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VOL. 94

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1886.

REPORTED BY

THEODORE F. DAVIDSON.

(VOL. 3.)

Annotated Through Vol. 241

RALEIGH, N. C.
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1956

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FEBRUARY TERM, 1886.

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*Appointed by the Court, on the death of WILLIAM H. BAGLEY.

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FEBRUARY TERM, 1886.

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MEMORANDUM

The case of *State v. Moore*, 93 N. C., 500, was tried before Shipp, Judge, and not Gudger, Judge, as there reported.

CASES REPORTED

CASES CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH.

FEBRUARY TERM, 1886.

THOMAS ELY v. C. M. EARLY, ET ALS.

Amendment—Joining Causes of Action—Action to Recover Land—Statute of Limitation—Mistake—Correction—Jury Trial.

1. The Court cannot, except by consent, allow an amendment which changes the pleadings so as to make it substantially a new action, but an amendment which only adds to the original cause of action is not of this nature, and may be allowed.
2. In an action to recover land, the Court may allow an amendment so as to set up a mistake in a deed.
3. An action to recover the possession of land, and to correct a mutual mistake in a deed for the same land, executed by the plaintiff to the defendant, constitute but one cause of action.
4. Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but this rule does not apply when the new matter allowed by the amendment constitutes a part of the original cause of action.
5. So where, in an action to recover land, the Court allowed the plaintiff to amend, so as to set up a mutual mistake in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced.
6. A Court will only correct a mistake in a deed or other written instrument, upon clear, strong and convincing proof, and it is error in the Court to charge the jury that the plaintiff is entitled to have the issue found in his favor upon a mere preponderance of evidence.
7. In such cases, if the Court should be of opinion that, in no reasonable view of the evidence, is it sufficient to warrant a verdict establishing the mistake, a verdict should be directed for the defendant.

8. In the trial by a jury of issues arising in equitable matters, the rules of equity should be followed as far as possible.

9. Issues of fact, as distinguished from questions of fact, in equitable as well as legal actions, must be tried by a jury; but this does not authorize the finding of such issues on less evidence than a chancellor would find them.

(2) CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at Spring Term, 1883, of the Superior Court of HERTFORD County.

This action was brought to recover the possession of two adjoining tracts of land. At the appearance term of the Court, the plaintiff filed the ordinary complaint in such cases, describing the land, alleging title in himself to the same, the wrongful possession thereof by the defendants, etc. The appellant defendants, in their answer, denied every material allegation in the complaint.

At a subsequent term, the plaintiff moved for leave to amend the complaint, which was granted by the Court, the appellant defendants objecting. In pursuance of such leave, the plaintiff filed a further complaint, alleging, as to one of the tracts of land mentioned, that unintentionally, by inadvertence, and the mutual mistake of the parties to it, he had executed a deed embracing the same land to the defendant Early; that the latter had admitted the mistake and consented to a proper correction of the deed; that on hearing that the husband appellant was about to purchase the land embraced by the deed from Early, he notified him of such mistake, and not to

(3) purchase; that he declared that the deed was registered and he would purchase and take the risk; that he did purchase the land with notice of the plaintiff's equity in that respect; and he demanded judgment that the deed be corrected. Only the appellants filed an answer, denying all the material allegations in this amended complaint, and they further alleged that more than three years had elapsed next after the plaintiff had knowledge of the alleged mistake, and *before the filing* of the amended complaint, and therefore his alleged right to have the deed corrected was barred by the statute of limitations. As to this part of the case, three issues of fact, whereof the following is a copy, were submitted to the jury, and they responded to the two first in the affirmative, and the third in the negative:

(1) "Was the interest of plaintiff, Thomas Ely, in the Brittain land by mistake of both parties conveyed by the deed of 26th August, 1875, to C. M. Early?"

(2) "Was A. B. Atkins (husband appellant) notified by Thomas Ely or C. M. Early of this mistake, and of Thomas Ely's claim to said land before November 4th, 1878?"

(3) "Did the plaintiff discover, more than three years before this suit was commenced, that the Brittain land was conveyed in the deed of August, 1875?"

The Court gave the jury the following instructions, to which the appellants excepted:

"That the burden of showing the alleged mistake was upon the plaintiff; that it must be done, not beyond a reasonable doubt, but by a preponderance of evidence—that is to say, if the plaintiff's evidence was placed in one end of the scales, and the defendant's in the other, and the one exactly balances the other, then the issue should be found in favor of the defendants. But if the plaintiff's evidence weighs down ever so slightly that of the defendants, then in favor of the plaintiff."

The appellants moved for judgment *non obstante veredicto,* which motion was overruled, and they excepted.

There was judgment on the verdict for the plaintiff, and the (4) defendants appealed.

Messrs. W. D. Pruden and W. B. Shaw, for the plaintiff.

Messrs. R. B. Peebles and Winborne, for the defendants.

MERRIMON, J. (after stating the facts). It is very true that the Court cannot, without the consent of the parties, so amend, change or modify the pleadings in a pending action as to make it substantially a new one. *Merrill v. Merrill,* 92 N. C., 657; *McNair v. Commissioners,* 93 N. C., 364. But its general powers, and especially those expressly conferred by The Code, Secs. 272, 273, to allow amendments of the pleadings "in furtherance of justice," are broad and comprehensive, and in all proper cases should be exercised freely by the Court, having due regard to fairness and the rights of the parties.

That it was competent to allow the amendments made in this case there can be no serious question. It seems that there was some mistake or misapprehension in the preparation of the complaint at first. The plaintiff's cause of action was not fully and sufficiently alleged. It is obvious that the allegations in the further or amended complaint were "material to the case," and such as might, and, indeed, ought to have been made at first, in order to enable the plaintiff to reach the complete merits of the cause of action sued upon, as we shall presently see.

The Code, Sec. 273, expressly provides, among other things, that the Court may, "in furtherance of justice, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a 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 defence, by conforming the pleading or proceeding to the facts proved."

(5) Now, the plaintiff brought this action to recover the land in question. If the allegations in the complaint were true, the land was his, and he ought to have recovered, but it turned out, as was alleged, that by inadvertence and mistake, in the provisions of a deed embracing it, of which the appellants had notice, the legal title to the land was in the husband appellant. At first, the plaintiff filed the ordinary complaint in an action to recover land, alleging title in himself. Why he failed to allege the mistake and material facts in respect to the same, and demand equitable relief, does not appear. Perhaps he may have believed that he had the equitable title to the land and could recover upon that. But whatever may have been the cause of omission, it was competent to allow the amendment by adding further allegations to the complaint. This is what was in legal effect done, however informal the amendment in taking the form of a further complaint.

Treating the right to have the deed corrected for the causes alleged, as a separate cause of action, as certainly in some cases it might be, the plaintiff might have united it with the cause of action at first alleged. The Code, Sec. 267, provides, that "the plaintiff may unite in the same complaint, several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of, (1) the same transaction, or transaction connected with the same subject of action * * * (5) claims to recover real property, with or without damages, for the withholding thereof, and the rents and profits of the same." Plainly, the right to have the deed corrected was "connected with the same subject of action"—the land—and it was directly connected with, and affected the claim "to recover real property." The same section provides, that when such causes of action are united, they must affect "all the parties to the action," and so they do in this case. Such causes of action may be united in the same complaint. One chief purpose of the Code is to facilitate litigation, without multiplicity of actions, and the power of the Court to complete a litigation begun, by amending the

(6) pleadings, is almost unlimited. *Robinson v. Willoughby,* 67 N. C., 84; *McMillan v. Edwards,* 75 N. C., 81.

But under the circumstances of this case, we think the ground of the equitable relief demanded, constituted a part of the plaintiff's cause of action at first alleged, and he did not need to allege two distinct causes of action. His alleged right to recover the land, and directly in that

connection and for that purpose, and as part of it, to have the deed corrected, constituted his cause of action. The legal and equitable rights in respect to the land were so clearly connected, so essentially one, that they might not improperly be regarded and treated as constituting one cause of action.

The defendant had possession of the land, and was seeking in that connection to take an inequitable advantage of a mistake in a deed, whereby the legal title was in him. A part of the plaintiff's cause of action was the right to have the deed corrected.

It is true, that under the common law method of procedure, this could not be so, because, under it, the plaintiff would recover the land by his possessory action at law, after he had had the mistake in the deed corrected in a separate court of equity, wherein alone he could obtain equitable relief; but under the Code method of procedure, as it prevails in this State, legal and equitable relief must be administered in the same court, and may be in the same action, and in some cases, in the same cause of action. The principles, doctrines and rules of law are distinct from those of equity, but they may be administered together by the same Court, when it is appropriate and necessary to do so. *McRae v. Battle,* 69 N. C., 98; *Murray v. Blackledge,* 71 N. C., 492; *Farmer v. Daniel,* 82 N. C., 152; *Condry v. Cheshire,* 88 N. C., 375.

The appellants contended that if the amendment could be allowed, it must be treated as the introduction of a distinct equitable cause of action, the action as to it beginning at the time the amendment was allowed; and further, that as more than three years had (7) elapsed between the time the plaintiff had knowledge of the alleged mistake in the deed, and the time the amendment was allowed, this cause of action was barred by the statute of limitation.

In some cases, no doubt, the time of allowing an amendment would be treated as the beginning of the action, as to the new cause of action introduced, especially in cases where such cause is not a part of, is distinct from and not germane to the cause of action at first alleged. Such a case is that of *Gill v. Young,* 88 N. C., 58.

The present case, however, is not of that class. As we have seen, the matter alleged in the amendment, constituted an essential part of the plaintiff's single cause of action, which was at first imperfectly alleged, and the amendment was intended to perfect the statement of it in the complaint. The action when brought, was intended to embrace the whole cause of action, not simply a part of it, and it was a legal demand upon the defendants to satisfy the plaintiff's claim to the whole extent of his cause of action, and, therefore, the amendment had rela-

tion back to the time when the action was begun. So that the cause of action was not barred by the statute of limitations, taking the facts to be as contended by the appellants. *Wynne v. Insurance Company,* 71 N. C., 121.

The exceptions to the instructions given to the jury must be sustained. We think it very clear that the Court erred in telling them that the plaintiff must prove the affirmative of the issues as to the alleged mistake "by a preponderance of evidence." This ordinary rule of evidence in civil actions does not apply in a case like this.

That the Court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed, or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only where the mistake is made to appear by clear, strong, and convincing proof. The Court must be satisfied from the evidence, beyond reasonable question, of the alleged mistake. By the solemn agreement
(8) of the parties to it, the deed, at once, upon its execution, becomes high and strong evidence of the truth of what is expressed in it, as between the parties to it. One of its chief purposes is to make such evidence, and it ought not to be changed or modified upon the clearest proof of mistake. In some cases, mistake might be manifest from what appears in the deed itself and necessary surrounding circumstances—in others, the evidence of it may be clear, direct, and satisfactory, as where it is mutual, and the interested parties admit it. In such cases, the Court would grant relief without hesitation. In other cases, the evidence may be uncertain, conflicting, and circumstantial, coming from a variety of sources, and unsatisfactory. In such cases, the Court will not disturb the deed or other writing, and upon the strong ground that the parties have agreed to make the writing evidence between them as to the matters contained in it. It must stand, until by a weight of proof greater than itself, a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it. The Court always acts in such cases with great caution and upon the clearest proof. In *Wilson v. The Land Company,* 77 N. C., 452, Mr. Justice BYNUM, having reference to a deed, said:

"The whole sense of the parties is presumed to be comprised in such an instrument, and it is against the policy of the law to allow parol evidence to add to, or vary it, as a general rule. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, relief will be withheld upon the ground that the written paper must be treated as the full and correct expression of the intent, until the contrary is established." The same doctrine is laid down in Story's Eq. Jur., Secs. 153, 157; Pomeroy Eq. Jur., Sec. 859; *Rawley v. Flan-*

nelly, 30 N. J. Eq. R. 612; *Burger v. Dankle,* 100 Pa. St. 113; *Browdy v. Browdy,* 7 Pa. St. 157.

Under the present system of civil procedure in this State, issues of fact as distinguished from questions of fact, arising in equitable actions, as well as like issues arising in actions at law, are to be tried by a jury. Whether this is wise or not, is not for us to (9) determine; but it cannot be, that a jury should find the facts in respect to a question of mistake, such as that in this case, upon less evidence than a Chancellor would do, sitting in a court of chancery. The strength of reason leads to a different conclusion. The law contemplates that a jury shall find such issues, as nearly as may be, as a Chancellor would do in passing upon like issues. The Court should be careful to instruct the jury in such cases, as to the nature of the issue, the application of the evidence produced before them, and, especially, that the instrument in writing to be corrected, is, of itself, strong evidence of what is expressed in it; that, however, it is not absolutely conclusive; and that from the evidence they should be thoroughly satisfied of the mistake alleged, before they would be warranted in finding the affirmative of the issue submitted to them. The peculiar nature of such issues, renders it necessary that this should be done.

As we have said above, the Court will not, in the exercise of equitable jurisdiction in cases like this, grant relief, unless the proof of mistake be clear and satisfactory. Therefore, if the Court should be of opinion, that in no reasonable view of the whole of the evidence produced on the trial of the issue, it is sufficient to warrant a verdict ascertaining the fact of mistake, then it ought to direct the jury to find the negative of the issue. In the trial by jury of issues arising in equitable matters, the principles, doctrines and rules of equity, should be observed and applied, as nearly as may be, in the ascertainment of the facts. Otherwise, it would be difficult to administer equity at all in many cases. *Todd v. Campbell,* 32 Pa. St., 250; *Piersall v. Neile,* 63 Pa. St., 420; *Stockbridge Iron Company v. Hudson Iron Company,* 102 Mass., 45.

We are unable to determine the merits of the motion for judgment *non obstante veredicto,* because all the evidence in reference to the issue as to the alleged mistake has not been sent up. If the evidence was insufficient in any reasonable view of it, to warrant the jury in finding the fact of mistake, then it may be, the appellants (10) were entitled to judgment. The evidence should have been sent up, if the appellants desired to have the benefit of the exception in this respect.

There is error for which there must be a new trial. Let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

Cited: Hemphill v. Hemphill, 99 N.C. 440, 441, 442; *McNair v. Pope,* 100 N.C. 409; *Glover v. Flowers,* 101 N.C. 141; *Summerlin v. Cowles,* 101 N.C. 476; *Harding v. Long,* 103 N.C. 6; *Giles v. Hunter,* 103 N.C. 202; *Pollock v. Warwick,* 104 N.C. 641; *Berry v. Hall,* 105 N.C. 165; *Southerland v. Fremont,* 107 N.C. 572; *Hester v. Mullen,* 107 N.C. 726; *Bergeron v. Ins. Co.,* 111 N.C. 50; *McMillan v. Baxley,* 112 N.C. 586; *Cobb v. Edwards,* 117 N.C. 253; *Mizzell v. Ruffin,* 118 N.C. 71; *Craven v. Russell,* 118 N.C. 565; *Goodwin v. Fertilizer Works,* 123 N.C. 164; *Mfg. Co. v. Blythe,* 127 N.C. 327; *Sallenger v. Perry,* 130 N.C. 138; *Warehouse Co. v. Ozment,* 132 N.C. 846; *Boles v. Caudle,* 133 N.C. 533; *Gillis v. Arringdale,* 135 N.C. 301; *Reynolds v. R. R.,* 136 N.C. 348; *Perry v. Ins. Co.,* 137 N.C. 404; *Joyner v. Early,* 139 N.C. 50; *Rudisill v. Whitener,* 146 N.C. 413; *White Co. v. Carroll,* 147 N.C. 334; *Fraley v. Fraley,* 150 N.C. 503; *Ellett v. Ellett,* 157 N.C. 163; *Makely v. Montgomery,* 158 N.C. 591; *Bennett v. R. R.,* 159 N.C. 347; *Culbreth v. Hall,* 159 N.C. 591; *Cooper v. R. R.,* 165 N.C. 581; *Cedar Works v. Lumber Co.,* 168 N.C. 394; *Glenn v. Glenn,* 169 N.C. 730; *Hardware Co. v. Banking Co.,* 169 N.C. 747; *Lefler v. Lane,* 170 N.C. 183; *Ray v. Patterson,* 170 N.C. 227; *Champion v. Daniel,* 170 N.C. 332; *Grimes v. Andrews,* 170 N.C. 523; *R. R. v. Dill,* 171 N.C. 177, 178; *Coulter v. Wilson,* 171 N.C. 539; *Johnson v. Johnson,* 172 N.C. 532; *Hardware Co. v. Lewis,* 173 N.C. 300; *McLaughlin v. R. R.,* 174 N.C. 185; *Boone v. Lee,* 175 N.C. 384; *Taylor v. Edmunds,* 176 N.C. 329; *Lefkowitz v. Silver,* 182 N.C. 348; *Montgomery v. Lewis,* 187 N.C. 579, 581; *Corporation Com. v. Bank,* 192 N.C. 370; *S. c.,* 193 N.C. 117; *Scales v. Trust Co.,* 195 N.C. 775; *Hubbard & Co. v. Horne,* 203 N.C. 209; *Henley v. Holt,* 221 N.C. 275; *Perkins v. Langdon,* 233 N.C. 246; *Erickson v. Starling,* 235 N.C. 654; *Wheeler v. Wheeler,* 239 N.C. 649.

THOMAS RAY v. W. T. BLACKWELL ET ALS.

Evidence—Parol to Vary Written Instrument.

1. Parol evidence is not admissible to alter or contradict the terms of a written contract.
2. Where the part of the contract attempted to be proved by parol has been omitted by fraud, or by *mutual* mistake or accident, it may be used as a defence to an action on the contract, if properly pleaded.

CIVIL ACTION, tried before *Gilmer, Judge,* and a jury, at January Special Term, 1886, of the Superior Court of DURHAM County.

The plaintiff entered into a contract, written and under seal, with the defendants William T. Blackwell and Julian S. Carr, constituting the partnership firm of Blackwell & Carr, for the rent of a certain house owned by them, expressed in the following terms:

"The undersigned, Thomas Ray, hereby agrees to rent from (11) Blackwell & Carr the premises known as House No. 18, situate on Rail Road street, for the term of twelve months, at the price of ten dollars per month, payable monthly in advance. And it is further agreed, that the said Thomas Ray shall take good care of the said property, not committing, nor permitting any waste thereon, and shall not sublet the same without the written consent of said Blackwell & Carr. And further, that if the rent shall not be paid at the first of each and every month, or if at any time any of the stipulations hereof are broken, then the term of the said Thomas Ray therein shall cease, and the said Blackwell & Carr shall resume their possession of the same, which the said Thomas Ray agrees to surrender, waiving all demand and notice to which he might otherwise be entitled under the law.

"In testimony whereof, the said Thomas Ray has hereunto set his hand and seal the 3rd day of September, 1883.

his
"THOMAS × RAY, (Seal).
mark.

"Witness:
"N. A. RAMSEY."

Under this contract of lease, confined to a single room in the numbered tenement, the plaintiff held possession for about one month, as his complaint alleges, when the defendant Ramsey, as agent for, and under the authority of his co-defendants, took possession of the house, in the presence of, and against the remonstrance of the plaintiff, and in the course of several days removed it to another locality, in doing which it was rendered uninhabitable, and plaintiff was compelled to leave. For this invasion of the plaintiff's possession and the damages consequent thereon, the present action was instituted by the issue of a summons early in the next month.

The answer, not controverting the making of the lease nor the entry upon the premises and removal of the house, defends their action by averring that there was a contemporary verbal agreement (12) accompanying the execution of the covenant, that the lessors should have the right, to be exercised at their pleasure, to remove the house at any time during the year, and the lease should terminate, and that they had availed themselves of this reserved power.

Upon the trial of issues before the jury, the defendants proposed to prove, and after objection made by plaintiff and overruled, were allowed to prove, by the defendant Ramsey, examined as a witness for the defendants, that such agreement as is set out in the answer was made; that he told the plaintiff he could not rent the property for a longer time than it was the pleasure of his employers to allow the house to remain where it was; that they intended to remove it, and, if during the twelve months, they should choose, they were to have full liberty to do so and plaintiff must surrender possession.

There was a verdict and judgment for the defendants, and the plaintiff appealed.

Mr. John Manning, for the plaintiff.

Mr. W. W. Fuller, for the defendants.

SMITH, C. J. (after stating the facts). It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound, 1 Greenleaf Ev., Sec. 76. *Etheridge v. Palin,* 72 N. C., 213.

The cases cited do not contravene this rule, and rest upon the idea that the writing does not contain the contract, but is in part execution of it. Such is the ruling in *Twidy v. Sanderson,* 31 N. C., 5;
(13) *Daughtry v. Boothe,* 49 N. C., 87; *Manning v. Jones,* 44 N. C., 368; *Perry v. Hill,* 68 N. C., 417; *Woodfin v. Sluder,* 61 N. C., 200; *Kerchner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57; *Terry v. Railroad,* 91 N. C., 236; *Sherrill v. Hagan,* 92 N. C., 345; *Willis v. White,* 73 N. C., 484.

The case most relied on and pressed in support of the admissibility of the testimony, is that of *Kerchner v. McRae, supra,* the facts of which, summarily stated, are these: John McCallum died indebted to Charles McRae and Henry McCallum who were partners, doing business in the individual name of the former. The executors of the deceased gave their bond for the amount due, and at the same time it was agreed that the proceeds of certain cotton deposited with the firm by the testator in his life time, when sold, should be applied in payment of the bond, and credited thereon. The bond passed into the hands of the plaintiffs, subject to all the equities attaching to it when held by

the obligees, without endorsement of the agreed credit. This evidence was held competent by the Court, and properly so, since it did not in any way modify the terms of the bond, but provided a mode of payment, which the *holders* were to carry into effect and neglected to do. Out of this contemporary contract springs the defendants' equity to have their testator's assets applied to a debt which they had assumed, and in their exoneration *pro tanto,* and which was enforced. Somewhat similar is the ruling in *Willis v. White,* above cited.

The true ground upon which such evidence is received, is that it shows the contract of the other party to the agreement, or the part not committed nor intended to be committed to writing, and consequently not constituting the entire agreement.

We do not intend to say, that if the excluded portion of the full parol agreement for renting not contained in the writing, has been left out through fraud or *mutual mistake or accident,* there is not an equitable power residing in the Court for its reformation, so that it shall effectuate the common understanding, when the pleadings are framed in such a way as to admit the defence. Undoubtedly this may be done, but this is not the case presented to us, and our ruling rests upon (14) a well established rule of evidence prevailing as well in equity as at law. *Howell v. Hooks,* 17 N. C., 258.

There is error. The verdict must be set aside and a new trial had. Let this be certified.

Error. Reversed.

Cited: Nickelson v. Reves, 94 N.C. 564; *Parker v. Morrill,* 98 N.C. 235; *Meekins v. Newberry,* 101 N.C. 19; *Moffitt v. Maness,* 102 N.C. 461; *Bank v. McElwee,* 104 N.C. 308; *Cobb v. Clegg,* 137 N.C. 157; *Bank v. Moore,* 138 N.C. 532; *Evans v. Freeman,* 142 N.C. 65; *Basnight v. Jobbing Co.,* 148 N.C. 357; *Bowser v. Tarry,* 156 N.C. 37; *Wilson v. Scarboro,* 163 N.C. 385; *Potato Co. v. Jennette,* 172 N.C. 4; *Thomas v. Carteret,* 182 N.C. 379; *White v. Fisheries Co.,* 183 N.C. 230; *Overall Co. v. Hollister Co.,* 186 N.C. 209; *Slayton v. Comrs.,* 186 N.C. 695; *Exum v. Lynch,* 188 N.C. 395; *DeLoache v. DeLoache,* 189 N.C. 400; *Watson v. Spurrier,* 190 N.C. 730; *Lumber Co. v. Sturgill,* 190 N.C. 780; *Hardware Co. v. Kinion,* 191 N.C. 219; *Kindler v. Trust Co.,* 204 N.C. 201; *Sakellaris v. Wyche,* 205 N.C. 174; *Carlton v. Oil Co.,* 206 N.C. 118; *Winstead v. Mfg. Co.,* 207 N.C. 113; *Oliver v. Hecht,* 207 N.C. 486; *Coral Gables, Inc., v. Ayres,* 208 N.C. 428; *Ins. Co. v. Morehead,* 209 N.C. 175; *Williams v. McLean,* 220 N.C. 506; *S. c.,* 221 N.C. 230; *Bell v. Chadwick,* 226 N.C. 600; *Bost v. Bost,* 234 N.C. 557; *Wilkins v. Finance Co.,* 237 N.C. 403; *Neal v. Marrone,* 239 N.C. 78.

JACKSON B. HARE v. JESSE HOLLOMON ET ALS.

Burnt Records—Recitals in Deeds—Infants—Service on—Guardian ad litem—Judgment Irregular.

1. Where records have been burned or destroyed, the entries in the bound volumes containing the minutes of the Court are admissible in evidence, to establish the regularity of the proceedings.
2. Where land has been sold under a decree of Court, and the records have been destroyed, the recitals in the deeds are evidence of the regularity of the proceedings.
3. Where, under the former system, a petition to sell land for assets was filed in a Court having jurisdiction of the proceeding, and a guardian *ad litem* was appointed, but no service was made on the infants: *it was held*, that even if the judgment was irregular, it was not void, and could not be attacked collaterally.
4. A judgment rendered before the adoption of the Code of Civil Procedure against infants who were not served with process, but who were represented by a guardian *ad litem*, is valid and binding on the infant, unless it appears that no real defence was made for the infant, and that he has suffered thereby.
5. A judgment against an infant who has not been served with process is not void, and will not be set aside to the prejudice of a *bona fide* purchaser without notice.
6. *It seems* that under the provisions of The Code, Sec. 387, decrees against infants who were not served with process are binding, except where fraud enters into and vitiates them.

(15) CIVIL ACTION, tried before *McKoy, Judge,* and a jury, at July Special Term, 1884, of HERTFORD Superior Court.

This was a civil action, prosecuted under a claim of title for the recovery of the possession of the land described in the complaint and withheld by the defendants. It was in evidence that the land formerly belonged to one Josiah Bridgers, who, at his death, in May, 1831, devised the same, subject to the life estate therein of his surviving widow, Charlotte, to John P. Bridgers. The life tenant died in March, 1869, whereupon the plaintiff immediately entered upon the premises, claiming to be owner of the estate in remainder, by virtue of a deed of conveyance made to him on October 20th, 1868, by Timothy Q. Copeland and wife Irene, and continued in the occupation and use thereof until November, 1881, when, without legal process, he was ejected by some of the defendants, all of whom have since remained in possession. John P. Bridgers died intestate, early in 1854, leaving the *feme* defendants Sarah E. and Margaret C., Mary Bridgers, who has since died without issue, Joseph P. Bridgers, John C. Bridgers, and William Bridgers, his children and only heirs at law.

In deducing title from the said John P. Bridgers, the plaintiff introduced from the clerk's office, a bound volume, which purported to contain the records of the county Court of Hertford, from February Term, 1854, to August Term, 1867, and proposed to read therefrom the following entries, as of May Term, 1856:

"Letters of administration on the estate of John B. Bridgers are granted to William Dunning, to whom special letters of administration on said estate have been granted since the last term of this Court, who entered into bond for the sum of twenty-five hundred dollars with William W. Mitchell, Pleasant Jordan and John A. Anderson, sureties thereto, which bond is accepted by the Court, and he duly qualified as administrator by taking the oath required by law."

"WILLIAM DUNNING, administrator of JOHN P. BRIDGERS, deceased,
against
JOSEPH P. BRIDGERS and others, heirs at law of JOHN P. BRIDGERS. (16)

"Petition for the sale of land as assets in the administrator's hands. L. M. Cowper is appointed guardian *ad litem* to the defendants, who accepts service of the petition and submits to a decree."

"It appearing to the Court that the personal estate of John P. Bridgers is insufficient to pay his debts and charges of administration, it is decreed that William Dunning, his administrator, have a license to sell the land mentioned in the petition, on a credit of six months, on the premises, after advertising the same according to law, in order to pay the debts of his intestate and the charges of administration; and that the petitioner make title to the purchaser when the purchase money is paid."

"Issued copy of decree."

It was shown by the present clerk, and others, that the book had been always kept in his office, as a record of the county Court, and was so treated; that the entries were all in the handwriting of L. M. Cowper, who was, in 1856, and had been many years before, clerk of that Court. It was also proved that the court-house had been twice burned—once in August, 1831, and again in the year 1862.

The introduction of this evidence was opposed by the defendants, but admitted by the Court, and exceptions entered. The plaintiff then produced a deed from William Dunning, administrator of John B. Bridgers, made June 10th, 1857, to one Kindred Copeland; a deed from William M. Montgomery, Clerk and Master in Equity of said county, executed on May 1st, 1862, to Timothy Q. Copeland, and a deed from Timothy

Q. Copeland and wife Irene, to himself, the plaintiff, dated on October 28th, 1868. These deeds were all duly proved and registered, and describe and purport to convey the tract of land in dispute. The
(17) first mentioned deed contains a recital in these words:

"That, whereas, the said William Dunning, administrator as aforesaid, by authority of a decree of the County Court of Hertford, at August Term, 1856, last past, directing the said William Dunning, administrator as aforesaid, to advertise and make sale of a certain tract or parcel of land, which the said John P. Bridgers died seized and possessed," etc., describing the tract, "which, reference being had to said order and decree, will more fully and at large appear; and whereas, the said William Dunning, administrator as aforesaid, and by virtue and authority of said decree, did, on the 10th day of October last past, on the premises, after advertising agreeably to act of Assembly, offer the aforesaid tract or parcel of land for sale, at public auction, on a credit of six months, when the said Kindred Copeland appeared and bid the sum of twelve hundred and fifty dollars, being the highest and best bidder, and so became the purchaser; and whereas, the said William Dunning, administrator as aforesaid, did, at May Term, 1857, last past, report to the said County Court of Hertford County, the sale of the land as aforesaid, when the said Court ratified the said sale, and further decreed that the said William Dunning, administrator as aforesaid, should make a deed to the said Kindred Copeland, which reference being had to said decree will more fully and at large appear. NOW, this indenture witnesseth," etc.

The second deed from the Clerk and Master in Equity recites:

"That, whereas, by virtue of a decree of the Court of Equity, obtained at Fall Term, 1860, by the heirs of Kindred Copeland, deceased, for the sale of certain real estate, of which the said Kindred Copeland died owning the same, but not in possession, and the clerk and master being authorized by said decree, did, on the 10th day of June, 1861, expose to public sale upon the premises, one tract of land lying in said county, adjoining," etc., "which was purchased by the said Timothy Q.
(18) Copeland, for the sum of twelve hundred and fifty dollars, he being the last and highest bidder. Now, I, the said William M. Montgomery, clerk and master aforesaid, for," etc.

The last deed conveys the same land for the consideration of one thousand dollars to the plaintiff. It was shown that upon the death of Kindred Copeland, the land descended to Annie, who intermarried with Levi Davis, and W. A. Copeland, his heirs-at-law, and was sold for partition under a decree of the said Court of Equity. The *feme* defendants Parker and Hollomon, were married during the life of said Charlotte Bridgers, and before attaining full age, while the other heirs-at-

law of John P. Bridgers each became twenty-one years of age before the plaintiff's eviction, and have been under no disability.

The defendants insisted that these fragmentary memoranda found upon the records of the former county Court, were insufficient proof of any judicial action, which could have the legal effect of divesting the estate which descended to the heirs-at-law of the intestate and transferring it to the purchaser at the administrator's sale. The Court declined so to charge, and left the inquiry, upon the evidence, to the jury, who rendered a verdict for the plaintiffs.

From the judgment rendered thereon the defendants appeal.

Mr. W. D. Pruden, for the plaintiff.
Messrs. Winborne and R. B. Peebles, for the defendants.

SMITH, C. J. (after stating the facts). We sustain the ruling of the Court as to the admissibility of the record evidence of the proceeding instituted for the sale of the land, and the action of the Court thereunder. Not only do these entries show the special facts which they recite, but by aid of the maxim *omnia presumuntur rite esse acta,* they furnish inferential evidence of the regularity of that precedent action, upon which the validity and efficacy of what those entries show to have been done by the Court, were dependent. This rule is indispensable, when, as in the present case, the original papers in the cause (19) have been burned or lost. Some references will serve to illustrate the principle.

In *Kello v. Maget,* 18 N. C., 414, the petition was filed under the Act of 1830, passed for the relief of such persons as may suffer from the destruction by fire of the records of Hertford County, to establish and enforce a guardian bond, in reference to which GASTON, Judge, uses this language: "But it was to be inquired, first, whether such a bond had ever been given; secondly, if given, whether the defendant's intestate was one of the obligors; and, finally, what were the contracts or terms of the bond. The appointment of Daughtry as guardian, was admitted in the pleadings, and *upon that appointment, a legal presumption arose that he executed a guardian bond, since such a bond is made a prerequisite to the appointment.*"

Again, an entry on the records of the same county Court in these words: "James Clark, guardian for Mason Harrell, Sarah Elizabeth Harrell and James Thomas Harrell, orphans of John T. Harrell, deceased, appeared in open court and renewed his bond as guardian, by entering into bond for the sum of $3,000, and W. M. Montgomery and J. B. Hare, sureties," was held evidence to go to the jury of the existence, execution and terms of the bond, against the defendant in *Harrell*

v. Hare, 70 N. C., 658. In a recent case, *State v. Glisson,* 93 N. C., 506, it is said that the examination of a witness without objection, raises, ordinarily, a presumption that he was properly sworn, because the taking an oath is an indispensable condition to his giving testimony. The statute made to meet cases like the present, interposes and gives legal force to recitals in records, deeds and exhibits, surviving a destruction of the originals.

"The recitals, reference to, or mention of, any decree, order, judgment or other record of any court of record of any county in which the court house, or records of said courts, or both, have been destroyed by
(20) fire or otherwise, contained, recited or set forth in *any deed of conveyance,* paper writing, or other *bona fide* written evidence of title, executed prior to the destruction of the court house and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, Superior Court Clerk, Clerk of the Court of Pleas and Quarter Sessions, sheriff or other officer, or *commissioner appointed by either* of said Courts, and authorized by law to execute said deed or other paper writing, shall be *deemed, taken and recognized as true in fact,* and shall be *prima facie* evidence of the *existence, validity* and *binding force* of said decree, order, judgment or other record so referred to or recited in said deed or paper writing, and shall be to all intents and purposes, binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through, or under them, or either of them." Code, Sec. 69.

The next section makes deeds of conveyance, registered according to law, "*prima facie evidence* of the *existence and validity* of the decree, judgment, order or other record upon which the same purports to be founded, without any order or further restoration or re-instatement of said decree, order, judgment or record, than is contained in this chapter. Sec. 70.

The petition of the administrator, as shown in the docketing of the cause, is against Joseph P. Bridgers and others, heirs-at-law of John P. Bridgers, and as the married defendant is one, so it is shown on this trial who were the others, all of whom were the heirs-at-law of the intestate. It is therefore a reasonable inference that the petition did set out the names of the others, as well as the name of one of the defendants, to whom as a class the land descended. And the same conclusion is deducible from the order of sale made in pursuance of the application.
(21) The next objection to the proceeding is, that the infant defendants were not served with process, and were not rightfully before

the Court, so that the action of the Court is inoperative as to them, and leaves their title undisturbed.

This objection cannot be sustained. Whether served with process or not, there was a guardian *ad litem* appointed by the Court to defend the interests of the infant heirs, and recognizing this representation, the Court proceeded to adjudicate the cause, the subject matter of which and the conversion of the land into assets by an authorized sale, was within the jurisdiction of the Court.

The judgment, if irregular, was not therefore a nullity, but remained in force until set aside or reversed by some proper proceeding directed to that end.

Under the former mode provided for the creditor to subject the lands of his debtor to the payment of the debt, after the ascertained deficiency of the personal estate, by the issue of a *scire facias* against the heirs, or devisees, the process did not issue against the heirs, but service was admitted by the guardian, and the Court held that the infants were in Court, and assigned as the ground of the ruling, that the Court so deciding was the proper judge, and that the record could not be contradicted in the collateral way proposed. *White v. Albertson,* 14 N. C., 241-243.

In *Matthews v. Joyce,* 85 N. C., 258-264, the Court says, "a different practice has long and almost universally prevailed in this State, and this power of appointment, (of a guardian *ad litem* to infant defendants), has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the Court always assumed to protect the interests of such party, and to this end committed them to the defence of this special guardian," and cases are referred to in support of the practice.

