Tufts v. Tufts,* 18 *Wend.,* 621.

In Illinois the lien resulting from the judgment subsists for seven years, if execution be sued out in one year, and the

lien ceases after that time as against purchasers and subsequent encumbrancers; and, in putting an interpretation upon the act, *Bruce,* C. J., delivering the opinion in *Gridley v. Watson,* 52 Ill., 186, puts an inquiry and makes answer thereto in these words: "Did the last execution, issued after the expiration of seven years, revive the lien of the judgment, so that the fruits of it might be obtained by a levy and sale of the premises? We answer, no. The office of an execution is not to revive an expired lien, but to carry into effect an existing lien."

This is correct so far as the writ performs the office of a *venditioni exponas,* and to such we understand the remark of the Court to be intended to apply, and not as to its other functions as a *fieri facias.*

In *Tauncy v. Heneressy,* 53 Ill., 97, *Walker,* J., (382) reiterates the proposition, remarking that the levy of the execution "did not have the effect of prolonging the lien of the judgment beyond the period limited by the statute, and if the levy operated as a lien *it expired with the lien* of the judgment." In *Bayley v. Ward,* 37 Cal., 121, *Rhodes,* J., says: Under the execution, doubtless, lands not subject to the judgment lien may be levied on." See also *Rogers v. Druffel,* 46 Cal., 654, to the same effect. The cases decided in this Court which may be supposed to be in conflict are *Pasour v. Rhyne,* 82 N. C., 149, and *Lyon v. Russ,* 84 N. C., 588, but on examination there will not be found any repugnancy.

In *Pasour v. Rhyne,* the judgment had become dormant and when leave to issue execution was asked under sec. 440 of The Code, the defendant in opposition exhibited his discharge in bankruptcy, which was a complete answer to the application, unless the debt had become a lien on the debtor's land, and then it was effectual only to the extent of the value of the property, on which it was an encumbrance. But it appeared that the judgment lien had expired, and the indebtedness which might have survived, if left to be enforced in a State Court, was itself swept away. The order for an issue of execution was therefore denied in the Court below, and the ruling was affirmed on appeal.

In *Lyon v. Russ,* two intervals, each of more than three years, had separated successive executions, and the judgment

had become doubly dormant. The last preceding, that of 3 July, 1879, under which the sheriff made sale, was issued in November, 1874. The process was considered in substance an order of sale, in the nature of a *venditioni exponas, to satisfy the judgment lien,* and as the lien had been lost by lapse of time, and could not be enforced by such process, it was held to confer no authority on the officer to sell. But the decision does not go so far as to prevent a sale of the debtor's property under an execution operating as a writ of *fieri facias,* and we have since held in *Williams v. Mullis, supra,* that personal property (and if so, why not land?) may be sold under such process. This examination has been protracted with a view to settle the law on this practi- (383) cal subject, and we announce as our conclusion, that to preserve the judgment lien, the process to enforce and render it effectual must be completed by a sale within the prescribed time. If delayed beyond these limits, unless interrupted in the manner pointed out in sec. 435 of The Code, the lien is gone, and the officer can only sell the debtor's estate as if no such lien had ever existed, and in subordination to liens or encumbrances meanwhile attaching. While the point is not necessarily involved in passing on the appeal, we are inclined to the opinion, though it is held otherwise in New York, under the words of the statute of that State, that the lien as against a *bona fide* purchaser for value, or other execution, originates in the levy or seizure of the property, whether real or personal, thus producing harmony in the administration of the law, and conforming the rule as to the former to that created for the latter by the act of 1869. The Code, sec. 448, par. 1. The law now gives the judgment creditor a much more advantageous lien for the security of his debt, with its duration commensurate with the statute of limitations in which it may be made available, thus superseding the rule, and removing the reasons for its adoption, which referred the lien under the former system, to the *teste* of the execution.

NO ERROR. Affirmed.

ASHE, J., *dissented.*

Cited: *Sawyers v. Sawyers, ante,* 324; *Coates v. Wilkes,* 94 N. C., 181; *Lytle v. Lytle, Ib.,* 658, 6; *Adams v. Guy,*

106 N. C., 277; *Pipkin v. Adams,* 114 N. C., 203; *McCaskill v. Graham,* 121 N. C., 192; *Bernhardt v. Brown,* 122 N. C., 593; *Heyer v. Rivenbark,* 128 N. C., 272; *Wilson v. Lumber Co.,* 131 N. C., 167; *Evans v. Alridge,* 133 N. C., 380.

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(384)

L. A. BRISTOL, Assignee v. J. H. & R. J. HALLYBURTON.

Execution—Injunction—Contingent Remainder.

1. A court of equity will not interfere by injunction to stay an execution regularly issued upon a judgment at law, because the sheriff has levied on property not the subject of sale under execution, or because the property belongs to another than the judgment debtor, except where the property levied on is personal property, and the sheriff and plaintiff are both insolvent.
2. A vested remainder may be sold under execution, but a contingent remainder can not.
3. A sale under an execution issued upon a judgment which is a lien on all the debtor's property, vests in the purchaser only the interest of the debtor at the time the judgment lien attaches, and if the debtor has no interest subject to sale under execution, the purchaser gets nothing.
4. So, where a judgment debtor applied for an injunction to restrain the sheriff from selling a contingent interest in land, which was not liable to be sold under execution; *It was held,* that the injunction should have been refused.

(*Watson v. Dodd,* 68 N. C., 528; *Whitehurst v. Green,* 69 N. C., 131, cited and approved.)

ACTION tried before *Avery, Judge,* at August Term, 1885, of BURKE.

This was an application based upon the affidavits of the defendants, to enjoin the sheriff of Burke from selling the interest of the defendants in a certain tract of land in the county of Burke, and described in their affidavit.

It was alleged that the plaintiff Bristol had obtained a judgment against the defendants at the August Term, 1867, of Burke, and issued an execution thereon on 11 May, 1885, to the sheriff of Burke county, who had levied the execution upon the interest of the affiants in the said described lands, and had made thereon the following return:

"For want of goods and chattels, I, J. A. Lackey, sheriff of Burke county, have this day levied this execution on the interest of the defendant R. J. Hallyburton, in a tract of land devised by Jacob Hanshaw, deceased, to Elizabeth Hallyburton and her children, the interest of the defendant therein being a vested remainder therein as one of (385) the children of the said Elizabeth Hallyburton, as by reference to the will of said Jacob Hanshaw, will more fully appear. This 30 June, 1885.

"J. A. LACKEY, *Sheriff.*"

Affiant further states that the land was advertised by the sheriff for sale under said execution on 10 August, 1885, and will be sold unless the plaintiff and sheriff are restrained by order of the Court.

He alleges that his interest is derived from the will of his grandfather, Jacob Hanshaw, who devised the land to his mother, Elizabeth Hallyburton, "for the term of her natural life, and, at her death, to go to and be enjoyed by her children, to them and their heirs forever," and that he is advised by counsel that his interest in the land is only a contingent remainder, which is not the subject of a sale under execution, and if his interest should be sold, it would work an irreparable injury to him, etc.

The plaintiff answered the affidavit of the defendant and admitted the facts set forth therein, but denied, as he was advised, that the will of Jacob Hanshaw was susceptible of the construction put upon it by the defendant, and contended that the interest of the defendant was a vested remainder, liable to be sold under execution. There was a restraining order issued in the case by AVERY, Judge, at Chambers, 7 August, 1885, and on motion to show cause, on 20 August, 1885, at the Fall Term of Burke, the cause coming on to be heard before *Avery, Judge,* on motion of plaintiff's counsel to vacate the restraining order theretofore granted; after argument and after admission by counsel on both sides, that the defendants and other children of Elizabeth Hallyburton were *in esse* at the death of Jacob Hanshaw, their grandfather, it was, on motion of counsel of defendants, adjudged that said motion be refused, and that plaintiff be perpetually restrained and enjoined from selling the land levied

on and described in the affidavit of defendants, or any interest therein, by virtue of the execution issued in this
(386) case, and that the defendants recover their costs of this injunction. From this judgment the plaintiff appealed.

Mr. E. C. Smith for the plaintiff.
Mr. J. T. Perkins for the defendants.

ASHE, J., (after stating the facts). The appeal in this case is taken from an order of the Judge at Chambers making perpetual an injunction, upon the hearing of a motion by the appellant to dissolve the same.

Upon a review of the record presented to us, and upon consideration of the ruling of his Honor, we think he erred in refusing to dissolve the injunction. The application to stay the execution regularly issued upon a judgment at law, because the sheriff has levied upon property not subject to the execution, or because the property belong to another than the defendant in the judgment, is a procedure unknown to our practice. There may be cases where personal property is levied upon and about to be sold and the plaintiff and sheriff are insolvent, that the restraining power of a Court of Equity may be invoked to prevent an irreparable injury. But as land can not, like personal property, be removed, there can not be the same reason for the interference of a Court of Equity.

We can not see how the sale of the land, although it may not be the subject of sale under execution, can work an irreparable injury to the defendant in the execution; for the sale and sheriff's deed has no other effect than to pass such interest as the defendant had, at the time of the sale, subject to execution. A vested remainder may be sold under execution, but a contingent remainder can not. If then the affiant in this case has a vested remainder, it may be sold, but if his interest is a contingent remainder it can not; and not being the subject of execution, the sheriff's deed would pass nothing, and when the remainder should fall in after the sale upon the happening of the contingency, the remainderman would hold the land, the same as if there had been
(387) no sale. *Watson v. Dodd,* 68 N. C., 528.

That was a case where an action was brought to

subject the interest of the defendant in a tract of land to the payment of the plaintiff's judgment, and the interest of the defendant was a contingent remainder. It was held that "such contingent interest not being assignable at law, it follows as a matter of course that it can not be sold under execution." And PEARSON, Chief Justice, speaking for the Court, said, "the action is of the first impression. No authority was cited in support of the position, and we presume the diligent counsel of the plaintiff was unable to find a case in which the power was ever exercised."

A sale under an execution upon a judgment which is a general lien on all the property of the debtor, vests only the interest of the debtor at the time the judgment lien attaches, or such as the debtor might have conveyed by a suitable instrument for a valuable consideration. It is limited to, and can rise no higher than that of debtor; a stream can not rise higher than its fountain. A purchaser under an execution takes all that belongs to the debtor, and nothing more. Herman on Executions, sec. 360. If he has no interest subject to execution, of course nothing passes by a sale, and no injury can result to the affiant, except, perhaps, to expose him to an action at law to recover the land, if he should be in possession when the remainder falls in, or to the necessity of bringing an action if the purchaser should get into possession. But that is the only and proper procedure for settling the question of title involved in this proceeding. It can not be done in this novel and summary way. It has no sanction in practice or authority.

Courts of equity have always been cautious in interfering with judgments at law; thus it is held that when courts of law afford ample and sufficient remedy for such grievances as may arise in the enforcement of judgments, equity will not interfere—High Injunctions, sec. 98—and in *Whitehurst v. Green,* 69 N. C., 131, in the opinion by PEARSON, Chief Justice, this Court held that "a perpetual injunction against issuing an execution on a judgment at law (388) granted upon a *motion* and *affidavit,* is erroneous. It is not in accordance with any allowable mode of proceeding under the old system or the new."

Our conclusion is there was error in the ruling of the

Judge of the Superior Court in refusing to vacate the restraining order, and in granting a perpetual injunction.

ERROR. Reversed.

Cited: Gatewood v. Burns, 99 N. C., 363; *Bruce v. Nicholson,* 109 N. C., 205; *Bostic v. Young,* 116 N. C., 769; *McLean v. Shaw,* 125 N. C., 492; *Hodges v. Lipscomb,* 128 N. C., 63.

GEORGE D. WITT et al. v. J. R. LONG et al.

Appeal—Printing Record—Undertaking on Appeal—Irregular Judgments—Default final.

1. While it is better and more convenient to have the record printed as soon as the case is docketed in the Supreme Court, and this practice is commended by the Court, yet it is a compliance with the rule if the record is printed when the case is called in its order for argument.
2. Appellants should be careful to see that the rule is duly observed in respect to the parts of the record required to be printed, as it is intimated that a mere colorable compliance will be treated as no compliance at all, and the appeal dismissed.
3. The statute does not require that the justification of the surety on the undertaking on appeal should state that he is worth double the amount of the undertaking, above his liabilities and his homestead and exemptions allowed by law. It is sufficient, if it state that he is worth double the amount therein specified.
4. A judgment by default final is irregular in an action on an open account for goods sold and delivered, where there is no express contract alleged in the complaint, but the plaintiffs only seek to recover on the implied contract the reasonable value of their goods. In such case, the judgment should be by default and inquiry.
5. A judgment by default final can only be rendered when the complaint is verified.

(*White v. Snow,* 71 N. C., 232; *Brickell v. Bell,* 84 N. C., 82; *Rodgers v. Moore,* 86 N. C., 85, cited and approved.)

MOTION to set aside a judgment for irregularity, (389) heard by *Graves, Judge,* at July Special Term, 1885, of HAYWOOD.

The summons having been served upon the defendants, the plaintiffs at the return term filed their complaint, not verified, in which they alleged that they had "sold and delivered

to said defendants merchandise, boots and shoes, agreeable to bill rendered, to the amount of $499.45, which said merchandise, boots and shoes, were reasonably worth" the sum mentioned, and which the defendants agreed to pay. The complaint contained other allegations not necessary to be mentioned here.

The defendants did not enter an appearance, and no answer or other pleading was filed by them.

At that term, the Court, upon the summons and complaint, gave judgment against the defendants and in favor of the plaintiffs for the alleged debt, interest and costs. The judgment recited as follows: "This action having been brought to a trial before the Court upon the summons and complaint on file, the defendants having failed to answer said complaint, and it appearing to the Court from the evidence filed that the defendants are indebted to the plaintiffs, according to account rendered, the sum," etc. What the evidence before the Court was, does not appear.

At a special term of the Court held next after the return term, the defendant J. R. Long moved to set aside the judgment mentioned, upon the ground that it was irregular, in that it was made final, when it ought to have been interlocutory only.

The Court denied the motion, gave judgment accordingly, and the mover, having excepted, appealed.

In this Court, the appellees moved before the appeal was called in its order, to dismiss the same, first, because the record had not been printed as required by the rule; and secondly, because the surety to the undertaking upon appeal failed to state in his affidavit that he was "worth double the amount of said undertaking over and above his liabilities, and his homestead and exemptions allowed by law." When the appeal was called in its order for argument, it appeared (390) that the record had been printed.

Mr. Geo. A. Shuford for the plaintiffs.

Messrs. C. A. Moore and *Norwood & Smathers* for the defendants.

MERRIMON, J., (after stating the facts). The motion to dismiss the appeal can not be allowed. While it would be

more convenient to counsel, and therefore better, to have the record printed as soon as practicable after the appeal shall be docketed, and the Court commends this practice, yet, it is a sufficient compliance with the rule to have it printed by the time the appeal shall be called for argument in its order. Indeed, the rule so provides in terms.

We take this opportunity to suggest that the appellant should be careful to see that the rule is duly observed in respect to the parts of the record required by it to be printed. A mere colorable compliance with it would be treated as none at all, and the appeal might be dismissed in such case.

The affidavit of the surety to the undertaking upon appeal attached thereto, states that he is worth double the amount therein specified. This is sufficient. The statute (The Code, sec. 560), does not require that the surety shall make affidavit that he is worth double the amount, "over and above his liabilities and his homestead and exemptions allowed by law." If the appellee is not satisfied with the solvency of the surety, the statute just cited provides, that he may except to the sufficiency of the surety in that respect and have relief as allowed.

The judgment was clearly irregular. It was taken by default final, the defendants having failed to answer, it seems, upon the supposition that it was allowed by The Code, sec. 385. The Court misapprehended the true meaning of that section. It provides that judgment by default final may be had on failure of defendant to answer as follows: (1). Where the complaint sets forth one or more causes of action,
(391) each consisting of a breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation, upon proof of the personal service of the summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants, in the cases provided in sec. 232.

Now, first, the cause of action set forth in the complaint did not consist, "of the breach of an express or implied con-

tract to pay absolutely or upon a contingency a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." It consisted of an open account of the plaintiffs against the defendants for goods the former had sold to the latter. The plaintiffs alleged that they had sold and delivered the goods to the defendants, and they were reasonably of the value stated, and that the defendants agreed to pay for them. This allegation of agreement does not imply that the defendant stipulated to pay the price charged for the goods, it simply means, that the goods were worth reasonably that sum of money, and as the defendants got them, the law implied their agreement to pay the sum stated. The sum to be paid was not fixed by the terms of the contract, or implied from it, nor could the same be ascertained therefrom by computation, because, no terms had been fixed as to the price, other than such as the law implied, which was the reasonable value of the goods to be ascertained, not by mere computation, but by due inquiry as to the value. The judgment, therefore, should have been by default and inquiry, as allowed by The Code, sec. 386, and the inquiry should have been executed at the term of the Court next after the appearance term.

Secondly, the complaint was not verified, and therefore, if the debt sued for had been such as, in a proper case, would have warranted a judgment final, such judgment could not have been given. The statute expressly makes verification of the complaint essential in order to entitle (392) the plaintiff to judgment by default final in a proper case. The object is to afford some security that the plaintiff has such contract as he alleges, and will not make his demand and obtain judgment therefor, for more than is due. So that the plaintiffs were not according to law, and the due course of procedure, entitled to judgment by default final. *White v. Snow,* 71 N. C., 232; *Brickell v. Bell,* 84 N. C., 82; *Rodgers v. Moore,* 86 N. C., 85.

There is error. The judgment by default final must be set aside, and judgment by default and inquiry entered according to law.

ERROR. Reversed.

Cited: Hammerslaugh v. Farrior, 95 N. C., 13; *Hart-*

man v. Farrior, Ib., 178; *Walker v. Scott,* 102 N. C., 489; *Horton v. Green,* 104 N. C., 403; *Skinner v. Terry,* 107 N. C., 108; *Hunt v. R. R., Ib.,* 448; *Edwards v. Henderson,* 109 N. C., 84; *Jeffries v. Aaron,* 120 N. C., 169; *Smith v. Montague,* 121 N. C., 94; *McLeod v. Nimocks,* 122 N. C., 441; *Junge v. McKnight,* 137 N. C., 290.

FANNIE NOFLEET v. M. HAWKINS et al.

Execution of power by feme covert—Consideration—Presumption.

1. In the execution of a power, except simply to effect a sale, no consideration necessary.
2. There is no contract between the donee of the power and the appointee, the latter takes the estate as if it had been conveyed directly to him from the donor.
3. The doctrine of presumption of fraud arising from fiduciary relations, has reference to contracts between the parties, and applies to contracts between husband and wife.
4. In the application of the doctrine of presumption of fraud to the execution of a power by a married woman, in favor of her husband, there is a distinction between a power appendant and a power collateral. The former is where the execution of the power affects some interest or estate of the donee; the latter is a mere naked power, which does not affect his interest, but enables him to create an estate independent of his own.
5. Where there is a *contract* between the parties, or a *feme covert,* (393) in the execution of a power in favor of her husband, affects some estate or interest of her own, there is a presumption of law that the transaction is fraudulent, and the burden of showing that it is fair and conscientious is on him who seeks to support it. But when the transaction is the execution of a mere naked power, the law raises no presumption of fraud, but it is a question of fact to be decided by the jury upon the facts and circumstances of each case.

(*McRae v. Battle,* 69 N. C., 98; *Taylor v. Eatman,* 92 N. C., 601, cited and approved.)

ACTION for the foreclosure of a mortgage, tried before *Shepherd, Judge,* and a jury, at Spring Term, 1885, of VANCE. The action was commenced on 2 April, 1881, by the plaintiff against the defendant M. Hawkins and his

wife, Truxilla Hawkins, for the foreclosure of a mortgage of a lot of land in the town of Henderson, heard at Spring Term, 1884, of said Court. J. T. McCraw who claimed the land as heir of Betty McCraw, was made a party defendant.

It was admitted that the defendant McCraw was the sole issue and heir-at-law of Bettie McCraw, wife of F. M. McCraw, that he arrived at the age of twenty-one years 25 August, 1881, and that his mother died 14 October, 1862. The plaintiff offered in evidence a deed made by her to Truxilla Hawkins, the *feme* defendant, conveying the land in controversy, dated 1 January, 1879, and a mortgage from said Truxilla Hawkins and her husband, M. Hawkins made to her, to secure the purchase money of said land, bearing date 25 February, 1879. Also, the following deeds in support of her title:

First, a deed from Francis M. McCraw to W. H. Hughes, dated 22 March, 1859, conveying the land in dispute, and a considerable amount of personal property, in trust, to pay certain debts specified, only amounting to something over three hundred dollars, and all other debts he might owe, and the residue to be held by him in trust for the sole, separate and exclusive benefit of his wife, Bettie McCraw, for and during the term of her life, and to such other uses as she by will or deed might appoint, and if she should (394) die without having made any appointment, then over, etc.

Secondly, a deed from Bettie McCraw to her husband, Francis M. McCraw, dated 22 March, 1859, for the land in dispute, after her life, in exercise of the power in the deed of F. M. McCraw to W. H. Hughes.

Thirdly, a deed for the land from F. M. McCraw to W. H. Hughes, dated 3 August, 1863.

Fourthly, a deed from W. H. Hughes to Edith Holliday, for the use of the plaintiff, bearing date 10 February, 1864.

It was admitted that the conveyance by Hughes to E. Holliday, in trust for the plaintiff, was made for a valuable consideration, and that she had no actual notice of the trust or any breach thereof on the part of the trustee Hughes, and that she had no actual notice that he was trustee; that she entered into possession of said premises at the time of the execution of the deed to E. Holliday, and that she and those

who claim under her, including the defendants, have ever since been in the continuous possession of the same under known and visible boundaries, claiming the same adversely to all persons.

The defendant J. T. McCraw denied the execution of the deed from Betty McCraw to her husband, and insisted that, if executed, its execution was procured by fraud and undue influence of F. M. McCraw, and that it was in law void. The following issues were submitted to the jury:

1st. Did Betty McCraw execute the alleged deed to F. M. McCraw?

2d. If she executed the same, was it done by the fraudulent and undue influence of her husband, F. M. McCraw?

The Court was asked by the defendant McCraw to charge the jury, that the deed was presumed in law to be void, unless it was shown to be made upon a fair consideration; that it devolved upon the plaintiff to show this by a preponderance of testimony, and that if she failed to do so, the sec-
(395) ond issue should be found in the affirmative.

The Court declined to so charge, and the defendant McCraw excepted.

The jury found the first issue in the affirmative and the second in the negative.

It was agreed by the counsel that the Court should try any other issue of fact raised by the pleadings, and after the finding of the jury, the defendant offered a certified copy of the records of Granville County Court, showing that by the decree of said Court, in a petition for the sale of slaves, F. M. McCraw was entitled, in right of his wife, to the one-third of $1,910.00, which was assigned in his deed of trust to W. H. Hughes for the payment of his debts, etc. This evidence was objected to by the plaintiff, and the Court, upon the facts admitted and the issues found by the jury, held the plaintiff's right to recover could not be affected by said evidence and refused to admit it, and the defendant excepted.

Judgment for plaintiff.

Motion for new trial. Motion refused, and defendant McCraw appealed to Supreme Court.

No counsel for plaintiff.

Messrs. Davis & Cooke attorneys for defendants.

ASHE, J., (after stating the case). On the trial the defendant's counsel requested his Honor to charge the jury that the deed from Betty McCraw to her husband was presumed in law to be void unless it was shown to be made upon a fair consideration, and it devolved upon the plaintiff to show this by a preponderance of testimony, and if she failed to do so, the second issue should be found in the affirmative. We do not exactly comprehend what the learned counsel meant by a *fair consideration,* as in the execution of a power, except simply to effect a sale, no consideration is necessary. But we take it from the argument made in the case that what was meant by a *fair consideration* was, that the relation of husband and wife was of such a nature as to give (396) the husband an influence over his wife so as to raise such a suspicion with respect to contracts between them, that the law would throw the burden upon him to show that the transaction was fair and free from any undue influence. It was contended that certain fiduciary relations, such as trustees and *cestui que trust,* attorney and client, guardian and ward, etc., are sufficient to raise a presumption of fraud as a matter of law, and that owing to the intimate relation of husband and wife, the same legal presumption applies to transactions between them; and to support this position, the counsel cited the cases of *McRae v. Battle,* 69 N. C., 98; *Boyd v. DeLa Montague,* 73 N. Y., 498; *Darlington's Appeal,* 86 Penn. St., 512. We concede that the doctrine enunciated by the counsel is well supported by authorities, and has a general application to all persons standing in a fiduciary relation, including husband and wife.

It is well settled that a wife may execute a power and even appoint to her husband. 2 Washburn Real Property, 607; 1 Sugden Powers, 99. In the execution of a power there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made the appointee at once takes the estate from the donor as if it had been conveyed directly to him. The doctrine of a presumption of fraud arising from fiduciary relations in almost every case where it has been enforced, had reference to *contracts* between the parties, and but few cases are to be found where it has been applied to the

execution of a power, and in these cases only when, by the execution of the power, some interest of the donee in the estate appointed passed to the appointee. And the learned counsel in his researches upon the subject has been able to refer us to but two or three cases in which the doctrine has been held to apply to the execution of a power by the wife in favor of her husband, to-wit: the case of *Boyd v. De La Montague,* 73 N. Y., 498.

(397) This was a transfer of the wife's leasehold to her husband; there was no fraud, but both parties acted under a mutual mistake—and Darlington's Appeal, 86 Penn. State, where the wife two months after marriage, being in bad health and weak mind, conveyed her real estate to her husband for the consideration of one dollar, reserving a life estate; and in this State the case of *McRae v. Battle, supra.* But that was a case where the power reserved to the donor in an antenuptial settlement was executed so as to pass a subsisting interest of the wife in the estate appointed, and it was held to be in violation of the terms of the settlement and in contravention of the intention of the parties clearly deducible from the deed of settlement

The only other case cited involving the question of a power executed by a married woman to her husband, was the case of *Taylor v. Eatman,* 92 N. C., 601.

There the case turned upon the validity of the execution of a naked power of appointment, which the *feme covert* had exercised in favor of her husband; and although the appellant was represented in this Court by counsel distinguished for his ability and indefatigable research, no such point was pressed or even raised. In the application of the doctrine of presumptive fraud to the execution of a power by a married woman in favor of her husband, there is a distinction between a power appendant and a power collateral. The former is where the execution of the power attaches on the interest of the donee and takes effect out of his estate, and the latter is a mere naked power and does not attach upon his interest, but enables him to create an estate independent of his own. 4 Kent. Com., 350. In the former case, according to the decision in *McRae v. Battle,* it is held to apply, but that is as far as it seems ever to have been extended. It can have no application to the case of the execution of a mere naked or

collateral power. We take the distinction to be that when there is a *contract* between the parties, or the donee of a power in executing the power at the same time transfers some interest of his own in the estate, affects in some way his interest, there is a presumption of law that that transaction is fraudulent, and the burden of showing its fair- (398) ness is upon him who seeks to support it and to show that he has taken no advantage of his influence and that the arrangement is fair and conscientious. But when the transaction is the execution of a mere naked power, the law raises no presumption of fraud, but it is a question of fact for the jury, to be decided by them upon the facts and circumstances of each case that may be submitted to their determination.

Here the deed of Betty McCraw to her husband did not affect any interest of hers, it being to take effect at her death, and the jury have found as a fact that the deed executed by Betty McCraw to her husband in execution of the power vested in her was not done by the *fraudulent and undue influence* of her husband F. M. McCraw. That was conclusive, and after the finding, as his Honor held, the exception taken to the refusal of his Honor to admit the evidence of the transcript from the County Court of Granville, and the other point pressed in the argument as to the statute of limitations and constructive notice, became immaterial.

NO ERROR. Affirmed.

Cited: Sims v. Ray, 96 N. C., 89.

JOHN BOWLES v. G. W. COCHRAN.

Penalty—License for Marriage of Females under eighteen.

1. The Code, secs. 1814 and 1816, being in *pari materia*, are to be construed together, and make it the duty of the register of deeds before issuing a marriage license, to make *reasonable inquiry* whether there is any legal impediment to the marriage of the parties, or whether either of them is under the age of eighteen years and resides with her father, etc.
2. By such *reasonable* inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists.

3. When a man of good character and reliable applied for the license, and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of her parents and the person producing the statement said it was true, though no name was signed to it: *Held*, that the register had made such inquiry as was required of him, and was not liable for the penalty.

(399)

ACTION, begun in a Court of a Justice of the Peace, and tried on appeal at Fall Term, 1885, of CATAWBA, before his Honor, *Shipp, Judge,* and a jury.

The action was brought by the plaintiff against the defendant to recover the penalty of $200 against the defendant, for issuing a marriage license to one Robert Stevenson with the daughter, Julia, of the plaintiff, said daughter being under the age of eighteen years at the time of issuing the license, on 2 December, 1884.

Exception 1st. The plaintiff was introduced as a witness for himself, and testified that his daughter lacked four months of being eighteen years of age at the time of issuing the license for her said marriage with the said Robert Stevenson, and that said daughter Julia was living with him and a member of his family, subject to his control, at the time of the issuing said license, and had been ever since; and that said marriage license issued against his will and without his written consent or knowledge, and that the said daughter and said Stevenson were married immediately after the issuing of the said license without his consent and against his will.

The defendant was introduced as a witness in his own behalf, and testified, that he did not know the said Robert Stevenson or the said daughter Julia, at the time of issuing the said license of marriage. That one White, of Hickory, N. C., of Catawba county, of good character and reliable, applied to him for the license and produced a written statement purporting to contain the age of the said Julia and Stevenson, and the names and residences of his and her father and mother. That said writing had no name signed to it, nor did he know the handwriting, or who wrote it. That it represented the age of the said Julia to be eighteen years, and he asked the said White, who made the application, if that statement in this paper-writing was true, to which

(400) said White replied: It is true.

He further swore that Hickory, the place of residence of the plaintiff, was ten miles distant, and that there was railroad and telegraph communication from Newton to Hickory.

This was all the information he had as to the age of the said Julia Bowles.

The counsel asked the Court to instruct the jury that upon this evidence the defendant had not shown that he had made reasonable inquiry at the time of issuing the license of the age of the said Julia; and that if they believed the evidence of the plaintiff that said Julia was under age of eighteen years at the time of issuing the said marriage license, they should return a verdict for the plaintiff.

His Honor declined to give this instruction, but told the jury that if they believed the testimony of the defendant, he had made reasonable inquiry, and their verdict should be for the defendant.

The plaintiff excepted.

There was a verdict for the defendant. Rule for a new trial by the plaintiff. Rule discharged. Judgment for the defendant. Appeal prayed by the plaintiff, and granted to the Supreme Court.

Mr. J. L. Cline for the plaintiff.
Messrs. Haywood & Haywood for the defendant.

ASHE, J., (after stating the case). We are of the opinion there is no error in the judgment of the Superior Court. The action is brought against the defendant as register of deeds for the county of Catawba, for the penalty of two hundred dollars, given by sec. 1816 of The Code, for issuing a license for the marriage of plaintiff's daughter, who, at the time was under the age of eighteen years, without making reasonable inquiry as to her age. Sec. 1814 of The Code provides that "every register of deeds *shall,* upon appli- (401) cation, issue a license for the marriage of any two persons; *Provided,* it shall appear to him *probable* that there is no legal impediment to such marriage." The section further provides that if either party to the proposed marriage shall be under eighteen years of age and shall reside with her father, etc., the register shall not issue the license for such

marriage, without the written consent of the father in writing, etc. And then sec. 1816, declares that any register of deeds who shall *knowingly or without reasonable inquiry,* issue a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by sec. 1814, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

These two sections are *in pari materia,* and must therefore be construed together. The latter section requires that the register shall make *reasonable inquiry,* and the former provides that he shall not issue the license unless it shall appear to him *probable* that there is no legal impediment to the marriage. The latter section is qualified by the former which indicates the degree of diligence to be used in making the inquiry, and shows what is meant by *reasonable inquiry,* that is, it must be such an *inquiry* as makes it probable that there is no impediment to the marriage.

Here the register did all that was required of him under this construction of the statute, a paper was produced to him stating the age of the female to be over eighteen years of age —it is true it was not signed by any one, but the person who produced the paper was known to the register to be a man of good character and reliable, and he stated that he knew the statement in the paper to be true. When a stranger or one who is of a bad or doubtful reputation applies for a license, the register should of course act with more caution than when the applicant is known to be reliable. Here he is reliable, and there is no reason why the register should not have put implicit faith in his statement. The inquiry was not only reasonable in the strict sense of the term, but was
(402) amply sufficient to raise a strong *probability* of the *fact* that there was no impediment to the marriage.

NO ERROR. Affirmed.

Cited: Williams v. Hodges, 101 N. C., 302, 4; *Cole v Laws,* 104 N. C., 656, 7; *Maggett v. Roberts,* 108 N. C., 178; *Walker v. Adams,* 109 N. C., 483; *Maggett v. Roberts,* 112 N. C., 75; *State v. Patterson,* 134 N. C., 620.

PEOPLE'S BANK v. J. D. STEWART.

Practice—Nonsuit.

The plaintiff may, at any time before the defendant has pleaded a counterclaim, submit to a nonsuit, and withdraw his suit.

(*Hill v. Overton*, 81 N. C., 393; *Johnson v. Murchison*, 60 N. C., 83; *Pescud v. Hawkins*, 71 N. C., 299; *Graham v. Tate*, 77 N. C., 120; *Tate v. Phillips, Ibid.*, 126; *Bank v. Pettigrew*, 74 N. C., 326; *Francis v. Edwards*, 77 N. C., 271; *McKesson v. Mendenhall*, 64 N. C., 502, cited and approved.)

ACTION, tried before *MacRae, Judge,* at the Spring Term, 1884, of UNION County.

The case is sufficiently stated in the opinion of the Court.

Messrs. Payne & Vann and *Haywood & Haywood,* attorneys for plaintiff.

Messrs. Covington & Adams and *Mr. J. W. Hinsdale,* attorneys for defendant.

SMITH, C. J. The plaintiff's action is upon two promissory notes of the defendant, and to the verified complaint filed at the term to which the summons was returnable, the defendant demurred, specifying the several alleged defects therein. At a subsequent term the following entry appears in the cause:

Plaintiff called and failed; judgment, nonsuit without prejudice; judgment against plaintiff for costs; same day defendant moved to be allowed to file answer. Thereupon the judgment of nonsuit was stricken out, and (403) the defendant allowed to withdraw his demurrer and file his answer. From this last order the plaintiff appeals.

The question presented is not so much the power of the Court to modify, amend or revise its own orders during the term, but to deny to the plaintiff his right to abandon his action at this stage of its progress by entering a judgment of nonsuit or a *nol. pros.* According to the ancient forms a nonsuit was the appropriate mode of terminating the suit when the trial was about to be entered into, and the plaintiff could elect to submit to it any time before the verdict was rendered. A *nol. pros.* could be entered at any time previous as to all or some of the defendants, and might be restricted to a part of

the series of counts which made up the declaration. But a misnomer of the entry in calling a *nol. pros.* a nonsuit would not affect its office when applied to a judicial proceeding, for its legal efficiency would designate its appropriate name, and so it is held in *Hill v. Overton,* 81 N. C., 393. But the modern practice authorizes the plaintiff to submit to a nonsuit even before the defendant's appearance or the return of the process, as is declared upon an examination of the authorities in *Johnson v. Murchison,* 60 N. C., 83. "Whenever in the progress of a cause," in the language of BYNUM, J., "the plaintiff perceives that the judge or the jury are against him, or that he will on a future occasion be able to establish a better case, *he may elect to be nonsuited.*" *Pescud v. Hawkins,* 71 N. C., 299.

"A plaintiff can at any time before verdict," remarks PEARSON, C. J., "withdraw his suit, or, as it is termed, take a nonsuit by absenting himself at the trial term." *Graham v. Tate,* 77 N. C., 120. Again, in *Tate v. Phillips, Ibid.,* 126, when the defendant under the authority of a statute, proposed to use bank notes as a setoff to the action, while he was not allowed to recover for the excess, the same eminent Judge repeats the rule and adds: "So, according to the course of the Court, the *plaintiff had a right* to pay up the costs and walk out of court." If, however, the defendant sets up a
(404) counterclaim, entitling him to judgment for its excess over the plaintiff's demand, and it is not a mere defense to defeat the action, the plaintiff can not of right put an end to the suit, and, in such a case, a nonsuit would be a withdrawal of his own claim, and leave him exposed to a recovery of the counterclaim. *Bank v. Pettigrew,* 74 N. C., 326; *Francis v. Edwards,* 77 N. C., 271.

The law is so clearly laid down in *McKesson v. Mendenhall,* 64 N. C., 502, by RODMAN, J., that we reproduce a portion of the opinion: "It is sometimes said," he remarks, "that a judgment of nonsuit can only be at the instance of the defendant. But the cases cited for that only prove that the Court will not give it *mero motu,* but only at the instance of one of the parties; and the proposition can only be maintained to the extent that the Court will not allow a plaintiff to become nonsuit to the prejudice of the defendant, and in a case in which, although nominally a plaintiff, he is substan-

tially a defendant. As the plaintiff possessed the power of becoming nonsuit when called before verdict, it became a general practice to allow him to do so, at any time before verdict, when he desired for any reason to abandon his action. So long as he is merely plaintiff, the Court has no means by which he can be compelled to appear and prosecute his suit against his will, and no injury can result from allowing him to abandon it."

These references clearly recognize the right of a plaintiff before any counterclaim is set up to terminate his action and retire from the Court, or, in the language of the late Chief Justice, "to walk out of Court."

The cause was depending upon the issue raised by the demurrer when the action was taken by the plaintiff, and consequently no such claim had been asserted by the defendant as entitled him to have it retained. The answer is unnecessarily sent up, since it is a question of legal right, wholly outside of any intended defense, upon which the appeal requires us to decide. So that, while the answer was intended, as we see from its terms, to bring forward a counterclaim for usurious charges entering into the notes, the de- (405) fendant was then relying upon imperfections in the statement of the plaintiff's cause of action, and it was his own choice not earlier to put in his answer. Nor if, as suggested in the argument, the statutory law might interfere in any future assertion of the defendant's demand, that would not now be in his way, nor warrant the Court in denying to the plaintiff the exercise of his legal right to withdraw his suit. The counterclaim could have been the subject of an independent action, and thus the law have been avoided. Whatever may be the purpose of this course on the part of the plaintiff, or its results, we have nothing to do with them, and can not compel him to remain in Court and prosecute his suit. There is error in setting aside the nonsuit and permitting the answer to be filed, after the cause was out of Court by the nonsuit. The judgment of nonsuit must therefore stand.

ERROR. Reversed.

Cited: *McNeill v. Lawton,* 97 N. C., 20; *Bynum v. Powe, Ibid.,* 377; *Pass v. Pass,* 109 N. C., 486; *Wilkins v. Suttles,* 114 N. C., 558; *Hickory v. R. R.,* 138 N. C., 315

B. T. JUSTICE et al. v. J. O. BAXTER.

Betterments—Notice.

Where the title to the land was in a *feme covert* who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good: *Held*, that the doctrine of constructive notice from registration did not apply to such party, and that he was entitled to compensation under the act—The Code, sec. 473—for permanent improvements made by him on the land.

(*Thompson v. Blair*, 7 N. C., 583; *Holmes v. Holmes*, 86 N. C., 205; *Merritt v. Scott*, 81 N. C., 385, cited and approved.)

ACTION tried at the Special Term held in February, 1885, of CRAVEN, before *Shipp, Judge.*

There was judgment for the plaintiffs, from which (406) the defendant appealed. The facts are stated in the opinion of the Court.

Messrs. Green & Stevenson for plaintiffs.
Messrs. Simmons & Manly for defendant.

SMITH, C. J. This action, instituted to establish the plaintiffs' title to the land described in the complaint and to recover the possession, terminated at Spring Term, 1882, of Lenoir in a judgment for the plaintiff in the following form:

"This action coming on to be heard, it is ordered and adjudged, with the consent of all the parties thereto, given in open Court, that the plaintiffs were entitled to the lands, in the pleadings mentioned, in fee simple absolute, at the commencement of the action, and up to the last Term of the Court, since which time the plaintiff B. T. Justice has conveyed his undivided one-third interest to the defendants, Alice Ferrebee, W. W. Ferrebee, J. W. Dawson and wife, S. E. Dawson, W. T. Caho, Israel Boomer, J. L. Bryan, J. W. Brabble, John H. Nichols, J. O. Baxter, and Jas. S. Lane:

"And it is further ordered and adjudged, consent being given in manner aforesaid, that the plaintiffs do recover of

the defendants aforesaid, the possession of the said lands, the execution to be suspended until the question of betterments can be determined according to law—provided that the defendants do proceed, without delay, and provided further, that the value of the use and occupation of the said lands by the defendants, shall be determined in said proceedings in respect to betterments."

Thereupon the defendant J. O. Baxter, applied to the Court, by petition, wherein he alleges, that holding the premises under the deed purporting to convey the fee, and believed by him to pass the title, he has made permanent improvements upon the land, and prays that he may be allowed for the same over and above the value of the use and occupation of the land under the provisions of the statute. The Code, sec. 473.

The plaintiffs answer and contest the claim, and upon an issue submitted to the jury, they find that the (407) petitioner is not entitled to the betterments. From the judgment rendered against the petitioner, and directing execution to issue for the recovery of possession, the petitioner appeals to this Court.

The facts connected with the trial as stated in the case on appeal, so far as necessary to elucidate the rulings of the Court intended to be reviewed are as follows:

The petitioner offered evidence a deed purporting to convey the premises excuted on 26 May, 1855, by Jno. H. Hampton to Willoughby D. Ferrebee, and a deed for the same land, executed on 16 July, 1870, by the latter and his wife Alice, to the petitioner, both of which had been duly proved and registered. The petitioner, examined on his own behalf, testified, that in the year 1866, the date of the deed of Ferrebee to him, he went into possession of the land set forth in his petition,—being the same described in the conveyance from Ferrebee to him—under said deed which was believed by him to be good, and without any actual notice or knowledge whatever of any defect in his title or that of his grantor. That under said deed and title, believed by him to be good and without defect, he made lasting and permanent improvements on said land. That the land was woodland, none of it being cleared. That he cleared all or most of it, fenced, ditched

and put it in a fair state of cultivation. That he built thereon a dwelling house, barn, stables and other necessary outhouses. That the enhanced value of the land by reason of the permanent improvements placed thereon is two thousand two hundred and fifty dollars.

That the land at the time he went into possession of it was worth two hundred dollars. That the value now, including all improvements, is two thousand five hundred dollars. That the value of the land now without the buildings placed thereon by defendant, is about sixteen to eighteen hundred dollars. That a fair annual rental of the land since the year 1879 including improvements is one hundred dollars—a fair annual rental of the land in the condition when defend-
(408) ant entered on the land was about twenty-five dollars.

W. T. Caho testifies to the same thing in substance.

It was admitted that Mary B. Justice owned said land and that, while an infant, she married Alexander Justice on 19 March, 1846, and died 30 July, 1862, and that Alexander Justice died 9 June, 1879, and that the plaintiffs are the children and heirs-at-law of said Mary B. Justice by said Alexander Justice. That Mary B. Justice and Alexander Justice, her husband, executed a bond for title to this land on .... June, 1847, to one Nichols from whom the defendant Baxter, through several mesne conveyances, derived title, the conditions of which bond was that Mary B. Justice and her husband Alexander Justice, would make a deed for the said land to the said Nichols when the said Mary B. Justice became of age. That the said deed was never made. The Court instructed the jury that the defendant Baxter was not entitled to betterments and could not recover anything, notwithstanding he may have had no actual notice of any defect in his title, and, under a title believed by him to be good, made permanent improvements on the land.

The instruction given and guiding the jury to their verdict, that the petitioner was entitled to no compensation for improvements *bona fide* made and in the belief that he was the owner of the estate, seems to have proceeded, and such was the course of the argument in behalf of the appellees, upon the ground of a constructive notice of his defective title, in that in tracing it back, he would have made the discovery that

the estate was in a former *feme covert* owner, and had never been divested by any valid conveyance or contract on her part to convey. In support of this view, counsel rely on *Thompson v. Blair,* 7 N. C., 583, cited in *Holmes v. Holmes,* 86 N. C., 205, with approval, wherein the Chief Justice declares it to be a well-established rule that "where a purchaser, in the necessary deduction of his title must use a deed which leads to a fact showing an equitable title in another, (409) he will be affected with notice of that fact." It is not shown that the contract to sell the lands to Nichols signed by Justice and wife, admitted to be in operation as to the latter, was ever put on the registry, so that a search would have led to its discovery, and no constructive notice can be imputed to the petitioner from registration. Its existence and the failure to execute it by deed, as he testifies, were alike unknown to him when he made the large expenditure upon the property. To apply the artificial rule in equity laid down by the Court, to a case like the present, would be, in our opinion, to emasculate the statute of all its virtue and render it meaningless. For he who improves land must see to it, in order to reap its benefits, that his title is not defective; he would not need its aid, and if he can not be compensated for his outlay, if it is defective, it would be wholly useless and unnecessary. It is in just such contingencies, when the ameliorating work has been done *bona fide* and under the honest belief of having title, that the statute interposes and says to the true owner, you are entitled to your land, but it is inequitable for you with it to take the enhanced value of the expendtiure and labor of another honestly put upon it. The statute is clear and positive in its terms: "If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises at a time when there was reason to believe the title good under which he or they were holding the said premises, permanent and valuable improvements, they shall estimate, in his favor, the value of such improvements, as were made *before notice,* in writing, of the title which the plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment." The Code, sec. 476. The beneficent provisions

of the statute would be defeated by a construction which charges the *bona fide* claimant under a deed in form and purpose purporting to convey a perfect title with a knowledge of imperfections which might be met with in the deduction of his own title. It was not so extended, and if the pe-
(410) titioner's case, as he presents it, is not embraced in its terms, it is a useless encumbrance upon the statute book.

The case of *Merritt v. Scott,* 81 N. C., 385, so far from militating against this view of the meaning and object of the act, sustains it. It is there held that a life tenant who, cognizant of his limited estate, puts improvements upon the land, does so for his own advantage, and has no claim for reimbursement from the enhanced value against the tenant in remainder, to whom the property comes after the expiration of the preceding particular estate. "But the owner of land," as the Court in the opinion remarks, "has no just claim to anything but the *land itself,* and a *fair compensation* for being kept out of possession; and if it has been enhanced in value by improvements made under the *belief that he was the owner, the increased value he ought not to take without some compensation to the other. This obvious equity is established by the act.*"

It is not necessary to proceed further, since most clearly, upon the petitioner's statements, he was entitled to compensation under the provisions of the act, and the Court erred in ruling that he was not. The judgment is reversed, and it is ordered that a *venire facias* issue.

ERROR. Reversed.

Cited: Barker v. Owen, 93 N. C., 203; *R. R. v. McCaskill,* 98 N. C., 535; *Wood v. Tinsley,* 138 N. C., 513.

W. H. RUNNION et als. v. M. J. RAMSAY et als.

Jurisdiction of the Supreme Court over Questions of Fact—Waiver.

1. Where, in a suit instituted in the late Court of Equity, and transferred to the Superior Court docket under the provisions of The Code of Civil Procedure, the parties agreed that the Judge should find the facts, and that he should examine witnesses orally, and only the substance of the oral evidence was sent up with (411) the record; *It was held, that* the right to have the findings of fact reviewed by the Supreme Court was waived.
2. Where the parties agree to a particular mode of trial, they are bound by it.
3. The Supreme Court can only review and pass on issues of fact in certain cases, and then only when the evidence on which the finding in the court below was based, is set out fully and at large in the record.
4. A party can not lose the right to appeal by an agreement that the judgment of the court below shall be final, and that neither party will appeal therefrom.

(*Leggett v. Leggett*, 88 N. C., 108; *Wessell v. Rathjohn*, 89 N. C., 377; *Worthy v. Shields*, 90 N. C., 192; *Coates v. Wilkes*, 92 N. C., 376, cited and approved. *Falkner v. Hunt*, 68 N. C., 475, distinguished and approved.)

ACTION, heard before *Graves, Judge,* at Spring Term, 1884, of MADISON.

This suit was brought to the Fall Term, 1867, of the late Court of Equity in and for the county of Madison; it was pending at the time of the adoption of the present method of Code Procedure in this State; and as allowed by the statute (C. C. P., sec. 406; The Code, sec. 944), it was transferred to the Superior Court of that county, to be proceeded in and tried under the laws and rules of procedure, as these prevailed next before the enactment of the statute authorizing such transfer. (C. C. P., sec. 302.)

The pleadings were completed, depositions were taken, and at the Fall Term, 1876, of the last named Court, the cause was heard, and a decree in favor of the plaintiff was passed.

Afterwards, at the Fall Term, 1878, of that Court, the defendant filed a petition in the cause to rehear the same and vacate the last-mentioned decree. Upon the hearing of this petition, the Court set the decree aside, and from the judgment in that respect, the plaintiffs appealed to this Court.

Here the judgment was affirmed. *Runnion v. Ramsay,* 80 N. C., 60.

Afterwards, at the Fall Term, 1884, of the Court below, the case was heard upon its merits. It is stated in the case settled upon appeal for this Court, that a jury trial was waived, and it was agreed by the parties that the Judge should "hear the testimony and find the facts." It is further
(412) stated, that "many depositions were read, and witnesses who had before been examined on commission, were present at the trial, and were, without objection, examined, at the request of the plaintiffs." The Court found the facts adversely to the plaintiffs, and gave judgment against them, whereof the following is a copy:

"This cause coming on to be heard upon the bill of complaint, answers, proofs and exhibits, and the former orders in this cause, and being argued by counsel on both sides, and fully understood by the Court here, a trial by the jury of the issues of fact, raised by the pleadings, and directed to be tried by a jury under a former order in this cause, having been waived by counsel for both parties, and it being expressly agreed by both parties that the Court might try the said issues of fact, and declare the law upon such findings, the Court doth now declare that the testimony offered in this cause is not sufficient to satisfy the Court that the parol agreement alleged in the bill of complaint to have been made and entered into between William Ramsay and A. J. Ramsay, to purchase the tract of land herein mentioned and described in said bill of complaint, for their joint benefit, was in fact made and entered into as alleged. And the Court, therefore finds that the said alleged agreement was never so made and entered into. It is, therefore, ordered, adjudged and decreed, that said bill of complaint be dismissed. It is, therefore, further ordered and adjudged, that the plaintiffs pay their costs in this behalf incurred, and the defendants likewise pay their own costs."