In *Larkins v. Bullard,* 88 N. C., 35, certain infants were directed to be made parties, but were not served with process, nor was any guardian *ad litem* appointed for them, nor did their names anywhere appear in the record, and it was held that the judgment rendered (22) against them was irregular, and the Court had the power to set it aside, RUFFIN, J., saying, "it would be a plain violation of right, to leave the judgment standing so as to *operate as an estoppel upon these* infants, when the Court can see that no real defence was ever made for them." Again: In reference to his point, MERRIMON, J., in *England v. Garner,* 90 N. C., 197-201, uses this language in answer to a suggestion that a judgment against a defendant not of full age was void: "If he was an infant, this fact did not render the judgment as to him absolutely void. It was irregular, and might upon proper application have been set aside, not however to the prejudice of *bona fide* purchasers without notice," citing *White v. Albertson, supra; Williams v. Harrington,* 33

N. C., 616; *Marshall v. Fisher*, 46 N. C., 111; Freeman on Judgments, Sec. 513.

In *Day v. Kerr*, 7 Mo., 426, it was held that, where infant defendants were not served with process, but the record showed that, upon their motion, a guardian *ad litem* had been appointed who proceeded in the cause, the decree against the infants was not void and could not be collaterally impeached.

In answer to the suggestion that the interests of the infants were left unprotected, we but repeat the words used in response to a similar objection in *Howerton v. Sexton*, 90 N. C., 581-586. "It does not appear that any successful resistance could have been made to the prayer of the petition, or that any injury accrued thereupon to any of the defendants. His silence *then*, we cannot even now see to have been to their prejudice, or to involve any dereliction of duty to them." Nor, we may add, does it appear that the property did not bring its full value, or that any surplus would be left after payment of the intestate's debts, to come to the heirs. We should be reluctant to disturb titles acquired under the former practice, universally recognized and acted on in this State, thus introducing distrust and confusion in regard to the tenure of estates and the loss of confidence in the judicial action of the Courts, the
(23) mischievous results of which can hardly be foreseen, and we could do so only under clear and cogent convictions of error entering into them. We may add that the General Assembly seemed to have anticipated similar controversies and to have furnished relief in the two enactments of 1879, ch. 257, and of 1880, ch. 23, embodied in The Code, Sec. 387. This legislation declares valid and binding decrees rendered where infants were not, as if they had been, served with process, except when fraud enters into and infects them.

It must be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Sumner v. Sessoms, 94 N.C. 376; *Syme v. Trice*, 96 N.C. 246; *Cates v. Pickett*, 97 N.C. 26; *McGlawhorn v. Worthington*, 98 N.C. 202; *Irvin v. Clark*, 98 N.C. 444; *Brittain v. Mull*, 99 N.C. 492; *Coffin v. Cook*, 106 N.C. 378; *Iseley v. Boon*, 109 N.C. 560; *Smith v. Allen*, 112 N.C. 226; *Smith v. Gray*, 116 N.C. 314; *Sledge v. Elliott*, 116 N.C. 715; *Morrison v. Craven*, 120 N.C. 330; *Morris v. House*, 125 N.C. 557, 562; *Sutton v. Jenkins*, 147 N.C. 16; *Rackley v. Roberts*, 147 N.C. 205; *Hughes v. Pritchard*, 153 N.C. 143; *Barefoot v. Musselwhite*, 153 N.C. 211; *Harris v. Bennett*, 160 N.C. 343, 345; *Pinnell v. Burroughs*, 168 N.C. 319, 321; *Pinnell v. Burroughs*, 172 N.C. 186; *Welch v. Welch*, 194 N.C. 634.

STATE EX REL. McD. PATE & CO. v. LUBY HARPER ET ALS.

Executrix—Personal Property Exemptions—Mortgage.

1. A debtor is entitled to have his personal property exemptions ascertained up to and immediately before the sale.
2. After an execution has been returned with the allotment of the personal property exemption, it becomes an estoppel, but as long as the process remains in the officer's hands, such allotment is *in fieri*, and may be corrected.
3. If property belonging to the judgment debtor has been omitted by the appraisers, they have the power to correct the allotment.
4. While an unregistered mortgage is not valid as to third parties, yet the lack of registration cannot subject to sale under execution, property which would be exempt if there were no mortgages.

CIVIL ACTION, tried before *Connor, Judge,* and a jury, at Fall Term, 1885, of GREENE Superior Court.

There was a judgment for the defendants, and the plaintiffs appealed. The facts are fully stated in the opinion.

Mr. Geo. M. Lindsay, for the plaintiffs.
Mr. Geo. V. Strong, for the defendants.

SMITH, C. J. The plaintiffs' attorney, on their behalf, sued (24) out of the Superior Court of Greene County, and on December 30th, 1884, placed in the hands of R. A. Edwards, a deputy of the defendant Luby Harper, acting sheriff of the county, an execution against John T. Parker, issued upon a judgment recovered by the plaintiffs against him in the sum of $25.70, with interest from December 9th, 1881, and costs, and duly docketed in said court, with direction to lay off the defendant's exemption, and proceed to collect. The deputy accordingly summoned appraisers, who, on December 31st, laid off the debtor's personal property as exempt from execution, and of the value of $150, and returned a descriptive list of the exempt articles on January 5th, 1885, into the office of the Superior Court Clerk, who made a minute thereof on the judgment roll in the action, and the same was duly registered. There were omitted from the allotment two mules and a wagon, the ownership of which the debtor disclaimed, as he had conveyed this property by a mortgage, which, in the argument, it was said had not been registered. Thereupon the plaintiffs' attorney directed the deputy to seize and sell these articles, which he did seize, and the debtor demanded that his personal property exemption be laid off. Accordingly, the deputy again called the same appraisers together, and

they again made out a descriptive list, including the mules and wagon, and the officer made return of the process to the office on January 12th, 1885, with the following endorsement: "Executed by levy upon the personal property and setting apart to him his personal property exemption. No excess and no other property out of which to satisfy this execution belonging to the defendant to be found in my county. January 12, 1885."

The deputy, when required, refused to sell the mules and wagon, or any one of them, to satisfy the writ, and to recover damages for this neglect and alleged breach of the conditions of the sheriff's official bond, the present action is brought against him and the other defendants who are the sureties thereon.

(25) The matters in controversy upon the pleadings, are embodied in three issues, of which two were offered by the defendants, and the third added by the Court; those proposed by the plaintiffs having been refused:

1. Did John T. Parker demand that his personal property exemption be laid off, before the commissioners first laid it off?

2. Did he demand that his personal property exemption be laid off before the commissioners laid it off the second time?

3. Did he select the articles laid off to him the second time?

The jury responded in the negative to the first and third issues, and in the affirmative to the second.

The subject matter of contest before the jury, was whether the allotment of exempt articles was first made by the debtor's demand, or was the voluntary act of the appraisers, done by the direction of the plaintiffs' attorney, upon which its efficacy as a legal allotment was supposed to depend; and here the principal objection to the ruling insisted on, is the validity and conclusive effect of the first allowance, omitting the articles embraced in the list, and its operation, while remaining undisturbed, as an estoppel upon any further similar action of the sheriff and appraisers.

The finding of the jury shows that the debtor did not require his exemption to be set apart until it was done and the list made to include the mules and wagon, all in value falling short of the limit fixed in the law. Const., Art. X, Sec. 1.

The argument for the plaintiffs, appellants, is, that the first action of the appraisers, completed by their report and its registration, was final and exhaustive of their powers as such, and that what was afterwards done is a nullity, thus leaving the unmentioned articles open to execution.

The provision contained in Sec. 504 of The Code, slightly modified in terms, but in substance the same as before its adoption, directs the

proceeding by the appraisers, when ended, to be returned by the officer to the Clerk, for filing with the judgment roll, etc. This direction seems to contemplate a return of the proceeding for exemption with his return of the process to which it is incidental and explanatory. (26) It would be unjust to a debtor to prevent the officer, at the dictation of the creditor only, to appoint the inspectors, and cause their action taken immediately upon the delivery, to be at once transmitted to the Clerk, and thus as an estoppel, to bind the debtor and take away his constitutional rights. We think the debtor is entitled to have his exemption ascertained up to and just before the process is executed by a sale. While the process is in the officer's hands in full activity, the preliminary action of the appraisers is not conclusive, but remains *in fieri*, capable, at their instance, under the call of the officer at lease, of correction and amendment. If property has been omitted, which ought to have been put on the list, but was not known at the time to belong to the debtor so that it could be done, the appraisers ought to have the power, and we think do have it, to enlarge the exemption, so that none which should be exempt shall be sold from him. The mandate of the statute is, that the officer shall make his levy upon the entire personal estate subject to seizure under execution, *but before he sells,* to have so much of it set apart for the debtor, within the limited value, as he may select, and when insufficient, all being below the value, such selection is unnecessary.

The conclusive effect given to the action of appraisers in *Burton v. Spiers,* 87 N. C., 87, has reference to returns made and left in force when the execution of which it is part has been returned, and becomes a record in the cause. We do not consider that a hasty return, as in this instance, brought about by the plaintiffs' own agency, places the proceedings at once beyond the corrective power of both the officer and the appraisers, to the denial of the debtor's constitutional rights. The only regular and legal exemption recognized by the sheriff, is that enlarged by the addition of the mules and wagon, and which in form and effect is but amendatory of the other.

While the unregistered mortgage of the mules and wagon may be effectual between the parties to it, and yet inoperative against the plaintiffs for want of such registration, in the controversy between the plaintiffs and the defendant the right of the latter pre- (27) vails, and the non-registration cannot subject to a sale under execution, that which, if no mortgage had been made, would not be, because of its exemption. *Duvall v. Rollins,* 68 N. C., 220; *Crummen v. Bennett, Ibid.,* 494.

As the sheriff could not legally sell the property thus exempted, there has been no breach of his bond and no dereliction of duty in the premises, and the ruling of the Court must be sustained.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Rankin v. Shaw, 94 N.C. 407; *Etheridge v. Davis,* 111 N.C. 295; *Jones v. Alsbrook,* 115 N.C. 50; *Gudger v. Penland,* 118 N.C. 834; *Gardner v. McConnaughey,* 157 N.C. 482.

M. A. ANGIER, ADM'R., v. LOUIS M. HOWARD.

Subscribing Witness—Evidence—Seal—Consideration—Assignment of Error.

1. Where the subscribing witness to a bond is dead, evidence of his handwriting is admissible to prove the execution of the bond, and it is for the jury to say whether or not the bond was executed.
2. Where a note is under seal, the holder need not show any consideration.
3. Where the jury were allowed to take a certain paper with them to their consultation room, it cannot be assigned as error, if the appellant expressly agreed that they might do so.

This was a CIVIL ACTION, tried before *Gilmer, Judge,* and a jury, at the January Special Term, 1886, of DURHAM Superior Court.

The action was brought by the plaintiff to recover the amount alleged to be due upon the following sealed note:

(28) $150.

Twelve months after date, we, or either of us, promise to pay James House, with interest from date, or order, the sum of one hundred and fifty dollars, for value received. Witness our hands and seals, this 21st of September, 1860.

(Signed) ASA GREEN, [Seal].
his
L. M. × HOWARD, [Seal].
mark.

Attest:
M. H. TURNER.

The handwriting of M. H. Turner, the subscribing witness, admitted to be dead, was proved to be genuine by J. W. Marcom and F. M.

Proctor, the former of whom stated that the general character of M. H. Turner was bad, but that he had never known him to be indicted for any crime; and Proctor stated that some said it was bad, and some said it was good. One Wilkerson was introduced by the plaintiff, who testified that the body of the note, and the words "his mark," were not in the handwriting of M. H. Turner. It was also in evidence that M. H. Turner had been a constable for twenty years, including the time the bond bears date, and entrusted with much business. There was no evidence offered by defendant.

His Honor, among other things not objected to, charged the jury, that when the attesting witness to a bond was dead, its execution may be proved by proof of the handwriting of the subscribing witness, but that the jury must find from all the evidence, whether the defendant in fact executed said bond. The defendant having argued to the jury, that it was a circumstance of suspicion to be weighed by them, that plaintiff had not shown any transaction upon which the note sued on could have been founded, and that no consideration had been shown for the note, the plaintiff asked the Court to charge, and the Court did charge, that a note under seal imports a consideration, and it is not necessary for the holder of the note to show what was the consideration. And on being then asked by defendant's counsel, in the presence of the jury, whether the Court meant by this charge to (29) say mere proof of the handwriting of the subscribing witness was sufficient proof of the execution, the Court replied: "I do not; and have not said anything of the sort to the jury; whether it is sufficient proof is a question for the jury, and that the jury would consider all the evidence and argument of counsel, and determine whether defendant did execute said note or not, by making his mark to the same."

Defendant moved for a new trial for error in the charge, as given above, and also upon the ground that the jury had been allowed to take the bond with them when they retired. The plaintiff's counsel during his argument to the jury, asked if there was any objection to giving the note to the jury, and the defendant's counsel stated there was not, and expressly assented thereto. Thereupon the note was given to the jury and retained by them until they rendered their verdict.

The jury returned a verdict in behalf of the plaintiff, and there was a judgment in his favor. The defendant moved for a new trial upon the grounds of the exceptions taken on the trial. His Honor refused the motion, and the defendant appealed.

Mr. J. W. Graham, for the plaintiff.
Mr. John M. Moring, for the defendant.

ASHE, J. (after stating the facts). The first exception taken by the defendant, was to the charge of the Court, that, when the attesting witness to a bond was dead, its execution may be proved by proof of the handwriting of the subscribing witness, but that the jury must find from all the evidence whether the defendant in fact executed said bond. There was no error in this charge. It is well supported by authorities. *Black v. Wright,* 31 N. C., 447; *Burnett v. Thompson,* 35 N. C., 379; *McKinder v. Littlejohn,* 23 N. C., 66; *United States v. Lyon,* 15 Peters, 290.

The second exception was to the instruction given by his Honor to the jury, "that a note under seal imports a consideration, and
(30) it is not necessary for the holder of the note to show what was the consideration." This is such familiar elementary learning that it is needless to recite any authorities.

The next ground urged by the defendant for a new trial was, that the jury had been allowed to take the bond with them when they retired. But this ground is taken from under the defendant by his having not only not objected to its being given to the jury, but by *expressly assenting to it.*

There is no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Wester v. Bailey, 118 N.C. 195; *Bright v. Marcom,* 121 N.C. 87; *Moose v. Crowell,* 147 N.C. 552; *Cowen v. Williams,* 197 N.C. 433; *Taft v. Covington,* 199 N.C. 57; *Royster v. Hancock,* 235 N.C. 112.

THOS. D. HOLLY v. MARTIN PERRY.

Undertaking to Secure Costs—Bond.

1. In matters of procedure, it is always best to strictly follow all statutory requirements.
2. Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal.
3. Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of either the plaintiff or defendant, or the surety, it was held to be sufficient.

CIVIL ACTION, heard by *Avery, Judge,* at Spring Term, 1884, of the Superior Court of BERTIE County.

HOLLY *v.* PERRY.

At the appearance term, the plaintiff having filed his complaint, the defendant moved to dismiss the action upon the ground that the plaintiff had not given an *undertaking* as required by The Code, Sec. 209, which provides that, "before issuing the summons, the clerk shall require of the plaintiff, either to give an undertaking, with sufficient surety, in the sum of two hundred dollars, with the condition that the same shall be void, if the plaintiff shall pay the defendant all such costs as the defendant shall recover in the action," etc.

The plaintiff insisted that he had given a "bond" on the back, (31) or outside, of the summons, which was a substantial compliance with the statute, whereof the following is a copy:

"We acknowledge ourselves bound unto defendant in this action in the sum of two hundred dollars, to be void, however, if the plaintiff shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

"Witness our hands and seals this ..... day of ....., A. D. 188 ....

[Seal].

[Seal].

(Signed) J. B. MARTIN, [Seal]."

The Court held that this writing was not a substantial or any compliance with the statute recited above, and gave judgment dismissing the action; whereupon the plaintiff having excepted, appealed to this Court.

Mr. R. B. Peebles, for the plaintiff.

Mr. W. D. Pruden, for the defendant.

MERRIMON, J. (after stating the facts). The clerk ought to have required, and the plaintiff ought to have given, a formal *undertaking*, as required by the statute. Indeed, it is more orderly, better and safer, in all cases to observe strictly statutory requirements in matters of procedure. A contrary course never fails to result in irregular and confused practice, and is attended in almost every case with more or less hazard to litigants.

The bond written on the summons in this case, is certainly informal, and in some respects not very definite and certain, but taking it in connection with the summons, its purpose as indicated by its terms, and applying it as contemplated by the statute, we think it ought to be treated as in effect a sufficient undertaking. Although in form a bond, the law determines its nature and effect, and treats it as (32) an undertaking under seal. The seal does not defeat its pur-

pose. The clerk and the obligee intended it to be taken with, and as part of the summons, and by reasonable, just and almost necessary implication, the words "defendant" and "plaintiff" employed in it, mean, and were intended to mean, the persons mentioned in the summons by name as such, and as certainly as if they had been mentioned by their names respectively in the body of the bond. The sum of money mentioned in, and the condition of, the bond, are such as the law requires, and it must be treated as a sufficient undertaking.

There is error. Let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

Cited: Comron v. Standland, 103 N.C. 211.

ALICE JONES AND OTHERS v. JOHN DESERN AND OTHERS.

Partition—Practice in Special Proceeding.

1. When an issue of law is joined in a special proceeding, it is the duty of the Clerk to transmit it to the Judge for his decision.
2. It is the duty of the Judge to decide the question thus presented, and to transmit his decision in writing to the Clerk, who will then proceed with the special proceeding according to law.
3. It is irregular for the Judge in making his decision to order the Clerk to place the proceeding on the docket of the regular term for trial—it being the duty of the Clerk to do this without such order when an issue of facts is joined.
4. When an issue of fact is joined in such proceeding, or issues of both fact and law, it is the duty of the Clerk to place the proceeding on the docket of the trial term, for trial.
5. When the issues of both fact and law are decided, the Clerk proceeds to give all other orders and judgments as and for the Court, these orders and judgments being regarded as made by the Court through its proper officer.

(33) SPECIAL PROCEEDING for the partition of land, heard on appeal from the Clerk, by *Gilmer, Judge,* at January Special Term, 1886, of DURHAM Superior Court.

The facts are set out in the opinion.

The defendants appealed.

Mr. W. W. Fuller, for the plaintiffs.

Mr. R. C. Strudwick, for the defendants.

MERRIMON, J. On the 15th day of April, 1885, the plaintiffs began this special proceeding in the Superior Court of the county of Durham, by summons returnable on the 27th day of the same month. On the last named day they filed their petition, in which they alleged that they were tenants in common with the defendants, of the lands described therein, and demanded judgment that the same be partitioned among such tenants according to law, etc.

On the same day the defendants filed their answer to the petition, in which they alleged that then, and at and before the bringing of the special proceeding, there was another action in the same court "pending between the same parties for the same cause, to-wit, the recovery of the alleged interest of the said Alice Jones in and to the lands described in the petition," and they demanded "judgment of the summons and petition herein, that the same may be quashed."

Thereupon the plaintiffs moved "to strike out the answer of defendants as frivolous, irrelevant and sham, and moreover, for judgment for want of an answer and by default."

The record is imperfect, and it does not certainly appear whether the Clerk of the Court allowed or disallowed the last mentioned motion; but it seems that there was a decision one way or the other, and an appeal to the Judge, as allowed by The Code, Sec. 252; for on the 19th day of May, 1885, the Judge, at Chambers, made a decision, of which the following is a copy: "Upon consideration of the foregoing case, it is adjudged that the motion of the plaintiff be denied, and (34) that the clerk do place this cause upon the civil issue docket."

The last clause of the order was scarcely regular, for the Judge is required by The Code, Sec. 255, simply to transmit "his decision in writing, endorsed on, or attached to the record, to the clerk of the court, who shall," etc.; but the Judge, no doubt, seeing that issues of law and fact were raised by the pleadings, made the order that the case be transferred to the civil issue docket, as the Clerk is required to do in such case, by the last clause of The Code, Sec. 256.

Afterwards, at the special term of the court, held in January, 1886, the case having been placed on the civil issue docket, "it was agreed by the parties that his Honor should try all issues of law and fact arising on the pleadings, and render his judgment accordingly."

The only issues of law and fact presented by the pleadings, were those as to the alleged pendency of another action between the same parties and for the same cause of action. As to these, the Court found that another action had been pending in the same Court, but did not find what was its nature and purpose, and found further, that the plaintiff in it had taken a *non-suit* after this proceeding was begun. The Court further proceeded to hear the petition upon the merits, found the

facts summarily, applied the law, declared the rights of the parties, and made an order appointing commissioners to partition the land, make report, etc. The defendants excepted and appealed.

It will be observed that the agreement of the parties was that the Judge should try the issues of fact and law presented by the pleadings. The only issue of fact was, as to the pendency of another action between the same parties and for the same purpose, and issues of law arising upon, and incident to the trial of the same. When the Judge, under the agreement, made his findings upon the issues of fact and law, at once, and without any order directing him to do so, the Clerk should have entered such findings, and proceeded in the special proceeding to do such things, and make such orders and judgments as the law required
(35) to be done in such a case, as and for the Court. If the Judge found that no such action, as that alleged in the answer, was pending, and he decided the questions of law adverse to the defendants, and the latter desired to amend their answer and make further defence, the Clerk might, for just cause, have allowed them to do so, as allowed by The Code, Sec. 251; and if issues of fact and law should be raised by such amended answer, these would be tried before the Judge at the ensuing term of the Court; and if the Clerk should decide a question of law, and either party should be dissatisfied, he might appeal to the Judge at Chambers. *Brittain v. Mull,* 91 N. C., 498; *Wharton v. Wilkerson,* 92 N. C., 407; *Tillett v. Aydlett,* 93 N. C., 15; *Taylor v. Bostic, Ibid.,* 415.

It should be remembered, that the Clerk represents and acts for the Court, "unless otherwise especially stated, or unless reference is made to a regular term of the Court, in which case the Judge alone is meant." The Code, Sec. 132.

The Code, Sec. 251, provides that "the Clerk of the Superior Court shall have jurisdiction to hear and decide all questions of practice and procedure in this Court, and all other matters whereof jurisdiction is given to the Superior Court, unless the Judge of said Court, or the Court at a regular term thereof, be expressly referred to."

So that, at first, under the *Code of Civil Procedure,* the pleadings in all cases were made up before, and under the supervision of the Clerk, and he could make all orders and judgments in the course of the action or proceeding, except in such respects as the statute might specially require the Judge himself to act, or that the action be taken in term time. The Clerk was required to act as and for, and in the place of, the Court, and his action stood as that of the Court, unless, in case a party dissatisfied with his decision should appeal to the Judge, and then the Judge would decide the question presented by the appeal and his action would prevail.

But the statute (Act 1870-'71, ch. 42, Bat. Rev., ch. 18), re- (36) quired that *"all civil actions"* should be brought to and conducted in *term time;* so that the Clerk does not now generally superintend the pleadings and practice, and make orders and judgments in *"civil actions."*

These statutory regulations do not, however, apply to *special proceedings,* and the Clerk of the Court represents the Court in them, as he did before the act suspending the Code of Civil Procedure in certain respects was passed, except as his authority may have been modified or affected in some particular respect by subsequent statute.

Now, the procedure to obtain partition, dower and the like, is by *"special proceeding"* in the "Superior Court," and therefore, the *Clerk* acts, as and for the court, in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein, unless his action shall be reversed or modified by the Judge upon appeal. Issues of fact arising in the proceedings, are to be tried before the Judge in term time, but when, and as soon as they are tried, the Clerk, and not the Judge, proceeds to make further orders and judgments as allowed by law, until the proceeding shall be ended, unless his further action shall be corrected upon appeal.

It may be suggested, that it would be convenient for the Judge to proceed to hear and determine the proceeding upon its whole merits, when it comes before him for the purpose of the trial of issues of fact. And so it might in some cases; but the statute provides otherwise. Its purpose is to expedite the hearing and determination of such proceedings—they are not to be delayed, to be disposed of in term, except in respect of the trial of issues of fact.

In the case before us, the Judge in term should, under the agreement of counsel, have simply passed upon the single issue of fact presented by the pleadings, and decided any question of law presented in that respect, and thereupon, without further order, the Clerk should have proceeded according to law to make further orders and do (37) whatever the law allowed or required in that behalf.

There is error. To the end that further action may be had in the proceeding according to law, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Warden v. McKinnon, 94 N.C. 388; *Loftin v. Rouse,* 94 N.C. 510; *Brittain v. Mull,* 94 N.C. 599; *Maxwell v. Blair,* 95 N.C. 321; *Click v. R. R.,* 98 N.C. 392; *R. R. v. R. R.,* 106 N.C. 22.

CHARLES E. MALLETT v. CLIFFORD SIMPSON.

Corporations—Charters—Power to Convey Land—Ultra Vires—Statute of Limitations.

1. Where the charter of a corporation authorizes it to purchase land for some specified purpose, in the absence of evidence, it will be presumed that any land purchased by it, was acquired for the purposes authorized by the charter.
2. Where the charter of a railroad company authorized it to purchase land for the purpose of procuring stone and other material necessary for the construction of the road, or for effecting transportation thereon: *It was held*, that the charter authorized the purchase of land for the purpose of getting cross-ties and fire wood.
3. At common law, in the absence of any provision in the charter, a corporation has the power to acquire and hold real estate in fee. The statutes of mortmain have never been adopted in this State.
4. Even if a corporation is forbidden by its charter to hold or take a title to real estate, a conveyance of land to it is not void. It is valid until vacated by a direct proceeding by the sovereign, instituted for that purpose.
5. A break of two or three years in the chain of possession for thirty years, necessary to show title out of the State, is immaterial.

CIVIL ACTION to recover the possession of land, tried before *Shipp, Judge*, and a jury, at February Special Term, 1885, of CRAVEN Superior Court.

The plaintiff introduced the following deeds in support of his title:

(38) (1) A deed from Owen Chestnut to Elijah Hardison, executed in 1842.

(2) A deed from Elijah Hardison to the Atlantic and North Carolina Railroad Company, executed in 1856.

(3) A deed from said company to George A. Davey, executed in 1881.

(4) A deed from said Davey to plaintiff, executed in 1881.

It was in evidence that the defendant took possession of the land in controversy some three or four months before the action was begun, and has continued to hold possession ever since, and that the plaintiff's deeds covered the same.

It was also in evidence that Owen Chestnut was in possession of the land in 1833, and continued to live on it until he sold to Elijah Hardison in 1842; that said Hardison was in possession of the land from 1842 to 1856; that he had a hog-pen on the land, situated on the line of his land, that ran through the field of the defendant, which was alleged to be on the land of the plaintiff, and is the subject of this action. It

was also in evidence that the railroad company was in possession of the premises, and from 1856 to the time when the plaintiff went into possession in 1881, frequently cut wood and cross-ties on parts of it, and that the plaintiff was in possession of the land from the time of his purchase until the defendant took possession.

The defendant introduced no evidence, except the charter of the Atlantic and North Carolina Railroad Company, with specific reference to Sec. 23, and it was admitted by the plaintiff that the land in controversy was a part of an ordinary plantation, and the evidence was, that the railroad ran through it, but not over the *locus in quo*, and that it was used for no other purpose by the company, than for the purpose of wood for fuel and crossties.

Defendant's counsel contended that the railroad company was incapable of taking or making title to the land, and that the title was in the heirs of Elijah Hardison, he being dead. His Honor (39) ruled against the defendant and he excepted.

His Honor instructed the jury, that as it was in evidence "that Chestnut was in possession of the land in 1836, and afterwards until the sale to Hardison, and by reason of other testimony that possession in favor of plaintiff and those under whom he claimed, would begin to run from 1833, without color, in making out his title by thirty years possession; and a break of two or three years in the chain of continuous possession for thirty years would make no difference.

The jury returned a verdict in favor of the plaintiff and there was judgment accordingly, from which the defendant appealed.

Mr. C. M. Busbee, for the plaintiff.
Mr. Jno. Devereux, Jr., for the defendant.

ASHE, J., (after stating the facts). The only exception taken by the defendant on the trial, was to his Honor's ruling adversely to his contention, that under the 23d section of the Act of Incorporation (Laws of 1852, ch. 136), the railroad company was incapable of taking or making title to the land, and that the estate was in the heirs of Elijah Hardison, who was dead.

The section of the act relied upon by the defendant as the ground of his exception, is as follows: "That the said company may purchase, have, and hold in fee for a term of years, any lands, tenements or hereditaments which may be necessary for said road or the appurtenances therefor, or for the erection of depositories, store-houses, houses for the officers, servants or agents for the company, or for workshops or foundries to be used for said company, or for procuring stone or

other materials necessary to the construction of the road, or for effecting transportation thereon, and for no other purpose whatever." But, in connection with this section, in ascertaining the powers conferred by the charter of the company, the fifth section of the act should
(40) be considered, in which it is declared that the company "shall be capable, in law and equity, of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, acquiring the same, by gift or devise, so far as shall be necessary for the purpose embraced within the scope, object and intent of this charter, and no further." By the charter, the corporation is empowered to purchase, hold and sell real property, for the purpose of *"procuring stone or other material necessary to the construction of the road, or for effecting transportation thereon."* In the absence of any evidence with respect to the use made of the land after its purchase by the company, it is to be presumed that the land purchased was acquired for the purpose authorized by the charter. The deed to the company covered the fee, and the company had the right to sell and convey the same. This principle is announced in the case of *Yates v. Van De Bogert,* 56 N. Y., 526, in which it is held, that "where a railroad company is authorized by its charter to acquire by purchase such real estate as may be necessary for the construction of its road, it will be presumed that lands deeded to it, are acquired for that purpose. By a deed purporting to convey a fee, it acquires title in fee, and when the land is no longer used for its purpose, it has the right to sell and convey the same."

But it is not necessary that the plaintiff should resort to such a presumption in this case in support of his title from the Railroad Company. For it was in evidence that the company bought the land in question in 1856, and held it for twenty-five years; that its road ran over the land, and that it was used by the company for the purpose of getting *wood for fuel and cross-ties.* These were *materials,* certainly essential to the purpose for which the company was chartered.

The cross-ties were *necessary to the construction of the road,* and its repairs, and the fuel was equally necessary, after the road was constructed, in *effecting transportation,* so that the purchase of the land by the company, was strictly within the power conferred by the charter, and having used it for the purpose for which it was pur-
(41) chased, it had the right, under the fifth section of the act, to sell it when it was no longer needed for that purpose.

But there is another view of the subject which is fatal to the contention of the defendant. Conceding that the Railroad Company had not purchased the land in question, nor used it for the purpose contemplated by the charter, the deed from Hardison to it vested the legal

title, and its right to purchase and hold the land could not be collaterally assailed. No one but the State could take advantage of the defect that the purchase was *ultra vires*. This principle is fully sustained by the authorities. Like an alien who is forbidden by the local law to acquire real estate, he may take and hold title until "office found." *Fairfax Devisees v. Hunter's lessees,* 7 Cranch, 604.

At common law, corporations generally have the legal capacity to take a title in fee to real property. They were prohibited in England by the statutes of mortmain, but these statutes have never been adopted in this State, so that the common law right to take an estate in fee, incident to a corporation, (at common law), is unlimited, except by its charter and by statute. But the authorities go to the extent, that even when the right to acquire real property is limited by the charter, and the corporation transcends its power in that respect, and for that reason is incompetent to take title to real estate, a conveyance to it is not void, but only the Sovereign, (here the State), can object. It is valid until assailed in a direct proceeding instituted by the Sovereign for that purpose. *Leazern v. Hilegas,* 7 Sargt., 313; *Gonndie v. Northamton Water Co.,* 7 Pa. St., 233; *National Bank v. Whiting,* 103 U. S., 99; Angel & Ames on Corporations, Secs. 152-777; *Runyon v. Coster,* 14 Pet., 122; *The Bank v. Poiteaux,* 3 Rand (Va.), 136.

The case of *Leazern v. Hilegas, supra,* was very similar to the one before us, in the facts and the questions of law involved. The plaintiff there claimed the land through the Bank of North America, by deeds of conveyance to and from said Bank. The Bank was restricted by its charter from purchasing land except for certain purposes, (42) which it had transcended, and the defendant contended that the Bank was incapable of purchasing and alienating the land. But the Court held, "the Bank might take independent of a provision in the act of incorporation, and that the title of the corporation, like that of an alien, would be defeasible only by the State. No one can take advantage of the defect (of title) but the State."

In Illinois it was held, that "when a corporation was authorized by its charter to purchase real estate for certain purposes, but for no other, a deed executed to it, by one having capacity to convey, vested the title in the corporation, and that such title could be assailed on the ground that the purchase was *ultra vires,* only by the State, or by a stockholder, but not by the grantee." *Hough v. Cook County Land Company,* 73 Ill., 23.

The deduction from the authorities is, that if the corporation acquired the land for any of the purposes authorized by the charter, its purchase and sale was valid; and if on the other hand, it transcends the authority conferred by the charter, its purchase and sale would still be

valid against every body except the State, and its title could not be collaterally assailed, as was attempted in this case.

The only other exception taken by the appellant, was to that part of his Honor's charge, in which he held, that "a break of two or three years in the chain of continuous possession for thirty years would make no difference." We are unable to see from the record, what fact in the evidence called for the remark, for the possession, beginning in 1833, seems to have been continuous for more than thirty years; but if there had been such a break in the continuity of the possession, there would have been no error in the instruction, for it is settled by the decisions of this Court in several cases. The decision in *Cowles v. Hall,* 90 N. C., 330, is in strict conformity with the instruction given by his Honor, and that case was decided upon the authority of *Reed v. Earnhart,* 32 N. C., 516, instead of which, through some inadvertence, the
(43) case of *Candler v. Lunsford,* 20 N. C., 542, was cited, which applied to a different principle.

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Hamilton v. Icard, 114 N.C. 536; *Barcello v. Hapgood,* 118 N.C. 729; *Walden v. Ray,* 121 N.C. 238; *Cross v. R. R.,* 172 N.C. 122, 123.

J. B. W. NOVILLE v. LAWRENCE DEW.

Claim and Delivery—Justice's Jurisdiction.

1. In actions *ex contractu,* justices of the peace have jurisdiction, when the *sum demanded* does not exceed two hundred dollars, but in actions *ex delicto,* their jurisdiction is limited to cases wherein the *value of the property* does not exceed fifty dollars.
2. In actions before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property, and such statement in the summons gives the justice *prima facie* jurisdiction.
3. *It seems,* that where a plaintiff, in an action for a tort before a justice, only demands damages to the amount of fifty dollars—and on the trial it is ascertained that his damages amount to more than that sum, he may remit the excess, and thus give jurisdiction to the justice.
4. Where, in an action of claim and delivery, it appears that the value of the property exceeds fifty dollars, it at once ousts the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter.

5. A judgment rendered by a justice of the peace in an action in which he has no jurisdiction, is void.
6. Where, in an action of claim and delivery begun before a justice, the jury found the value of the property to be over fifty dollars, but that the plaintiff was entitled to the possession: *It was held*, that the justice had no jurisdiction and the action should be dismissed and the property restored to the defendant.

CIVIL ACTION, tried before *Graves, Judge,* and a jury, on (44) appeal from the judgment of a justice of the peace, at Spring Term, 1885, of EDGECOMBE Superior Court.

The plaintiff complains that the defendant unlawfully and wrongfully withholds from him a mule of the value of fifty dollars.

The defendant denies the allegations of the complaint.

Two issues were submitted to the jury:

1st. Is the plaintiff the owner of the mule described in the complaint?

To which they responded—Yes.

2nd. What is the value of the mule?

To which they responded—Seventy-five ($75) dollars.

Upon hearing the testimony offered by both parties, the Court finds the value of the mule sued for to be seventy-five ($75) dollars.

Upon the return of the verdict and the finding of the Court, the defendant moved to dismiss plaintiff's action and for a writ of restitution because of want of jurisdiction in the justice's Court.

The plaintiff resisted the motion:

1st. Because it is the value of the mule demanded *bona fide,* and not the value found by the jury that determines the jurisdiction.

2nd. For that, as the jury had found the property to be in the plaintiff, the defendant had no right to an order of restitution.

His Honor sustained the motion of the defendant, and gave judgment dismissing the action, and ordered the writ of restitution to issue.

From this judgment, the plaintiff appealed.

Mr. G. M. T. Fountaine, filed a brief for the plaintiff.
Messrs. John L. Bridgers and A. W. Haywood, for the defendant.

ASHE, J. (after stating the facts). We find no error in the (45) judgment of the Superior Court. There is a marked distinction in the jurisdiction of justices of the peace in actions *ex contractu* and *ex delicto.* In both cases, their jurisdiction is limited and defined by the Constitution. By Art. 4, Sec. 27, jurisdiction is given to them of all civil actions founded on contract, wherein the *sum demanded* shall not exceed two hundred dollars, "and the General Assembly may give to justices of the peace jurisdiction of other civil actions, wherein the

value of the property in controversy does not exceed fifty dollars;" and the General Assembly, in the exercise of this power, have enacted that "justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the *value of the property* in controversy does not exceed fifty dollars." The Code, Sec. 887.

In the one case it is the *sum demanded,* and in the other the *value of the property* sued for, that constitutes the criterion by which the jurisdiction is to be determined. In either case, the amount of the sum demanded, or the value of the property sued for, must be stated in the summons. The Code, Sec. 832, *Allen v. Jackson,* 86 N. C., 321.

Where the action is for a tort, the summons should contain the amount of damage claimed, not exceeding fifty dollars, and if for the recovery of specific property, for instance by *claim* and *delivery,* the value of the property, not exceeding that amount, should be set forth in the summons. It is the sum demanded, or the damages claimed, or the value of the property sought to be recovered, as set forth in the summons within the prescribed limitations, that *prima facie* gives jurisdiction to a justice over the cause of action. To this an exception is made, when the action is on contract, and the sum demanded exceeds two hundred dollars, and the plaintiff shall remit the excess of principal above two hundred dollars, with interest on the said excess, and shall, at the time of filing his complaint, direct the justice to make an entry to that effect. The Code, Sec. 835; *Dalton v. Webster,* 82 N. C., 279.

(46) But this section does not embrace actions for torts. Yet we do not see why in the action for a tort, when damages are claimed, the case does not come within the spirit of the act, to the extent, that when the plaintiff, in his summons and complaint, only claims damages to an amount not exceeding fifty dollars, and on the trial it is ascertained that his damages amount to more than that sum, he may not remit all the excess over the amount claimed in his summons, and have judgment for that amount. In the case of *Harper v. Davis,* 31 N. C., 44, when the damages were assessed by the jury to an amount greater than that demanded in the warrant, the plaintiff was allowed, in this Court, to remit the excess and have judgment for the amount demanded in the warrant, the case having been commenced before a justice of the peace. See also *Grist v. Hodges,* 14 N. C., 198. But this point is not presented by the record for our decision.

Yet, however it may be, when the action begun before the justice is to recover damages arising from a tort, there can be no question, it seems to us, that when the action is *claim and delivery* for the recovery of specific property, as in this case, and the value of the property is found to be more than fifty dollars, that fact ousts the justice of juris-

diction. It is not such a case, as the cause of action could be brought within the jurisdiction of a justice, by a remitter, for the plaintiff must recover judgment for the specific property, and if its *value* exceeds fifty dollars, the justice, under the Constitution, has no jurisdiction, and any judgment he might render in such a case would be a nullity. In *Jones v. Jones,* 14 N. C., 360, it is held, that a judgment rendered by a justice of the peace for a larger sum than he had jurisdiction, is void. And it is held by the Court, that when a defect of jurisdiction is made to appear to the Court, that it is exercising a power not granted, it ought to stay its action, and, *ex necessitate,* the Court may, on plea, suggestion, motion, or *ex mero motu,* when the defect of jurisdiction is apparent, stop the proceeding. *Branch v. Houston,* 44 N. C., 85; *Burroughs v. McNeil,* 22 N. C., 297; *State v. Benthall,* 82 (47) N. C., 664.

Under these authorities, then, it was right and proper, and the duty of the Judge in the Court below, when it was found by the jury that the property sued for was worth more than fifty dollars, to dismiss the action and award to the defendant a writ of restitution for the mule. For it has been decided by this Court, that "whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment." *Perry v. Tupper,* 70 N. C., 538.

We have not overlooked the fact that in actions like this for the recovery of specific property, the judgment is in the alternative, like that in the old action of detinue, "for restoring of the specific articles if to be had, and if not, for their value as assessed by the jury." *Manix v. Howard,* 82 N. C., 125.

In such a case where the *value* of the property and the damages assessed amount to more than fifty dollars, there could not be a remitter, for, as the judgment must be for the specific property if it can be had, and if it is ascertained to be worth more than fifty dollars, the principle of remitter could not apply.

Our conclusion is there was no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Morris v. O'Briant, 94 N.C. 75; *Singer Mfg. Co. v. Barrett,* 95 N.C. 38; *Brantley v. Finch,* 97 N.C. 93; *Leathers v. Morris,* 101 N.C. 187; *Bowers v. R. R.,* 107 N.C. 722; *Kiger v. Harmon,* 113 N.C. 407; *Starke v. Cotten,* 115 N.C. 84; *McPhail v. Johnson,* 115 N.C. 302; *Malloy v. Fayetteville,* 122 N.C. 483; *Watson v. Farmer,* 141 N.C. 454; *Riddle v. Milling Co.,* 150 N.C. 690; *Sewing Machine Co. v. Burger,* 181 N.C. 243; *Henderson County v. Smyth,* 216 N.C. 423.

JOHN W. PATE v. LUCY S. TURNER.

Collusion—Estoppel—Evidence—Landlord and Tenant.

1. The rule is well settled that one who obtains possession of land under a contract of lease, must restore the possession to him who gave it before he will be permitted to deny the lessor's title, unless he be evicted by due process of law or compelled to yield to a paramount title, and afterwards let into possession by a new and distinct title of a new landlord, and this *bona fide*. The rule extends to the assignees of the term.
2. Where it appeared that the title to the land in controversy was in N, who resided with the plaintiff, her son, by whom her business was managed; that the defendant entered under a lease made with son, in which no reference was made to the mother, and the rents were paid to him: *Held*, that these facts created no presumption that the lease was made on behalf of the mother, and that they furnished some evidence that it was made in the name and for the benefit of the plaintiff.
3. The defendant having entered as the tenant of the plaintiff, pending an action by the latter to recover possession, the counsel for the defendant recovered judgment by default against his client for the possession of the same land, issued a writ of possession, under which the defendant was put off the premises, but her property suffered to remain, and she immediately attorned and re-entered as the tenant of her said counsel: *Held*, that these facts furnished same evidence of a collusive eviction for the purpose of defeating the plaintiff's recovery.

(48) CIVIL ACTION tried before *Gudger, Judge*, at Fall Term, 1884, of NORTHAMPTON Superior Court.

The suit was begun on October 31, 1870, and is for the recovery of the tract of land described in the complaint, which formerly belonged to one Burwell Pate. He died in 1861, leaving a widow and two children who are the parties litigant in the action. In deducing title, the plaintiff, who administered on the estate of his intestate father, offered in evidence the record of proceedings instituted by himself for license to sell the descended lands, and convert them into assets, under and in pursuance of which he sold and executed a deed for the tract in dispute, to the said Nancy, the purchaser. He next produced a deed from her to himself, bearing date April 23, 1862, wherein a life estate is reserved, and his own deed executed to her, and reconveying the premises on February 28, 1868. The said Nancy died in 1870, and by her will devised all her real estate to the plaintiff. The proceedings for the conversion of the lands into assets were ruled out as insufficient to divest the title acquired by descent.

To estop the defendant from controverting the plaintiff's title, he introduced evidence to show a renting from him of the prem-
(49) ises by one Gray in December, 1868, for one year, under which

the defendant and her husband, then living, were let into the possession, and that upon his death during the lease, in 1869, the defendant continued in the occupation of the land.

In November, 1875, R. B. Peebles, claiming the land, commenced an action against the defendant and the plaintiff to recover possession, and at Spring Term, 1876, obtained judgment by default against both for want of an answer. This judgment was afterwards, by consent, set aside as to the plaintiff, who then put in his answer, in which he denies the plaintiff's title, and also his own possession. At Fall Term, 1879, the cause came on for trial between these parties, and the plaintiff in that action, finding that he could not prove the possession as to the present plaintiff, entered a *nol. pros.* as to him, leaving the judgment in force against the present defendant. He then sued out a writ of possession, upon which the sheriff made return that he had put her out of, and said Peebles in possession of, the premises. The *bona fides* of this action being controverted, the testimony on the subject was in substance this: The defendant Lucy stated that, after being told by the sheriff that he had come to remove her from the land, and she must go out into the public road, which she did, and she then made the contract and re-entered, not being angry at what was going on.

James A. Parker, the acting deputy of the sheriff in executing the writ, testified to his taking her to the road, and there delivering possession to the agent of R. B. Peebles, and to her renting the premises, which he thinks took place in the house; that while passing out the defendant remarked, "that Capt. Peebles (referring to the recovering plaintiff) was her friend, and she did not think he would do her any harm"—nor did she show any anger while the removal was going on.

E. J. Peebles, the agent, testified to the same facts about the execution of the writ, and the renting by him on behalf of his principal, who had directed him to receive possession from the officer, and then to rent to the defendant, and if she would not rent, then to some other person; that he returned with her to the house and there they (50) made the contract; and that her goods were not removed, but remained in the house.

R. B. Peebles testified, that the action of ejectment was prosecuted in good faith, in order that the title might be adjudicated, and he consented to the *nol. pros.* as to the said John W. Pate, because he denied his possession, and witness was unable to prove the fact; that he received a bale of cotton for rent; that he has been counsel for defendant in this action from its inception; that he has had no communication with the defendant in regard to the eviction or renting, other than as testified through his agent.

Records were produced to show that the said R. B. Peebles derived his title to the land under an execution sale against the plaintiff which was inoperative, his estate having been previously divested by a sale under execution issued upon the same judgment, and the proceeds of which, less the costs, had been received by him as attorney of the plaintiff in that suit, in part discharge of the judgment debt, from the sheriff. The record was to this effect: The judgment was rendered at Fall Term, 1862, in favor of Mary E. Phillips against said John W. Pate, administrator of Burwell Pate, N. Harris, and Henry Pate, upon which executions issued to the sheriff and he made return of no property to be found. Thereupon process was issued against said John W. Pate, to subject his own estate to the payment of said moneys, in pursuance of which judgment, directing execution to issue *de bonis propriis* against said Pate, at Special January Term, 1873, of the Superior Court of Northampton, and such execution accordingly issued. By virtue of this writ, the estate of said Pate in the tract, and in another sold at the same time, were sold at public sale, and bought by William T. Stephenson for two hundred and twenty-two dollars, of which, after retaining the costs, the residue, one hundred and sixty-eight dollars, were applied to the debt, and paid over to said Peebles, attorney for one Long, to whom the judgment had been assigned, as appears in the sheriff's return and the attorney's receipt on the writ. The
(51) sheriff accordingly, on the same day, conveyed the two tracts to the purchaser.

On June 8, 1874, another execution was sued out on the same judgment, with the endorsements entered upon that by virtue of which the previous sale was made, and the tracts again exposed to sale by the sheriff, when said Peebles became the purchaser of both tracts at the price of five dollars for each.

A record was also produced showing that an action was begun September 21, 1880, by Henrietta Pate, wife of John W. Pate, whom she married in 1858 and by whom she had four children, against the heirs-at-law of said William T. Stephenson, to enforce specific performance of an alleged agreement between her and the intestate purchaser Stephenson, by which he agreed that if she would pay off a certain debt, he would convey the tracts to her, and in which she alleges full performance; and such proceedings were had in the cause, that at Spring Term, 1881, a decree was entered declaring the facts and the said Henrietta's title to the land, and directing a conveyance in fee to be made to her, and appointing a commissioner to execute a deed therefor, two of the defendants being infants, but represented by a guardian *ad litem*.

These are the material facts, extracted with no little difficulty from the confused papers, in manuscript, sent up.

The record shows that three issues were passed upon by the jury:

I. Is the plaintiff the owner in fee simple and entitled to the immediate possession of the land described in the complaint?

Answer—Yes.

II. Is the defendant in the wrongful possession of said land, and does she wrongfully retain the same from the plaintiff?

Answer—Yes.

III. What damage has the defendant sustained by such wrongful withholding of possession?

Answer—From 1870, $20 per year, $280.

The series of exceptions to the records offered in evidence, that (52) of the suit of *Phillips v. Pate and others,* and that of *Henrietta Pate v. the Heirs-at-Law of Stephenson,* with all the proceedings in each, as well as the deeds in furtherance of what was done, is removed in the direction to the jury to discard them from their consideration.

The controversy seems to have been mainly upon the question whether the original renting, by virtue of which the defendant and her husband entered into possession, was by the plaintiff on his own behalf, or for his aged mother, to whom he had conveyed the land, and in whose business he acted generally as her agent: And secondly, whether the eviction and renting to the defendant had the effect of annulling the previous tenancy, and denying the plaintiff's title.

The Court was asked by the appellant to instruct the jury as follows:

I. The complaint alleges no tenancy in the defendant's occupation, and it is not involved in the controversy. This was refused.

II. If there were such tenancy, it terminated by the eviction, and the defendant's occupation of a new lease from Peebles, who claimed to hold by title paramount, removed the estoppel. This instruction was given with the additional words, "if *bona fide.*"

III. There is no evidence that the eviction was collusive and fraudulent. Refused.

IV. The plaintiff, upon the evidence, is not entitled to recover. Refused.

V. There is no sufficient evidence that the defendant or her husband rented from the plaintiff acting for himself. Refused.

VI. The alleged title being in said Nancy at the time of the renting, and plaintiff being her general agent, the presumption is that the lease was made by him in the exercise of his agency. Refused. Instead, the Court charged the jury that it was for them to say, upon the evidence, from whom the land was rented by Gray—whether from the plaintiff, or his mother through him. (53)

VII. There is no evidence to rebut the presumption of a renting from the said Nancy. Refused.

VIII. The plaintiff must have title at the time of commencing his suit, and at the trial. Refused.

IX. The evidence shows that the title was not in the plaintiff, but in his wife, and the issue as to title should be answered in the negative. Refused.

X. As plaintiff relies on his right to possession upon his alleged principal title, and the evidence being that he had none such at the commencement of the action or time of trial, the jury should find the latter part of the first issue in the negative, and respond to the entire issue—No. Refused.

These rulings furnish the ground of the exceptions to the refusal of instructions asked.

The Court, withdrawing the records already referred to from the jury as irrelevant and useless, proceeded to charge them:

I. If they should find that Gray rented the land from the plaintiff and not from his mother, and leased the same to the husband of defendant, and they, in pursuance of the contract, entered upon and occupied the land until his death, and she has since remained there and never surrendered possession, she is estopped from denying plaintiff's title.

II. If the jury find that the defendant was *bona fide* and in good faith evicted by the sheriff under the execution, she is not estopped from disputing the plaintiff's title, even if the lease was from him—but if the eviction was not in good faith, but a mere contrivance between her and the plaintiff in the ejectment suit against her, in order to gain an advantage in this action, the eviction amounted to nothing, and the estoppel, arising from the first renting, if from the plaintiff, would remain.

III. If the renting was not from the plaintiff, but from said Nancy, no estoppel would be created, and plaintiff could not recover.

The defendant also excepted to the charge as given.

(54) The verdict being for the plaintiff, and judgment rendered thereon, the defendant appealed.

Messrs. R. O. Burton, Jr., and Willis Bagley, for the plaintiff.
Messrs. W. H. Day and R. B. Peebles, for the defendant.

SMITH, C. J. (after stating the facts). We find no error in these rulings. The two material questions of fact in reference to the original renting, and the attempt to change the tenancy, and continue the defendant's possession, were for the jury to pass on, and were properly

left to them. The transaction of Gray was with the plaintiff apparently acting for himself, and his mother's name was not mentioned in the transaction. So, the rent was in like manner paid to him, as if he were entitled to it. This was certainly some evidence of his personal relation to the contract, and its weight has been passed on by the jury. Perhaps the jury might have been warranted in drawing the inference from the possession of title, that the lease was for the owner, as upon the evidence they are in finding it to be the personal transaction of the plaintiff.

The nature and effect of the eviction was also properly committed under instructions to the jury, and these instructions are certainly not unfavorable to the defence.

The attorney who had been defending the action from its beginning, institutes his action for possession against the defendant, and she makes no resistance to judgment as did the other defendant, the present plaintiff, as to whom the *nol. pros.* was entered.

No anger was excited in executing the process for dispossessing her. She spoke of her confidence in her attorney's kind disposition; her household goods were left in the house undisturbed while the eviction was going on; the defendant re-enters under a new contract with the one who has dispossessed her, and remains to set up the new defence.

It certainly cannot be contended that these facts furnish no evidence of collusion, that is, of a course of action which shall keep her in possession, and enable her to violate the well-settled rule, that (55) a tenant obtaining possession under a contract of lease, must restore the possession to him who gave it before she can set up title in herself or in any one else.

This is the general rule. But if evicted by process of law, or yielding to the demand of one who has a paramount title, the landlord's action may be resisted by showing the fact. But an essential condition is the existence of a superior title in the claimant evicting or entering. Bigelow on Est., 407. Here no proof whatever was offered of a superior title, and no opposition made to the judgment. It is in substance, a voluntary act of submission to an unsustained demand, and can no more remove the obligation to surrender, than the execution of a deed, and recognition of its efficacy as a protection. The rule which forbids a tenant who has been let in possession by a contract of lease from disputing the landlord's title without restoring the possession after the termination of his lease, "is founded," in the words of HENDERSON, Chief-Justice, "on high grounds of morality and good faith, and at all times ought to be rigidly adhered to, where circumstances require its application." *Yarborough v. Harris,* 14 N. C., 40, and this is repeated by RUFFIN, Chief-Justice, in *Burwell v. Roberts,* 15 N. C., 81.

The rule applies with equal force to a lessee's assignee or under tenant. *Lunsford v. Alexander,* 20 N. C., 166; *Callender v. Sherman,* 27 N. C., 711.

A lessee cannot deny his lessor's title, until discharged from the estoppel, by yielding up possession to the lessor; nor will his acceptance of a lease from another lessor enable him to do so, *Freeman v. Heath,* 35 N. C., 498, unless when he has been evicted and afterwards let in possession by a new and distinct title of a new landlord, and this *bona fide. Gilliam v. Moore,* 44 N. C., 95.

An exception to the rule is, that where a lessee could have gone into equity and obtained an injunction against being turned out of possession, upon some equitable grounds. He may now set this equity
(56) up in an action by the landlord. *Turner v. Lowe,* 66 N. C., 413; *Davis v. Davis,* 83 N. C., 71.

While, therefore, we find no error in the ruling, it would be obviously unjust to give a conclusive effect to a finding and judgment, that title is in the plaintiff, which, as *res adjudicata,* would preclude all future inquiry into the title, when the result is produced by an estoppel, which only prevents a retaining of the tenant's possession. Upon the admitted evidence in this case, the moiety in the land descending to the defendant as one of two heirs-at-law as co-tenant, the plaintiff, incurs the disability of contesting his claim of ownership upon a technical rule growing out of her husband's lease and acquirement of the possession —continuing in consequence of her continuance in occupancy. In this case the verdict rests wholly upon the estoppel, and the judgment, without finally determining the title, should be merely for the recovery of possession and damages, leaving the defendant free hereafter to assert and maintain her own title.

The judgment thus modified must be affirmed.

No error. Affirmed.

Cited: Benton v. Benton, 95 N.C. 562; *Springs v. Schenck,* 99 N.C. 555, 558; *Bonds v. Smith,* 106 N.C. 563; *Alexander v. Gibbon,* 118 N.C. 806; *Campbell v. Everhart,* 139 N.C. 515; *Nance v. Rourk,* 161 N.C. 648.

WM. H. HUGHES, EX'R OF SAMUEL CALVERT, v. F. L. HODGES.

Caveat—Will—Executor—Parties—Supplemental Complaint—Mortgage—Irregular Judgment—Prosecution Bond.

1. The filing of a caveat to the probate of a will, does not prevent the executor, upon giving the bonds prescribed by the statute, from proceeding in the collection of debts due the testator. The Code, Secs. 2158, 2159, 2160.
2. An objection that one who has been permitted to become a party plaintiff upon filing a prosecution bond, has not complied with the condition, comes too late after the amendment has been made and supplemental complaint filed. The execution of such bond is an incidental and not an essential condition of the order.
3. A Supplemental Complaint, or Answer, is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its result; but where the death of the original party and the relationship of the new parties to him are ascertained, there seems to be no necessity for supplemental pleadings.
4. A decree of foreclosure of mortgage made before all the heirs-at-law of the mortgagee, who had been declared "necessary parties," were made parties of record, is irregular and will be set aside upon proper application.

This action, begun in June, 1879, by the plaintiff testator, is (57) for the FORECLOSURE OF A MORTGAGE made by the defendant on January 8, 1876, to secure certain notes therein described and for the sale of the land therein conveyed for their payment. The mortgagee, Calvert, having filed a verified complaint at the return term of the summons and before further action in the cause, died in 1881, leaving a will, the probate of which has been caveated and is still in contest, and therein appointing William H. Hughes, executor, who, upon an *ex parte* probate, qualified as such before the caveat was entered. At Spring Term, 1882, an order was entered in these terms:

"It appearing to the satisfaction of the Court, that Samuel Calvert the plaintiff, is dead, and that W. H. Hughes has duly qualified as executor upon said Calvert's estate, it is therefore ordered that said W. H. Hughes be, and he is hereby permitted to make himself party plaintiff, upon filing a good and sufficient bond in the sum of $200 for the prosecution hereof."

The executor accordingly at Spring Term, 1883, without giving the required bond, so far as the record shows, put in a verified supplemental complaint, adopting that of his testator, and further alleging that the wife of the defendant had died since the commencement of the suit.

At Spring Term, 1884, it was ordered that notice issue to the heirs of the testator, naming them, who are declared necessary parties, to

show cause why they should not be made such. Such notice was served upon all, of whom, except two, none were willing to become par-
(58) ties to the action, and no further action was taken in that matter.

No answer has ever been filed by defendant.

At Fall Term, 1884, on motion of plaintiff's counsel, judgment was rendered for want of an answer, that the plaintiff recover his debt and interest with costs, and further adjudging a foreclosure of the defendant's equity of redemption and a sale of the premises by a commissioner named, unless said debt and costs incurred in the action should be paid on or before the 1st day of January following.

From the judgment the defendant undertook to appeal and obtained leave to do so without giving the security required by law, but did not prosecute his appeal. At Spring Term, 1885, on hearing affidavits of the defendant and of the counsel of plaintiff in support of defendant's motion to set aside the judgment of the previous term, and to amend the record, the Court rendered the following judgment:

It appearing to the Court that, at the Fall Term, 1884, S. J. Calvert and Charles Calvert, some of the heirs-at-law of Samuel Calvert, came into Court in obedience to the order made in this case, and made themselves parties plaintiff, and filed no complaint in writing; and that the other heirs-at-law of Samuel Calvert failed to make themselves parties plaintiff; and it further appearing that ten days' notice of this motion was duly served on the attorneys of the plaintiffs, it is now, on motion of R. B. Peebles, counsel for defendant, considered and adjudged that the judgment rendered herein, at Fall Term, 1884, be and the same hereby is set aside for being irregular. And it is further considered that plaintiffs have thirty days to file complaints, and defendants thirty days thereafter to file answer.

From this ruling and judgment the plaintiffs appeal.

Mr. T. W. Mason, for the plaintiffs.

Mr. R. B. Peebles, for the defendant.

(59) SMITH, C. J. (after stating the facts). The grounds assigned in support of the motion are, that the executor of the deceased original plaintiff could not become a party plaintiff and prosecute the action, pending the controversy raised by the caveat as to the execution and validity of the propounded script; and secondly, for that the newly-introduced plaintiffs, Charles and Samuel J. Calvert, had filed no written complaint in the action.

While these reasons alone are assigned for the demanded action of the Court in the case on appeal, others have been urged in the argument outside of it.

The answer to the first ground of objection to the rendition of the judgment by default and calling for its annulment, is furnished in the statute, which declares that:

When a caveat is entered and bond given as directed in the two preceding sections, the Clerk of the Superior Court shall forthwith issue an order to any personal representative having the estate in charge, to suspend all further proceedings in relation to the estate, *except the preservation of the property and the collection of debts, until a decision of the issue is had.* The Code, Sec. 2160.

This provision is manifestly intended, in cases to which it is applicable, to dispense with the necessity of appointing an administrator *pendente lite,* and confers very similar forms upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered. *Sym v. Broughton,* 86 N. C., 153.

The prosecution of the action in order to the collection of the debts, is evidently sanctioned by the statute and in furtherance of the purpose of its enactment.

The second exception to the regularity of the action of the Court in entering up the judgment by default, now sought to be set aside, rests upon the assumed necessity of a supplemental complaint from the newly introduced plaintiffs.

The executor comes into the cause and takes the place of his testator, with the unopposed permission of the Court, and files such complaint, verified as was the other, which he adopts, and adding a single additional averment of the death of the wife of the defendant (60) since the suit was instituted. Nor does his failure to give the required prosecution bond avoid the act by which he became such, or displace him from his position in the cause. The order of admission, the admission, and the filing of the complaint, even if the failure to execute the bond had been sufficient to debar the executor, if the objection had been made in apt time, now constitute a part of the record and must remain such until modified or amended by the Court.

But the execution of the bond, though incidental, is not an essential condition of the order admitting the plaintiff to prosecute the action.

This construction has been put on an order in somewhat similar terms, appointing an administrator on an intestate estate.

Thus an order in this form: "Administration on the estate of A, granted to B, *he giving bond,*" etc., has been held to be unconditional, and the appointment valid until set aside, though no bond was given. *Haskins v. Miller,* 13 N. C., 360; *Spencer v. Cahoon,* 15 N. C., 225. Same case in 18 N. C., 27.

The objection has more pertinency and power as applied to the heirs-at-law of the deceased mortgagee, of whom, while all were served

with process to appear and show cause why they should not be made plaintiffs, two only consented, while the others refused to be made parties, and none filed a complaint. The statute in such case allows the personal representative to come in and prosecute or defend the action *"on motion,"* if application be made within one year after death, or afterwards on a supplemental complaint. There would seem to be no necessity for a supplemental complaint, when the death of the party is ascertained and determined, as well as the relationship of the applying party to the deceased, showing his right of succession, since the law determines the devolution of the estate, and there is no new fact to be alleged, to which answer could be made. When new parties are introduced, who are in no wise shown in the complaint to be connected with the controversy, or interested in its result, an amendment must
(61) be made to show the connection, and if not, a judgment would be irregular and meaningless, and more especially if the summons informs the defendants that a complaint, a new one of course, will be filed at the return term of the process which they are required to answer. This was the ruling in *Vass v. Building Association,* 91 N. C., 55, and for the reason suggested, the judgment rendered by default for want of an answer was set aside.

Again, as the additional complaint in the present case would seem to be needless, so it might be waived, unless assigned by a defendant in Court as an answer to a motion for judgment.

But aside from these considerations, the heirs-at-law have been declared in the decretal order, requiring notice to be given them, to be *"necessary parties,"* and steps were taken to bring them in and place them by the side of the executor, as associate plaintiffs, and this has not been done. While they remain outside of the cause, and the order has not been carried into execution, it was premature to move for final judgment, for the cause was not in a condition to admit of this summary disposal. While insufficient reasons may have influenced the Judge, yet if his action was right, and the first judgment ought to have been put out of the way, there was no error committed.

As was said in *Bell v. Cunningham,* 81 N. C., 83: "If the judgment is right, it will not be reversed because the result is reached by an erroneous process of reasoning." To same effect, *Hughes v. McNider,* 90 N. C., 248-251.

The vacating the judgment by default, restores the parties to the positions occupied by them at and previous to its rendition, and the cause will thence proceed as if that obstruction had not been interposed.

There is no error. Let this be certified to the Court below.

No error. Affirmed.

Cited: Howerton v. Sexton, 104 N.C. 86; *Albertson v. Terry,* 109 N.C. 9; *In re Will of Palmer,* 117 N.C. 138; *Hughes v. Gay,* 132 N.C. 51; *Batchelor v. Overton,* 158 N.C. 399; *Brown v. Lumber Co.,* 167 N.C. 14; *Grady v. Parker,* 228 N.C. 56; *In re Estate of Pitchi,* 231 N.C. 487.

(62)

POPE & CO. v. J. B. HARRIS AND OTHERS.

Exoneration—Homestead—Marshalling—Trust—Equity.

1. Where one creditor is secured by a lien upon two funds, and another by a lien upon only one of them, the former will be compelled to exhaust the subject of his exclusive lien before he can resort to the other.
2. The equity to have the securities embraced in a trust for the benefit of creditors of different classes, marshalled and appropriated in exoneration of the liens of the less preferred class is an equity against the *debtor*, and not against the doubly secured creditor.
3. The right of the debtor to a homestead is superior to that of all creditors except so far as it may be impaired by the voluntary act of the claimant.

This was a CIVIL ACTION heard upon exception to the report of the Clerk before *Phillips, Judge,* at the Spring Term, 1885, of CHATHAM Superior Court.

At the Fall Term, 1884, of said Court, a judgment was rendered in favor of the plaintiff against the defendant, John B. Harris, for the sum of three hundred and four dollars and thirty cents.

A reference was then ordered by the Court, to the Clerk, to take an account of the property, money and effects that have come or ought to have come into the hands of H. A. London, trustee of J. B. Harris, by virtue of a deed of trust executed to him by said Harris on the 16th day of May, 1883, for the use and benefit of the creditors of said Harris, as contained in said deed; and report to the next term of the Court. It was further ordered that he report, whether the said trustee had collected, taken into his possession, and applied in due course of administration all the property and effects conveyed to him, as aforesaid, and if not, what part and how much of the money remained unexpended in the hands of the said trustee, and what is the character and nature of the said property and effects.

At Spring Term, 1885, the Clerk made his report, which shows that prior to the date of the execution of the deed of trust, the (63) defendant John B. Harris, and his wife, had given three several mortgages on two tracts of land situate in the county of Chatham, on

Landren's creek, containing about three hundred acres; one to Jesse Richardson to secure a debt of $800, due July 17th, 1883, with interest; another to S. T. Womble to secure a debt for $325 due 1st January—with interest at eight per cent.; and a third mortgage to B. Y. White to secure a debt for the sum of $800 with interest at eight per cent. from the 24th day of May, 1882. The aggregate sum secured by these mortgages amounted to $2,038.75, and there was no reservation of the homestead in either of these mortgages.

After the execution of the mortgages, to-wit, on the 16th day of May, 1883, the defendant John B. Harris executed to H. A. London, a deed of trust conveying to him all of his personal and real estate, including the land conveyed in the mortgages, for the benefit of his creditors, excepting his homestead and personal property exemptions. The creditors secured were provided for in two classes. Those mentioned in the mortgage deeds, and some others, constituted the first class. The trustee sold all the property, except two hundred and fifty acres, the land conveyed in the mortgages, which was allotted to the defendant as his homestead by proceedings had by the sheriff under an execution which was issued to him, upon a judgment rendered in favor of Bynum Manufacturing Company against Harris, after the execution of the deed of trust.

And after allowing to the defendant his personal property exemption of five hundred dollars, he applied the proceeds of the sales to the payment of the debts in the class of preferred creditors, in which were included the mortgagees, and that the amount paid to the mortgage creditors was $456.65 more than the value of all the real estate of the defendant Harris sold by the trustee, and the assessed value of the homestead as assigned to him. In other words, the trustee applied the proceeds of the sales of the real estate and the personal property
(64) conveyed in the deed of trust to the extinguishment of the debts secured in the mortgages, in exoneration of the defendant's homestead, and the amount thus paid on the debts secured in the mortgages was $456.15 more than the value of all the real estate of the defendant, including the land conveyed in the mortgages, which was allotted to the defendant for his homestead.

The plaintiff excepted to the report of the clerk, for that he had not charged the trustee with the value of the two hundred and fifty acres allotted to the defendant as his homestead.

His Honor overruled the exception, confirmed the report and discharged the trustee from further performing of the trust, and the plaintiff appealed therefrom.

Mr. J. H. Headen, for the plaintiff.
Mr. John Manning, for the defendant.

ASHE, J. (after stating the case). The sole question presented for our consideration is, was there error in the overruling the exception of the plaintiff? The exception of the plaintiff is founded upon a well-established principle of equity, that where one has a lien upon two funds, and another a lien upon only one of them, the former will be compelled to exhaust the subject of his exclusive lien before he can be permitted to resort to the other, and then only for the purpose of making up the deficiency. *Harris v. Ross,* 57 N. C., 413; *Williams v. Washington,* 16 N. C., 137; Adams Equity, 506, note 1.

This kind of equity is personal against the debtor, and is not binding on the paramount creditor, for no equity can be created against him by the fact that some one else has taken an imperfect security. But it is an equity against the debtor himself, that the accidental resort of the paramount creditor to the doubly-charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate, discharged of both the debts. If, therefore, the paramount creditor resorts to the doubly-charged estate, the *puisne* creditor will be substituted to his rights and will be satisfied out (65) of the other fund, to the extent to which his own may be exhausted. Adams Eq., 507.

This is the equity which the plaintiff, by means of his exception, seeks to enforce against the defendant Harris. It is the equity of marshalling the securities. Adams Equity, 506-7. But the equity of marshalling the securities is subject to the superior equity of the debtor to have a homestead. This is an equity, or a right, secured to the debtor by the Constitution, and is "superior to all creditors, except so far as it may be impaired by the voluntary act of the claimant himself."

This principle is clearly announced in the very lucid opinion of RUFFIN, Judge, in the case of *Butler v. Stainback,* 87 N. C., 216, which is a case so similar in the facts to the case under consideration, that it is needless to cite any other authority bearing on the question, as the principle announced in that case is decisive of this. It was there expressly held, that the homestead of the debtor could not be defeated by invoking the equity of marshalling the fund.

In that case, like this, the debtors had given a mortgage on their real estate to secure a debt, without any reservation of their homestead rights, but afterwards executed to a trustee, a deed of trust conveying a considerable amount of personal property and effects to secure certain debts enumerated therein, among which was the debt secured in

the mortgage, which, with some others, were provided to be preferred debts.

The plaintiff insisted that the lands conveyed in the mortgage should be sold, and the proceeds applied to the debts secured in the mortgage, and exhausted, before those creditors should be allowed to participate in the funds in the hands of the trustee.

The defendants, on the other hand, insisted that the funds in the hands of the trustee, should be applied ratably to all the preferred debts, including those secured in the mortgage which were in that class.

His Honor, in the Court below, sustained the contention of the plaintiffs, but his judgment was reversed in this Court.

(66) Judge RUFFIN, speaking for this Court, said: "The deed of the 6th of February, 1882, (the deed of trust), expressly provides that the debt due to Rountree & Co., (a debt secured by the mortgage,) shall share in the benefits of the trust with the other debts therein enumerated, as preferred. It matters not what motive prompted such a provision, the makers of the deed, who were the owners of the property conveyed, and therefore competent to dispose of it upon any terms not inconsistent with the policy of the law and the demands of good faith, have affixed to the trust this condition: that a ratable part of the fund raised thereunder should go to the debt of Rountree & Co. as a *pro tanto* exoneration of the land hitherto conveyed to them by mortgage. The plaintiffs while accepting the benefits of the trust, and seeking, as they are, to have benefits under it, cannot be permitted to object to the terms imposed."

In this case, both the plaintiffs in the action and the plaintiffs in the judgment and execution under which the homestead was laid off, were creditors in the second class of preferred creditors. And as in that case there was no lien upon the property when the trust was made, but the action under which the homestead was laid off was not instituted until after the execution of the trust. So there was no creditor at the time whose debt was defeated by the deed of trust.

We hold upon the authority of *Butler v. Stainback*, there was no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Graves v. Currie, 132 N.C. 312; *Trust Co. v. Godwin*, 190 N.C. 517.

(67)

B. H. BUNN v. JOHN D. WELLS.

Construction—Deed.

1. In the construction of deeds no regard is had to punctuation; but the *intention* of the parties should control unless in conflict with some rule of law.
2. A deed containing the following clauses—"To have and to hold one-half of the said tract of land; and I, the said P, (the bargainor) do warrant and defend the said bargained tract of land unto the said W (the bargainee), his heirs and assigns, against the lawful claim of any person or persons claiming the same in any manner whatever"—conveys the title to the lands therein described in fee-simple to the bargainee.

This was a SPECIAL PROCEEDING for a partition, begun before the Clerk of the Superior Court of NASH County, and carried by appeal, upon a question of law raised by the pleadings, before *Connor, Judge.*

The petitioner alleged in his petition:

1. That William Pittman, Sr., late of this county, died intestate, and without leaving any surviving wife, several years prior to 1848; leaving him surviving two children, William Pittman, Jr., and his sister, ... Pittman, the intestate's only heirs-at-law.

2. That upon said heirs-at-law, the intestate's real estate descended, equally to be divided as tenants in common—each of the said children being entitled to one-half thereof.