From this judgment the plaintiffs appealed to this Court.

Messrs. Theo. F. Davidson and *Battle & Mordecai* for the plaintiffs.

Messrs. J. H. Merrimon and *McLeod & Moore* for the defendants.

MERRIMON, J., (after stating the facts). This suit was begun in the late Court of Equity, and, regularly, it should have been "proceeded in, and tried under the existing laws and rules applicable thereto," just before the act (413) was passed authorizing its transfer to the Superior Court (C. C. P., sec. 402). If that had been done, this Court would have authority to consider the evidence, review the findings of fact by the Court below, and reverse, change or modify them. But the parties chose to agree that the Judge who heard the cause "should hear the testimony and find the facts." And the Court, consenting to, acting upon and in pursuance of that agreement, did find them.

The Court had general jurisdiction of the subject-matter of the cause, as well as the special jurisdiction conferred by the statute authorizing its transfer from the Court of Equity to the Superior Court. The method of trial agreed upon was one authorized by law. It was, therefore, competent for the parties, with the assent of the Court, to agree to adopt it. The Court was not necessarily required to hear and determine the cause, as if it were in the late Court of Equity, if the parties consented to a different authorized method of trial. So that the trial was effective and binding upon both the plaintiffs and defendants, as much so as if the suit had been originally instituted under the present method of procedure.

The appellants having consented to the method of trial adopted, are bound by it and the legitimate consequences resulting from it. Having accepted that, they are not at liberty to insist upon another. *Leggett v. Leggett,* 88 N. C., 108; *Wessell v. Rathjohn,* 89 N. C., 377.

But it was insisted on the argument, that this is an "equity case," begun before the present method of procedure was adopted, and it must be heard and determined as such, and therefore this Court can consider the evidence and find the facts, just as the late Court of Equity would have done. As we have already said, that would be so, but for the method of trial adopted. The case was not heard like a case in the late Court of Equity—the Court not only heard the depositions of witnesses, but witnesses were examined orally before the Court, and the evidence thus produced was considered by it. The depositions taken have been sent up with (414)

the appeal, but only hasty minutes—rough notes—of what the witnesses testified to orally, taken by the Court, have been sent up. We can not be put in possession of the evidence received and heard on the trial as the Court below heard it. The questions put to the witnesses examined orally—how these were answered—exactly what the witnesses said—are not sent up—only the substance—perhaps not all of that is sent up. So that we can not see, appreciate, and weigh the evidence received as the Court below did. If depositions had been taken, and all the evidence had been sent up as was done in the late Court of Equity, it would be otherwise. We can not review the evidence, hear the case, and determine it as was done in cases in that Court. It is settled, that unless a case comes before us in such shape as that we can do so, we can not consider the evidence and find the facts. Ordinarily, the findings of the Judge upon issues submitted, or of the facts by the Court, as the case may be, must be conclusive. There are well defined exceptions to this rule, but this case is not one of them. These are so well understood, that we need not here point them out. *Worthy v. Shields,* 90 N. C., 192; *Coates v. Wilkes,* 92 N. C., 376.

The plaintiffs' counsel relied in part upon *Falkner v. Hunt,* 68 N. C., 475. That case is not in conflict with what we have here decided. It was begun in the late Court of Equity —was an equity case, prosecuted and heard as such. The agreement of the parties to submit the case to the Court to try the issues of fact and law, was in effect just what the Court was charged by the law to do, except the part of the agreement which undertook to make the decision of the Court final and cut off the appeal. The agreement did not change, or undertake to change, the method of trial. The Court held simply that such agreement could not deprive either party of his right of appeal—the appeal lay, notwithstanding the agreement, and the case having been heard in the Superior Court purely as an equity case, the parties were entitled to have it so heard in this Court upon appeal. If, however, witnesses had been examined orally by the Court, and
(415) a mere minute of their testimony had been taken and sent up, in that case, the decision of this Court would necessarily have been different.

The appellant's grounds of exception were not specially assigned in the record as they should have been, but what we have said is conclusive against them in every aspect of the case. If the findings of fact by the Court below were conclusive, as we have decided they were, then the judgment of that Court appealed from, was such as they could not justly complain of.

NO ERROR. Affirmed.

Cited: Gatewood v. Burns, 99 N. C., 359; *Cowell v. Gregory,* 130 N. C., 85.

SARAH TAYLOR v. G. T. BOSTIC, EXR.

Appeal—Special Proceedings.

1. An appeal will not be entertained in this Court when there is no judgment rendered in the court below.
2. In order for a special proceeding to get before the Judge of a Superior Court, on a question of law, there must be an appeal from some judgment of the clerk.

SPECIAL PROCEEDING, heard on an agreed statement of the facts by *Philips, Judge,* at Spring Term, 1885, of RUTHERFORD.

This was a special proceeding brought by the plaintiff as widow of W. W. Taylor, against the defendant as his executor, for a year's allowance out of his personal estate. The case was commenced before the clerk, and transferred by him to the civil issue docket of the Superior Court for the county of Rutherford, and was there heard and determined before Philips, Judge, upon the following state of facts agreed:

Sarah Taylor, the plaintiff, and one W. W. Taylor, were married in the year 1852, and she lived and co- (416) habited with him until 1856, when they were divorced by the decree of the Superior Court for said county, *a mensa et thoro,* which was as follows:

"This case coming on to be heard upon the petition and answer, former orders and findings of the jury; upon motion of counsel and with consent of the parties: It is ordered and adjudged and decreed by the Court, that the parties be, and are hereby divorced from bed and board, which shall continue until a reconciliation shall take place between them, and it is further ordered, adjudged and decreed, that the plaintiff shall have power to sue and be sued as a *feme sole,* and that she may, and is hereby invested with power to acquire, retain and dispose of property in her own name by purchase, gift, devise or descent, free and discharged from every and all liability whatever; and it is further ordered, adjudged and decreed that defendant pay his costs incurred in this Court in the defense of this suit to be taxed by the clerk, and that he pay the further sum of two hundred dollars to the plaintiff as alimony, in consideration of which he is hereby discharged and acquitted from all liability to maintain, support and provide for the plaintiff in future. And if necessary, let execution issue for the costs aforesaid and alimony allowed the plaintiff. It is further ordered that this decree be enrolled in the minutes of this Court."

The parties lived separate and apart until the death of the said W. W. Taylor in the year 1883. The amount stipulated in the decree to be paid to Sarah Taylor by W. W. Taylor was paid.

W. W. Taylor left a last will and testament, in which the defendant was made his executor, and has qualified as such, and entered upon the duties of his office.

The plaintiff entered her dissent to the will.

The defendant's testator left at his death a considerable amount of personal property, of which the plaintiff has received no part.

The plaintiffs claims three hundred dollars as her (417) year's allowance, which is resisted by the defendant.

His Honor, in the Superior Court, filed the following opinion:

I do not think the decree affects the rights of the wife after the death of her husband. A divorce from bed and board is only a legal separation, terminable at the will of the parties, the marriage continuing in regard to everything not neces-

sarily withdrawn from its operations by divorce. Mrs. Taylor is certainly entitled to administer on her husband's estate, and is entitled to dower, and is also entitled to year's support. Her rights of property are the same as if she had not been separated. The doctrine is laid down in Schouler's Domestic Relations, second edition, marginal pages 301 and 302. Nor does our statute change the doctrine thus laid down as to the respective rights and duties of parties divorced from bed and board. On the contrary, the wife's rights may be clearly inferred from sec. 1843 of The Code, as it there declares what kind of a divorce will lose her right to dower and to year's support, viz: *a vinculo*. Mrs. Taylor is entitled to her year's support as prayed for in her complaint, and the same should be allotted to her from the crop, stock and provisions of the defendant's testator as the law directs, and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased."

The defendant appealed.

Mr. J. A. Forney for the plaintiff.

No counsel for the defendant.

ASHE, J., (after stating the facts). The appeal in this case was prematurely taken. There was no judgment rendered by the Judge, nor by the Clerk from which an appeal could be taken to the Judge, and there was therefore no question of law presented for his decision.

The case is therefore remanded that the Clerk may proceed with the case according to law.

REMANDED.

Cited: Jones v. Desern, 94 N. C., 35; *Powell v. Morrisey,* 98 N. C., 430; *Cameron v. Bennett,* 110 N. C., 277; *Milling Co. v. Finlay, Ibid.,* 412; *Rosenthal v. Roberson,* 114 N. C., 596; *Carter v. Elmore,* 117 N. C., 297; *Rogerson v. Lumber Co.,* 136 N. C., 269.

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SARAH TAYLOR v. LEROY TAYLOR et als.

Divorce—Alimony—Dower—Curtesy.

1. Alimony is that part of the husband's estate which is allotted to the wife for her support during the period of a judicial separation.
2. The property rights of both husband and wife remain unchanged by a divorce *a mensa et thoro* and an allowance for alimony, and on the death of the husband, the wife is entitled to dower, and if he die intestate, to her distributive share in his personal estate, and on the death of the wife, the husband is entitled to curtesy and to administer on her estate.
3. After a divorce *a mensa et thoro*, the wife holds, and may dispose of her property as a *feme sole*.
4. Where alimony is allotted to the wife in specific property of the husband, the title to such property remains in him, and will revert at the death of the wife, or upon a reconciliation.
5. Alimony ceases upon a reconciliation, or the death of either party, and may be reduced or enlarged at any time in the discretion of the Court.
6. Where a decree in an action for divorce *a mensa et thoro*, directed that the husband pay a sum in gross, and be discharged from all further liability for the support of his wife; *It was held*, that after his death, the wife was entitled to dower in his lands.

(*Rogers v. Vines*, 28 N. C., 293, cited and approved.)

SPECIAL PROCEEDINGS, heard on appeal from an order of the clerk, by *Philips, Judge,* at Spring Term, 1885, of RUTHERFORD.

The plaintiff alleged in her complaint that she was the widow of W. W. Taylor, who died 9 October, 1883; that she was married to the said W. W. Taylor in 1852, and lived and cohabited with him for some time thereafter; that she was divorced from him *a mensa et thoro,* by a decree of the Superior Court of Rutherford County, at the Spring Term, 1856, of which the following is a copy, to-wit: "This cause coming on to be heard upon the petition and answer, former orders, and finding of the jury, on motion of counsel and with consent of parties, it is ordered, adjudged and decreed, that the parties be, and they are hereby, divorced from bed and board,

(419) which shall continue until a reconciliation shall take place between them; and it, is further ordered, adjudged and decreed, that the plaintiff shall have power to sue and be sued as a *feme sole,* and that she may, and is

hereby invested with power to acquire, retain and dispose of property in her own name, by purchase, gift, devise or descent, free and discharged from every and all liability whatever; and it is further ordered, adjudged and decreed, that the defendant pay his costs incurred in this Court in defense of this suit, to be taxed by the clerk, and that he pay the further sum of two hundred dollars to the plaintiff as alimony, in consideration of which he is hereby discharged and acquitted from all liability to maintain, support and provide for the plaintiff in future."

That the said W. W. Taylor, at the time of his death, was seized and possessed of two tracts of land lying in the county of Rutherford, containing about four hundred and twenty-two acres; that he made a last will and testament which was duly admitted to probate, in which he devised the said land to the defendant Leroy Taylor, and from which she entered her dissent.

The defendants demurred to the complaint of the plaintiff, and alleged as ground therefor, "that the complaint does not state facts sufficient to constitute a cause of action, in this: that according to plaintiff's own showing, on the face of the complaint, the defendant's testator, W. W. Taylor, was by decree of the Court, and with the consent of the plaintiff, discharged and acquitted from all liability to maintain, support, and provide for plaintiff in future."

The demurrer was overruled by the Clerk. The defendants O. P. Taylor and Leroy Taylor moved through their counsel for leave to answer. The motion was refused by the Clerk, and judgment given that a writ of dower be issued, from which the said defendants Leroy and O. P. Taylor appeal to the Judge of the Superior Court, and his Honor adjudged that the judgment of the Clerk of the Superior Court, in overruling the demurrer, be sustained. From which judgment the said defendants appealed to this Court.

Mr. J. A. Forney for the plaintiff. (420)
No counsel for the defendants.

ASHE, J., (after stating the facts). The Judge, on the appeal from the Clerk, sustained his judgment in overruling

the demurrer, but omitted to adjudicate upon the question whether the defendants, upon overruling the demurrer, had the right to answer the complaint, so that the only question presented by the record upon the appeal from the judgment of his Honor is, was there error in his judgment in sustaining the judgment of the Clerk?

The defendants' counsel contended that by the decree of divorce, a sum in gross was awarded the plaintiff, which was paid by the husband, and accepted by her in full satisfaction of her claims on him for maintenance, support, and provision, and as dower is given for the maintenance, support, and sustenance of the wife, the husband's estate was discharged from all further liability for her support, and consequently his estate was discharged from her claim of dower.

This contention is founded on a mistaken notion of alimony, and the relative rights of husband and wife upon a divorce *a mensa et thoro*. Alimony, in its legal sense, may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to the wife for her subsistence and livelihood during the period of their separation. Shelford Marriage and Divorce, 586. "It is not a sum of money, or a specific proportion of the husband's estate, given absolutely to the wife; but it is a continuous allotment of sums, payable at regular periods for her support from year to year." 2 Bishop Marriage and Divorce, sec. 427.

Instead of the allotment of a certain sum to be paid from year to year, the decree in the case referred to in the pleadings, gave the plaintiff a sum in gross, which she consented to take in lieu of all future allotments, and the husband was thereby discharged from any liability to be charged with any other sums for her support during their separation.
(421) That is so clearly the meaning and effect of the decree, that we can not conceive how any other construction could be put upon it.

The property rights of the parties separated, remain in general unchanged. The only exception to this is, that she may hold during the separation, as a *feme sole*, any such property as she may acquire by her own industry, or the donations of her friends. Such is held to be her own property, which she holds against her husband and his creditors, and

may dispose of as if she were a *feme sole.* But when the alimony is allotted out of the specific property of her husband, she acquires no such right, but the property continues in the husband, and will revert in possession to him upon her death or reconciliation.

For it is given to her until a reconciliation, and notwithstanding the divorce, the husband will be entitled to his curtesy in her lands, and the wife to dower in his, just as if there had been no divorce; and the husband would still have the right to reduce her *choses in action* into possession and upon her death administer upon her estate—Schouler Domestic Relations, sec. 222—and the wife can not only claim her dower upon the death of her husband, but claim her distributive share of his personal estate, in case he dies intestate. 2 Scribner Dower, 515; Bishop Marriage and Divorce, *Ibid.;* 2 Blackstone Com., 130. But we need not go out of our own State for authority upon the subject. In *Rogers v. Vines,* 28 N. C., Chief Justice RUFFIN, who delivered the opinion of the Court, has given a very full and clear exposition of the law appertaining to the legal rights of husband and wife during a separation under a decree of divorce *a mensa et thoro.* unless, indeed, she should lose dower by leaving her husband and living in adultery. Co. Lit., 32, 33. (422) Moreover, the decree for alimony, vests in the wife no absolute right to the allowance, whether it consists of money, or specific things; for, besides that it ceases upon reconciliation, it may be changed from time to time, and reduced or enlarged at the discretion of the Court."

There is no error in the judgment of his Honor in sustaining the judgment of the clerk in overruling the demurrer, but the clerk was in error in refusing to allow the defendants to answer, after overruling their demurrer. The cause must therefore be remanded to the Superior Court of Rutherford, that the defendants may answer the complaint of the plaintiff, should they still be advised so to do.

ERROR. Remanded.

Cited: Castlebury v. Maynard, 95 N. C., 285; *Taylor v. Taylor,* 112 N. C., 139.

F. E. PATRICK v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Pleading—Variance—Evidence—Agent.

1. A plaintiff is entitled to such relief as the facts stated in his complaint, will admit, although he misconceives the manner in which it may be afforded.
2. A variance is not material unless it has misled the adverse party.
3. Where a contract with a railroad company provided that it might be terminated by a written notice for thirty days to be signed by a person designated in the contract; *It was held*, that the agent giving the notice had the power to recall it before the expiration of the thirty days.
4. *It seems*, that an agent to give notice of the intention of one party to a contract to end it, can not withdraw the notice so as to continue the contract, after it has ceased to be operative.
5. In an action for damages for a breach of a contract, which could have been terminated by a notice, and a notice was given, but withdrawn before the contract was annulled; *Held*, that it is proper to allege in the complaint that no notice was given.

(*Jones v. Mial*, 82 N. C., 252, cited and approved.)

ACTION, tried before *Philips, Judge,* and a jury at (423) Spring Term, 1885, of MECKLENBURG.

The facts fully appear in the opinion. The plaintiff, in submission to the rulings of his Honor, took a nonsuit and appealed.

Messrs. Jones & Johnston and *A. M. Lewis & Son* for the plaintiff.

Messrs. D. Schenck and *Burwell & Walker* for the defendant.

SMITH, C. J. The plaintiff and the president of the defendant company, acting upon its behalf, entered into the following contract:

"This agreement, made 1 August, 1876, between the Richmond & Danville Railroad Company of the first part, and F. E. Patrick of the second part, witnesseth: That whereas the said F. E. Patrick is now operating and proposes to operate, a cotton compress in the town of Charlotte, N. C., at present located on the cotton platform of said company in said town,

and for the sake of convenience of access to the railroad of the party of the first part, and in consideration of the increased facilities which he will thereby acquire for the conduct of said compress, wishes to secure the right to occupy an additional portion of the cotton platform belonging to said company and contiguous to their depot in said town.

"Now, therefore, in consideration of the advantages that are likely to accrue to said company from the business and operations in which the said Patrick shall embark, and of the sum of one dollar to them paid, the receipt whereof is hereby acknowledged, the said Richmond and Danville Railroad Company hereby agree to rent to the said Patrick for the term of three years from 1 August, 1876, (subject to revocation, as hereinafter provided), so much of their said platform as is embraced in the space marked red on the plat accompanying and forming part of this agreement, granting to said Patrick the right to erect at his own cost, suitable sheds over said portion of platform so rented as afore- (424) said, provided, however, the operations of said company are not thereby interfered with. And it is further agreed, that at the expiration of said term, the said Patrick shall have the privilege of renewing the same for an additional term of two years, on the same terms and conditions. It is understood that the location of the compress, and of the boiler operating the same, are to be the same as at present, and as indicated in the accompanying plat—the party of the second part expressly binding himself that the same shall not be changed except by the consent and under the direction of the party of the first part, and that the smokestack thereto shall at all times be provided with an efficient spark arrester, and the property of the party of the first part shall be in no wise endangered by fire on account of the operations of the party of the second part.

"It is distinctly understood and agreed that the said Richmond and Danville Railroad Company, reserves the right to reclaim possession of said platform, and to recall and end all rights and privileges herein granted, at any time during the continuance of said term, whenever, in the judgment of the President or General Superintendent of said company, the interest of said company so require, after first giving thirty

(30) days' notice in writing to said Patrick or his assigns, or to any party in the use and occupancy of said platform, of their (the said company's) intention to reclaim such possession, and the said Patrick hereby agrees to deliver possession of said platform to said railroad company on demand and notice as aforesaid.

"And it is further agreed by the parties hereto, that in the event of said railroad company reclaiming at any time, possession of said platform, the said Patrick, his successors or assigns, shall remove, without cost, injury or loss to said company, within the period of sixty (60) days from notice of intention to so reclaim, the said compress and all sheds which may have been erected thereon.

"Witness the following signatures this day and year (425) herein first above written.

"THE RICHMOND AND DANVILLE RAILROAD COMPANY.
"BY A. S. BUFORD, Pres.

"F. E. PATRICK."

The complaint alleges that the plaintiff has observed all the conditions and specifications contained in the lease and devolving upon him, and continued his compress operations until 23 December, 1877, when they were put a stop to by the entry of the officers and servants of the company, in the night time and during his absence, upon the premises, and their taking possession of the plaintiff's compress and other property used with it, without giving the notice required under the contract, and of their action he was soon after notified, as well as of the intention of the company to resist with force any attempt on his part to reenter.

For this alleged wrongful dispossession and withholding of the plaintiff's property, and for the losses consequent from the breaking up of the plaintiff's business, he seeks redress in the present action, and demands large damages.

The defendant in its answer, denies the imputed wrongful act; avers that due and sufficient notice was given of the intended termination of the lease and the withdrawal of the rights and privileges attaching to it, and that notwithstanding and after the thirty days provided in the contract had expired, the plaintiff did not desist, but continued to carry on his compress operations as before, for sixty days more after

the service of the notice, and that thereupon the defendant entered upon the premises, as it might lawfully do, and resumed possession of its platform whereon the compress was, notifying the plaintiff that he was at liberty to enter for the purpose of removing what property belonged to him.

The notice referred to and produced on the trial, bearing date 20 October, 1877, and which the plaintiff received two days later, is in the form of a note addressed to (426) him by T. M. R. Talcott, acting in his official capacity, as general superintendent, and in which he is notified that, at the end of thirty days, the company " will resume the control and occupancy of our platform at Charlotte, now used by you in connection with your compress," and further directing him in these words: "You will be allowed thirty days additional in which to remove your machinery, boilers, etc., from the company's platform, but we will not permit the use of the compress, after the expiration of the thirty days from date,"

A notice was also issued to the plaintiff on 23 December, 1877, over the signature of A. B. Andrews, an agent of the company (and a second in the same terms followed on Monday, the next day, to remove any objection to the first on account of its being Sunday), informing the plaintiff, that "in accordance with instructions from Col. Talcott, general superintendent of the R. & D. Railroad Company, and per agreement between the Railroad Company and yourself, I have this day taken possession of the platform at the depot, on which your compress is located. And I hereby forbid you, your agents or employees from entering upon the premises for any purpose."

We forbear upon entering upon an inquiry as to the correctness of the several rulings by which evidence offered by the plaintiff was excluded, as not pertinent to the allegations contained in the complaint and the relief demanded, and proceed to the consideration of a single exception, decisive of the case on appeal, with the remark that these rulings seemed to be a very strict enforcement of the former, and superadded principles of pleading, which now govern, and to ignore the adjudications made in *Jones v. Mial,* 82 N. C., 252, and subsequent supporting cases, which declare a plaintiff entitled to such relief as the facts stated in his complaint will admit, while he may misconceive the way in which it is to be afforded.

The rulings seem also to be at variance with the Code of Civil Procedure, which enacts "that no variance between the allegation in the pleading and the proof, *shall be*
(427) *deemed material, unless it has actually misled the adverse party* to his prejudice in maintaining his action upon the merits." The Code, sec. 269 and 270.

We propose to examine only the last in the series of exceptions to the action of the Court, in refusing to hear testimony, in consequence of which the plaintiff declined to proceed in the case, and suffered a nonsuit and appealed.

To obviate the effect of the notice given to terminate the contract relations of the parties, the plaintiff proposed to show that in an interview between himself and the general superintendent who gave it, had on 20 November, before the notice became efficacious, the latter withdrew the notice with a view to the continuance of the subsisting relations formed by the contract. On objection, the evidence was held to be incompetent by the Court upon two grounds:

1st. Because the plaintiff had not shown a *prima facie* case of agency in Talcott to recall the notice and reinstate the lease, and

2d. For that there was a material variance between the allegation and offered proof.

In our opinion, the evidence ought to have been received, and neither of the assigned reasons is sufficient to warrant its exclusion.

The contract itself designates the officers of the company, its president, who on its behalf entered into it, and its general superintendent, to each of whom is committed the right to determine whether it should continue, or be abrogated in the interest of his principal. This is an express delegation of authority to the superintendent to put an end to the relations formed under it, and as he may exercise it at his discretion, so he may refrain from exercising it at all, or forbear to proceed after taking initiatory steps in the matter at any time, at least with the assent of the other party, before any practical result has been reached, or their relative rights have been changed. This proposition so forcibly commends itself to the approval of the judicial mind, as to need no argu-
(428) ment or authority for its support. Such is the present case. The thirty days' notice of the intended action

of the company had not passed, and the future termination of the lease, as yet, only rested in a purpose formed but not carried into effect. The former relations of the contracting parties were unaffected by what had been done, and so might continue, unless and until the reserved power to terminate was exercised, and by its exercise the lease was ended.

We are unable to see any reason whatever, why the superintendent should be held to be incompetent to pause and not act under the notice, or in other words to withdraw it, because if not recalled it might in time have had the effect of ending the contract. Can it be that a purpose to annul, conveyed though it may be in writing, yet superinduced by false information, afterwards ascertained to be such, can not be abandoned when it is for the interest of the principal that it should be, and so the superintendent believes? Is the first erroneous step in the direction of the exercise of the reserved power, so potent as to compel him to persevere against his own judgment? Is a mere written notification of the future intended act, *vox emissa non revocabalis,* requiring that the act shall be done? Is there no intermediate *locus penitentiæ,* where progress may be arrested? The power to stop is inseparable from the power to proceed, and rests, in our opinion, equally in the agent who undertakes to use it. Until the purpose is made effectual, it is and must be under the control of the one in whose mind it is formed. It is not the case of action consummated by an annulment of existing relations, which perhaps the agent, whose authority was exhausted in doing so, may not then be able to restore and thus *renew,* that is, again enter into a similar or the same contract and bind his principal. To such a case some of the authorities cited in the full brief submitted by defendant's counsel are applicable. This is not an attempted renewal of an ended contract, but the recall of a notice in pursuance of which it might soon have been ended, but the preservation of a contract, entered into and recognized as binding on the defendant and (429) not destroyed when it might have been by its agent.

Assuming that the power remained in the superintendent to withdraw his notice, and let the lease remain, it is obvious the second reason given for the rejection of proof of the fact of withdrawal is equally unfounded.

A notice recalled ceases to have any further operation, and

is the same as if none had been given. It was therefore logically and legally correct, to aver that no notice of an intended resumption of the possession of the leased premises, and the privileges secured to the plaintiff under the contract, had been given before the alleged wrongful acts of the defendant were committed, and the rejected evidence was in support of the averment. We are not called upon to inquire into the extent of the authority of a general superintendent of a railway to act for the company whose agent he is, *virtute officii,* but the very name indicates the possession of very large authority from the principal. The learning upon this subject has no bearing upon the present controversy, for he is, in the contract itself, invested with the power to terminate, and, as we have said, to refrain from terminating, the contract, even after he has given notice of the contemplated abrogation, but before abrogation has been accomplished, and in this he is associated with the president, the highest officer of the corporation, and shares with him the power to annul, when in his judgment the interests of their common principal may so require. We do not advert to the declarations of the president, made to the plaintiff just before the alleged withdrawal of the notice, as he testifies, "Well, I will see Talcott immediately, and write or wire you at once," as indicating the extent of the superintendent's authority in the premises, since, without this, it was clearly in his power, not only to undo anything done, but to recall and put out of the way the notice, as a precedent requisite to effective action, and to let the lease and contract stand, as if none had been given. There
(430) is therefore error in ruling out the evidence proposed, for which the plaintiff is entitled to have a new jury.

ERROR. *Venire de novo.*

Cited: Harris v. Sneeden, 104 N. C., 377; *Skinner v. Terry,* 107 N. C., 109; *Johnson v. Loftin,* 111 N. C., 323; *Scarlett v. Norwood,* 115 N. C., 285; *Warehouse Co. v. Duke,* 116 N. C., 204; *Collins v. Pettit,* 124 N. C., 736; *Watkins v. Mfg. Co.,* 131 N. C., 539.

C. S. HOLTON v. THE BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY.

Constitutional Law—Taxes—Roads.

1. Courts never declare statutes unconstitutional and void, unless they plainly conflict with the constitution. If any construction can be given to their provisions which will make them consistent with the constitution it will be done, and every reasonable doubt will be given in favor of their validity.
2. The provisions of the Constitution requiring taxes to be uniform, apply to the levying and payment of taxes, and not to the distribution of the revenue arising therefrom.
3. *Quære.* Does a difference in the method of the payment of taxes properly levied, come within any inhibition of the Constitution?
4. The Legislature passed an act authorizing a county to be divided into suitable road districts, but providing that no incorporated city or town should be embraced in such district. It further provided that a tax might be levied for road purposes on all the property in the county, including that situated in cities and towns, and that the revenue arising therefrom should be divided among the road districts, not according to the number of miles in such district, but according to the amount of work needed on such roads. It was further provided that any taxpayer might discharge his road tax by working on the roads within the district where the tax was charged. In an action by the resident of a city to restrain a collection of the tax on his property; *It was held,* 1st. That the tax was uniform. 2d. That the tax could be levied on the property situated in cities and towns. 3d. That the taxpayer in the city could pay his tax by his labor.

Motion for an INJUNCTION, heard by *Shipp, Judge,* at chambers in Charlotte, on 4 December, 1885.

The statute (Laws 1885, ch. 134), entitled "An act relating to roads and highways," relates to and embraces only the county of Mecklenburg. It embraces and (431) systemizes the whole subject of ordinary public roads, bridges, ferries and fords in that county, it declares what these are and shall be, how they shall be established and constructed, how they shall be changed, extended or discontinued, how they shall be kept in repair, and how labor and money for such purposes shall be provided.

A leading and distinctive purpose of the statute is, to give to the justices of the peace in the several townships, "supervision and control of the public roads in their respective townships," and to this end, those of each township are incorpo-

rated as the "board of trustees" thereof. These boards of trustees are required to have stated, and may have special, meetings, and to keep a record of their proceedings.

They may sue and be sued, and exercise other corporate powers conferred. They are required to examine from time to time into the condition of the roads with which they are charged, and make report thereof to the Judge of the Superior Court.

They were further required, on the first of May, or within four weeks next thereafter, in the present year, "to divide their respective townships into suitable road districts, and annually thereafter may make such alterations therein as they may deem proper, and cause a brief description thereof to be made on the township records, and also furnish each supervisor with a plat of his road district."

They are also required to elect a supervisor of roads for each road district, and it is made his duty to do many things prescribed by the statute, such as ordering out for duty such persons as may be liable to work on the roads, direct and supervise their work, take care of necessary tools, etc.

The statute requires every able-bodied male person, within the ages of eighteen and forty-five years, except persons permanently disabled in the military service of the State, to do four days labor in each year on the highways, under the direction of the supervisor of the road district in which he resides, unless he shall choose to pay three dollars in lieu of such labor. The money so paid, and fines and penal-
(432) ties prescribed, when incurred and collected, must be applied by the supervisor to the use of the roads in his district. Among other things, it is provided as follows:

"Section 17. That the commissioners and board of justices of the peace of the respective counties of this State, are hereby authorized to levy at the June session of their board annually, for road purposes, not less than seven tenths of a mill, nor more than two mills on the dollar, and the chairman of the county commissioners shall place the same on the tax list of the current year, to be included in, and collected in the annual taxes; that if the trustees of any township shall deem an additional road tax necessary, they shall determine the *per centum* to be levied upon the taxable property of their respective townships, and shall certify the same in writing

to the board of county commissioners and justices of the peace at their June session, who may levy a special tax, not exceeding one mill on the dollar, and the commissioners and justices may levy and assess the same, on the taxable property of the township, and the same shall be collected as other taxes, and paid out as herein provided.

"Sec. 18. That the chairman of the board of county commissioners, immediately after the commissioners, at their annual session for that purpose, have determined the amount to be assessed for road purposes in their respective counties, shall give notice in some newspaper in general circulation in the county, of the *per centum* on each hundred dollars of the valuation so determined to be assessed in such county and *township*, and that the said tax may be discharged by labor on the roads under the direction of the supervisors of the several districts, and shall make out a list of the names of each taxpayer of the amount of the road tax with which each stands charged, and transmit the same to the supervisor of the proper district.

"Sec. 19. Any person charged with a road tax may discharge the same by labor on the public highways, within the district where the same is charged, within the time designated in the act, at the rate of one dollar per day, (433) and a ratable allowance per day, for any team, implement and material furnished by any person under the direction of the supervisor of such district, who shall give to such person a certificate specifying the amount of tax so paid, and the district and township wherein such labor was performed, which certificate shall in no case be given for any greater sum than was charged against such person, and the sheriff shall receive all such certificates as money in the discharge of said road tax. The township trustees in determining the division of this fund, shall be governed not by the miles of road in each district, but by the necessities of the roads, the convenience of getting material, the quantity of material necessary to make substantial repairs, etc., and thus make a just and equitable division of said fund between the several districts."

And in sec. 32 it is, among other things, provided that *"The township trustees shall not lay off any portion of any incorporated city, town or village, in any road district.* The tax

levied by the county commisisoners and justices of the peace under this act, shall be levied in accordance with the Constitution of this State, and shall apply to all cities and towns."

Charlotte township embraces the incorporated town of that name. The board of trustees of that township properly divided the same, except so much thereof as was embraced within the corporate limits of the town, into suitable road districts, and appointed a supervisor in each of them.

No road district embracing the town of Charlotte was established, nor any provision made for, or in respect to, the streets or highways within the limits of the town. On the first Monday in June, of the present year, the defendant commissioners, in conjunction with the justices of the peace of the county above named, in addition to the other taxes levied for general county purposes, levied a tax of ten cents on the one hundred dollars valuation of all property, both real and personal, taxable in the county, including the property of all persons who were citizens of the town of Charlotte, including that of the plaintiff, who was a citizen thereof. A (434) proper tax list, embracing the tax so levied, was made out and placed in the hands of the defendant sheriff for collection.

The plaintiff brought this action in behalf of himself and all other taxpayers of the town of Charlotte, against the defendants, commissioners of the county named, and the sheriff of that county. He alleges, and it appears sufficiently, that he has paid all the taxes owed by him, except the tax levied against him as above stated for road purposes, that the tax list for such tax is in the hands of the defendant Potts, sheriff, etc., and he is about to proceed to collect the same as directed by his co-defendants. He insists, that at all events, so much of the statute mentioned, as authorized the levy of such tax upon the property of the citizens of Charlotte, is in violation of the Constitution and void. It is not insisted that the whole tax levied by the defendant commissioners exceeds the Constitutional limitation upon the power of taxation, but that first, the tax for road purposes is not uniform, and secondly, that it is unequal: first, in that the citizens of Charlotte are required to pay such taxes, when no part thereof is to be expended within the limits of the town, in constructing and keeping in repair the streets and highways therein, and

secondly, in that the taxpayers, outside of the town limits, may pay taxes due from them respectively in labor at one dollar per day, while citizens of the town can not do so.

The Court at chambers, granted an injunction restraining the defendants from collecting the tax until the hearing of the action upon the merits, and they, having excepted, appealed to this Court.

Mr. W. P. Bynum for the plaintiff.
Messrs. Burwell & Walker for the defendants.

MERRIMON, J., (after stating the facts). Unquestionably, if the Court can give the provisions of the statute in question effect, by any reasonable interpretation of them, consistent with the Constitution, it is its obvious duty to (435) do so. Courts never declare statutes and statutory provisions in conflict with the Constitution, and therefore void, except where they are plainly so. They are presumed to be valid, and every reasonable doubt is to be given in favor of their validity. The Court can not allow plausible arguments and speculative opinions to overthrow them, and thus defeat the legislative intent.

The first assigned ground of objection to the statute is clearly untenable. The tax in question was levied just as were all the other county taxes, for an ordinary and lawful county purpose, and by the same uniform rule, upon the *ad valorem* assessment of all the taxable property in the county. The purpose was to raise county revenue, to be expended in constructing, amending and keeping in repair, the public roads, bridges, ferries, and fords in the county. The statute, in effect, apportions the revenue raised by the tax, to the township—not necessarily to the road district—from which it was collected. This distribution could not destroy the uniformity of the tax levy by which it was raised. We can not see any reason why the apportionment of the revenue, as indicated, should affect the uniformity of the tax levy at all, much less why it should destroy and render it void. The intention seems to have been to allow the taxpayers and the people of the township, paying the money, to have, as nearly as practicable, the direct benefit of it. There is no constitutional provision that forbids this to be done.

The second ground of objection assigned is, that the statute violates the Constitution in that it authorizes a tax on account of the public roads to be imposed upon the property of the tax paying citizens of the town of Charlotte, and requires that no part of the revenue raised from such tax, and indeed that no part of the revenue of the county for purposes of roads, shall be expended within the corporate limits of that town, for like purposes.

It is contended that this provision is unequal and unjust.

The Constitution does not prohibit such inequality.

(436) While it is very true, that there must be equality and uniformity in imposing the burden of taxation upon property subject to it, so that each taxpayer shall pay the same proportionate tax on the same species of property taxed, that every other taxpayer pays, and the tax must be levied *ad valorem,* this rule of equality does not apply to the distribution of the revenue arising from such taxation. It is to be observed, that the objection here, is not to the method or rule observed in levying the tax—the levy, as we have seen, was by uniform rule, and regular. But the objection is to the distribution of the revenue to be raised by the tax imposed.

Now, the necessities, wants, purposes and interests of government are such, that it is practically impossible to distribute its revenues equally among those who pay taxes. Indeed, this can not, in most instances be approximately done, not even to the localities from which most of it is taken. The State may, sometimes must, expend large sums of money in one section, for proper and necessary purposes, while it expends very little in another, when perhaps the greater part of the taxes were paid by taxpayers in the latter. This is an essential inequality, arising from the diversified and multiplied wants and necessities of government. Its very nature renders such inequality necessary. A constitutional provision forbidding it, would defeat, at all events greatly hinder, the purposes and aims of government.

Such inequality prevails in the State government, and as well, and for the like reasons, in the county government. It may turn out, oftentimes does, that a large part of the county revenues must be expended in one locality in the county, to build a road, construct a bridge, erect a workhouse or the

like, essential to the general and common good of the people of the county.

The statute under consideration undertakes to distribute the revenue arising from the taxes for the purposes of roads, to the townships—not necessarily in equal parts to the several road districts—from which it is to come. This seems to be a distinctive purpose. The taxes collected, and all fines and penalties, are to be so distributed and ap- (437) plied, following up the general and leading purpose of the statute, to give "the supervision and control of the public roads" to the justices of the peace respectively, of the several townships. Hence, it is provided in sec. 19, that "the township trustees, in determining the division of this fund, shall be governed, not by the miles of roads in each district, but by the necessities of the roads, the convenience of getting material, the quality of material necessary to make substantial repairs, etc., and thus make a just and equitable division of said funds between the several districts," And to effectuate this purpose the better, it is provided in sec. 17, "that the chairman of the board of commissioners shall make out a list of the names of each taxpayer, of the amount of the road tax with which each stands charged, and transmit the same to the supervisor of the proper district." The taxpayer and the sum of money thus due from him, being thus designated, he may discharge the sum of money so due "by labor on the public highways within the district where the same is charged, within the time designated in this act, at the rate of one dollar per day," etc. But if the tax due is not thus discharged in labor, the township trustees will destribute the cash fund, when it shall be collected by the sheriff, to the several road districts, in the township as above indicated.

What we have said serves to show that the inequality complained of, is not such as comes within any constitutional inhibition, and the statute is not void on that account. It is not necessary to advert to the advantages the taxpayers of Charlotte must gain by the expenditure of the revenue arising from the taxes they are required to pay, in improving the roads that lead directly into their town, and the further advantage they have in being exempt from performing four days labor on the public roads, that the taxpayer living in a road

district must perform, or pay three dollars in cash. This does not affect the merits of the objection just disposed of.

The third ground of objection is, that the taxpayer outside of the corporate limits of Charlotte, may discharge the (438) taxes due from him in labor, while the taxpayer in town can not. The objection is unfounded. The taxpayer in Charlotte has the right to, and may, discharge the tax due from him in labor on the roads, just as may any other like taxpayer residing outside that town. As we have seen, the revenue arising from the tax is to be applied in the township from which it comes. To this end, a list of the taxpayers, and the tax due from each, must be sent to the supervisor of the proper road district, as above indicated. The taxes so designated, are to be distributed and apportioned by the township trustees to the several road districts, as provided in the last clause of sec. 19, of the statute above recited. The tax due from the taxpayers in Charlotte will be thus apportioned to a road district in Charlotte township, and each may discharge the tax due from him, by labor on the roads in the district to which his tax may be assigned. The language of the statute (sec. 19), is, "any person * * * * * may discharge the tax due from him on the public highways within the district where the same is *charged,*" etc. When the tax due is apportioned by the township trustees, the tax "is charged," in the sense of the statute, in the road district to which it is so apportioned. If the township trustees have not so apportioned the taxes due, they ought to do so, so that the taxpayer may exercise his right to discharge the tax due from him in labor. This interpretation, it seems to us, is not unreasonable, and it gives just effect to the statute. If it be said, that the distribution of the revenue arising from the tax is cumbersome, it must be said in reply, that the statute is not clear in much of its details. But apart from what we have said, it is questionable how far a difference in the method of the payment of taxes properly levied, comes within any inhibition of the Constitution. We express no opinion in that respect.

We think the Court erred in granting the injunction, and the order granting it must be

REVERSED.

Cited: *Brown v. Comrs.*, 100 N. C., 99.

(439)

NAVASSA GUANO COMPANY v. JOHN BRIDGERS.

Justice of the Peace—Power to Set Aside Judgments.

1. Justices of the peace have power to rehear cases decided by them, when mistake, surprise or excusable negligence is shown, and the application is made in ten days after the date of the judgment. After the lapse of that time, they can not rehear their judgments for such cause.
2. A new trial can not be allowed in a justice's court.
3. Where a defendant relied on the assurance of a justice of the peace, that his cause would not be tried, after which the justice rendered a judgment against him in his absence; *Held*, the remedy is by an appeal or a *recordari* as a substitute therefor, and not by a motion to set aside the judgment.

(*Froneberger v. Lee*, 66 N. C., 333; *McDowell v. Watkins*, 76 N. C., 399; *Sparrow v. Davidson College*, 77 N. C., 35; *Caldwell v. Bently*, 69 N. C., 365; *Marsh v. Cohen*, 68 N. C., 283; *Koonce v. Pelletier*, 82 N. C., 236, cited and approved.)

MOTION to set aside a judgment, heard on appeal from a justice of the peace, by *MacRae, Judge*, at January Term, 1885, of ROBESON.

On 19 October, 1876, the plaintiff brought its action before a justice of the peace, in the county of Robeson, against the defendant, to recover the sum of $50 due by note. The summons was made returnable on the 26th day of the same month. On that day the case was continued on the application of the defendant, until 1 November next thereafter, and on the latter day, the defendant failing to appear, the justice of the peace gave judgment in favor of the plaintiff for the sum of $43.50, with interest on $38.47 from that date until paid, and for $1.30 costs. The justice of the peace who gave the judgment died before the motion to set it aside, presently to be mentioned, was made. On 30 November, 1882, the defendant moved before the justice of the peace,, who was the successor in office of him who gave the judgment, to set the same aside for "errors of law" apparent. Upon hearing the evidence produced in support of the motion, it was denied, and the justice of the peace gave judgment against the defendant for costs, whereupon, the latter appealed to (440) the Superior Court of the county named. In the Superior Court, the Judge, by consent of the parties given in writing,

heard the motion *de novo,* and upon consideration of the evidence produced before him, reversed the judgment of the justice of the peace denying the motion, and made an order setting the judgment aside, whereupon the plaintiff excepted and appealed to this Court. In his affidavit filed in support of the motion, the defendant states, that he produced before the justice of the peace on the day the judgment was given against him, a letter from an agent of the plaintiff with whom he had made a contract in reference to the note sued upon, at the time it was given, that the justice of the peace said to him, on reading the letter, "that settled it—that there would be no trial and he (defendant) might go home as he would never hear of it again." That defendant went home after what had been said, believing the action was stopped, that afterwards the justice of the peace told him "the action on said note had been fixed all right, and he would never be troubled about it again;" that the judgment remained on the docket of the justice of the peace, until it was docketed in the Superior Court, about five years after it was given, and he knew nothing of it, until about ten days before the motion to set it aside was made. The justice of the peace who gave the judgment and the alleged agent of the plaintiff, had died before the motion was made.

The plaintiff appealed.

Mr. Frank McNeill for the plaintiff.
Mr. T. A. McNeill for the defendant.

MERRIMON, J., (after stating the facts). We are of opinion that the order of the Superior Court was erroneous. The defendant was duly served with a summons in the action before the justice of the peace. The latter had jurisdiction of the defendant and the subject-matter of the action, and therefore had power to grant the judgment. If the judg-
(441) ment was rendered in the absence of the defendant, and such absence was caused by sickness, excusable mistake or neglect of the party—in such case, upon proper application *within ten days* next after the date of the judgment, the justice of the peace might have reheard the case as allowed by The Code, sec. 845, but after the lapse of that time, he had no authority to rehear it, or set the judgment

aside for such cause. A new trial can not be allowed in a Justice's Court. In case of dissatisfaction with his judgment, the party dissatisfied may appeal to the Superior Court where there will be a new trial of the whole matter in controversy. The Code, secs. 865, 880; *Froneberger v. Lee,* 66 N. C., 333. It seems to have been the purpose of the Legislature to limit the control of justices of the peace over their own judgments within a brief period of time.

The defendant insists, however, that he was deceived and misled by the justice of the peace, who informed him, in substance, shortly before giving the judgment, that he would not do so, and, that acting upon such assurance, he was not present at the time and place fixed for the trial, and when the judgment was given, that he did not hear of the judgment for several years after it was given, and therefore he could not apply within the time prescribed for a rehearing, nor could he appeal. But it was his folly or misfortune to act upon the assurance, he was a party defendant to, and had the notice of the action, it was his duty, as well as his right, to see what judgment was rendered by the justice of the peace. If he had been diligent and watchful of his rights as a litigant, he might have made a successful defense, or failing in this, he might have appealed to the Superior Court, *McDowell v. Watkins,* 76 N. C., 399; *Sparrow v. Davidson College,* 77 N. C., 35.

If the defendant was misled and surprised as he alleges, and there was excusable neglect, as it seems there was, he could not have redress by a motion to set the judgment aside. To set it aside would imply necessarily the granting of a new trial, and as we have seen, a justice of the peace can not grant a new trial.

The defendant was not without remedy. If the judgment was fraudulent, then his remedy was by a proper action to have it declared void. If there was excusa- (442) ble neglect, and he had diligently pursued his remedy, he might have had relief by means of the writ of *recordari* as a substitute for an appeal. We do not, however, mean to suggest that he may yet have such relief. As to that, we are not at liberty to express an opinion. No question in that respect is before us, *Caldwell v. Beatty,* 69 N. C., 365; *Marsh v.*

Cohen, 68 N. C., 283; *Koonce v. Pelletier,* 82 N. C., 236; Clark's Code, 329.

There is error. The order of the Superior Court, reversing the order of the justice of the peace denying the motion, and setting the judgment aside, must be

REVERSED.

Cited: King v. R. R., 112 N. C., 321; *Salmon v. McLean,* 116 N. C., 210; *Bullard v. Edwards,* 140 N. C., 647.

AREY GRAY v. DAVID F. WEST et als.

Wills—Charge of the Legacy on Land.

1. Technical rules of construction and decided cases serve only as aids rather than as binding rules in the construction of wills. The construction of the will depends largely upon the circumstances of the testator as they appear from the will itself.
2. The meaning attributed by the testator to words and phrases in a will, when it appears, must prevail, however different this may be from the meaning ordinarily applied to such words and phrases in other wills.
3. Where a will provided "that A. G. should have her support out of the land," *It was held,* under the circumstances of the will, not to be a charge on the *corpus* of the land, but only the right to receive a support out of the rents and profits.

(*Wall v. Williams,* 93 N. C., 327, cited and approved.)

ACTION, tried before *Graves, Judge,* at Fall Term, 1885, of DAVIE.

The action was instituted for the purpose of having the legacy of the plaintiff declared a charge on the lands devised by the testator. The facts fully appear in the opinion.

(443) There was a judgment for the plaintiff, and the defendants appealed.

Messrs, Clement & Gaither for the plaintiff.

Mr. D. M. Furches for the defendants.

MERRIMON, J. It appears that James Gray died in the county of Davie in the early part of the year 1873, leaving

surviving him neither wife nor children, and leaving a last will and testament, which was duly proven, and James Gaither qualified as executor thereof.

By this will the testator disposed of considerable estate, consisting of both real and personal property. The parts of the will to be construed and necessary to be set forth here, are as follows:

"9th. I give Margaret Forcum and Emily Clampet and Mary Clampet, the land I now live on and all my property that I have on the land.

"10th. Arey Gray is to have her support out of the land.

"11th. I give Milly Gray and her children one mule, one cow, five sheep. Turner Gray is to tend the land and keep the fences up by giving the third of the produce."

The *feme* defendants are the persons named in the ninth clause of the will above recited, Emily Clampet having, since the death of the testator, intermarried with the defendant David West, and Mary Clampet with the defendant John Johnson.

The *feme* defendants, as was admitted, were the natural children of Alexander Gray, deceased, who was the brother of the testator, and after the death of their father they lived with and were cared for by the testator, as if they had been his own children, until the time of his death.

Arey Gray, the plaintiff, mentioned in the tenth clause of the will, had been a faithful slave of the testator in time past, before his death, and she was advanced in life and somewhat infirm. It appears that she had some means of support of her own, but not sufficient to make her comfortable.

On the argument before us, the counsel for the plain- (444) tiff insisted that the "support" provided for her in the will must be treated as a charge— a lien—on the land, and it might be sold to pay arrearages for her support, as directed by the judgment of the court below, and cited numerous cases, none of them, however, directly in point, to support the view contended for by him.

In interpreting wills, it is the duty of the Court to ascertain and give effect to the intention of the testator. Technical rules of construction, and decided cases, serve only as aids rather than as binding rules in the discharge of such duties, the meaning of every will and its several parts depends largely

upon the circumstances of the testator as these appear from the will itself. The meaning attributed by him to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator, whose will may be under consideration, intended.

It is plain in this case, that the testator intended by the ninth clause of his will, as his principal purpose, to devise to the *feme* defendants the tract of land—the whole of it—on which he lived at the time of his death. The terms employed are broad and strong, and without qualification.

By the tenth clause he did not devise any part of the land to the plaintiff, but made a provision that she should "have her support out of it."

This provision does not imply that she might have the land sold, or parts of it, from time to time, so that she might, from the proceeds of such sales, get her "support" out of it, it was no part of the purpose to make the provision—the "support"—a lien upon the land, and subject it to sale. Such an interpretation would tend to defeat, and might possibly defeat, the chief and primary purpose of the testator, to devise the land to the *feme* defendants, and this can not be allowed if a more reasonable one can be given. It seems to us that the obviously reasonable interpretation of the (445) two clauses mentioned is, that the testator intended to provide that the plaintiff should have her support out of the net annual product—the rents and profits of the land—that out of these she should get her "support"; no matter who might make or receive them, the support was intended to be a charge upon them, and she had the right, as against the executor, who it seems received them until 1878, the defendant or any other person, to have so much thereof as might reasonably be necessary for that purpose. Her right was not against the *feme* defendants, at all events, it was only so in case they made or were in receipt of the rents. It was not the intention that the plaintiff should get her "support" from them, but "out of the land," that is, out of the rents of it or the use or occupation thereof. She misapprehended her right in looking to them, instead of the rents directly, whether in their hands or in those of the executor or some other person.

This view is strengthened by the prvision in the eleventh section of the will, that "Turner Gray is to tend the land and keep the fences up by giving the third of the produce." The testator thus recognized and treated the lands as productive of rents, and as affording, from year to year, means—"produce" —out of the land for the "support" of the plaintiff, as well as for the purposes under the will.

If it had turned out that, for any cause, neither the *feme* defendants, nor the executor, nor any other person would cultivate the land and make rents, so that the plaintiff might have her "support" out of the same, in such case, she might have had her remedy through the courts.

The Court might have directed the land to be leased for cultivation, so as to make rents, or she might have been allowed to cultivate it, or a sufficient part of it, herself, as the Court might allow; or she might have had such relief as the Court would deem her entitled to.

The will does not specify any particular sum of money or supplies of any kind for the "support" of the plaintiff. The supply, whatever it might be, was left to depend upon her wants growing out of her physical condition, and her circumstances, pecuniary and otherwise. It was not (446) intended that she should receive annually, or at shorter intervals, a sum of money or other suitable supplies, whether she needed them for her support or not—nor was it intended that her estate should be enhanced, or that she should have a legacy at all events, equal to a sum of money sufficient for her "support." The purpose was that she should have a "support out of the land" equal to the supply of her reasonable wants and necessities, in view of her condition and station in life. The provision was for her personally—not for others that might be about, and dependent more or less on her.

If she had abundance, it might be questionable whether or not she could get anything "out of the land"; if she had not enough for her comfortable "support," then the deficit must be supplied, and the supply would depend upon her reasonable wants; if she were homeless, she would be entitled to be supplied in a proper way with a comfortable place to live; if she were stout and strong, her demands would be less; if she were infirm, helpless, sick, then she would be entitled to more. If those interested in the land would not supply such measure

of comfortable support, then the Court would allow it out of the rents of the land. She might have applied for redress long ago—that she did not, was her own neglect or her misfortune; if she accepted promises from the *feme* defendants that were broken, that was also the fruit of misplaced confidence. The courts were open to her at all times. *Wall v. Williams, ante,* 327; *Ellerbe v. Ellerbe,* Spears Eq. (S. C.), 328.

It follows that the support to which the plaintiff was entitled was not a charge upon the land in the sense and way contended for by her, and it further follows that the *feme* defendants were not amenable to her for her "support" for the time they did not receive the rents and profits thereof. The judgment is erroneous and must be reversed and further proceedings had in the action in the court below in accordance with this opinion.

ERROR. Reversed.

Cited: Misenheimer v. Sifford, 94 N. C., 594; *Barnes v. Barnes,* 104 N. C., 620; *Kornegay v. Morris,* 122 N. C., 202; *Perdue v. Perdue,* 124 N. C., 163; *Wall v. Wall,* 126 N. C., 408; *Ricks v. Pope,* 129 N. C., 55; *Helms v. Helms,* 135 N. C., 169; *Whitaker v. Jenkins,* 138 N. C., 480.

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F. W. KERCHNER v. M. A. MCEACHERN et als.

Consent Decree—Power to Alter.

1. A Court has power to set aside and vacate a consent judgment for fraud or surprise, but it can not alter or correct it, except with the consent of all the parties affected by it.
2. In order to set aside a consent decree, on the ground that there has been a mutual mistake in the terms in which it was entered, it must appear that there was a common intention and understanding which fails to find expression in the decree.

(*Vaughan v. Gooch,* 92 N. C., 524; *Edney v. Edney,* 81 N. C., 1; *Wilcox v. Wilcox,* 36 N. C., 36; *Kerchner v. McEachern,* 90 N. C., 177, cited and approved.)

ACTION, heard before *MacRae, Judge,* at February Special Term, 1885, of RICHMOND.

In a special proceeding prosecuted by the appellant and other legatees under the will of John Fairley, deceased, against the present plaintiff, to whom, on the refusal of the executor therein appointed to accept the trust, letters of administration with the will annexed, had been issued for an account and settlement of the testator's estate, before the Clerk as Probate Judge, and while there pending, the parties agreed upon a compromise, and caused a consent decree to be entered in the form following:

HENRY FAIRLEY, NANCY FAIRLEY, MARGARET ANN MCEACHERN, WILLIAM GILCHRIST, ANGUS GILCHRIST, SALLY MCCORMAC and E. L. MCCORMAC, *vs.* F. W. KERCHNER, Administrator of JOHN FAIRLEY, deceased.	Superior Court of Richmond.

This cause coming on to be heard, and all of the parties being present in person and by counsel, by consent of all parties it is ordered, adjudged and decreed that the plaintiffs recover of the defendant the sum of seven hundred dollars and the costs of this proceeding, in full and complete satisfaction, compromise and discharge of all claims and demands, actions and causes of action, which the said plaintiffs (448) have or may have, against the said defendant by reason of his administration of the estate of said John Fairley, and in particular of all matters of account in dispute in this proceeding.

D. STEWART,
C. S. C. and Judge of Probate.

JOHN D. SHAW,
R. T. BENNETT,
Attorneys for Plaintiffs.
STEELE & WALKER,
JUNIUS DAVIS,
F. D. POISSON,
Attorneys for Defendant.

At the same time certain other papers were prepared and executed, marked in the record as Exhibits "B," "C" and

"D," except that some of the signatures were affixed to Exhibit "B" a few weeks afterwards, which are as follows:

EXHIBIT "B."

RICHMOND COUNTY, Probate Court. } *Before D. Stewart.*

Henry Fairley, Nancy Fairley and others,
vs
Francis W. Kerchner, Administrator of Estate of John Fairley.

Received of Francis W. Kerchner seven hundred dollars, in full settlement and compromise of all matters of dispute in the above-entitled cause, in pursuance of the decree therein rendered at this date.

August 8, 1877.

JNO. D. SHAW,
R. T. BENNETT,
Attorneys for Plaintiff.

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EXHIBIT "C."

STATE OF NORTH CAROLINA, Richmond County.

We, Henry Fairley, Nancy Fairley, Wm. Gilchrist, Angus Gilchrist, E. L. McCormac and wife, Sallie E. McCormac, devisees and legatees under John Fairley's will hereby release and forever discharge Francis W. Kerchner, administrator with the will annexed of John Fairley, deceased, from all liability to us on account of his administration of said estate, and from all claims and demands we may have against him on said account, being satisfied after a full and complete examination of the vouchers and accounts of said administrator.

Witness our hand and seals the 8th day of August, 1877.

HENRY FAIRLEY. (Seal.)
WM. GILCHRIST. (Seal.)
SALLIE E. MCCORMAC. (Seal.)
E. L. MCCORMAC. (Seal.)
ANGUS GILCHRIST. (Seal.)
NANCY FAIRLEY. (Seal.)

EXHIBIT "D."

STATE OF NORTH CAROLINA,
Richmond County.

I, Francis W. Kerchner, administrator of John Fairley, and also in my individual capacity, hereby release and forever discharge Henry Fairley, Nancy Fairley, Wm. Gilchrist, E. L. McCormac and his wife, Sallie E. McCormac, and Margaret Ann McEachern, all of whom are legatees and devisees of said John Fairley, under his will, from all claims, demands, actions, or causes of action I may have against them on account of any sums due me from the estate of said Fairley, or against them in any other manner, except as far as there may exist in my behalf, any right, claim or demand against them or any of them, on account of certain debts secured by mortgage on the Laurel Hill place, (450) and as to those debts so secured, I hereby covenant that I will not sue any of the said parties upon the same. It being understood that I reserve the right to subject the lands conveyed by the mortgage made to secure the said debts, to the payment of said debts, and to enforce no other remedies against the said parties or any other property they may have received from the estate of John Fairley.

Witness my hand and seal, this 8 August, 1877.

F. W. KERCHNER. (Seal.)

Witness: JNO. D. SHAW.

The complaint alleges that the agreement of compromise embraces all the matters contained in the three last-mentioned exhibits, and that the decree does not fully express the intent of the parties, in that, by inadvertence and mistake, it omits to refer to those papers, and incorporate them in it, nor were these papers filed with and made part of the record. The plaintiff therefore demands judgment for a reformation and correction of the proceedings, records and decree in the said special proceedings above referred to, so that they may conform to the intention and agreement of the parties, and that "the papers containing the said agreement may be filed as part of the record," and the decree made to refer thereto; and for general relief.

The answer of the defendant Margaret A. McEachern,

who alone appeals from the ruling of the Court below, denies her delegation of authority to counsel who represented the other plaintiffs in the cause, to enter into any such agreement to bind her, and that she only gave her consent to have her name inserted among them, because she was advised that otherwise she would be brought into the cause as a defendant; that she knew nothing of the action of the Court, being absent until some months afterwards, when she was informed of the decree and matters of record connected therewith, and of the seven-hundred-dollar receipt; nor was she aware
(451) that the plaintiff claimed that there were other or further parts of the agreement, until the plaintiff moved in May, 1881, before the Clerk, to be allowed to file said papers and make them by reference, part of the decree; that as soon as she learned the contents of the plaintiff's release (Exhibit "D") she refused to recognize or take any benefit under it; that this paper was never delivered to her nor to any one authorized to act on her behalf; and that at the making of said compromise, the plaintiff and his counsel were advised by Messrs. Shaw and Bennett that they would not say that respondent would execute the release (Exhibit "C"), or surrender any of her rights against the plaintiff.

The respondent also sets up the defense that the cause of action did not accrue within three years next before the beginning of the action, and that it is barred by the statute of limitations.

The parties waived a jury trial of the controverted matters, and the cause was tried before the Judge, at the Special Term of Richmond Superior Court, held in February, 1881, whose findings, so far as pertinent to the errors assigned in the appeal, are as follows:

"The three papers, 'B,' 'C' and 'D,' were prepared as part or the compromise arrangement, with the decree, with the assent of two of the plaintiffs, Henry Fairley and William Gilchrist, and the plaintiff in the present action, the defendant in that. The name of the respondent, Margaret A., was not inserted in the body of Exhibit "C," which was then signed by the plaintiffs who were present, and within two months thereafter by the others whose signatures are attached. It was never presented to her, nor did she hear of it until the making of the motion to amend the decree.

"It was prepared at the instance of Kerchner's counsel, who said, 'we prefer to have the individual release,' the plaintiff's counsel at the same time replying he did not deem it necessary to bind the parties; that they were bound by the receipt and release of Kerchner. At the same time counsel for plaintiffs told the counsel for the defendant that (452) he would not guarantee that the said Margaret A. would sign the paper. When she heard of it, she refused to be bound by it or to take benefit under the release to her and the others, nor was any portion of the money paid received by her.

"The said Margaret, on being informed that unless she consented to become a plaintiff in the special proceeding, she would be made a party-defendant, then authorized Messrs. Shaw and Bennett to enter her name as plaintiff and to appear for her.

"The release executed by Kerchner (Exhibit "D") was never shown to appellant, nor was she notified of its existence.

"After the compromise, Kerchner brought his action to foreclose the mortgage upon the Laurel Hill tract, against the devisees and legatees of the testator, John Fairley, and Robert N. Fairley and wife, Mary J., when the two last named and the said Margaret A., in their answers, set up the decree as an estoppel against the said Kerchner, to deny his possession of assets sufficient to pay all the testator's debts, including that secured by the mortgage. Thereupon he moved to correct and amend the decree, and the cause being removed to the Supreme Court by appeal, it was denied, and he commenced the present action on 22 October, 1884. The defendants R. N. Fairley and wife were not parties in the special proceeding, nor in person or by attorney were they present when the settlement was agreed on. The former was a surety to the testator's notes, and the lands conveyed in their mortgage are and were the property of the wife."

Upon the foregoing facts found, it is considered by the Court:

"That the terms of the compromise made by the attorneys representing plaintiffs and defendants in the special proceeding for account and settlement, heretofore set out, are embraced in the decree of the Probate Court, Exhibit 'A,' at-

tached to the answer, and the three other papers marked 'B,' 'C' and 'D,' attached to the same, and that the failure to refer to the said papers and make them part of the decree was by mistake and inadvertence on the part of the counsel preparing and giving the same, it being the intention
(453) of the counsel and the parties present that the decree should embrace the whole terms of the compromise.

"That the said decree by consent, as it was intended to be, and the compromise as set out in the decree and the three exhibits 'B,' 'C' and 'D,' was within the scope of the authority granted to said counsel by the parties. And the acceptance of the release signed by Kerchner, with the promise therein by the attorneys of record of Margaret A. McEachern, is binding upon her.

"That the plaintiff's cause of action herein is not barred by the statute of limitations, because of the attempt by plaintiff to assert his rights in the said special proceedings within three years of the discovery by him of the mistake in the decree, said discovery being made upon the filing of the answer of M. A. McEachern in the action for foreclosure, and his petition being filed 24 May, 1881, and the present action being commenced 22 October, 1884, within one year after the denial of relief upon the petition in the Supreme Court.

"Or, if the discovery of said mistake was at an earlier date, there was no statute of limitation bearing upon the cause of action.

"No relief is demanded in this action against the defendants Robert N. Fairley and wife, and, on motion of plaintiff, a *nol. pros.* is entered as to R. N. Fairley and wife, with costs.

"It is further considered that the plaintiff is entitled to the reformation of the decree as demanded in the complaint."

Judgment accordingly; defendant McEachern appeals to Supreme Court.

Messrs. Burwell & Walker for the plaintiff.

Messrs. Frank McNeill and *T. A. McNeill* for the defendant.

SMITH, C. J., (after stating the facts). The exceptions to the rulings of the Judge, taken by the appellant, are numer-

ous, but may be condensed, so far as they are material to our determination of the cause, into these:

1. For that the Court did not adjudge that the decree could not be amended as proposed, and refuse (454) relief.

2. For that the Court found, without evidence, that there was a mutual mistake in the drawing of the decree, and that it did not carry out, in its present form, the understanding of the counsel and parties.

3. For that it was adjudged that appellant had conferred authority upon counsel to enter into and bind her by said compromise.

4. For that it was not ruled that the action was barred by the statute of limitations.

It will be noticed that the complaint does not state in precise terms the omitted and agreed matter sought to be inserted in the decree; and not more definite is the demand for relief. Its object seems to be merely to introduce a clause referring to the other papers, and constituting them thereby parcel of the decree itself; and this in face of the undenied fact that the release was executed by only two of the persons whose signatures and seals it bears, and not by the other four until some time afterwards, and while it contains in its body the names of all who actually executed it, it omits the appellant's name altogether. The result contemplated in the proposed modification is nothing less than to impose upon her the obligations voluntarily undertaken by the other plaintiffs in that proceeding.

1. We have not in our researches found any precedent which supports the present application, nor any authority for the exercise of the power invoked to amend or change a decree entered by consent against the will of any of the parties to it. There can be no question of the authority of the Court to vacate or set aside a consent decree procured by fraud, as any other decree brought about by means which, in equity, call for and justify an intervention of the Court for the relief of the wronged party.

"I see no reason to doubt," says *Tucker,* President of the Court of Appeals of Virginia, delivering the opinion in *Anderson v. Woodford,* 8 Leigh, 328, "that an original bill will lie to set aside a decree [he is discussing a con-

(455) sent decree] obtained by surprise as well as one obtained by fraud"; and indeed the surprise which forms a ground for equitable relief may be classed with frauds.

In *Vaughan v. Gooch,* 92 N. C., 524, the nature of such decrees or judgments came up for consideration, and we quoted with approval the language of DILLARD, J., in *Edney v. Edney,* 81 N. C., 1, where he says "a decree by consent, as such, *must stand and operate as an entirety, or be vacated altogether, unless the parties by a like consent shall agree upon, and incorporate into it an alteration or modification,*" and if a clause be stricken out, he adds, "or (as we think) if a clause be inserted therein against the will of a party, then it is no longer a *consent decree,* nor is it the decree of the Court, for the Court never made it."

And so we held in the case from which the recited extract is taken, following what was said by GASTON, J., in *Wilcox v. Wilcox,* 36 N. C., 36, and in other subsequent cases, "the decree is, by consent, the act of the parties rather than of the Court, and it can only be modified or changed by the same concurring agencies that first gave it form," etc.

When this case was before us upon a motion to amend (*Kerchner v. McEachern,* 90 N. C., 177), MERRIMON, J., speaking for the Court, uses this language: "The appellant does not consent to the filing of the papers, or the correction prayed for; on the contrary she refuses to do so, and assigns sundry grounds, specified in her answer to the petition, why she will not. It is very clear that the *Court can not amend the judgment.* We do not intend to intimate that the defendant could not have redress by a proper action, notwithstanding this decision," manifestly having reference to the equity suggested to have the judgment put out of the way for surprise, fraud or other sufficient cause. We are not prepared to concede that the relief here asked, which proposes, not to vacate the decree and remove the obstacle which it interposes in the way of the foreclosure suit, but to amend and modify, and allow it to remain when amended
(456) and modified, in full force, as a consent decree among the parties.

2. But passing by this difficulty, the appellant's second exception rests upon an alleged absence of evidence to sustain

the finding, or rather the conclusion drawn from the facts found, "that the failure to refer to the other papers, and make them part of the decree, was by mistake and inadvertence on the part of the counsel preparing the same, it being the intention of the counsel and parties present that the decree should embrace the whole terms of the compromise."

The testimony abundantly shows that all these papers were embraced in the agreement, and together constitute the compromise as a full and final adjustment of the matters.

The testimony of Mr. Davis, and of the other counsel of Kerchner is, that while "he does not recollect that there was any specific agreement that Exhibits 'A,' 'B' and 'C'" (intending Exhibits "B," "C" and "D," as is obvious) "should be filed with the decree, but it was certainly and clearly agreed, and distinctly understood, that the decree was a compromise decree, and upon the terms set forth in the said several exhibits."

The testimony of Kerchner is substantially similar, except that he adds that these papers "were to be filed with the decree though this may not have been expressly mentioned and agreed upon."

Examining the testimony, we do not discover that it is anywhere shown that the decree is not in the form "intended by all the parties, or that there was any *mutual mistake* as to provisions which were to be, and are not inserted in it. It must appear that it was a common *intention and understanding* which fails to find expression in the instrument, before any change can be made.

We think the objection well taken that there is no evidence that the decree should embody the matter contained in the other writings contemporaneously executed.

3. The remaining exception to be considered, is to the ruling that the appellant is bound by what was done, as a party on whose behalf her counsel acted in entering into the agreement.

It is not necessary to discuss the question of authority of counsel to be inferred from his appearing (457) of record, to bind the client in the manner here alleged, and which embraces matters outside the conduct and disposal of the action in which he is retained, as is ruled by the Court.

The appellant did not become a party to the release (Exhibit "C"), nor does it seem upon its face to have been prepared for her to execute with the others. Furthermore, it was shown, and so the Court finds the fact to be, that her counsel said to the counsel of Kerchner, that he could not guarantee that she would sign the release, or in other words undertake to bind her to perform this part of the agreement.

While the concurring testimony is, that the counsel for the plaintiffs in that suit undertook to act for all, including appellant, it was accompanied with this disclaimer of authority as to her, and to that extent.

We are unable to see how the legal liability of the parties would be affected by the filing of the outside papers with the decree, unless by reference they become incorporated in it, and its essential conditions; and we think there was no evidence on which the Court could find that such was intended to be the form of the decree; and that in consequence of a *mutual mistake* was left out in drafting it. We are not called upon to consider, nor do we intend to express an opinion, upon the question of the legal right of the appellant to avail herself of the decree as a defense to the foreclosure proceedings, and repudiate at the same time the other parts of the one agreement which comprises the compromise as an entirety.

Our only purpose is to decide, and we only do decide, that there is error in the ruling in the present action, by which the decree is sought to be itself changed in form and effect. Upon this ground we reverse the judgment.

ERROR. New trial.

Cited: Deaver v. Jones, 114 N. C., 651; *McLeod v. Graham,* 132 N. C., 475.

(458)

EVA C. HUNTLEY v. JOHN R. CLINE et al.

Counterclaim—Tenants in Common—Partition—Warranty.

1. Even although tenants in common in making partition, execute to each other quitclaim deeds, there is an implied warranty between them that each will make good to the others any loss sustained by an eviction under a superior title.
2. Where a sum is charged on the share of one tenant in common for owelty of partition, he may set up as a counterclaim any damage he may have sustained by having been evicted from a part of his share in the land by a superior title, in an action to enforce the charge against him.

(*Nixon v. Lindsay*, 55 N. C., 230, cited and approved.)

ACTION, tried before *MacRae, Judge*, and a jury, at Spring Term, 1885, of CATAWBA.

The plaintiff, in his complaint alleged that Dowd T. Link died in the County of Catawba, intestate, in 1870, seized at the time of his death of a considerable real estate—leaving surviving him his widow, Polly Link, and the following children, to-wit, the plaintiff Sarah, who afterwards intermarried with John R. Cline, and Barbara Sigman, to whom the lands descended as tenants in common. That in October, 1873, they agreed that three persons selected by them, should make partition of the said land between them, which was done, and deeds intended to be quitclaims, were executed by each to the others. That upon the partition of the land, the persons selected to make the partition agreed that two hundred dollars was the sum which ought to be paid by Sarah Cline to the plaintiff, in order to make the shares of said Sarah and the plaintiff equal, and it was also agreed that Sarah Cline should pay fifty dollars to Mrs. Sigman for equality of partition. That no part of the two hundred dollars has been paid, and twenty-five dollars of the fifty dollars awarded to Mrs. Sigman is the only amount paid to her

That the partition was made with the understanding and agreement of all the parties, including the widow, Polly Link, that she was not to claim her dower, but was to be supported by John R. Cline, husband of Sarah (459) That Sarah Cline died in February, 1874, leaving an only child, the defendant Thaddeus Cline. That after the

death of Sarah, her husband, John R. Cline, refused to support the widow, Polly Link, and she thereupon filed a petition for her dower, which was allowed and allotted to her, embracing one hundred acres of the land allotted to Sarah Cline, including the dwelling house, and the rental value of the land thus covered by the dower was fifty dollars a year.

That the widow enjoyed the said dower from April, 1874, till November, 1880.

These facts were either admitted in the pleadings or found by the jury. The plaintiff demanded judgment against the defendants John R. Cline and T. B. Cline for the sum of two hundred dollars, with interest on the same from 28 October, 1873, and that the same be declared a lien on the land assigned to Sarah Cline, and now in possession of the defendants, and that she have execution therefor, and for other relief.

The defendants, John R. Cline as tenant by the curtesy of land assigned to his wife Sarah, and Thaddeus B. Cline, as her heir-at-law, set up a counterclaim against the defendants' recovery. They allege that it was the understanding and agreement of the parties at the time of the partition that the home place should be allotted to Sarah, and that she should pay the sums charged thereon for equality of partition, in view of the fact that the widow, Polly Link, had agreed not to claim dower in the land, but that in contravention of such agreement she had obtained her dower, and caused it to be located upon the share of Sarah Cline, and has deprived the defendant John R. Cline of the rental value of the land assigned for dower, amounting to fifty dollars a year for the six years and a half that the widow was in the possession of the same, and they allege that in equity and good conscience the plaintiff and Mrs. Sigman ought to indemnify him for this loss, in proportion to their several interests, and they ask that an account be taken.

(460) Upon the admissions in the pleadings and the facts found by the jury, as above set forth, his Honor rendered the following judgment, to-wit: "It is considered by the Court that the land allotted to Sarah Cline was charged with $200 in favor of Eva C. Huntley, the plaintiff, and with $50 charged in favor of Mrs. Sigman, in 1874. That the plaintiff's deed to said Sarah should be reformed

by striking out the covenants of warranty, which were inserted therein by mistake, and making the same a quitclaim. The jury found the facts that by the agreement of the parties, the land allotted to Sarah Cline was to be charged with the sum of $200, in favor of that allotted to plaintiff, and with $50 to that allotted to Mrs. Sigman. That nothing has been paid plaintiff, and $25 only to Mrs. Sigman. The defendants allege, and set up as a counterclaim, that the dower assigned to Polly Link was so laid off as to cover one hundred acres of the land allotted to Sarah Cline—the annual rental value of which was found by the jury to be $50, and the widow, upon the assignment of her dower, took possession of the land assigned her, in April, 1874, and continued in possession thereof until November, 1880, when she died, and that this was an eviction of the defendants by a superior title, and was a breach of the implied warranty obtaining between tenants in common upon a partition, and that they have a cause of action for contribution against the plaintiff and Mrs. Sigman in proportion to the respective values of their shares."

From this judgment, the defendants appealed.

Messrs. Reade, Busbee & Busbee for the plaintiff.
Mr. F. L. Cline for the defendants.

ASHE, J., (after stating the facts). We are of the opinion that the defendants J. R. and T. B. Cline had the right to set up as a counterclaim against the demand of the plaintiff, the value of the rents of the one hunderd acres of the share allotted to Sarah Cline from which they had been evicted by the location of the dower upon it.

Although the deeds interchangeably executed be- (461) tween the parties for their several shares in effecting the partition made by the commissioners, were found to be only quitclaim deeds, yet in partitions between tenants in common there is an implied warranty between them that each will make good to the other any loss sustained by an eviction under a superior title. In *Nixon v. Lindsay,* 55 N. C., 230, Chief Justice PEARSON held: "In partition of land a warranty is implied because of the privity of estate." To the same effect is *Rogers v. Turley,* 4 Bibb, 356; *Morris*

v. Harris, 9 Gill, 26; and in Washburne Real Property, 590, we find the doctrine thus announced: "If, after the partition has been made, one of the parties has been evicted of his property by paramount title, the partition as to him is defeated by his eviction, and he may enter upon the shares of the others as if none had been made, and have a new partition of the premises, and if in the case supposed, one cotenant, after partition, is evicted by paramount title, he is not confined in his remedy to a new partition, but may rely upon his warranty, and recover his recompense for his loss by an action thereon against his former co-tenants." If the eviction, then, gives to the party evicted a cause of action upon the implied warranty, it must follow that they may set up as a counterclaim against the demand of the plaintiff, the sum charged upon their land for equality of partition.

We are, therefore, led to the conclusion that there was error in the adjudications of the court below, in omitting to give the defendants the benefit of their counterclaim. There should have been a reference to ascertain and adjust the relative right of the several parties. To that end the case is remanded to the Superior Court of Catawba County, that a reference may be had to adjust these rights upon the basis that the land allotted to Sarah Cline, and now in the possession of the defendants, may be charged with the sums respectively charged thereon in favor of the plaintiff and Barbara Sigman, and after the several shares are thus made equal, then that the loss sustained by the defendants
(462) in consequence of he eviction, be estimated so as to effect a recompense from each of the shares *pro rata,* including that of the defendants, according to the extent of the loss, and such balance or balances as may be ascertained, shall be charged on the share or shares which shall be found liable therefor.

ERROR. Remanded.

Cited: Harrison v. Ray, 108 N. C., 217.

JOHN H. REED v. RICHARD REED.

Pleadings—Admissions—Description of Land.

1. Where in an action on an instrument in writing, the answer denies the allegations of the complaint and for further defense to the action pleads matters in avoidance, it is error for the court below to disregard the denials and adjudge that the answer admits the instrument.
2. A defendant can plead several defenses, even though they be inconsistent.
3. Admissions made by parties on the trial and in the presence of the Court are only binding when they are recognized and treated as such.
4. Where land is described as "lying on Laurel, reference being had to a deed from J. R. to me, for a more definite description," it is too vague without the introduction of the deed in evidence.

(*Whedbee v. Riddick*, 79 N. C., 518; *Sumner v. Shipman*, 65 N. C., 623; *Capps v. Holt*, 58 N. C., 153; *Hinchey v. Nichols*, 72 N. C., 66; *Dickens v. Barnes*, 79 N. C., 440; *Harrell v. Butler*, 92 N. C., 20, cited and approved.)

ACTION tried before *Gudger, Judge,* at November Term, 1885, of MADISON.

The complaint alleged in substance, that the plaintiff became surety for the defendant for a bill of costs in which the defendant had been cast, in the sum of about two hundred and fifty dollars. That in order to indemnify the plaintiff the defendant had delivered to him his bond under seal, which had been duly registered, by which he bound himself to make a good and sufficient deed to the plain- (463) tiff for one hundred and seven acres of land, if the plaintiff should suffer loss by reason of becoming surety for the said costs. That the defendant had failed to pay the costs, and the plaintiff had been forced to do so, and that the defendant had failed and refused to execute the deed.

The only part of the bond material to the opinion in this Court, is the description of the land agreed to be conveyed, which is in these words: "one hunderd and seven acres of land on Laurel, reference being had to a deed from John Reed to me for a more specific description."

The answer, after denying the allegations of the complaint *seriatim,* proceeded as follows: "For a further defense to said complaint, the defendant says, that the alleged bond is

void and of no effect, on account of the vagueness, indefiniteness and uncertainty of the description of the land alleged to be referred to in said bond, and because it describes no land claimed by the defendant."

"For a further defense to the complaint, the defendant alleges, that the said alleged bond having been executed, as alleged in the complaint, as an indemnity and security to the plaintiff, it is in effect a mortgage and should be treated as such by the Court, and the land mentioned therein sold on such terms as to the Court may seem just and proper, and the plaintiff reimbursed out of the proceeds of such sale all such sums as he may have been compelled to pay on account of the suretyship mentioned in the complaint, and the remainder of such proceeds paid to the defendant."

When the case was called for trial, the plaintiff was permitted to amend his prayer for relief by asking only for a sale of the land, instead of the execution to him of a deed therefor. He also asked that the trial be postponed until he could get a witness to prove the execution of the bond declared on, and the payment by the plaintiff of the bill of costs. The defendant thereupon, said that he would admit the (464) execution by him of the paper, and the payment of the money by the plaintiff, and would rest his case on the uncertainty and vagueness of the description of the land in the bond, and offered to prove that there was no such deed in existence as the one referred to in the bond. The deed was not produced by the plaintiff, nor was any evidence offered of its existence.

His Honor was of opinion that the last defense set up in the answer, admitted the sufficiency of the description of the land in the bond, or at least was a waiver of the objection, and refused to submit any issue in relation to the description of the land to the jury, and rendered a judgment that the land be sold. To this judgment the defendant excepted and appealed.

No counsel for the plaintiff.

Messrs. Geo. A. Shuford and *Gudger & Carter* for the defendant.

MERRIMON, J. We are of opinion that the Court misapprehended the meaning and effect of the pleadings, and particularly, the effect of the answer.

In the latter, the defendant broadly denies all the material allegations of the complaint, thus raising issues of fact to be tried by a jury.

The second and third defenses set forth, were not, nor were they intended to be, admissions of the execution of the bond alleged in the complaint, or the effect of it.

They refer to it as the "alleged bond," and the obvious purpose was to insist, first, that if the bond was executed as alleged, then and in that case, it would, for the causes stated, be inoperative; and secondly, if the last-mentioned defenses were not good, then the bond, if it existed, should be treated as a mortgage.

Nor could the answer be treated as an admission that the plaintiff paid money for the defendant as alleged.

Although the defense is not very skillfully drawn, it is obvious that the defendant and pleader did not intend by his answer, simply to admit the allegations of the (465) complaint and aver new matter in avoidance.

He had a right to plead several defenses, even though they be inconsistent. The Code, sec. 245; *Ten Broeck v. Orchard,* 79 N. C., 518; *Sumner v. Shipman,* 65 N. C., 623.

In the case settled upon the appeal for this Court, it is stated that the defendant said, it seems *ore tenus,* that he would admit the execution by him of said paper, and the payment by the plaintiff of said cost, etc. But such admission was not entered on record, nor does it appear that it was accepted or recognized by the Court. It is not mentioned in the recitals of fact in the judgment, and, on the contrary, it is recited, that it appearing by the answer of said defendant, that the paper-writing made a part of said complaint was executed by said defendant, etc. What was said, seems to have been treated as a loose proposition to admit the execution, not accepted or acted upon. Admissions of parties on the trial and in the presence of the Court, are certainly binding, where they are recognized and treated as such—not otherwise.

Further, the Court treated the last ground of defense set forth in the answer, as an admission of the sufficiency of the bond alone, as evidence of an agreement in writing to convey a designated tract of land.

For reasons already stated, we think this defense was not

an admission at all, but if it should be so treated, it is manifest that the reference to the land in the condition of the bond is so vague and indefinite, as to render it of itself inoperative and void.

The stipulation is for the conveyance to the plaintiff of "one hundred and seven acres of land on Laurel, reference being had to a deed from John Reed to me for a more specific description." This description, without the aid of the deed referred to, is wholly insufficient. That deed was not before the Court; indeed, it was contended that no such deed (466) was in existence, in which case, the Court would not —could not—decree specific performance, *Capps v. Holt,* 58 N. C., 153; *Hinchey v. Nichols,* 72 N. C., 66; *Dickens v. Barnes,* 79 N. C., 440; *Harrell v. Butler,* 92 N. C., 20.

ERROR. Reversed.

Cited: Davidson v. Gifford, 100 N. C., 23; *Threadgill v. Comrs.,* 116 N. C., 628; *Johnston v. Case,* 132 N. C., 798; *Eames v. Armstrong,* 142 N. C., 514.

ALICE FOWLER et al. v. W. P. POOR et al.

Judgments—Irregular—Motion in the Cause—Infants—Judicial Sale—Innocent Purchaser.

1. Where an action has been determined by a final judgment, a new action and not a motion in the cause, is the proper method to attack the judgment for fraud.
2. Where the object is to set aside a judgment for irregularity, although the action has been determined and a final judgment rendered, a motion in the cause anl not a new action is the proper manner of proceeding.
3. Where a partition to sell lands for assets, was filed, and service made on the infant defendants, but no guardian *ad litem* was appointed until after the order of sale, when one was appointed who was represented by the attorney of the plaintiff, who was also the purchaser of the land, and came in and consented to the order of sale; *It was held,* that the irregularity was not such as rendered the judgment void, and was cured by the statute. The Code, sec. 387.
4. A purchaser at a judicial sale need only see that the court has jurisdiction, and that the judgment authorizes the sale.

5. If a judgment and sale be fraudulent and liable to be set aside as to the purchaser, an innocent party buying from such fraudulent purchaser, gets a good title.

(*Johnson v. Futrell*, 86 N. C., 122; *Howerton v. Sexton*, 90 N. C., 581; *Williamson v. Hartman*, 92 N. C., 736; *Morris v. Gentry*, 89 N. C., 248; *England v. Garner*, 90 N. C., 197, cited and approved.)

ACTION tried before *Graves, Judge,* at Spring (467) Term, 1884, of TRANSYLVANIA.

The plaintiffs are the children and heirs-at-law of P. S. Morgan, who died about the year 1862, and at the time of their father's death, they were all infants of tender years.

The parts of the case settled upon appeal material to a proper understanding of the opinion of the Court, are as follows:

It appears from the records of the Superior Court of Transylvania county, that at the Spring Term, 1869, of said Court, W. P. Poor, administrator of P. S. Morgan, by his attorneys, Coleman & Duckworth, filed his petition for the sale of certain lands therein described, which are admitted to be the lands described in the complaint, which petition appears to be in proper form, that a summons issued 27 July, 1869, returnable to the Fall Term, 1869, of said Court, notifying the heirs of said P. S. Morgan, designating them each by his proper name, and on the back of said summons was endorsed, "Executed. R. Hamilton, sheriff."

That at the Fall Term, 1869, the following entry appears:

W. P. Poor, administrator of P. S. Morgan, deceased *ex parte,* petition for sale of land: order of sale granted.

That the report of sale showed that the land was sold to W. B. Duckworth on 6 August, 1870.

That at Fall Term, 1870, the records show the following entry:

W. P. POOR, Administrator of P. S. MORGAN, deceased,
vs.
The heirs-at-law of P. S. MORGAN, MARCUS MORGAN, MANN MORGAN, GEO. B. MORGAN, ALICE MORGAN.

It appearing to the Court that the defendants are without guardian, Archibald Aiken, is appointed by the Court guar-

dian *ad litem* of the said infants to defend this suit. The said A. Aiken, guardian, appears by his attorney,
(468) W. B. Duckworth, Esq., and has himself made a party defendant to this suit, accepting service of process, and consents to the decree and all the proceedings had in this action. Leave is given, on his application, to the said guardian, to file an answer for himself and the said infants as of Fall Term, 1869. And at the same term, to-wit, Fall Term, 1870, the following order was made:

W. P. POOR, Administrator of P. S. MORGAN, deceased,
vs.
The heirs-at-law of the said P. S. MORGAN.

"This cause coming on for further directions, and it appearing that W. P. Poor, administrator of P. S. Morgan, deceased, on 6 August, 1870, sold the land described in the petition to W. B. Duckworth, at the price of eleven dollars, and the said sale appearing to be just and reasonable, it is therefore ordered and decreed that the said sale be confirmed, and that the said administrator proceed to collect the amount when it becomes due, and that he apply a sufficiency of the proceeds thereof to the payment of such debts and charges of administration as the personal estate may have been insufficient to discharge, after first deducting the costs of this suit. If any surplus shall remain in his hands after the payment of said debts and charges, the same is to be considered as real estate, and is to be disposed of by said administrator, among such persons as would have been entitled to the land itself according to law. It is further ordered that upon the payment of the whole of the purchase money, the said W. P. Poor, administrator, as aforesaid, is to execute a deed to the purchaser of said land."

The said Court began on 10 October, 1870.

It is admitted that W. B. Duckworth, the purchaser at the administrator's sale, is the same person whose name appears to the petition as one of the attorneys of W. P. Poor, administrator of P. S. Morgan.

(469) It is further declared that the proceedings for the

allotment of dower to margaret Morgan, widow of P. S. Morgan, are in all respects regular.

It is further found as a fact admitted by the plaintiffs, that the said Margaret Morgan has by deed duly executed, dated....., conveyed her dower right to the said W. B. Duckworth.

It is further declared that on the — day of ....., W. B. Duckworth executed a deed to Joseph Duckworth, conveying the land described in the complaint.

And the jury having been empaneled, found in response to the issues submitted to them:

1st. That value of the lands at the time of the sale to W. B. Duckworth, subject to the encumbrance of the widow's dower, was two hundred and fifty dollars.

2d. That the rental value of the whole land, including the dower, was twenty-five dollars per annum.

3d. That rental value of the land, exclusive of the dower allotted to the widow, was four dollars per annum.

4th. That the deed to the said W. B. Duckworth was not obtained by fraud on the part of the said W. B. Duckworth.

5th. That Joseph Duckworth did not have actual notice of any fraud in the deed to W. B. Duckworth.

6th. That value of all the land, including the widow's dower, was, at the time of the sale to W. B. Duckworth, six hundred dollars.

Thereupon, it was adjudged that the order of sale, and the sale thereunder, and the deed from said W. P. Poor to W. B. Duckworth are void, and that the title to the land described in the complaint, is still in the plaintiffs, the heirs of P. S. Morgan, subject to the widow's right of dower, which is considered to be in Joseph E. Duckworth by operation of the deed from Margaret Morgan to W. B. Duckworth, and from W. B. Duckworth to Joseph E. Duckworth.

It was also adjudged that the plaintiffs recover possession of all the lands described in the complaint, outside of the lands allotted as dower to Margaret Morgan, and (470) that a writ of possession issue therefor.

It was further adjudged that Joseph E. Duckworth was entitled to hold the land embraced in the dower set apart to Margaret Margon, during her lifetime, and at her death the

plaintiffs should recover possession of the land embraced in the said dower.

It was ordered that W. B. Duckworth surrender the deed executed to him by W. P. Poor, administrator of P. S. Morgan, to the Clerk, to be canceled by him.

It was further adjudged that the plaintiffs recover of the defendant forty-eight ($48.00) dollars damages assessed by the jury.

The defendants having excepted, appealed to this Court.

No counsel for the plaintiffs.

Messrs. Geo. A. Shuford and *J. H. Merrimon* for the defandants.

MERRIMON, J., (after stating the facts). The purpose of this action, is to have an alleged fraudulent judgment, and sale of land under it, declared inoperative and void. The action is a proper one for that purpose. The proceeding in which the judgment complained of was given, was long ago completely ended, so that a motion or petition therein would not be appropriate. It is only when the action is not ended, that steps may be properly taken in it to have a fraudulent order or judgment therein set aside.

It would be otherwise, however, if the purpose were to set the judgment and sale aside for irregularity. In such case, a motion in the cause, although the action be ended, is the proper remedy. In this connection we may add, that, while it appears that there was some irregularity in the proceedings, judgment and sale of the land in question, it was clearly not such as rendered them void, and this irregularity was cured by subsequent statutes. The Code, sec. 387; *Johnson v Futrell,* 86 N. C., 122; *Howerton v. Sexton,* 90 N. C., 581; *Williamson v. Hartman,* 92 N. C., 236.

(471) It is not alleged in the complaint, nor does it appear in any way in the record, that it was unnecessary to sell the land in question to make assets to pay debts; indeed, it seems to be conceded that the proceeding for that purpose was in itself unobjectionable. Nor does it appear from anything admitted in the pleadings or the findings of the jury, that the judgment was obtained by fraud, or that the sale of the land was fraudulent, and fraud is expressly negatived by the finding of the jury as to the deed to the de-

fendant W. B. Duckworth, and it is likewise found as a fact, that the defendant Joseph Duckworth, did not have "notice of any fraud in the deed to W. B. Duckworth," from whom he purchased. So that he was, as appears by this affirmative finding, an innocent purchaser without notice of fraud.

As the case appears to us in the record, it is very clear that there is error in the judgment of the court below. In the proceedings complained of, the Court had jurisdiction of the parties thereto, the subject-matter, and authority to direct a sale of the land. The order of sale was very summary and indefinite as to its terms, but a sale and report thereof to the Court was made, and there was a judgment confirming the same, and directing an application of the proceeds, and it was also ordered that title be made to the purchaser. The allegations of fraud were not sustained by anything that appears in the record, on the contrary, in material respects, the jury expressly found that there was no fraud. It is not simply necessary to allege fraud in the judgment, but it must be made to appear to the Court by proper proofs.

Even if it appeared that the judgment and sale were fraudulent as to the defendants Poor and W. B. Duckworth, and they might be answerable to the plaintiffs in that respect, this could not affect the defendant Joseph Duckworth, because he bought the land without notice of such fraud, and must, therefore, be protected. He was only bound to see that the Court had jurisdiction of the parties and the subject-matter of the proceedings, and that the judgment authorized the sale. All this appeared on record, and must be allowed (472) to protect him, in the absence of fraud, or notice thereof, on his part. *Morris v. Gentry,* 89 N. C., 248; *England v. Garner,* 90 N. C., 197, and the authorities there cited.

The purchase of the land, worth $250, by the defendant W. B. Duckworth for himself, at the grossly inadequate price of eleven dollars, he being counsel of the infant defendants (the present plaintiffs), at the time, was, in a professional point of view, wholly indefensible, but it is not within the scope of this action, certainly in its present shape, to determine his civil liability on that account to the plaintiffs. Such purchase was not necessarily fraudulent, although it might be evidence of fraud, or a fraudulent intent.

We think it proper to say in this connection, that if the facts are as they appear to be, he ought to hasten to make reparation to the plaintiffs, and not wait for an action to be brought against him. It is a grave breach of professional propriety for an attorney to take unconscionable advantage of his client, more especially, when they are infants and of tender years.

There is error, for which the judgment must be

REVERSED.

Cited: *Burgess v. Kirby,* 94 N. C., 579; *Morris v. White,* 96 N. C., 93; *Syme v. Trice, Ib.,* 245; *Ward v. Lowndes, Ib.,* 380; *Cates v. Pickett,* 97 N. C., 26; *Rollins v. Love, Ib.,* 215; *Grimes v. Taft,* 98 N. C., 198; *McGlawhorn v. Worthington, Ib.,* 202; *Brickhouse v. Sutton,* 99 N. C., 106; *Branch v. Griffin, Ib.,* 182; *Knott v. Taylor, Ib.,* 515; *Spivey v. Harrell,* 101 N. C., 50; *Tyson v. Belcher,* 102 N. C., 115; *Smith v. Fort,* 105 N. C., 453; *McLaurin v. McLaurin,* 106 N. C., 334; *Carter v. Rountree,* 109 N. C., 30; *Dickens v. Long, Ib.,* 170; *S. c.,* 112 N. C., 315; *Deaver v. Jones,* 114 N. C., 651; *Smith v. Gray,* 116 N. C., 314; *Sledge v. Elliott, Ib.,* 717; *Ferrell v. Broadway,* 127 N. C., 405; *Carraway v. Lassiter,* 139 N. C., 155.

S. BARKSDALE et al. v. COMMISSIONERS OF SAMPSON COUNTY.

Constitution—Power of County Commissioners to Levy Tax for Schools.

1. While it is the duty of the county commissioners under Art. IX, sec. 3 of the Constitution, to levy a tax sufficient to keep the common schools open for four months in each year, yet in discharging this duty they can not disregard the limitation imposed as to the amount of tax to be levied by Art. V, sec. 1.

2. The act of the Legislature of 1885, ch. 174, sec. 23, which allows the commissioners to exceed this limit is therefore unconstitutional.

3. This act does not come within the provisions of Art. V, sec. 6,
(473) which authorizes a "*special tax*" for a "*special purpose,*" with the approval of the Legislature.

4. When the Constitution imposes a duty and provides means for its execution which prove to be inadequate, all that can be required of the officer charged with the duty is to exhaust the means thus provided.

(*Broadnax v. Groom*, 64 N. C., 244; *Simmons v. Wilson*, 66 N. C., 336; *Mauney v. Commissioners*, 71 N. C., 486; *Trull v. Commissioners*, 72 N. C., 388; *French v. Commissioners*, 74 N. C., 692; *Cromartie v. Commissioners*, 87 N. C., 134, cited and approved.)

(*University v. Holden*, 63 N. C., 410; *Simmons v. Wilson*, 66 N. C., 336; *Street v. Commissioners*, 70 N. C., 644; *Brothers v. Commissioners, Ibid.*, 726; *French v. Commissioners*, 75 N. C., 477; *Clifton v. Wynne*, 80 N. C., 145; *Mills v. Williams*, 33 N. C., 558; *Caldwell v. Justice*, 57 N. C., 323; *White v. Commissioners*, 90 N. C., 437; *McCormac v. Commissioners, Ibid.*, 441; *Broadnax v. Groom*, 64 N. C., 244; *Holcombe v. Commissioners*, 89 N. C., 346; *Evans v. Commissioners, Ibid.*, 154, cited in the dissenting opinion.)

Mr. Justice MERRIMON dissents from the opinion of the Court.

ACTION tried upon a case agreed by *McKoy, Judge,* at October Term, 1885, of SAMPSON.

The facts sufficiently appear in the opinion. There was a judgment for the plaintiffs, and the defendants appealed.

Messrs. Boykin & Faison and *Battle & Mordecai* for the plaintiffs.

The Attorney-General and *Mr. E. C. Smith* for the defendants.

SMITH, C. J. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one, and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head. Const., Art. V, sec. 1. Each county shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least four months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirements, they (474) shall be liable to indictment. Art. IX, sec. 3.

The State and county taxes, among the former of which is a tax for school purposes, imposed under the act of 1881,

of twelve and a half cents on property valued at one hundred dollars, and thirty-seven and a half cents on the poll, which taxes in the county of Sampson come up to the full measure of the limits fixed in the Constitution, as interpreted in numerous adjudications. There is also a special tax of small amount in excess, levied with the special approval of the General Assembly, under Art. V, sec. 6, whose legality is not drawn in question.

It is found to be impracticable to carry out the mandate to keep up the public schools in the county for four months of the year, without laying an additional tax of thirteen and one-third cents on the property, and forty cents on the poll, and accordingly the commissioners have made this further assessment, as they are expressly required to do by the amendatory act in regard to public schools, passed at the session in 1885, ch. 174, sec. 23. The section is in these words:

"If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district, for the period of four months, then the board of commissioners of each county shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools, for the said period of four months or more * * * The said tax shall be levied on all property, credits and polls of the county, and in the assessment of the amount on each, the commissioners shall observe the constitutional equation of taxation, and the fund thus raised shall be expended in the county in which it is collected, in such manner as the county board of education may determine, for maintaining the public schools for four months at least in each year."

In executing this legislative mandate to raise by assessment the additional sum required to maintain the public schools for the prescribed period under the constitutional provision which has been recited, the aggregate amount of the taxes levied is eighty-eight and one-third cents on the
(475) one hundred dollars worth of property, and two dollars and sixty-five cents on the poll. Inasmuch as these provisions of the Constitution are in conflict in their application to the facts in the present case, the one commanding under a penalty to be done, that which the other withholds the means of doing, the question is presented, if they

can not, upon any reasonable construction, be reconciled, which shall prevail, and which must yield. The court below ruled that the tax levied under the act of 1885, overstepping the limits of the taxing power conferred, although necessary to a compliance with the directions as to the schools, is not warranted by the Constitution, and can not legally be enforced. The correctness of this ruling is before us on the appeal.

While reluctant to declare a legislative act unconstitutional, and the Court will only so adjudge in a plain case, admitting of little or no doubt, yet a most imperative obligation rests upon them to uphold the fundamental law, when they are in irreconcilable conflict, and to declare the former inoperative and void.