3. That said intestate, at the time of his death, was seized in fee simple of a tract of land situated in the county aforesaid, containing sixty acres more or less, and fully described by metes and bounds in a deed from William Pittman, Jr., to Redmond Wells, recorded in the register's office of Nash County, in book 19, at page 256, which is herewith filed as a part of this complaint.

4. That afterwards, the said intestate's daughter granted and (68) conveyed her undivided interest in said land to one Redmond Wells and his heirs, and he, the said Redmond, granted and conveyed the same interest and estate to the defendant, John D. Wells and his heirs.

5. That prior to the first day of April, 1848, the said William Pittman, Jr., granted and conveyed his undivided one-half interest in said land, to the said Redmond Wells by the deed described in paragraph (3) above, to said grantee for and during his natural life.

6. That the said Redmond Wells died in November, 1883, having previously, by deed, conveyed all his interest and estate in said land to the defendant;

7. That said William Pittman, Jr., by a deed dated July 11, 1885, granted and conveyed his one-half interest in said land to the plaintiff,

B. H. Bunn and his heirs and assigns; that the plaintiff and defendant are tenants in common, and he prays for a partition of said land.

The defendant answering the petition, alleged that on the 4th day of April, 1848, the said William Pittman, Jr., by deed, granted and conveyed to the said Redmond D. Wells, his undivided one-half interest in said land, and that said deed, by proper construction, conveyed to the said Redmond D. Wells the fee simple in said land, and that he was sole seized of the same.

The limitation in the deed referred to by defendant was in the following words: "To have and to hold one-half of the said tract of land; and I, the said William Pittman, do warrant and defend the said bargained tract of land unto the said Redmond D. Wells, his heirs and assigns, against the lawful claim of any person or persons claiming the same in any manner whatever."

His Honor adjudged that the said deed conveyed an estate in fee simple, and that the plaintiff had no interest in the land, and that the defendant was sole seized thereof, from which judgment the plaintiff appealed to this Court.

(69) *Mr. Jacob Battle, for the plaintiff.*
Mr. Hugh F. Murray, for the defendant.

ASHE, J., (after stating the case). It is an established rule of the interpretation of deeds, that the intention of the parties should control unless inconsistent with some rule of law.

In the case of *Parkhurst v. Smith,* Willes Rep., 332, Lord Chief Justice WILLES on this subject said, "the construction of deeds ought to be favorable, and as near to the intent of the parties as possibly may be, and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect, for the law is not nice in grants, and therefore it doth often *transpose* words, contrary to their order, to bring them to the intent of the parties." The rule of construction there laid down by the learned Judge, has been adopted by this Court, and frequently applied in the construction of deeds—notably in the cases of *Phillips v. Davis,* 69 N. C., 117; *Waugh v. Miller,* 75 N. C., 127; *Allen v. Bowen,* 74 N. C., 155; *Phillips v. Thompson,* 73 N. C., 543; *Stell v. Barham,* 87 N. C., 62.

Some importance may be attached to the fact, that the *habendum* in the deed for our construction, is separated from the clause of warranty by a semicolon, but that can have no effect in controlling the construction, for it is a rule in reading and constructing deeds, "that

no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon, and although stops are sometimes used, they are not regarded in the construction or meaning of the instrument." 3 Wash. on Real Property, 343, and cases cited in the note.

Then disregarding the punctuation, we think the proper construction of the deed in this case is, that the words "unto the said Redmond D. Wells, his heirs and assigns," refer to and control both the warranty and habendum. This construction manifestly effects the intention of the parties, for if only a life-estate was intended, why warrant the title to the bargainee and his heirs? In fact, this case is so directly on "all fours" with the case of *Phillips v.* (70) *Thompson, supra,* that the decision in that case controls and is decisive of this. There the words of limitation were, "To have and to hold all and singular the premises, and we do for ourselves, our heirs and executors and administrators warrant and forever defend against the lawful claims of all persons whatsoever unto him the said Council Best, to him, his heirs and assigns forever," and it was held this deed conveyed the fee simple.

Our conclusion is there is no error, and the judgment rendered by the Judge of the Superior Court is affirmed. Let this be certified to the Superior Court of Nash County, to the end the case may be disposed of in conformity to this opinion.

No error. Affirmed.

Cited: Hicks v. Bullock, 96 N.C. 169; *Winborne v. Downing,* 105 N.C. 23; *Anderson v. Logan,* 105 N.C. 271; *Redmond v. Comrs.,* 106 N.C. 132; *Saunders v. Saunders,* 108 N.C. 332; *Real Estate Co. v. Bland,* 152 N.C. 229, 230; *Whichard v. Whitehurst,* 181 N.C. 81; *Lee v. Barefoot,* 196 N.C. 115; *Stanback v. Ins. Co.,* 220 N.C. 499; *Williams v. Rand,* 223 N.C. 737; *Coppedge v. Coppedge,* 234 N.C. 175; *Voncannon v. Hudson-Belk Co.,* 236 N.C. 711.

JOSIAH TURNER v. W. W. HOLDEN.

Execution—Supplemental Proceedings—Receiver.

Where a receiver is appointed in a proceeding supplemental to execution, he becomes the legal assignee of the property specified in the order, subject to the direction of the Court in which the judgment was rendered, and the judgment debtor is forbidden to interfere in any manner with its collection or control.

This was a motion for leave TO ISSUE EXECUTION, heard before *Gilmer, Judge,* at Fall Term, 1885, of CHATHAM Superior Court.

The plaintiff, at Spring Term, 1879, of the Superior Court of Chatham, upon issues submitted to and found by the jury, recovered judgment against the defendant for eight thousand dollars and his costs incurred in the action, which was duly docketed therein, and also in the Superior Court of Wake. Execution issued thereon to the sheriff of the last named county, to which he made return, bearing
(71) date May 19, 1879, that no property was found for its satisfaction. The judgment having become dormant, the plaintiff, upon notice given to the defendant, made a motion before the Superior Court Clerk of Chatham, on Monday, the 2d day of February, 1885, for leave, founded on affidavit that no part thereof had been paid, to sue out execution, and enforce collection. The defendant, in opposition to said motion, made affidavit, and introduced the record evidence in proof of his allegations, that in certain supplemental proceedings, auxiliary to and in aid of two judgments recovered, the one by George W. Swepson, the other by the Falls of Neuse Manufacturing Company against said Turner and another, in the Superior Court of Wake aforesaid, one G. Rosenthal was appointed receiver of all his property and effects, and especially his judgment against affiant, and thereby the title thereto vested in said receiver, and the plaintiff was "enjoined from interfering in any manner with said judgment."

Upon the hearing the evidence, the clerk adjudged that the plaintiff was not entitled to leave to issue execution and dismissed his motion.

From this ruling an appeal was taken and a re-hearing had before the Judge, on October 30th, 1885, when the ruling was affirmed and the motion disallowed at the plaintiff's costs.

From this judgment, the plaintiff again appealed to this Court.

No counsel for the plaintiff.

Mr. Spier Whitaker, for the defendant.

SMITH, C. J. (after stating the case). We entirely concur in the action of the Judge, and the sufficiency of the reasons assigned for denying the application. The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and was vested with the property therein, and he was "subject to the direction and control of the Court in which the judgment was obtained, upon which the
(72) proceedings are founded." Code, Sec. 495.

As the plaintiff had lost all control over the judgment, and was forbidden to interfere with it, he was rightfully refused to be

allowed to intervene and sue out process. If derelict in duty, his remedy might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for losses sustained by reason of his negligence and inattention, and, if necessary, upon his bond to secure a faithful discharge of duty. There is no error, and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Rice v. Jones, 103 N.C. 231.

W. H. MORRIS AND J. H. HOPSON, ADMINISTRATORS, v. WM. O'BRIANT.

Claim and Delivery—Jurisdiction—Landlord and Tenant—Evidence—Betterments.

Where a landlord brought an action before a Justice of the Peace to recover the sum of eighty dollars, alleged to be due upon a contract for rent, and ancillary thereto procured an order for the seizure and delivery to him of certain crops of greater value than fifty dollars: *Held,*

(1) The question of the jurisdiction of a Justice of the Peace is determined by the summons and complaint, especially the former.

(2) The order for the seizure and delivery of the property was *coram non judice,* but did not oust the jurisdiction of the Court over the cause of action.

(3) Evidence of betterments placed upon the land by the tenant was not competent, no issue in respect thereto having been made by the pleadings, tendered by the parties, or submitted by the Court.

This was a CIVIL ACTION begun before a justice of the peace, and carried by appeal of the plaintiff to the Superior Court of the county of DURHAM, and tried before *Gilmer, Judge,* at the January Special Term, 1886.

In the statement of the justice transmitted on the appeal of (73) the plaintiff to the Superior Court, it appears that the defendant was summoned to answer the complaint of the plaintiff for the non-payment of the sum of eighty dollars due by contract, and the plaintiff in his complaint alleged that the defendant was, in the year 1883, the tenant of his intestate, upon whose land he raised a crop; that he had paid no rent and that there was still due eighty dollars, for which he demanded judgment.

At the time of suing out the summons, the plaintiff filed an affidavit in the prescribed form in a proceeding for the claim and delivery of

the following property, alleged to be a part of the crop made by the defendant on the land of the intestate, to-wit—one barn of tobacco, 12 barrels of corn, 25 bushels of wheat, fodder and oats.

There was an order of *seizure* endorsed upon the affidavit, and the plaintiff gave the bond required by law, but the record fails to show any return of the sheriff. The defendant in his answer, denied all the material allegations in the complaint, and for further defences alleged that the plaintiff was indebted to him in the sum of two hundred dollars for improvements put upon the plaintiff's land, and that he and the plaintiff, in September, 1884, agreed to refer to arbitration all the differences between them in this action, and that their award should be a rule of Court, and the matters were referred to arbitrators selected by them, who made an award that the plaintiff should pay the defendant the sum of three hundred dollars.

The following issues were submitted to the jury, to-wit:

1. Was the defendant William O'Briant the tenant of Reddin George for the year 1883?
2. Did the defendant pay to Reddin George or his administrators the rent due as tenant for said year?
3. What was the rental value of said lands for the year 1883?
4. Did plaintiff and defendant submit all matters in dispute in this action to arbitrators?

(74) The jury responded to the first issue, "yes;" to the second, "no;" to the third, "forty-eight dollars," and to the fourth, "no."

On the trial, one Joseph Hobson was introduced as a witness in behalf of the plaintiff, and the defendant offered to prove by the witness, on cross-examination, that the defendant took possession of the premises mentioned in the pleadings, under a parol contract of purchase made with plaintiff's intestate and the owner of the land, and made valuable and permanent improvements thereon, which still remain there.

This was offered with the view and intention of insisting on defendant's right to set off the value of such improvements against any sum the plaintiff might be entitled to for occupation of the premises. The proposed testimony, upon objection by the plaintiff, was not admitted by the Court, and the defendant excepted.

The defendant moved to dismiss the plaintiff's action upon the ground the justice had no jurisdiction, the value of the property sued for being more than fifty dollars. The motion was overruled by the Court, and the jury returned a verdict in favor of the plaintiff for forty-eight dollars.

The defendant then moved for a new trial, assigning as ground therefor, alleged error in the ruling of the Court in excluding the proposed testimony in regard to the improvements. The Court overruled the motion and rendered a judgment in favor of the plaintiff for the amount found by the jury, from which the defendant appealed.

Messrs. R. C. Strudwick and R. B. Boone, for the plaintiff.
Mr. W. W. Fuller, for the defendant.

ASHE, J. (after stating the case). The only points raised by the record, are to the refusal of the Court to dismiss the action for want of jurisdiction, and to grant a new trial. In neither of which rulings of the Court do we find any error.

The defendant's motion to dismiss the action for want of juris- (75) diction in the justice, is founded upon the idea that the action is *claim and delivery*, and the value of the property claimed is more than fifty dollars. But this is a misconception of the plaintiff's action. The fact that the plaintiff filed an affidavit and obtained an order of seizure of the property described in the affidavit, does not necessarily make it an action of *claim and delivery*. In ascertaining whether a justice of the peace has jurisdiction of a cause of action in his Court, the question must be determined by the summons and complaint, and especially by the former, as has been frequently decided by this Court—*Noville v. Dew, ante,* 43, and cases there cited—and the reason is, because the pleadings in that Court are usually oral and are not required to be in writing.

In this case, the summons was to answer the complaint of the plaintiff for the non-payment of the sum of eighty dollars, due by contract, and the complaint alleges that defendant has paid no rent to the plaintiffs or their intestate, and that the amount of rent due for the year 1883, is eighty dollars, and judgment is demanded for the sum of eighty dollars. It is an action on contract, and the fact that the plaintiffs had resort at the same time to the provisional remedy of claim and delivery, cannot have the effect of changing the character of the action. This point was expressly decided in the case of *Deloatch v. Coman,* 90 N. C., 186, where it was held, that an action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease, and cognizable in the Court of a justice of the peace. The jurisdiction cannot be ousted by a demand on the part of the plaintiff for relief which such court has not jurisdiction to give, as a seizure of the crop on the landlord's lien, under claim and delivery. It must therefore

follow, that when the action, as in this case, is one on contract, and the provisional remedy of claim and delivery is at the same time resorted to by the plaintiffs, it is immaterial whether the value of the property seized or sought to be seized is of more or less value
(76) than fifty dollars, for in such a case, the justice has no right to take cognizance in that connection of the proceeding of claim and delivery, and his action in that respect is extrajudicial. This disposes of the question of jurisdiction.

The motion for new trial upon the ground that the Court excluded the evidence of the witness Hobson upon the question of betterments, was properly overruled by the Court, upon the ground that the evidence was not applicable to any issue submitted to the jury, and no such issue was warranted by the pleadings. The evidence proposed was therefore irrelevant, and there was no error in excluding it.

We find no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Singer Mfg. Co. v. Barrett, 95 N.C. 39; *Starke v. Cotten,* 115 N.C. 84; *Hargrove v. Harris,* 116 N.C. 419.

S. H. LOFTIN v. S. T. CROSSLAND AND WIFE.

Agency—Advancements of Agricultural Supplies—Estoppel—Fraud—Husband and Wife—Lien—Married Women.

1. While coverture is no protection to the wife against responsibility for torts, or positive acts of fraud voluntarily committed, all the elements necessary to create an operative estoppel will be more stringently required when the doctrine is sought to be enforced against a married woman than against those who are under no legal disabilities.
2. The constitution of the husband the agent of the wife for the purpose of leasing her lands, confers no authority upon him to subject her rents to the lien of advancements of agricultural supplies made to her tenant, to enable him to make the crop, by one who believed the lands belonged to the husband and agent, if she did nothing to produce such belief or otherwise mislead the parties to the transaction.

(77) This was an ACTION TO RECOVER POSSESSION of certain crops raised on land belonging to the *feme* defendant, and was tried before *Avery, Judge,* at November Term, 1885, of LENOIR Superior Court.

The plaintiff claimed title to the property sued for, under a lien bond, hereinafter set forth, executed by one N. L. Hemby, who had rented certain lands from the defendant S. T. Crossland for the year, 1883, and by the said S. T. Crossland, to secure him for the advancement of certain agricultural supplies to be used in the cultivation of a crop on said land during said year. The *feme* defendant also claimed them as rents due for the use and occupation of the lands by Hemby for said year, asserting title to said land, and that the same was rented by S. T. Crossland as her agent to Hemby, and that the said S. T. Crossland had no authority to execute the said lien bond. The plaintiff insisted that S. T. Crossland did have such authority, and if this were not so, the *feme* defendant was estopped by her conduct to deny the validity of the plaintiff's claim under the lien.

The said N. L. Hemby, a witness for the plaintiff, testified that he rented a tract of land from the defendant S. T. Crossland for the year, 1883; that Crossland and the other defendant, his wife, were living on the land at the time, to-wit: in December, A. D. 1882; that both defendants were present when the land was rented; that they were both living thereon and gave witness one room in the dwelling which they occupied, which he took possession of and occupied till they left some three weeks thereafter and removed to the town of Kinston; that during this time, witness was getting ready to cultivate the land as a farm; that the renting was talked about by witness and the defendant S. T. Crossland in the presence of his wife, nearly every day; that witness asked plaintiff to furnish what agricultural supplies he might need for the year 1883 in the cultivation of said land, who said he would do so if the defendant S. T. Crossland would sign a "lien bond" on the products to be raised on the land for the year 1883, in order to secure him; that S. T. Crossland did sign said (78) bond, together with Hemby; that about a week before the execution of the said bond, it was agreed between the parties that it should be executed, and upon the faith of this agreement, the plaintiff advanced to the said Hemby the sum of $40 to pay S. T. Crossland for some cotton seed belonging to his wife, and which he had agreed to sell Hemby on her account, for use on the land for the year 1883, which sum was then and there paid to S. T. Crossland; that at the suggestion of the plaintiff, the bond was not executed till about a week afterwards; that witness made no crop during said year except on this land; that he heard the *feme* defendant say during the year that she supposed the plaintiff would have to pay for his advances before she got her rent; that she went out several times to the land during the year, and on one occasion in September, 1883, said that she thought

that there would be enough produce raised to pay the plaintiff and herself also; that she supposed that he would get pay for his advances before she got her rents, and if there was not enough to satisfy her too, she would have to make some arrangement to wait on witness; that she was on the land one Sunday after three or four bales of cotton had been picked, and witness delivered three of said bales to the plaintiff; that after their delivery, the *feme* defendant took possession of all the balance of the crop and hauled it away; that plaintiff advanced to witness under said bond, the full sum named therein, to-wit: $400, of which witness paid $132.37.

Upon cross-examination, he stated that he first heard of the *feme* defendant's claim to the land when he delivered the three bales of cotton to the plaintiff in November, 1883; that he heard the *feme* defendant say that her husband told her he would have to sign a lien bond with witness; that he heard him tell her the day after he got the $40 for the cotton seed, that he had gotten it, and that he would have to sign a lien bond on the crops raised on the land to the plaintiff for supplies, and that she did not object; that he did not know
(79) it was her land; that S. T. Crossland agreed with plaintiff to sign away his interest in the rents; that he heard the *feme* defendant and his, (witness's), wife talking about the matter the day after S. T. Crossland received the $40.

The defendant S. T. Crossland then testified on behalf of the *feme* defendant: that the witness Hemby came to the house of witness to rent land, and said that he would give the witness eight bales of cotton as rent; that the witness said he would not take it, and it was finally agreed that he would give ten bales: that the *feme* defendant said she was willing for the place to be rented at that rent; that Hemby then said he wanted some cotton seed that were there; that the *feme* defendant said that she was willing to sell the seed if he would pay her for them; that Hemby then said that he had made arrangements to get his supplies; that they came to Kinston, and Hemby told witness he could not get money to pay for the cotton seed unless witness would sign the lien bond; that witness thereupon did sign it on the same day; that he at first hesitated, but signed it upon the assurance of the plaintiff that if he did so, he, plaintiff, would let Hemby have what supplies he wanted; that witness had left his wife at home; that he afterwards told her he had signed it, and she told him he ought not to have done so; that she had not authorized him to sign any paper; that she had told him he could rent the land for her, but he must not sign any paper or give any lien. It was admitted that the land belonged to the *feme* defendant. This witness further testified that he

did not tell Hemby it was his land and that he was renting it as his property.

Upon cross-examination, he testified that he was married to the *feme* defendant in the year 1877; that he rented it as her land, but that he did not tell Hemby so; that Hemby never asked him whose land it was; that he had heard Hemby speak of the land as belonging to his wife before that, but that he could mention no time nor place; that Hemby had rented an adjoining tract of land from one Hill, and that witness had frequent opportunities to talk, and did talk (80) with Hemby; that they merely spoke of the ownership of different tracts of land in a general way; that he heard Hemby, speaking of this land, say his wife "had a good place." Witness could not say whether it was spoken before or after the renting by Hemby; that witness had been in the habit of renting said land before the renting to Hemby; that he would rent it in his own name and would afterwards tell his wife about it.

The *feme* defendant then testified in her own behalf; that she was present when the land was rented; that she told her husband she thought ten bags was enough for the place; that she had told her husband never to sign any liens or bonds; that she knew nothing of the lien bond in question till after she moved to Kinston; that she then said to her husband, "I am surprised at you, I told you never to do anything of the kind;" he said he supposed there would be enough for both; that witness had always told her husband never to give any liens on her part of the crop; that witness went out to the farm a good many times during the year 1883; that she said to Hemby, "I suppose the plaintiff must have his pay first;" that she had found out that plaintiff was getting cotton from the place and made this remark for that reason, supposing he must have a right to take it.

This witness further testified that she had no such conversation as the witness had testified to, out in the country, about the lien bond, and that she did not know of it till after she moved to Kinston; that she heard her husband had gotten pay for the cotton-seed, and as soon as he got back home on the day he received it, but that she did not know how much.

The plaintiff then testified in his own behalf: that Hamby came to him in Kinston, in December, 1882, and wanted advancements to be used on the land which he had rented for the next year from the defendant S. T. Crossland; that Hemby and Crossland came together soon thereafter, and talked about the bond, and witness paid Crossland $40 for the cotton-seed, at Hemby's request; that before the $40 was paid, it was agreed that they should come back after the

(81) 1st of January next thereafter and sign the lien bond; that witness did not know that the lands belonged to the *feme* defendant; that she never notified him that she would not agree to that lien and not to make advances thereunder; that she was in his store in Kinston in the fall of the year 1883, but that he did not recollect what she talked about; that he always thought the land belonged to S. T. Crossland, and had always heard it called such till that Fall.

Upon this evidence the Court instructed the jury that the title to the land in controversy being admitted to be in the *feme* defendant, there is no testimony that the husband, as agent of the wife, was empowered to execute the lien to the plaintiff, nor is there any testimony to estop the wife from denying the validity of said lien and the right of the plaintiff to seize her rents by virtue of it; and further, that the jury must find all issues in favor of the defendants, which they did accordingly.

The plaintiff excepted; judgment for defendants; appeal by plaintiff.

The bond was as follows:

On the first day of October, 1883, we promise to pay S. H. Loftin, or order, four hundred dollars, for advances to be made by said Loftin to cultivate a crop for the year 1883.

To secure the payment of the same, we hereby constitute this a lien on the crop of corn, cotton, rice, wheat and other produce to be raised by us during the year 1883, in Lenoir County.

And for further security we hereby convey to said S. H. Loftin the following articles of personal property: One bay mare, one bay mare mule.

But on this special trust, that if we fail to pay said debt and interest, on or before the 1st day of October, A. D. 1883, then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving ten days' notice at three public places, or in some newspaper published in the county, and apply the proceeds of
(82) such sale to the discharge of said debt and interest on the same, and costs, and pay any surplus to us.

Given under our hands and seals this 6th day of January, 1883.

S. T. CROSSLAND, [seal].
N. L. HEMBY, [seal].

Mr. Geo. V. Strong, for the plaintiff.
Mr. R. H. Battle, for the defendants.

SMITH, C. J, (after stating the facts). The exceptions to be considered on the appeal are to the rulings that,

1. There is no evidence that the defendant, who became himself a party to the lien bond, had authority from the *feme* defendant, his wife, to enter into such obligation or to bind her thereby.

2. Neither any act nor declaration of hers, superinducing the plaintiff's action, estops her from asserting, as owner and lessor of the land, her superior lien upon the crops for rent.

I. There is not only no ground furnished in the testimony to sustain the first exception, but the contrary is shown: Both defendants, on their examination as witnesses, say that the husband had no such authority, and his agency was limited to the renting out of the premises, and, indeed, that the wife herself was present at the making and gave assent to the contract, as made with the lessee when this occurred. The husband states, that at that time, Hemby expressed a wish to have some cotton-seed that were on the premises, when she replied that "she was willing to sell the seed, if he would *pay for them,*" and that the lessee said "he had made arrangements to get his supplies." This arrangement about the advances was made between the plaintiff and the two others, on the same day, afterwards, at Kinston, on the lessee's assurance that he could not obtain the credit, unless the said S. T. Crossland would sign the bond; and this he did, not in the presence of his wife, and with her express disavowal of his authority, as soon as she knew what had been done.

The plaintiff does not himself pretend that he had any com- (83) munication with the *feme* defendant on the subject, and says that she did not notify him of her dissent to her husband's action, nor does he say that when she was in his store in the Fall, he made any inquiry as to her consent to the terms on which his advances were made. The fact is very apparent, that the plaintiff acted on the belief that the husband owned the land, but it is not shown that the wife did or said anything to create the impression, or that any means were used—not even the husband asked, in whom was the title, to correct that erroneous impression.

II. As to the estoppel.

"A right can only be lost or forfeited," remarks PEARSON, J., in *Devereux v. Burgwyn,* 40 N. C., 351-355, "by such conduct as would make it *fraudulent* and against conscience to assert it. If one acts in such a manner as *intentionally,* [the italics are in the opinion], 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 otherwise not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages. If one stands by, or allows another to buy property to which he

has the title, he will not, on account of this fraud, be permitted, in a Court of Equity, to assert his title."

The requisites of an operative estoppel *in pais,* are said by READE, J., in *Holmes v. Crowell,* 73 N. C., 613-627, to be these:

1. That the defendant knows of his title.

2. That the plaintiffs did not know, and relied on the defendant's representations.

3. That the plaintiffs were deceived.

And he adds that some authorities require further "that the defendant *intended* to deceive."

The proposition is repeated by SETTLE, J., speaking for the Court in *Exum v. Cogdell,* 74 N. C., 139-142.

This is the doctrine applied to transactions in which the actors are *sui juris* and are under no legal incapacities. The rule is more
(84) stringent when to be enforced against a married woman, whose contracts, except as permitted by law, are inoperative, and as they do not bind, do not create an estoppel producing the same result.

We shall not pursue the inquiry, since the subject is examined in the case of *Boyd v. Turpin, ante,* 137. Coverture is no protection against responsibility for positive acts of fraud, or torts, when voluntary and not committed under the coercion, actual or presumed, of the husband. *Burnett v. Nicholson,* 86 N. C., 99-105.

But where can be detected any fraud in the *feme* defendant, any false representation in words or conduct, which was intended or even calculated to mislead the plaintiff in making his advances to the lessee? Her declaration made to him, "I suppose the plaintiff must have his pay first," merely shows her misapprehension of the law in respect to the priority of the conflicting liens—nothing more—as is immediately explained.

The difficulty is, that the plaintiff supposed the husband owned the land, and without inquiring of him or any one else, agreed with the tenant to give him the limited credit, provided the husband would unite with him in executing the bond to create the statutory lien. It was his own mistake, negligently fallen into, under which he made the advances, and for which the *feme* cannot be held responsible.

The argument here undertook to separate the seal from the instrument, and give it operation as a mere written contract, and convert it into a contract as if made by the wife herself. In answer to this these suggestions will readily occur to the legal mind:

1. The contract is the personal covenant of the husband and, as such, binds him.

2. If divested of the seal, and we know of no principle upon which this can be done by others than the parties to it, it would remain in form and effect the contract of the same parties.

3. The husband had no authority, nor did he undertake to (85) exercise any, as conferred by his wife, in entering into the contract.

4. All the parties understood it to be his own personal act, and binding him only, as such.

The case in our own court, *Blacknall v. Parish,* 59 N. C., 70, and the citations from Story's Agency, are not repugnant to the views expressed, nor appropriate to the facts of the present case. In the case referred to, a paper, signed and sealed by the owner of land, with blanks for the name of the bargainee, was placed in the hands of an agent, with parol authority to fill the blanks with the name of the purchaser and price. This he did, and it was held that the instrument, though not operative as a covenant, was operative as a contract within the statute of frauds, and could be specifically enforced. But the contract purported to be that of the principal, and remained unchanged by disregarding the presence of a seal, which was not necessary to give it efficacy. It furnishes no support to the present endeavor to get rid of a seal, rightfully put there by the party himself, and thus not only to change the nature of the instrument, but to make it the contract of another and different person, in opposition to its express terms and to the original understanding of all the parties to it.

We discover no error in the rulings, and the judgment must be affirmed.

It is so ordered.

No error. Affirmed.

Cited: Weathersbee v. Farrar, 97 N.C. 112; *Thurber v. LaRoque,* 105 N.C. 313; *Hart v. Hart,* 109 N.C. 373; *Estis v. Jackson,* 111 N.C. 149; *Williams v. Walker,* 111 N.C. 610; *Wells v. Batts,* 112 N.C. 289; *Bishop v. Minton,* 112 N.C. 529; *Buford v. Mochy,* 224 N.C. 243.

(86)

L. M. COOPER AND OTHERS v. B. F. MIDDLETON, ADM'R., AND OTHERS.

Exceptions to Report—Guardian—Mortgage—Subrogation—Surety—Trust.

1. Exceptions to the report of a referee must distinctly point out the alleged error.

2. Facts found by a referee and approved by the Court, in which the order of reference was made, are not the subject of review in the Supreme Court, unless *there is no evidence* to support the finding.
3. Where a guardian conveyed certain property to the sureties upon his bond, in trust to "well and truly to pay off his wards," and "save harmless his sureties on his guardian bond," and the wards recovered judgment against the guardian for the amounts severally due them: *Held*, that the wards were entitled to have the land so conveyed subjected to the satisfaction of their judgments irrespective of the liability or solvency of the sureties.

CIVIL ACTION, tried by *Gudger, Judge,* at May Term, 1885, of the Superior Court of DUPLIN County.

This was an action brought to recover of W. B. Middleton, guardian, the intestate of defendant B. F. Middleton, and the sureties upon his bond, whatever might be due the plaintiffs as wards of said W. B. Middleton, and to subrogate the plaintiffs to the rights of the sureties in a certain mortgage deed executed to them by said W. B. Middleton. The cause was, by consent, referred to F. A. Daniels, at Spring Term, 1883, and at Spring Term, 1884, said referee made the following report:

The undersigned, to whom was referred for trial the issues in the above entitled cause, respectfully reports, that the cause came on for trial before him on the 27th day of September, and.....day of October, 1883. The evidence taken accompanies this report. The objections to evidence offered were made and noted, and ruled upon in report of evidence herewith. Having heard the argument of counsel of the parties, after considering the evidence, I find the following facts:

(87) I. That W. B. Middleton, by order of the Court of Pleas and Quarter Sessions of Duplin County, was at January Term, 1859, appointed guardian of the relators, L. M. Cooper, John D. Cooper and William Cooper; that he accepted said trust, and entered into bond for the faithful performance thereof, payable to the State of North Carolina, in the sum of fifty thousand dollars, with the defendant Matthew Moore, D. J. Middleton and Stephen Graham as sureties thereto, and entered upon the discharge of the duties of his office as guardian; that said W. B. Middleton, as guardian as aforesaid, at October Term, 1866, of said Court, renewed his bond, payable to the State of North Carolina in the sum of five thousand dollars, with the defendants D. J. Middleton and Jesse B. Southerland as sureties thereto.

II. That said W. B. Middleton, by virtue of his said office, took into his possession real and personal property of his wards, hired out the slaves until they were emancipated, and rented out the lands till the wards arrived of age.

III. That the said W. B. Middleton filed regular annual accounts as guardian, from his qualification to the year 1866, inclusive, but

thereafter he failed to file such accounts, and has failed to file any final account, or to account and settle with his said wards, since their arrival of age.

IV. That the said W. B. Middleton, as guardian of L. M. Cooper, at Spring Term, 1861, of the Court of Equity of Duplin County, presented the petition of L. M. Cooper for the sale of certain lands of said L. M. Cooper, described in said petition; that said lands were sold under order of the Court, by the Clerk and Master, on the 24th day of September, 1861, for one thousand and five dollars, for which purchase money, by order of the Court, the Clerk and Master took a note payable in six months, which sale at September Term, 1861, was in all respects confirmed, and in the decree confirming the sale, the Clerk and Master was directed to turn over to the guardian the note for purchase money of said lands.

V. That the note for said purchase money was, by said guar- (88) dian, collected in May, 1863, in Confederate money, and the said guardian was never thereafter able to invest the same, and the fund became worthless in his hands by the result of the war.

VI. That said wards arrived of age respectively, L. M. Cooper on the 23d day of June, 1870, John D. Cooper on the 17th day of July, 1872, and William Cooper on the 17th day of October, 1874.

VII. That the said W. B. Middleton died intestate on the 10th day of August, 1881, leaving him surviving as children and heirs-at-law, the defendants B. F. Middleton, S. O. Middleton, W. L. Middleton, A. W. Middleton, Elizabeth A. Middleton, and Mary P. Middleton, and the defendant B. F. Middleton was appointed and qualified as administrator of W. B. Middleton, and entered upon the discharge of his duties as such.

VIII. That the said W. B. Middleton, prior to his death, on the 15th day of May, 1878, executed and delivered to the defendants Matthew Moore, D. J. Middleton, Stephen Graham and Jesse B. Southerland, his sureties on his said guardian bonds, a deed of trust or mortgage, whereby he conveyed to said grantees, certain real and personal property described therein, for purposes expressed therein, which deed of trust was duly probated, and was registered in the office of the register of deeds of Duplin County, on the 31st day of May, 1878.

IX. That the said S. O. Middleton has purchased for value and is now the owner of all the debts secured in said deeds of trust, except the debt due the wards of W. B. Middleton, deceased, and on the 22d day of September, 1881, caused to be registered in the office of register of deeds of Duplin County, the transfers of said debts to him.

X. That the said W. B. Middleton, on the 3d day of October, 1878, executed and delivered to D. H. Wallace and S. O. Middleton, partners trading under firm and style of Wallace & Middleton, a mortgage conveying a portion of the lands conveyed in the deed of trust or mortgage aforesaid, to secure the payment of a note for $599.33,
(89) of even date with said mortgage, executed by said W. B. Middleton to said Wallace & Middleton, which mortgage was probated and registered in the office of register of deeds of Duplin County, on the 8th day of October, 1878. That the said W. B. Middleton, afterwards, to-wit: on the 6th day of February, 1879, executed and delivered to Wallace & Middleton a mortgage conveying a portion of the lands conveyed in the deed of trust or mortgage aforesaid, to secure the payment of a certain note for the sum of $410.72 of even date with said mortgage, executed by said W. B. Middleton to Wallace & Middleton, which mortgage was duly probated, and on the 7th day of March, 1879, registered in the office of register of deeds of Duplin County; that an action for the foreclosure of said mortgage deeds was instituted at Fall Term, 1881, of Duplin Superior Court, in which D. H. Wallace and S. O. Middleton were plaintiffs, and B. F. Middleton, administrator of W. B. Middleton, B. F. Middleton, W. L. Middleton, A. W. Middleton, E. Annie Middleton and May P. Middleton were defendants. In that action a decree of sale was rendered, subject to the deed of trust or mortgage first above mentioned, at Fall Term, 1881, by which decree, James W. Blount was appointed commissioner to sell said lands. The said commissioner reported to Spring Term, 1882, that, in compliance with the decree, after legal notice, he sold at the court-house door in the town of Kenansville, when and where S. O. Middleton, bidding by permission of Court, became the last and highest bidder at the sum of $1,350, recommending the confirmation of said sale, and thereafter, on the 1st day of June, 1882, the said commissioner executed and delivered to the defendant S. O. Middleton, a deed for said lands.

XI. That the cause of action of the relators herein, upon the guardian bonds against Matthew Moore, D. J. Middleton, Stephen Graham and Jesse B. Southerland, sureties thereto, accrued to each and every one of the relators more than three years prior to the commencement of this action.

(90) XII. That the Smith note of $71, due January 1st, 1860, might, by the exercise of reasonable diligence, have been collected by the guardian.

Upon the foregoing facts I find as conclusions of law:

I. That W. B. Middleton, guardian, committed a breach of his bond by failing to file his final account and settle with his wards.

II. That there is due to the relator L. M. Cooper, from his guardian W. B. Middleton, the sum of $2,356.93.

III. That there is due the relator William Cooper, from his guardian W. B. Middleton, the sum of $3,067.71.

IV. That there is due the relator John D. Cooper, from his guardian W. B. Middleton, the sum of $3,085.75.

V. That the action is barred as against Matthew Moore, D. J. Middleton, Stephen Graham and Jesse B. Southerland, as sureties on the guardian bond of W. B. Middleton.

VI. That the deed of trust executed by W. B. Middleton to Matthew Moore *et als.*, was intended as a security for the debts herein found due the relators, as well as for the notes therein recited.

VII. That the relators are entitled to judgment against B. F. Middleton, Administrator of W. B. Middleton, for the amount of their respective debts.

VIII. That the relators are entitled to have the sureties, grantees under the said deed of trust, declared trustees of the property therein conveyed, for the relators and the other creditors mentioned therein; and that the relators are entitled to be subrogated to the rights of said sureties.