It is an incontrovertible proposition, that when in the same instrument, a restricted authority is conferred, and an act to be done under it, to which that authority is inadequate, it is only necessary to do what can be done within the prescribed limits. The duty then, of keeping up the public schools devolved upon the commissioners, is performed when all the resources open to them are employed and exhausted in the effort to maintain them for the designated period. Within the limits of the power to tax, given the commissioners, the schools must be kept up, and the mandate is arrested when those limits are reached. Action beyond is not only not required, but is void if attempted. The levy finds no support in sec. 6 of article V, for this is not one for a "*special purpose* and with the *special* approval of the General Assembly" for county purposes. The enactment is in general applicable to the whole State, and part of the general State legislation in furnishing facilities for the education of its people. It can not find shelter under any of the numerous adjudications sustaining the power to tax, be- (476)
yond the assigned restraints and in disregard of the established ratio between State and county taxation, which will be found at the foot of the section.

This form of taxation is local as well as special, and such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained. *Broadnax v. Groom,* 64 N. C., 244; *Simmons v. Wilson,* 66 N. C., 336; *Mauney v. Commissioners,* 71

N. C., 486; *Trull v. Commissioners,* 72 N. C., 388; *French v. Commisisoners,* 74 N. C., 692; *Cromartie v. Commissioners,* 87 N. C., 134.

These cases settle the extent of the taxing power, when exercised by the county authorities, and allow its restraints only to be disregarded, when the tax is needed to meet obligations existing before the adoption of the Constitution, by virtue of the Constitution of the United States, and decide that the limitations do not apply to other municipal corporations erected by law.

Our decision rests upon the interpretation heretofore repeatedly given to the clause that directs the imposition of a poll tax equal to that imposed upon property valued for taxation at three hundred dollars, by which the taxes are both thus associated, and arrested, when, on the poll, they reach the maximum of two dollars. If the construction of the constitutional provision were an open question, we might pause to thus limit the taxing power upon property, a restraint found, as Mr. Justice RODMAN says in his separate opinion *in Winslow v. Weith* at end of 66 N. C., (p. 659), exists in no other State, and which has so crippled the action of the General Assembly in its course of legislation for the public good, and disables it, for want of means, to do many things which the Constitution requires, such as providing for the interest on the State debt, and a sinking fund to discharge the principal, to do which it has been necessary to break through the restraints to discharge an obligation to creditors, and not impair the contracts from which they spring.

There was a propriety in fixing a limit to the poll tax, because the fund raised from this source is appropriated
(477) exclusively to two subjects, the support of the poor, and the providing the means of free education, but it was impracticable to foresee the needs of the State for moneys for its future management. And it is to be observed that the equation is only to determine the measure of the personal or poll tax, so long as it can be levied for the special objects mentioned, and up to its fixed limits.

This mode of interpretation would have avoided all the difficulties growing out of the want of power to tax, and escaped the present conflict. But we are bound by continuous adjudications to which legislation has been adjusted, and we

are not free to unsettle them. But as the repugnance of the provisions under consideration is manifest, the commissioners must refrain from assessment, however necessary for schools, which pass the bounds of conferred power.

We therefore sustain the ruling of the court below.

NO ERROR. Affirmed.

MERRIMON, J., (dissenting). The constitutional question presented by this appeal, is one of great importance, and as I do not concur in the opinion of my brethren nor in the judgment of the Court, I deem it proper to state the grounds of my dissent.

The plaintiffs in their complaint, allege in substance, that the defendant commissioners, in conjunction with the justices of the peace of Sampson county, have levied, and the defendant sheriff is about to collect, a tax of 13⅓ cents on the $100 valuation of property, and 40 cents on the poll, for the further support of public schools in that county, as allowed by the statute (Acts 1885, ch. 174, sec. 23), that this tax levy is in excess of 66⅔ cents on the $100 valuation of property and $2.00 on the poll, and is therefore, as they insist, not allowed, but is in effect forbidden by Art. V, sec. 1, of the Constitution. The defendants admit the facts as alleged, but insist that the statute just cited, is not within any inhibition of the Constitution, that it is not in conflict with, but on the contrary, is warranted by the Constitution, and is in all (478) respects valid and operative.

1. It is not contended that there is any provision of the Constitution that forbids or contravenes the statute cited above, except Art. V, sec. 1 thereof, which provides as follows: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each, to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

This Court has construed this section in many cases, beginning with that of *University v. Holden,* 63 N. C., 410, and has uniformly held that it establishes an equation between capitation and property tax—that the capitation tax as to

the persons subject to it, "*shall* be *equal* on each to the tax on property valued at three hundred dollars in cash," and that the "State and county capitation tax shall never exceed two dollars on the head." That is to say, the capitation tax on each individual subject to it, *must be equal* to the tax on property valued at three hundred dollars in cash, and as the capitation tax can not exceed two dollars on the head, therefore the tax levied on property of the cash value of three hundred dollars, can never exceed two dollars. So that generally, not always, as will appear presently, the power of the Legislature is so *limited,* that it can not ordinarily levy a tax greater on the poll than two dollars, and on property of three hundred dollars' value, than two dollars, and in that proportion, but it may levy a less tax, observing the established ratio.

But, while this limitation upon the power of the Legislature prevails generally, it is very clear that it does not always. There are numerous specified and well-defined purposes of the Constitution, and perhaps others not yet well understood and defined, that do and may require the expenditure of sums of money great or small, which the Legislature may raise by taxation, untrammeled by such
(479) limitation, if the tax levy within its scope shall be inadequate to supply money for those purposes. Some of these were pointed out in *University v. Holden, supra,* and among them, those to raise money to pay the principal and interest of the public debt, to supply a casual deficit in the treasury, to suppress insurrection or repel invasion, and to raise money for special county purposes with the approval of the General Assembly. There is no restriction upon the power of the Legislature to levy taxes for these purposes, and for the same reason, as I believe, for the purpose of the support of the public schools, as I will presently endeavor to show. The case just cited is a leading one. It was argued at great length and with distinguished ability, and all the Judges delivered opinions in it. In respect to the exceptions to the limitation upon the general power of taxation in the Legislature, the late Chief Justice PEARSON said: "I agree that if under the equation, carried to its limits, the amount is not enough to meet current expenses and also to pay the interest on the public debt, then for the excess needed, it is

not only within the power, but it is the duty of the General Assembly to disregard the equation, for this protection to property must be taken to be subject to the injunction to maintain the honor and good faith of the State untarnished in regard to the public debt, (Art. I, sec. 6), and by sec. 4 of the Article under consideration it is ordained: "The General Assembly shall *by appropriate legislation* and *adequate taxation* provide for the payment of the interest on the public debt, and after 1880 it shall lay a special tax, as a sinking fund to discharge the principal." He further conceded, that to supply money to meet a casual deficit, and suppress insurrection or invasion, the equation might be disregarded.

Justice READE said in reference to the equation and limitation, that the tax it would allow to be raised "was thought to be sufficient for the ordinary and economical administration of the government. * * * * It ought not to be supposed that a constitution would be framed with such limitations upon the taxing power, as that the vessel of State will sail safely in fair weather, to be wrecked in the first (480) storm. We may well impute it to wisdom to provide that ordinarily, there shall be light taxes and economy in expenditures, but when any extraordinary necessity arises, the whole power of the State must be unloosed to meet it. It is admitted, that the counties, for special purposes, and with the approval of the Legislature, may under sec. 7, levy a tax without limit and without a vote of the people."

Justice RODMAN said: "This proportion and this limit apply equally to all State taxes whatever, but not with equal force. As to some, it is absolutely imperative, and a tax laid contrary to its provisions would be void. As to others, from the nature of the objects of the tax, and from the provisions of the Constitution, it seems to me to be merely directory, that is to say, addressed to the discretion of the Legislature, and to be regarded, if possible, consistently with the attainment of the great objects of the Constitution, but if these can not be attained within the limits and proportions prescribed, then to be disregarded. And of this possibility, the Legislature must necessarily be the exclusive judge." He then proceeds to enumerate several exceptions, as to which the limitation mentioned would not apply.

Justice DICK said: "We must suppose that the framers of our government did not intend by these restrictions to limit the Legislature in such a manner as to prevent it from sustaining the honor and credit of the State, providing for the exigencies of the government and advancing the best interests of the people. * * * The object of the Constitution in Art. V, sec. 1, was to provide a system of general taxation for the ordinary expenses of the government. * * * * The restriction can not, under any circumstances, extend to a debt incurred for a casual deficit, or for suppressing insurrection or invasion."

Justice SETTLE said: "It is apparent that this construction would effectually destroy the most cherished objects of the Constitution. It would *virtually repudiate* the old debt, notwithstanding the Declaration of Rights, etc. * * * The Constitution, Art. IX, sec. 2, requires the General Assembly to 'provide by taxation and otherwise, for a (481) general and universal system of public schools, etc. * * * This provision of the Constitution, involving as it does the honor and prosperity of the State, must become a dead letter," etc. He points out distinctly, that the equation and limitation apply only to the power of the Legislature to levy taxes for the ordinary expenses of the government, and in this all the Judges seem to have agreed.

The view thus expressed by the several Judges composing a Court, confessedly, of great ability, the decisions of the Court in that case, and in many similar cases, were not founded upon any express provision of the Constitution excepting the subjects mentioned from the limitation upon the power of the Legislature to levy taxes generally—there were no such provisions—but upon the broad ground that the Constitution required in terms, or by necessary and reasonable implication, that certain things specified should—must—be done, at all events, and they could not be done within the limitation upon the taxing power and if the same should be observed. The Court viewed the Constitution as a whole—its terms and phraseology—its general and special provisions—its purposes and the ends to be accomplished by it, some of these necessarily and at all events—others in the discretion of the constituted authorities, including the Legislature; and as

to the subject immediately before the Court, it so construed the sections affecting it, as to render them and the whole Constitution operative and effectual. There were inconsistent and contradictory provisions to be interpreted and reconciled. In doing this, the Court held, and was obliged to hold, that the limitation of the taxing power of the Legislature, applied to taxes levied for the ordinary and current expenditures of the State, and not to such special purposes as the Constitution designated specially, and required to be accomplished at all events, unless this could be done within the scope of the limitation. Thus, Art. V, sec. 1, established the equation and limitation in respect to taxation. The Constitution required, in strong and mandatory terms, that the public debt and the interest on it should be paid, and the public (482) faith and honor maintained, but made no special provisions for raising money to pay the same, and it was insisted that this could not be done if the limitation on the power of taxation should be observed. The Court held, that in such case, the limitation did not apply, because, as the Constitution, in effect, specifically required this to be done at all events, by necessary implication—implication as strong as if the Constitution provided so in terms—power was conferred on the Legislature to levy taxes adequate for the purpose, without regard to the limitation.

This section affected, vitally, all the leading purposes of the Constitution, and it was the plain duty of the Court, to give it such construction as would effectuate all its provisions, and certainly those specially designated. The Court was forced to adopt this interpretation, else the Constitution might—would—in some most material respects, be wholly inoperative and essentially absurd! This interpretation has been uniformly recognized by this Court in many cases, and the legislative and executive branches of the government seem to have accepted and acted upon it as correct and conclusive. *Simmons v. Wilson,* 66 N. C., 336; *Street v. Commissioners,* 70 N. C., 644; *Brothers v. Commissioners, Ibid.,* 726; *French v. Commissioners,* 75 N. C., 477; *Clifton v. Wynne,* 80 N. C., 145.

Now, accepting these decisions, and many others like them, and the grounds upon which they rest as correct, it seems

to me—I can not doubt—that the power of the Legislature to levy taxes adequate for the support of the public schools for four months in every year, is unaffected by the limitation upon the general power of taxation. It may, if need be, go beyond it, and to such extent as may be necessary. If this is not true, then, as this case makes plain, the Constitution, in one of its leading and most important purposes, is partially, and may become altogether, inoperative. This ought not to be allowed if it can be avoided. All rules of construction forbid it.

The Constitution, Art. IX, provides, in secs. 1, 2 (483) and 3 thereof, as follows:

"SEC. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"SEC. 2. The General Assembly at its first session under this Constitution, shall provide by *taxation* and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State, between the ages of six and twenty-one years. And the children of the white race, and the children of the colored race, shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of either race.

"SEC. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained, at least four months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

It appears from these sections, and, indeed, in a stronger light, from the whole of the article last cited, that the Constitution treats the subject of education as of the highest and most essential importance and as lying at the foundation of good government and the happiness of the people. It requires in plain, strong and mandatory terms, that the Legislature "*shall provide by taxation* and otherwise, for a general system of public schools," and that "such schools shall be maintained at least four months in every year, and if the com-

missioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." This important purpose being thus treated as fundamental and essential, and being so specially provided for, the intention that it should and must be executed at all events, as prescribed, could scarcely be expressed in plainer or more commanding terms. No provision of the Constitution is clearer, more direct and absolute. Its framers, whatever else may be said of their work, seem to have been specially anxious to establish and secure, beyond peradventure, a system of free popular education. They declared it was (484) essential to wholesome government and human happiness, thus indicating its transcendant importance. Hence, the purpose was made special, and specially provided for—it was treated as important and essential, and the Legislature, was, as it seems to me, required in imperative terms, and, at all events, to execute it by *taxation,* as well as by other means, and to emphasize and enforce the command, it was made indictable to fail to maintain such school for four months in each year. How was this to be done? How could it be done without money? And how was the money for this great purpose to be raised? Is it not manifest that it was contemplated that money sufficient for it, should be raised by adequate taxation, and, if need be, without regard to the limitation upon the general taxing power of the Legislature, just as in the case of raising money to pay the public debt, supply a casual deficit in the treasury, or to suppress insurrection or repel invasion? The provisions of the Constitution in the last-mentioned respects, are not stronger or more imperative than those in respect to public schools—indeed, generally, they are much less mandatory, and appear only by reasonable implication.

In view of the authorities cited, and what I have said, I can not think that the Constitution contemplates, that if the Legislature should exhaust its power to levy taxes for the ordinary support of the State government, without providing for the public schools at all, the schools should be discontinued altogether. I can not escape the strong conviction, that they "*shall* be maintained at least four months in each year," at all events, and that the Legislature has unrestricted power to raise money for that purpose by taxation.

2. But, in my judgment, if need be, the tax levy in question may be upheld in another view of it. The several counties of the State are political agencies, intended to effectuate the political organization and the civil administration of the State government. The Legislature has power, subject to the Constitution, to create and establish them—it can enlarge, abridge, or modify their powers, and it can prescribe (485) by statute what shall be their purpose, ordinary, special, and otherwise, and thus incidentally and necessarily determine what shall be their "necessary expenses." The necessary expenses of a county must be such as are incident to the execution of the purposes for which it is created, and with which it is charged from time to time by the Legislature. *Mills v. Williams,* 33 N. C., 558; *Caldwell v. Justices,* 57 N. C., 323; *White v. Commissioners,* 90 N. C., 437, and authorities there cited; *McCormac v. Commissioners, Ibid.,* 441; Cooley Const. Lim., 488.

To build and keep in repair court-houses, public jails, poor-houses, roads and bridges, and other like things, to pay jurors and other court expenses, constitute part of the necessary expenses of counties, because the Legislature has so provided. It might provide that such things should be done, and such expenses paid otherwise. Counties must serve such purposes as the Legislature, subject to the Constitution, requires; it prescribes and establishes their powers and functions, and their expenses incurred in these respects are "necessary expenses," unless otherwise provided.

It is exclusively the province of the Legislature to establish a "uniform system of public schools," and to provide how it shall be maintained, except as specially provided in Art. IX of the Constitution. There is no provision that hinders it from providing that a general State tax shall be levied for school purposes, and that the school fund thus raised shall be supplemented by a fund for the like purpose to be raised in each county, under the uniform school system established. If it should do so, to raise such fund would become a part of the "necessary expenses" of each county, as much so as the expenses of constructing and keeping in repair public roads, bridges and the like. All these things, including public schools, are alike incident to the government of the State, it

is an essential part of its duty to provide for them, and it is the office of the Legislature to prescribe and establish the agencies and instrumentalities by and through which such provision shall be administered, unless in some particulars, wherein special provision is made by the Con- (486) stitution itself, not necessary to be adverted to here. Indeed, the Constitution contemplates that the several counties and county authorities, shall have much to do in the administration of the public school system. Art. VIII, sec. 2; Art. IX, secs. 3-5.

It might be unwise and inconvenient to require the several counties to provide for the support in part of their respective public schools, but the Legislature has power to so provide, and must be the judge of its exercise. Its members are responsible to the people for the just and prudent exercise of its powers, as well in this as in other respects. In this view, if it should be said the Legislature might evade—has undertaken to evade—the limitation upon its general powers of taxation, such suggestion would have no force, because, in so doing it would exercise its legitimate powers in respect to counties.

It has practically provided by the statute in question (Acts 1885, ch. 174, sec. 23), that the several counties, each for itself, shall, if need be, supplement the general school fund supplied by the State. The material part of this section provides as follows: "If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for the period of four months, then the board of commissioners of each county, shall levy annually a special tax to supply the deficiency, for the support and maintenance of said school for said period of four months or more * * * and the fund thus raised shall be expended in the county in which it is collected, in such manner as the county board of education may determine, for the maintaining of the public schools for four months at least in each year." It is thus made a part of the purpose of each county, and a county burden, to supply for itself, if need be, annually, a school fund for a specially designated purpose. I can see no reason why the Legislature may not in the exercise of its almost unlimited power over counties,

create this county purpose, and impose such burden, just as it may require the several counties to construct and keep in repair court-houses, roads, bridges and the like things.
(487) The legislative power in the one case is as broad and plenary as in the other. I know not where any distinction in this respect is to be found.

If the Legislature may impose such burden, then it becomes a part of the "necessary expenses" of each county, and such tax as that in question is not forbidden by the Constitution, Art. VIII, sec. 7, which prohibits a county tax to be levied "except for necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Nor is this affected adversely by Art. V, sec. 6, which provides 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 a special purpose, and then with the special approval of the General Assembly," because such tax is "for a special purpose," and by the statute itself, the "special approval of the General Assembly" is given to it. *Brodnax v. Groom,* 64 N. C., 244; *Halcombe v. Commissioners,* 89 N. C., 346; *Evans v. Commissioners, Ibid.,* 154.

The mere fact that the section of the statute authorizing the tax in question, is part of an "act to amend the public school law, chapter fifteen of The Code," can not change or affect its purpose or legal effect; manifestly the Legislature might in such a statute impose burdens upon the several counties for county purposes. It may be added, that the substance of the section in question has been a part of the statute law of the State since 1881, (Acts 1881, chap. 200, sec. 62; The Code, sec. 2590). The statute was not enacted hurriedly or incautiously. On the contrary, it has had the express sanction of the Legislature at different times.

I am strongly impressed with the belief, that the views I have expressed, are at least substantially correct, and that the statute authorizing the tax in question is valid. It seems to me, that in any possible view of it, there is at least such grave doubt, as that the Court should not declare it void. The strong presumption is in favor of its validity. And in view of the construction repeatedly placed upon the provisions of

the Constitution in question by this Court, as above pointed out, the legislative judgment should have unusual weight. It is obviously based upon the ground, that (488) the legislative power to levy taxes for the support of the public schools, like that to raise money to pay the public debt and to meet other specified purposes, is unaffected by the limitation upon the power to levy taxes for ordinary purposes. The purpose was to give effect to the Constitution, in the light of judicial interpretation. In my judgment the tax complained of is valid and the order granting the injunction should be reversed.

Cited: Board Education v. Comrs., 107 N. C., 112; *S. c.* 111 N. C., 579; *S. c.,* 113 N. C., 385; *Herring v. Dixon,* 122 N. C., 423; *Hornthal v. Comrs.,* 126 N. C., 32.

Overruled. Collier v. Comrs., 145 N. C., 171, 175.

JAMES W. GRANT, Administrator, v. R. O. EDWARDS, Executor.

Interest—Executors and Administrators.

1. Where an administrator did not disburse all the money of the estate which he received, but there is no positive evidence that he misapplied it, he will not be charged with interest.
2. When at the time of his removal from his office as administrator he has funds of the estate in his hands, he is chargeable with interest on such funds.

EXCEPTIONS to the report of a referee, heard at October Term, 1885, of the Supreme Court.

This case is reported in 87 N. C., 34, 90 N. C., 558, and 92 N. C., 442 and 447. At the last hearing, the Court ordered a rereference to the clerk, and upon the filing of his report, the defendant filed exceptions thereto. Reference is made to the former reports of the case, where the facts fully appear.

Messrs. R. B. Peebles and *T. N. Hill* for the plaintiff.

Messrs. Mullen & Moore and *Day & Zollicoffer* for the defendant.

MERRIMON, J. The account as stated in the report of the referee made to the present term does not conform in its details to the directions of the Court heretofore given, in
(489) several material respects. Indeed, it is so much at variance with the instructions given, that we deem it better, without passing severally upon the exceptions of the parties to recommit the report, with instructions to restate the account, in accordance with the further instructions given in this opinion, and make report to the present term.

With the view to ascertain the value of the interest of B. F. Lockhart in the estate of the testator of the plaintiff, the referee will ascertain the net value of that estate on the 25th day of June, 1865. To this end, he will first ascertain the gross value thereof as of that day. He will then deduct from that sum, all the debts due from the estate as of that day, and also the costs of administration. This will embrace commissions on the fund, no matter to whom due, and fees properly paid to counsel.

Secondly, he will ascertain the value of the life estate of B. F. Lockhart in two-thirds of the net value of the estate of the testator of the plaintiff—that is, the interest on that sum from the day mentioned, until the death of Lockhart. To this sum must be added any commissions due to Lockhart as executor. He was entitled to commissions upon collections and disbursements made by him. In ascertaining what was due him in the aggregate, he must be charged with such moneys as he received as executor, and credited with such sums of money as he properly disbursed in the payment of costs and debts against the estate. Any sum remaining in his hands and not accounted for must be deducted from the sum due to him.

It seems that he did not disburse all the money that he collected. It, however, does not appear that he misapplied any part of it while he continued to be executor. There is only ground of suspicion that he did. Under the circumstances of this case, he will not be charged with interest in this respect. But if he failed to pay the plaintiff any money remaining in his hands at the time he was removed as executor, then he must be charged with interest on that sum from the date of the removal.

Thirdly, he will ascertain what sum remained due from the testator of the defendant to the plaintiff, on (490) the first day of the present Term, on account of the balance unpaid of the decree of 25 November, 1868, for $12,077.34.

From such balance due, must be deducted the net sum due to Lockhart ascertained as above indicated.

IT IS SO ORDERED.

SMITH, C. J., did not sit.

ARA BRITTAIN v. S. E. MULL et al.

Appeal—Certiorari—Undertaking on Appeal.

Ordinarily, the writ of *certiorari*, when used as a substitute for an appeal, will be issued only when the applicant for it files a proper undertaking for the costs, but the Supreme Court has the power, in a proper case, to allow the writ to issue without such undertaking.

APPLICATION by the plaintiff for a writ of *certiorari* as a substitute for an appeal, heard at October Term, 1885, of the Supreme Court.

Mr. E. C. Smith for the plaintiff.
Mr. Theo. F. Davidson for the defendants.

MERRIMON, J. This is an application for the writ of *certiorari* as a substitute for an appeal. It appears, to our satisfaction, that at Spring Term, of the present year, of the Superior Court of the county of Burke, the Court, in an action wherein the petitioner was plaintiff and S. E. Mull and others were defendants, gave judgment against the petitioner, from which she promptly took an appeal to this Court; that she was poor and unable, by reason of her poverty, to give the security required by law for her appeal, and that she made affidavit of that fact, and that she was advised by coun- (491) sel learned in the law, that there was error in matter of law in the decision of the Court complained of. It further appears, that the Judge who granted the judgment,

left the place where the Court was held, and the judicial district, before the petitioner had opportunity to apply for leave to prosecute her appeal, without giving the required undertaking upon appeal for costs. She, however, promptly sent her affidavit, above mentioned, to the judge, accompanied by the statement, in writing, of her counsel, who practiced in that Court, to the effect, that they had examined her case, and were of opinion that the decision of the Court, of which she complained, was contrary to law.

The Judge declined to grant the leave prayed for, upon the ground, that he had left the judicial district that embraced the Court, in which the judgment was given, and he therefore had not the authority to grant it.

It appears sufficiently from the petition, certificate of counsel, and affidavits, that there was reasonable ground for the appeal. The petitioner took it promptly after judgment was granted, and was reasonably diligent in her efforts to obtain leave to prosecute it without giving an undertaking upon appeal for costs. It is unnecessary to inquire now whether or not the Judge had the power to grant such leave, after he had left the judicial district in which the judgment was given—he declined to grant it, and the apeal on that account was lost. The case is plainly one in which the writ of *certiorari* as a substitute for an appeal should be allowed, and without requiring an undertaking for costs.

Ordinarily, the writ of *certiorari,* when used as a substitute for an appeal, will be issued only when the applicant for it files a proper undertaking for costs. The Code, sec. 545. But as it is a substitute for the lost appeal, the applicant ought to be, and the law contemplates that she shall be, allowed to bring up the record for review, as nearly as may be as she would have brought up her appeal if no obstacle had been in her way, and with the same rights, privileges and exemptions. It is very clear, she was entitled to appeal
(492) without giving an undertaking for costs, and the Judge would no doubt have allowed her to do so, if he had, under the circumstances, thought he had authority in that respect. This Court, in granting the writ, must have the incidental power to grant such leave, just as the Judge below might have done—otherwise appellants in such cases would

be without remedy. It seems to us, that a reasonable, almost a necessary, interpretation of the statute is, that this Court is vested with the authority to extend to applicants for the writ, the same privilege or exemption that the Judge of the Superior Court can extend to an appellant.

The writ must issue without requiring the usual undertaking for costs.

IT IS SO ORDERED.

Cited: *State v. Warren,* 100 N. C., 493.

WORTHY v. BROWER.*

The allowance made to referees for their services, is entirely in the sound discretion of the Court, and is not reviewable upon appeal.

SMITH, C. J. There is also an exception to the allowance of $500 to the referee made in the final judgment, and the refusal of the Court to order a reference to ascertain the number of days in which the referee was employed in discharging the duties of the commission. We suppose this exception was made upon the idea that the Code of Civil Procedure, sec. 285, regulated the fees of the referee, and without a knowledge of the change in The Code, sec. 583, which leaves the amount to the sound discretion of the Court. It may be excessive, but of this we are not to be the judges, and the judgment of the Judge below is based upon a fuller knowledge of the facts than we can be supposed to possess upon a mere examination of the record.

This is an action upon the administration bond, and there is no error in law in the allowance that we can correct.

*This exception was omitted from the report of the case by an oversight.

(493)

STATE v. JAMES VINES.

Homicide—Manslaughter—Reckless Use of Dangerous Weapons—Accident—Evidence—Opinion.

1. Where one engaged in an unlawful and dangerous sport kills another by accident, it is manslaughter.
2. If the sport were lawful and not dangerous, it would be homicide by misadventure.
3. The test of responsibility depends upon whether the conduct of the accused was unlawful, or, not being so, was so grossly careless or violent, as necessarily to imply moral turpitude.
4. The opinion of an eye witness, as to whether the fatal blow was accidental or not, is not competent. That is a fact for the jury to determine upon the consideration of all the circumstances connected with the homicide.
5. A charge to the jury that if they believed the witness—there being but one witness, and no conflict in, and no alternative aspect, of his testimony—the prisoner was guilty of manslaughter, was not erroneous.

(*State v. Dixon*, 75 N. C., 275, cited and distinguished; *State v. Walker*, 4 N. C., 662; *State v. Hildreth*, 31 N. C., 429; *State v. Ellick*, 60 N. C., 450; *State v. Baker*, 63 N. C., 276; *State v. Elwood*, 73 N. C., 189; *State v. Buck*, 82 N. C., 551; *State v. Shirley*, 64 N. C., 610; *State v. Roan*, 13 N. C., 58, cited and approved.)

The prisoner was tried for the murder of one Samuel Joyner, at Spring Term, 1885, of GREENE, before *Gudger, Judge.*

There was a verdict against the prisoner for manslaughter, and judgment being pronounced thereon, he appealed.

The part of the case settled upon appeal necessary to a proper understanding of the opinion of the Court, is as follows:

"The only evidence adduced on the trial, was the testimony of one Freeman Streeter, sworn and introduced as a State's witness. He testified that he, with several other men, was at the prisoner's house on the night of the homicide, and saw the killing of Joyner, the deceased; that it was done by a pistol shot fired by the prisoner; that the deceased lived but a few seconds after the firing.

"That they were expecting to have a 'festival' at the (494) prisoner's house that night, at which the prisoner was to furnish the refreshments, and the witness was one of the invited guests. Witness did not know of any ill feeling ('madness,' as he expressed it) among any of the parties

present. That some girls were expected but it was raining and they did not come. That the killing of the deceased was about one or two o'clock at night; the weapon which caused his death being a thirty-two caliber pistol with several barrels. That he (witness) saw the prisoner load every barrel of the pistol on the night of the homicide, and before the deceased was shot. That one John Hines, who was present, also had a pistol. That the prisoner, soon after loading his pistol, discharged one barrel of it, shooting out of the door, and that John Hines also fired his out of doors. The deceased had no pistol. John Hines and James Vines (the prisoner) got to 'fooling' with sticks. Then they put their sticks down, and John Hines caught up his pistol from the chimney piece, and told prisoner that if he fooled with him, he would blow his brains out. Prisoner then got his pistol from a shelf and told John Hines if he could smoke more than he (prisoner) could, to smoke away. Witness said 'Jim, you and John put down your pistols and quit fooling with them, you might shoot some person.'

"Prisoner said he was not going to shoot any one.

"At this time the deceased was sitting on a bed in the prisoner's house. Then, while both Hines and Vines, (the prisoner), were standing face to face pointing their pistols at each other, Hines fell down behind the deceased on the bed and said to the prisoner, 'shoot and be damned,' and then the prisoner's pistol fired. The shot struck Joyner, the deceased. John Hines then ran into the back room, and the deceased 'made for' the back door and commenced to stagger, and fell against the house. The prisoner, who was at that time standing in the floor, caught the deceased and held him up, then turned him loose and the deceased fell to the floor.

"Cross-examined: the witness testified that he and the deceased were invited to the prisoner's house on the night of the homicide.

"That he saw no liquor there. That as the deceased fell, the prisoner said, 'Boys, I have shot him, but (495) it was an accident.' Prisoner's counsel offered to ask the witness if he regarded the shooting as accidental? Objected to by the Solicitor for the State; objection sustained, and prisoner excepted."

The Solicitor for the State, in his address to the jury, while expressing his belief that in strict law the offense was murder, claimed only a verdict for manslaughter.

His Honor instructed the jury that if they "believed the testimony of the witness, the prisoner was guilty of manslaughter"

The *Attorney-General* for the State.
Mr. Hugh F. Murray for the prisoner.

MERRIMON, J., (after stating the facts). The Court instructed the jury, that if they should believe the evidence, the prisoner was guilty of manslaughter. They rendered a verdict of guilty of that offense, and it must be taken that they believed the evidence; and, if they did, it is manifest that the prisoner was at least guilty of manslaughter. If it be granted that he and Hines were in jest and rough sport—and this is by no means certain—he was using a dangerous weapon—a loaded pistol, knowing that it was loaded—not only incautiously, but in a most reckless and unlawful manner. He had it pointed at Hines who fell behind the deceased, saying as he did so, "shoot and be damned," when at once he fired the fatal shot. If he did not intend to kill Hines, and the discharge of the pistol was unintentional, still the killing was manslaughter, because in any view of his conduct, he used the dangerous weapon carelessly, recklessly and unlawfully. It is clear, that where one engaged in an unlawful or dangerous sport, kills another by accident it is manslaughter. Arch. Cr. Pl., 397; Fost. Cr. Law, 259, 260, 261; 1 Hale Pl. Cr., 472, 473; Ros. Cr. Ev., 687, 688; *State v. Shirley,* 64 N. C., 610; *State v. Roan,* 13 N. C., 58. This, however, would not be so, if the sport were lawful and not dangerous—in such case it would be no more than
(496) homicide by misadventure. There is a variety of cases in which a person, causing the death of another, without intending to inflict injury, is criminally responsible, though not under the circumstances, chargeable with murder. In such cases, the test of responsibility depends upon whether the conduct of the party accused, was unlawful, or, not being so, was so grossly negligent, reckless or violent, as necessarily

to imply moral impropriety or turpitude. In some cases it may be difficult to determine the grade of the offense, but the case before us leaves no ground for doubt or hesitation in determining that it is at least one of manslaughter; indeed, in one aspect of the case, it was murder. There was some evidence going to show the willful purpose of the prisoner to shoot without regard to the consequences, and if this purpose existed, it was murder.

The prisoner's counsel proposed to ask the witness, "if he regarded the *shooting as accidental?*" Upon objection, the Court would not allow the question to be put, and this is made a ground of exception.

The question was properly excluded, because, first, the opinion of the witness was not competent evidence, and secondly, it was immaterial.

Generally, the Court or the jury, as the case may be, as the triers of questions and issues involving the ascertainment of facts, reach their conclusions from the facts in evidence before them, and not from the opinions of witnesses. There are well-defined exceptions to this general rule, but these do not affect this case, and need not be stated here. If, in some possible cases, the opinion of a non-expert may be competent evidence, as ingeniously contended by the counsel for the prisoner in his very interesting brief, this is clearly not one of them. The facts of the case were plain, clear and distinct and the witness by a simple recital of them, put the Court and jury in full possession of them and the circumstances attending the homicide, and they were as competent to judge whether or not the shooting was accidental as the witness. There is nothing in the case that warrants a departure from the general rule of law that excludes such evidence.

If the facts testified to, were not stated with suffi- (497)
cient fullness of detail, the prisoner might have elicited them by a proper cross-examination of the witness, in which case, the jury could have drawn proper inferences from them without the opinion of the witness. There was no necessity for the opinion of the witness in order to give the jury the facts they could not get otherwise than by his opinion.

The opinion of the witness was also immaterial. If he

had been allowed to say that in his opinion the shooting was accidental, this could not have materially changed the case, because, the prisoner had used the loaded pistol in an unlawful and reckless manner, and whether the firing was accidental or not, made no difference. The law does not tolerate such use of dangerous weapons, and when fatal consequences result from it, the offender can not be held guiltless; in such case he must answer for the consequences. It would be monstrous and shocking to reason to allow a man to so use a loaded pistol, and then take shelter behind the fact that the firing was accidental!

It was insisted on the argument here, that the Judge invaded the province of the jury in instructing them that, "if they believed the testimony of the witness, the prisoner was guilty of manslaughter." We do not think so; this contention has not the slightest foundation.

The Judge did not intimate in the least degree in terms or by implication, that he did or did not believe the evidence to be true, nor did he tell the jury that they should believe it, or any part of it; he, in effect, told them that in any possible view of the evidence (and taking it most favorably for the prisoner), if they believed it to be true, then as a conclusion of law, he was guilty of manslaughter. This was unobjectionable in this case.

There was but one witness—there was no conflict of testimony—there were no alternative aspects of it to be submitted. The credit of the witness and the sufficiency of his testimony to produce conviction upon their minds, was broadly and without qualification left to the jury. *State v. Walker,* (498) 4 N. C., 662; *State v. Hildreth,* 31 N. C., 429; *State v. Ellick,* 60 N. C., 450; *State v. Baker,* 63 N. C., 276; *State v. Elwood,* 73 N. C., 189; *State v. Buck,* 82 N. C., 551.

The case of *State v. Dixon,* 75 N. C., 275, relied upon by the counsel, is not like this. There the Judge *directed* the jury to return a verdict of manslaughter. This was obviously erroneous—the jury were not allowed to pass upon the weight and sufficiency of the evidence, nor to say whether or not they believed it.

In our judgment, the prisoner has not the slightest ground

of complaint at the verdict of the jury, or the action of the Court. Indeed, it is fortunate for him that he was not convicted of a more serious offense.

NO ERROR. Affirmed.

Cited: *State v. Dixon,* 104 N. C., 706; *State v. McLain, Ibid.,* 897; *State v. Winchester,* 113 N. C., 642; *State v. Gentry,* 125 N. C., 737; *State v. McDowell,* 129 N. C., 530; *State v. Hall,* 132 N. C., 1107; *State v. Capps,* 134 N. C., 631; *State v. Horton,* 139 N. C., 597.

STATE v. JOSEPH BARBEE.

Indictment—Motion to Quash.

1. A motion to quash should be made on arraignment and before pleading, it will never be entertained after verdict.
2. It is very disirable that when parties to actions appeal *for delay merely* they should content themselves with *one* exception, which will answer their purpose as well as a greater number.

(*State v. Jarvis,* 63 N. C., 556, cited and approved.)

INDICTMENT for larceny, tried before *Clark, Judge,* at July Term, 1885, WAKE.

The defendant was convicted, and from the judgment thereon pronounced he appealed.

The *Attorney-General* for the State. (499)

Messrs. A. M. Lewis & Son and *J. C. L. Harris* for the defendant.

ASHE, J The jury found the defendant guilty. The Court pronounced judgment, and the defendant appealed.

The defendant, on the trial, took seven exceptions to the rulings of his Honor in admitting and rejecting evidence, no one of which was tenable.

In the "case on appeal" it is stated that the defendant moved to quash the indictment. When this motion was made,

if made at all, does not appear. It certainly does not appear in the record proper that such a motion was ever made. The defendant was twice put on his trial—first at the ———— Term, 188.., of same Court, when there was a mistrial, and then at the July Term, 1885, when he was convicted and appealed to this Court. At each of these terms of the Court, the defendant was arraigned and pleaded not guilty. Strictly, a motion to quash must be made on the arraignment and before pleading, and will never be entertained after verdict. *State v. Jarvis,* 63 N. C., 556. But conceding it to have been made in apt time, there is no ground that we have been able to discern in the record for quashing the indictment or arresting the judgment.

When defendants appeal merely for delay, it is very desirable that they should content themselves with *one* exception, which will answer their purpose just as well as seven or more.

NO ERROR. Affirmed.

Cited: State v. Haywood, 94 N. C., 850; *State v. Gardner,* 104 N. C.,741.

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(500)

STATE v. BRYAN MOORE.

Appeal in Forma Pauperis in Criminal Actions.

To entitle a defendant in a criminal action to an appeal to the Supreme Court without security for costs, he must file his affidavit containing these essential averments: (1). That he is wholly unable to give security for the costs; (2). That he is advised by counsel that he has reasonable cause for the appeal prayed: and (3). That the application is in good faith. The Code, sec. 1235. The Court has no authority to dispense with, or the presecutor to waive the requirements of the statute in this respect.

(*State v. Divine,* 69 N. C., 390; *State v. Morgan,* 77 N. C., 510; and *Stell v. Barham,* 85 N. C., 88, cited and approved.)

APPEAL from the Inferior Court of BEAUFORT, heard before *Gudger, Judge,* at Spring Term, 1885, of BEAUFORT Superior Court.

The facts are stated in the opinion.

The *Attorney-General* for the State.
Mr. Geo. H. Brown for the defendant.

MERRIMON, J. At the August Term, 1884, of the Inferior Court of the county of Beaufort, the defendant was convicted of a criminal offense; there was judgment against him, and he appealed from the same to the Superior Court of that county.

At the Spring Term of 1885, of the latter Court, the judgment of the Inferior Court was affirmed, and the defendant appealed to this Court. He filed an affidavit in that connection, the material part of which is in these words: "That he is unable to give any security for costs on his appeal to the Supreme Court, and unable to give a bond or security; that he is a very poor man, and has no property whatever; that he is advised by his counsel to appeal to the Supreme Court in this cause, and he prays to be allowed to sue without giving bond."

Upon this affidavit he moved the Court that he be allowed to bring up this appeal "without giving security for cost." The Court allowed the motion and entered an order in these words: "The defendant having appealed, and (501) filed his affidavit that he is unable to give an appeal bond, or other security as required by law, he is permitted to appeal without giving bond."

In this Court, when the case was called for argument, the Attorney General moved to dismiss the appeal, because "there has not been filed the required bonds or undertaking on appeal, or the necessary affidavit and proofs to authorize the appeal without such bond or undertaking."

Generally, a defendant convicted of a criminal offense, either in the Superior or Criminal Court, has the right to appeal to this Court "on giving adequate security to abide the sentence, judgment or decree of the Supreme Court." The Code, sec. 1234.

But the statute makes an exception in favor of such defendants, who are unable to give security for costs of the appeal. The Code, sec. 1235, provides that: "In all such cases of conviction in the said Courts (the Superior or Criminal Courts), the defendant shall have the right to ap-

peal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, *and that the application is made in good faith.*"

So the Court has no authority to grant an appeal "without security for costs," until the affidavit so required shall be filed. This is so because, in the absence of the affidavit, the statute requires security for costs to be given, and the Court can not disregard the statute; this is the source of its authority in such respect.

The affidavit required, must at least embody in substance these facts: *First,* that the defendant is wholly unable to give security for the costs; *secondly,* that he is advised by counsel that he has reasonable cause for the appeal prayed for; *thirdly,* that the application is made in good faith.

The statute makes these facts essential, and an affidavit that omits them is not such a one as is required to authorize the Court to allow the appeal without security for costs.

(502) While the law is careful not to allow the poverty of a defendant to deprive him of the right to appeal in a proper case, it does not encourage groundless or frivolous appeals, taken merely for the purpose of delay to gratify a whimsical or peevish temper. To prevent this in some measure, the affidavit embodying the material facts mentioned, is required to enable the Court to allow the appeal without security for costs.

The affidavit in this case is fatally defective. It sufficiently states the inability of the defendant to give the security for costs; but it wholly fails to state the further material facts that he "is advised by counsel that he has reasonable cause for the appeal prayed, and that the appeal is in good faith." There is nothing in it that can reasonably be construed as implying such meaning. The mere fact that counsel advised him to appeal, does not imply that he was of opinion that there was reasonable cause for it; if he thought there was, he ought to have said so; that he did not, rather implied that he did not think so. It may be, the counsel advised him to appeal to avoid present punishment, or for some other cause. In such case, the law does not allow

an appeal without security for costs. In *State v. Divine,* 69 N. C., 390, the Court said: "The insolvency of the party is not alone sufficient to entitle him to the benefit of this act; it must also appear by the affidavit, which must be filed before the Judge can grant the appeal, that the defendant is advised by counsel that he has reasonable cause for the appeal prayed for, and that the application is in good faith. Both of these essential requisites are wanting in the record before us. We think the affidavit should set forth the name of the counsel who advises that there is reasonable cause for the appeal. Otherwise, it would be in the power of the defendant to commit a fraud upon the Court, for it does not follow that the counsel upon whom he relies, is an attorney of the Court, or any one learned in the law." *State v. Morgan,* 77 N. C., 510, is to the same effect, and as also *Stell v. Barham,* 85 N. C., 88.

It was suggested in the argument, that it must be taken that the Solicitor for the State was present when the Court made the order allowing the appeal, and waived the insufficiency of the affidavit, but this he had no power (503) to do. He represented the State, it is true, but the statute conferred upon him no such discretion; he could not suspend or waive a statutory requirement.

The motion to dismiss the appeal must be allowed.

APPEAL DISMISSED.

Cited: *S. v. Jones, post,* 618; *S. v. Duncan,* 107 N. C., 819; *S. v. Wylde,* 110 N. C., 502, 3; *S. v. Perkins,* 117 N. C., 699; *S. v. Bramble,* 121. N C., 603; *S. v. Gatewood,* 125 N. C., 695.

STATE v. CALVIN BENNETT.

Appeal—Certiorari—Judgment—New Trial.

1. A judgment in a criminal action is not vacated by an appeal, until the statutory requirements with respect to the perfecting of the appeal are complied with, and it is the duty of the Court to enforce the judgment. The Code, sec. 935.

2. A judgment regularly entered at one term of the court, can not be set aside at a subsequent term, except in cases of surprise, mistake or excusable neglect. The Code, secs. 274 and 1202.

3. Where a party has lost his appeal by the conduct of his adversary, his remedy is by the writ of *certiorari*, to bring the case to the appellate court, and not by a motion for a new trial.

(*State v. Bill*, 35 N. C., 373; *State v. Dixon*, 71 N. C., 204; *Davis v. Shaver*, 61 N. C., 18; *Sharp v. Rintels, Ibid.*, 34; *State v. Alphin*, 81 N. C., 566; *England v. Duckworth*, 75 N. C., 309, cited and approved.)

APPEAL from the Inferior Court of PITT, heard before *Gudger, Judge,* at Spring Term, 1885, of Superior Court for that county.

The facts are fully stated in the opinion.

The *Attorney-General* for the State.
Mr. Aug. M. Moore for the defendant.

ASHE, J. This was an indictment for larceny and receiving stolen goods, preferred against the defendant, and tried in the Inferior Court of Pitt, at August Term, 1884.

The defendant was convicted and sentenced, and
(504) from the judgment of the Inferior Court, appealed to the Superior Court, where, at the Fall Term, 1884, the appeal was dismissed. At the February Term, 1884, of the Inferior Court, the defendant moved for a new trial, which was overruled, and, upon motion by the Solicitor, the sentence of the Court was pronounced against the defendant, from which judgment he appealed to the Superior Court; and, in that Court, at the Spring Term, 1885, his Honor, *Judge Gudger,* held that there was no error in the ruling of the Inferior Court, and adjudged that the judgment of that Court be affirmed, and from that judgment the defendant appealed to this Court.

In the record transmitted from the Inferior to the Superior Court, it appears that the appeal was not taken within the time prescribed by the statute, and we presume that is the ground upon which the appeal of the defendant was dismissed. The defendant filed an affidavit in the Inferior Court, setting forth as a reason for not perfecting his appeal in time, that there was an agreement, as he was informed, between the State's Solicitor and his counsel, for an extension

of the time for perfecting his appeal. But we do not see how that could avail him, if true, after his appeal had been dismissed, and the opinion of the Superior Court certified to the Inferior Court. His only remedy in such a case, was by writ of *certiorari,* which he failed to apply for. *State v. Bill,* 35 N. C., 373.

But the defendant's counsel in support of his motion for a new trial at the February Term of the Inferior Court contended, "that a motion for a new trial could be made at any time before judgment, and the appeal in this case having vacated the judgment rendered at the August Term of the Superior Court, that the Court had the authority, and the motion was in apt time." But in that he was mistaken. His contention was founded upon false premises. The judgment rendered at the August Term, 1884, has never been vacated and still stands as a judgment of that Court.

When an appeal is *regularly* taken by a defendant in a criminal action from a judgment against him, (505) the appeal vacates the judgment; but when the appeal is taken without a compliance with the statutory requirements, and is for that reason dismissed, the appeal is a nullity, and does not vacate or suspend the judgment, and it stands as if no appeal had been taken. *State v. Dixon,* 71 N. C., 204. That being so then, assuming that the defendant's position that the motion should be made before judgment is correct, he ought to have made it at the August Term, 1884, and it can not avail him to say that a second judgment was rendered at the February Term, 1885, for there was no necessity for that judgment as the first was in existence. All the Court had to do at the subsequent term was to see that the judgment was enforced.

It is well established that a judgment regularly entered at one term of the Court, can not be vacated at a subsequent term. *Davis v. Shaver,* 61 N. C., 18; *Sharp v. Rintels, Ibid.,* 34; *State v. Alphin,* 81 N. C., 566; *England v. Duckworth,* 75 N. C., 309; The Code, sec. 935. The only exception to which is the discretion given to a Judge by The Code, sec. 274, to set aside a judgment rendered at a former term of the Court for "mistake," etc.

The decision in *England v. Duckworth, supra,* is directly

in point. There was, in that case, a verdict and judgment in the Superior Court against the defendant, and at the same term of the Court he moved for a new trial, and the Judge ordered the motion to be continued to the next term, and that the judgment be stricken out, and that the plaintiff be allowed to take the deposition of a certain witness. At the next term the Judge granted a new trial, and the plaintiff appealed. The judgment granting the new trial was reversed, and RODMAN, Judge, speaking for the Court, said: "We are of the opinion that under section 236, C. C. P., sub-sec. 4 (The Code, sec. 492, sub-sec. 4), the Judge should have passed on the motion for a new trial at the term of which the new trial was had, and had no right to decide it at a subsequent term. He is expressly forbidden to do so (506) by the section cited."

It is true that was a civil action, but it is provided by The Code, sec. 1202, that Courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases. But independent of the statute, the rule of the common law was the same. In Wharton's Criminal Law, sec. 3391, it is laid down that "at common law the Court trying the case, is the sole tribunal by whom a new trial can be granted, and its refusal so to do being matter of discretion is no ground for a writ of error." S. P., 1 Chitty Criminal Law, star page 660.

These authorities lead us to the conclusion that there was

NO ERROR.

Cited: S. v. Sanders, 111 N. C., 703; *S. v. Kinsauls,* 126 N. C., 1097.

STATE v. DANIEL E. GLISSON.

Perjury—Oath—Evidence—Witness—Presumption.

On the trial of an indictment for perjury, several witnesses testified to the fact of the defendant having given evidence as a witness on the trial wherein the perjury was alleged, but none of them stated that they saw or heard the oath administered, nor were they

particularly examined on this point; another witness, however, swore that he "was present when the defendant *was sworn*," and that "he *swore*," etc.—*Held*,

1. The administration of an oath is an essential element in the crime of perjury.
2. That it was not error to refuse an instruction to the jury that there was no evidence of an oath having been administered.
3. Under the maxim *omnia presumuntur rita esse acta*, it might reasonably be inferred that the oath had been duly administered.
4. The objection that there is no evidence to go to the jury, must be taken on the trial below—it can not be made, for the first time, in the Supreme Court.
5. It is not competent to ask and elicit an answer to a question collateral to the issue, in order to prove it false and thus impugn the credit of the witness.

(*Green v. Collins*, 28 N. C., 139; *Grant v. Hunsucker*, 34 N. C., 254; *State v. Jenkins*, 51 N. C., 19; *State v. Jones*, 69 N. C., 16; *State v. Hinson*, 82 N. C., 597; *State v. Keath*, 83 N. C., 626, cited and approved.)

(507)

Indictment for perjury, tried before *Connor, Judge*, at July Term, 1885, of WAYNE.

The defendant was charged in the first count of the indictment with perjury, committed on his examination as a witness on his own behalf, on the trial of a civil action prosecuted against O. K. Uzzell before a justice of the peace; and, in the second count, with perjury upon his examination in the same cause, removed by appeal to the Superior Court and there tried.