IX. That the guardian, W. B. Middleton, is not chargeable with the $1,005 collected by him in May, 1863, for the purchase money of lands.

The defendants except to the report of the referee, as follows:

For that the conclusions of law numbered 2, 3, 4, 6 and 8 are erroneous and contrary to the facts and the law governing this case.

The following is a copy of the material parts of the deed of (91) May 1st, 1878:

This indenture made this the 1st day of May, 1878, between William B. Middleton of the above named State and county, of the first part, and Matthew Moore, Stephen Graham, D. J. Middleton and Jesse B. Southerland, all of the same county and State, of the second part, witnesseth: that whereas the said party of the first part, on the 18th day of January, 1859, became and was duly appointed guardian of L. M. Cooper, Wm. Cooper and Jno. D. Cooper, children of Wm. Cooper, deceased, and gave as sureties on his guardian bond, made on the 18th day of January, 1859, Matthew Moore, D. J. Middleton and Stephen Graham, for the sum of fifty thousand dollars, and gave as his sureties on his second guardian bond, made on the 16th day of

October, 1866, D. J. Middleton and Jesse B. Southerland, for the sum of five thousand dollars; and whereas, the said party of the first part has not made a final settlement with his said wards, and discharged and satisfied the said guardian bonds; now therefore, to indemnify the said parties of the second part, and save harmless his said sureties, the said parties of the second part, this indenture witnesseth: for and in consideration of the premises, and the further consideration of one dollar, the said party of the first part has granted, bargained, sold and conveyed unto the said parties of the second part and their heirs, a certain tract or tracts of land.

* * * * * * * *

The condition of the foregoing deed is such, that whereas, the said parties of the second part, are liable for the said party of the first part, as herein specified; and whereas, the said party of the first part, is also indebted as follows: To H. Bowden, on face of the note, date not recollected, but now in possession of Matthew Moore, in the sum of forty dollars; to John A. McArthur, by note due January 1st, 1878, for one thousand and fifty-five dollars and seventy-three cents; to I. B. Kelly, by note due 15th May, 1878, for one hundred and fifty-seven dollars and eighty-two cents; to Stephen Graham, by
(92) note due 4th April, 1878, at 8 per cent., for two hundred and eighty dollars; to H. Grimes & Co., by note due 18th January, 1875, at 8 per cent., for one hundred dollars.

Now, therefore, if the said party of the first part, shall well and truly pay off and satisfy his said wards, L. M. Cooper, Wm. Cooper and John D. Cooper, and save harmless his said sureties on his guardian bonds, the said parties of the second part, and pay off and discharge the said indebtedness just above specified, then this deed is to be void; but otherwise the said parties of the second part, and their heirs, are to hold the property in trust, to sell the same and pay off and discharge the said debts.

Upon the report of the referee being made, the Court adjudged that the exceptions of the defendant be overruled, and the report be in all respects confirmed; and it was further adjudged that the plaintiffs recover of the defendant B. F. Middleton, administrator of W. B. Middleton, the sum of fifty-five thousand dollars, the penal sums of the two bonds of B. F. Middleton, guardian of the relators, to be discharged upon the payment by said administrator of the sums found by the referee to be severally due to each of the relators, with interest on each of said sums from the 19th day of May, 1884, until paid; and it was further adjudged that, in case the personal assets in the hands of B. F. Middleton, administrator as aforesaid, should not be suffi-

cient to discharge the several sums to the relators, that the real and personal estate described in the mortgage deed of the said W. B. Middleton to Matthew Moore and others, sureties, of May 1st, 1878, be subjected to, and applied to the payment thereof, and to that end, the defendants, Matthew Moore, Stephen Graham, Daniel J. Middleton and Joseph B. Southerland, the grantees in the deed of the 1st day of May, 1878, are declared trustees of the real and personal property therein to them conveyed; and it was further adjudged, that in case the several amounts therein before adjudged to be paid, should not be paid out of the personal assets of the said W. B. Middleton, on or before the 20th day of May, 1886, and should remain unpaid, (93) then, in such case, H. R. Kornegay and W. R. Allen were appointed commissioners to make sale of all the real estate mentioned and described in the deed of May 1st, 1878. The decree then proceeded to direct the manner and time of sale.

The defendants appealed.

Mr. H. R. Kornegay, for the plaintiffs.

Messrs. Geo. V. Strong and W. R. Allen, for the defendants.

ASHE, J. (after stating the facts). The avowed object of this action, was to subrogate the plaintiffs to the rights of the sureties in a certain mortgage deed made by W. B. Middleton to his sureties on his guardian bond.

The cause was referred to Frank A. Daniels, both parties assenting, for trial upon all the issues of law and fact arising on the pleading. The referee made his report, accompanied by the evidence taken in the cause, distinctly stating in his report the facts found upon the evidence, and his conclusions of the law arising from the facts so found. In this respect the referee has strictly complied with the practice as prescribed by this Court. *Klutts v. McKenzie,* 65 N. C., 102; *Green v. Castleberry,* 70 N. C., 20; *Earp v. Richardson,* 75 N. C., 84.

The evidence in the case was very voluminous, and as will be seen by reference to the statement of the case, the facts found and the conclusions of law, were numerous; but the only exception relied upon in the argument before us was, that "the conclusions of law numbered 2, 3, 4, 6 and 8, are erroneous and contrary to the facts and the law governing the case." All the other exceptions were abandoned in this Court.

The exception cannot be sustained. It is too vague and uncertain. It points out no faults, either in the facts found nor error in the conclusions of law upon them. The law requires that an exception to

the report of a referee, should discriminate and point out specifically the faults complained of. An exception that a referee ought to
(94) have found as a conclusion of law that the plaintiff recover nothing, is not sufficient. *Suit v. Suit,* 78 N. C., 272.

The meaning and purport of the defendants' exception is, that upon the whole case the plaintiff is not entitled to the relief he seeks.

The facts in the case were found by the referee, and are presumed to have been approved by the Court, and when that is so, they are not the subject of review in this Court. *Hyman v. Devereux,* 65 N. C., 588. The exception to this is, where there is no evidence to support the finding, but even then the error must be made the ground of exception, otherwise the finding will be presumed to be right. *Green v. Jones,* 78 N. C., 265.

But to give the defendant the full benefit of his exceptions as taken, and zealously urged in this Court (and what does it amount to?), he contended that the mortgage was given to indemnify the sureties of Middleton against liability on his guardian bond, and that the right of the creditor did not attach to such a security, until the principal and sureties should all become insolvent, and as it did not appear from the finding of the referee, that either Middleton or his sureties were insolvent, the plaintiff, as creditor, had no right to be subrogated to the rights of the sureties in the mortgage. If this were a mortgage simply to indemnify the sureties, there would be some force in the position taken by the learned counsel, for the same doctrine with some qualifications was announced by this Court in the recent case of *Ijames v. Gaither,* 93 N. C., 358. But that case is distinguishable from this. There the mortgage was given exclusively for the indemnification of the sureties, but here it is given, avowedly for the purpose of indemnifying the sureties, but at the same time expressly providing, not only, that if the debt should be paid by the grantor the deed should be void, but in the event the debt should not be paid by him, that the property should be held by the sureties, in trust to sell the same and pay off and discharge the said debt, so that the property conveyed in the deed, was, by its express terms, appropriated to the payment of the
(95) debts mentioned therein. The entire deed, in all its parts, must be considered in ascertaining the scope, meaning and intention of the parties, and we think its proper construction is, that it reposes trust in the sureties to hold and sell the property conveyed, and apply the proceeds to the payment of the debts specified therein, if the trustor should fail to pay the same, by which means the sureties are to be indemnified. So that there was, in fact, no necessity for resorting to the equitable doctrine of subrogation, as the creditors mentioned

in the deed were the persons for whose benefit the deed was intended to enure. But as the effect will be the same, whether there is a judgment for subrogation or a direct judgment that the sureties shall proceed to sell the property and apply the proceeds to payment of the debts, there is no error in the judgment of the Superior Court. In either case, the sureties obtain their indemnification to the amount realized from the sale, which is all they have a right to claim.

The judgment of the Superior Court is affirmed, except as to the time when the sale of the property conveyed in the mortgage shall be made, and that must be subject to the further directions of the Court below, and the case is remanded to the Superior Court, to the end that an account may be taken of the assets in the hands of B. F. Middleton, as administrator of W. B. Middleton, to ascertain what amount thereof may be applicable to the debts secured in the mortgage, and that the said Court may make all such further orders and judgments in the cause as shall be deemed necessary to effectuate the judgment of the Superior Court as affirmed by this decision.

No error. Affirmed.

Cited: *Howerton v. Sexton,* 104 N.C. 83; *Fertilizer Co. v. Reams,* 105 N.C. 291; *Lanning v. Comrs.,* 106 N.C. 511; *Wadesboro v. Atkinson,* 107 N.C. 319; *Tilley v. Bivens,* 110 N.C. 344; *Hooker v. Yellowley,* 128 N.C. 300; *Harris v. Smith,* 144 N.C. 441; *Lewis v. May,* 173 N.C. 105; *Burnsville v. Boone,* 231 N.C. 579.

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(96)

*THOMAS D. HOLLY v. SALLIE D. HOLLY ET AL.

Counsel—Abuse of Privilege—Judge's Charge.

1. As a general rule, objections to comments of counsel, alleged to be an abuse of privilege, must be made before the case is given to the jury, in order that the Court may, by proper directions, prevent any prejudicial consequences. After verdict the exception should not be entertained.
2. There may, however, be instances where the abuse of privilege is so gross that it will become the duty of the Judge, *ex mero motu,* to interfere.
3. The Judge is not required by the Act of 1796—The Code, Sec. 413—to "charge" the jury where the facts at issue are few and simple and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated,

*CHIEF JUSTICE SMITH took no part in the decision of this case.

and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirements of the statute.

CIVIL ACTION to recover land, tried before *Avery, Judge,* and a jury, at January Special Term, 1884, of the Superior Court of BERTIE County.

It was admitted on the trial that both the plaintiff and defendants claim title to the land in controversy, under the will of Augustus Holly. It was in evidence that Augustus Holly owned a very large body of contiguous land, composed of the "Ellenhouse," the "Willow Branch," the "Hermitage," the "John Gaskins place," (bought of John S. Gaskins in 1871), and the "Gus Gaskins place," (bought from the heir-at-law of Augustus Gaskins in January, 1872), the "Ashland," and the "Mount Gould place." The Willow Branch place was devised to the plaintiff, who contended that it embraced the land in dispute. It was admitted that Augustus Holly gave the land in controversy, in 1852, to Augustus Holly Gaskins, because he was
(97) named after him, and it was in evidence that in 1872, hearing that one Byrum, who had married the daughter and only heir-at-law of Augustus H. Gaskins, was about to sell the land, the said Augustus purchased it back again, and stated, at the time of the purchase, that it was a part of his father's "Willow Branch" place, and that he intended to put it back where it came from, and that he intended that it should stay there.

The defendant, on the other hand, introduced evidence that Augustus Holly, about the time he bought back the "Gus Gaskins" place—the *locus in quo*—stated that he had done so because he needed it to go with the "John Gaskins" place, for the purpose of timber and wood; that the "John Gaskins" land was lacking in timber, and the "Gus Gaskins" land was adjoining it, and was well timbered; that after his marriage with the defendant, he stated the same thing; that he used the timber on it for no other purpose, and that he had the crops from the two places put together, and on one occasion stated that he did so because they were the same. No witness testified that the land in dispute was ever called the "Gaskins" place, but several of them testified that it was sometimes called the "Augustus Gaskins place."

In the argument before the jury, the defendants' counsel indulged in some comments upon the conduct of the plaintiff, which were alleged to be an abuse of privilege, but no objection was made to the remarks at the time, nor was the attention of the Court called to them when the case was submitted to the jury.

The Court charged the jury as follows: "The Court can aid you but little in this case, as the questions involved are chiefly those of

fact, of which you are the sole judges. Both parties admit title in Augustus Holly, deceased. The plaintiff says, it was at the death of Augustus Holly, a part of the Willow Branch land, conveyed to him in the will under the devise to him of the "Willow Branch farm." The plaintiff must recover in ejectment, upon the strength of his own title; he must satisfy you, by a preponderance of evidence, (98) that the *locus in quo* was a part of the "Willow Branch" place —you need not inquire whether it was a part of the "Gaskins," the "Hermitage," or "Ashland" land. Are you satisfied by a preponderance of evidence that the land, at the death of Augustus Holly, was a part of "Willow Branch" land? If so, you must find the first issue "yes," and in answer to the second, name such sum as in your judgment is proper."

The following issues were submitted to the jury, to-wit:

1. Is the plaintiff the owner in fee-simple of the land described in the complaint and in controversy in this action?

2. What is the annual rental value of the land in controversy?

To the first issue the jury responded "no," and there was no response to the second issue.

There was no exception taken by the plaintiff to the ruling of the Court as to the competency of the testimony, nor was there any exception to the charge of the Court, when delivered. Two days after the verdict was rendered, counsel for the plaintiff asked to be allowed to except to the charge. But no specific objection to the charge of the Court was then made. No special instructions were asked on the trial, but after the trial and the rendition of the verdict, the counsel for plaintiff wished to except to the failure of the Court to stop the defendants' counsel when using remarks amounting to an abuse of privilege. The Court declined to entertain the exceptions, and rendered judgment upon the verdict in favor of the defendants, from which the plaintiff appealed.

Mr. R. B. Peebles, for the plaintiff.

Mr. W. D. Pruden, for the defendants.

ASHE, J., (after stating the case). There was but one point raised by the plaintiff on the bill of exceptions, and that was the refusal of the Court to entertain his exception to the failure of the Court to stop defendants' counsel in the remarks made by him in the argument before the jury, which it was insisted was an "abuse of (99) privilege."

The plaintiff's counsel contended it was the duty of the Court to stop the counsel, and its failure to do so was error, and entitles the plaintiff to a new trial. This may be so, if the counsel of the plaintiff had made his objection to the objectional remarks in apt time, but it was made too late. In *State v. Suggs,* 89 N. C., 527, it was held, that "a party complaining of the *abuse of privilege* by opposing counsel, must object at the time, so that the Court, when it comes to charge the jury, may correct the error, if one was committed, or the objection will be lost;" and it has been expressly held by this Court, that an objection that the Judge failed to stop counsel in improper remarks to the jury, comes too late when made after verdict. *State v. Sheets,* 89 N. C., 543, and *Horah v. Knox,* 87 N. C., 483.

There may be cases when it would be the duty of the Judge to stop the counsel, when his remarks and conduct are in violation of all the rules of the decorum and propriety that should be observed in the administration of justice, when nothing the Judge could say in his charge to the jury could rectify the wrong or efface the prejudice produced. Such was the case of the *State v. Noland,* 85 N. C., 576, but that was an extreme case, such as has never before occurred in the history of our judicial proceedings, and it is to be hoped will never again occur.

It was insisted in the argument before us in behalf of the defendant, that he was entitled to a new trial, because the Judge in his charge to the jury had failed to comply with the requirements of the Act of 1796, The Code, Sec. 413, which requires the Judge to state in a plain and concise manner, the evidence given in the case, and declare and explain the law arising therefrom; and to sustain his position he cited the cases of *State v. Jones,* 87 N. C., 547, and *State v. Rogers,* 93 N. C., 524, and other cases of like import might have been cited. But all of these cases, it will be seen, were cases where questions of law were involved, which might be declared the one way or the
(100) other, according as the jury might find the facts to be, to which the principles of law were applicable.

The Act of 1796 is held to be declaratory of the common law, and that a Judge is not bound to *charge* the jury unless he chooses to do so, but if he does undertake to *charge,* then he must conform to the requirements of the Act. *State v. Morris,* 10 N. C., 391. What is evidently meant by the *charge* to the jury, are the instructions given by the Judge, upon the law applicable to the facts of the case, but when there is no principle of law involved, he cannot be said to charge the jury in the sense of the statute.

But although a Judge is not bound to charge the jury, as Chief Justice TAYLOR said in Morris's case "no Judge would ever refuse to

impart such assistance, when it is requested by a jury, nor would he withhold it in any case wherein the nature of the evidence, or the conduct of the cause, led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility. But it must of necessity depend upon the circumstances of each case, whether the Judge believes that his aid would be of any efficacy; whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe."

The object of the act of 1796, was evidently intended to be applied to those cases where questions of law arise upon the facts of the case, for the Judge is required "to *declare and explain* the law arising upon them." *Cui bono* recapitulate the facts of a case, where there is no principle of law arising upon them, and it is a pure question of fact, lying entirely within the province of the jury?

When, in the trial of a cause like that of the *State v. Rogers, supra,* and others of that class, where the witnesses are numerous, the evidence complicated and conflicting, and there are different principles of law applicable to the different aspects of the case, as presented by the opposing evidence, it is most clearly the duty of the Judge to comply with the requirements of the statute. To refuse to give (101) any charge in such a case would be a gross dereliction of duty, and subject him to just public censure. But when the facts of a case are few and intelligible, and there is no question of law to be charged by the Court, we do not see the necessity of recapitulating the facts, nor do we think it is the duty of a Judge to do so, unless he is requested so to do. *State v. Reynolds,* 87 N. C., 544, and *State v. Grady,* 83 N. C., 643.

In the case under consideration, there was no question of law involved. It was a simple question whether the land in controversy was included in the devise of the "Willow Branch place." There was no request that the Judge should recapitulate the facts, and we are unable to see how this doing so could have aided the jury in coming to a determination upon the facts of the case. It was a question of preponderance of evidence, exclusively within the province of the jury; and we are of the opinion, therefore, that the charge of the Judge is not obnoxious to the objection of the defendant.

The judgment of the Court below must be affirmed.

No error. Affirmed.

Cited: Holley v. Holley, 96 N.C. 230; *S. v. Jones,* 97 N.C. 474; *S. v. Boyle,* 104 N.C. 822;*Cawfield v. R. R.,* 111 N.C. 604; *Duckworth v. Orr,* 126 N.C. 677; *S. v. Tyson,* 133 N.C. 696; *Blake v. Smith,* 163

N.C. 275; *S. v. Steele,* 190 N.C. 509; *Switzerland Co. v. Highway Com.,* 216 N.C. 458; *McNeill v. McNeill,* 223 N.C. 182; *S. v. Hawley,* 229 N.C. 170.

W. H. HEDRICK v. ROBERT S. PRATT.

Judgment—New Trial—Non-suit—Verdict.

1. A plaintiff may, in deference to an intimation from the Court that he cannot maintain his action, submit to a non-suit, and have the question of law reviewed upon appeal.
2. Parties to an action *may agree* that, if a verdict—rendered in favor of a plaintiff, subject to the opinion of the Court upon a question of law reserved—is set aside, the plaintiff may submit to a judgment of non-suit, and, upon appeal, the question will be reviewable in the Supreme Court.
3. If a verdict in favor of a plaintiff is set aside upon the ground that the Court holds a question of law reserved, with the defendant, the effect is to award a new trial, and the plaintiff—there being no agreement, or further intimation from the Court—cannot voluntarily take a non-suit and appeal.

(102) This was a CIVIL ACTION tried before *Shipp, Judge,* and a jury, at Spring Term, 1885, of CHOWAN Superior Court.

The plaintiff introduced a mortgage from John S. Hedrick to himself, to secure a note therein recited, payable to the plaintiff.

He showed that the defendant had purchased the mare described in the deed, and was still in possession. It was admitted that the mortgagor, J. S. Hedrick, had died before the commencement of this action.

Plaintiff was offered as a witness in his own behalf, and was asked "if the debt secured in the mortgage had been paid?" To this question the defendant objected as incompetent. The Court reserving the question of law, admitted the question, and the witness answered, "It has not been paid in full."

The plaintiff then proposed to prove by himself as a witness, that the note described in the mortgage was in his possession, and had been since the execution of the mortgage to him. To this the defendant objected—the Court, reserving the question of law, permitted the plaintiff to answer as above set forth.

Plaintiff then proposed to read the note to the jury, and the defendant objected, and upon its appearing to the Court that there was a subscribing witness to the note, who resided in the State, and was not present, the Court declined to permit it to be read. No other evidence was offered.

HEDRICK *v.* PRATT.

Upon the facts and proofs submitted, his Honor directed a verdict to be entered finding all issues in favor of the plaintiff, subject to the opinion of the Court on questions of law reserved.

The Court, upon consideration of all the law bearing upon the case, being of opinion with the defendant, directed the verdict to be stricken out. Whereupon the plaintiff took a non-suit and appealed.

Mr. J. A. Williamson, for the plaintiff. (103)
Messrs. W. D. Pruden and John Gatling, for the defendant.

MERRIMON, J. It is a well settled rule of practice in this State, that when on the trial, the Court intimates an opinion that the plaintiff cannot maintain the action, he may, in deference to the opinion of the Court, submit to a judgment of non-suit, assign ground of error, and appeal to this Court. In such cases, the judgment is not regarded as one entered simply at the instance of the plaintiff; he submits to it with the understanding on the part of the Court, that he shall have the right to except and appeal. *Pescud v. Hawkins,* 71 N. C., 299; *Graham v. Tate,* 77 N. C., 120; *Wharton v. Commissioners,* 82 N. C., 11.

But that rule of practice was not observed in this case. The trial was had, and under instructions from the Court, the jury rendered a verdict for the plaintiff. Thereupon, "the Court upon consideration of all the law bearing upon the case, being of opinion with the defendant, directed the verdict to be stricken out." The necessary legal effect of this action of the Court was to leave the action as if no trial had been had, and to direct a new trial.

It seems that the plaintiff was not only dissatisfied with what the Court did, but for some singular reason that does not appear "took a non-suit and appealed." The verdict having been "stricken out"—set aside—he had the right to ask for and have a judgment of non-suit, but the effect of such judgment was to put him out of Court, with no right of appeal. *Graham v. Tate, supra.* No appeal lay from a judgment such as he asked for and obtained. He could not assign ground of error to be reviewed and corrected by this Court, for as to the judgment of non-suit demanded and obtained by him, the Court had made no decision adverse to him: it had allowed him just what he voluntarily asked for. He could not be allowed to do the absurd thing of asking this Court to correct alleged error in a judgment in his own favor, granted at his instance, and in no sense at that of the defendant, nor at the suggestion, or under any adverse ruling (104) of the Court as to it. The action of the plaintiff, it seems to us, is inexplicable upon any ground. The state of the pleadings re-

quired a trial by jury, and the Court, by setting the verdict aside, in effect directed a new trial. If the plaintiff could have appealed as he undertook to do, this Court could not do more than grant a new trial. Why, therefore, did he desire to appeal? Counsel in the argument here could not tell us.

It may be, that the parties could have agreed before the rendition of the verdict, that if the opinion of the Court should be adverse to the plaintiff as to the question of law reserved, then the verdict should be set aside and a non-suit entered, with leave to the plaintiff to appeal, and have any error of the Court corrected. In *Dickey v. Johnson,* 35 N.C. 450, this Court intimated that such agreement might be made, and a like suggestion is made in *Kirby v. Mills,* 78 N. C., 124. But it does not appear that there was any such agreement. Indeed, we were informed by the counsel for the appellee that there was none.

The appeal was improvidently taken and it must be dismissed, and it is so ordered.

Appeal dismissed.

Cited: Warner v. R. R., 94 N.C. 255; *Mobley v. Watts,* 98 N.C. 290; *Weeks v. McPhail,* 128 N.C. 137; *Hayes v. R. R.,* 140 N.C. 134; *Merrick v. Bedford,* 141 N.C. 506; *Chandler v. Mills,* 172 N.C. 368.

A. J. ROUNTREE, ADM'R OF C. J. WORRELL, v. T. A. BRITT AND J. C. VINSON.

Administration—Counter-claim—Deed—Description—Jurisdiction—Mortgage—Verdict.

1. A new trial will not be granted, if the verdict is a proper one, although it may have been returned in obedience to an erroneous instruction from the Court.
2. The sale or mortgage of *a crop to be planted,* as well as one planted and in process of cultivation, is valid—provided the *place* where the crop is to be produced is designated with certainty sufficient to identify it. *It seems,* parol testimony is competent to fit the description to the property and show the agreement of the parties.
3. A mortgage conveying "my entire crop of every description" is too vague to pass any title to the property mentioned.
4. A defendant is entitled to judgment upon a counter-claim, if no reply or demurrer has been interposed, although it would have been refused if objection had been made in apt form and time.

5. Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counter-claim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant's judgment will be stayed until it is ascertained what amount of the assets of the estate of the intestate is applicable thereto.
6. The Superior Court, in term, has incidental jurisdiction to order the taking of an account of the administration, where necessary for adjusting the rights of the parties to any action therein pending.

This was a CIVIL ACTION tried before *Shipp, Judge,* and a jury, (105) at the Spring Term, 1885, of HERTFORD Superior Court.

The action was brought by the plaintiff, as the administrator of C. W. Worrell, and he alleged in his complaint, that his intestate in his lifetime was the owner of the following personal property, viz: Eight bales of lint cotton, 12,921 pound seed cotton, one two-horse wagon, two horses, one mule, one cart and wheels, fifty-six flour barrels of corn in shuck, 2,048 bundles of fodder, three cows and three heifers; that the property was worth one thousand dollars; that C. W. Worrell died intestate about the .....day of February, 1883, and after his death, the defendants unlawfully took into possession the above described property, and converted the same to their own use. The defendants, in their answer, set up two defences: First, That the same property mentioned in the complaint was conveyed to them by a chattel mortgage, executed to them by the plaintiff's intestate, dated the 18th of January, 1882, which is as follows, to-wit:

"I, C. W. Worrell, of the county of Hertford, State of North (106) Carolina, am indebted to Britt & Vinson, of Hertford County, in said State, in the sum of one thousand dollars, for which they hold an open account, to be due on the 1st day of November, A. D. 1882, and to secure the payment of the same, I do hereby convey to them these articles of personal property, to-wit: Two head of horses, two head of mules, twenty head of hogs, twenty head of cattle, two carts and wheels, one wagon, and my entire crop of every description.

"But on this special trust: That if I fail to pay said debt and interest and cost, on or before the 1st day of November, A. D. 1882, then they may sell said property, or so much thereof as may be necessary, by public auction, for cash, first giving ten days' notice at three public places, and apply proceeds of such sale to the discharging of said debt, and interest on the same, and pay any surplus to me."

For a further defence, they complained of the plaintiff, that the said C. W. Worrell was indebted to them in the sum of one thousand and fifty-seven dollars and eighty-five cents, for goods, wares and merchandise, sold and delivered to him, at his request, between the 18th day of January, 1882, and the first day of December, inclusive of said

two dates. That said account and debt was due and payable on the 1st day of January, 1883, and that no part had been paid, and they demanded judgment for the same.

The defendants tendered the following issue: "Was the cotton, corn and fodder described in the complaint, or any part thereof, the same crop which was described in said mortgage, or any part of same."

His Honor in his charge to the jury, stated, that it appearing from the evidence that no part of the corn, cotton or fodder, described in the complaint, was on hand at the date of the execution of the mortgage under which the defendants claimed title, but that the whole thereof was the product of the crop of 1882, planted after the execution of the said mortgage deed, he would instruct them to respond to the issue "No."

(107) The jury found the following special verdict, to-wit:

I. That the corn, fodder and cotton described in the complaint, was no part of the crops described in the defendant's mortgage.

II. That the conversion complained of was after the death of C. W. Worrell, and before plaintiff qualified as his administrator.

III. That when the mortgage was executed, C. W. Worrell had no crop on hand, except about enough corn and fodder to run his farm during the year 1882.

IV. That the corn, cotton and fodder mentioned in the complaint, were grown on Worrell's land in 1882, and converted by defendants in February, 1883.

V. That the value of the crops converted, including interest to date, was six hundred and nineteen dollars and twenty-three cents.

VI. That the amount due defendants by plaintiff's intestate up to date was nine hundred and six dollars and sixty-seven cents.

Upon this finding of the jury, the Court rendered the following judgment, viz:

"That the plaintiff recover of the defendants T. A. Britt and J. C. Vinson, the said sum of six hundred and nineteen dollars and forty-five cents, and the further sum of $....., the costs of the action, to be taxed by the clerk.

"And it is further adjudged that the estate of C. W. Worrell is indebted on this day, after deducting all credits, to T. A. Britt and J. C. Vinson, in the sum of nine hundred and six dollars and twenty-three cents, and that the same shall be paid by the administrator, *pro rata* with other debts of like class, out of the assets of the estate, in due course of administration.

"No execution is to issue without the further order of this Court, except for two-thirds of the said recovery."

From this judgment the defendants appealed.

Messrs. John Devereux, Jr., W. D. Pruden and D. A. Barnes, for the plaintiff.

Mr. R. B. Peebles, for the defendant.

ASHE, J., (after stating the facts). The main question pre- (108) sented by the record is, was there error in the instructions given by the Court to the jury, and the judgment rendered upon their finding.

Although there was a special verdict rendered by the jury, their first finding, "that the corn, cotton and fodder described in the complaint, was no part of the crops described in the mortgage," we take it, was in deference to the charge of the Court; the special verdict therefore, does not relieve the case from the question of error in the charge of the Court. Then, was there error? We are of the opinion the judgment of the Court was in the main correct, and must be sustained, with some modifications.

The Court seems to have predicated its charge to the jury that the mortgage was defective, because the crops claimed to have been passed by it, were not planted at the time of the execution of the mortgage; but that is immaterial, for if the Court decides a point correctly, there is no error to be attributed, although it may give a wrong reason for its conclusions; and besides, even if there was error in the charge, the error was cured by the verdict of the jury, who decided the point according to law, as we shall see.

We are of the opinion the description of the corn, cotton, and fodder mentioned in the deed of mortgage, was too vague and uncertain to pass any title to the property to the mortgagees.

It is now settled that to make a valid sale or chattel mortgage, the property conveyed must be *in esse*, or at least have a potential existence at the time of the execution of the mortgage. It was formerly held in this State, that a crop was not the subject of sale or execution before it was planted, but the law has undergone a very great change in this respect. It is now generally the adopted principle, that a mortgage of an unplanted crop, or the future products of a farm, made by one in possession of the land, as owner or lessee, is valid at law. Jones on Chattel Mortgages, Sec. 143.

The principle is recognized in Georgia, Wisconsin, and New (109) York. Jones on Chattel Mortgages, Sec. 143, Note 1. The principle was first adopted in this State in the case of *Cotton v. Willoughby*, 83 N. C., 75, which has been followed with approval by *Harris v. Jones, Ibid.*, 317; *Rawlings v. Hunt*, 90 N. C., 270. In that case it was held, "that a crop to be planted *on one's own land, or on land let to him*, as well as a crop planted and in process of cultivation,

is the subject of a valid mortgage." There, the land, known as the Henry place, was designated in the deed as the land on which the crop was to be raised. And in the case of *Atkinson v. Graves,* 91 N. C., 99, the same principle is announced, and the Court then said, "a mortgage or sale of a crop to be raised on a certain field or farm in the possession of the mortgagor or seller, is as far as the principle has been carried in respect to unplanted crops; and it has never, as we are aware, been extended to the products of the soil to be raised without designating the *place* where they are to be produced." The mortgage in question fails to designate any *field, farm* or *land* on which the crop was to be produced, and in that respect, according to the authorities cited, is defective, and passed no title in the corn, fodder and cotton, to the mortgagees.

The defect might possibly have been cured by parol evidence, offered to apply the description to the subject matter intended to be conveyed —Jones on Chattel Mortgages, Sec. 63—but there seems to have been no evidence offered as to any agreement or understanding between the parties as to the place where the crop was to be produced, or what crops were intended to be conveyed.

We therefore hold that there was no error in the judgment rendered by the Court in behalf of the plaintiff, except in that execution might issue for only two-thirds of the amount of the judgment. The plaintiff should have execution for the whole amount of the judgment in his behalf, for there may be debts of higher dignity than that of the defendants, the payment of which it would not be right to postpone until an account of the administration could be taken.

(110) We hold also that the judgment in behalf of the defendants must be sustained. For, whether the defence set up by them could be properly pleaded as a counter-claim, as a matter connected with the subject of the plaintiff's action, there was no replication or demurrer filed by the plaintiff, and we must therefore hold that any objection was waived. The Code, Sec. 249, *Barnhardt v. Smith,* 86 N. C., 473. This would seem to be in conflict with the decision in *Mauney v. Ingram,* 78 N. C., 96; but is not so, for there was a demurrer by the plaintiff in that case to the answer of the defendant.

No execution will of course be issued on the judgment in favor of the defendants, until it can be ascertained what amount of the assets of the estate of C. W. Worrell in the hands of the plaintiff, as his administrator, is applicable to this debt, and this involves the necessity of an account of the administration of the estate of the intestate by the plaintiff. To that end, therefore, the case is remanded to the Superior Court of Hertford, that an account may be taken of the

administration of the estate of C. W. Worrell, by the plaintiff, as his administrator, so that it may be ascertained what amount of this judgment, in due course of administration, shall be due them upon a *pro rata* application of the assets to the class of debts to which this debt, upon which the judgment was founded, belongs; and to the further end, that upon the report of the referee, the amount which shall be found applicable to the defendants' judgment may be adjudged to be paid them.

And it is further declared that the administrator, in taking the account, may make all necessary parties, to effect a final account of his administration, the Superior Court in Term having incidental jurisdiction to take the administrator's account in such a case, as was held in *Whedbee v. Riddick*, 79 N. C., 521.

Judgment modified, and case remanded to be proceeded with in conformity to this opinion.

Modified. Remanded.

Cited: S. v. Garris, 98 N.C. 736; *Harris v. Allen,* 104 N.C. 90; *Pate v. Oliver,* 104 N.C. 465; *Taylor v. Hodges,* 105 N.C. 348; *Weil v. Flowers,* 109 N.C. 217; *Davis v. Mfg. Co.,* 114 N.C. 329; *Hurley v. Ray,* 160 N.C. 379; *In re Miller,* 217 N.C. 137; *Casualty Co. v. Lawing,* 223 N.C. 14.

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(111)

ELLEN P. JONES v. WILLIAM JONES, ET AL.

Consolidating Actions—Evidence—Refreshing memory of Witness.

1. Exception to an order for the consolidation of actions must be taken at the time the order is made.
2. The order in which consolidated actions shall be tried is within the discretion of the Judge, and not reviewable in the Supreme Court.
3. The evidence for the purpose of refreshing the recollection of a witness comes within the general rule, that "the best evidence the case admits of must be produced," therefore, a witness will not be allowed to refresh his memory by referring to copies of deeds executed by him when the originals may be had.
4. Copies of instruments on the books of the register of deeds are not the best evidence to refresh the memory of the maker of the instrument.

This was a CIVIL ACTION tried before *McKoy, Judge,* and a jury, at the January Special Term of the Superior Court for the county of HERTFORD.

There were two actions. The first was brought by Ellen P. Jones, widow of William H. Jones, deceased, for dower, against William Jones and others, before the clerk, and carried up to the Judge of the Superior Court by appeal, upon an issue of law raised by the defendant William Jones, to the effect that the sheriff's deeds, under which the decedent, W. H. Jones, claimed the land in controversy, were drawn for the entire interest of William Jones, the defendant in the executions, when, in fact, the sheriff at the time of the sale, publicly announced that he only sold the excess after allowing the said Jones his homestead, and prayed that the deed might be reformed.

The second action pending, was one brought by William Jones, the defendant, against Ellen P. Jones, the widow, and H. H. Jones, the only heir-at-law of the said William H. Jones, to have the sheriff's deeds reformed in the particulars and for the reason above set forth in his answer to the petition for dower, insisting that W. H. Jones acquired only a life estate by the sale of the sheriff, and the widow was not entitled to dower.

(112) At Fall Term, 1883, *Avery, Judge,* made an order that the two cases be consolidated and continued.

At Special Term, 1884, William Jones asked that No. 2 should be first tried. The Court ordered the trial to proceed under the order of consolidation, to which William Jones excepted. Ellen P. Jones put in evidence two deeds from Isaac Pipkin, sheriff of Hertford County, one dated April 10th, 1869, and the other August 10th, 1869, which were registered, the former purporting to convey the *locus in quo* absolutely to W. H. Jones, deceased, and the defendant John E. Jones, as tenants in common in fee, and the latter purporting to convey the *locus in quo* to James L. Anderson in fee. The said Ellen then introduced a deed from J. L. Anderson, dated October 7th, 1870, which was registered properly, purporting to convey the *locus in quo* to W. H. Jones, deceased, and John E. Jones, as tenants in common, in fee.

Isaac Pipkin was examined on behalf of William Jones, and testified that he sold the land in question under an execution. "I think the homestead of William Jones was not sold. I put it up subject to the homestead. I made that announcement. I have no recollection of making but one sale, and at that sale William H. Jones and John E. Jones were the purchasers."