The false swearing in the latter court is assigned in his testimony, in that in his contract with said Uzzell for certain work to be performed in putting up a storehouse for the latter, it was stipulated and agreed that the defendant "was to have charge of the work until it was completed; that no lost time was to be charged against him; that he was not absent to exceed four days," and that he "did not advise or encourage any of the laborers employed to strike for higher wages than had been agreed to be paid them."

Upon the trial before the jury of his plea of not guilty, the defendant was convicted of taking the false oath first specified in the second count, and acquitted of all the other charges mentioned in both counts.

1. The counsel for the defendant contended that there was no evidence of the administration of an oath to the wit-

ness, under the obligations of which he gave his testimony, and that there was error in leaving the question to the jury.

Several witnesses were produced and examined by the State, as to what the defendant swore on the trial in the Superior Court, none of whom testified to seeing or hearing an oath administered, or to seeing any book in defendant's hands; while all testified to his having given in evidence, as a witness in the cause.

(508) One John I. Ivey testified as follows: "I was present when the defendant *was sworn* in the case of D. E. Glisson v. O. K. Uzzell. He, the defendant, *swore* upon the trial of the said civil action, that he was to have charge of the work until it was completed."

The witness was not specially interrogated about the administering the oath, nor as to his own meaning in using the somewhat equivocal terms in which he expressed himself, and his testimony was allowed to go undisturbed to the jury, to be weighed and passed on by them.

The Court refused to give an instruction that there was no evidence as to the taking an oath, and charged that if the jury shall find that the defendant was sworn, it would be presumed that he was sworn properly and in the usual form; but it was incumbent on the State to prove that he was sworn, and the proper oath administered, and this might be inferred from evidence of his being sworn.

The *Attorney-General* and *Messrs. Faircloth & Allen* for the State.

Mr. George V. Strong for the defendant.

SMITH, C. J., (after stating the case as above). We see no error in these directions. It is a reasonable inference from the delivery of testimony, that it comes under the sanction of an oath or an affirmation, its equivalent, inasmuch as this is an indispensable prerequisite to its being received and heard, and no objection from any source was made to its admission. Upon the legal maxim, *omnia presumuntur rita esse acta,* it may be inferred that the conditions essential to all personal testimony had been observed, or the witness would not have been heard, and against this

the inadvertence of others present who may not have noticed, or whose memory is in fault, ought not to prevail.

But while this may be the general rule, we are not disposed to carry it so far as to dispense with proof of the administration of an oath, which is an essential element in the crime of perjury, and allow a conviction in its absence.

But the evidence is supplied in the testimony of Ivey, who says that "the defendant *swore* upon (509) the trial," etc., and that he "*was present* when the defendant *was sworn*," etc.

If the defendant did not in fact take an oath, as his counsel here interprets the words of the witness who says he was sworn, it was easy for him to inquire what the witness meant to say, and to be understood as saying, when he thus testified. He states a positive fact as within his own knowledge, and it was certainly right and proper to submit the testimony to the jury for their consideration.

It would not conduce to the healthful and fair administration of justice to permit a party accused to remain silent, when it is in his power to have testimony explained and its import ascertained, when it may be supposed not to express what the witness intended, and then, upon the trial, put an inadmissible interpretation upon it.

The witness says the defendant was sworn—and if he was not, the accused should, by examination, have shown that he was not, or that the witness did not mean to say that it was within his knowledge that he was.

II. The objection to the proving what the defendant swore upon the trial of the civil suit in the Superior Court, by the witness J. B. Pearsall, based upon his incompetency to tell the substance of all the defendant said, while he could remember and detail the substance of all he said about the contract, has been abandoned, and we think properly not insisted on.

III. The defendant insists there was no evidence of the taking the false oath to go to the jury. So far as this exception pertains to the *act of being sworn*, it has already been conisdered.

If it is intended to have a wider scope, and deny that there is evidence of the false statement, it is sufficient to say that there is evidence of what that false statement was, from sev-

eral witnesses; and if there was none, no such exception was taken at the trial, and none such can be entertained, first taken here. The rule is well established in numerous cases. *Green v. Collins,* 28 N. C., 139; *Grant v. Hunsucker,* 34 N. C., 254; *State v. Jenkins,* 51 N. C., 19; *State v.* (510) *Jones,* 69 N. C., 16; *State v. Hinson,* 82 N. C., 597; *State v. Keath,* 83 N. C., 626, and other cases.

IV. The prosecutor and witness O. K. Uzzell, on cross-examination by defendant's counsel, was asked if he had not himself sworn on the trial of the action against him, that it had taken thirteen hands four days to put the shingles on his store, and he denied that he so swore.

Several of defendant's witnesses contradicted him, and testified that he did so state, and defendant then proposed to falsify the statement, and show that four hands only were sufficient to do the work, and this to prove, not the falsehood, but the bias and prejudice of the prosecutor. The latter evidence was disallowed, and to this ruling the defendant also excepted.

There is no error in the refusal to admit the proposed evidence. The matter is entirely collateral, and it is not competent to ask and elicit an answer to an inquiry foreign to the issue, in order to prove it false, and thus impugn the credit of the witness. The false estimate of the time and labor needed to cover the house with shingles, sheds no light upon the issue as to the false oath imputed to the defendant. The prosecutor may have committed a similar crime in the trial, but whether this be so or not, it does not refute the charge against the defendant and vindicate him.

The office of such evidence is, and can only be, to impair the credit of the prosecuting witness, and for this purpose, when a witness is interrogated as to a collateral fact, his answer is conclusive and final. All the indulgence allowable was given in permitting the prosecutor to be contradicted as to what he had sworn—and it ought not to have been extended to an inquiry into the truth of the decaration which was but an expression of opinion. To do this would be to open a new and foreign issue, and virtually to put the witness on trial for false swearing, as well as the defendant, and distract the attention of the jury from the matter before them.

The inquiry was, therefore, properly arrested, and the

the minds of the jurors confined to the issue of the de- (511) fendant's guilt of the criminal act charged.

There is no error, and the Court below must proceed to render judgment on the verdict.

NO ERROR. Affirmed.

Cited: *Hare v. Holoman,* 94 N. C., 19; *State v. Ballard,* 97 N. C., 446; *State v. Bruce,* 106 N. C., 793; *State v. Morris* 109 N. C., 822; *State v. Kiger,* 115 N. C., 751; *State v. Harris,* 120 N. C., 578; *Burnett v. R. R., Ib.,* 519.

STATE v. J. W. MILLER.

Drummer—Taxation—Indictment.

1. A drummer, within the meaning of the Acts of 1885, ch. 175, sec. 28, is one, who, for himself, or as agent for a resident or non-resident merchant, travels, and sells or offers to sell, with or without sample, goods, wares or merchandise, which is afterwards to be sent to the purchaser.
2. Where an indictment under this Act charges the sale to have been to two as partners, and the proof is a sale to one only, the variance is fatal.

(*Albertson v. Wallace,* 81 N. C., 479; *State v. Faucette,* 4 Dev. & Bat., 107; *State v. Stamey,* 71 N. C., 202, cited and approved.)

INDICTMENT, tried before *Meares, Judge,* and a jury, at October Term, 1885, of MECKLENBURG Criminal Court.

The indictment is for an alleged violation of sec. 28 chap. 175, of the act to raise revenue, passed at the last session of the General Assembly, and contains two counts. In the first, the defendant is charged with the unlawful selling and attempting to sell, "goods, wares and merchandise" to M. C. Mayer and John Ross, partners trading under the firm name of Mayer & Ross, the said goods, wares and merchandise not being of his own manufacture, without having paid the tax and obtained the license therefor."

In the second count, he is charged with unlawfully selling and attempting to sell, while acting as the agent of the Union

Milling Company, a foreign corporation, "goods, wares and merchandise" of the said company, by wholesale, to
(512) the same co-partnership, without having paid the tax and obtained a license.

Upon the trial, upon the plea of not guilty, the jury returned a special verdict in these words:

"The defendant is a member of the firm of R. M. Miller & Sons, who are general cotton and commission merchants, and doing business in the City of Charlotte. Some ninety days ago, the Union Milling Company, of Detroit, Michigan, shipped to the order of J. L. Hardin, of Charlotte, N. C., a car-load of flour, and drew through the bank for the amount of the flour, with a bill of lading attached to the draft. J. L. Hardin refused to accept the draft, whereupon the draft was paid by the defendant, and the bill of lading turned over to the defendant. When the flour arrived in Charlotte it was delivered to the defendant, who took possession of the same. The defendant then took samples of the flour and went to, among others, one M. C. Mayer, at Mayer's place of business in Charlotte, and offered to sell the same by wholesale to him. M. C. Mayer is a merchant doing business in Charlotte, but in a different place from that of the defendant, and is in no way connected with the defendant. The business house of Mayer is on the same side of the street with that of the defendant, and in the same building. He finally sold it. The defendant returns the amount of his sales as a commission merchant for taxation. He accounted for the amount of this sale to the Union Milling Company, reserving his usual commissions. He has returned his commissions in this case for taxation. He has not paid the tax required by law for carrying on the business of a drummer, nor did he have a license to carry on the business of a drummer, at the time he offered the flour for sale to M. C. Mayer. If the Court should be of the opinion, from the foregoing finding, that the defendant is guilty, then the jury find him guilty; but if the Court should be of the opinion, from the foregoing facts, that the defendant is not guilty, then the jury find him not guilty."

Upon this verdict the Court adjudged the defend-
(513) ant, J. W. Miller, not guilty, and from the order of discharge the Solicitor, on behalf of the State, appealed.

The *Attorney-General* and *Messrs. Reade, Busbee & Busbee* for the State.

Messrs. Bynum, Bynum & Shipp for the defendant.

SMITH, C. J., (after stating the facts). The offense with which the defendant is charged, is a violation of sec. 28, chap. 175, of the Acts of 1885, entitled an act to raise revenue, such parts and so much of which as are material in passing upon the appeal are as follows:

"Every person acting as a drummer in his own behalf, or as agent for another person or firm, who shall sell or attempt to sell, goods, wares or merchandise of any description, by wholesale, with or without samples, shall, before soliciting orders or making any such sales pay to the State Treasurer a tax of one hundred dollars, and obtain a license which shall operate one year from its date, and shall be exempt from any other license tax, either State, county, city or town. * * * Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not less than two hundred dollars, or imprisoned not less than ninety days," etc.

While the defendant as a general cotton and commission merchant in association with his sons and, under the partnership name of R. M. Miller & Sons, is conducting a regular and recognized business in Charlotte, upon which he pays all the taxes imposed under the revenue law, he is sought to be made responsible, as a "drummer" under another clause of the act, though not so designated in the charge, for the single act of selling a consigned and paid for lot of flour sent from a distant State.

We think few persons in reading the statute and noticing the different classes of employment or occupation there assessed, would regard the act of the defendant as a "drumming," and the defendant as a drummer within the purview of the section upon which the indictment rests, nor could they well do so, without confounding business (514) distinctions enumerated and separately taxed therein. The word, in our opinion, is neither used in the act, nor in its common acceptation, in a sense which admits its application to the conduct of the defendant, as ascertained in the special verdict. The writer of this opinion has examined the clauses imposing a tax upon the business of a drummer, con-

tained in the series of enactments for raising revenue from 1866 to that of 1885, to discover its meaning from its relations and surroundings, and it is manifestly employed to mark out, as a proper subject for taxation, another and distinct employment from that of general and stationary merchandising, such as that in which the defendant is engaged.

In the Revenue Act of 1866, the tax is imposed upon "every nonresident merchant, drummer, or who shall come into this State and sell," etc. Chap. 21, sec. 22.

In Laws of 1866-67, the words are, "every nonresident or drummer, or agent of a nonresident, who shall sell," etc. Chap. 72, sec. 22.

The same terms are used in Laws of 1868, chap. 108, sec. 33; of 1869-70, chap. 229, sec. 27; of 1870-71, chap. 227, sec. 26; of 1871-72, chap. 58, sec. 24.

These statutes evidently confine the word "drummer" to agents and representatives of nonresident principals in whose employment they are in soliciting purchases in the State.

In the subsequent Revenue Act, the sphere is enlarged, and "drummers and traveling agents of any person," resident or non-resident, are included. Laws 1872-73, chap. 144, sec. 23; 1873-74, chap. 134, sec. 23; Laws 1874-75, chap. 185, sec. 23. In the Laws 1876-77, the language is varied in form, but in substance the same: "Every person acting as a drummer in his own behalf, or as agent for any other person" —chap. 156, sec. 24; and this phraseology is pursued in subsequent enactments. Laws 1879, chap. 70, sec. 25; Laws 1881, chap. 116, sec. 19; Laws 1883, chap. 136, sec. 28.

It is very obvious that this legislation is directed
(515) to a class of traveling or itinerant tradesmen, first to such as represented nonresident merchants, and whose occupation was in competition with resident merchants, who paid an assessment upon their business, to which the nonresident was not subject. It was subsequently extended to similar agencies, engaged in the same calling, of resident merchants, perhaps to avoid a discrimination that might fall under the inhibitions of the Federal Constitution. *Albertson v. Wallace,* 81 N. C., 479.

But the essential and distinguishing difference between these and salesmen having a fixed place of business, is that the drummer is a traveling and soliciting salesman, and these

separate callings are assessed with dissimilar taxes in the entire series of financial legislation. That this is the sense of the legislation is manifest from an inspection of the enactment itself. The expression "with or without samples," indicates the absence of the goods proposed to be sold from the place of sale, and can scarcely be supposed to include the home merchant, whose stock of goods is on hand for direct examination.

Our definition of the term is not without the support of judicial authority.

"The term 'drummer,'" says *Turney, Judge,* delivering the opinion of the Court, "has acquired a common acceptation, and is applied to *commercial agents who are traveling for wholesale merchants, and supplying the retail trade with goods, or rather taking orders for goods to be shipped to the retail merchant,* upon which merchandise the State collects her revenue." *Singleton v. Fritsch,* 4 B. J. Lea (Tenn.), 93.

We are therefore clearly of opinion that the act of the defendant is not within the penal interdict of the statute, nor does it make the defendant a drummer, subject to its provisions.

But it is also to be noticed that the offense charged is not that shown on the proofs and found by the jury. It is alleged in the indictment that the sale of the flour was made to M. C. Mayer and John Ross, partners, constituting the firm of Mayer & Ross; that is, to these two persons in their capacity as partners, while the finding in the special (516) verdict is of a sale made to M. C. Mayer alone. Upon the facts contained in the special verdict, the defendant can not be adjudged guilty of the charge set out and specified in the indictment. *State v. Faucett,* 20 N. C., 239; *State v. Stamey,* 71 N. C., 202. We have, however, deemed it best to dispose of the question as affecting the administration of the revenue law.

NO ERROR. Affirmed.

Cited: State v. Long, 95 N. C., 583; *State v. Tisdale,* 145 N. C., 424.

STATE v. W. F. SMITH.

Drummers—License—Intent.

1. A drummer is not protected from the penalty imposed by the statute against persons selling goods without license, unless he shall be in the actual possession of the license at the time that he makes the sale.
2. When an act forbidden by law is done, *the intent to do the act* is the criminal intent, and no one violating the law can be heard to say that he had no criminal intent in doing the act.
3. When the act itself is equivocal, and becomes criminal only by reason of the intent with which it is done, both must unite to constitute the offense, and both must be proved in order to warrant a conviction.

(*Lewis v. Dugar*, 91 N. C., 16; *State v. King*, 86 N. C., 603; *State v. Voight*, 90 N. C., 741, cited and approved.)

INDICTMENT, tried before *Avery, Judge,* and a jury, at Fall Term, 1885, of BURKE.

The defendant, agent of the mercantile house of Whiteley, Tapscott & Melville, doing business in Baltimore, is charged with violating section twenty-eight of the act to raise revenue, which was ratified and took effect 12 March, 1885, in selling by sample and at wholesale, certain goods specified in
(517) the indictment, and without license therefor, on 16 April, 1885, to T. T. Daves & Bro., at Morganton in this State.

It was in evidence that his principals had paid for and obtained a license, in the defendant's possession at the time of sale, which had however expired, and that they had on 26 January preceding, taken out another for the present year, of which the defendant was not in possession when he made the sale. The defendant, examined on his own behalf, stated that when he left Baltimore he intended to bring out with him the license last issued, but by mistake, as he discovered in looking over his papers previous to the day of sale, had taken possession of that which had expired.

He stated further that his principals had another agent in the same service in the State, but whether they had secured another license to protect his operations also, he was unable to say.

1. His counsel contended that as the license issued in January, while the revenue law, enacted at the previous session of the General Assembly, was in force, and the offense was under a corresponding section made an offense with a punishment prescribed which was within the cognizance of a justice of the peace, an indictment in the Superior Court would not lie.

2. That actual possession of the license at the time of the sale was not required for his protection against the penalty.

3. That it was incumbent on the State to prove a criminal intent in the defendant, in order to make the act a misdemeanor.

These instructions, terminating in a request to charge the jury to find for the defendant, were refused, and the Court directed the jury as follows:

1. If the defendant made sale of the goods in April, his offense would fall under the condemnation of the Laws of 1885, which rendered it illegal, and it was not in any sense *ex post facto.*

2. If the defendant sold the goods, knowing that he had no protecting license with him, in his actual possession, it was a violation of the law.

3. When the intent is not of the essence of the offense, a party doing a forbidden act must be pre- (518) sumed to intend the natural consequences of what he does; and as defendant had testified that he did not have in Morganton at the time of sale the license of January, produced at the trial, if he sold with knowledge of the fact, it would be presumed that he intended to violate the law.

The jury found the defendant guilty, and from the judgment rendered thereon he appealed.

The *Attorney-General* and *Messrs. Reade, Busbee & Busbee* for the State.

No counsel for the defendant.

SMITH, C. J., (after stating the case). There is no error in the refusal to give the instructions asked for, nor in the directions given instead. The facts of the present case as disclosed in the testimony, bring it directly within the ruling and decision made in *Lewis v. Dugar,* 91 N. C., 16, and render any further discussion useless.

The statute has no retroactive energy, and was in force when the criminal act was committed to which it affixes the penalty. It was not required of the State to prove more than that the forbidden act was intentionally done.

As is said by the Court, where a similar defense was set up in *State v. King,* 86 N. C., 603:

"When an act forbidden by law is intentionally done, *the intent to do the act* is the criminal intent, which imparts to it the character of an offense; and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act. * * * But when the acts themselves are equivocal, and become criminal only by reason of the intent with which they are done, both must unite to constitute the offense, and both facts must be proved in order to a conviction." To same effect is *State v. Voight,* 90 N. C., 741.

These are the only exceptions shown in the record,
(519) and our revising appellate power is exercised in disposing of them. They are untenable.

NO ERROR. Affirmed.

Cited: State v. McLean, 121 N. C., 594; *State v. Morrison,* 126 N. C., 1126; *State v. Morgan,* 136 N. C., 630.

STATE v. GEORGE ATKINSON and WILLIAM WHITFIELD.

Larceny—Evidence.

1. What is evidence, and whether there is any evidence to be submitted to the jury, is a question of law to be decided by the Court. What weight and effect should be given to evidence submitted to them, is a matter of fact to be decided by the jury.
2. The Court has the power to set aside the verdict of guilty when it is against the weight of evidence, or when there is no evidence.
3. If the evidence produced is so slight and inconclusive as that in no view of it, ought the jury reasonably to find a verdict of guilty, then there is no evidence which should be submitted to them.
4. Upon the facts stated in this case it is clear that there was evidence which should be submitted to the jury.

(*State v. White,* 89 N. C., 462; *State v. Patterson,* 78 N. C., 470; *State v. Crockett,* 82 N. C., 600; *State v. James,* 90 N. C., 702; *State v. Gaskins,* at this Term, cited and approved.)

STATE *v.* ATKINSON.

INDICTMENT for larceny, tried at Spring Term, 1885, of JOHNSTON, before *MacRae, Judge,* and a jury. The jury returned a verdict of guilty against the defendants, and the Court gave judgment, from which they appealed.

The case is stated in the opinion of the Court.

The *Attorney-General* and *Mr. D. G. Fowle* for the State.
Messrs. Reade, Busbee & Busbee for defendants.

MERRIMON, J. What is evidence, and whether or not there is any evidence to go to the jury in respect (520) to an issue submitted to them, are questions exclusively for the decision of the Court. But if there is evidence —any evidence—to go to the jury, it is their province to determine its weight and effect, and whether or not it is sufficient to warrant them in rendering a verdict of guilty in a criminal action. Of course, this does not imply that the Court would not have the power in a proper case, where there is a conflict of testimony, to set a verdict of guilty aside, as being manifestly against the weight of evidence. If the evidence produced is so slight and inconclusive, as that in no view of it, could the jury reasonably render a verdict of guilty, then there is no evidence that ought to be submitted to them. *State v. White,* 89 N. C., 462, and the cases there cited.

The question presented by the record is, was there evidence that ought to have been submitted to the jury? If this question must be decided in the affirmative, then it was the province of the jury to determine its weight and sufficiency. The ingenious argument of the counsel for the defendants failed to satisfy us that there was no evidence. We are of opinion, that taking all the facts and circumstances in evidence together, their natural bearing upon each other, the legitimate inferences that might reasonably be drawn from them, some of them in detail and from them as a whole, the verdict was not an unreasonable one, if the jury believed the evidence, and it must be taken that they did. There was strong evidence going to show that the prosecutor's cotton was stolen by some person. Two or three witnesses testified that it was at the place designated by them, and that it disappeared in a clandestine way, without the knowledge or sanction of the

owner. It was suggested on the argument that it might have been shipped with other cotton by mistake. There was not the slightest evidence to warrant such a supposition or inference. While it was in the range of possibility that it might have been, this was extremely improbable, especially in view of the total absence of evidence tending to show such mistake. The suggestion rests upon the merest conjecture.

(521) The defendants had knowledge of the cotton, particularly the defendant Whitfield; he weighed, marked and worked more or less with it, and both worked about it shortly before it was missed, and before they were discharged from such service by their employer, because "they did not attend to his business." The larceny was committed in November. Very shortly after the defendants were so discharged, at night, perhaps as late as nine o'clock at night, the defendant Atkinson, in the immediate neighborhood of the cotton, asked the witness Holland, who had a horse and cart, if he wanted to make some money. On receiving an affirmative reply, he said he wanted some cotton moved. The witness, knowing that he had not made any, asked where. The reply was "up here," pointing up the way towards Hyman's platform, where the cotton of the prosecutor was, and he further said he had two bales—half the number missed. The manner and circumstances of this conversation, manifestly impressed the witness with the strong belief that this defendant had not come honestly by the two bales of cotton he desired to have removed; for he said he could not remove it—that he could not afford to get himself into trouble, etc. This defendant did not, so far as appears, resent at all the implied imputation that he had stolen, or was about to steal the cotton, nor did he offer any explanation in respect to it, to satisfy the witness that he would encounter no danger if he would remove it for him. The first impulse of an innocent man would have been to deny and resent such an imputation; at all events, he would have made some explanation—the occasion made it necessary. But he said nothing. This was an admission, by strong implication, that he had stolen two bales of cotton at Hyman's platform, an important fact to be taken in connection with the other evidence.

After the disappearance of the cotton had been talked of in

the neighborhood, this defendant said to another witness, *"Whitfield"* (the other defendant) "was a fool for leaving, that he had a place for him to stay, until Doane Thomas came back from Raleigh, and then we are going to see David and stop the thing." He did not say what "thing," but it is reasonable to infer that he had reference to the (522) charge of larceny against Whitfield and himself, in the absence of explanation. The declaration laid the ground for the not unreasonable inference, in view of other evidence, that the defendants needed to have stopped something that affected them adversely in common. What thing? In the absence of explanation, the accusation against them in respect to the cotton.

The defendant Whitfield was arrested very shortly after he was discharged from service by the witness Hyman, at an obscure place a mile from the main road; he had his clothes with him, and on seeing the officer, without knowing that he had a warrant directing his arrest, so far as appears, he fled from the house. Why did he flee? So far as appears, the only charge against him was that in respect to the cotton alleged to be stolen. That he so fled was a strong circumstance against him—indeed, it raised a presumption of guilt against him. After this defendant was arrested himself, the officer and the witness Hyman rode together in a buggy to town. On the way, Hyman said to him that he was surprised "that he was guilty." He did not deny his guilt; he only said, "Richmond Smith was mighty smart, and if he didn't watch, he'd be in his condition and fix." That he did not deny that he was guilty, was evidence against him, and stronger, as he seemed to complain against some one, not upon the ground that he was innocent, but because that person had said or done something against him in respect to the charge upon which he was arrested. It might be so inferred. What this defendant said to the witness Holland, taken in connection with the other evidence, was very significant, and went strongly to make evidence against him. That witness testified: "I saw Whitfield" (this was shortly after the latter had been discharged). "He came by my house. I asked him the news. He said, nothing, only he was discharged. I said, you've lost a pretty good job. He said, 'Never mind. I've got the money just the same.' "

An inference by no means unreasonable, to be (523) drawn from this declaration taken in connection with the other evidence, was that he had lost nothing by being discharged, because he had gotten the cotton. How did he get "the money just the same"? Such a combination of facts and circumstances, and the reasonable implications and inferences arising upon them, make evidence, and sometimes very strong evidence. We can not doubt it—it is clear—that there was evidence in this case to go to the jury. If they believed it in all its reasonable bearings, and we must take it that they did, the verdict was fully warranted. *State v. Patterson,* 78 N. C., 470; *State v. Crockett,* 82 N. C., 600; *State v. White, supra; State v. James,* 90 N. C., 702; *State v. Gaskins, post,* 547; Lawson Pres. Ev., 537-552. The other exceptions in the record are without merit, and were properly abandoned in this Court.

NO ERROR. Affirmed.

Cited: S. v. Powell, 94 N. C., 968; *S. v. Mitchener,* 98 N. C., 693; *S. v. Goings,* 101 N. C., 709; *S. v. Calley,* 104 N. C., 860; *Berry v. Hall,* 105 N. C., 165; *S. v. Brackville,* 106 N. C., 708; *S. v. Telfair,* 109 N. C., 882; *S. v. Chancy,* 110 N. C., 508; *S. v. Gragg,* 122 N. C., 1091; *S. v. Harrison,* 145 N. C., 416.

STATE v. JOHN ROGERS.

Indictment—Murder—Judge's Charge.

1. To render the act of killing excusable, on the ground of self-defense, the prisoner should have reasonable ground to apprehend, and should actually apprehend, that his life is in danger or that deceased is about to do him some great bodily harm, but it is for the jury, and not for the prisoner, to judge of the reasonableness of such apprehension.
2. It is held as a general rule that the failure of the Judge to charge the jury on a certain point, unless requested so to charge, is not error. But it is his duty under The Code, sec. 413, to state clearly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of facts which they may find from the evidence.

3. Where there are divers witnesses, and the testimony is conflicting, it is error in the Judge to single out a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner (524) was guilty of murder.

4. When there is a conflict of testimony which leaves a case in doubt before the jury, and the Judge uses language which may be subject to misapprehension and is calculated to mislead, this Court will order a *venire de novo*.

(*State v. Scott*, 26 N. C., 409; *State v. O'Neal*, 29 N. C., 251; *State v. Dunlap*, 65 N. C., 288; *State v. Jones*, 87 N. C., 547; *State v. Matthews*, 78 N. C., 523; *Anderson v. Steamboat Company*, 64 N. C., 399; *Jackson v. Commissioners*, 76 N. C., 282; *Brem v. Allison*, 68 N. C., 412; *State v. Bailey*, 60 N. C., 137, cited and approved.)

INDICTMENT for murder, tried before *Graves, Judge,* and a jury, at Spring Term, 1885, of NORTHAMPTON.

The following is the substance of the evidence offered on the part of the State:

Dr. I. T. Eldridge was examined as a witness for the State, who was admitted to be an expert, and he testified that the deceased, Millard Peebles, died of wounds inflicted upon the left side of his head. The symptoms, he said, indicated a depression caused by a transverse wound on the head, above his left ear, an inch and one-fourth in the flesh, and three-fourths in the skull, causing a fracture of the outer table of the skull. A little lower down, a small penetrating wound ran three inches into the skull. The wounds were made with some sharp instrument. After the knife, a common Rogers pocket knife, was produced, which was said to be like that the prisoner had exhibited as the one with which he said he had inflicted the wounds, the witness said neither of the wounds could have been inflicted with such a knife. The force used to produce the wounds would have broken the blade. The blade, in his opinion, could not have made the smaller wound, for the bone is there hard and thick.

Doctor Moore, introduced by the State, concurred with the opinion of Dr. Eldridge.

Joseph I. Lassiter, a witness for the State, testified that he did not see the commencement of the difficulty between the prisoner and deceased. When he rode up to the crowd, he said the prisoner ran around the crowd and stabbed Mr. Peebles; Wilkins Powell had hold of Mr. Pee- (525) bles; he went eight or ten steps around and stabbed

him twice on the left side of his head; he saw a blade in his hand, but could not tell what kind of a blade it was; he got down off his horse and said, "what did you hold that man and let the negro stab him for?" On cross-examination, he said he saw the knife, and it looked larger than the blade of a common pocket-knife, and said: "I do not say it was a pocket-knife; I said it did not appear like the little blade of a pocket-knife; I said it looked larger than a pocket-knife." He was ten steps off, and did not see Peebles strike prisoner; saw a pistol drop from the hands of Peebles; did not remember how Powell was holding Peebles, but he was in front and had hold of his arms.

William C. Faison, a witness in behalf of the State, stated that Peebles and Boyce, at a race, had a little scuffle, in which the coat of Boyce was torn, but it was soon satisfactorily settled. The prisoner said, "if a man had treated me in that way, he would have had me to whip"; witness said, "what have you to do with it?" and told him he had better keep his mouth out of other people's business; he said nothing; witness, soon after this, told Peebles what the prisoner had said; they were eight or ten steps off; Peebles asked prisoner what business it was of his, and told him to keep his mouth out of his business; prisoner replied, "my mouth is my own, and I will use it when I damned please"; Peebles turned towards him and they seemed to go to fighting; witness was thrown back and separated from them for a half a minute; when he got back, he saw the prisoner strike Peebles on the side of the head; Peebles was cut, and Wilkins Powell had hold of Peebles, and witness told him to turn him loose; he said he was as good a friend of Peebles as he was; witness did not see any weapon at all, and if they were separated, he did not see it; he was thrown back so that he could not see; he denied having given a pistol to Peebles on the occasion; witness said he did not remember seeing John Fann, and he had no recollection of telling him to turn Peebles loose; witness
(526) said Lassiter was sober at the race, though he may have got "mixed up" after; he could not say they were all sober; they all seemed capable of attending to business when he left; he himself had taken one or two drinks.

One McSparrin, introduced by the State, stated that he saw the difficulty. He saw Peebles walk up to the prisoner

and ask him what he had to do with it?—and he replied, "nothing, only he just said so," and Peebles struck at him. They were separated. Prisoner was carried around the crowd, and John Fann had hold of Peebles and let him go. Peebles stood still a short time, maybe one-half minute, and seeing prisoner approaching, he went towards him and struck at him, and prisoner struck him one lick with his right hand, and W. Powell went towards Peebles as if going to take hold of him—thought he did not take hold of him before he was struck. He did not see him have hold of him afterwards.

Wilkins Powell, a witness for the State, testified that he saw the fight between prisoner and Peebles; he heard Peebles ask prisoner what he had to do with it? and prisoner replied, "nothing, boss." The next thing the witness saw, they were together and seemed to be knocking. Fann took hold of Peebles, and Faison said turn him loose—the prisoner backed and Peebles drew his pistol and said, "the d—d scoundrel has cut me." Peebles drew his pistol with his right hand—it did not drop, he put it back in his pocket. Witness stated that he did not take hold of Peebles until he had thrown prisoner back.

Several witnesses were examined by the State, who concurred in stating that they saw prisoner soon after the rencounter, in flight, about one-half mile from the place where it had occurred, and he said William Peebles had struck him three times, and he cut him three times and had tried to cut his throat.

W. B. Boyce, a witness for the State, on his examination, stated that he saw Faison when he took Peebles aside, and about that time prisoner came up to him and asked him to lend him his pistol; he told him he had none. He did not say what he wanted with it, but said he was going to get into a difficulty. Witness said he told prisoner (527) he thought Faison gave Peebles something. Something passed, but he did not say it was a pistol.

The night after the fight the prisoner came to his house, and asked him to come out. Witness asked him what he stabbed that man for; he said he thought he was going to shoot him, and he tried to cut his throat. He showed me the knife he said he used. It was a Rogers knife, and he said had used the little blade. There was no blood on the knife.

Witness said he was in his house about twenty feet off, and saw all the fighting. Peebles struck at prisoner first, and he knocked off the lick; he struck at him again, but did not strike him. Prisoner at that time did not strike Peebles. They were then separated. John Fann held Peebles, and Faison told him if he did not turn him loose, he would shoot him. Tom Mason took hold of prisoner, and took him off about some twenty feet. Abut fifteen feet from where this rencounter took place, he saw Peebles and prisoner near together. Peebles went up to prisoner and struck him. Prisoner then stabbed him. He struck two blows, and was about to strike the third time, when Wilkins Powell ran in and took hold of Peebles, and knocked up prisoner's hand and pushed him back, and he ran off across the field. Peebles did not draw his pistol until after he was cut.

Tom Person, a witness introduced for the defense, stated that after the race he heard some one say, "I am going up yonder and beat that d—d negro," and when Peebles came to prisoner and said, "What have you to do with my and Boyce's business?" prisoner replied, "Nothing, boss, more than I said if a man had torn my coat that way I should not have liked it." Peebles then struck him a pretty good blow, and pushed him with the other hand, and he knocked the lick up. John Fann took hold of Peebles, and Tom Mason of prisoner, and parted them. They walked around the crowd, and Peebles struck the prisoner with his left hand. In the first engagement, the prisoner did not strike, he only warded off the blow. In the second, they seemed to clinch, and Wilkins Powell ran in and threw the prisoner back, he
(528) then ran off half bent, looking back. Just as Wilkins got there, and I saw prisoner running, I heard Lassiter say, "Are you going to hold that man and let the other kill him?"

John Fann, a witness for the prisoner, testified that Peebles came up to prisoner and asked him what he had to do with his and Boyce's business; he replied, "Nothing, boss," and began to apologize, when Peebles struck him; he struck him twice, and he took hold of Peebles and told him not to do that, and carried him back to about the wheel track; Faison said, if he did not turn him loose he would shoot him, and he did turn him loose, and Peebles then went down to

the prisoner and struck him with his left hand—prisoner struck him three times—W. Powell then threw him back and took hold of Peebles. After prisoner ran, Peebles said, "If you had not held me, I would have shot him."

Cullen Hayley, examined for the prisoner, stated that he heard Peebles ask prisoner what he had to do with his and Boyce's business; he replied, "Nothing, boss; I ask your pardon," and Peebles struck him with his right hand and struck at him again, and prisoner knocked up the lick, and John Fann took hold of Peebles and ran him back, and some one ran the prisoner back; Faison told Fann to let Peebles go, or he would shoot him; he turned him loose, and in half a minute he went over on the right of the road towards the prisoner. When they met, Peebles struck the prisoner one or two licks with his left hand; the prisoner struck Peebles twice; Wilkins Powell took hold of Peebles and held his pistol, and Peebles said, "You are a friend to me, for if it had not been for you I would have shot the negro."

J. E. Mastin, a witness for the prisoner, testified that he got on the fence near the crowd; the crowd was drunk; Peebles passed him; he went up to the prisoner and said, "Damn you, what have you to do with me?" and slapped him with his left hand; his right hand was down by his side, and prisoner immediately struck him twice; he did not think that the prisoner advanced until Peebles struck; he did not see the first engagement; was then looking (529) for his horse; he did not see Wilkins Powell until he shoved prisoner back; witness knows the character of John Fann; it is good, where he was raised and where he now lives.

I. B. Bridgers was introduced as a witness for the State. He stated that he saw both difficulties; was some distance off at first rencounter; saw John Fann have Peebles, and Mason shoved the prisoner; they met at the lower end of the crowd; Peebles struck a back-handed lick, as if he was warding off a blow, or giving him a blow in the mouth; prisoner struck two or three licks, and Powell ran in, and prisoner seemed to strike around Powell; witness was ten feet off when Powell ran in between them; Peebles seemed to strike with his open hand, and almost at the same time prisoner struck him;

Peebles was between witness and Powell, and Powell between witness and prisoner.

At the close of the testimony the prisoner's counsel asked his Honor to charge the jury "that if the prisoner thought that he would be shot if he did not cut, and that he did cut to protect himself, then the killing was justifiable homicide, and the jury should return a verdict of not guilty." His Honor declined to give the charge, but instructed them "that it is for the jury to say whether there was reasonable ground for the prisoner to apprehend danger."

There was a verdict of guilty of murder, and from the judgment thereon the prisoner appealed.

The *Attorney-General* for the State.

Messrs. Peele & Maynard and *B. S. Gay* for the defendant.

ASHE, J., (after stating the facts). There was no error in this ruling. It is founded on a principle too well and too long settled to admit of a question. This was the only instruction asked by the prisoner before the case was submitted to the jury, but after the verdict his counsel filed a number of exceptions to the charge of his Honor, nearly all of (530) which were taken too late, but there are one or two that we think are worthy of our consideration, especially "that the charge consists of abstract propositions of law, without making application of them to the facts of the case," and "he did not present the case in every aspect, but only in the aspect most unfavorable to the defendant, in singling out Lassiter's testimony, which was contradicted by most all the witnesses, and charging the jury, if they believed Lassiter's testimony the defendant was guilty of murder." In considering the instructions given by his Honor to the jury, the material and prominent question presented is, was it such a charge as comes up to the requirements of the law, in a case of such serious and vital importance to the prisoner? The charge was very long, and was a carefully prepared exposition of the law of homicide.

We find no particular fault with the principles of law as enunciated, but the charge is decidedly obnoxious to the objection of failing to apply the principles to the evidence in

the case. For throughout the charge there is no particular application to the facts of the case, until at the conclusion a reference is made to the testimony of Lassiter, a witness on the part of the State, which is as follows: "If the prisoner killed the deceased, and you are satisfied that it was done in self-defense, you will acquit him. If the prisoner took the life of the deceased unlawfully, and you are satisfied it was done without malice, then it will be your duty to return a verdict of guilty of manslaughter; and if you should find the prisoner killed the deceased with malice aforethought, your duty will be to return a verdict of guilty of murder. If William Powell was holding the deceased, and the prisoner, not in the *furor brevis,* came around behind the crowd, and inflicted the blow, under the circumstances as testified to by the witness Lassiter, then it is murder."

The witness Lassiter was contradicted by several other witnesses, both on the part of the State and defendant, who testified to a state of facts which, if believed by the jury, made out a case only of manslaughter; but instructions were not asked on that point, and it is held as a general rule, that an omission on the part of the Judge to (531) charge the jury on a certain point is not error, unless he is requested to do so. *State v. Scott,* 26 N. C., 409; *State v. O'Neal,* 29 N. C., 251. But when the Judge in his charge to the jury fails to "state in a precise and correct manner the evidence given in the case, and explain the law arising thereon," as he is required to do by sec. 413 of The Code, there is error. His Honor has failed to comply with the requirements of this statute. There are so many decisions in our Reports construing this statute, and pointing out the duty of the Courts under its provisions, that we are at a loss to conceive why a Judge should fail to comply with its directions. It is held under the requirements of the statute, to be the duty of the Judge in charging the jury, "to eliminate the material facts of the case, array the 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." *State v. Dunlap,* 65 N. C., 288; *State v. Jones,* 87 N. C., 547. And in *State v. Matthews,* 78 N. C., 523, the Court say: "We think he (the Judge) is required in the interest of human life and liberty,

to state clearly and distinctly the particular issues arising on the evidence and on which the jury are to pass, and to instruct them as to the law applicable to every state of facts, which upon the evidence they may find to be the true one. To do otherwise is to fail to declare and explain the law *arising on the evidence,* as by the act of Assembly he is required to do." C. C. P., sec. 237; The Code, sec. 413.

But there is still another error in the charge of his Honor, which is the ground of the defendant's second exception. It consisted of the instruction to the jury, "that if Wilkins Powell was holding the deceased, and the prisoner, not in the *furor brevis,* came around behind the crowd and inflicted the blow, under the circumstances testified by the witness Lassiter, then it is murder." This part of the charge was prejudicial to the prisoner, by giving undue prominence to the testimony of this witness, and it was therefore calcu-
(532) lated to mislead the jury, by making an impression upon their minds, as it probably did, that it was his Honor's opinion that more weight was to be given to his testimony than to the other witnesses, whose testimony was in direct conflict with his. For in stating that the prisoner came round the crowd and struck the deceased, and that Powell had hold of Peebles when the prisoner struck him, he is expressly contradicted by Powell, who testified that he did not take hold of Peebles until after he had thrown the prisoner back, and he is corroborated in this statement by McSparrin, Boyce, Person, Fann and Martin, and all of these witnesses contradicted his statement that the prisoner came around the crowd and attacked the deceased.

They concurred in stating that Peebles advanced upon the prisoner, after the first engagement, or went to meet him, and struck him with his left hand.

The instruction was in effect telling the jury, "if you believe the testimony of the witness, Lassiter, the prisoner is guilty of murder." He had no right to give such a charge. It was clearly error. A Judge has no right thus to single out one witness, and instruct the jury, if they believe him, they should find in a particular way, and more especially is it erroneous when the testimony is conflicting, and there are divers witnesses. *Anderson v. Steamboat Co.,* 64 N. C.,

399; *Jackson v. Commissioners,* 76 N. C., 282; *Brem v. Allison,* 68 N. C., 412.

And when there is a conflict of testimony which leaves a case in doubt before a jury, and the Judge uses language which may be subject to misapprehension, and is calculated to mislead, this Court will order a *venire de novo. State v. Bailey,* 60 N. C., 137.

ERROR. *Venire de novo.*

Cited: Holly v. Holly, 94 N. C., 99, 100; *State v. Jones,* 97 N. C., 474; *State v. Boyle,* 104 N. C., 822; *Farthing v. Dark,* 109 N. C., 299; *State v. Rollins,* 113 N. C., 734; *Harris v. Murphy,* 119 N. C., 37; *Withers v. Lane,* 144 N. C., 190.

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(533)

STATE v. LEWIS KILGORE, JR.

Indictment—Murder—Jurors—Their Competency — Practice—Evidence.

1. When on the trial of an indictment, a juror is challenegd for cause, triers are now dispensed with, and the Judge determines the facts, and the legal sufficiency of the challenge, and the finding of the facts by the Judge is not reviewable in this Court.
2. When a juror challenged by the defense, says he has formed and expressed the opinion that the prisoner is guilty, but stated further that his mind was fair and unbiased, and that he could hear the evidence and render a verdict without being in any degree influenced by what he had heard or said; *Held,* that he was a competent juror.
3. The only qualification required of jurors summoned under a special writ of *venire facias,* is that they shall be freeholders of the county wherein the trial is had. It is no cause of challenge that such juror has served on the jury within two years, or has not paid his taxes for the preceding year.
4. When three prisoners are on trial, charged, as principals or accessories, with the same offense, the declarations of one not made in the presence of the other two, are evidence against him, and when the Court remarked distinctly in the hearing of the jury, that it was not evidence against the other two, and that the jury would be so instructed, but the Judge failed to notice it in his charge, and the counsel for prisoner failed to call attention to it; *Held,* that the remark of the Judge was equivalent to an instruction to the jury, the attention of the Court not having been called to it by the counsel.

5. Where there is an abuse of privilege by counsel in addressing the jury, it is cured by the Court at the time correcting it, and it is not error if the presiding Judge does not advert to it in his charge.

(*State v. Collins*, 70 N. C., 241; *State v. Wincroft*, 76 N. C., 38; *State v. Garland*, 90 N. C., 668; *State v. Whitfield*, 92 N. C., 831; *Wilson v. White*, 80 N. C., 280; *State v. Matthews, Ibid.*, 417; *State v. Braswell*, 82 N. C., 693, cited and approved.)

Indictment for MURDER, tried before Gilmer, Judge, and a jury, at Spring Term, 1885, of HENDERSON.

There was a verdict of guilty, and from the judgment thereon the defendant appealed. The facts appear fully in the opinion.

The *Attorney-General* for the State.

No counsel for the defendant.

(534) SMITH, C. J. The indictment consists of three counts, in the first of which the prisoner, Lewis Kilgore, Jr., is charged as principal in the first degree, with committing the criminal act of the murder of Matt. Henderson; and Henry Robinson and John Corpening as being present, aiding and abetting, and, in the other counts, the said Henry Robinson and John Corpening are severally charged with the homicide, and the others as aiding and abetting. On their plea of not guilty, they were jointly tried, and a verdict rendered convicting the prisoner Kilgore and acquitting the others of the imputed offense. From the judgment rendered against the former, he appeals to this Court. We have not been favored with an argument on his behalf, and have therefore carefully examined the exceptions found in the record, and scrutinized the proceedings, to ascertain if there are any just grounds for the appeal, and any error committed which entitles him to another jury.

Exception 1. A juror of the special *venire*, after the perusal of the regular panel, was challenged by the prisoner, and cause assigned, in that he had formed and expressed an opinion unfavorable to him. Upon his examination, the juror so stated, but added that his mind was free and unbiased; that the opinion was formed upon mere rumor, and he had never heard any of the witnesses speak of the matter; and that he felt that he could say without hesitation, that he

could hear the evidence and render a verdict without being in any degree influenced by what he had heard, or himself said. The Court adjudged the juror indifferent and overruled the challenge, and thereupon he was peremptorily challenged by the prisoner. Triers are now dispensed with, and the Judge determines the facts as well as the legal sufficiency of the challenge based upon them. The Code, secs. 405 and 1199.

The ruling of the Court is correct in law, and the finding of indifferency conclusive and unreviewable. *State v. Collins,* 70 N. C., 241; *State v. Wincroft,* 76 N. C., 38; *State v. Garland,* 90 N. C., 668.

Exception 2. Another juror tendered and challenged was objected to by the prisoner on the ground (535) that he had served on the jury in the court within the two preceding years. The challenge was disallowed by the Court.

Exception 3. Another juror was challenged by the prisoner, and the cause therefor assigned, that he had not paid his taxes for the preceding year. This challenge was also overruled. These exceptions to jurors of the special *venire* rest upon the same substantial basis, and may be considered together. The jurors, of whom these objected to are part, were summoned under a special writ of *venire facias,* issued under sec. 1738 of The Code, the only qualifications prescribed for which are, that they shall be *freeholders* of the county wherein the trial is had. This is expressly decided in the cases of the *State v. Garland,* 90 N. C., 668, and *State v. Whitfield,* 92 N. C., 831. Neither exception to the ruling is tenable.

The evidence produced by the State to prove the prisoner's guilt was circumstantial and voluminous, but unnecessary to be set forth, further than to present the fourth exception of the prisoner.

Exception 4. When the Sheriff arrested John Corpening, the alleged associate in crime of the prisoner, and so charged in the indictment, the latter said, as testified by the Sheriff, "Why don't you arrest Henry Robinson?" (the other accused party). "I left there (the place of homicide) at 2 o'clock, and left Henry and Lewis there." The prisoner objected to the admission of this declaration, but the Court allowed it to be heard, remarking twice, distinctly, in the

hearing of the jury, "that it was no evidence whatever against the defendants Kilgore and Robinson, but was only evidence against defendant Corpening, and that the jury would be so instructed."

The Court did not, in the charge, advert to this declaration, nor was attention called to it by prisoner's counsel, while all the instructions that were asked on his behalf were given to the jury. The limited and explained purpose of the reception of the evidence, as affecting only the defendant who spoke the words, in substance, was a direction to the (536) jury to disregard it as affecting the prisoner, and equivalent to a direct instruction to the jury. The omission to repeat seems to have been deemed unnecessary by prisoner's counsel in their silence about this, while submitting other instructions. There is no error in this ruling.

Exception 5. It appeared in evidence that two rings, worn by the deceased on her finger the night previous to her death, were missing the next morning, and some rings, whether identified or not does not appear, were found the next day in a drawer in the dining room of a boarding house where Kilgore served as butler, with collars and cuffs of his. These rings were shown to have been given to his mother, who, on her examination as a witness for the State, said she did not remember what had become of them. In the argument, the Solicitor insisted, as evidence of the prisoner's guilt, that no explanation had been made about the rings, which the jury were entitled to hear. Thereupon prisoner's counsel objected to the line of argument, insisting that such comments were in violation of the statute (The Code, sec. 1353), which permits an accused party, at his own request, to testify on the trial of a criminal prosecution, but that his failure to make such request "shall not create any presumption against him." The Solicitor disclaimed any such purpose, and the Court said distinctly, in the hearing of the jury, that they "would be instructed that no influence (inference probably intended) to the prejudice of the prisoners, could be made or argued because they did not testify on their own behalf."

The same omission to so charge occurred as in the other matter, attention not being called to it by prisoner's counsel, nor embraced in any of the instructions asked.

If the comments of the Solicitor are susceptible of a meaning, which he denies, within the prohibition of the enabling act referred to, the objection is obviated and the difficulty removed by what was said by the Court. It may be an irremediable infirmity in the administration of the law through the instrumentality of the jury system, that (537) impressions made by the admission of incompetent evidence can not be wholly effaced from the mind of those who hear it, yet it is, and must be a governing principle, to consider evidence recalled and rejected, as not considered and acted on in forming a conclusion and rendering a verdict. When improper evidence received is ruled out, or the jury instructed not to regard something which through inadvertence may have occurred during the trial, it must be assumed that such did not enter into the consideration of the jury in arriving at a verdict, and thus the error is corrected. *Wilson v. White,* 80 N. C., 280; *State v. Matthews, Ibid.,* 417; *State v. Braswell,* 82 N. C., 693. We find no error in the record of which the prisoner can complain.

NO ERROR. Affirmed.

Cited: State v. Green, 95 N. C., 612, 615; *State v. Finley,* 118 N. C., 1164; *State v. Vick,* 132 N. C., 998.

STATE v. ALONZO THOMPSON.

Larceny—Indictment.

1. At common law, larceny can not be committed of things which are a part of the freehold at the time they are taken, but by statute in this State, any vegetable or other product, cultivated for food or market, growing, standing or remaining ungathered in any field, is the subject of larceny.
2. An indictment under this statute which fails to charge that the article alleged to be stolen, was cultivated for food or market, is fatally defective.