The witness was then asked to examine the deed book, in which was recorded the deeds of April 10th, and August 10th, and refresh his memory thereby, and then state his recollection as to the number of times he had sold the land. Ellen P. Jones objected, first because witness had not asked to be permitted to refresh his memory; second; the paper tendered was incompetent for that purpose. The Court ruled a

register's book incompetent to refresh his memory, and William Jones excepted.

The following issues were submitted to the jury, to-wit:

(1) Was William H. Jones, the husband of the plaintiff Ellen P. Jones, seized and possessed of the Askew tract of land, mentioned in the pleadings, during his coverture with the petitioner Ellen P. Jones?

(2) Was W. H. Jones seized and possessed of the William Jones tract of land mentioned in the pleadings, during his cover- (113) ture with the said Ellen P. Jones?

To each of which issues the jury responded in the affirmative, and there was judgment accordingly in favor of the plaintiff, from which the defendants appealed to the Supreme Court.

Mr. W. D. Pruden, for the plaintiff.

Messrs. Winborne and R. B. Peebles, for the defendant.

ASHE, J., (after stating the facts). All of the exceptions taken by the defendant on trial, were abandoned in this Court, except those taken to the ruling of the Court in consolidating the two actions; and refusing to allow the witness Pipkin to refresh his recollection as to the number of times he sold the land, by reference to the register's book in which his deeds were recorded.

We think the exception to the ruling of consolidation came too late. It was at Fall Term, 1883, that the order was made by the Court to consolidate the two cases. No exception was then taken to the ruling, but the defendant, by his silence, is presumed to have acquiesced in the order.

At the Special Term, 1884, the defendant William Jones, asked that No. 2—his action against the plaintiff Ellen P. Jones and others—should be tried first. The Court refused the motion, and ordered the trial to proceed under the order of consolidation, made at Fall Term, 1883, to which the defendant William Jones excepted.

It will be noticed that there was no exception to the order of consolidation, but only to the order in which the two consolidated cases should be tried. But this exception was abandoned in this Court, for the defendant abandoned all exceptions except that to the *order* of *consolidation,* and the ruling in the matter of refreshing the memory of the witness. After the actions were consolidated, it was a matter entirely in the discretion of the Judge, which order should be observed on the trial, and his ruling in that respect is not reviewable. (114)

We think as the defendant W. H. Jones acquiesced in the order of consolidation at the time it was made, and when even at the time, he made no objection to the order, but only to the manner in

which the two should be consolidated, he waived his objection to the order, and cannot be allowed to take it for the first time in this Court. In the ruling of the Court upon this point there was no error.

Nor do we think there was any error upon the other point. It is well settled that the best evidence the case admits of shall be offered. In this case, the two deeds executed by the witness Pipkin, as sheriff, the one to J. E. Jones and W. H. Jones, and the other to James L. Anderson, bearing his signature, were in evidence and before the Court. A reference to these deeds was certainly the best means of refreshing his memory. Why, then, resort to the register's book, which was only a copy of the deed? Was it admissible? In Starkie on Evidence, 181, it is held, "whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of particulars entirely forgotten, it must, in conformity with the general principles of evidence, be the best for the purpose the case admits of;" and in the case of *Burton v. Plummer*, 2 A. & E., 348, (29 E. C. L. Rep.), it was held, that "the copy of an entry, not made by the witness contemporaneously, does not seem admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and the rule appears to be applicable, whether the paper be produced as evidence in itself, or to be used merely to refresh the memory." This decision, which was made by Justice PATTERSON, is referred to with approval by Taylor in his work on Evidence, Sec. 1265.

The register's book was no doubt admissible as evidence in the cause, upon the question of title, but it was not the best evidence for the purpose for which it was offered, *i. e.* to refresh the recollection
(115) of the witness. The original deed having the signature of the witness, *for that* purpose was certainly the best evidence. We are, therefore, of the opinion there was no error in the ruling of the Court upon that point.

The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

Cited: Blount v. Sawyer, 189 N.C. 211.

B. F. ELLIOTT, ADMINISTRATOR, ET ALS. v. R. H. WHEDBEE, ET ALS.

Parol Evidence to Vary a Written Contract—Insurance—Assignment of Policy—Parties.

1. Parol evidence is incompetent to vary, explain, or contradict a written instrument. So where an insurance company contracted in writing to pay a sum of money to the personal representative of the insured, parol evidence is not admissible to show that it was intended that the sum should be paid to certain of his children.
2. Where the by-law of an insurance company allowed the holder of a policy to designate the beneficiaries, by endorsing on the back of the policy the names of such beneficiaries, which endorsement was to be signed and witnessed; *It was held*, that a designation could not be made by the insured, by merely writing the names of the beneficiaries in the blank prepared on the policies for that purpose, but without signing it.
3. Where a policy of insurance is payable to the personal representative of the deceased, his administrator may maintain an action for the money, against some of the next of kin who have received it.
4. Where, in such case, the amount of the policy has been paid to some of the next of kin of the insured, and the administrator sues them to recover the amount, if the estate is solvent, and the money is not needed for the payment of debts, the defendants are entitled to retain their distributive shares, and the administrator can only recover the excess.

This was a CIVIL ACTION, tried before *Shipp, Judge,* at Spring Term, 1885, of CHOWAN Superior Court, upon the following case agreed, to-wit:

John W. Nowell died intestate in Chowan County in 1883, (116) leaving him surviving, Cornelia C. Nowell, his widow, and the plaintiff J. W. Nowell, Jr., and the three *feme* defendants, Julia, wife of R. H. Whedbee, Ada Nowell, and Sallie, wife of W. H. Elliott, none of whom had any estate, and all are now of full age, except the plaintiff J. W. Nowell, Jr., who was born since the death of his father. Letters of administration on his estate were granted to the plaintiff B. F. Elliott.

Before his death, the intestate procured a certificate of membership in the Christian Brotherhood, of Norfolk, Virginia, an insurance organization, of which the following is a copy:

No. 956. CLASS 1.

THE CHRISTIAN BROTHERHOOD.

Benefit Certificate.

Know all men by these presents, that John W. Nowell is this day admitted a member of the *Christian Brotherhood,* entitled to all the benefits of Class No. One, and no other, as the same may appear. In

case of the death of the said John W. Nowell, being at the time of his decease a member hereof in good standing and repute, and not in arrears to said Brotherhood in annual dues, assessments, or otherwise, the said Brotherhood hereby agrees to pay to the personal representative or representatives of said John W. Nowell, or to the person or persons herein designated by said John Nowell to receive the same, as the case may be, a sum of money aggregating in all not more than the sum of one thousand dollars. * * * *

(Signed) JOHN W. NOWELL.

Countersigned by RICHARD H. JONES,
J. H. GARRETT, *Agent.* *General Secretary.*

On the back of this policy there was a printed form for the designation of the beneficiaries, which was as follows: "I desire and
(117) direct you to pay all sums of money due and owing my estate, at the time of my death, by reason and virtue of this certificate, to , of the State of
Witness: Signature of Holder."

The blank after the word "to" was filled in, in the handwriting of the intestate, with, *"my three daughters, Sallie, Julia and Ada,"* but it was not signed by the intestate, nor was there any witness to the same. At the time of the application to the agent of the said Brotherhood for the certificate, the intestate said to him that he desired to procure the same for his said three daughters, and at the time of making the above endorsement, he called it to the attention of his daughter, Ada Nowell, and gave his reasons why he intended it for his three daughters. At the death of Nowell, the said certificate was found among his papers and effects, and in the condition exhibited. The defendants, other than Elliott and wife, took possession of the same, and demanded payment thereof of the company.

The officers of the company said they thought the designation sufficient, but declined to pay, because of the adverse claim set up by the plaintiff, Elliott, administrator, etc. By consent of the parties, plaintiff and defendant, the money due by the Brotherhood, on said certificate, was collected by the defendants, and deposited in Bank, to await the determination of this action.

In a few weeks after the death of Nowell, the plaintiff John W. Nowell, Jr., was born. John W. Nowell, Sr., took out the policy in February, 1882, died in February, 1883, and his son John was a child of his second marriage.

One of the by-laws of the corporation was, that "members of the society may issue their certificates to whomsoever they may choose, or

they may designate the person or persons to whom payment shall be made after death."

The plaintiffs claim that the money belongs to Elliott, the administrator of Nowell, to be distributed under the statute. Whedbee and wife, and Ada, claim that it belongs exclusively to Sallie, Julia, and Ada.

The estate of Nowell is solvent, and this fund is not necessary (118) to pay debts.

If the opinion of the Court shall be in favor of the plaintiffs, judgment shall be rendered in favor of B. F. Elliott, administrator, for $699.85, and interest from, 1884, otherwise for the defendants.

The Court rendered judgment in favor of the defendants, and the plaintiffs appealed.

Mr. W. D. Pruden, for the plaintiffs.

Mr. L. L. Smith, for the defendants.

ASHE, J. (after stating the facts). The Christian Brotherhood was a corporation chartered by the General Assembly of Virginia, upon the mutual insurance principle. It was made by the charter, capable in law and equity, to sue and be sued, to plead and be impleaded, contract and be contracted with, and use a common seal, etc. In the second paragraph of the charter, it was declared: "The objects of this brotherhood are entirely benevolent, and shall be established in the city of Norfolk, State of Virginia, for the purpose of encouraging a high standard of morality, lightening the burdens of the poor, abating privation and suffering, promoting industry, economy and needed reform, and providing relief for widow and orphans by voluntary contributions." By the fifth paragraph it was authorized to adopt such by-laws as may be necessary for the government of the Brotherhood.

The only by-law bearing on the question before us, and the only one referred to by the counsel for the defendant, is as follows:

"Members of this Society may issue their certificates of membership to whomsoever they may choose, or they may designate the person or persons to whom payment shall be made after death."

The question presented by the record for our consideration, (119) is whether the defendants, the three daughters of the insured, John W. Nowell, are entitled to hold the whole of the fund paid on his policy, or whether the plaintiffs, the widow and posthumous son of the insured, are not entitled to share equally with the defendants in the fund, and if so, whether the administrator may not recover the same for their use.

The plaintiffs insist that under the by-law above cited, the representative of J. W. Nowell, that is, his administrator, is designated in the policy as the person who is to take the amount due upon the death of Nowell, and the defendants contend, that notwithstanding the policy was made payable to the representative of the insured, the insured had the right under the charter and by-law, to designate the person or persons to whom the policy should be paid, which he had done, by filling in the names of his three daughters in the blank form found on the back of the policy.

We will first consider the question, whether by the designation on the back of the policy, or other matter connected with the transaction, the right to the policy was transferred to the defendants.

There is no provision in the charter, nor any by-law that has been brought to our notice, that the policy issued by the Brotherhood must be taken in the name or for the benefit of the widow, children, or family of the insured. The contract evidenced by the policy, is to pay to the *personal representative* of the insured. That is the agreement. It is in writing and under the seal of the corporation, and the evidence offered by the defendants to show that the insured intended the policy for the defendants, was insufficient for the purpose for which it was offered. For parol evidence is not admissible to vary, explain, or contradict an agreement in writing. *Donaldson v. Benton*, 20 N. C., 572; *Etheridge v. Palin*, 72 N. C., 213; *Wilson v. Sandifer*, 76 N. C., 347.

(120) But it is contended that if the parol evidence tending to show the intention of the insured is not sufficient, the policy and all interest in it was transferred to the defendants by the designation indorsed on the back of the instrument.

But we are of the opinion that it did not have that effect, for several reasons. First, because it was incomplete. The by-law permitted the assignment and designation of the person to whom it was to be paid, but the company prescribed the mode by which it should be done, by placing the blank form in print upon the back of the policy, with the place designated for the signature of the holder and for the name of the witnesses, which shows that it required the assignment, as well as designation, to be signed by the holder, and attested by a subscribing witness. In this case, it was neither signed by the holder nor attested by a witness. The holder of the policy, when he filled up the blank in the form for designation with the names of his three daughters, could not help seeing below the printed form, the words: "Signature of holder," and "witness." This omission to sign, under the circumstances, leads to the conclusion that it was done with a purpose, and that he had some reason for not completing, at that time, the designation, by signing his name and having it witnessed. The designation bears no date. It may

have been, that he was then contemplating his second marriage, or if married, that he was expecting the birth of the child, with which his wife was *enceinte* at the time of his death, and he forebore to complete the designation in the mode prescribed by the company, reserving to himself the right to modify it, according to circumstances that might arise. But whatever may have been his motive, he left it incomplete, and the mere attempt to make the designation, which was not consummated, could have no effect upon the original contract.

The form for the designation of the person to whom the holder might direct the policy to be paid, was evidently prescribed by the company for its own protection; that upon the death of the holder there might be no question as to the person to whom it was to be paid, and not leave it to the uncertainty of parol evidence. Therefore, the (121) form of designation was prescribed, and it required that it should be signed by the holder, and attested by a witness or witnesses. But in this case, it was not complied with, and the designation having been thus put out of the way, the question arose, can the action be maintained by the administrator of John W. Nowell, deceased? We can see no reason why it cannot. The express terms of the contract, as manifested by the certificate, is that the amount due upon the policy, on the death of the holder, shall be paid to his representative or representatives, and there is nothing in the charter or by-laws, that makes it payable, even by implication, to any one else; for by the by-law above cited, the holder may assign the policy to whomsoever he may choose.

There is no provision in the charter or by-laws indicating, as in many other corporations of like kind, some of which have been referred to in the argument of the defendants' counsel, that the policies issued by the company shall enure to the benefit of the "widow, children or family" of the insured. The only reference in the charter to "widows and children," is the declaration that one of the objects of the incorporation, is for the relief of *"widows and orphans"* by *voluntary* contributions.

Contributions by whom? It is susceptible of no other construction, than that it means contributions made by the association for the relief of "widows and orphans," *"by lightening the burdens of such as are poor, and abating their privation and suffering."*

Our opinion is, the administrator had the right to maintain the action, but as it is agreed that the fund in controversy is not needed for the payment of the debts of the intestate, and when received must go in distribution among the next of kin, who are the defendants and the plaintiffs other than the administrator, and in as much as the fund is in the possession of the defendants, the administrator should have

judgment only for two-fifths thereof, the shares going to the two plaintiffs who are next of kin of the deceased, and the defendants
(122) shall be allowed to retain their shares, to-wit, three-fifths of the fund, for as was said in *Baker v. Railroad,* 91 N. C., 308, "there is no reason why it should be required to be paid, when it must be returned;" and see *Rogers v. Chestnut,* 92 N. C., 81.

Our opinion is, there was error in the judgment of the Superior Court, and the plaintiff Nowell, as administrator, is entitled to judgment as indicated in this opinion. Let this be certified to the Superior Court of Chowan, that the case may be disposed of in conformity to this opinion.

Error. Reversed.

ALVIN HULBERT v. R. M. DOUGLAS ET AL.

Negotiable Instrument—Notice—No Evidence—Agent.

1. If the endorsee of a negotiable instrument before its maturity, knew, or if such facts came to his knowledge, which, if inquired into, would have informed him of an equity of the maker, he takes the instrument *cum onere.*
2. Where a negotiable note is secured by a mortgage, the fact that one-half the land has been released, is some evidence to charge a purchaser of the note before maturity with notice that there has been a partial payment on the note.
3. If anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed.
4. Notice to an attorney of any matter relating to the business in which he is engaged for his client, is notice to the client.
5. Where an attorney sold a note to a person who was occasionally his client, and such attorney, acting for the purchaser, investigated the title to the land on which the note was secured by a mortgage, and was afterwards employed by the purchaser to bring suit on, and collect the note; *It was held,* to be some evidence that the attorney was acting for the purchaser in the sale of the note.

(123) CIVIL ACTION, tried before *Gilmer, Judge,* and a jury, at August Term, 1885, of the Superior Court of GUILFORD County.

The defendant Robert M. Douglas, for the purpose of obtaining a loan of money, on the 20th day of May, 1879, executed to the other defendant, Thomas B. Keogh, his promissory note, in the sum of $7,000, payable at five years, and bearing ten per cent interest from date, which interest was represented by five several coupons, each of $700, due annually; and to provide ample security therefor, conveyed five

acres of land in Chicago, where the loan was expected to be obtained, to his brother, Stephen A. Douglas, as trustee.

To effectuate the negotiation under this arrangement, Keogh proceeded to Chicago, and failing in his effort, obtained an advance of $2,500, from one Myron A. Decker, acting in an agency not then disclosed, but afterwards it appeared to be on behalf of his wife, on the deposit of the note and deed in trust with him as collateral security for said sum. On his return to Greensboro and reporting his want of success, Keogh purchased from Douglas the note with coupons and deed in trust, by surrendering to the latter, notes held against him, the payment of $1,300 in money, and giving his own note for the residue of the purchase money of $200. This agreement was made and carried out on July 18th, 1879, whereby, subject to liability for the sum advanced, the securities became the property of Keogh. After the assignment, and in the fall of the same year, Douglas, desiring to have one-half the land so conveyed, exonerated, obtained the consent of Keogh thereto, on condition that Decker also assented, and further that Douglas should pay Keogh $4,000 on the note, and as soon as relieved, that he should sell the remaining half still charged with the debt, and deposit in bank at Chicago, so much of the proceeds of such sale as would be sufficient to discharge the entire indebtedness. This arrangement was concurred in by Decker, and in February, 1880, Douglas paid to Keogh the agreed sum of $4,000 on the $7,000 note, taking a receipt expressing that it was to be credited on it, then still held by (124) Decker. The payment of the $4,000 to Keogh was afterwards personally made known to Decker by Douglas, as also the release of half the land from the trust deed, and of his contract to sell the other half and make the money deposit in bank sufficient to discharge the whole debt and interest. At the same time, they conferred as to the best method of disposing of that portion of the land. In the fall of the year, Douglas effected the sale, deposited in the bank $3,800 (the amount of the note and coupons on their face then payable), a sum sufficient to pay the balance of the debt and interest to December 1st, 1880, and the further sum of $200 to meet contingencies, of all which, both Keogh and Decker had notice.

The deposits were made in the name of the trustee, with directions to make the payments. Keogh did not apply the $4,000 paid, as a credit on the note, it not being in his possession at the time, but appropriated the amount to other alleged indebtedness of Douglas to him; and about June, 1880, having separated the first over-due coupon, placed the note with all the other coupons, in the hands of Decker, to be disposed of for him, without entering the credit or informing him of the $4,000 payment. They were accordingly sold to the present plain-

tiff in August of the same year, for the sum of $7,080, and the note, with over-due coupons, endorsed and delivered to the plaintiff. In this transaction Decker acted as agent of Keogh only, as he testifies. The second coupon becoming due the note, with it attached, was presented at the bank and payment of the coupon then maturing, to-wit, on May 21st, 1881, demanded, and payment being refused, it was protested and notice thereof given the defendants.

The present action was begun on July 25, 1881, and is prosecuted to recover the sum of $700, due on the second maturing coupon, with interest from date of maturity.

A single contested issue was submitted to the jury:—Did the plaintiff purchase the note sued on, for value and in good faith, before it was due, and without any notice of any defence, set-off or equi-
(125) ties in favor of defendant Douglas, as set forth in his answer?

The jury to this inquiry answer: No.

There was a judgment on the verdict for the defendant Douglas, and the plaintiff appealed.

Mr. J. B. Batchelor, for the plaintiff.

Mr. J. W. Graham, (Messrs. Dillard & Morehead were with him on the brief), for the defendant Douglas.

SMITH, C. J. (after stating the case). It is manifest that if the plaintiff knew, or such facts came to his knowledge as ought to have put him on inquiry, or which, if prosecuted, would have conveyed the information, before he purchased the security, of the $4,000 partial payment received by the payee from the defendant Douglas, with the express agreement that it should be appropriated to the note, and be entered as a credit thereon, he would take it *cum onere*, and the deposit left in the bank would operate as a discharge of the maker. If the plaintiff had no such knowledge, actual or constructive, the note and coupons, not being due, would pass into his hands, as if no such partial payment had been made. The possession of this information by Decker, seems not to have been questioned, but the evidence offered to prove the fact, was objected to by the plaintiff's counsel, as incompetent to affect the rights transmitted in the endorsement to him, and was admitted by the Court, with the declaration that it would be withdrawn from the jury, unless the plaintiff's connection with it should be afterwards shown. This evidence was not afterwards withdrawn from the jury, and the plaintiff's counsel insisted then, as he does now, that it had not been shown that the plaintiff had direct or constructive notice of the payment to Keogh; and that the notice to Decker was not

notice to the plaintiff, unless the former was the agent of the latter, of which no proof had been offered.

The controversy is thus narrowed down to the single inquiry, (126) whether the plaintiff had information himself, or is chargeable with that possessed by Decker as his agent or attorney, which, if properly followed up, as a prudent man of business in the management of his affairs is expected to do, would have led to the discovery of the payment, and the equity that springs from it.

Was there any such evidence laid before the jury which could warrent their verdict? The deed at first conveyed five acres of land, two and a half of which were relieved of the trust, and this the plaintiff ascertained before his purchase, and also examined the land itself. In his testimony, he said he did not himself examine the abstract of title, adding, "I understood my attorney examined it," and when asked "Who?" replied, "I instructed Mr. Decker to do so." Yet, in answer to the question, "Was he acting as your attorney at that time?" he said, "No, sir; but he has been my attorney in several transactions. This was only an investment I made."

He testifies that he understood that Decker was selling for Keogh, and his recollection is that the draft he gave in payment was in favor of Keogh; that he told Decker to collect the notes, and directed him "to bring suit on the coupon in North Carolina."

While thus speaking, the witness denies positively that Decker was his agent, or that he had information of the $4,000 payment.

The testimony of Decker, an attorney-at-law, is to the effect that he negotiated the sale, and did not mention any infirmities or equities which could affect the title to the notes assigned to the plaintiff, nor did he know or hear from any one that any such existed.

The plaintiff's evidence is somewhat confused, yet we cannot say that his knowledge of a diminution in the value of the security by one-half, and for no apparent reason, would not suggest some correspondent reduction in the secured debt, which would put a prudent man on inquiry as to the reason of the withdrawal of half of the land. Nor is it clear that Decker did not act as well for the endorsee (127) as for the endorser in bringing about the transfer.

Slight though the evidence might be, it would derive some force from the conflicting statements of the plaintiff himself as to the agency of Decker, and whether he did not act for both the contracting parties in the sale.

Again, Decker, in reference to his being the plaintiff's attorney, says, "I can't say that I am his general attorney and adviser * * *. I have done a good deal of business for him * * *. At the time the

paper was sold to him I was his attorney in some matters, and I knew of his having other suits in which I was not his attorney."

We cannot sustain the plaintiff's contention that there is no evidence of the agency of Decker, exercised on behalf of the plaintiff in the transaction under examination, of the sufficiency of which to establish the fact, the jury alone are the judges.

Nor do we propose to re-enter the field of controversy opened in the argument for the plaintiff, as to the extent to which information acquired by an agent or attorney, before and outside of the sphere of his agency, is to affect his principal, since we have so recently laid down the principle which governs, in *Dupree v. Insurance Company,* 92 N. C., 417, and we see no reason for departing from it.

"Constructive notice from the possession of the means of knowledge," remarks RUFFIN, C. J., "will have that effect ('convert one into a trustee,') although the party were actually ignorant, but ignorant merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed." *Bunting v. Ricks,* 22 N. C., 130; 2 Pom. Eq. Jur., Sec. 608.

While the evidence which connects Decker with the plaintiff as his agent, in the negotiations, is very slight, and in opposition to repeated averments from both in their depositions, that he was not, in
(128) support of which the purchase at full value is strong confirmatory evidence, Decker was such attorney for the plaintiff in many matters, was entrusted to collect the present demand, and, though denied by him, the defendant's testimony tends to prove that he was fully informed of the part payment early in 1880, and yet he disposes of the security to the plaintiff, without any intimation of this fact, and as a claim, upon which the whole amount expressed upon its face to be due, was in truth due.

But of the relations of the agent, intermediate between the seller and purchaser, the jury were the judges upon the evidence, and there was some such, as in the examination of the abstract of title and the plaintiff's employment of Decker to make it, and his proceeding with the collection of the claim in suit, of a larger agency in the negotiation itself.

We do not, therefore, feel at liberty to interfere with a verdict rendered under this condition of the proofs, by declaring to be error the ruling that there was evidence proper to be passed on by the jury.

There is no error.

No error. Affirmed.

Cited: Branch v. Griffin, 99 N.C. 181; *Bryan v. Hodges,* 107 N.C. 498; *Osborne v. Wilkes,* 108 N.C. 675; *Farthing v. Dark,* 109 N.C. 298; *Farthing v. Dark,* 111 N.C. 245; *Arrington v. Arrington,* 114 N.C. 172; *Loftin v. Hill,* 131 N.C. 110; *Rollins v. Ebbs,* 138 N.C. 159; *Hill v. R. R.,* 143 N.C. 566; *McIver v. Hardware Co.,* 144 N.C. 490; *Wilson v. Taylor,* 154 N.C. 218; *Smathers v. Hotel Co.,* 162 N.C. 352; *Wynn v. Grant,* 166 N.C. 45; *Ins. Co. v. Dial,* 209 N.C. 350; *Perkins v. Langdon,* 237 N.C. 168.

ALVIN HULBERT v. R. M. DOUGLAS AND T. B. KEOGH.

Liability of Endorser—Controversy Between Co-defendants.

1. Where the payee of a note, on which there have been partial payments made, which are not entered on the note, endorses it to a third party for its full value, he is liable as endorser for the full face value of the note.
2. Under the Code practice, co-defendants cannot set up demands and ask relief against each other, unless their disputes arise out of the subject of the action as set out in the complaint, and have such relation to the plaintiff's claim that their adjustment is necessary to a final determination of the cause.

This was the defendant Keogh's appeal in the foregoing case. (129) The facts are the same as in the foregoing case.

Mr. John Devereux, Jr., for the plaintiff.
Mr. W. W. Fuller, for the defendant.

SMITH, C. J. It is conceded that the appellant, when owner of the note and its coupons, subject to the lien for the money advanced and for which it was held as collateral security, received from the maker $4,000 as a part payment, under an agreement that it should be entered as a credit, and that, without a disclosure of the fact, the note was endorsed for its full value, before any one of the four attached coupons remaining had matured. The first coupon had been cut off and was retained by the appellant. The endorsement clearly rendered him liable for such, for all appearing to be due upon the face of the assigned papers, as if no payment had been made by the principal debtor, and he has not ground of complaint for the judgment rendered against him.

The controversies between the defendants, growing out of their mutual dealings, outside of those connected with the note, are not before

us in the present appeal, and whatever they may be, the plaintiff is entitled to recover his money without awaiting their adjustment. Nor, in our opinion, can they be rightly introduced in the present action, as they are wholly foreign to its purpose, and must be settled in another suit between the defendants themselves. The practice, sanctioned by the Code, does not go so far as to permit the introduction of questions in dispute among the defendants, unless they arise out of the subject of the action as set out in the complaint, and have such relation to the plaintiff's claim, as that their adjustment is necessary to a full and final determination of the cause. *Hughes v. Boone*, 81 N. C., 204.

The rule in Chancery, to which the Code practice is intended to be assimilated in this feature, is thus clearly stated by Chancellor
(130) Walworth, in his opinion in *Elliott v. Pell*, 1 Paige (N. Y.) 253:

"It is the settled law of this Court, that a decree between co-defendants, *grounded upon the pleadings and proofs between the complainant and the defendants*, may be made, and it is the constant practice of the Court to do so, to prevent multiplicity of suits," citing cases; "but such decree between co-defendants, to be binding upon them, *must be founded upon, and connected with the subject matter in litigation between the complainant, and one or more of the defendants.*"

Nor do we understand the ruling of the Court in refusing the appellant's motion to strike from the answer of his co-defendant, so much as demands judgment for the $4,000 against appellant, if his defence proves unavailing and the plaintiff shall recover of him without deduction of that sum.

I. The facts set out in the answer of Douglas are all referable and pertinent to the plaintiff's demand, and the objectionable clause is found only in the demand, upon such contingency, for judgment against the appellant. It is, therefore, wholly harmless, if untenable.

II. The matter is directly connected with the plaintiff's cause of action, and the demand, whether admissible or not, is for an adjustment of the contingent responsibility of both to the plaintiff.

III. It is rendered entirely immaterial and removed from contention, by the result of the action in the exoneration of the defendant Douglas.

The appellant's interest in this respect is that of the plaintiff, and is settled by the adverse verdict and judgment considered in the other appeal.

The claims asserted in the appellant's last amended answer, for services rendered and dealings between himself and co-defendant to the amount of many thousand dollars, and reaching back over several years, which he proposes to settle in this suit, is a striking illustration of the wisdom of the rule that confines matters of defence to such only

as relate to the plaintiff and his cause of action, and of the confusion and mischief that might ensue from relaxing it. (131)

This action terminates with the decision of the double appeal, and what is left undetermined is extraneous and superfluous. Let this be certified, that judgment be so entered in the Court below.

No error. Affirmed.

Cited: Gibson v. Barbour, 100 N.C. 200; *Bank v. Mfg. Co.,* 100 N.C. 346; *Bobbitt v. Stanton,* 120 N.C. 258; *Parrish v. Graham,* 129 N.C. 232; *Bowman v. Greensboro,* 190 N.C. 615; *Montgomery v. Blades,* 217 N.C. 656; *Blades v. R. R.,* 218 N.C. 704; *Schnepp v. Richardson,* 222 N.C. 230; *Moore v. Massengill,* 227 N.C. 246; *Horton v. Perry,* 229 N.C. 322, 323; *Fleming v. Light Co.,* 229 N.C. 404, 405; *Wrenn v. Graham,* 236 N.C. 721.

JOHN F. McCOY v. JOSEPH LASSITER.

Appeal—Service of Statement of the Case—Rules.

1. An appeal will not be dismissed because there is no statement of the case on appeal, because there may be error apparent on the face of the record. The proper motion, if there be no error apparent on the record, is to affirm the judgment.
2. Any statement in the record is taken as true, and the Supreme Court will act on it, until it shall be modified in some proper way by the Judge who made it.
3. So where it was stated in the record by the Judge who settled the case on appeal, that it was agreed that the Court should make out the statement of the case, without notice to counsel, the Supreme Court will take it as true, and will not expunge the case from the transcript, on the affidavit of the appellee and his counsel that no such agreement was made.
4. This Court will not entertain any motion, unless reduced to writing.

Motion by the plaintiff to DISMISS AN APPEAL, heard at the February Term, 1885, of the SUPREME COURT.

The facts appear in the opinion.

Mr. Allen, for the plaintiff.

Mr. Geo. Rountree, filed a brief for the defendant.

MERRIMON, J. The appellee moved at the present term to dis- (132) miss the appeal, "for that the appellant did not serve a statement

of case on appeal on the appellee, within five days from the entry of appeal, as required by Sec. 550 of The Code."

This motion could not be allowed, even if the facts stated in support of it be accepted as true. The appeal brings the case into this Court, whether a statement of the case, or a case settled on appeal, be sent up or not. Such statement of a case is not essential to the appeal. It might be, that the grounds of error relied upon, would sufficiently appear assigned in the record, without any statement. If so, it would be, unnecessary. *State v. Crook,* 91 N. C., 536; *State v. Freeman,* 93 N. C., 558; *State v. Byrd, Ibid.,* 624.

But if in such case no ground of error be sufficiently assigned in the record, the appeal would not be dismissed, but the judgment would be affirmed. *Paschall v. Bullock,* 80 N. C., 8; *Bank v. Creditors, Ibid.,* 9; *Neal v. Mace,* 89 N. C., 171.

We, however, find in the record, that there is a case settled upon appeal by the Judge before whom the action was tried, and he states, that "it was agreed that the Court should make statement of case on appeal without notice to counsel." This plainly implies that the counsel of the parties so agreed. This statement in the record imports verity, and we must accept and act upon it, certainly and at all events, until in some proper way it shall be modified or arrested by the Judge who made it. It is official, and made in the course of the action, and cannot be contradicted collaterally. *McDaniel v. King,* 89 N. C., 29; *Currie v. Clark,* 90 N. C., 17; *Cheek v. Watson, Ibid.,* 302; *Ware v. Nisbit,* 92 N. C., 202.

The counsel for the appellee here, in support of his motion above referred to, produced before us the affidavits of the appellee's counsel in the Court below, to the effect that they did not agree as stated, with any person or authority, and he insisted that the Judge must have acted under a misapprehension of facts, and that the case so settled should be quashed, as having been settled improvidently, or by inadvertence.

(133) This proposition seems to us very singular, and without precedent. We cannot for a moment think of allowing it to prevail. To do so, would be subversive of the integrity and dignity of judicial proceedings, and justly offensive to the judicial office. The law reposes in the Judge implicit confidence as to his ability, integrity, care and circumspection in his official conduct. It confides to, and charges him with the conduct of judicial proceedings, as well as the decision of causes and motions cognizable before him. What he says and does in the course of his office, must be accepted as true. There arises a strong presumption in favor of the integrity and correctness of his official statement and conduct, and these must prevail unquestioned in the

course of procedure, until they shall be altered, not summarily as proposed, but, in the absence of statutory regulations, in a way consistent with justice to all parties directly interested, the importance of the matter in question, and the dignity and propriety of judicial action. It is always of serious moment to the public, as well as individual litigants concerned, to bring in question the official conduct of Judges. Their errors should be corrected promptly and certainly, especially such as savor of nonfeasance, misfeasance, or malfeasance, but this should be done with fairness and due caution. This is due alike to the Judge as an individual, his office and the public.

The highly respectable counsel of the appellee, disclaimed all purpose to question the integrity of the statement of the Judge who settled the case upon appeal, but said, that in view of the affidavits and rights of the appellee claimed, he could not see any present remedy for the latter, other than that insisted upon by him.

We are not called upon here to suggest the remedy—to do so is the office of counsel. It is sufficient for us to say that the remedy adopted is not a proper one, and cannot prevail.

The same counsel afterwards made a motion, *ore tenus,* to remand the case, to the end that the appellee might take steps to have the case settled on appeal quashed by the Judge who settled it himself. This motion, however, was not reduced to writing, so far as ap- (134) pears, as required by Rule 13, and we must therefore decline to consider it. The rules of practice prescribed are essential to the due and safe administration of justice, and it is important to observe and uphold them.

The motion to dismiss the appeal, and the relief demanded incident to and in support of it, must be denied.

Motion denied.

Cited: Mfg. Co. v. Simmons, 97 N.C. 90; *Walker v. Scott,* 160 N.C. 58; *Howell v. Jones,* 109 N.C. 103; *Cummings v. Hoffman,* 113 N.C. 268; *S. v. Harris,* 181 N.C. 608; *Mason v. Comrs. of Moore,* 229 N.C. 628.

PETER S. WILLIAMS v. R. T. WEAVER AND WIFE.

Docketed Judgments—Execution—Teste—Lien—Constitutional Law—Changes of the Remedy.

1. An execution should bear *teste* as of the term next before the day on which it was issued, and not of the day on which it is issued; but such irregularity does not render the execution void, or vitiate a sale under it.
2. It is the docketing of the judgment, and not the issuing of the execution, which creates the lien under the present system.
3. An execution issued after the death of the judgment debtor is void, and no title passes to a purchaser at a sale under such an execution; and this is so, although the judgment was obtained on causes of action accruing prior to the adoption of the Code of Civil Procedure.
4. An act which changes the remedy of the creditor is not unconstitutional, if it gives him another equally efficacious.

CIVIL ACTION to recover land, tried before *Avery, Judge,* and a jury, at Fall Term, 1883, of HERTFORD Superior Court.

Both the plaintiff and the defendants claim to derive title to the land, the subject of this action, from Godwin C. Moore, who died on the 25th day of May, 1880.

Before and at the time of his death, there were two docketed judgments, for considerable sums of money, in favor of different per-
(135) sons, against him in the Superior Court of the County of Hertford.

After his death, on the 27th day of July, 1880, executions, bearing *teste* as of that day, were issued upon these judgments, directed and delivered to the sheriff of the county last named, who by virtue of them, sold the land in question, situated in that county, as the property of the said Moore, on the 6th day of September, of the same year, the plaintiff being the purchaser, and taking the sheriff's deed for the same.

On the trial, the plaintiff produced the judgments, the executions mentioned, the returns of the sheriff thereof and thereupon, and the sheriff's deed mentioned, and relied solely upon the same as evidence of title to the land in him.

The Court held that the executions were void, and that the deed of the sheriff was inoperative, and passed no title to the plaintiff, and gave judgment for the defendants. The plaintiff having excepted, appealed to this Court.