(*State v. Foy,* 82 N. C., 679; State v. Liles, 78 N. C., 496, cited and approved.)

Indictment for LARCENY, tried before *MacRae, Judge,* and a jury, at August Term, 1885, of ROBESON.

(538) The indictment was in the following words and figures, to-wit: "The jurors for the State, upon their oath, present, that Alonzo Thompson, late of the county of Robeson, on 27 July, 1885, with force and arms, at and in the county aforesaid, one watermelon, of the value of a sixpence, the property of C. B. Thompson, then and there standing and remaining ungathered in a certain field of the said C. B. Thompson there situate, feloniously did steal, take and carry away, against the form of the statute," etc.

The defendant was convicted. There was a motion in arrest of judgment, which was overruled by the Court. Judgment was pronounced against the defendant, from which he appealed to this Court.

The *Attorney-General* for the State.
Messrs. French & Norment for the defendant.

ASHE, J., (after stating the facts). By the common law, larceny can not be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. 2 Russell Crimes, 136; *State v. Foy,* 82 N. C., 679.

But the defendant was indicted under the statute, which declares, "If any person shall steal, or feloniously take and carry away any maize, corn, wheat, rice, or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any vegetable or other product cultivated for food or market, growing, standing, or remaining ungathered in any field or ground, he shall be guilty of larceny, and punished accordingly." The Code, sec. 1069.

Can the indictment be sustained under the statute? We are of the opinion it can not. Watermelons are not named in the statute as the subject of larceny, and it is no violation of law to steal them while growing and ungathered, unless by construction, they are included in the words of the statute, "or any fruit, vegetable or other product cultivated (539) for food or market." These words constitute the description of the offense, and unless the indictment follows the language of the statute, and expressly charges the offense, so as to bring it within the description, it is defective. This indictment omits the words, "cultivated for food or

market," which constitute a material part of the description of the offense. It was so held in the case of *State v. Liles,* 78 N. C., 496.

There the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted, and it was held by this Court that the indictment, for that reason, was fatally defective. That case is directly in point and is decisive of this.

ERROR. Judgment arrested.

Cited: State v. Ballard, 97 N. C., 447.

THE STATE v. LAURA STEWART.

Concealing Birth of Child—Indictment.

1. By sec. 1004 of The Code, the secret burying or other secret disposal of the body of a dead child, born alive, is made a misdemeanor, and the endeavor to conceal the birth of such child is also a misdemeanor.
2. The form of the indictment set out in this case approved.

INDICTMENT tried before *Avery, Judge,* at Fall Term, 1885, of BURKE.

The facts are stated in the opinion.

The *Attorney-General* for the State.
No counsel for the defendant.

SMITH, C. J. The indictment against the defendant is in the following form:

STATE OF NORTH CAROLINA, } Superior Court, (540)
BURKE COUNTY. } Spring Term, 1885.

The jurors for the State, upon their oath, present that Laura Stewart, late of the county of Burke, on 1 March, A. D. 1885, with force and arms at and in the county aforesaid, unlawfully and willfully did endeavor to conceal the

birth of a newborn male child, not yet named, of her, the said Laura Stewart, by then and there secretly placing and leaving the dead body of said child in a secret place, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

J. S. ADAMS, *Solicitor.*

The indictment is framed upon an act ratified and taking effect on 12 March, 1883, which as contained in sec. 1004 of The Code, is as follows: "If any woman or other person shall, by secretly burying or otherwise disposing of the dead body of a newborn child of such woman or any other woman, or endeavors to conceal the birth of such child, such person shall be guilty of a misdemeanor, and punished by a fine or imprisonment, to be in the county jail or penitentiary, at the discretion of the Court: *Provided,* that the imprisonment in the penitentiary shall in no case exceed a term of ten years; *Provided further,* that nothing in this statute shall be construed to prevent the mother, who may be guilty of homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. And any person aiding, counseling, or abetting any woman in concealing the birth of her child, shall be guilty of a misdemeanor."

This enactment is a substitute for that contained in the Revised Code, chapter 34, sec. 28, which it repeals. The defendant's counsel, upon her arraignment to answer the imputed offense, moved to quash the bill upon two grounds: 1st. That the enactment upon which the indictment was founded, is so vague and indefinite in its terms as not to create a criminal offense; and 2d. That the indictment itself fails to set out and charge an indictable offense.

(541) The motion was overruled and the plea of not guilty entered, upon the trial whereof she was convicted by the verdict of the jury. The counsel again moved in arrest of judgment, assigning the same reasons, which motion was also denied, and judgment being pronounced, she appealed to this Court.

There are no other exceptions contained in the record and the refused motions rest upon the same basis. We have not had the aid of an argument in support of the motions, nor

any reference given by counsel to adjudged cases or other authority. Nor in our own investigations do we discover any error committed in the action of the Court in overruling them.

The statute constitutes the secret burying or other secret disposal of the body of a dead child, born alive, a misdemeanor, and also the endeavor to conceal the birth of such child. This latter is the criminal act imputed to the accused, and it is brought within the condemnation of the law by the averment of hiding of the body in a secret place, whereby its birth is attempted to be concealed.

NO ERROR. Affirmed.

STATE v. ANN McDOWELL.

Appeal—Record—Certiorari.

1. An appeal to the Supreme Court will be dismissed when the transcript of the record fails to show that a court was held, or that a grand jury presented the indictment, and when it appears from the case on appeal that the grounds on which the defendant appealed are frivolous.
2. A *certiorari* will not be granted to perfect the record and constitute the appeal in the Supreme Court, when it appears from the case on appeal that the appellant has no merits.

(*State v. Butts*, 91 N. C., 524; *State v. Johnston, Post*, 559, cited and approved.)

MOTION to dismiss the defendant's appeal, heard at (542) October Term, 1885, of the Supreme Court.

The *Attorney-General* for the State.
No counsel for the defendant.

MERRIMON, J. The papers in the case on file in this Court, purporting to be the transcript of the record in the Superior Court of the county of Bladen, fail to show that a Court was held by a Judge at the time and place prescribed by law. Nor does it appear, that a grand jury presented an indictment against the defendant, nor does a judgment appear. For these and other less important defects, the

Attorney-General moved at the present term to dismiss the appeal.

Enough however, appears in the papers—not the transcript of a record—to satisfy us that there is, or ought to be, a record in the Court mentioned, and we might direct the writ of *certiorari* to issue to the Clerk of that Court, commanding him to certify to us a perfect transcript thereof, but on looking into what purports to be the case settled upon appeal for this Court, we find that the defendant's ground of exception is without the slightest merit, and we deem it proper to grant the motion to dismiss the supposed appeal. *State v. Butts,* 91 N. C., 524; *State v. Johnston, post,* 559.

Cited: State v. Walker, 103 N. C., 413; *State v. Preston,* 104 N. C., 735; *State v. May,* 118 N. C., 1205.

STATE v. THOS. LONG.

Assault with intent to commit Rape—Evidence.

1. The fact that the prosecutrix in an indictment for an assault with intent to rape is a lewd woman only goes to her credit.
2. If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of
(543) rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed.
3. *It seems* that this offense is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents.
4. In order to warrant a verdict of guilty in indictments for assaults with intent to commit rape, it is sufficient if the evidence shows that the defendant intended to gratify his lust on the person of the prosecutrx notwithstanding any resistance on her part.

INDICTMENT for an assault with intent to ravish, tried before *Graves, Judge,* and a jury at Fall Term, 1885, of YADKIN.

The prosecutrix, Lucy Venable, testified that the defendant assaulted her in an indecent and forcible manner, that he

dragged her into the woods and bit her on the face and shoulder, that she screamed and fought him until she forced herself from him.

The defendant, as a witness in his own behalf, admitted that he assaulted the prosecutrix, and bit her as alleged, but said he did so because she had snatched his handkerchief, which had ten cents tied up in it, and attempted to run off with it, and when he caught her, she refused to give it up, and struck him on the head with a stick. He denied any intent or attempt to have connection with her by force or otherwise. A witness for the State testified that he saw the defendant in a few minutes after his struggle with the prosecutrix, and he told him that he had just had a struggle with the prosecutrix, that she offered to allow him to have carnal connection with her, if he would pay her ten cents, and that he attempted to accomplish his purpose without paying her anything.

There was evidence that the prosecutrix was heard to cry out, about the time of the alleged assault, and that as soon as she reached her father's home, she made known the fact of the assault, and a warrant was issued for the arrest of the defendant.

There was other evidence tending to show that shortly before the alleged assault, the defendant proposed to another colored man to follow her and use force upon her.

His Honor, among other things which were not objected to by the defendant, charged the jury that if they believed that the prosecutrix offered to allow the de- (444) fendant to have connection with her for ten cents, and he refused to pay that sum, and attempted to have connection with her against her will and by force, he would be guilty of the crime charged in the bill of indictment.

To this the defendant excepted. There was a verdict of guilty. Rule for new trial. Rule discharged, and judgment against the defendant, from which he appealed.

The *Attorney-General* for the State.

Messrs. R. F. Armfield and *Batchelor & Devereux* for the defendant.

ASHE, J., (after stating the facts). We are of opinion there was no error in the charge of the Judge. The sole ques-

tion in the case is, did the defendant attempt to have carnal knowledge of the prosecutrix by force and against her consent? The jury have found the fact that he did, and the verdict of the jury was well supported by the evidence, for the prisoner himself admitted a few minutes after the struggle, as testified to by the prosecutrix, that she offered to let him have carnal connection with her if he would pay her ten cents, and he attempted to have connection with her for nothing. This evidence of itself, independent of the testimony of the prosecutrix and the corroborating testimony of other witnesses, made out the criminal offense.

That she was a lewd woman and placed so small an estimate upon her favors, can make no difference. That only counts to her credit, for the fact that a woman is a common strumpet or the mistress of the defendant, is no bar, though such fact would undoubtedly prejudice her testimony. Wharton's Criminal Law, sec. 1148. Nor can it make any difference that she consented, upon certain terms, if the defendant, refusing to comply therewith attempted by force to have carnal knowledge of her person without her consent. In such cases the law allows a *"locus penitentiæ."* There is no difference with respect to the "want of consent" as constituting a necessary ingredient of the offense, between the higher
(545) crime of rape, and an assault with intent to ravish, and in *Wright v. State,* 4 Humphrey, (Tenn.) 193, which was an indictment for rape, it was held, that "although the person abused consented through fear, or was a common prostitute, or consented after the act, *or was taken first with her own consent, if she was afterwards forced against her will,* the offense would be committed."

In order to warrant a verdict of guilty in indictments of this nature, all that is required is, that the jury should be satisfied, not only that the defendant intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all costs, and notwithstanding any resistance on her part. *Rex v. Lloyd,* 7 C. & P., 318.

NO ERROR. Affirmed.

THE STATE v. J. K. S. CASE and another.

Evidence—Attempt to Bribe Juror.

Upon the trial of a criminal action, it is competent to show that the defendant, with a view to prevent a verdict of guilty, had attempted to bribe one of the jurors.

(*State v. Swink*, 18 N. C., 9, and *State v. Nat*, 51 N. C., 114, cited and approved.)

Indictment for FORNICATION AND ADULTERY, tried at Fall Term, 1885, of JACKSON, before *Gudger, Judge*.

The facts are stated in the opinion.

The *Attorney-General* for the State.

No counsel for the defendants.

ASHE, J. The State offered evidence showing that (546) the female was a married woman, that her maiden name was Huffman, and that at the time of the alleged adultery, she was the wife of one Golden. One Watkins was introduced as a witness for the State, and testified that at the Spring Term, 1885, of Jackson Superior Court, he was a juror, and the defendant Case came to him and said: "I have a case in Court, and I owe you ten dollars, if you will take care of me, you can get your money whenever you please." Witness said, I am sworn to go according to the law. Defendant then said: "You can at least hang the jury till hell freezes over, and if you will do so, I will pay; otherwise I will not."

The defendant objected to this testimony, because: 1st. It was in no wise responsive to the charge contained in the bill of indictment. 2d. That the evidence tended to put the defendant in disrepute and prejudice him before the jury. 3d. That the evidence imputed a criminal charge, for which the defendant was not under indictment.

The State further proved, that at the Spring Term, 1885, of Jackson Superior Court, this indictment was the only case pending in the Court to which the defendant was a party.

The jury found the defendant guilty. There was judgment against the defendant, and he appealed.

There is no error in the judgment of the Superior Court.

The evidence objected to by the defendant was properly admitted. In criminal cases, every circumstance that is calculated to throw light upon the supposed crime is admissible, *State v. Swink,* 18 N. C., 9. The fact that immediately after the discovery of a crime, the person charged with its commission flies, is admitted as a circumstance to be considered by the jury. *State v. Nat,* 51 N. C., 114. So it is held, that if the prisoner, when arrested, attempts to make his escape, or attempts to bribe the officer to let him escape, the evidence is admissible. 11 Geo., 123; *Fanning v. Missouri,* 14 Mo., 386; *Dean v. Commonwealth,* 4 Grattan, 541; 26 Ia., 275.

But the defendant contends that the offer to bribe
(547) the juror is a distinct offense, and it is therefore inadmissible in evidence. There are some authorities sustaining that position. But Roscoe, in his work on Criminal Evidence, says: "The notion that it is in itself an objection to the admission of evidence that it discloses other offenses, especially where they are the subject of indictment, is now exploded." If the evidence is admissible on general grounds, it can not be resisted on this ground, and he cites numerous authorities to support the position.

NO ERROR. Affirmed.

Cited: S. v. Manly, 95 N. C., 662; *S. v. Bishop,* 98 N. C., 775.

STATE v. JOHN GASKINS et al.

Murder—Judge's Charge.

1. Where two conspire to kill or inflict grave bodily injury on a third person, and in carrying out this purpose, one of them fires a pistol at such person, who immediately pursues them and kills the one who did not fire the pistol, it is manslaughter.
2. Where a defendant asks a special instruction to the jury upon an aspect of the case which is presented by the evidence, which the Court does not give, it is error, and entitles the defendant to a new trial.

Indictment for MURDER, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of PITT.

The appellants and Henry Speight and Granville Slade were indicted for the murder of one Nixon Moore.

At the close of the evidence, the Solicitor for the State consented to a verdict of not guilty as to Granville Slade, and a verdict for manslaughter was by consent rendered as to Henry Speight. A verdict for murder was (548) rendered against the appellants John Gaskins and Parker Gaskins.

The Solicitor for the State and the counsel for the appellants having failed to agree upon the case for this Court upon appeal, the presiding Judge settled the same, and the material part thereof is as follows:

"W. S. Fleming, a witness on the part of the State, testified that he was at his store near Greenville on the night of the homicide, which was 4 October last, that in the early part of the night there was a wrestling match between Henry Speight and one Church Moore, the father of the deceased, in which Moore was thrown and his ankle sprained. That after the wrestling, there were some angry words between some of the defendants and Church Moore's two sons, Nixon Moore (the deceased) and Joe Moore. That soon thereafter, at the invitation of Church Moore, the parties drank some whiskey together, and they appeared to be friendly. They then came out of doors into the road a short distance from the store, and a dispute arose between the deceased and his brother Joe on one side, and the four defendants on the other. That Henry Speight proposed to wrestle again, but Church Moore objected, and Granville Slade said, 'Wrestle, Church, d—n it, nobody shall bother you.' He said this laughingly. That the deceased and his brother Joe stepped off to one side and held their heads near together, as if talking. About this time Granville slapped his hands on Speight's shoulder, and proposed that they go home. About this time Nixon Moore (as one witness thought) fired a pistol at Speight, the ball slightly cutting the flesh of Granville Slade's hand, which was at that time resting on the shoulder of Henry Speight. The witness could not state positively which of the brothers fired the pistol, but thought it was the deceased. The witness further testified, that as soon as the pistol fired, the two brothers, Joe and Nixon, ran down the road, and the four defendants named in the indictment ran after them, Speight saying, 'God d—n him, let's kill him.' I walked in the house, spoke to Mr. Harrington, and came back to (549)

the door, and heard a noise as of fighting and cursing. In about five minutes Nixon came running back, saying, 'Mr. Fleming, Mr. Fleming,' and said he was cut, and lay down by his father. Soon John Gaskins came with a knife in his hand, and said with an oath, 'I have a mind to kill you,' and drew his knife up. That the distance to where the struggle occurred was 140 yards from the store. That the other defendants came back with John Gaskins, and that Nixon Moore died in a few minutes after he lay down. Mr. Harrington sold the knife to John Gaskins that evening. The witness got the knife from John Gaskins when he was arrested, and the knife had stains of a reddish color resembling blood on it.

"Fred. Fleming, a State witness, testified that it was Joe Moore who fired the pistol, that when they came back from the scuffle, Parker and John Gaskins were together, and Parker had a knife in his hand, and was cursing. John Gaskins went to where deceased was lying and said with an oath, 'If I knew you had fired the pistol, I would cut you to death.'

"It was in evidence that when Parker Gaskins was arrested the next morning, there was blood on his person. He said that his nose was bleeding, but the blood was dry. There was evidence tending to show that Church Moore and his two sons and the defendants were strangers. It was in evidence that no pistol was found about the deceased or on the road between the place of the fight and the store, or at the place of the fight. It was further in evidence, that Joe Moore did not return to the store that night, and that for some time before the trial he had absented himself from his house.

"James Allen, for the State, testified, that John Gaskins the next morning after the killing, showed him a knife, and said 'I cut him the night before. I did not know who the man was.' The knife he showed witness was bloody and gapped. Dr. F. W. Brown, who was admitted to be an expert, testified, that he examined the body of the deceased at the coroner's inquest, and found two wounds on the body,

(550) one a contused wound, a half inch long on the right side of the head, the other an incised wound on the left side, between the third and fourth ribs, cutting into the cavity of the body and cutting the front lobe of the

left lung, and the intercostal artery. His opinion was, the deceased died from the last wound.

"The defendants requested the Court to charge the jury, that if they believe that the four persons whose names are included in the indictment and charged with murder, were all standing together talking, that the deceased and his brother acting in concert and by agreement, came up within a few paces, and without warning to the defendants, fired a loaded pistol into the crowd and immediately ran down the road, that the prisoners immediately pursued their assailants, and overtook them at a distance of one hundred and forty yards, and a struggle commenced in which the deceased was killed, that the prisoners immediately returned to the place where the pistol was fired, and the whole transaction did not cover a greater time than five minutes, then the defendants would only be guilty of manslaughter.

"In response to this request, the Court charged that if the pistol was fired by Joe Moore, and not by the deceased, that the killing would not be reduced to manslaughter, and there was some evidence that Joe Moore fired the pistol, and no evidence of an agreement, combination or conspiracy between the deceased and his brother to fire at the crowd. The prisoners, John and Parker Gaskins, excepted to the charge as given and the refusal of the Court to charge as requested."

The jury rendered a verdict of guilty. Rule for a new trial for misdirection. This rule was discharged. There was judgment of death, and the prisoners appealed to this Court.

The *Attorney-General* for the State.
Mr. Aug. M. Moore for the defendants.

MERRIMON, J., (after stating the facts). Taking all the facts and circumstances in evidence together, as they (551) naturally bear upon each other, and the reasonable implications arising upon them, we think there was some evidence before the jury tending to prove the aspect of the case suggested by the special instruction prayed for by the appellants.

The leading facts are, that the appellants, and the other persons indicted with them, on one side, and the deceased and his brother on the other side, quarreled, the quarrel having its origin about the father of the latter, who was present,

and who had very shortly before that received some injury in a wrestle with Speight, that gave rise to angry words, that just as the quarrel seemed to have ended, and Speight proposed to one of his comrades to go home, the deceased and his brother held a conference apart from the appellants and the others, and the deceased, or his brother, immediately fired the pistol at Speight—it may not unreasonably be inferred, at the crowd—and hit Slade on the hand, tearing the flesh; that the deceased and his brother at once ran off down the road—these and other facts of minor import, certainly constituted some evidence of concert of action on the part of the deceased and his brother. Their passions were aroused, and they seemed to make common cause against the appellants and their comrades. There was some evidence of the concerted purpose.

Of course, the jury must determine its weight— they might deem it sufficient to prove the combination—they might deem it insufficient.

The instruction given by the Court in response to the special prayer was therefore erroneous. If there was a concerted purpose on the part of the deceased and his brother to assault the appellants and the two others indicted with them, then it made no difference which of the two fired the pistol. The Court instructed the jury that if the surviving brother fired the pistol, the offense would not be mitigated to manslaughter. This was error. If the jury were satisfied that there was concert on the part of the brothers to assault the appellants, then the case would have been one of manslaughter, if the deceased had fired the pistol, as seems to have been conceded, then it would still be that grade of offense, although the surviving brother fired it.

(552) Where the prisoner prays for a special instruction, and he is entitled to have it, or the substance of it, given, or to have it qualified and given, and the Court fails to give it, or the substance of it, or, giving it with modification, errs in his charge, this is ground for a new trial.

The appellants are entitled to a

NEW TRIAL.

Cited: State v. Atkinson, ante, 523; *State v. Melton,* 121 N. C., 597.

STATE v. MARY McNEILL et al.

Grand Jury—Indictment—Practice—Quashing—Challenges to Jury.

1. The endorsement on the back of an indictment "a true bill," by the foreman, raises a presumption that every member of the grand jury concurred in the finding of the bill. Such presumption may, however, be rebutted.
2. If a defendant wishes to take advantage of the fact that less than twelve grand jurors concurred in finding the bill by which he is charged, he must bring forward such matter by a plea in abatement, and prove the truth of his plea by evidence.
3. Where the defendant is charged in four separate indictments with larceny, the Court may treat them as if the several offenses charged had been embraced in one indictment, containing different counts. Such consolidation, however, should only be allowed in cases where the presiding Judge is satisfied that the ends of justice require it, and the Solicitor should be forced to elect on which bill he asks for a conviction, before the defendant is required to give his evidence.
4. In such case, *it seems*, that the defendant is allowed the same number of peremptory challenges to the jury as if he had been tried separately on each bill.
5. When different felonies of the same nature are embraced in different counts in the same bill, the presiding Judge may, in his discretion, either quash the bill, or compel the Solicitor to elect on which count he will proceed.
6. A second indictment for the same offense, is, in effect, a new count to the first indictment.
7. When the Solicitor elects to proceed on one count in an indictment, it is equivalent to a verdict of not guilty on the other counts.
8. Where the Judge in his charge to the jury, does not draw any inference of fact himself, or direct them to do so, but only points out the evidence to them, leaving them to draw their own inferences, the charge is not objectionable.

(*State v. Cox*, 28 N. C., 440; *State v. Grimes*, 86 N. C., 632; *State v. Reel*, 80 N. C., 442; *State v. King*, 84 N. C., 737; *State v. Johnson*, 50 N. C., 221; *State v. Watts*, 82 N. C., 656; *State v. Dixon*, 78 N. C., 558; *State v. Hastings*, 86 N. C., 596; *State v. Joyner*, 84 N. C., 73, cited and approved.)

Indictment for LARCENY, tried before *Meares, Judge,* and a jury, at May Term, 1885, of the Criminal Court of NEW HANOVER.

There was a verdict of guilty, and the defendants appealed.

The facts sufficiently appear in the opinion.

The *Attorney-General* for the State.

Messrs. Frank H. Darby and *Russell & Ricaud* for the defendants.

MERRIMON, J. The interesting and important question, whether or not in this State, an indictment presented by the concurrence of only nine members of a grand jury, as allowed by the statute (Laws 1885, ch. 63, sec. 18), can be upheld as valid under the Constitution, is not presented by the record in this case, because, it appears affirmatively in the record that the indictment was presented in the manner and form, therein set forth, by twelve "good and lawful men, duly summoned, drawn and sworn, and charged to inquire for the State, of and concerning all crimes and offenses," etc. And upon the back of it is the entry, "a true bill," signed by the foreman of the grand jury. This language implies, and the presumption—not the conclusive presumption, however—is, that every grand juror concurred in the presentment. This is so generally. So that, if the grand jury should consist of eighteen members, the presumption would be, that all concurred in making the presentment, nothing to the contrary appearing. There is nothing in this case that renders it an exception to the general rule. There is nothing in the record, showing, or tending to show, affirmatively or negatively, that a less number than the whole of the grand jury con-
(554) curred.

The defendants pleaded in abatement, that the indictment was presented, only nine members of the grand jury concurring, but they offered no evidence to prove the plea, and of course it failed. Unless it shall appear in the record, that a less number than twelve of the grand jury concurred in presenting the indictment, the defendant must aver by proper plea and prove the fact if he would avail himself of it. As it appears in this case that twelve concurred, the question sought to be presented under the statute does not arise. *State v. Cox,* 28 N. C., 440; *State v. Gaines,* 86 N. C., 632; *Young v. State,* 6 Ohio 435; *Turner v. Commonwealth,* 6 Metcalf, 225; *Hudson v. State, I Black,* 320.

There were four indictments against the defendants, in each of which they were charged in a first count with a distinct larceny, and in a second with receiving stolen goods,

knowing the same to have been stolen. Upon motion of the Solicitor for the State, the Court treated them as if the several offenses charged in them had been embraced in one indictment, in eight distinct counts, each charging a distinct offense, but required the Solicitor to elect at the close of the testimony-in-chief of the State, which of the several indictments he would insist upon a conviction in.

The defendants objected, and excepted, but interposed no motion to quash. Such practice is not common, but in our judgment, there is nothing in principle or reason that necessarily forbids it, if the defendant's rights of peremptory challenge of jurors shall be allowed, and the Court shall require the prosecuting officer to elect before the defendants offer their evidence, which particular charge he will insist upon.

This practice may be allowed, observing the restrictions mentioned, in the sound descretion of the Court, but it ought to be done with caution, and only in cases where the Court shall be satisfied from the peculiar circumstances of the case, that the due administration of criminal justice requires it, and moreover, the Court should be careful that the defendant suffers no prejudice from confusion, or from evidence not pertinent to the charge insisted upon. This the Court can guard against ordinarily, by proper caution to the jury, and in case of a verdict of guilty that is proba- (555) bly not warranted by the evidence, by granting a new trial. It is settled in this State, that when different felonies of the same nature are embraced in different counts in the indictment, a motion to quash made in apt time *may* be allowed by the Court, but the Court *may,* in its discretion, refuse to allow it, and require the prosecuting officer to elect the counts on which he will ask a verdict of guilty before the defendants shall begin the taking of the evidence in his behalf. *State v. Reel,* 80 N. C., 442, and the cases there cited. *State v. King,* 84 N. C., 737. Indeed, such seems to be the generally accepted practice. Bish. Cr. Prac., sec. 81; Whar. Cr. Law, sec. 416; and see the general rule stated, and a great number of cases cited in 58 Am. Decisions, 248, *et seq.*

In *State v. Johnson,* 50 N. C., 221, it was held that a second and new indictment for the same offenses, was in

effect adding a new count to the first indictment, and if the counts were inconsistent, this would be ground for a motion to quash, or the Court might require the prosecuting officer to elect the count on which he would ask for a verdict of guilty. This case was afterwards recognized and approved in *State v. Watts,* 82 N. C., 656; *State v. Dixon,* 78 N. C., 558; and *State v. Hastings,* 86 N. C., 596.

So that distinct felonies of the same nature may be charged in different counts in the same indictment, and two indictments for the same offenses may be treated as one containing different counts, subject to the right of the defendants to move to quash in case of inconsistent counts, and the power of the Court to require the prosecuting officer to elect the count or indictment on which he will insist. This, certainly, may be done, and we can see no substantial reason why the same rule of practice may not apply to several indictments against the same parties for like offenses, when the just administration of criminal justice will thereby be subserved. In Pennsylvania such a rule of practice was upheld in *Withers v. Commonwealth,* 5 Sergt. & R., 58. In that case

(556) the Court held that two indictments for conspiracy, found at different sessions of the Court, might be tried by the same jury, notwithstanding the objection of the defendants, if the Court, in its discretion, should think proper to allow it, especially if the right of the defendant to challenge four of the jurors on each indictment shall be allowed, and an abuse of such discretion, even if such abuse existed, would not be error. The material facts were, that "at February Session, 1818, the plaintiff in error, and a certain Joseph Withers, were indicted for conspiracy against, and cheating Benjamin Hickman. Joseph Withers died before the trial. At the August Session following, the plaintiff in error was again indicted for conspiracy with Joseph Withers, against one William Thomas. At the ensuing November Sessions, these two indictments were, by order of the court below, tried by the same jury at the same time, without the consent of the plaintiff in error, and as appeared by the special entries in the record, after he had expressly objected. He was allowed, however, the privilege of challenging four jurors on each indictment." That case was

substantially like the present one, except that in the latter, no question was raised as to the right of challenge of jurors.

The Court having consented to treat the four indictments as one containing different counts, the Solicitor must be regarded as having consented to a verdict of not guilty as to the others. Indeed, the defendants having pleaded not guilty, and having been put upon their trial, they were entitled to a verdict of not guilty as to the several charges not insisted upon. This followed as a necessary consequence of the election of the prosecuting officer. *State v. Joyner,* 84 N. C., 73.

Obviously, the motion in arrest of judgment could not be sustained. *State v. Reel, supra; State v. King, supra.*

We think the Court did not, in any degree, invade the province of the jury, or express an opinion as to the truth or weight of the evidence, or any part of it. It was the duty of the Court to recapitulate the evidence in a plain and concise manner, and point out its legal bearing and application in the case.

In the respect complained of, the Court did not (557) draw an inference or direct the jury to do so, from the evidence to which their attention was properly directed—it only pointed out to them how to ascertain the truth, leaving to them to believe or disbelieve the evidence, and to draw from it such just inference as they might deem proper. Indeed, just before using the language complained of, the Court told the jury, "that it was a question entirely within the province of the jury, whether they should believe any or all of these witnesses, and if the jury should come to the conclusion that the table-cover was stolen," etc. The jury were thus cautioned and informed as to their province and duty, then, and almost in that immediate connection, the Court said: "It is competent, gentlemen, to be considered by you on this question of time, and to ask yourselves the question, if the piece of silk was not stolen on the same day as the table-cover, why was it still wrapped up and lying on the table, instead of being put in some other place?" These facts were in evidence—it was proper for the jury to consider them, they were pertinent and important, and it is just and proper to take what the Court said of them, in connection with the caution as to their duty. The Court did not say that the evidence was true, or how much weight should be given it—

that was left to the jury, nor did the Court indicate by its tone or manner, an opinion adverse to the defendant. It does not so appear, nor is it suggested that it did. Whether or not the table-cover had been stolen, like the other questions of fact, was expressly left to the jury.

It appears to us that the trial was fair, and that the conviction was just. There is no error in the judgment.

NO ERROR. Affirmed.

Cited: *State v. Bowers,* 94 N. C., 912; *State v. Jones,* 97 N. C., 472; *State v. Hall, Ib.,* 477; *State v. Sorrell,* 98 N. C., 739; *State v. Goings,* 100 N. C., 505; *State v. Cross,* 101 N. C., 789; *State v. Parish,* 104 N. C., 689; *State v. Harris,* 106 N. C., 687; *State v. Toole, Ib.,* 739; *State v. Perdue,* 107 N. C., 856; *State v. Lee,* 114 N. C., 845; *State v. Mangum,* 116 N. C., 1000; *State v. Perry,* 122 N. C., 1020, 1022; *State v. R. R.,* 125 N. C., 670.

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(558)

STATE v. S. T. FREEMAN.

Statement of the Case on Appeal—Practice.

When no statement of the case accompanies the transcript of the record sent to the Supreme Court, and no error appears on the face of the record, the judgment will be affirmed.

(*State v. Murray,* 80 N. C., 364; *State v. Edney, Ibid.,* 360; *State v. Leitch,* 82 N. C., 539, cited and approved.)

INDICTMENT tried before *MacRae, Judge,* and a jury at Spring Term, 1885, of ROBESON. There was a verdict of guilty, and from the judgment thereon, the defendant appealed.

On the hearing in the Supreme Court, the Attorney General moved to affirm the judgment, on the ground that no statement of the case accompanied the record.

The *Attorney-General* for the State.

No counsel for the defendant.

ASHE, J., The defendant was charged with selling intoxicating liquor on Sunday. He was found guilty by the jury and sentenced by the Court, from which he appealed to this Court.

There is no "statement of the case" accompanying the record sent to this Court, and when that is the case and no error appears in the record in a criminal action, the Court will affirm the judgment of the court below. *State v. Murray,* 80 N. C., 364; *State v. Edney, Ibid.,* 360, and *State v. Leitch,* 82 N. C., 539.

We find no error in the record. The judgment of the Superior Court of Robeson is therefore

AFFIRMED.

Cited: McCoy v. Lassiter, 94 N. C., 132; *State v. Bagby,* 106 N. C., 690; *State v. Foster,* 110 N. C., 510.

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(559)

STATE v. DUNCAN A. JOHNSTON.

Appeal—Transcript—Certiorari.

1. An appeal will be dismissed when the transcript fails to show that a court was held by a Judge at the place allowed by law, or that a grand jury was drawn and charged.
2. A certiorari will not be issued to bring up a perfect transcript, when it appears from the case on appeal that the questions intended to be raised are without merit.

(*State v. Butts,* 91 N. C., 524, cited and approved.)

MOTION to dismiss an appeal, heard at October Term, 1885, of the Supreme Court. The facts appear in the opinion.

The *Attorney-General* for the State.
No counsel for the defendant.

MERRIMON, J. The transcript of the record in this case is fatally defective. It does not appear from it that a Court was held by a Judge at the place allowed by law, or, indeed at all, or that a grand jury was drawn and charged. The

papers sent up, purport to be copies of some parts of a record, and are disorderly. They fail to give this Court jurisdiction to decide the question intended to be sent up for review.

The case is substantially like that of *State v. Butts,* 91 N. C., 524, and we might, *ex mero motu,* order the writ of *certiorari* to issue, commanding the Clerk of the Superior Court to certify to this Court a full transcript of the record. But the Attorney-General moved to dismiss the appeal upon the ground that the appellant has not filed in this Court a proper transcript, and we deem it proper to grant the motion, as in looking to the case settled upon appeal for this Court, the questions intended to be raised are without merit.

The motion to dismiss the appeal is allowed.

APPEAL DISMISSED.

Cited: State v. McDowell, ante, 542; *State v. Farrar,* 103 N. C., 413; *State v. Preston,* 104 N. C., 735; *State v. May,* 118 N. C., 1205.

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(560)

STATE v. FRANKLIN BORDEAUX.

Indictment—Perjury—Record—Motion to Quash—Arrest of Judgment—Grand Jury.

1. Several assignments of perjury may be contained in one count of the indictment, and all the several particulars in which the prisoner swore falsely may be embraced in one count, and proof of the falsity of any one will sustain the count.
2. Objections to a record for alleged defects can only be taken by a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment. Whenever the objection requires proof to support it, it must be taken by a motion to quash or a plea in abatement, which must be filed upon the arraignment, and before pleading in bar.
3. If the defect appears on the face of the record, it must be taken by demurrer, or motion in arrest of judgment. If by demurrer, it must be filed before the plea in bar.
4. A motion in arrest of judgment lies for some matter appearing on the record, or for some matter which ought to, but does not appear on the record.
5. The Court has the power to amend a record so as to make it speak the truth, even after a motion in arrest of judgment, even if such alteration removes the grounds for the motion.

6. Where a record states that the grand jury returned a bill into open Court, it is not competent, on a motion in arrest of judgment, to contradict the record by evidence *aliunde*.

7. When the record recites the selection of a grand jury and that an indictment is "presented in manner and form following" etc., it sufficiently shows that the grand jury were present in Court when the presentment was made.

8. The grand jury should be present in open Court when indictments are returned.

(*State v. Blackburn*, 80 N. C., 474; *State v. Cox*, 28 N. C., 440; *State v. Lanier*, 90 N. C., 714; *Bank v. McArthur*, 82 N. C., 107; *State v. Gaines*, 86 N. C., 632; *State v. Potter*, 61 N. C., 338; *State v. Roberts*, 18 N. C., 540, cited and approved.)

Indictment for PERJURY, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of PENDER.

The indictment contains two assignments for perjury in the same count. The defendant was found guilty, and moved in arrest of judgment.

1. Because the bill of indictment contained two dis- (561) tinct charges or assignments of perjury in one count of said bill, and in the second count of said bill, two distinct charges or assignments of perjury are made in the said count, as aforesaid in the first count.

The two charges or assignments in both counts of the bill charge that the defendant falsely swore that he did not have a stick, and further falsely swore that he was struck by one Walter Bordeaux.

2. The defendant moved in arrest of judgment, because there was no record made that the bill of indictment was ever returned into Court by the grand jury.

Thereupon, the Court made an order, as appears from the record, so as to show that the grand jury did return the bill into Court. The defendant objected, and offered to show by the foreman of the grand jury which found the bill, that the bill was returned into Court by the foreman alone, none of the other grand jurors coming into Court with him at the time he returned the bill, and that he, (the foreman), sent some bills into Court by an officer waiting upon the grand jury, and that he could not say whether this officer did not bring this bill into Court, in the absence of the entire grand jury.

Thereupon, the Court made the following order: "It appearing to the satisfaction of the Court, that a bill of indict-

ment was at Spring Term 1884, of this Court, returned into open Court by the grand jury, as a true bill against the defendant Franklin Bordeaux, for perjury, and the Court finds as a fact, that said bill of indictment was returned into open Court as aforesaid, and it further appearing from an inspection of the record, that the Clerk of the Court failed at said Spring Term, 1884, to enter on record the said return of said bill of indictment: It is ordered and adjudged by the Court (the said defendant being present in open Court), that the return of the said bill of indictment at Spring Term, 1884, as a true bill, be recorded on the minutes of this Court now, as of the time aforesaid."

(562) The motion in arrest of judgment was refused, and the sentence of the law pronounced by the Court, from which the defendant appealed.

The *Attorney-General* for the State.
Mr. E. W. Kerr for the defendant.

ASHE, J., (after stating the facts). The defendant moved to arrest the judgment upon two grounds: 1st, because the bill of indictment contained two assignments of perjury in one count of the indictment; and 2d, because the record did not show that the bill was returned into Court by the grand jury, and because his Honor refused to admit the testimony of the foreman to show that it was not so returned.

The motion is not sustainable upon either ground. It is well settled by the authorities that several assignments may be contained in one count of an indictment for perjury. Wharton lays it down that all the several particulars in which the prisoner swore falsely may be embraced in one count, and proof of the falsity of any one will sustain the count. Cr. L., sec. 2260; *Regina v. Rhodes,* 2 Lord Raymond, 886; *State v. Hascall,* 6 N. H., 352; 3 Greenleaf Tv., sec. 193; *Rex v. Leefe,* 2 Camp., 134.

The second ground for the arrest of the judgment is also untenable.

Objection to a record for alleged defects can only be taken by motion to quash, plea in abatement, demurrer, or motion in arrest of judgment. Whenever the objection requires proof to support it, it must be taken by a motion to quash,

or plea in abatement, and they must be made or filed upon the arraignment and before the plea in bar. *State v. Blackburn,* 80 N. C., 474; Bishop Cr. Pro., sec. 440.

The demurrer and motion in arrest are never taken except to some defect which appears upon the face of the record. The demurrer must be filed before the plea of not guilty, and the motion in arrest of judgment is never made until after verdict.

We believe a loose practice prevails in many of our courts, with respect to the return of bills of indict- (563) ment into court by the grand jury. It is often the case that the bills are carried into court by the foreman alone, but this is a practice to be condemned, because it is not the legal mode of proceeding. The law requires the grand jury should make their returns in a body, that the Court may see that they, as a body, assent to the returns made. *State v. Cox,* 28 N. C., 440. But if the defect in this record existed, as contended by the defendant, before the amendment made by his Honor, it might have been taken advantage of either by a motion to quash or a plea in abatement, or even by a motion in arrest of judgment, for a judgment can be arrested for some matter appearing, or *that ought to appear, but does not, in the record. State v. Lanier,* 90 N. C., 714.

But his Honor had the power to amend the record so as to make it speak the truth, by the insertion of anything which may have been omitted. *Bank v. McArthur,* 82 N. C., 107.

After the order made by his Honor in this case, the alleged defect in the record was cured. It was then a perfect record, and a motion in arrest of the judgment can only be entertained when there is a defect appearing upon the face of the record. In the record it is stated, after the organization of the grand jury, "it is presented in manner and form following, that is to say," etc., which, in this State, is held to be sufficient to show the presence of the grand jury in court. *State v. Gainus,* 86 N. C., 632; *State v. Haywood,* 2 Nott. & McC., 312; Bishop Cr. Pro., sec. 550; *State v. Potter,* 61 N. C., 338; Roscoe Cr. Ev., 204.

And although the amendment was made in this case after the motion in arrest of judgment, the Court had the power to do so. In *State v. Roberts,* 18 N. C., 540, it was held that "it was competent for the Court, after a motion in arrest of

judgment, to alter the record during the same term, by inserting into or striking from the minutes whatever may be necessary to make it speak the truth; and if by such alteration the grounds for the arrest be removed, upon an appeal nothing can be looked to but the record in its complete state."

And "when the record states that the grand jury (564) returned the bill in open court, it is not competent to disprove the recital in the record on a motion in arrest of judgment, by *aliunde* testimony." *Turner v. The State,* 9 Geo., 58.

No ERROR. Affirmed.

Cited: Wynne v. Small, 102 N. C., 136; *State v. Weaver,* 104 N. C., 762; *State v. Van Doran,* 109 N. C., 865; *State v. McBroom,* 127 N. C., 530.

STATE v. JAMES COLLINS.

Evidence—Practice.

Where a Judge allows improper evidence to be introduced, after objection, but before the conclusion of the trial reverses his ruling and withdraws the evidence from the consideration of the jury, instructing them that the evidence is inadmissible and they must not consider it; *Held,* not to be error.

(*McAllister v. McAllister,* 34 N. C., 184; *State v. May,* 15 N. C., 328; *State v. Davis, Ibid.,* 612, cited and approved.)

Indictment for LARCENY, tried before *Meares, Judge,* and a jury, at September Term, 1885, of the Criminal Court of NEW HANOVER.

The defendants were charged with the larceny of some hams, the property of John L. Boatwright, and on the trial, after some testimony had been offered tending to establish the larceny, the defendant Julius Jones was placed on the stand by the Solicitor, and was cautioned as to his legal rights and informed with great particularity by the Court that he was not bound to give any testimony that would criminate himself.

He then testified that the defendant James Collins gave the hams to him, at the store of J. L. Boatwright, and told him that he (Collins) would pay him if he would sell them for him, and furthermore that he did not know what the bag which he received from the said Collins contained (565) until it was opened at the cook-shop.

During the examination of one Southall, a witness for the State, the Solicitor offered in evidence the declaration of the defendant Julius Jones, made after his arrest, to the witness, voluntarily and without any inducement whatever, viz, "that he (the defendant Jones) had received the hams in question from the defendant Collins to sell for him."

The Solicitor argued that a conspiracy had been established by the testimony, and that the declaration of a co-conspirator was admissible. The counsel for the defendants contended that no conspiracy had been established, and objected to the admission of the testimony.

The Court admitted the declaration in evidence, and the counsel for the defendants excepted.

Also, during the examination of John L. Boatwright, a State's witness, the Solicitor called for the same declaration, viz, "that the defendant Jones had told him several times since his arrest, voluntarily and without any inducement, that the defendant Collins had given him the hams, and that he (Jones) was to sell them." The Solicitor again insisting there had been proof of a conspiracy, which was denied by the defendant's counsel. The Court admitted the evidence, and the defendant's counsel excepted.

After the examination of the witnesses had closed, and after one of the counsel for James Collins had finished addressing the jury, and when the Solicitor was partly through his remarks to the jury, but before the last speech of the defendant's counsel, who had the closing speech, was made, the Court, without any suggestion from counsel, came to the conclusion that the declaration of the defendant Julius Jones, made to the witnesses Southall and Boatwright, was inadmissible, for a reason that had not been urged by either of the counsel in the case, and had not occurred to the Court at the time of the admission of the testimony, viz, that the declaration was made after the transaction, and was, therefore, "not in furtherance of a common design," and

(566) was inadmissible, and the Court then declared to the counsel in the case, in the full hearing of the jury, that the said declaration was ruled out and excluded from the testimony.

The Court instructed the jury with regard to the testimony of Julius Jones, that it was unsafe to convict upon the uncorroborated testimony of an accomplice, and it was for the jury to say whether there was sufficient evidence in the case to convince them beyond a reasonable doubt of the guilt of the defendant Collins, excluding the evidence of the defendant Jones, and if they were not so satisfied, the question of corroboration would arise, and it was for them to say to what extent the witness, who was an accomplice, had been corroborated by the testimony in the case.

The Court told the jury in unmistakable language that the declaration of the defendant Jones, made to the witnesses Southall and Boatwright, had been excluded, and must not be considered by them.

The jury found the defendants guilty.

There was a motion for a new trial, and the error assigned was, that the Court had admitted the declarations of Jones, upon the ground that a conspiracy had been established. The motion was overruled by the Court. There was judgment against the defendants, from which Collins alone appealed.

The *Attorney-General* for the State.
Mr. Marsden Bellamy for the defendant.

ASHE, J., (after stating the facts). There is no error. If his Honor committed an error in admitting the declaration of Jones, it was remedied by his withdrawing it from the jury, and excluding it from their consideration. The case of *McAllister v. McAllister,* 34 N. C., 184, settles this point. There the error alleged was in receiving the register's book in evidence, instead of a certified copy of the registry. RUFFIN, C. J., said: "If there had been error in admitting the register's book, the defendant would have no cause of
(567) complaint, for the evidence was clearly and promptly withdrawn from the jury as irrelevant, and the defendant suffered no prejudice from it. It is undoubtedly proper and in the power of the Court to correct a slip, by

withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury"—and the same learned Judge, in the case of *State v. May,* 15 N. C., 328, said: "If improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to receive it." To the same effect is *State v. Davis,* 15 N. C., 612.

The improper evidence in this case was promptly withdrawn from the consideration of the jury before the case was submitted to them. There is, therefore,

NO ERROR.

Cited: State v. Eller, 104 N. C., 856; *State v. Crane,* 110 N. C., 534, 535; *Wilson v. Mfg. Co.,* 120 N. C., 95; *State v. Flemming,* 130 N. C., 689; *Gattis v. Kilgo,* 131 N. C., 208.

STATE v. JOHN GEORGE, *alias* JOHN GREEN.

Evidence—Confessions—Abduction—Indictment.

1. The confessions of a party accused of crime, made voluntarily and without any inducement or threat, and after he has been cautioned, are admissible in evidence against him.
2. When a statute makes a particular act an offense, and describes it by terms having a definite meaning, it is sufficient to charge the act itself without its attending circumstances, in an indictment.
3. When a statute creating an offense contains provisos and exceptions in distinct clauses, it is not necessary in an indictment under the statute, to state that the defendant does not come within the exceptions, or to negative the provisos. It is only necessary to negative an exception or proviso when it is stated in the enacting clause.
4. In an indictment for abduction under sec. 973 of The Code, the indictment need not state the means by which the abduction (568) was accomplished, nor that it was done without the consent and against the will of her father, nor that the defendant was not a nearer relation to the child than the person from whose custody it was abducted.

(*State v. Patterson,* 68 N. C., 292; *State v. Stanton,* 23 N. C., 424; *State v. McIntosh,* 92 N. C., 794; *State v. Liles,* 78 N. C., 496; *State v. Lanier,* 88 N. C., 658, cited and approved.)

INDICTMENT, tried before *Clark, Judge,* and a jury, at September Criminal Term, 1885, of WAKE.

The indictment was preferred under sec. 973 of The Code, which is as follows, to-wit: "Any one who shall abduct, or by any means induce any child under the age of fourteen years, who shall reside with the father, mother, uncle, aunt, or elder sister or brother, or shall be at a school, or be an orphan and reside with a guardian, to leave such person or school, shall be guilty of a crime, and on conviction shall be fined or imprisoned at the discretion of the Court, or may be sentenced to the penitentiary for a period not exceeding fifteen years."

In the succeeding section, 974, which makes it criminal to conspire to abduct, etc., and subjects the offender to like imprisonment as in the preceding section, it is provided "that no one who may be a nearer blood relation to the child than the persons named in said act, shall be indicted for either of said offenses."

The indictment is in the following words: "The jurors for the State, upon their oath present, that on 23 January, A. D. 1884, in the County of Wake, one Irene Pearson, then and there being a child of one H. I. Pearson, was residing with her said father, H. I. Pearson, and that then and there, while the said Irene Pearson was so residing with her said father, John George *alias* John Green, late of said county, willfully and unlawfully did abduct the said Irene Pearson from, and induced her, the said Irene Pearson, to leave her father aforesaid, the said H. I. Pearson, she, the said Irene Pearson, then and there being under the age of fourteen years, against the form of the statute," etc.

(569) On the trial, H. I. Pearson, the father of Irene Pearson, and a witness for the State, testified that in a conversation with the defendant he, the defendant, commenced telling on himself, and witness cautioned him not to tell anything to convict himself, and said to him "that he did not come there to get evidence to convict him, but he wanted to use him as a witness"; that he made him no promise, and thereupon the defendant admitted his taking his girl off, and that he did it; that prior to that time he had no information of the defendant's guilt.

This evidence of the admission of the defendant was excepted to by his counsel, but the exception was overruled by the Court, and the jury returned a verdict of "guilty."

The defendant moved in arrest of judgment upon the following grounds:

1. That the indictment did not state the means by which the said Irene Pearson was abducted.

2. That the indictment does not set forth that the abduction was done without the consent and against the will of her father, the said H. I. Pearson.

3. That it was not alleged in the indictment that the defendant was not a nearer blood relation to the child than H. I. Pearson, her father, named in the bill of indictment.

The motion was overruled, and from the judgment pronounced on the verdict the defendant appealed.

The Messrs. *Attorney-General* and *Peele & Maynard* for the State.

Messrs. J. C. L. Harris and *A. M. Lewis & Son* for the defendant.

ASHE, J., (*after stating the facts*). The exception to the admission of the evidence of the confession of the defendant was properly overruled. The testimony was clearly admissible. It was voluntary and without any inducement of *hope or fear,* and was made after he was cautioned by the witness Pearson not to tell anything to convict himself. The evidence would have been admissible even if the defendant, at the time of making the confession, had been (570) in custody and charged with the crime. *State v. Patterson,* 68 N. C., 292.

The grounds assigned for the arrest of judgment ought not to have been sustained.

It was not necessary in the indictment to state the means by which the abduction was effected. The statute is broad and comprehensive in its terms, and embraces all means by which the child may be abducted from the father, or the person having her in charge. The crime is defined in the statute by the term *abduction,* which is a term of well-known signification, and means in law "the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion or open violence." *Webster's Dictionary.*

The indictment strictly follows the words of the statute, and that is laid down in all the authorities as the true and safe rule. It is true there are some few exceptions, but we

do not think they embrace this case. In the case *State v. Stanton,* 23 N. C.,424, it is said by Chief Justice RUFFIN, that "when a statute makes a particular act an offense, and sufficiently describes it, by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself, without its attendant circumstances. Thus, upon a statute making it a felony to endeavor to seduce a soldier from his duty, an indictment is good which charges such an endeavor, without stating the mode adopted," and to sustain his position he relied upon the case of *Rex v. Fuller,* 1 Bos. & Pul., 180. See also *State v. McIntosh,* 92 N. C., 794, and the cases there cited, especially the case *State v. Liles,* 78 N. C., 496.

The second ground, that the indictment did not allege that the child was abducted without the consent and against the will of the father, is without any foundation, because it is not a part of the description of the offense that the child should be abducted without the consent or against the will of the father.

The remaining ground is even less tenable than the preceding, for here the clause creating the offense is in sec. 973, and the *proviso* which the defendant's counsel insists (571) should have been negatived in the indictment, is in the subsequent section, 974, and it is a well-settled rule that "when a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exception or negative the proviso it contains." Chitty Cr. L., 283, b. 284; Archbold Cr. L., 53. It is only necessary to negative an exception or *proviso* when it is stated in the enacting clause, in order that the description of the crime may in all respects correspond with the statute. Bishop on Criminal Procedure, sec. 37; Archbold, *Ibid.; State v. Lanier,* 88 N. C., 658.

NO ERROR. Affirmed.

Cited: State v. Foy, 98 N. C., 746; *State v. Emery, Ib.,* 772; *State v. Watkins,* 101 N. C., 705; *State v. Harwood,* 104 N. C., 728; *State v. Chisenhall,* 106 N. C., 679; *State v. Haddock,* 109 N. C., 875; *State v. Bryant,* 111 N. C., 694; *State v. Downs,* 116 N. C., 1067; *State v. Covington,*

125 N. C., 642; *State v. R. R., Ib.*, 671; *State v. Newcomb*, 126 N. C., 1106; *State v. Mitchell*, 132 N. C., 1036; *State v. Burnett*, 142 N. C., 581; *State v. Connor, Ib.*, 707; *State v. Hicks*, 143 N. C., 694; *State v. Harrison*, 145 N. C., 417.

STATE v. STEWART HALL and LORENZO SAVAGE.

Indictment—Arson—Indictment.

1. The crime of arson was complete at common law by the burning of any part of a house, and a house is burned when it is charred, that is, when any of the wood therein is reduced to coal.
2. As a general rule, an indictment should charge a statutory crime in the words of the statute.
3. Where an indictment under the statute, charged the defendants with unlawfully setting fire to a certain lot of fodder, etc., but did not charge that they burned it; *It was held*, fatally defective, and the judgment was arrested.

(*State v. Sandy*, 25 N. C., 570, cited and approved.)

APPEAL from the Inferior Court, heard by *Graves, Judge*, at Spring Term, 1885, of EDGECOMBE Superior Court.

The act of 1875, under which the indictment is framed, declares that any person who shall willfully burn or destroy any other person's corn, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or (572) other produce, in a stack, hill, rack or pen, or secured in any other way out of doors, shall be guilty of a misdemeanor. The Code, sec. 985, subdiv. 5. The indictment charged that the defendants "did unlawfully and willfully set fire to a certain lot of fodder in a stack and out of doors, the property of," etc.

After the trial and conviction in the Inferior Court, a motion in arrest of judgment was made and overruled for insufficiency in describing the statutory offense, and sentence being pronounced, the defendant appealed to the Superior Court, where the motion was sustained, and judgment ordered to be arrested, and from this ruling the State appeals to this Court.

The *Attorney-General* for the State.
Messrs. J. L. Bridgers & Son for the defendants.

SMITH, C. J., (after stating the facts). The only question presented in the record, and which we are required to dispose of, is whether the words "set fire to" contained in the indictment are of equivalent legal import with the word "burn" used to designate the offense made such in the act.

In examining the seven subdivisions of the section relating to arson, the first of which only prescribes the punishment of the crime as defined by the common law, it will be observed that "burn" and "burning" are the terms employed in three of them, Nos. 2, 3 and 5; "set fire to and burn" in that numbered 4; "set fire to" in number 6, and "attempt to burn" in the last. While it is true that these enactments enlarging the crime of arson were made at different sessions of the General Assembly, they are all associated and reenacted in their original forms, as found in The Code, and constitute a system. It must therefore be understood that the variant phraseology retained rests upon substantial ground, and was not intended to convey one and the same meaning, for if so, why was not the same language used?

(573) The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common law definition of the offense when it is charred, that is, when the wood is reduced to coal, and its identity changed, but not when merely scorched or discolored by heat. 2 Whar. Cr. Law, sec. 1659; *State v. Sandy,* 25 N. C., 570. As the very natural and usual effect of setting fire to combustible matter is to convert it into coal or ashes, it might seem that the burning is accomplished by setting the fodder stack on fire, and that the crime denounced in the statute is sufficiently charged in the indictment to warrant the judgment.

And so it is held by the Supreme Court of Maine, that the charge by setting fire to a barn is a burning under a statute of that State, somewhat similar to ours. *Davis, J.,* speaking for the court, after declaring that actual ignition of any part of the building, though the fire go out at once, is a burning, adds: "It can hardly be contended that setting fire to a building signifies any less." In this case, however, the in-

dictment averred not only that the prisoner set fire to the barn, but that by means of the fire, the barn was burned. The ruling of the Court may be sustained without regard to the *dictum* that the terms are equivalent.

But there have been cases to the contrary, decided in the States, and Blackstone, 4 Com., 222, recognizes the distinction, and uses this language: "As to what shall be a burning, so as to amount to arson, a bare intent or attempt to do it *by actually setting fire to a house, unless it absolutely burns,* does not fall within the description of *incendit et combussit*—set on fire and burn."

In *Harrel v. Commonwealth,* 5 Grattan, 664, determined in 1848, the indictment alleged that the prisoner "set fire to a certain house," while the statute used the words "burn any house," etc., and, as in our case, both expressions are found in different sections of the enactment. It was held that the statutory offense was not sufficiently charged.

In *Cochran v. State,* 6 Maryland, 400, the same difference existed between the statute and the indict- (574) ment. *Le Grand, C. J.,* in delivering the opinion, says: "We have no doubt that the indictment was defective in not averring that the house was burned."

In *Mary v. State,* 24 Ark., 44, the Supreme Court arrested judgment after conviction on an indictment for arson, which alleged that the accused "did set fire to a certain dwelling house," but failed to aver that it was "burned."

The form given in Arch. Cr. Pleading, 204, uses these words: "did set fire to *and burn,*" the latter word being wholly surplusage if those preceding are to have the same meaning without it.

The distinction may appear to be a refinement unworthy to be upheld, but it is safest to follow approved precedents, and it is certainly possible to set fire to some articles, which, by reason of the sudden extinction of the fire, may fail to change by charring even the material to which it has been applied, so that the defendant may have done the act imputed and yet not *burned* it within the meaning of the act, and if so, no judgment can be rendered against him. This conclusion derives support from the succeeding word "destroy," which indicates the legislative intention in employing the language used to define the offense.

As a general rule, the indictment should charge a statutory crime in the statutory words that define it, which was not followed in the drawing of the present indictment.

We therefore sustain the ruling in the Superior Court, and direct judgment to be arrested.

NO ERROR. Affirmed.

Cited: State v. Foy, 98 N. C., 746; *State v. Bagwell,* 107 N. C., 860.

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(575)

STATE v. ZENO LYON.

Peace Warrant—Appeal.

1. An appeal does not lie to the Superior Court from the action of a justice of the peace requiring a party brought before him on a peace warrant, to give bond to keep the peace. It is suggested, that in a proper case the action of the justice might be reviewed by a *certiorari* or *habeas corpus.*
2. Where a justice bound a party over to keep the peace, and on appeal to the Superior Court, the order of the justice was reversed, and the prosecutors ordered to pay the costs, who appealed to the Supreme Court; *It was held, to be erroneous.*

(*State v. Locust,* 63 N. C., 574, cited and approved.)

Proceedings on a PEACE WARRANT, heard before *MacRae, Judge,* at June Special Term, 1885, of GREENE.

On 1 September, 1884, the appellants applied for and obtained from a justice of the peace in the County of Greene, a peace warrant against one Zeno Lyon. Lyon was arrested and taken before the justice of the peace, who, on the 24th of same month, made his order requiring him, with sureties, to enter into a recognizance, as allowed by law in such cases, in the sum of two hundred dollars, conditioned that he should keep the peace generally, and particularly towards the present appellants. From that order the defendant Lyon appealed to the Superior Court. That Court heard the matter of the warrant mentioned *de novo,* and made an order discharging the defendant Lyon, and gave judgment against the prosecutors, the present appellants, for the costs of the action The appellants excepted and appealed.

The *Attorney-General* for the State.
Messrs. Bryan & Burkhead, for appellants.

MERRIMON, J., (after stating the facts). The counsel for the present defendants insisted, on the argument before us, that no appeal lay in favor of the defendant in the peace warrant, from the order of the justice of the (576) peace requiring him to enter into a recognizance to the State, conditioned that he would keep the peace and be of good behavior, etc. We are of that opinion, and think that the Superior Court should have dismissed the supposed appeal.

A "peace warrant" is denominated in The Code *a criminal action,* but it is no part of its purpose to charge a party with a criminal offense, try him for the same, and, if found guilty impose a punishment upon him. It is a proceeding in the administration of preventive justice, the purpose of which is to oblige a person who, there is probable ground to believe, will commit some criminal offense, or do some unlawful act, to stipulate with and give satisfactory assurance to the public, that such apprehended offense will not happen; that he will keep the peace and be of good behavior generally, and in such cases specially toward a person or persons named. The party recognized is only required to do what a good citizen ought to do without compulsion. Sir William Blackstone says: "This preventive justice consists in obliging the persons whom there is a probable ground to suspect of future misbehavior, to stipulate with and give full assurance to the public that such offense as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior. This requisition of securities has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but these also must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment." 4 Bl. Com., 252.

The nature of the purpose to be so subserved, suggests and requires that the action of the officer requiring such security of a party, must be conclusive, and not subject to the right of appeal, ordinarily. An appeal, in the absence of any statutory regulation to the contrary, would vacate the order

requiring security to keep the peace, and the persons,
(577) from whom danger is apprehended, might, without such restraint, commit the offense pending the appeal. Hence, Justice DICK said in *State v. Locust,* 63 N. C., 574, that such proceedings must be summary and conclusive to render them effectual for the protection of the complainant, and to secure the public peace, and generally there is no appeal from the action of the justice of the peace in the matter."

This view is not in conflict with the provision of the Constitution (Art. XVIII, sec. 27,) and the statute—The Code, sec. 900—allowing appeals from justices of the peace in criminal cases. These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed in The Code, secs. 900, 901, 903. They refer to the *conviction* and *sentence* of defendants.

It is asked, "Is there no remedy, if the action of the justice of the peace is manifestly erroneous, or if he shall prostitute his powers?" It is not to be presumed that he will be in error, or prostitute his powers; but if he should, the law does not provide that such wrong shall be corrected by appeal, and for the reasons already stated.

It may be that the action of the justice of the peace in such a case as that suggested, might be taken to the Superior Court by *certiorari;* or if the party complaining should be in close custody, he might obtain relief by *habeas corpus,* but we are not called upon to decide any question in this respect.

There is error. The judgment of the Superior Court reversing the order of the justice of the peace must be reversed, and the appeal to that court dismissed.

ERROR. Reversed.

Cited: State v. Byrd, post, 627; *State v. Walker,* 94 N. C., 858; *State v. Gregory,* 118 N. C., 1199.

(578)

STATE v. ROBERT NORWOOD.

Punishment—Judgment—Imprisonment—Costs.

1. A Court has no authority to imprison a convict elsewhere than in the county jail, nor can it delegate to the county commissioners, power to change the punishment imposed by the Court to imprisonment in the work house of the county.
2. When the Court sentences a defendant to a term of imprisonment, it can not also adjudge that he may be confined in the workhouse of the county, after the term of imprisonment has elapsed, until he pay the costs of the trial. The statute leaves the disposition of persons imprisoned for the nonpayment of costs to the discretion of the county commissioners.

(*State v. McNeill*, 75 N. C., 15; *State v. Jackson*, 82 N. C., 565, cited and approved.)

INDICTMENT, tried before *Clark, Judge,* and a jury, at July Criminal Term, 1885, of WAKE.

The prisoner was convicted, and appealed from the judgment as pronounced.

The facts fully appear in the opinion.

The *Attorney-General* for the State.
Mr. J. C. L. Harris for the defendant.

MERRIMON, J. The jury found the defendant guilty of an assault with a deadly weapon, and the Court gave judgment, of which the following is a copy: "And it is now ordered, that Robert Norwood be imprisoned in the common jail of Wake County for the term of six months, beginning on 13 July, 1885—for four (4) months of the said six months imprisonment he may be confined in any other place as the commissioners of Wake County may direct; and it is further ordered, that he pay the costs herein, and if he fails to pay said costs, when his six months imprisonment expires, it is ordered that he thereafter be confined in the workhouse of Wake County until the costs are paid."

The Court did not have authority to imprison the defendant elsewhere than in the county jail, nor did it have authority to delegate to the commissioners of Wake County, power to change the punishment imposed by the Court, (579) to imprisonment in the workhouse or elsewhere. The

judgment must be that of the Court, and such as the law authorizes.

The statute (The Code, sec. 987) provides that, "In all cases of assault, with or without intent to kill or injure, the person convicted, shall be punished by fine, or imprisonment, or both, at the discretion of the Court," etc. And the statute (The Code, sec. 1174) further provides, that "No person shall be imprisoned by any Judge, Court, Justice of the Peace, or other officer, except in the common jail of the county: *Provided,* that whenever the sheriff of any county shall be imprisoned, it may be in the jail of any adjoining county."

Generally, when the statute prescribes the punishment of imprisonment, as in the section above cited, it implies imprisonment in the common jail of the county, and not elsewhere. Such was the general meaning of the term "imprisonment" at the common law, and such it has always been in this State. Indeed, prior to the present Constitution, persons convicted of criminal offenses in this State, were not imprisoned in any other place than the common jail, and thus the term came to have the general meaning we attribute to it. Now, other kinds of imprisonment are prescribed by law, but when these are intended, they are specially made applicable to specified classes of offenses, or to a particular offense. *State v. McNeill,* 75 N. C., 15; *State v. Jackson,* 82 N. C., 565.

And for the like reason, the Court could not direct that, if the defendant should fail to pay the cost by the end of the term of six months imprisonment, he should next thereafter be confined in the workhouse until he should pay the same. There is no statute that authorizes such order. The Court could only give judgment for costs, and these the defendant must pay unless he shall be discharged in the way, and as the law allows.

The statute (The Code, sec. 3448) provides that the county commissioners of the several counties may provide
(580) under such rules and regulations as they may deem best, for the employment of "all persons imprisoned in jails of their respective counties, * * * upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the

peace, or for good behavior, and who fail to pay costs which they are adjudged to pay, or to give good and sufficient security therefor: * * * *Provided also,* it shall not be lawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the Court before whom the trial is had, shall in its judgment so authorize."

This does not authorize the Court to designate such employment, or where it shall be performed. That matter is left to the discretion of the county commissioners, under rules and regulations prescribed by them.

So much of the judgment as is erroneous can not be treated as surplusage, and is therefore immaterial, because it might mislead the county commissioners, and besides, but for such orders in the judgment, it may be that the Court would have given a different judgment. The law did not authorize it, and judgment must be such, and such only, as the law authorizes.

The defendant is not entitled to a new trial, but to have such judgment against him as the law allows.

REMANDED.

Cited: State v. Johnson, 94 N. C., 865; *State v. Pearson,* 100 N. C., 415; *State v. Hicks,* 101 N. C., 748; *State v. Young,* 138 N. C., 572.

(581)

STATE v. JAMES C. LEWIS.

Assignment of Error—Privilege of Counsel—Perjury—Evidence—Variance.

1. Even if counsel make improper arguments to the jury, it can not be assigned as error, unless the attention of the Judge was called to it at the time.
2. In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not.
3. Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B, and

the records of that Court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the Judge allowed this record to be introduced; *It was held*, to be error, and that the variance was fatal.

(*State v. Suggs*, 89 N. C., 527; *State v. Street* 5 N. C., 150, cited and approved.)

Indictment for perjury, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of SAMPSON.

The false oath assigned as perjury, was alleged in the indictment to have been taken on 14 February, 1884, at an Inferior Court then and there held for the county of Sampson, before J. L. Stewart, J. G. Huggins and A. J. Johnson, justices of said court, there and holding the same, in a certain criminal action for an assault and battery in said court depending and tried, wherein the State was plaintiff and James Green, Troy Green and Daniel Peterson were defendants.

The record of the February Term, 1884, of said Inferior Court did not show that there was any indictment tried at that term of the court against the said Greens and Peterson for an assault and battery.

But the record of the Inferior Court for November Term, 1883, which was offered in evidence by the State, did show that at that time an indictment for an assault and battery against the said Greens and Peterson was tried. The defendant objected to the admission of this evidence, but his
(582) Honor received it, and the defendant excepted. There was a great deal of evidence offered, an exception was taken to certain remarks made by the Solicitor in his speech to the jury, but there was no objection to the remarks, nor was the attention of the court called to them at the time, and there were a number of special instructions asked by the defendant's counsel, which the court declined to give, and proceeded to charge the jury, and there was no exception taken to the charge of the Judge, nor to any part thereof.

The defendant was convicted. There was a rule for a new trial, because the court refused to give the instructions asked, and because the verdict was against the weight of evidence. This was refused, and the rule for a new trial discharged. Thereupon, the defendant moved in arrest of judgment, which

was overruled, and the sentence of the law was pronounced against him, from which he appealed.

The *Attorney-General* for the State.
Mr. E. W. Kerr for the defendant

ASHE, J., (after stating the facts). The defendant can take no advantage from his execption taken to the alleged abuse of privilege in the remarks made by the Solicitor in his argument made before the jury. For assuming them to be improper, there is no error to be imputed to the Judge in not stopping the Solicitor, unless they were objected to, or the attention of the Judge called to them at the time. This does not appear to have been done in this case, and the objection was lost, *State v. Suggs,* 89 N. C., 527. Although there was no exception taken to the charge of the Court at the time, the Court had refused to give the first instruction asked by the defendant, which was as follows, to-wit: "That there was a fatal variance between the allegation and the proof, in that the indictment alleges the perjury to have been committed on 14 February, in an Inferior Court, then and there holden, in a certain criminal action, in which the State was plaintiff and James Green, Troy Green and Daniel (583) Peterson were defendants, charged with an unlawful assault upon J. C. Lewis, while the record of the said described court of February Term, 1884, fails to show any such trial."

The records of the February Term, 1884, did not show that a trial of the two Greens and Peterson for the said assault took place at that term of the Inferior Court. But the Solicitor offered in evidence the record of the November Term, 1883, of said court, which did show that the said two Greens and Peterson were tried at that term of the Court, for an assault upon the defendant Lewis, and upon objection by the defendant to the introduction of the evidence, his objection was overruled by the court, and the evidence admitted, to which the defendants excepted. The exception was, in our opinion, well taken, and the court committed an error in admitting it.

The Code, sec. 1185, declares, that "in any indictment for willful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and

by *what court,* or before whom the oath was taken," etc. This section of The Code, which is the act of 1842, dispenses with the necessity of setting forth the record of the indictment, on the trial of which the false oath is alleged to have been taken, and only requires that the substance should be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were necessary to be proved, and it is necessary to prove in *what court,* or before whom, the oath was taken. Archbold, in his work on Criminal Pleading, p. 101, lays down the law to be, that, "where records are produced in evidence, they must be strictly conformable with the statements in the pleading they are intended to prove, the slightest variance, in substance, between the matter set out and the record produced in evidence will be fatal." So in *Woodford v. Ashley,* 2 Camp., 193, an allegation that the plaintiff was acquitted "by a jury in the court of our Lord, the King, before the King himself, at Westminister, before the Chief Justice, (584) and discharged thereupon by the court, was holden not to be proved by a record stating the trial to have been at *nisi prius,* and the plaintiff to have been discharged by the court *in banc.*"

The same doctrine is announced in 3 Russell Crimes, 41, and in this State, in the case of *State v. Street,* 5 N. C., 150, it was held, in an indictment for perjury, the style of the court before which the perjury is alleged to have been committed, must be legally set forth. In every indictment, the facts and circumstances which constitute the offense must be stated, and must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offense or not, in order that he may demur or plead to the indictment accordingly—that he may be enabled to determine the species of offense they constitute, in order that he may prepare his defense accordingly. Archbold Cr. Plead., 42. But the defendant in looking at this indictment, might be thrown off his guard, for he knew that no such indictment as that set forth in the bill against him, was tried at the February Term, 1884, of the Inferior Court of Sampson County, and knowing that, he might reasonably conclude that it was not necessary for him to prepare any defense.

We are of the opinion that there was a fatal variance between the allegations in the indictment and the proof offered, and the Judge erred in overruling the exception of the defendant, and refusing to give the instruction asked. There must be another trial.

ERROR. *Venire de novo.*

Cited: State v. Green, 100 N. C., 550; *Hudson v. Jordan,* 108 N. C., 12; *Byrd, v. Hudson,* 113 N. C., 212; *State v. Tyson,* 133 N. C., 695; *State v. Archbell,* 139 N. C., 538.

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(585)

STATE v. LEROY TERRY.

Concealed Weapons.

1. One who is in the occupation of land as a tenant, even at will or by sufferance, or an agent or overseer, or any one else who is vested with the right of dominion, is the owner of land within the meaning of the statute against carrying concealed weapons.
2. A mere servant or hireling who is found with a concealed weapon on the premises of his employer, is not on his own premises, and is guilty under the act.

INDICTMENT for carrying a concealed weapon, tried before *Clark, Judge,* and a jury, at August Term, 1885, of JOHNSTON.

The evidence was, that the defendant was hired by the prosecutor, for a certain purpose, namely, to tend and cultivate the lands of the prosecutor, that the defendant, slept and lived at his father's house, about a mile distant from the residence of the prosecutor, that the defendant, on the day in question, was in a field of the prosecutor, engaged in work which he had been employed to do by the prosecutor, that on the prosecutor's remonstrating with him about the neglect of his work, the defendant became angry, used insulting language, drew a pistol from the inside pocket of his coat, which was lying on a stump in the field, and made threats against the prosecutor, and walked off with the pistol in his hand. The defendant's father's house was on another, but

adjoining tract of land, belonging also to the prosecutor, and the defendant, in going from his father's house, his sleeping place, need not pass over any land, except that of the prosecutor.

The defendant asked his Honor to charge the jury, that being a servant of the prosecutor, and on the prosecutor's land at the time he was seen with the pistol, and there being no evidence that he had that day been off the prosecutor's land with the pistol, the defendant was not guilty. His Honor refused to give the charge, and the defendant excepted.

There was a verdict of guilty, and a rule for a new
(586) trial. The rule was discharged, and the defendant appealed.

The *Attorney-General* for the State.
No counsel for the defendant.

ASHE, J., (after stating the facts). The case falls clearly within the inhibition of the statute. The statute forbids any person from carrying concealed weapons, except when on his own premises. The word "premises" here is evidently used as synonymous with land, for the statute proceeds to declare, if any one not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof, that is, one may carry a weapon concealed about his person, while on his own land, but when he goes off his own upon that of another and is seen with or is known to have a deadly weapon, as is described in the statute, the bare possession of the weapon is *prima facie* evidence of the concealment. What is meant by *his own premises* and *his own land,* is not that he must have a legal title to the land, for, we think, one who is in the occupation of land as a tenant at will or at sufferance, would, in the meaning of the statute, be the owner thereof. So would an agent or an overseer, or any one who is vested with the right of dominion or superintendence over it.

But we can not see how one who is a mere servant, can in any sense of the term be said to be the owner of the land, or to be on his own premises, when he is simply employed as a laborer. He has no interest in the land and no dominion over it.

The defendant, then, not being on his own land, is at work as a hireling on the land of the prosecutor—and when remonstrated with for some negligence in his work, flies into a passion, draws a pistol from the inside pocket of his coat, which he had placed upon a stump, and with it, threatened his employer. It is to be presumed that he carried the pistol with him into the field, and probably with the very purpose of using it, in the event of a difficulty with his employer. It is to be presumed that he wore his coat to (587) the field. If any one carried it there for him, or if the pistol was so carried in the coat pocket as to be open to view, and not concealed, it was easy to be proved by his own testimony, but he offered no testimony to rebut the *prima facie* case made out against him by the facts of the case, and he was properly convicted. There is

NO ERROR.

Cited: State v. Deyton, 119 N. C., 883; *State v. Perry,* 120 N. C., 581, 2, 4, 6; *State v. Anderson,* 129 N. C., 522.

IN THE MATTER OF JOHN BRITTAIN.

Habeas Corpus—Certiorari—Power of the Court over Its Judgments.

1. A writ of *habeas corpus* will not be issued when it appears on the face of the petition, that the petitioner is detained by virtue of the final judgment of a Court of competent jurisdiction.
2. A petition for *habeas corpus* must allege that the imprisonment has not been already adjudged upon a prior writ of *habeas corpus.*
3. A writ of *certiorari* as a substitute for an appeal, will not be granted when the applicant fails to give any excuse why he has failed to appeal, and when he shows no merits.
4. The Court has power, during a term, to recall, correct, or modify an unexecuted judgment, in a criminal, as well as in a civil case.
5. Where a prisoner was sentenced to twelve months imprisonment, and during the same term at which the punishment was inflicted, and after eight days of the time had expired, the Court changed the punishment to six months imprisonment; *It was held,* that the Court had power to so decrease the punishment, and the prisoner could not complain.

6. In such case, the time for which the convict is to be imprisoned begins from the day when he first went to jail, and so in this case, the six months must be shortened by the eight days.

(*State v. Warren*, 92 N. C., 825, cited, distinguished and approved.)

APPLICATION to the Supreme Court for a *habeas corpus,* and also for a *certiorari,* heard at October Term, 1885,

The facts are fully set out in the opinion.

(588) The *Attorney-General* for the State.

Messrs. G. N. Folk and *S. J. Erwin* for the petitioner.

SMITH, C. J. The application of the petitioner, is for the two-fold purpose of obtaining the writ of *habeas corpus,* directed to John A. Lackey, sheriff of Burke County, in whose custody the prisoner is alleged to be, commanding said sheriff to bring his body before this Court, to the end that the lawfulness of his imprisonment may be inquired of, and also that a writ of *certiorari* may issue to the clerk of the Superior Court of that county, requiring him to send up a transcript of the record of the proceedings in which the imprisonment was adjudged, that the same may be reviewed.

Upon an examination of the petition, we find two insuperable obstacles in the way of granting the writ of *habeas corpus.*

1. It states that the prisoner was sentenced to be imprisoned for a period of six months, upon his conviction for an assault and battery committed by him, and in pursuance thereof, was by said Court, committed to the custody of the sheriff, and is now undergoing said punishment.

The statute in express terms refuses the application in cases, "when persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction." The Code, sec. 1624, par. 2.

2. The petition fails to allege "that the legality of the imprisonment or restraint has not been already adjudged upon a prior writ of *habeas corpus,* to the knowledge or belief of the applicant," as required by sec. 1627, par. 4.

As an application for the writ of *certiorari,* it must also be denied. Aside from the fact that no explanation is given

of the failure to bring up the case by appeal when judgment was pronounced, we are clearly of opinion that the case made in the petition has no merits, and is entirely unsupported in the rulings to which we have been referred, *Ex parte Lange,* 18 Wall., 163, and *State v. Warren,* 92 N. C., 825.

In the latter case, judgment of imprisonment was (589) rendered at one term, and after partial confinement, the prisoner was called into Court, and as we interpret the record, the residue of the punishment remitted on certain terms, accepted and carried into effect by him. At the succeeding term, a new sentence of imprisonment was pronounced, as if none had been before, ignoring both that which had been suffered, and the fine that had been imposed and paid. This, it was decided, was in excess of judicial authority, and not warranted by law. But we said that in thus holding, we did not question "the right of the Court, during a term, to correct, modify or recall an unexecuted judgment, in a criminal or in a civil case."

Here an imprisonment was adjudged for one year, or rather for twelve months, when, after eight days' confinement, near the close of the term, he was brought into Court, and a part of the term of imprisonment *remitted*—that is, for the intervening space between that and the ensuing term, when he was required to enter into bond, (recognized, we suppose to be intended), to keep the peace meanwhile, and to make his appearance at the following term to undergo the residue of his sentence.

It would be very extraordinary if this form of mitigating a punishment during the sitting in which it was imposed, was to be denied the Court, and thus the sentence become irrevocable. Can not the Judge remit part or even all of a fine? If so, is his authority to reduce the term of confinement to be denied?

It is not important what words are used to describe the judicial act, and whether, as called in the petition, it is the substitution of a new, in place of a previous judgment, the legal effect of what was done is a *remission of part of the term of imprisonment, and nothing more.* It may be, and such is the inclination of our opinion, that the confinement undergone, should by that period, shorten the

duration of the six months' imprisonment, or in other words, be counted as part of it. The application for both writs must be denied.

DENIED.

Cited: State v. Manly, 95 N. C., 663.

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(590)

STATE v. R. C. WHITENER.

Practice—Criminal Intent—Injury to Property by a Tenant —Fixtures.

1. Where upon an appeal, the Supreme Court held that no offense was charged in the bill, by inadvertently overlooking the statute creating the offense, it is proper for the Superior Court to again try the defendant.
2. The word "willful," when used in a statute creating a criminal offense, implies the doing of the act, purposely and deliberately, in violation of law.
3. Where an act to be criminal must be willfully done, and a party does such act under a claim of right, he does not do it willfully within the meaning of the law.
4. So, where a statute declared it criminal in a tenant during his term, to willfully and unlawfully injure or damage the leased house, and a tenant removed from the leased house certain window sashes which he had placed in them, under a claim that they belonged to him; *It was held,* that it did not come under the meaning of the statute.
5. *It is intimated* that an away-going tenant has the right to remove fixture put on the premises by himself for his own convenience.

(*State v. Roseman,* 66 N. C., 634; *State v. Hanks,* 66 N. C., 613; *State v. Ellen,* 68 N. C., 281; *State v. Crossitt,* 81 N. C., 579; *State v. Hause,* 71 N. C., 518, cited and approved. *State v. Bryan,* 81 N. C., 505, cited and distinguished.)

INDICTMENT for injury to a house by a tenant, tried before *Avery, Judge,* and a jury, at Fall Term, 1885, of BURKE.

The indictment was preferred under sec. 1761 of The Code, which forbids any tenant, who shall, during his term, or after its expiration, willfully and unlawfully demolish, destroy, deface, injure or damage any tenant house, inhabited house, or other outhouse belonging to his landlord or upon his

premises, by removing parts thereof, etc. The evidence shows that the defendant had been a tenant from year to year of Mrs. M. R. Caldwell, for four years prior to 1 January, 1885, and that he removed the sash from two windows in December, 1884. That the sashes were fastened into the windows by a strip, like that ordinarily used in fastening the sash into a window. The strips were held by shingle nails, driven about half up into the wood, which were pulled out by the defendant, and the sash taken out. (591) The defendant proposed to prove that there was no sash in the windows when he went into the occupancy of the house under his lease, and that he borrowed the sash from his brother, about two years before the removal, and hauled them away with his furniture when he gave up the possession, and subsequently returned them to his brother. This evidence was objected to by the Solicitor, and was excluded by the Court, to which the defendant excepted. The counsel for the defendant asked the Court to charge the jury, that under the facts of the case as found and admitted, the defendant could not be convicted, but the Court refused to give the instructions, and charged the jury that upon the facts admitted to be true, the defendant was guilty. The defendant excepted—there was judgment against him, and he appealed.

The *Attorney-General* for the State.
Mr. S. J. Erwin for the defendant.

ASHE, J., (after stating the facts). This case was before us heretofore, *State v. Whitener,* 92 N. C., 798. The act of 1883, sec. 1761 of The Code, under which the indictment was found, was inadvertently overlooked by the court, in consequence of not being placed under the title of Crimes, and not having been called to the attention of the court at the time. We think it was altogether proper for the court below, in discovering the mistake, to submit the matter to the jury with instructions under sec. 1761. But we are of opinion there was error in the instructions given, and the refusal to admit the evidence proposed by the defendant, with respect to the circumstances under which the sash was placed in the window and taken out. The evidence, we think, had a

material bearing on the criminality of the act. The facts as found and admitted, clearly bring the act of the defendant within the words of the statute, but they do not bring him within its meaning and spirit. The indictment, following the statute, charges that the act of removing the sash,
(592) was unlawful and willful. Conceding it to have been unlawful, it does not follow that it was *willful.* The word willful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one can not be brought within the meaning of a criminal statute. In *State v. Roseman,* 66 N. C., 634, where the defendants were indicted for unlawfully and *willfully* demolishing a public schoolhouse, and they offered some evidence of their possession under a person who claimed title to the *locus in quo,* which was rejected by the court, READE, J., speaking for this Court, said: "If the defendants were in the adverse possession of the schoolhouse, and *bona fide* claiming it as their own, it certainly was not a *crime* in them to pull it down. It was important, therefore, for them to prove that fact, for the words of the statute are 'unlawfully and *willfully,*' demolish, etc. Upon the supposition that the record which was offered and rejected, was not sufficient evidence of title upon an issue directly involving title, it was certainly evidence tending to explain the possession of the defendants, and the *bona fides* of what they did."

The object of the Act of 1866, The Code, sec. 1120, was to keep off intruders, and subject them to indictment if they invaded the possession after being forbidden, and when a person *believing* land to be vacant, made an entry, procured a warrant and survey, and entered upon land in possession of another, it was held, that although the land was not vacant, he was not guilty of a civil or forcible trespass, *State v. Hanks,* 66 N. C., 613. If one, under a claim, enters upon land in possession of another, after being forbidden to do so, he was held not to be guilty of a *willful trespass. State v. Ellen,* 68 N. C., 281. If one enters upon the land of another under a *bona fide* claim of right, he is guilty of no criminal

offense. *State v. Crossett,* 81 N. C., 579, so if one enter or travel over the land of another, under a *bona* (593) *fide* claim of right, it was held he was not criminally guilty of a trespass under the statute, although he was mistaken in his right, but *believed* he had the right to do so, because he and the former owners of the land had done so for sixteen years—*State v. Hause,* 71 N. C., 518—and in a Tennessee case, *State v. Dodson,* 6 Caldwell, which was an indictment under a statute similar to our Act of 1866, the court say: "If one commit a trespass upon the land of another, his good faith or ignorance of the true right or title, will not exonerate him from civil responsibility for the act. But when the statute affixed to such a trespass the consequence of a criminal offense, we will not presume that the Legislature intended to punish criminally, acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction."

But it is contended on the part of the State, that the case of *State v. Bryan,* 81 N. C., 505, if it does not overrule the decisions of the Court as above cited, at least qualifies them, so that they can have no application to this case. But we have carefully reviewed that case, and think it is in no way in conflict with them. In *Bryan's* case, the defendant asked the court to charge the jury, that if the defendant believed he had the right to enter or travel over the prosecutor's land, because he and the former owners and tenants of the land had done so so for ten or eighteen years, he would not be guilty. The fact was, that the only user of the way through the prosecutor's land by the defendant and those under whom he claimed, was just before the commencement of the action, and he had been forbidden to do so.

This Court held, that there was no error, and the reason given was, that "if a party be indicted for a trespass on land, and in the proof there be no evidence of a claim of title, or *such facts and circumstances* upon which he could *reasonably* and *bona fide believe* he had a right to do what he did, the court will not submit an inquiry to the jury as to a mere abstraction, and therefore we hold there was no error in the refusal to charge the jury as requested." (594)

The gist of the decision is, that to constitute a valid

defense in such a case, there must be a claim of title or *facts* shown upon which the defendant could, *reasonably* and *bona fide,* believe he had the right. Now to apply the principle enunciated in these cases, and even in the last. The defendant Whitener offered to show that the windows had no sash in them when he entered the house under his lease, and about two years before he removed them, he borrowed the sash from his brother and put them in, where they remained until just before the expiration of the lease, when he took them out by drawing a few small shingle nails, with which the strips holding them in were fastened. Did not the defendant have a reasonable ground to believe that the sash belonged to his brother, and that as they had been loaned to him for his own use, it was his right and duty to take them out and return them? We venture to say, that there is not a man, who is not a lawyer, that would hesitate to say he certainly had the right to do so, and even a lawyer, under the more recent authorities upon the subject, might be excused for holding that a tenant has the right to remove, during the continuance or his term, such fixtures as he may have made to the freehold for his convenience and comfort. The question has never been decided in this State in any case where the question was directly presented, as to the rights of a *tenant* to remove such annexations to the land. But it has been so held in New York and Massachusetts. *King v. Wilcomb,* 7 Barb., 263, 266, and *Ware v. Hinds,* 4 Gray, 256, 270, 271. And Tyler on fixtures 484, 485, after reviewing these and other authorities, and in view of the general tendency of the courts in relaxing the principles of the common law with regard to tenants, gives it as his opinion, that the question whether annexations to be freehold by tenants were removable, would depend on circumstances. For instance, he says, "if the house was destitute of windows when the tenant took his lease, and the openings were filled for his own use and convenience, he would doubtless have the right to take (595) them away at the end of the term."

We have referred to this authority not to decide the questions to which they refer, for we do not think it necessary in this case, but to show that upon a matter where lawyers and jurists may differ, or have a doubt, certainly one who is not a lawyer, should not be held criminally responsible

for acting *bona fide* on his own untutored opinion, when it accords with justice and the common sense of mankind. Our conclusion is, there was error.

ERROR. *Venire de novo.*

Cited: State v. Howell, 107 N. C., 840; *State v. Wells,* 142 N. C., 595.

STATE v. CLITUS WEAVER.

Former Jeopardy—Evidence.

1. Where two were indicted for an affray, and one pleaded former jeopardy, which plea was tried before the plea of not guilty, the other defendant has never been in jeopardy, and may be tried for the offense.
2. In an indictment for an affray, one defendant may be examined as a witness by the State against the other defendant.
3. In such case, it is not error for the presiding Judge to caution the witness before the counsel for the other defendant cross-examines him, that he need tell nothing to criminate himself.

(*State v. Rose,* 61 N. C., 406; *State v. Smith,* 86 N. C., 705, cited and approved.)

INDICTMENT for an AFFRAY, heard on appeal from the Inferior Court, by *Gudger, Judge,* at Fall Term, 1885, of BUNCOMBE.

The indictment charged the defendant Clitus Weaver and one George Presley, with the commission of an affray, in mutually assaulting and beating each other in a public place.

When the case was called for trial, the defendant Presley pleaded "former conviction," and asked that (596) the issue raised by this plea should be first tried, and the Court directed the Clerk to empanel the jury to try the one issue of former conviction. The Clerk being somewhat deaf, and not understanding the instruction of the Court, empaneled the jury in the usual form, to try the issues of traverse, joined between the State and the defendants Clitus Weaver and George Presly, as on the plea of "not guilty." Witnesses were then introduced by the defendant Presley, who was sworn in the usual form, to testify in the case

wherein the State was plaintiff, and Clitus Weaver and George Presley were defendants. Neither the Court nor the Solicitor for the State noticed or discovered the mistake of the Clerk in empaneling the jury and swearing the witnesses, nor had any knowledge thereof, until after the rendition of the verdict against the defendant Presley on the plea of former conviction, but the counsel of defendant Weaver did notice the manner and form of the empaneling the jury and the swearing of the witnesses at the time, but did not call it to the attention of the Court.

Weaver did not enter any plea, nor was this trial participated in by him or his counsel in any way whatever.

The defendant Presley offered on his trial, evidence of his previous conviction before a justice of the peace, for an assault on the defendant Weaver, and of the identity of that offense with the one charged against him in this case, and for this purpose he introduced in evidence the bill of indictment, the same not having been read to the jury at the beginning of the trial. In reply to the above testimony, the State, on cross-examination of the defendant Presley, who offered himself to prove the identity of the two cases, showed that the defendant Presley was cut or marked with an ordinary pocketknife, and struck on the head with what seemed to be a rock, by the defendant Weaver. This testimony was not offered by the Solicitor against the defendant Weaver, but only to show that a deadly weapon was used in the fight between the defendants, and consequently that the justice
(597) of the peace had no jurisdiction to try and punish the defendant Presley. The Court charged the jury only upon the plea of "former conviction," telling them the only question for them to consider, was whether or not the defendant Presley had already been tried and convicted for this offense by a court of competent jurisdiction, that if a deadly weapon was used in the fight between the defendants, either by Presley or Weaver (and that an ordinary pocketknife is a deadly weapon), the justice of the peace did not have jurisdiction of the case; that if they found that the defendant had been so tried and convicted by a court of competent jurisdiction, their verdict would be: "We find the plea in favor of the defendant." But if they should find that he had not been so tried, then the verdict would be: "We find the plea against

the defendant." The jury found "the plea against the defendant." Counsel then, for defendant Weaver, moved that said Weaver be discharged. The motion was refused, and Weaver excepted. After this motion, and before the jury left the box, it was suggested by the Solicitor for the State that if the Court should think that the proceedings had were such as to put Weaver in jeopardy, a juror should be withdrawn and a mistrial had as to him. The Court declined this suggestion and discharged the jury, and counsel for the defendant Weaver thereupon again moved the Court for his discharge upon the ground of former jeopardy. The Court held that upon these facts Weaver had never been in jeopardy, and refused the motion. Weaver excepted.

Another jury was then empaneled in usual form to try the issues of traverse, joined between the State and the defendants Clitus Weaver and George Presley. The same bill of indictment was read to the jury, and each defendant pleaded "not guilty."

One Lynch, being introduced by the State, testified that he, in company with the defendant Weaver, passed a mill where they saw defendant Presley. The parties seemed friendly, but, when Weaver and witness were about leaving, Presley requested witness to make Weaver drink, and bring him back by way of the mill, in order that he, Presley, might give him a "damn good cursing" or "whip him." (598) Witness told Weaver of this request, who replied that he would go back by the mill "and see if Presley was mad with him," but wanted to have no difficulty with him, and asked witness to note that he wanted no difficulty. The parties again stopped at the mill, and after some friendly conversation with Presley, Weaver started off; Presley called to him and accused him of having made certain remarks about his (Presley's) dead brother. Weaver answered that he had not made them. Presley said, "I said when I heard them that you was a damned liar, and that one or the other of us had to take a whipping." Weaver said that he had not made the remark, and wanted no difficulty, for the subject of the alleged remarks was dead, but that he was not afraid of any man.

Presley then advanced towards Weaver, who remained where he then stood; Weaver then said, "You have your knife

open in your pocket, but I am not afraid of you," and took out and opened his own knife. Presley said "it was a damned lie," took his knife from his pocket and threw it upon the ground, and advanced to where Weaver was standing. Presley threw up his arm and Weaver his hand. Presley said, "Don't collar me"; they then grappled, and Weaver pushed Presley down and held him there, completely within his power, but did not strike him. Weaver threw down his knife in the fight as they grappled. Witness did not at any time see him use it. Presley called to witness to take Weaver off, who did so. After they were separated and were up on their feet, and while witness was yet holding Weaver, Presley struck him with his fist, and Weaver then immediately, and while witness was holding him, threw at Presley a rock about the size of a hen's egg, which he had in his hand when he arose. Presley was making no attempt or offer to strike Weaver at the time Weaver threw the rock. Here the fight ended. There was a little fresh scar on Presley's forehead after the fight was over. The mill where the difficulty took place is a grist and sawmill, patronized by the public.

There was no one present at any period of the diffi-
(599) culty, except the defendants and the witness.

The State then introduced the defendant Presley as a witness against his co-defendant Weaver. Weaver objected —objection overruled. The Court instructed the witness that he need not, unless he desired to do so, state anything that tended to criminate himself. He then testified substantially to the same facts stated by the witness Lynch.

The Court permitted Weaver's counsel to cross-examine this witness, but instructed the witness that he need not answer any question which tended to criminate himself. Weaver excepted. Neither defendant offered any evidence.

The Court charged the jury that a grist and sawmill of the kind testified to by the witnesses was a public place within the meaning of the law in regard to affrays, and that if they were satisfied beyond a reasonable doubt that the defendants willingly fought together there, under the circumstances detailed by the witnesses, they were guilty of an affray; that if defendant Weaver did not engage in the fight willingly, but used excessive force, or more force than was reasonably necessary for his defense, he would still be guilty of an affray, and

the jury might consider the throwing of the stone by him as evidence of such excessive force, provided that they were fully satisfied that the stone was thrown as stated by the witnesses. But that the force which a party may use in his defense should not be weighed in gold scales. Weaver excepted. Verdict of guilty. Weaver moved for a new trial; motion refused. He then again moved to be discharged; motion refused, and Weaver appealed to the Superior Court, where the judgment was affirmed and an appeal was taken to this Court.

The *Attorney-General* for the State.
Mr. F. A. Sondley for the defendant.

MERRIMON, J. It is too manifest to admit of question, that the exception upon the ground that the defendant had been put in "former jeopardy" in respect to the same alleged offense, has not the slightest foundation. The (600) defendant had not at the time of the former trial referred to, pleaded to the indictment, nor did he or his counsel understand that he was on trial; nor did the Solicitor for the State, nor did the Court so regard or treat him—they did just the reverse.

The objection that the co-defendant was incompetent as a witness against the defendants, was entirely groundless. The Code, secs. 1350, 1351; *State v. Rose,* 61 N. C., 406; *State v. Smith,* 86 N. C., 705.

And so, likewise, it was not good ground of exception that the Court told the co-defendant witness "that he need not answer any question which tended to criminate himself." The Code, sec. 1354; *State v. Smith, supra.*

The exception to the charge of the Court to the jury does not specify any ground upon which it rests, and we are unable to see any—the slightest. The charge was fair and just, and in such a case, the judgment must be

AFFIRMED.

STATE v. THOMAS CHAMBERS.

Private Statutes—Public Local Statutes—Indictment.

1. Private statutes are such as relate to or concern a particular person, or something in which individuals or classes of persons are interested in a way peculiar to themselves, and not common to the entire community. Public statutes are such as affect the public at large, whether they apply to the whole State or only to a locality in it.
2. A statute may be local without being a private one.
3. Public local statutes are not repealed by The Code, if not (601) brought forward in it.
4. A statute forbidding the sale of liquors within two miles of a certain locality, is a public local statute.
5. Where a statute makes an act indictable upon the happening of a contingency, the indictment must show that the contingency has happened. So, where an act made it indictable to sell liquor within two miles of a certain place, but the act was not to go into operation until an election was held, an indictment under the act must set out that such election has taken place.

(*State v. Cobb*, 18 N. C., 115; *Shepherd v. Commissioners*, 90 N. C., 115; *State v. Loftin*, 19 N. C., 31; *State v. Eason*, 70 N. C., 88; *State v. Sloan*, 67 N. C., 357, cited and approved.)

INDICTMENT, tried before *Avery, Judge,* and a jury, at Fall Term, 1885, of BURKE.

The defendant was indicted under the provisions of chap. 78, Laws 1872-73, sec. 3. This act provides for an election to be held, and if a majority of the votes cast should favor "prohibition," that it should be indictable to sell liquor within two miles of the court-house in Morganton.

The facts sufficiently appear in the opinion.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

The *Attorney-General* for the State.
Mr. S. J. Erwin for the defendant.

MERRIMON, J. The indictment is founded upon the statute, Laws 1872-73, chap. 78. The counsel for the defendant insisted on the argument that this act was repealed by the statute (Laws 1876-77, chap. 86,) and that the latter act was repealed by the statute (Laws 1885, chap. 120, sec. 60). He

also insisted that the act first cited is a private act, and ought to have been set forth, or in an appropriate way referred to, in the indictment. He further contended that if the act is a public one, then it is repealed by The Code, sec. 3867.

It is not at all certain that the act of 1876-77 repealed that of 1872-73, but if it be granted that it did, the act of 1885 plainly repealed that of 1876-77, and that of 1872-73 remains in force. The act of 1885, sec. 60, by its (602) terms and effect, repealed all laws and clauses of laws in conflict with it, "and all laws heretofore passed chartering or amending the charter of the Town of Morganton." The statute of 1872-73 was in no respect in conflict with it, nor did it charter or amend the charter of the Town of Morganton—it had no reference or application to that town as a corporate organization—it applied to and embraced an area of territory that embraced the town and more than that, and its provisions were to be executed in certain respects by certain designated county officers, without reference specially to the officers and authorities of the town as such.

We think, also, that the statute of 1872-73 is not a private law. Private statutes are such as relate to, concern and affect particular persons, or something in which individuals or classes of persons are interested in a way and degree peculiar to them, and not common to the whole community. Public statutes are such as relate to, concern and affect the public generally—the community at large, without distinction in any respect—they operate alike and in the same degree upon all individuals and classes of persons and their interests, subject to the law, where they are in the same condition and circumstances. And this is so, whether the law applies to the whole State or to a locality or localities in the State. It is the quality of public, general and common right or purpose, that makes the statute a public one. 1 Kent Com., 459; Potter's Dwarris Statutes, 52, 53.