Messrs. Winborne and W. H. Day, for the plaintiff.

Messrs. W. D. Pruden, R. B. Peebles and W. C. Bowen, for the defendants.

MERRIMON, J. (after stating the facts). The executions under which the sheriff undertook to sell the land in controversy, were irregular, in that they were not *"tested"* as of the term of the court next before the day on which they were issued, as required by The Code, Sec. 449, but this irregularity did not render them void. Such *teste* serves no essential purpose. It does not now, as under the former method of procedure in this State, determine the time when the lien of the execution began. Now, the execution does not operate as a lien. It is the docketed judgment that creates the lien from the time it was docketed. The statute, nevertheless, ought to be observed, as indeed, all statutes ought to be, but it is merely directory, and an execution not bearing *teste* as required by it, is not on that account void, and this Court has so expressly held. *Bryan v. Hubbs,* 69 N. C., 423. (136)

If, however, the executions in question in this case had been regular in all other respects, they were irregular, inoperative and void, because they were issued after the death of the judgment debtor, and therefore could not authorize the sale and the sheriff's deed to the plaintiff. So that he got no title by virtue of them. This is settled by the recent case of *Sawyers v. Sawyers,* 93 N. C., 321, in which the Chief Justice stated clearly and fully, the law in respect to executions in this State, issued after the death of the judgment debtor. Nothing need now be added to what he said. This case is in all material respects like that, and must be governed by it.

The counsel for the appellant suggested on the argument, that the judgments upon which the executions issued, were founded upon contracts "made prior to the ratification of the Code of Civil Procedure," and therefore the present statutory regulations in respect to executions do not apply in this case. Granting what he says as to the contracts upon which the judgments are founded to be true, nevertheless, his contention is groundless, because C. C. P., Sec. 8, provides expressly that actions founded upon such contracts, shall "be governed in respect to the practice and procedure therein, up to and including judgment, by the laws existing prior to the ratification of this act (C. C. P.), as near as may be, *and the practice in such actions subsequent to judgment shall be governed by the enactment of this act."* So that, after judgment in such cases, the provisions of the Code of Civil Procedure do apply, as in other cases.

The counsel further contended, that the Code of Civil Procedure changed the remedy of the creditor by execution as to debts contracted prior to its adoption, and it is therefore void in such respect. The remedy of the creditor may be changed, if another substantially as good shall be substituted for that abolished. Without going into details we think it sufficient to say, that it is manifest that the remedy of such

creditors is not substantially impaired as contended; indeed, on
(137) contrary, it is rather strengthened and facilitated by the statutory provisions complained of. The Court properly held that the sheriff's deed did not pass any title to the land to the plaintiff, and the judgment must therefore be affirmed.

No error. Affirmed.

Cited: Holman v. Miller, 103 N.C. 120; *Tuck v. Walker,* 106 N.C. 288; *Gambrill v. Wilcox,* 111 N.C. 44; *Bernhardt v. Brown,* 122 N.C. 594; *Flynn v. Rumley,* 212 N.C. 27; *Sheets v. Walsh,* 217 N.C. 39; *Moore v. Jones,* 226 N.C. 151.

ELIZABETH BOYD v. J. B. TURPIN ET ALS.

Fraudulent Conveyances—Coverture—Contract to Sell Land.

1. A contract to sell a tract of land, purporting to belong to a *feme covert,* was made by one who acted as her agent; *It was held,* that the contract was not binding on the *feme,* 1st, because of her coverture, and 2nd, because the agent was not authorized by an instrument under seal to make the contract. Such contract is not binding on the agent, because its terms do not purport to bind him.
2. A conveyance to defraud creditors is void as to a creditor who is pursuing legal process to subject the fraudulently aliened land to the satisfaction of his debt, but it is not void, even as against creditors, when collaterally attacked.
3. A son conveyed his land to his mother, a *feme covert,* for the purpose of defrauding his creditors, and afterwards contracted in her name and as her agent to sell the land to a *bona fide purchaser.* After a portion of the purchase money had been paid, the mother attempted to repudiate the contract, and brought an action to recover the possession of the land; *Held,* that she cannot be permitted to hold the land for which she paid nothing, and at the same time disown the authority of the agent who assumed to act for her. She must either surrender the land to him, or abide by his disposition of it. The disability of coverture carries with it no license to practice a fraud.
4. In such case, a Court of Equity looks through the disguises which cover the transaction, and charges the legal estate with a trust, which, while it cannot be enforced by the fraudulent donee, may be by those who, in good faith, deal with him as possessed of authority to make the contract of sale.

CIVIL ACTION to recover land, tried before *Graves, Judge,* and a jury, at July Special Term, 1885, of the Superior Court of HAYWOOD County.

There was a judgment for the plaintiff, and the defendants appealed. (138)

The facts fully appear in the opinion.

No counsel for the plaintiff.

Mr. George A. Shuford, for the defendants.

SMITH, C. J. The facts ascertained by the jury, in connection with the admissions of the parties, are in substance as follows:

One W. Boyd, whose full name for brevity we omit, a son of the plaintiff, who at the time of the transactions which gave rise to the controversy, was a married woman, being in debt, entered into a covinous agreement with her, in order to place his property beyond the reach of creditors, and to defraud them of their just rights, he was to cause such lands as he might thereafter buy, and particularly the two tracts demanded in the action, to be conveyed to her, and he was to act in her name and as her agent in making both the purchases and dispositions of them. In carrying out the fraudulent arrangement, the tracts described in the complaint, the title to which had been vested in her, were contracted by him to be sold to Linda Messer and her children, eight in number, for the price of $500, to be paid in semiannual instalments of $50 each, and to this end, he executed a bond for title to them, describing the said Linda as guardian of the others, wherein it is stipulated that the two tracts, or one of them (for there is an apparent repugnancy in the terms of the condition), shall be conveyed to the vendees on payment of the purchase money. This instrument purports to be the bond of the plaintiff, and concludes in these words:

"Given under our hands and seal, this the 1st day of February, 1877.

ELIZABETH BOYD, (seal).

H. H. BRADLEY. done by W. J. G. B. BOYD, Agent."

On this contract, payment in two notes, one of $200, and the other of $155, in the aggregate $355, have been made by said Linda to said agent.

The bond for title with its equities, by successive assignments (139) from all but three of the obligees (and of those assigning, some were under coverture at the time), has been transmitted to the defendant. The several assignees accepted the bond in good faith, and under assurances from the agent that there remained due only $100 of the purchase money, in full confidence of the truth of the representations thus made in answer to their direct inquiries.

The jury, under directions to which exception was taken by the defendant, in response to issues submitted to them, find and declare that the said W. Boyd was not, at the time of the sale, *sole* owner of any beneficial interest in the land, nor has he now any in the result of the suit.

It was conceded that the agency was constituted by parol and without any writing under seal.

The instructions complained of, are in an abbreviated form to this effect: While a conveyance made by a debtor, with intent to avoid payment of his debts, or to defeat the claims of creditors, would be void at the election of the latter, it was only void and inoperative against creditors, but would be effectual to pass the estate as between the parties to the transaction, and no evidence had been offered to show the defendant to be such creditor. In such case, Boyd was not sole owner of a beneficial interest in the premises, when he undertook in the plaintiff's name to make the contract, nor has he now an interest in the fruits of a recovery.

The ruling upon the invalidity of the writing, put in the form of a bond of the plaintiff, is entirely correct. It has no binding force, as a contract, upon either the plaintiff or the agent; not upon her, by reason of the disability of coverture, and this removed, for want of authority under a sealed instrument to enter into the obligation; not upon him, because upon its face the contract purports to be her undertaking, and there are no operative words affecting him. *Sellers v. Streator,* 50 N. C., 261; *Fisher v. Pender,* 52 N. C., 483; *Holland v. Clark,* 67 N. C., 104.

(140) The portion of the charge to which the defendant excepts, proceeds upon an obvious misconception of the equity set up against the plaintiff's legal right to evict the defendant, and to secure to him affirmative relief. The doctrine laid down by the Court, is in itself correct, with the addition, that a conveyance infected with fraud, is void as against a *creditor who is pursuing legal process to enforce* his demand and subject the fraudulently aliened property to its satisfaction. To such process it is no obstruction, and the attempted conveyance is void.

It is, though covinous, as effectual against an inactive creditor, when collaterally drawn in controversy, as against any one else, in transferring title. But if the principle had any application to the facts of the present case, it would be unavailing to the defendant, since if the deed to the plaintiff was void, and could be so treated, it would leave the title in the grantor, and equally beyond the reach of the defendant in the present action, as if no deed had been made. Moreover, the rule annuls fraudulent deeds executed by the *debtor,* to place his property where access to it by final process cannot be had, so as to leave it

still exposed to the claims of his creditors. *Peebles v. Pate,* 90 N. C., 348, and cases cited.

But this learning is foreign to the present controversy. The defendants' asserted equity grows out of the fraudulent contrivance by which the agent is to do business, for himself in truth, but in the name of, and as agent for, his mother, and then she undertakes to screen the land from liability for acts done in the sphere of the agency, and while repudiating the contract to sell and convey, made on her behalf, to retain the land as her own. This arrangement cannot be allowed to be consummated and rendered successful, to the manifest wrong and injury of others, nor can coverture be used as a protection for a party engaged in it.

A Court of Equity looks through the disguises which cover the transaction, and deems the legal estate charged with a trust which may be enforced, not by the agent, but by those who, in good faith, deal with him as possessed of authority to make the contract of sale. It is his property for this purpose, and the defendant cannot be permitted to hold that for which she paid nothing, and at the same time (141) disown the authority of the agent who assumed to act for her, when both are in the compass of the fraudulent agreement previously entered into between the parties. She must surrender the land to him, or abide by his disposition of it. "It must be borne in mind," say the Court in *Pilcher v. Smith,* 2 Head. (Tenn.), 208, "that the legal disability of coverture or of infancy, carries with it no license or privilege to practice fraud or deception on other innocent persons, nor will the disability be permitted to protect them in doing so." So remarks RODMAN, J., delivering the opinion of the Court in *Towles v. Fisher,* 77 N. C., 443: "To estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might *reasonably* rely, and upon which he did rely and was thereby injured." In *Burns v. McGregor,* 90 N. C., 225, MERRIMON, J., uses this language: "It would controvene the plainest principles of justice, to allow a married woman to get possession of property under an engagement, not binding upon her, and let her repudiate her contract, and keep the property. If she will not, the creditor may pursue and recover it by proper action in her hands;" citing numerous cases. See also 1 Story Eq. Jur., Sec. 385; Kelly Cont. Mar. Wo., ch. 6, Sec. 5.

Now the plaintiff becomes the depositary of the title to the land, bought by her son and subject to his disposal in her name as agent, under an express agreement between them to prevent its pursuit by his creditors. She now disowns his agency, refuses to be bound by his contract, made in her name, and yet asserts her right, as owner, to dis-

possess one who, as assignee, succeeds to the rights of some at least with whom the obligation to make title was entered into, while the agent, who has received the larger part of the purchase money in her name, refuses to restore it, and, by reason of insolvency, cannot be coerced to do so.

(142) Such a fraud cannot be countenanced, and the plaintiff must fulfil the contract of her agent, or restore the land to the rightful owner that the contract may be carried into effect, or the purchase money paid restored. She cannot keep his land and he the money received, and the purchasers made to lose all, and be without remedy against either. In rendering judgment for the plaintiff in the action, and denying relief in any form from the action to recover possession, there is error, and the judgment must be set aside.

The defendant cannot, in the present condition of the cause, obtain the full measure of redress demanded in his counter-claim, for the absence of the vendees, to whose interests he has not succeeded, and who have the same interest with him in the result. His equity is such as to protect him against the present suit, while its enforcement in furnishing affirmative relief requires the presence of other interested parties in the cause.

The cause will therefore be remanded, to the end that application may be made for an amendment admitting new parties, and if this be not done, that judgment may be entered for the defendant, declaring that the plaintiff is not entitled to recover possession of the premises.

Let this be certified.

Error. Remanded.

Cited: Loftin v. Crossland, 94 N.C. 84; *Hodge v. Powell,* 96 N.C. 69; *Weathersbee v. Farrar,* 97 N.C. 112; *Walker v. Brooks,* 99 N.C. 210; *Francis v. Herren,* 101 N.C. 507; *Thurber v. LaRoque,* 105 N.C. 313; *Farthing v. Shields,* 106 N.C. 300; *Wood v. Wheeler,* 106 N.C. 514; *Blount v. Washington,* 108 N.C. 233; *Brown v. Davis,* 109 N.C. 27; *Hart v. Hart,* 109 N.C. 373; *Williams v. Walker,* 111 N.C. 610; *Draper v. Allen,* 114 N.C. 52; *Bell v. McJones,* 151 N.C. 90; *Buford v. Mochy,* 224 N.C. 243.

(143)

C. T. WILLIS v. A. BRANCH ET ALS.

Pleading—Office of the Complaint—Variance—Issues—Set-off—Evidence—Damages—Landlord—Trespass by.

1. The plaintiff must allege his cause of action in the complaint, and he cannot recover on a cause of action set out in the pleadings of his adversary.
2. In some cases, a defective statement of a cause of action may be aided by the admissions in the answer.
3. Where the cause of action set out in the complaint was, that the defendant had torn out certain gas fixtures and damaged certain furniture, and so deprived the plaintiffs of the use of a certain house, the plaintiff cannot abandon these causes of action and recover for a breach of the terms of the lease for the house.
4. A variance arises where the proofs do not sustain the cause of action alleged in the complaint. If it is immaterial, it will be disregarded; if material and misleading, the Court may, in its discretion, allow an amendment, upon just terms; but where the evidence relates to a cause of action entirely different from that stated in the complaint, it is not a case of variance at all, and it was never intended by The Code, to allow a plaintiff to prove a cause of action which he has not alleged.
5. Issues arise on the pleadings, and it is improper to submit any issue not raised by them. When immaterial issues are submitted, which tend to confuse or obscure the real issue, it is ground for a new trial.
6. If there is no evidence to support an issue, the Court should so charge the jury.
7. Where a plaintiff leased a house from the defendant, and agreed to pay a certain sum as rent, and the defendant afterwards entered and tore out certain fixtures and damaged the furniture, for which trespass the plaintiff brought suit; *It was held*, that the alleged damages do not constitute a set-off against the sum contracted to be paid as rent.
8. The measure of damages in such case, would be the cost of returning the fixtures so taken out, repairing the furniture injured, and such consequential damages as were the direct result of the trespass, such as the loss resulting from inability to use the house while the repairs were being made.
9. A wrong done to the plaintiff, does not create in him a right to quit his business, and then recover from the wrong doer the amount which he might possibly have realized by industrious effort.
10. Where a lessor injures the leased property, he is liable to the lessee for the trespass.

CIVIL ACTION, tried before *Graves, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of EDGECOMBE County.

The following is a copy of the material facts of the plaintiff's complaint:

(144) "1st. That some time during the year 1882, the plaintiff and defendants entered into an agreement, whereby defendants leased to plaintiff a hall in the town of Wilson, well known as Mamona Hall, and generally used for theatrical purposes. That said plaintiff agreed to fit up and furnish said hall so that it would be suitable for theatrical entertainments.

"2d. That plaintiff did equip and furnish said hall in all respects required.

"3d. That long before said lease expired, the defendants tore out from their place in said hall, the gas fixtures put there by plaintiff at much cost, and removed and damaged the other furniture put in said hall by plaintiff, and, without cause, deprived the plaintiff of the use of said hall, furniture and gas machine, to the plaintiff's great damage and injury, $1,500.00.

"Wherefore the plaintiff demands judgment for the sum of $1,500.00 and costs."

To this complaint the defendants filed their answer, whereof the following is a copy:

"1st. That as to allegation one, it is true that plaintiff and defendants entered into a contract or agreement, which is herewith filed as a part of this answer, marked A.

"2d. That as to allegation three, the hall leased to plaintiff as aforesaid was the second story of a building owned by defendants, and of which the lower story, consisting of two stores, was leased to Branch & Hadley, merchants, who carried therein large stocks of merchandise; that a short time after said lease, without the knowledge of the defendants, or the said Branch & Hadley, the plaintiff placed in the roof of said building a large tank, filled with gasoline, a very dangerous and highly inflammable fluid, connected with lamps by means of pipes, to be used for the purpose of lighting said hall; that the first notice which Branch & Hadley or the defendants had of the action of plaintiff, came from the insurance agents, who informed them that the policies of insurance on said stock of goods, and the building, as well as an
(145) adjoining building which belonged to defendants, had been cancelled, and that no insurance would be carried on said property if the tank and gasoline remained in the roof; that therefore defendant A. Branch notified W. W. Hargrave, plaintiff's agent in Wilson, that the said tank must be removed, and in a few days he was informed by Hargrave that he had seen the plaintiff, and that the defendant had permission to remove the tank; that he therefore employed R. L. Wyatt, a skilled and experienced tinner, to remove the tank, with little or no damage thereto; that the tank was, after being emptied, placed in the

warehouse of Branch & Hadley, where it remained, subject to plaintiff's order, until destroyed by fire during the month of November, 1884.

"3d. That as to allegation four, by the terms of said lease, it was expressly stipulated that the plaintiff should pay, quarterly, certain rents, and that upon failure to pay said rents, the lease should be forfeited, and the defendants might enter upon, and take the property in their possession; that the plaintiff did fail to pay the rent as stipulated, and the defendants, in the exercise of their rights under the lease, entered upon, and resumed possession of said hall; that plaintiff is now indebted to them —— dollars for rent of said hall.

"For a further defence they say, that by reason of some tax imposed upon theatrical companies by the town of Wilson, the plaintiff announced publicly that he had abandoned the enterprise, and would no longer use the hall; that it is untrue that plaintiff has been damaged by any act of defendants.

"Wherefore defendants demand judgment that they go without day and recover their costs."

The following is a copy of the material facts of the case settled upon appeal for this Court.

The following issues were submitted to the jury:

1st. Have defendants violated their contract as alleged in the complaint? Answer—Yes.

2nd. Had plaintiff forfeited his lease by non-payment of rent (146) or otherwise? Answer—No.

3rd. What damage has plaintiff sustained by reason of said breach? Answer—$500.

Upon the first issue, the Court instructed the jury, that if they believed from the testimony, that the defendants had failed to plaster the walls as they had agreed to do, this was a breach of their contract, for which an action would lie, and they would therefore answer the first issue "Yes."

Upon the second issue, that if the jury believed from the testimony, that the plaintiff, at the time defendants took possession of the hall, had paid the rent, their answer to the second issue would be "No."

Upon the third issue, that the measure of damages were the probable profits which the plaintiff would realize from his lease, after payment of rent and expenses. To all of which the defendants excepted on the following grounds:

To the charge upon the first issue, because there is no allegation in the complaint that plaintiff was damaged by the non-plastering of the hall.

To the charge upon the second issue, because the Court left it to the jury to ascertain whether the rent had been paid or not, when he should

have charged them that if they believed the plaintiff's own testimony, the rent had not been paid, and as a matter of law, he had forfeited his lease.

To the charge upon the third issue, because the jury were not told that there was no evidence of the plaintiff's being damaged by the failure of defendants to plaster the hall.

The Court refused to grant a new trial, gave judgment for the plaintiff, and the defendants appealed.

Mr. A. W. Haywood (Messrs. J. L. Bridgers & Son also filed a brief), for the plaintiff.

Mr. Geo. V. Strong, for the defendants.

(147) MERRIMON, J. (after stating the facts). It is the office of the complaint to state in a clear, succinct, and intelligible manner, the plaintiff's cause of action, and to demand judgment upon the same. The plaintiff cannot go to trial and recover upon a cause of action developed by facts stated in the answer, without alleging it himself. He must allege the cause of action in his complaint, and when the facts of the same are put in issue, prove them by competent evidence. He cannot rely upon a cause of action suggested in the pleadings by his adversary. *Shelton v. Davis,* 69 N. C., 324; *Rand v. The Bank,* 77 N. C., 152; *McLaurin v. Cronly,* 90 N. C., 50.

It is true, that in some cases, a defective or imperfect statement of a cause of action, may be aided by admissions in the answer, as was decided in *Garrett v. Trotter,* 65 N. C., 430, and *Johnson v. Finch,* 93 N. C., 205, but this is not one of them.

In this case, the complaint does not allege or assign a breach of the contract of lease. The lease is referred to simply for the purpose of showing the character of the plaintiff's right to have possession of, and use the hall and fixtures for his own benefit. The *gravamen* of the action, is the alleged trespass of the defendants "in tearing out from their place in said hall, the gas-fixtures put there by the plaintiff," the removal of the same, injury to the furniture, and depriving the plaintiff of the use of the hall and furniture. This is the cause of action specified, and there is none other. It may be, that the plaintiff might have alleged a breach of the contract of lease on the part of the defendants in interfering with his possession, and in failing to do certain things they stipulated to do, but it is obvious he did not do so. It is not sufficient that a party has a cause of action—he must allege it in such intelligible way, as that the Court can see, and take jurisdiction of it, and administer his right, if he shall establish it.

On the argument, the appellee's counsel contended, that the variance between the allegation and the proof was immaterial, or if material, it had not misled the adverse party to his prejudice, and under the liberal practice allowed by The Code, the plaintiff ought to (148) be allowed to prove a breach of the contract.

But broad and indulgent as are the provisions of The Code in respect to matters of pleading and practice, they do not dispense with a sufficient allegation of a cause of action to make it appear in the record, nor do they go to the latitudinous extent of allowing a party to prove a cause of action not alleged at all. Variances arise when the cause of action is alleged in the pleadings, and the proofs offered do not sustain it. In such cases, if the variance is immaterial, it will be disregarded; if material, and it misleads the adverse party, the Court may allow appropriate amendments to avoid it, upon just terms as to the trial and costs. The Code, Secs, 269, 270. As we have seen, no breach of contract was alleged in the complaint. The evidence offered in that respect, was therefore irrelevant, and no aspect of variance was presented.

For the like reason, the first issue was impertinent. It was not raised by the pleadings, and ought not to have been submitted. The issues proper to be tried, *must always arise upon the pleadings.* Immaterial and impertinent issues ought not to be submitted to the jury. They never fail to produce more or less confusion, and in some cases, as where they are calculated to mislead or obscure the real issues, they afford good cause for a new trial. *Miller v. Miller,* 89 N. C., 209; *Waddell v. Swan,* 91 N. C., 108. The first exception, therefore, must be sustained.

And so also must the second exception. The plaintiff himself testified that he had "paid no rent except the first quarter, as I considered damages for removing my gas tank had paid it." It appeared that there was more than one quarter's rent due. The alleged damages did not constitute a legal set-off against the rent. The pleadings presented no equitable feature in the action. There was evidence tending to show that a quarter's rent was due and unpaid, and none tending to show that it had been paid, and the Court ought to have so instructed the jury.

The case states that the Court charged the jury, "that the (149) measure of damages were the probable profits which the plaintiff would realize from his lease, after payment of rent and expenses." In this there is error.

If the plaintiff was entitled to recover, his measure of damage was a sum of money equal to the cost of returning the oil tank, the gas-fixture, repairing the furniture injured, and such consequential dam-

ages as were the direct result of the trespass; such as his inability, by reason of the injury, to use the hall, until it could be refitted for use, as it was at the time the injury was done. Hence also, if the plaintiff had existing engagements for theatrical entertainments, that were disappointed by the injury, damages sustained on that account might be embraced, but not for such as he might probably have had. The instructions given by the Court, were far too broad and indefinite—it embraced possible speculative damages, arising indirectly and remotely as a possible consequence of the trespass. Such damages are not recoverable. In the order of things and the course of business, the plaintiff might repair the injury and go on with his business. It is neither just nor reasonable that he should be allowed to abandon his business because of the trespass, and compel the trespassers to pay him a sum of money he might, by remote possibility, have realized from it in the course of an indefinite period of time. The trespass did not create in him the right to quit his business and have from the trespassers a gross sum of money, that he might perhaps have gotten by industrious and persistent effort. *Boyle v. Reeder,* 23 N. C., 607; *Foard v. The Railroad Co.,* 53 N. C., 235; *Sledge v. Reid,* 73 N. C., 440; *Mace v. Ramsey,* 74 N. C., 11; *Roberts v. Cole,* 82 N. C., 292; *Seely v. Alden,* 61 Pa. St., 302; *The Railroad Co. v. Hale,* 83 Ill., 360.

In what we have said in respect to the measure of damage, we have not adverted to the fact that the plaintiff was not the absolute owner of the property, but a lessee for the term of five years, because the defendants were his lessors, and the owners subject to the lease.
(150) If they were trespassers, they were bound to make reparation, and the property will return to them when the lease shall be over.

There is error for which there must be a new trial. To that end, let this opinion be certified to the Superior Court according to law, and it is so ordered.

Error. Reversed.

Cited: Porter v. R. R., 97 N.C. 70; *Knowles v. R.R.,* 102 N.C. 65; *Holler v. Richards,* 102 N.C. 548; *Simpson v. Simpson,* 107 N.C. 562; *Waller v. Bowling,* 108 N.C. 297; *Averitt v. Elliott,* 109 N.C. 563; *Hunt v. Vanderbilt,* 115 N.C. 563; *Gwaltney v. Timber Co.,* 115 N.C. 585; *Smith v. Building & Loan Asso.,* 116 N.C. 111; *Harris v. Quarry Co.,* 131 N.C. 555; *Wright v. Ins. Co.,* 138 N.C. 499; *Johnson v. R. R.,* 140 N.C. 579; *Machine Co. v. Tobacco Co.,* 141 N.C. 292; *Talley v. Granite Quarries Co.,* 174 N.C. 447; *Sprout v. Ward,* 181 N.C. 374; *Builders v. Gadd,* 183 N.C. 449; *Brewington v. Loughran,* 183 N.C.

562; *Monger v. Lutterloh,* 195 N.C. 278; *McCullen v. Durham,* 229 N.C. 427; *Myers v. Allsbrook,* 229 N.C. 790; *Cox v. Freight Lines,* 236 N.C. 79; *Nebel v. Nebel,* 241 N.C. 501.

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

Homestead—Allotment of.

1. The proceeding to have the allotment of the homestead made by the appraisers reviewed by the Board of Township Trustees, under Bat. Rev., ch. 55, Secs. 20, 21, must have been made before the sale of the excess under the execution.
2. After the repeal of this act, the homesteader might have had the action of the appraisers reviewed by a *recordari* or by a motion in the cause.
3. A homestead was laid off to a judgment debtor, with which he was dissatisfied, after the repeal of the act allowing an appeal to the Township Board of Trustees. After the enactment of Sec. 519 of The Code, the homesteader attempted to have the action of the appraisers reviewed under the provisions of that section; *It was held,* that he had lost his remedy by the failure to move in the manner allowed by law, before the sale of the excess.

This is a proceeding by the defendant, under section 2, chapter 357, of the Laws of 1883, to revise the allotment of his homestead, made on or about the 20th day of April, 1881, under executions issuing upon judgments docketed in the Superior Court of Halifax, in favor of the plaintiffs and against the defendant, heard before *Graves, Judge,* at Spring Term, 1885, of HALIFAX Superior Court.

The notice of appeal, together with a copy of the appraisers' (151) return of the allotment of homestead, was served on the 15th day of March, 1883.

At Fall Term, 1883, the plaintiffs moved to dismiss the proceeding, upon affidavit, upon the ground that a motion upon affidavit was then pending in the original cause to amend the record and set aside the allotment of homestead aforesaid, and the sale of the excess of defendant's land under said executions, and to have a re-allotment of the homestead. That proceeding was instituted February 28, 1883. Thereupon, the motion in the cause was dismissed, the defendant not objecting, at Fall Term, 1883, and the defendant was allowed, against the objection of the plaintiffs, to file additional exceptions in this proceeding, which were as follows:

He objects to said allotment:

1. In that the specific property set apart to him, was allotted against his protest, and did not embrace the dwelling-house of the defendant.

2. In that the appraisers refused to allot to him property selected by him as and for a homestead.

3. In that the property in which his homestead was allotted, was at the time, covered by a deed of trust, securing debts of about three times the value of the property, and by a mortgage securing debts of about eight times the value of said property.

4. In that he protested against the allotment to him of a homestead in property encumbered by said deed of trust and mortgage.

5. In that the appraisers refused to investigate the encumbrances upon his property, although requested by him so to do.

6. In that the appraisers refused to take in consideration said encumbrances in alloting to him a homestead, although requested by him so to do.

7. In that the appraisers had no power or authority to set apart to him a homestead in property encumbered as aforesaid.

8. In that the equity of redemption in the property allotted was not worth one thousand dollars.

(152) At Spring Term, 1885, this proceeding came on to be heard, and on the hearing, it appeared that the excess of the defendant's land, over and above said allotment of homestead, was sold on the 1st day of August, 1881, under said executions.

It also appeared that the defendant appealed within ten days from the allotment of his homestead, to the Board of Commissioners of Halifax County, he being advised and believing the Board had appellate jurisdiction, which appeal came before the commissioners for hearing, at their meeting on the 1st Monday in June, 1881, when they dismissed it for want of jurisdiction. Thereupon, the defendant appealed from the order of dismissal to the Superior Court of the county, but paid the Clerk of the Board no fees for sending up the record, and never requested him to send it up. Said record, on appeal, was not sent up to Fall Term, 1881, of the Court, and no steps were taken by defendant at said term to have the appeal sent up. At November Special Term, 1881, the defendant applied to his Honor, Judge Gilmer, for a writ of *certiorari*, without notice to the plaintiffs, to remove the proceedings into the Superior Court. His Honor granted his *fiat*, but the defendant was required to file a bond in the sum of one hundred dollars, before the clerk should issue the writ. On the back of said *fiat*, the counsel of the defendant endorsed, "Don't issue the writ till further instructions from R. P. Spiers," and signed the same. Such instructions were never given, the bond was never filed and the writ never issued. But at their February meeting, 1882, the

commissioners sent up their record, and at March Term, 1882, this proceeding was consolidated by his Honor Judge Bennett, with the ejectment suit of R. O. Burton, Jr., against R. P. Spiers, brought to recover the excess purchased by said Burton at the execution sale. On appeal to the Supreme Court this order of consolidation was reversed. (See *Hartman v. Spiers,* 87 N. C., 28, and *Burton v. Spiers,* 87 N. C., 87). Thereafter the *certiorari* proceedings were dismissed, and on the 28th day of February, 1883, the defendant gave notice of the aforesaid motion in the cause, which was dismissed at Fall Term, 1883, as aforesaid.

It further appeared that the excess was purchased by Robert (153) O. Burton, Jr., attorney for the plaintiffs, at said execution sale, and the sheriff's deed executed to him therefor, and he still claims title under this sale, and that he had notice of the several efforts of the defendant to obtain a re-allotment of his homestead.

Thereupon the plaintiffs moved to dismiss the proceeding, and the Court gave the following judgment:

"This cause coming on to be heard, it is, on motion of the plaintiffs' attorneys, ordered and adjudged that this proceeding, it being an appeal by defendant Spiers from the allotment of his homestead taken after the sale of the excess by the sheriff, be and the same is hereby dismissed.

"It is further adjudged that the plaintiffs recover of the defendant R. P. Spiers, and his surety on his bond, the costs of this proceeding, to be taxed by the Clerk."

From this judgment, the defendant appealed.

Messrs. Spier Whitaker and R. O. Burton, Jr., for the plaintiffs.

Messrs. John A. Moore, W. H. Day and R. B. Peebles, for the defendant.

ASHE, J. (after stating the case). At the time the defendant's homestead was laid off, there was no provision by law for his appeal from the allotment of the appraisers. Prior to the act of 1876-'77, ch. 14, a homesteader, if dissatisfied with the appraisement, had the right of appeal to the Board of Township Trustees; but by that act, the Board of Trustees was abolished, and the homesteader was put to such other means of relief as were given by the law. As the appraisers were not a court of record, the party deprived of his appeal, had the right to bring his case before the Superior Court by a writ of *recordari. Ballard v. Waller,* 52 N. C., 84; *Leatherwood v. Moody,* 25 N. C., 129; *Webb v. Durham,* 29 N. C., 130. This was a means provided by law for having the proceedings before the appraisers reviewed, of which the defendant

might have availed himself, but he failed to do so. Instead of
(154) applying for the writ of *recordari,* he applied for a *certiorari,* but even if that might have availed him, after obtaining the fiat of the Judge requiring him to give a bond, no bond was ever given, and no other steps taken by him to obtain the writ. It was never issued, but was stopped by the intervention of his counsel.

There was yet another remedy for the defendant, as prescribed in the case of *Burton v. Spiers,* 87 N. C., 87, of which the defendant might properly have taken advantage, if he had prosecuted the matter to a final determination. This Court there held, that the proceedings by the appraisers, were required to be returned by the officer, to the Clerk of the Court for the county in which the homestead is situated, and filed with the judgment-roll in the action, and a minute of the same entered on the judgment docket. Bat. Rev., ch. 55, Sec. 4. This direction, said the Court, as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, *but to subject it to a motion made in reasonable time to set it aside.* But the motion, as was said, should be made in a reasonable time—that must mean at the first opportunity the defendant might have to make his motion. It is true, the defendant did make his motion to have the allotment of homestead and the sale of excess under execution set aside, and to have a new allotment; but this was not done until the January Term, 1883, more than two years after the allotment had been made, and the excess sold under execution. But the defendant, after the act of 1883, hereinafter recited, took an appeal under that act, and allowed his motion in the cause to be dismissed without objection.

The law in force at the time the allotment was made, required that the debtor, dissatisfied with the valuation of the allotment of the appraisers, might, within ten days thereafter, *and before sale under execution of the excess,* file a transcript of the return of the appraisers with the Clerk of the Board of Township Trustees, who was required to notify the Board of Township Trustees, who might re-assess and allot the homestead—Bat. Rev., ch. 55, Sec. 20—and make their returns as provided in Sec. 21.

(155) It will be seen from this act, that the proceedings to have a re-assessment, must be had *before a sale under the execution.*

But the defendant says that he was deprived of this remedy, by the abolition of the Board of Township Trustees, and the Legislature has come to his relief, by passing the Act of 1883, ch. 357, Secs. 1-2, which gives him the right of appeal to the Superior Court.

That act is as follows:

"SECTION 1. That if the judgment creditor, at whose instance the personal property exemption or homestead of his judgment debtor shall

have been allotted, or the said judgment debtor, shall be dissatisfied with the valuation and allotment of the appraisers or assessors, as the case may be, either of them may, within ten days thereafter, or any other creditor, if dissatisfied, within six months thereafter, and *before sale under execution of the excess,* notify the adverse party and the sheriff having the execution in hand thereof, and file with the Clerk of the Superior Court of the county where the said allotment shall be made, a transcript of the return of the appraisers or assessors, as the case may be, which they, or the sheriff, shall allow to be made upon demand, together with his objections, in writing, to said return, and thereupon the said clerk shall enter the same on the civil issue docket of the said Superior Court, for trial, to be had at the next term thereof, as other civil actions, and the sheriff shall not thereupon sell the excess until after the determination of said proceeding.

"SEC. 2. That any creditor or debtor who is dissatisfied with the allotment of any homestead or personal property exemption, made since the abolition of the Board of Township Trustees, may have the same appealed to a regular term of the Superior Court of the county where the property was situated, under the provisions of this act; *Provided, however,* that no one shall be entitled to an appeal under this section, who has not already taken steps to have such allotment revised in some way."

The two sections of the act must be construed together. They are parts of a whole. The latter section refers to the first, and gives the right of appeal, *under the provisions of this act,* to any one (156) who has already taken steps to have such allotment revised in some way. But one of the provisions of the act is, that the appeal must be taken *before sale under execution of the excess,* and this was a provision in the act of 1868, Bat. Rev., ch. 55, Sec. 20, and no doubt the reason of this provision was, that the Legislature did not mean to allow the title of the purchaser to be disturbed, after a sale of the excess by the sheriff. This was the construction given to the act of 1868 in the case of *Heptinstall v. Perry,* 76 N. C., 190. There, the plaintiff recovered a judgment against the defendant, executions issued thereon, and the homestead of the judgment debtor was laid off. About six months after the sale of the excess by the sheriff, the plaintiff, becoming dissatisfied, requested a re-allotment of said homestead, and to that end applied for a mandamus to the Township Board of Trustees, which was refused by the Judge, and the defendant appealed. READE, Judge, delivering the opinion of the Court, said, "The statute is so plain as to leave no room for construction. The application for re-assessment and allotment of homestead, must be before the sale of the excess by the sheriff. Bat. Rev., Ch. 55, Sec. 20." The same construction must be

given to the act of 1883, for their provisions are the same in this respect. The second section of that act, then, was insufficient for the purpose intended to be effected by it, after the excess had been sold under execution; and this was probably the reason why the Legislature, in incorporating the act of 1883 in The Code, admitted the second section of the act, although The Code and the act of 1883 were adopted at the same session of the Legislature. The Code, Sec. 519.