The statute under consideration is a public one, applying to and operating in a particular locality, and affecting everybody alike who may reside, or go, or have interest there. It has one feature common to most private statutes—it is local, but all local statutes are not private ones; for example, such as create and regulate counties are local in an important sense, but they are not private. In most, if not all, other

respects, this statute has the essential qualities of a public law. It confers no special benefits upon individuals or classes of persons as distinguished from others—it applies to (603) all alike, in like circumstances. The violation of its provisions when it takes effect is made indictable, and punishable by fine or imprisonment, or both, in the discretion of the Court; it applies to all persons who may offend against it, whether they reside in the particular territory embraced by it or not; it is to be enforced like other public laws, and for the common good. It may be said that it is intended to benefit specially a locality and those residing there, but this may be said of all local laws. While it is intended to have a wholesome local effect, it does not apply to individuals or classes, but to the whole community, and is likewise intended to promote the common good, without distinction in any respect. *State v. Cobb,* 18 N. C., 115; *Shepherd v. Comrs.,* 90 N. C., 115.

The statute in question was not brought forward in The Code, and the counsel for the defendant insisted that if it is a public law it was repealed by the statute (The Code, sec. 3876), which provides "that all *public* and *general* statutes not contained in this Code are hereby repealed, with the exceptions and limitations herein mentioned." This contention is without foundation, because The Code, sec. 3873, expressly provides that "no act of a private or local nature * * * shall be construed to be repealed by any section of this Code." As we have seen, the statute is public and local, and is therefore not repealed.

Nevertheless, we are of opinion that the Court ought to have arrested the judgment, because the indictment does not sufficiently charge an offense under the statute, or indeed any offense. It provides that in a contingency specified in it, depending on a popular vote, to be taken as therein directed, it shall be unlawful to sell spirituous liquors, except in a quantity specified, within two miles of the court-house in the Town of Morganton, and it is made a misdemeanor to make any such sale, punishable by fine or imprisonment, or both, in the discretion of the Court.

The indictment does not allege that an election was held as required by the statute, or that the contingency happened upon which it became unlawful and indictable to sell spiritu-

ous liquors within the area of territory specified. Such omission is fatal. It must appear in the indictment (604) itself, that an offense is charged therein. This is essential to enable the party indicted to make his defense, and the Court to proceed to trial, and judgment in case of conviction. It must appear in the record that the Court has jurisdiction of the offense charged, and to this end it must appear in the indictment that an offense is charged.

The Court, seeing the indictment in this case, could not determine that an offense was committed, under the statute mentioned, or at all. Indeed, no offense is charged, for it was not unlawful to sell spirituous liquors as alleged, unless the contingency had happened upon which it became unlawful to sell. The Court could not take judicial notice that an election had been held by the authorities designated in the statute—that a majority of the votes cast were in favor of "prohibition," and that such result was duly certified, so that the sale of spirituous liquors became, within the area of country specified, a criminal offense. These facts, if they existed, as it seems they did, or the substance of them, ought to have been averred in the indictment and proven on the trial. *State v. Cobb, supra; State v. Loftin,* 19 N. C., 31; *State v. Eason,* 70 N. C., 88; *State v. Sloan,* 67 N. C., 357.

As the Court could not see in the record that an offense was charged against the defendant, no judgment could be properly given against him. Judgment must therefore be arrested.

ERROR. Reversed.

Cited: State v. Wallace, 94 N. C., 828; *State v. Sorrell,* 98 N. C., 740; *State v. Cooper,* 101 N. C., 688; *State v. Moore,* 104 N. C., 717; *State v. Pendergrass,* 106 N. C., 667; *State v. Witter,* 107 N. C., 795; *Durham v. R. R.,* 108 N. C., 401; *State v. Tenant,* 110 N. C., 612; *State v. Thomas,* 118 N. C., 1226; *Caldwell v. Wilson,* 121 N. C., 458; *State v. Jones, Ib.,* 619; *State v. Holloman,* 139 N. C., 646; *State v. Piner,* 141 N. C., 763.

(605)

STATE v. WILLIAM HARRISON.

Concealed Weapons—Criminal Intent.

1. While it is true as a general rule, that men are presumed to intend the natural consequences of their acts, yet evidence may be offered in certain cases, to show that no criminal intention existed.
2. If a man carry a deadly weapon concealed about his person, off of his own premises, for the purpose of trading it off, and the jury believe that such is his purpose, he is entitled to an acquittal.

(*State v. Gilbert*, 87 N. C., 527, cited and approved.)

INDICTMENT against the defendant for carrying a pistol concealed about his person while off his own premises, tried before *Avery, Judge,* and a jury, at the Spring Term, 1885, of MITCHELL.

On the trial one Harmon, a witness introduced by the State, testified that the defendant came to his house, about six miles from where he resided, and had a pistol concealed in his pocket, which he pulled out and offered to trade to the witness for an ax, and that when the witness declined to trade, he put the pistol in his pocket and went away. On cross-examination, he stated that he had not previously proposed to the defendant to trade for his pistol.

The defendant testified in his own behalf, and stated that he did carry the pistol concealed on his person at the time mentioned by the State's witness, to the house of the witness, which was several miles distant from his own premises, but that the said witness had previously proposed to trade him an ax for the pistol, and that he carried it for the purpose of trading it for the ax, and for no other purpose, and when the witness declined to trade, he carried it back in the same way. That he had not carried a pistol concealed about his person at any other time within two years before the finding of the bill of indictment.

The defendant's counsel asked the Court to instruct the jury, that if the defendant carried the pistol solely for the purpose of trading it for an axe, and the jury should
(606) so find from the testimony, the defendant was not guilty.

The Court refused to give the instructions asked, and

charged the jury that "when the testimony fully satisfies the jury that a defendant has carried a pistol off his own premises within two years before the finding of the bill of indictment, then the law raises a presumption that he is guilty, and nothing more appearing the jury must so find. In this case both the witness for the State, and the defendant himself, testify that he carried a pistol actually concealed about his person, off his own premises, at a time within two years before the finding of the bill of indictment. While the defendant may rebut the presumption of guilt, by showing to the satisfaction of the jury that he did not carry the weapon with a criminal intent, it is the province of the Court to say whether that is any evidence to be submitted to the jury, as tending to show that there was no criminal intent, and the Court instructs you that the testimony relied upon by the defendant is not sufficient, if believed, to rebut the presumption of guilt." The defendant excepted.

The jury returned a verdict of guilty. The Court pronounced judgment, and the defendant appealed.

The *Attorney-General* for the State.
Mr. J. T. Morphew for the defendant.

ASHE, J., (after stating the facts). His Honor instructed the jury that the defendant might rebut the presumption of guilt by showing to the satisfaction of the jury that he did not carry the weapon with a criminal intent, but he proceeded to instruct them that there was no evidence offered before them sufficient, if believed, to rebut the evidence of guilt. In this, we think, there was error. The testimony of the defendant, who testified that he carried the pistol in his pocket from his house to that of the State's witness, a distance of six miles, to be exchanged for an ax, and that he carried it for no other purpose, was certainly *some* evidence tending to rebut the presumption of a criminal intent, and should have been submitted to the jury. (607)

The case seems to be on *all fours* with that of the *State v. Gilbert,* 87 N. C., 527. There the jury found the facts, that the pistol was carried in the pocket of the defendant from one store to another, in the Town of Asheville, a distance of about three hundred yards, to have it packed with

other goods; that he had no criminal intent in conveying the pistol, and submitted the question of law to the Court as to the guilt of the defendant upon that state of facts. The Court below held that he was guilty, and rendered judgment against him.

But on appeal to this Court the judgment of the Superior Court was reversed, and RUFFIN, J., who spoke for the Court in that case, said: "It is true, it will always be presumed that a man intends to do what 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 intent connected with it, that must put an end to the prosecution."

In that case the jury found as a fact that the defendant had no criminal intent in carrying the pistol, and that finding was based upon the evidence offered before them, tending to rebut *prima facie* evidence of guilt, and this Court sustained their finding. The evidence in both cases is, in effect, the same. If it was proper for the jury to consider and act upon it in the one case, it would seem that it ought to be sufficient to be submitted to their consideration in the other.

We are of the opinion that the Court below erred in the instructions given to the jury, and in refusing that asked by the defendant.

ERROR. *Venire de novo.*

Cited: State v. Dixon, 114 N. C., 853, 854.

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(608)

STATE v. NOAH WILSON.

Disorderly House—Indictment.

1. A disorderly house is one kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by.
2. The facts set out in an indictment, and not the words used to describe them, determine the criminality of the accused. If they show an offense to have been committed, it is sufficient to authorize conviction and punishment, although the offense is not denominated by the usual legal word used to express it.

3. An indictment which charged the defendant with keeping an "ill-governed" house, and which omitted to state that it was "to the common nuisance," etc., was held sufficient to warrant a conviction for keeping a disorderly house.

(*State v. Robertson*, 86 N. C., 628; *State v. Thornton*, 44 N. C., 252; *State v. Baldwin*, 18 N. C., 195, cited and approved.)

INDICTMENT for keeping a disorderly house, tried before *Gudger, Judge*, and a jury, at Fall Term, 1885, of JACKSON.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

The facts are fully set out in the opinion.

The *Attorney-General* for the State.

Messrs. Reade, Busbee & Busbee for the defendant.

SMITH, C. J. The defendant is charged with keeping an ill-governed house, with the usual general averments that render it disorderly and an indictable nuisance at the common law. Upon his plea of not guilty, he was tried and convicted by the jury, and from the judgment rendered upon the verdict he appeals.

The evidence introduced to sustain the charge, in substance, was that the house was on a public highway, within a few feet of it, and a place where spirituous liquors were sold and drunk, and near by was a distillery for their manufacture, operated by the defendant and one Lewis; (609) that lewd behavior by a daughter of the accused and said Lewis had been seen at divers times, and the former had given birth to a bastard child; that there were frequent firing of guns at the premises, both at night and in the daytime, and that it was a resort for men of bad repute, and had become annoying to eight or ten families residing in the immediate neighborhood, and so offensive that women would not pass the place unattended. This is the current of the testimony adduced to show the character of the house maintained by the defendant, and in our view shows it to be disorderly and a public nuisance, subjecting the person who keeps it to a criminal prosecution.

A disorderly house is defined by Mr. Wharton as one "kept in such a way as to disturb, annoy or scandalize the public generally, or the inhabitants of a particular vicinity, or the

passers-by in a particular highway." 2 Whar. Cr. Law, sec. 2392.

The facts in the present case do not essentially differ from those in *State v. Robertson,* 86 N. C., 628. See also *State v. Thornton,* 44 N. C., 252.

The instruction asked for defendant, that all the evidence adduced did not establish the character of the house as disorderly within the meaning of the law, nor prove the offense imputed to the accused, was properly refused, and the substituted instruction "that if the defendant permitted disorderly conduct, lewd behavior, shooting, and other loud noises to be carried on at his house, and these acts disturbed the neighborhood and the passers-by, the defendant would be guilty," was unexceptionable and appropriate.

The proof of the birth of the illegitimate child upon the premises, to which objection is made, is concurrent with the evidence of the lascivious conduct of the mother which preceded, and all tends to exhibit the character of the house.

It is objected upon a motion in arrest of judgment, that the indictment is defective in two particulars: (1) In omitting to charge, in words, that the defendant kept up and (610) maintained a *"disorderly house"* according to the forms in use, the words *"ill-governed"* alone not being sufficient; and, (2) in omitting the conclusion that the acts specified were "to the common nuisance," etc. Neither of the grounds assigned warrants the motion in arrest.

I. The facts set out in the indictment, and not the words used to describe them, determine the criminality of the accused. If they show an offense to have been committed, it is sufficient to authorize conviction and punishment, though the offense which they constitute is not denominated by the proper legal word to express it, and which is commonly used.

II. The same remark is equally applicable to the other omission, and, in place of our own comments, we reproduce the language of that distinguished Judge, whose learning and the pure diction in which it is conveyed illuminate so many of the pages of our Reports.

"If the facts charged," says GASTON, Judge, "must from their very nature have created a nuisance to the citizens in general, *ad commune nocumentum,* though always proper and safest to be inserted, may be omitted, for they neither de-

scribe the crime nor the facts which constitute it. *Such facts necessarily show the crime.* If the facts charged show an offense, inconvenient and troublesome, that *may* have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum* becomes indispensable." *State v. Baldwin,* 18 N. C., 195.

The exceptions and the motion were properly overruled, and there is no error in the record.

NO ERROR. Affirmed.

Cited: State v. Calley, 104 N. C., 860.

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(611)

STATE v. ANDERSON JONES.

Evidence.

1. Although evidence may be irrelevant, yet if it might have exercised a prejudicial effect on the minds of the jury, a new trial will be granted.
2. It is error to admit the return of "not to be found' on a *capias* to show that the prisoner had fled, in the absence of evidence that the prisoner resided in the county to which the *capias* was issued.

(*State v. Mikle,* 81 N. C., 552, cited and approved.)

INDICTMENT, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of DUPLIN.

On the trial there were several exceptions taken to the ruling of the Court in receiving and refusing evidence, only one of which is necessary to consider for the purpose of determining this appeal.

With the view of showing the flight of the defendant, the Solicitor was allowed by the Court to offer in evidence eight writs of *capias,* issued to the Sheriff of Duplin County, to each of which the Sheriff returned "not to be found."

The ninth writ was issued to the Sheriff of Wayne County, and on that the Sheriff of that county returned that he had delivered the defendant to the Sheriff of Duplin County. To the admission of this evidence the defendant excepted.

The jury found the defendant guilty, and the Court pronounced judgment against him, from which he appealed to this Court.

The *Attorney-General* for the State.
Mr. H. R. Kornegay for the defendant.

ASHE, J., (*after stating the facts*). We are of opinion that the evidence was improperly admitted. It was no evidence of flight. It was therefore irrelevant, and may have exerted a prejudicial effect upon the minds of the jury, and
(612) when that is so, it is a ground for a new trial. *State v. Mikle,* 81 N. C., 552.

There was no evidence, as appears from the record, that the defendant had ever resided in the county of Duplin. There was evidence that he had illicit intercourse with the prosecutrix, but where it took place is not stated—except on one occasion he was seen "in a room of the house of the prosecutrix, with her, in the night, and without any light." This was the only positive evidence that he was ever in the County of Duplin. For aught that appears in the case, if the first *capias* had been issued to the County of Wayne, the defendant might have been arrested, for he was taken by the Sheriff of that county on the first *capias* issued to him.

As the record fails to disclose any evidence tending to show that the defendant, at the time of the finding of the bill of indictment against him, was a resident, or even a temporary sojourner in the County of Duplin, from which it might be inferred that he had absented himself from that county to avoid the service of process, it was error to admit the evidence, and the defendant is entitled to a

Venire de novo.

Cited: State v. McKinney, 111 N. C., 684.

STATE v. JAMES PAYNE.

Appeals in Forma Pauperis.

1. Where an affidavit to obtain an appeal without giving security for costs, in a criminal action, fails to state that the appeal is taken in good faith, it is fatally defective, and the appeal will be dismissed.
2. Where the affidavit to obtain an appeal *in forma pauperis* is defective, it is not a matter of discretion with the Court, but the appellee can have it dismissed as a matter of right.

(*State v. Morgan*, 77 N. C., 510; *State v. Divine*, 69 N. C., 390, cited and approved.)

INDICTMENT, tried before *MacRae, Judge,* and a jury at Spring Term, 1885, of ASHE. (613)

The defendant was found guilty, and upon judgment being pronounced against him, appealed to this Court.

Not being able to give the undertaking on appeal, he applied to the Court to be allowed to appeal without security, and in support of his application filed an affidavit as follows:

"James Payne, defendant in above case, after being duly sworn, says that he is unable to give security, or make the deposit required by law, to enable him to appeal to the Supreme Court, and therefore asks to be allowed to appeal as a pauper."

The affidavit was accompanied by a certificate of counsel that the defendant's grounds of appeal were well founded.

When the case was called for argument in this Court, the Attorney-General moved to dismiss the appeal on the ground that the defendant had not complied with the requirements of the statute allowing appeals in criminal cases without security for costs.

The *Attorney-General* for the State.
Mr. J. F. Morphew for the defendant.

ASHE, J., (after stating the facts). The affidavit is not in compliance with the statute. When persons are convicted, and are unable to give security for costs, the statute provides that "the defendant shall have the right to appeal without

giving security for costs, upon filing an affidavit that he is wholly unable to give the security for costs, and is advised by counsel that he has reasonable cause for the appeal prayed, *and that the application is in good faith.*" The Code, sec. 1235. The words in italics are held to be essential in an affidavit of this nature, to secure against appeals merely for delay.

In the case of *State v. Morgan,* 77 N. C., 510, these words were omitted, and the Court said "a defendant can not appeal without security, unless he makes an affidavit that he is advised by counsel that he has a reasonable cause for
(614) appeal, and that his appeal is in good faith." The Court further said, "there must be a compliance with the statute. It is not a matter of discretion." And in *State v. Divine,* 69 N. C., 390, it is held that it must appear by affidavit "that the defendant is advised by counsel that he has reasonable cause for the appeal prayed for, and that the application is in good faith. Both of these essential requisites are wanting in the record before us." To the same effect is decided at this term. *State v. Jones, post,* 617.

As we have no discretion in the matter, the appeal must be dismissed.

APPEAL DISMISSED.

Cited: State v. Tow, 103 N. C., 351; *State v. Duncan,* 107 N. C., 819; *State v. Wylde,* 110 N. C., 503; *State v. Jackson,* 112 N. C., 850; *State v. Harris,* 114 N. C., 832; *State v. Bramble,* 121 N. C., 603; *State v. Gatewood,* 125 N. C., 695.

STATE v. MILTON S. LITTLEFIELD.

Jurisdiction—Statutes—Construction of.

1. No statute should be given a retrospective operation, unless its words expressly require such construction.
2. The Legislature has power to provide that the Superior Courts shall not entertain jurisdiction of the prosecutions therein depending, and to direct that all such prosecutions shall be quashed.

3. Where two Courts have concurrent jurisdiction of certain crimes, and the Legislature enacts that one of these Courts should have exclusive jurisdiction thereof, it is error to quash an indictment for one of these crimes pending in the Courts deprived of the jurisdiction, when the act is passed.

(*State v. Perry*, 71 N. C., 522, cited and distinguished.)

INDICTMENT, heard before *Gudger, Judge,* at August Term, 1885, of MADISON.

The indictment was against the defendant and George W. Swepson, now dead, for a conspiracy. The indictment was found at Fall Term, 1870, of the Superior Court of Madison County, and was pending at the August Term, 1885, of said Court. *Capiases* had been regularly issued from time to time, and the return to each, was that the defend (615) ant "was not to be found." At the last-mentioned term of said Court, his Honor, Judge Gudger presiding, when the case was called on the docket, the Solicitor asked the Court for an order to the clerk to issue an *alias capias,* returnable to the next term of the Court. But the Court refused to make such an order, and made an order quashing the indictment, being of the opinion that the act of 1885, chapter 180, the latter part of the first section thereof, deprived the Court of jurisdiction to try the offense with which the defendant was charged, notwithstanding the fact that the indictment was pending when the act of 1885, chapter 180, went into effect. From the judgment of the Court, the Solicitor appealed to the Supreme Court.

The *Attorney-General* for the State.
No counsel for the defendant.

ASHE, J., (after stating the facts). It is provided by Laws 1885, chapter 180, that "the Inferior Courts of Buncombe and Madison counties, shall have *exclusive original* jurisdiction of all crimes committed in said respective counties, of which said Courts now have jurisdiction." An Inferior Court for the county of Madison had been theretofore established, with concurrent jurisdiction with the Superior Court as to the offense of conspiracy, the crime with which the defendant in the case is charged. We are of opinion that

his Honor erred in giving a retroactive effect to the act of 1885. It was certainly within the power of the Legislature to declare that the Superior Court of Madison should not entertain further jurisdiction of certain prosecutions therein depending, and direct that all such proceedings should be quashed. That would be the effect of the construction put by his Honor upon this statute, so far as relates to this indictment, for it could not again be reinstated in the Inferior Court, by reason of the statutory bar, and it is not to be presumed that the Legislature contemplated any such re-
(616) sult from the passage of the act of 1885. Such a construction would be giving a retrospective operation to the act, which is in violation of the general rule, that "no statute should have a retrospective effect." Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless a contrary intention is unequivocally expressed therein. Potter's Dwarris, p. 162, note 9, and cases cited.

There is nothing in the act tending to show an intention in the Legislature to make it retrospective, but on the other hand, from the use of the term *original jurisdiction,* it would seem that it was intended that the indictments for such offenses as the Inferior Court *then* had jurisdiction, should thereafter be *originated* in that Court, and that was what was meant by the use of the word "original" in the statute.

This case is distinguished from that of the *State v. Perry,* 71 N. C., 522. In that case, the punishment was so changed by the Legislature, as to bring the offense within the jurisdiction of a justice of the peace, and the Superior Court in which the indictment was pending, after the passage of the act reducing the punishment, had no power to pronounce judgment, and therefore the indictment was quashed. But in this case there is nothing to prevent the Superior Court from pronouncing judgment and imposing the punishment which the Legislature has attached to the offense.

ERROR. Reversed.

Cited: Leak v. Gay, 107 N. C., 481.

(617)

STATE v. SAM JONES and WILL JONES.

Appeal in forma pauperis—Presumption.

1. The affidavit upon which an order is based allowing the defendant to appeal *in forma pauperis*, must state that he is unable to give security, that he is advised by counsel that there is reasonable ground for the appeal, and that it is taken in good faith.
2. Where the affidavit does not appear in the record, but the substance thereof is set forth in the order allowing the appeal, from which it appears that it was fatally defective, a presumption that the order was based upon a sufficient affidavit can not arise.

(*State v. Divine*, 69 N. C., 390; *State v. Morgan*, 77 N. C., 510; *State v. Moore, ante*, 500; *Leatherwood v. Boyd*, 60 N. C., 123, cited and approved.)

INDICTMENT for an affray, tried before *MacRae, Judge,* and a jury, at Spring Term, 1885, of CALDWELL.

When the case was called in this Court, the Attorney-General moved to dismiss for the reasons set out in the opinion.

The *Attorney-General* for the State.
Messrs. A. M. Lewis & Son for the defendant.

MERRIMON, J. The Attorney-General moved to dismiss this appeal upon the ground that the order allowing the defendant to appeal without giving security for costs, was improvidently granted, in that the affidavit upon which it was founded, failed to state that the application for such order was made in good faith.

The affidavit was not sent up as part of the transcript of the record, but the order recites, that "upon the affidavit filed in this case by the appellants that they are unable to file an appeal bond, or make a money deposit in lieu thereof," etc.

It is manifest that the affidavit was insufficient. It is settled that the Court could not make the order, unless it appeared that the defendants were unable to give security for costs, that they were advised by counsel that there was reasonable cause for the appeal, and that the application therefor was made in good faith. *State v. Divine,* (618) 69 N. C., 390; *State v. Morgan,* 77 N. C., 510; *State v. Moore, ante,* 500.

It was insisted on the argument by the counsel for the appellants, that the presumption is, that the order was founded upon a sufficient affidavit. It is possible that this might be so, if the Court had not undertaken to set forth the ground of the order—the substance of the affidavit—but it did this, and it appears that it was insufficient and fatally defective. In such case, no such presumption arises, because the facts recited will not allow it—they rebutted any such presumption that might possibly have arisen. *Leatherwood v. Boyd,* 60 N. C., 123.

The exceptions in the record were argued in connection with the motion to dismiss the appeal. We are not at liberty to decide any question presented by them, as the motion to dismiss the appeal must be allowed. They seemed, however, to be without merit.

APPEAL DISMISSED.

Cited: State v. Payne, ante, 614; *State v. Tow,* 103 N. C., 351; *State v. Duncan,* 107 N. C., 819; *State v. Wylde,* 110 N. C., 503; *State v. Jackson,* 112 N. C., 850; *State v. Rhodes, Ib.,* 857; *State v. Harris,* 114 N. C., 831; *State v. Bramble,* 121 N. C., 603.

STATE v. JACKSON LAMBERT.

Indictment—Murder—Transcript of Record—Evidence—Challenge to Juror.

1. The Court to which, on the removal of a cause, the transcript of the record is sent, is the sole judge whether the transcript is properly verified by the seal of the Court from which it is sent, and all other courts are bound by its decision.
2. When the killing is proved, malice is always presumed, and it is incumbent on the prisoner to show matter in extenuation, unless it is brought out in the testimony offered by the State.
3. When the testimony is conflicting, it is the duty of the jury to reconcile it if possible. If this can not be done, they must determine which testimony is the most credible.
4. It is not error for the Judge to refuse to charge upon a hypothetical case which does not appear in the evidence.

5. Evidence is not admissible to show that a third party had (619) malice toward the deceased, a motive to take his life, opportunity to do so, and had threatened to do so.

6. A challenge to a juror for cause must be made in apt time. It is too late after the juror has been accepted by the prisoner, and has served on the trial.

7. When the incompetency of the juror is not discovered until after the verdict, it is a matter of discretion for the Judge whether he will grant a new trial or not; his refusal to do so is not reviewable.

(*State v. Duncan*, 28 N. C., 236; *State v. Moses*, 13 N. C., 452; *State v. Davis*, 77 N. C., 483; *State v. Jones*, 80 N. C., 415; *State v. Boone, Ibid.*, 461; *State v. Beverly* 88 N. C., 632; *State v. Gee*, 92 N. C., 756; *State v. Adair*, 66 N. C., 298; *State v. Patrick*, 48 N. C., 443; *State v. Greenwood*, 2 N. C., 141; *State v. Davis*, 80 N. C., 412; *State v. Perkins*, 66 N. C., 126; *Spicer v. Fulghum*, 67 N. C., 18, cited and approved.)

INDICTMENT for MURDER, tried before *Gilmer, Judge*, at Spring Term, 1885, of SWAIN.

The case, on motion of the prisoner, had been removed from Jackson County to Swain County for trial.

On the trial, one Jones, examined as a witness for the State, testified substantially, that on the evening of the homicide, ten or a dozen persons met at his father's house, which was near a public road, and some of them had liquor, and the most of them were drinking; that he found deceased at the house, apparently under the influence of liquor; that outside of the fence in front of the house, and about seven feet from the gate, there was a wagon bed lying, distant eight or nine steps from the house; that two or three minutes before the homicide, witness saw the prisoner in the wagon bed; the deceased started to leave about dark, and witness accompanied him to the gate to fetch deceased's mule; that getting outside the gate, he and deceased being together, the prisoner who was still in the wagon bed, asked, "who are you?" Deceased answered, "it is us." Prisoner, with an oath, said, "wait until I get my pistol, and I'll show you who 'us' is," and fired. Deceased sat down on the walk, and witness, pausing a moment to see if there would be any more firing, went on rapidly to the stable, and as soon as he reached the stable, heard another shot fired, went back (620) to where he left deceased, and found him at the same place. He was carried into the house, and it was found that

he was shot in the left hip, and he died the next night about two o'clock. Witness swore positively that it was the prisoner who did the shooting; that he recognized him by his voice, and the blaze of the pistol shot.

The State introduced a number of other witnesses, tending to corroborate the witness Jones, and the dying declarations of the deceased.

The prisoner, on the cross-examination of one of the State's witnesses, proposed to prove that the deceased was a revenue officer, and that Bragg Jones, a State's witness, and one of the persons present at the house during the afternoon and night of the homicide, was a dealer in illicit whiskey, for the purpose of showing a motive on the part of Bragg Jones to commit the murder charged against the prisoner, the State's witnesses having testified to facts tending to show, that until that day the prisoner and the deceased were strangers to each other, and that evening had been introduced, and took a drink together, and parted apparently in a friendly manner.

The Solicitor objected to the evidence. It was rejected by the Court, and the prisoner excepted.

The prisoner offered himself as a witness in his own behalf; he denied the shooting, and said he was not present when it occurred; and proposed to prove that Bragg Jones was a blockade distiller and prisoner had bought liquor from him, and that evening Jones told him that he was keeping and selling illicit liquor, and would sell prisoner some, if he would keep it a secret from the revenue officers. The evidence was objected to by the Solicitor, disallowed by the Court, and the prisoner again excepted.

It was also in evidence that before deceased left the house, one of the persons present, in going out at the gate, found prisoner lying in the walk, and came near stepping on him, and prisoner got up and went to and got in the wagon bed.

The prisoner asked the following instructions to (621) the jury:

1st. That if the prisoner was there, and they should so find, and fired the fatal shot, from the effects of which Wilson died—(which shot was without motive)—the offense would only be manslaughter, and they should so find.

2d. That if they should find that the prisoner was there,

and that there was no malice, though he should have fired the pistol in a heedless and incautious manner, it would only be manslaughter.

3d. That if the witnesses for the State, by their conflicting testimony, shall leave a reasonable and real doubt on their minds, as to which of them had told the truth, then they should discard their testimony in making up their verdict altogether, and determine the case as if they had not testified.

4th. That if the prisoner was present at the place of shooting, and shot the deceased under the influence of sudden passion, produced by the treading on him while lying on the ground, it would only be manslaughter and not murder.

The Court refused to give these instructions to the jury, and charged them in substance, that the fact of a killing with a deadly weapon being proved or admitted, the burden of showing matter of mitigation is then on the prisoner, unless it arises out of the testimony produced against him. That in this case, it being admitted that the deceased came to his death by a gunshot wound, at the hands of some one, the jury was to find whether the prisoner did the shooting, and if they were satisfied beyond a reasonable doubt that he did, then there being no matter of excuse offered in evidence, or tendered by the prisoner, who absolutely denied the shooting, it was their duty to find the prisoner guilty of murder.

The jury found the prisoner guilty of murder.

After verdict, prisoner moved for a new trial on the ground of the errors alleged in the exceptions taken on the trial, and on the further ground that one of the jurors who acted in the case, was under twenty-one years of age and not a freeholder.

In the selection of the jury, this juror had been challenged for cause by the prisoner, and examined (622) on his *voir dire,* as to his indifferency, and on being tendered was accepted by the prisoner and sworn as a juror; and after being sworn, and before taking his seat in the jury box, he remarked—loud enough to be heard by the Court and counsel—"My father says I am not twenty-one." But no objection was made to the juror by the prisoner until after the verdict.

The Court refused to grant a new trial, and the sentence

of the law was pronounced upon the prisoner, from which he appealed to this Court.

The *Attorney-General* for the State.
Messrs. Reade, Busbee & Busbee for the defendant.

ASHE, J., (after stating the case). We have carefully reviewed the record in this case, and find no error.

There was an exception taken by counsel for the prisoner, in this Court, that it did not appear in the transcript of the case from Jackson County to Swain County, where the trial was had, that it was certified under the official seal of the Superior Court of the former county.

The exception is untenable, for it is held, "the Court to which, on the removal of a cause, the transcript of the record is sent, is the sole judge whether the transcript is properly verified by the seal of the Court from which it is sent, and all other Courts are bound by its decision. *State v. Duncan,* 28 N. C., 236; *State v. Moses,* 13 N. C., 452. The transcript sent to this Court, is but a copy of the transcript from the Court of Jackson to the Court of Swain, and therefore could not have the impression of the seal of the Superior Court of Jackson County.

The Court below committed no error in refusing to give the instructions asked. The first two instructions could not have been given; for where the killing is proved, malice is always presumed, and it is incumbent upon the prisoner to show the matter in extenuation, unless it is brought out in the
(623) testimony offered by the State. This doctrine has been so repeatedly decided by the Court, that it is needless to cite any authority.

The third instruction could not be given, for there is no such rule as that indicated in the instruction. The rule is, when the testimony is conflicting, it is the duty of the jury to reconcile it if possible, and if that can not be done, then they must determine which testimony is the more credible. But in this case, there does not appear to be any material conflict in the testimony adduced by the State.

The fourth exception is without any evidence to support it. It is not made to appear that the prisoner, while lying

on the ground, was trodden upon by any one, much less by the deceased, who did not leave the house until after the prisoner had got into the wagon; so there was no such provocation as that mentioned in the instruction, which could have aroused the passions of the prisoner.

As to the exceptions taken on the trial to the ruling of the Court, in excluding the testimony by which the prisoner proposed to show that Bragg Jones had a motive to kill the deceased, it was clearly not sustainable. In *State v. Davis,* 77 N. C., 483, it is held, that "evidence that a third party had malice toward the deceased, a motive to take his life and an opportunity to do so, and had made threats against him, and that some time before deceased was killed, he went in the direction of deceased's house with a deadly weapon, threatening to kill him, was inadmissible." *State v. Jones,* 80 N. C., 415; *State v. Beverly,* 88 N. C., 632; *State v. Boon,* 80 N. C., 461; *State v. Gee,* 92 N. C., 756. Here there was no evidence proposed to be offered to connect Bragg Jones with the homicide, except that he was a distiller of illicit liquor, and the deceased was a revenue officer.

One of the grounds assigned by the prisoner why a new trial should be awarded him, was the fact that one of the jurors was under twenty-one years of age, and was not a freeholder, and the disqualification of the juror was not discovered until after he was tendered and accepted by the prisoner, and sworn. But it appears that the juror, (624) as soon as he was sworn, and before he took his seat in the box, stated in the hearing of the Court and counsel, that his father said "he was not twenty-one," yet the prisoner made no objection. If he had then moved for leave to challenge the juror for cause, it would have been competent for the Court to allow the challenge. *State v. Adair,* 66 N. C., 298. The challenge to a juror for cause must be made in apt time. It is too late, after a juror has been accepted by the prisoner and has served on the trial, to except to him for incompetency. *State v. Patrick,* 48 N. C., 443; *State v. Greenwood,* 2 N. C., 141; *State v. Davis,* 80 N. C., 412.

But when the incompetency is not discovered until after verdict, it is then a matter of discretion for the Judge, whether he will, under such circumstances, grant a new trial,

but his refusal to do so, is not reviewable. *State v. Perkins,* 66 N. C., 126; *State v. Davis, supra; Spicer v. Fulghum,* 67 N. C., 18.

There is no error. This opinion must be certified to the Superior Court of Swain County, that the case may be proceeded with in conformity to this opinion and the law of the land.

NO ERROR. Affirmed.

Cited: State v. Wilson, 104 N. C., 873; *State v. Council,* 129 N. C., 517; *State v. Maultsby,* 130 N. C., 665; *State v. Lipscomb,* 134 N. C., 697.

STATE v. J. W. BYRD.

Motion to Dismiss Appeal—Undertaking—Costs—Appeal—Statement of Case on Appeal.

1. An instrument executed by *the mark* of the party to be charged, is binding when proved.
2. When the surety to the undertaking on appeal, executed it by making his cross mark, and justifying before the clerk; *Held,* that the undertaking was sufficient in law.
3. Where the ground of exception to the order of the Court sufficiently appears in the record, a statement of the case on appeal is unnecessary.

(625) 4. When the subject-matter of the action has been lost, destroyed, or adjusted between the parties, an appeal will not be allowed from a judgment for *costs only.* But when the whole matter in litigation is an alleged liability for costs—as in the case of a prosecutor in a criminal action—an appeal lies as in other cases.

(*State v. Crook,* 91 N. C., 536; *May v. Darden,* 83 N. C., 237; *State v. Powell,* 86 N. C., 640; *State v. Cannady,* 78 N. C., 539; *State v. Murdock,* 85 N. C., 598; *State v. Crossett,* 81 N. C., 579, cited and approved.)

MOTION to tax the prosecutor with the costs in a Criminal Proceeding commenced before a justice of the peace of GREENE, and carried by appeal to the Superior Court of that county, in which it was heard before *Gudger, Judge,* at Spring Term, 1885.

On 12 August, 1884, the defendant applied to and obtained from a justice of the peace in the county of Greene, a State warrant, wherein he charged that one Zeno Lyon had committed an assault upon him in that county. Lyon was arrested, and pleaded not guilty to the charge.

At the trial of the action on 20 August of the same year, the justice of the peace decided that the defendant was not guilty, and gave judgment, discharging him. He also gave judgment against the prosecutor in that warrant, the present defendant, for the costs of the action; whereupon, he excepted, and appealed to the Superior Court. In that Court, the appeal was dismissed, and the defendant appealed to this Court.

No case upon appeal for this Court was stated.

The *Attorney-General* for the State.
Messrs. Bryan & Burkhead for the defendant.

MERRIMON, J., (after stating the facts). The security in the undertaking upon appeal executed the same by annexing to his signature a simple cross mark. On the day he thus executed it, he justified the same before the clerk of the Court.

In this Court the Attorney-General moved to dismiss the appeal, and assigned the following grounds in support of his motion:

1. The undertaking on appeal is defective in the manner of its execution, there being no evidence that (626) it was executed by Moye, the alleged surety.

2. That the case on appeal was not prepared and served as required by the statute and rules of practice in such cases made and provided. The affidavit of Monroe does not show sufficient service on Lyon, and it does not pretend to have made service on the Solicitor.

3. For that the appeal involves only a question of costs.

We are of opinion that the motion to dismiss the appeal can not be allowed. The several grounds assigned in support of it are, in our judgment, untenable. As to the first one: While generally a mere cross mark employed by a person,

who can not write, as evidence that he executed a paper-writing to which it is affixed, can not be proven, yet a person may have a mark so peculiar and so uniformly used by him for such purpose, as that it may become well known as his mark, and may be proven just as the signature of one who writes may be proven to be in his own handwriting. A mark, like the signature of a party, is intended to be evidence of the fact that the party making it, made it and identifies himself with the paper-writing signed in the way and for the purpose indicated in it, and it is just as binding ordinarily, without a subscribing witness as with one; but it may be proven as a signature may be, by one who saw it made, or who heard the maker acknowledge it to be his, and the maker himself is generally a competent witness to prove that he made it.

In this case, the security to the undertaking upon appeal executed it by making a simple cross mark—there is no subscribing witness, but he is a competent witness to prove that he made it—some one may have seen him make it, or he may have acknowledged in the presence of some one that he made it. He justified as security to the undertaking before the Clerk of the Court, and he thus by the strongest implication admitted the mark to be, and accepted it as his. He must be treated as having admitted it to be his.

(627) In respect to the second ground assigned, it must be conceded that there was no statement of the case for this Court upon appeal. But this is a case in which such statement was not necessary—the ground of exception to the order of the Court dismissing the appeal, sufficiently appears in the record. *State v. Crook,* 91 N. C., 536.

And as to the third ground assigned: This is not a case in which no appeal lies from a judgment for costs merely. Here, the subject-matter of the proceeding—the whole matter in litigation—is the alleged liability of the defendant as prosecutor to pay the costs of a criminal action. Where the purpose of the action or proceeding, as in this case, is to recover costs, an appeal lies from the judgment of the Court as in other cases. It is when it appears that the subject-matter of the action has been destroyed, or lost, or adjusted in some way by the parties, that an appeal will not be allowed from a judgment for costs only. Costs in such a case is not

the real matter in litigation. *May v. Darden,* 83 N. C., 247.

Passing to the exception of the defendant, it seems that the Court allowed the motion to dismiss the appeal from the judgment of the justice of the peace taxing the defendant as prosecutor with the costs of the criminal action before him, on the ground that no appeal lay in such a case. We are not able to discover in the record any other possible ground; the counsel on the argument did not suggest any other, and we must accept this as that on which the Court based its action.

So treating the case, we think that an appeal did lie in favor of the defendant. A peace warrant is a criminal action, and an appeal would not lie in favor of a defendant in such a proceeding. *State v. Lyon, ante,* 575. But the proceeding springing out of such an action to tax the prosecutor therein with costs, assumes the nature of a civil action. The purpose is not to punish the prosecutor, but compel him to pay costs, that were, at his instance, needlessly and wrongfully incurred. The fact that he may in a contingency, be imprisoned if he fails to pay the costs, does not render the proceeding criminal—he may be imprisoned, not as a punishment—but to compel him to pay the costs. The (628) extreme method of imprisonment to compel the payment of costs, is authorized only in cases where the Court finds that the proceeding or prosecution instigated by him was frivolous or malicious. In *State v. Powell,* 86 N. C., 640, SMITH, Chief Justice, said: "In saying this, we do not dispute the efficacy of the appeal in removing for review so much of the adverse judgment as is personal to the prosecutor and taxes him with the payment of costs. To this extent, the proceeding assumes the character of a civil controversy, and the legislation would not be obnoxious to the objections directed against the removal of the criminal charge," etc. This Court has repeatedly entertained appeals in cases like this in material respects. *State v. Cannady,* 78 N. C., 539; *State v. Murdock,* 85 N. C., 598; *State v. Crosset,* 81 N. C., 579.

As therefore the appeal lay, the Court ought not to have dismissed it, but ought to have proceeded therein according to law.

ERROR. Reversed.

Cited: McCoy v. Lassiter, 94 N. C., 132; *Brooks v. Austin, Ib.,* 224; *Tatom v. White,* 95 N. C., 460; *Hobson v. Buchanan,* 96 N. C., 447; *Mfg. Co. v. Simmons,* 97 N. C., 90; *Sellers v. Sellers,* 98 N. C., 20; *Devereux v. McMahon,* 102 N. C., 286; *S. c.,* 108 N. C., 143, 145; *Elliott v. Tyson,* 116 N. C., 185; *S. c.,* 117 N. C., 115; *State v. Horne,* 119 N. C., 854; *Herring v. Pugh,* 125 N. C., 439.

STATE v. GEORGE MCNAIR.

Indictment—Rape—Evidence—Practice.

1. Declarations of the prisoner made after the commission of the alleged offense, are not admissible as evidence for him unless they form part of the *res gestæ.*
2. To support an exception to the exclusion of testimony, the testimony rejected should be stated so that it may appear to be relevant.
3. The prisoner set up as a defense that he was under fourteen years of age when the alleged offense was committed. Upon this point there was conflict of evidence. *Held,* 1st, that the burden of proof as to his age was on the prisoner; 2d, that it was competent for the jury to look at the prisoner, and draw reasonable inferences as to his age from his appearance and growth.
4. If the Judge make a slip in a remark made in the presence of
(629) the jury, it is competent for him to correct it afterwards by proper instructions to them.

(*State v. Tilly* 25 N. C., 424; *State v. Hildreth,* 31 N. C., 440; *State v. Huntly* 25 N. C., 418; *State v. Vann,* 82 N. C., 631; *State v. Reitz,* 83 N. C., 634; *State v. Brandon,* 53 N. C., 463; *State v. Patterson,* 63 N. C., 520; *State v. Worthington,* 64 N. C., 594; *State v. Dula,* 61 N. C., 437; *Street v. Bryan,* 65 N. C., 619; *Knight v. Killebrew,* 86 N. C., 400; *McAllister v. McAllister,* 34 N. C., 184; *State v. May,* 15 N. C., 328; *State v. Davis, Ibid.,* 612; *State v. Arnold,* 35 N. C., 184; cited and approved.)

INDICTMENT for Rape, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of ONSLOW.

The jury returned a verdict of guilty, and the Court gave judgment thereon against the prisoner, from which he appealed.

The case is stated in the opinion of the Court.

The *Attorney-General* for the State.

No counsel for the defendant.

SMITH, C. J. The prisoner is charged with having committed a rape upon the body of Lizzie A. Edins, in an indictment containing two counts, the one being silent as to her age, the other alleging it to be under ten years. Upon the plea of not guilty, the prisoner was put on trial before a jury, at Spring Term, 1885, of Onslow Superior Court, and convicted of the offense. Thereupon, sentence of death being pronounced, the prisoner appeals to this Court. The record discloses two exceptions to the rulings of the Court, which we are required to review and determine.

1. The prisoner's counsel proposed to prove what was said by the prisoner to the officer, who made the arrest, in reference to the imputed crime. There had been no charge made against him by the arresting officer, nor had the State shown any communication between them, or between the prisoner and any one else on the subject. The evidence, on objection from the Solicitor, was disallowed as incompetent and tthe prisoner excepted. Similar evidence was (630) afterwards offered, and upon the same grounds rejected.

It is settled by repeated adjudications, that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received; and they are competent only when they accompany and constitute part of the *res gestæ*.

"As evidence," remarks RUFFIN, C. J., "what a party says, is received against him, not for him. It does not prove the truth to be as related; and the truth is the subject of inquiry before the jury. It does not matter that the account is not a recent one, but was given early after the transaction. Unless the declarations form a part of the transaction, they are not receivable in evidence." *State v. Tilly,* 25 N. C., 424; *State v. Hildreth,* 31 N. C., 440. To the same effect are *State v. Huntley,* 25 N. C., 418; *State v. Vann,* 82 N. C., 632; *State v. Reitz,* 83 N. C., 634; *State v. Brandon,* 53 N. C., 463.

There are no repugnant rulings to be found in *State v. Patterson,* 63 N. C., 520, and *State v. Worthington,* 64 N. C., 594. These cases simply decide that where a person is charged with an offense, and this is produced as evidence

against him, the accused has a right to have what he said in response to the charge, heard by the jury in repelling the inference of admitted guilt.

But it is not shown what the declarations proposed to be proved were, so that it can not be seen that they were at all relevant to the issue, and that there is error in the rejection. To sustain the exception this should be made to appear. *State v. Dula,* 61 N. C., 437; *State v. Worthington, supra; Street v. Bryan,* 65 N. C., 619; *Knight v. Killebrew,* 86 N. C., 400, and cases there cited.

II. The prisoner set up as defense, that he was under fourteen years of age at the time of the alleged criminal act, and testimony was offered upon this issue, the mother of the prisoner rendering it somewhat uncertain whether he was of that age, and a number of witnesses for the State (631) placing it at about seventeen years.

In instructing the jury upon this part of the defense, the Court used this language: "It is for you to say whether he is under fourteen years of age or not, being, as you see him before you, grown to the stature of manhood." Upon a suggestion from the Solicitor that the remark might be misconstrued, as intimating an opinion as to the prisoner's age, the court, not conceding that what was said was susceptible of such a construction, recalled the jury, as they were retiring, and said to them: "What the Court said to them in reference to the size and appearance of the prisoner, was not to be taken by them as indicating the opinion of the Court as to the prisoner's age, but that they had a right to consider his size and appearance to aid them in coming to a conclusion as to his age."

To this charge and action of the Court, exception was taken by the prisoner.

If the language first employed was obnoxious as the intimation of an opinion upon a disputed fact, and we do not admit that it was, the objection is removed by the subsequent explanatory statement made before the jury entered upon their deliberations. This was a prudent and proper course on the part of the presiding Judge.

"It is undoubtedly proper and in the power of the Court," observes RUFFIN, C. J., in *McAllister v. McAllister,* 34 N.

C., 184, "to correct a slip, by withdrawing improper evidence from the consideration of the jury, or by giving *such explanations of an error* as will prevent it from misleading a jury," citing *State v. May,* 15 N. C., 328.

But if the patent fact of the prisoner's full growth was before the jury and beyond dispute, how could there be error in telling the jury what they saw themselves?

In *State v. Davis,* 15 N. C., 612, the Court in the charge stated, "that the prosecutor appeared to have given a very fair and candid statement; that he seemed to be a credible man"; but he added, "perhaps I am going too far in speaking thus of the prosecutor and his testimony. (632) You gentlemen are the exclusive judges of such matters. I have no right to express an opinion upon facts of the case, and therefore, you will decide entirely for yourselves what degree of credit you will give the prosecutor, without being at all influenced by any inadvertent remarks of mine." It was held there was no error in the charge, even requiring correction, as the case states that the "prosecutor and principal witness was a respectable man." The Court then, GASTON, J., speaking, discuss the effect of a correction, were such necessary, and say: "We are of opinion that there is a precise analogy between the case in which improper evidence has been received, and an intimation of an opinion upon a question of fact, inadvertently given by the Court. So soon as the mistake is discovered, the Judge should specially instruct the jury wholly to disregard what they ought not to have heard. In either case, if there be reason to believe that the opinion inadvertently given, or the testimony improperly admitted, has biased the minds and perverted the judgment of the triers, a sufficient cause is furnished, addressed to the *discretion* of the Judge, for setting aside the verdict. But without some such reason, the presumption of law is, that what the Court has withdrawn from the jury, as unworthy of credit and wholly improper for consideration, has in truth been utterly disregarded. Any other presumption can not be warranted without disrespect to a tribunal, which the nature of our institutions proclaim as having the capacity and probity to decide rightly, where the materials for a correct decision are fairly laid before them. *If, therefore, the Judge*

had inadvertently expressed an opinion that ought to have been withheld, the complete removal of the opinion, removed also the ground of legal exception to the trial." This lucid exposition of the principle, leaves to us nothing to add, and has our cordial approval. Again, it was competent for the jury to look at the prisoner and draw such reasonable inferences as to his youth, as his appearance warranted. Indeed, the burden rested on him to prove his incapacity from nonage to commit the imputed crime.

In *State v. Arnold,* 35 N. C., 184, it was insisted (633) for the prisoner charged with homicide, that he was apparently under fourteen years of age, and it was therefore incumbent upon the State to prove that he was over that age, or, if under it, responsible for the act. In answer to this contention, RUFFIN, C. J., thus speaks:

"The objection assumes as a fact that the prisoner appeared to be under fourteen years of age. As there was no proof on this point, it could only be judged of by *inspection,* and, so far as that goes, it must be taken to have been decided against the prisoner, *both by the Court and the jury.* As the subject of direct proof, the *onus was certainly* on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved."

There is no error in the record, and the exceptions were correctly overruled.

NO ERROR. Affirmed.

Cited: State v. Ward, 103 N. C., 423; *State v. Stubbs,* 108 N. C., 775; *State v. Rhyne,* 109 N. C., 795; *State v. Williams, Ib.,* 848; *Wilson v. Mfg. Co.,* 120 N. C., 95; *State v. Dewey,* 139 N. C., 562; *Baker v. R. R.,* 144 N. C., 40.

(634)

AMENDMENTS TO THE RULES.

At this Term the following amendment was made to Rule 2, section 3, paragraphs 1 and 3, in regard to the call of cases in the Supreme Court:

Causes from the First District will be called on Wednesday of the first week of each Term of the Court; from the Second District on Monday of the second week; from the Third District on Monday of the third week; from the Fourth District on Monday of the fourth week; from the Fifth District on Monday of the fifth week; from the Sixth District on Monday of the sixth week; from the Seventh District on Monday of the seventh week; from the Eighth District on Monday of the eighth week; from the Ninth District on Monday of the ninth week; from the Tenth District on Monday of the tenth week; from the Twelfth District on Monday of the eleventh week; from the Eleventh District on Monday of the twelfth week.

It is further ordered, that paragraph three, of section three, of Rule two, be amended so as to read as follows:

(3) At the Term of the Court held next preceding the end of the year, no cause will be called and tried after the expiration of the twelve weeks designated, unless by consent of parties and the assent of the Court.

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