Our conclusion is, the defendant has lost his right to have a re-allotment of his homestead, by his own fault in not having resorted in time to the means of relief which the law afforded him.

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

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(157)

D. E. WOODLEY ET ALS. v. J. L. HASSELL ET ALS.

Ejectment—Possession—Evidence—Fraudulent Conveyance—Intent.

1. The statute requires that a motion to quash a deposition for irregularity shall be made in writing, and before the trial is begun, and unless the motion is so made, the objection to the deposition is waived.
2. The declarations and acts of a judgment debtor who remains in possession of land after it has been sold under execution and a sheriff's deed executed, are admissible to show agreement between himself and the purchaser at execution sale to defraud his creditors.
3. When there is any evidence to go to the jury, this Court cannot pass on its sufficiency, and when the case on appeal states that there was much evidence on certain question, introduced by both parties, this Court cannot say that there is no evidence to support the verdict.
4. Where the jury finds an *actual fraudulent intent*, the conveyance is void as to creditors, although the fraudulent donee paid for the land with his own money.
5. Where there is a private arrangement between a judgment debtor and a third person, that the latter shall purchase the land of the former at execution sale, and hold it for the benefit of the judgment debtor and to screen it from his creditors, if there is an actual fraudulent intent, other creditors may treat the conveyance by the sheriff to such third person as void, and sell the land under their executions.
6. If the plaintiff in an action of ejectment, gets possession of the land before judgment, if he recover, he is not entitled to a judgment that he recover the possession, but only to one declaring the validity of his title.

CIVIL ACTION for the recovery of land, tried before *Shipp, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of TYRRELL County.

The land, which is the subject of controversy, belonged to Daniel Woodley, senior, and was sold in November, 1868, to John W. Hassell, at the price of $106 by the sheriff of Tyrrell County, (158) under execution issuing upon a decree rendered in the Court of Equity of that county, to satisfy the fees and costs due the officers. The possession afterwards, as before the sale, remained undisturbed in the former owner. In January, 1878, the purchaser, by voluntary deeds, conveyed the premises to said Daniel Woodley and his wife, who were his parents-in-law, for their joint lives and the life of the survivor, and the estate in remainder to his own children, the defendants. Under an execution issuing upon a judgment recovered by Samuel S. Woodley, guardian of Daniel Woodley, junior, against Daniel Woodley, senior, the premises were again exposed to sale, as his property, by the sheriff, who, by deed executed on October 27, 1879, conveyed the same to Daniel Woodley, junior.

A month later, the present action was commenced by the latter against Daniel Woodley, Sr., John W. Hassell and wife Sophia, and their two infant children and donees, John L. Hassell and Mary Hassell; and in his complaint he claims title under the second sale, alleging the first to be fraudulent and void, and demands possession.

During the pendency of the action, the plaintiff died, having devised the land to Sarah F., who, as such devisee, was substituted in his place, as were the present plaintiffs, her children and heirs-at-law, in her's, upon her subsequent death and intestacy. At Spring Term, 1881, an order was entered appointing said John W. Hassell guardian *ad litem* to the two infant defendants, who having died without putting in an answer for them, Thomas L. Jones, was appointed in his place, and on behalf of said infants, answered the complaint, adopting the answer of the deceased defendant, and alleging that since the institution of the suit, the original plaintiff had entered into possession of the land, and continued to hold it up to his death, as had the plaintiffs, his heirs, since.

This allegation is not controverted or noticed, and at Spring Term, 1885, the cause came on for trial, upon issues submitted to the jury, whose responses affirm the following propositions:

I. John W. Hassell bought the land at the sheriff's sale, for (159) Daniel Woodley, senior.

II. It was purchased under a previous agreement between them, for the purpose of delaying, hindering and defrauding the creditors of the latter.

III. Daniel Woodley, Sr., was at that time insolvent, and in the same condition at the date of the two deeds from John W. Hassell.

IV. If a trust was created under said agreement, it was satisfied by the execution of said deeds.

Upon the issue of fraud, the plaintiff, after objection made and overruled, read in evidence the deposition of Daniel Woodley, senior, and also proved declarations and acts of his while in possession, tending to show the purchase to have been made for him.

The objection to the deposition, taken at the trial, was, that the infant defendants had no guardian *ad litem* to represent them when it was taken, and that it was, as to them, taken *ex parte*.

There was a judgment on the verdict for the plaintiffs, and the defendants appealed.

Mr. W. D. Pruden, for the plaintiffs.
Mr. E. C. Smith, for the defendants.

SMITH, C. J., (after stating the facts). I. The deposition was taken on December 22, 1880, under a mutual order for taking depositions *be bene esse*, after notice directed to all the defendants, service of which was accepted by their attorney of record, and they were represented by counsel on the occasion.

II. The statute requires a motion to be made before the trial is entered upon for the rejection of a deposition, "for irregularity in the taking of it, in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause," but the exception must be stated in writing. The Code, Sec. 1361. Here the deposition seems to have lain in the office, among (160) the records in the cause, for several years.

This is a waiver of the objection. *Kerchner v. Riley*, 72 N. C., 171; *Katzenstein v. R. & G. R. R. Co.*, 78 N. C., 286; *Wasson v. Leinster*, 83 N. C., 575.

III. The admission of the declarations and acts of the defendant in execution, remaining in possession after the sale, in the use and enjoyment of the property as before, is within the ruling in *Hilliard v. Phillips*, 81 N. C., 99.

IV. The defendants further excepted to the sufficiency of the evidence to show fraud, and to so much of the ruling as declared the sheriff's deed to the first purchaser, under whom they claim, inoperative and void upon the finding of the second issue.

The case states, that there was much evidence on the question of fraud, other than such as is set out, introduced by both parties. This precludes an inquiry into the sufficiency of the evidence to warrant the finding, if we were at liberty to consider it, and certainly we cannot say, in presence of what is stated in the case, that there was none. The only fraud assigned and established by the verdict, consists in the private arrangement between the judgment debtor and his son-in-law, Hassell,

by which the property was to be bought by the latter for his benefit, and this was done to screen the property from other creditors, and for the benefit of the former. The sale itself is not assailed for unfairness in the manner of conducting it, or in repressing the bidding, that the property should not sell for its value, or that any improper practice was pursued to obtain an unfair advantage in the purchase. It is not our province to say whether such an arrangement should be allowed to vitiate the sale, and prevent the transfer of the legal title, as against other creditors, but the jury superadd the further finding that this was not only to secure a home for the debtor, but had the positive covinous intent of defrauding other creditors of the debtor.

When this vitiating element—an actual fraudulent intent—enters into the transaction, even though the purchase money comes from the bidder, its effect in law is to annul the sale, and leave (161) the property accessible to the final process of another creditor in the enforcement of his debt. This is decided in the cases of *Dobson v. Erwin,* 18 N. C., 569, and *Morris v. Allen,* 32 N. C., 203.

In the latter case RUFFIN, C. J., uses this language: "In the case of *Dobson v. Erwin,* it was held, that if the debtor advance the money, or a considerable part of it, to make the purchase at the sale of the sheriff, and the purchase was made for his own use, *that was a fraud, which would avoid the title,* although the sale was at the instance of another, and for a just debt. For in such case, the sale though in form that of the sheriff, is by the contrivance of the debtor and the purchaser, and in respect of their fraudulent purpose, substantially as much a sale *inter partes,* as if there had been no intervention of the sheriff. It is the same thing precisely, although all the money paid to the sheriff, be advanced by the person to whom he makes the deed, provided only *there be the same intent in each case to cheat creditors.*"

We were at first somewhat at a loss to reconcile this ruling with that made in *Crews v. Bank,* 77 N. C., 110, and in others following it—*Young v. Greenlee,* 82 N. C., 346; *Black v. Justice,* 86 N. C., 504, and *Currie v. Clark,* 90 N. C., 355—wherein it is held that a sale by the sheriff, when there has been a fraudulent suppression of bidding, in which the purchaser participated, is not absolutely void, though the sale may be impeached and a re-sale obtained, by a proceeding directed to that end, instituted by an injured creditor. But these cases relate to combinations to prevent a fair sale, and to secure the property at an under-value, which is a direct injury to the owner or to the creditor, by diminishing the value of property looked to for the payment of debts, and lacks the distinguishing ingredient found in the other cases, to-wit, a pre-conceived purpose and plan, not only to secure the estate to the

debtor, but in doing this to cheat and defraud other creditors, in which the debtor is an active participant.

(162) As the allegation is that the plaintiffs have sought a remedy for themselves by entering upon the land and holding possession, and this is not controverted, we must assume such to be the fact. Hence this self-sought redress destroys the primary and principal cause of action, and no judgment for a possession already had can be given. *Johnson v. Swain,* 44 N. C., 335; *Thompson v. Reed,* 47 N. C., 412; *Horton v. White,* 84 N. C., 297.

The plaintiffs are entitled to judgment declaring the validity of their title and the nullity of the deed from the sheriff to their donor, but not for any defacement of the registry of said deeds, and not to an inquiry into rents and profits, since the present plaintiffs have had the occupation ever since their title accrued by the death of their ancestor.

There is no error in the ruling, and the judgment reformed in the manner directed will be here entered for the plaintiffs, and for their costs.

No error. Affirmed.

Cited: Shaffner v. Gaynor, 117 N.C. 24; *Credle v. Ayers,* 126 N.C. 15; *Brittain v. Hitchcock,* 127 N.C. 401; *Womack v. Gross,* 135 N.C. 379; *Byrd v. Spruce Co.,* 170 N.C. 435; *Hodges v. Hodges,* 227 N.C. 335.

MARY TUCKER, EXECUTRIX, v. GEORGE S. BAKER, ADMINISTRATOR.

Statute of Limitations and Presumptions.

1. The bond sued on in this action was executed in 1859 and is therefore governed by the statute of limitations then in force.
2. While the recognition of a subsisting indebtedness by the personal representative, and promise to pay the same, is not sufficient to revive a cause of action barred by a positive statute of limitations, yet it is competent to be considered in passing upon the issue of payment, and is sufficient to rebut the presumption of payment having been made.
3. When more than ten years have elapsed since the right of action arose, but during a portion of that time there was no personal representative of the creditor who could sue, or of the debtor who could be sued, whether such portion of time must be left out of the computation of time during which the statute was running—*Quœre?*

(163) CIVIL ACTION, tried before *Phillips, Judge,* upon a case agreed at January Term, 1886, of the Superior Court for FRANKLIN County.

The present action was commenced on October 16, 1879, and its object is the recovery of money due on a sealed note. The facts are agreed on as follows:

That on May 25th, 1859, James Murphy executed the note under seal sued on, for $300, payable one day after date; that on October 2nd, 1859, there was a payment on the note by Murphy of $100, which was duly credited thereon; that soon after such payment was made, the note was transferred to J. B. Tucker, plaintiff's testator, for value; that J. B. Tucker died in 1864, leaving a last will and testament, under which plaintiff qualified as executrix; that James Murphy died in 1861, leaving a last will and testament, to which H. Harris qualified as executor in 1861; that he was removed as executor in 1876, and W. H. Spencer was appointed administrator *de bonis non, cum testamento annexo.*

After the appointment of Spencer as administrator, the plaintiff executrix presented her claim to him and demanded payment. The administrator answered that there were no personal assets in his hands belonging to his testator, but that there was some land; and the plaintiff demanded that said land should be subjected to the payment of this debt, to which he assented, and promised that as soon as he could by proper proceeding make the land assets, he would pay the debt.

The administrator instituted proceedings against the heirs-at-law of said James Murphy for that purpose, which was resisted.

W. H. Spencer died in September, 1877, before any decree was obtained, and the proceeding abated.

Letters of administration were issued to the defendant Baker (164) as administrator *de bonis non* of James Murphy, October 15th, 1879. Summons issued on October 16th, 1879.

That no assets have come into the hands of the defendant, and none went into the hands of W. H. Spencer, administrator.

That sufficient assets to pay the debts of James Murphy went into the hands of H. Harris, his executor, and that no final account was rendered by said executor.

Upon the foregoing facts it was adjudged that the plaintiff take nothing by his action, and that the defendant go without day and recover of the plaintiff the costs and disbursements of the action.

From this judgment the plaintiff appealed.

Mr. Jos. B. Batchelor, for the plaintiff.
Mr. C. M. Busbee, for the defendant.

SMITH, C. J. (after stating the facts). The defences set up are payment presumed from the lapse of time, unexplained, under statute, and

the bar of the statute to the claims of creditors not prosecuted within seven years after the death of the debtor. Revised Code, Secs. 18 and 11.

There is no suggestion of the inability of the party who executed the note to pay it, and he did in fact pay a part of it. So, his executor, Harris, had assets sufficient for the purpose, during the succeeding fifteen years he held that office, and until his removal in 1876.

During this period, from which, however, must be eliminated the interval from May 20th, 1861, to January 1, 1870, by virtue of the act suspending the statutes of limitation and presumption, there is nothing to explain the delay in suing, or to repel the presumption. Counting the time from the payment on the note in October, 1859, to May 20, 1861, and from January 1, 1870, to the commencement of this action, more than ten years had elapsed, so that the presumption that the debt had been paid, would be raised, unless, as contended by plain-
(165) tiff's counsel, the two years between Spencer's death and the issue of letters of administration to the defendant, are to be left out in the count of time, or the presumption is repelled by what transpired between Spencer and the plaintiff in reference to the claim.

In drawing a distinction, which for many purposes undoubtedly exists, between a statute that bars the remedy, and a statute which presumes a satisfaction of a demand, the argument for the plaintiff was long and exhaustive of the learning on the subject. The cases cited from 3 N. C.—*Quince's Adm'r v. Ross, Adm'r*, 180, and *Ridley's Adm'r v. Thorpe*, 343—do seem, the first directly and the latter by inference, to sustain the contention that the statute does not run, or rather that the presumption is rebutted, by proof that during a portion of the ten years, there was a gap between the death and the appointment or qualification of a representative, or the death of the latter and the appointment of successor, during which time there was no one to sue. The later authorities, cited by defendant's counsel, do not seem to sustain the proposition. *Hamlin v. Mebane*, 54 N. C., 18; *Hodges v. Council*, 86 N. C., 181; *Hall v. Gibbs*, 87 N. C., 4, and other cases.

But it is not necessary to pass upon the point, since there is another ground upon which we propose to put our decision of the cause.

We regard what passed between the plaintiff and the administrator Spencer, after the latter's appointment, as his distinct recognition of the subsisting indebtedness, and assuming the facts to be true, sufficient to rebut the presumption, unless ten years thereafter passed before suit, and if this were so, during all that subsequent interval, the presumption would not arise, because the successive administrators, Spencer and Baker, were without assets wherewith to make payment.

While what transpired between the plaintiff and Spencer, would not be sufficient to revive a demand, barred by a positive statute limiting

the time for bringing the action, as was held in *Fleming v. Fleming,* 85 N. C., 127, so as to subject to liability the estate of (166) a deceased debtor, and still less so the debtor himself, even if what was there said was in writing—*Oates v. Lilly,* 84 N. C., 643—yet it is competent to be considered in passing upon an issue of payment, and rebutting the presumption of its having been made.

This is ruled in *Buie v. Buie,* 24 N. C., 87, and as an authority it is decisive.

In this case, the late Chief Justice, then a Judge of the Superior Court and presiding at the trial, instructed the jury thus:

"If the evidence satisfied the jury, that such an acknowledgment had been made by the defendant," (who became the executrix of one and the administratrix of the other obligor in the note under seal sued on), "within thirteen years next before the issuing of the writ, that would repel the presumption; but unless the acknowledgment was made within that time, there was nothing to repel the presumption, and they would find for the defendant on the issue of payment."

Upon the appeal, GASTON, J., delivering the opinion, says:

"All the points made in this case in the Court below, appear to us to have been properly decided."

Referring to the term of *"thirteen years"* used in the charge, instead of the ten years prescribed in the statute, he remarks that this inaccuracy furnishes no ground for reversing the judgment, for that "a party cannot except for error to an instruction which he hath himself prayed; and the *substance* of the instruction was correct, as the acknowledgment, if made at all, was made within ten years."

As the facts are agreed, we hold that the presumption is repelled by the acknowledgment.

There is error, and judgment will be here entered for the debt, interest and costs, but without charging the defendant with assets.

Error. Reversed.

Cited: Baird v. Reynolds, 99 N.C. 473; *Grant v. Gooch,* 105 N.C. 281; *Waldrop v. Hodges,* 230 N.C. 373.

(167)

L. J. PEOPLES AND OTHERS V. N. M. NORWOOD.

Practice—Irregular Judgment.

1. The purpose of the summons is to bring the parties into Court; the purpose of the pleadings is to give jurisdiction of the subject matter of litigation and of the parties in that connection.
2. These are generally necessary, but when the parties are voluntarily before the Court, and by agreement, consent, or confession, which are the same in substance, a judgment is rendered, such judgment is valid, although not granted according to the regular course of procedure.
3. In passing on the motion to vacate and set aside such judgment as irregular, it is proper for the Court to inquire as to the facts and considerations which led to such judgment.
4. The motion to set aside such judgment should be made within a reasonable time, and the irregularity to warrant the setting it aside should be in respect to some matter of substance prejudicing the party.
5. When there was evidence that two of the plaintiffs had been paid by defendant before the judgment was rendered, and that the third had been paid since, it was proper to set the judgment aside as to the former, but not as to the latter.
6. As to the latter, the proper course was to move to have satisfaction of the judgment entered on the record, which the Court could do on proof of payment.

This was a motion to set aside a judgment heretofore rendered in the Superior Court of GRANVILLE County, for irregularity, heard by *Shepherd, Judge,* at Spring Term, 1885, of said Court.

The facts were as follows:

It appears that on the 27th day of November, 1874, the Court of Probate of the County of Granville, made an order whereof the following is a copy:

"Whereas, Nathaniel M. Norwood, guardian to Charles H. Gregory, Robert H. Gregory and Wm. D. Gregory, has failed to exhibit his account to the Judge of Probate as required by Secs. 55 and 56 of an act concerning guardians and wards: It is therefore ordered by
(168) the Court, that the said Nathaniel M. Norwood do make his personal appearance, and file such returns in the office of the Clerk of the Superior Court and Probate Judge, at Oxford, on Tuesday, the 22d day of December, 1874, or show cause why an attachment should not issue against him as prescribed by law."

A copy of this order was duly served upon the said Nathaniel M. Norwood, who is the present appellee, and he appeared in obedience to the same.

On the docket of the Probate Court is the following entry:

"PROBATE COURT
vs.
NATHANIEL M. NORWOOD.

"Order to return an annual account, returnable December 22nd, 1874. Transferred to the civil issue docket."

At the Spring Term, 1875, of the Superior Court of the county named, the matter above mentioned appears upon the docket of that Court stated thus:

"VENABLE. "HAYS.	L. J. PEOPLES, agent for GREGORY and others. *vs.* N. M. NORWOOD, *Guardian.*	Petition for account and settlement; exceptions to report of Probate Judge."

Afterwards, at the Special Term, July, 1875, the case again appears with the entry, "Continued; transferred from the Probate Court." Same counsel marked.

At Fall Term, 1875, the case again appears with same counsel marked. No entries except "Transferred from Superior Court."

At Spring Term, 1876, the case appears, and the only entry appearing being, "transferred from the Probate Court."

At the next term, the same case appears, same counsel marked, with the words: "April, 1875, transferred from Probate Court. Continued." The case was continued on the docket, with same counsel, and same entries, until the Spring Term, 1878, when the word "open" (169) was added. The word "open" was written by Mr. Hays, attorney, who was making entries generally on the docket, while it was being called.

At the next term the judgment was rendered which is sought to be set aside, the same counsel being then marked on the docket, and the following is a copy of the entry thereof:

"NORTH CAROLINA, } SUPERIOR COURT,
GRANVILLE COUNTY. } Fall Term, 1878.

L. J. PEOPLES, agent and next friend of CHARLES H. GREGORY, ROBERT H. GREGORY and WILLIAM D. GREGORY, *Plaintiffs,*
against
NATHANIEL M. NORWOOD.

"This cause coming on for hearing at this term of the Court, on appeal from the Probate Court for Granville County, and now being heard before the Court, his Honor, John Kerr, Judge, presiding, and it appearing to the Court that the defendant is indebted to the plaintiffs, Charles H. Gregory, Robert H. Gregory and William D. Gregory, in the sum of one thousand two hundred and ninety-three dollars and fifty cents. It is therefore considered and adjudged by the Court, that the plaintiffs do recover of the defendant, Nathaniel M. Norwood, the sum of one thousand two hundred and ninety-three dollars and fifty cents, with interest on one thousand and fifty-three dollars and twenty-six cents from the first day of this term, and for costs of suit, to be taxed by the clerk, the same to include the sum of ten dollars to B. H. Cozart, clerk, for stating the account."

Afterwards an execution was issued upon the judgment on 21st day of November, 1878, and returnable to the next term. The return is, "Not executed by order of plaintiff." On the costs taxed in said execution was a tax fee for Attorney Venable, and $10 for Cozart, Commissioner.

(170) "Another execution issued June 22d, 1880. Returned satisfied as to amount of Court costs, say $38.63, herewith paid into office. Sheriff's fee retained. Not executed as to judgment debt and interest, by authority of T. B. Venable, attorney of plaintiff, as will appear by reference to his letter to John W. Hays, attorney for defendant, bearing date 27th September, 1880, which said letter is hereunto appended."

The letter is as follows:

"OXFORD, N. C., Sept. 27th, 1880.

John W. Hays, Esq.

DEAR SIR:—In regard to the execution in the hands of the sheriff of Warren, in favor of *Peoples & Gregory v. Norwood,* I understand that there has been, heretofore, an agreement between Peoples and Norwood in regard to the debt. If the costs are paid on the execution, so far as the debt is concerned, that can be held for further investigation, but it is distinctly understood that this is not in any way to affect the rights of the parties.

Yours truly,

(Signed) THOS. B. VENABLE,
Attorney for plaintiff."

Another execution issued 12th November, 1880, and was levied on the defendant's land, when further proceedings on the execution were stopped by injunction.

The Court found the following facts:

That Mr. Hays was employed by Mr. Norwood, and appeared for him before the Probate Court. That defendant was dissatisfied with the account as stated by the Probate Judge, and his counsel, Mr. Hays, at his instance, said he would file written exceptions, and move either for an appeal, or to have the case transferred to the Superior Court.

The case was transferred to the civil issue docket of the Superior Court. No summons was ever issued, no exceptions were filed until Spring Term, 1875. Mr. Hays continued to appear for Mr. Norwood in the Superior Court. There was no new employment, nor any subsequent contract or conversation between Hays and Nor- (171) wood about the case.

Norwood had actual knowledge that the case had been transferred and was pending in the Superior Court, but no knowledge that the proceedings had been changed, so as to make Peoples *et als.* parties plaintiffs, nor has he ever consented thereto.

There is no order showing that any amendment of parties was allowed, except the statement of the case heretofore mentioned, on the docket at the Spring Term, 1875.

No judgment or memorandum of the judgment was made by the Clerk, but simply an announcement of the balance due on the account. No complaint or petition was filed in either Court. Mr. Hays was present in the Court when the judgment was taken, and knew of it. The proceedings in the Superior Court was in relation to the same matter which was before the Probate Judge. No account was taken in the Superior Court, nor was any evidence heard by the Judge. The case was called, and the judgment was rendered upon the account stated by the Probate Judge. No exceptions were heard. When the case appeared upon the civil issue docket, Mr. Hays knew that its object was to obtain a judgment against the defendant, but did not communicate this to his client. There was no transcript from the Probate Court, but the papers were transferred.

Upon the foregoing facts found by the Court, it is adjudged that the judgment herein be set aside, and that the defendant be permitted to plead such pleas or to make such motions as to him may seem proper. That the defendant recover the costs of this motion.

From this judgment, the plaintiff appeals to the Supreme Court.

Mr. E. C. Smith, for the plaintiffs.

Mr. Jos. B. Batchelor, for the defendant.

MERRIMON, J. (after stating the case). The judgment in question was irregular, but not void. The appellants and appellee were
(172) before the Court, in the attitude of adversary parties litigant, for several years, and respectively all the time represented by counsel, cognizant of all that was done in the matter, and especially at the term of the Court at which the judgment was granted and entered, the appellee's counsel was present and had knowledge of it. Although the matter that went up from the Court of Probate to the Superior Court, was not such as in the ordinary course of procedure could entitle the appellants to a judgment for money, and regularly the judgment of the latter Court ought to have been confined to the exceptions to the account as audited by the Judge of Probate, nevertheless, the Court, in the exercise of its general jurisdictional powers, could, by consent and agreement of the parties, take jurisdiction of them, and grant a judgment by agreement or confession, and such judgment would be valid, notwithstanding there was neither summons nor pleadings. The purpose of the summons is to bring the parties into, and give the Court jurisdiction of *them,* and of the pleadings, to give jurisdiction of the *subject matter* of litigation and the parties in that connection, and this is orderly and generally necessary; but when the parties are voluntarily before the Court, and by agreement, consent or confession, which in substance are the same thing, a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure. *Farley v. Lea,* 20 N. C., 307; *State v. Love,* 23 N. C., 264; *Stancill v. Gay,* 92 N. C., 455.

The appellee knew that he had a matter pending before the Superior Court, and that he was represented by counsel. At his instance, his counsel in the Probate Court, took steps to take the matter of which he complained into the Superior Court, and it is obvious that he intended the counsel to represent him in the latter Court, as he did do. The record is very meagre and unsatisfactory. It was not, as we have said, in the regular course of the matter before the Court, to grant such a judgment, and what considerations led to it do not
(173) appear. It does not appear from anything in the record, or in the recitals of the judgment, that the appellee or his counsel assented affirmatively to it. There only arises the legal presumption, not irrebuttable, that it was properly entered.

It appears that the appellee made affidavit in support of his motion to set the judgment aside, to the effect that he did not confess the same, nor agree, nor assent thereto, nor authorize his counsel to do so, and that in fact, he had paid two of the appellants the money due

them, and for which they so obtained judgment, *before* it was granted, and that he paid to the third appellant the sum due him *after* it was granted. Although the Court did not formally find the facts to be so, it must be taken that it was satisfied that there was reasonable ground to so believe, as it set the judgment aside. The Court had jurisdiction to grant, and apparently had just ground for granting the judgment, but although the Judge signed it, it seems that the Court was not fully and accurately in possession of the facts, and advised as to the considerations that led to it. It was competent and proper for the Court in passing upon the motion, to make inquiry in respect thereto. *Koonce v. Butler,* 84 N. C., 221; *Weaver v. Jones,* 82 N. C., 440.

But the Court ought not to set the judgment aside as of course, because of irregularity that does not render it void. To warrant setting the judgment aside, the irregularity should be in respect to some matter of substance, that might prejudice the complaining party to it, and the motion to set it aside should be made within a reasonable time. *Williamson v. Hartman,* 92 N. C., 236; *Stancill v. Gay, supra.*

The appellee delayed making his motion to set the judgment aside for more than two years, and in the meantime, several executions had been issued upon it, of which he had notice, and he had paid the costs of the Court. But it seems that the acquiescence was not complete, and the Court below was satisfied that the judgment was not properly granted, that there was reasonable ground to believe that the appellee had paid two of the appellants the money due them (174) from him before it was granted, and to the third one the money due to him afterwards.

We are therefore of opinion that the motion to set the judgment aside was properly granted as to the two appellants who, it is alleged, received the money due them before the judgment was granted. But as to the third one, who it is alleged received the money due him after the judgment, the motion ought not to have been sustained, because it is not suggested that as to him, the appellee was prejudiced by the judgment. The latter alleges, that he paid the former the money due him since it was granted; if this be so, he can have prompt and adequate relief by a motion in the cause to have satisfaction of the judgment entered. *Foreman v. Bibb,* 65 N. C., 128. It is important that judgments should not be disturbed unnecessarily nor for light cause.

The order appealed from must be modified, as indicated in this opinion, and to that end, let it be certified to the Superior Court. *It is so ordered.*

Modified.

Cited: Click v. R. R., 98 N.C. 393; *Glover v. Flowers,* 101 N.C. 141; *Gay v. Grant,* 101 N.C. 218; *McMillan v. Reeves,* 102 N.C. 558; *Everett v. Reynolds,* 114 N.C. 369; *McLeod v. Graham,* 132 N.C. 474; *Junge v. MacKnight,* 135 N.C. 118; *Miller v. Curl,* 162 N.C. 5; *Holmes v. Bullock,* 178 N.C. 379; *Hargrove v. Cox,* 180 N.C. 365; *Bank v. Edwards,* 194 N.C. 310; *Moseley v. Deans,* 222 N.C. 734.

COATES BROS. v. JOHN WILKES.

Appeal—Jurisdiction of the Superior Courts—Assignment of Error—Injunction in Supplementary Proceedings—Statute of Limitations.

1. An appeal is the act of the party and not of the Court, and it rests on the appellant to show that it was perfected. So where an order was made in Term, appointing a receiver, from which order the record showed that the defendant appealed, but it did not appear that the appeal was perfected, the Court has the power, certainly by consent, after notice, to alter such order at Chambers.
2. An appeal does not take the case beyond the control of the Superior Court, until it is perfected.
3. *It seems,* that the Superior Courts have power to make an amendment to an interlocutory order in an ancillary proceeding out of Term.
4. If the appellant does not except to the making of such order at the time, he will be taken to have assented to it.
5. By consent, the Court can grant judgment in civil actions in vacation.
6. A party to the record cannot assign as error that an order made in the cause affects injuriously the rights of third persons who are not parties.
7. Where, in proceeding supplementary to execution, it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party, in some way, to the proceeding.
8. Proceedings supplementary to execution are in effect an equitable execution. So where after such proceedings had been instituted, the judgment became barred by the lapse of time; *It was held,* that this did not operate to bar the proceedings.

(175) This was an appeal from an interlocutory order made in a proceeding supplemental to execution, by *Montgomery, Judge,* at Chambers in CONCORD, on October 17th, 1885.

A former appeal in this case was heard and determined at the February Term, 1885, of this Court. *Coates v. Wilkes,* 92 N. C., 376.

Afterwards, at the August Term, 1885, of the Superior Court, proceedings were had, and the following is a copy of the material parts thereof:

"This cause coming on for further orders, before his Honor W. J. Montgomery, Judge, at a Superior Court held in Salisbury, for said county, on the 24th of August, 1885, it is now adjudged and decreed by the Court (the plaintiff and defendant being both represented by counsel), that the plaintiffs' motion for the appointment of a receiver herein be allowed, and that E. K. P. Osborne, Esq., be appointed such receiver, and his bond be fixed at ten thousand dollars, to be approved by the Clerk of this Court. It is further adjudged and decreed, that plaintiffs' motion for the production of the books in which are and were kept the accounts of Jane Wilkes, wife of defendant, be allowed and defendant is ordered to produce the same when called for.

"Appeal prayed by defendant; notice waived; undertaking (176) fixed at fifty dollars."

The following notice was filed in the office of the Clerk of the Court, on the 30th day of September, 1885:

"CAPT. JOHN WILKES:—You are hereby notified, that on Saturday, the 17th day of October, 1885, we shall move, before his Honor W. J. Montgomery, Judge, at his Chambers in Concord, North Carolina, for amendment and modification of the decree made at August Term, 1885, of Rowan Superior Court, appointing receiver, etc., in the supplemental proceedings now pending in the Superior Court of Rowan County, wherein we are plaintiffs and you are defendant."

Service of this notice was accepted September 30th, 1885.

The following amended judgment was rendered by his Honor, at Chambers:

"The above entitled cause coming on for further hearing and orders, pursuant to the opinion and judgment of the Supreme Court upon the appeal heretofore taken, it is now, on motion of plaintiffs' counsel, the defendant's counsel being present, and resisting the same, ordered and adjudged, that a receiver be appointed of the property of the defendant, John Wilkes, wherever situate, and that E. K. P. Osborne, of Charlotte, North Carolina, be and he is hereby appointed a receiver as aforesaid, and that he give bond in the sum of five thousand dollars, payable to the defendant, conditioned for the faithful performance of his duties as such, it appearing to the Court that there are no other supplemental proceedings instituted against the defendant.

"It is further ordered that the said defendant shall make no transfer or other disposition of his property, other than his property which may be exempt from execution as homestead and personal property exemption, or any interference therewith.

"It further appearing to the Court, from the testimony in the cause, that Jane Wilkes, wife of the defendant, claims the Mecklenburg Iron Works, machinery, tools and implements used in or connected therewith, and also the machinery, engine and fixtures at the Capp's
(177) Hill gold mine, said iron works and gold mine being situate in Mecklenburg County, and more fully described in the pleadings and exhibits in this cause; and it further appearing that the said Jane Wilkes claims to own several town lots and buildings in the town of Charlotte, as well as the lot and residence in said town now occupied by her and the defendant, it is therefore further ordered that said Jane Wilkes is hereby forbidden to transfer or to make other disposition of any of said described property, till a sufficient opportunity be given the receiver appointed herein, to commence and prosecute an action or actions to recover the same.

"It is further ordered, that said receiver be allowed to bring and prosecute such action or actions in the proper Court or Courts, in the name of the plaintiffs herein, for the recovery of the property of the defendant, real and personal, wherever situate, liable for the payment of plaintiffs' judgment, as he may be advised by his counsel in that behalf.

"It is further ordered, that the defendant shall, whenever required in these proceedings, produce for examination the books of the Mecklenburg Iron Works, kept by or under the direction of John Wilkes or other persons for Jane Wilkes, his wife."

This order was made *nunc pro tunc,* in lieu of the former order.

The following exceptions to this order, were filed in the office of the Clerk of said Court, on the 27th day of October, 1885, by the defendant:

I. That the Judge had no jurisdiction or power to make so much of the said order as forbids Jane Wilkes to transfer or make other disposition of the property described in the order, and which she claims as her own property.

II. That the order is erroneous, in so far as it requires the defendant John Wilkes to produce for examination the books of the Mecklenburg Iron Works, kept by or under the directions of John Wilkes, or other person, for Jane Wilkes.

(178) III. That it appears from the record, that the judgment upon which these proceedings are based, is, and was at the time of making the order herein referred to, barred by the statute of limitation, more than ten years having elapsed since the rendition and docketing of the judgment at the time this order was moved for and when it was made.

IV. That it appears in this case, that there is real estate upon which the judgment was a lien at the commencement of the supplementary proceedings.

The defendant appealed.

Mr. Theo. F. Kluttz, for the plaintiffs.
Mr. John Devereux, Jr., for the defendant.

MERRIMON, J. (after stating the facts). In this Court, the counsel for the appellant insisted on the argument, that the Judge at Chambers had no authority to amend the order made in Term, appointing a receiver, etc., because, the appeal taken in Term, at once put the order appealed from, and the proceedings incident to it, in this Court, and beyond the jurisdiction of the Court below. He further insisted that in any case, the Court had not power to amend at Chambers an order made in Term.

It does not appear that at the time the amendment of the order made in Term was made at Chambers, the appeal taken in Term was perfected, or that it ever was. No presumption arises that it was. The appeal was not the act of the Court, but that of the appellant, and therefore it rests on the latter to show that it was perfected, if he would take benefit by that fact. No presumption arises that he accomplished what was begun.

It is settled that the order appealed from did not pass out of the jurisdiction and beyond the control of the Court, until the appeal was perfected. *Wilson v. Seagle,* 84 N. C., 110.

Nor does it appear that the appellant objected below, that the Judge had no power to amend at Chambers an order made in Term. The presumption therefore is that he did not so object. It is by no means certain that the Judge did not have power to make the amendment at Chambers, the order being interlocutory, and in an (179) ancillary proceeding, but as the appellant did not object, the presumption is, that he assented to, or acquiesced in, the exercise of the power, and it is certain that if he did, the Court could make the amendatory order. The Court can in ordinary civil actions or proceedings, grant a judgment out of Term as in and of the Term, by consent of parties, although such practice is not generally encouraged. *Shackelford v. Miller,* 91 N. C., 181.

If, however, the objections so insisted upon had merits, we would not be at liberty to base a decision upon them, because they were not made in the Court below, and there is no exception in the record that embraces them. Such exceptions must be taken in the Court from which the appeal comes, and duly assigned in the record.

The first exception specified in the record, refers to so much of the order appealed from, as forbids Jane Wilkes to make a "transfer or other disposition of such property or interest," as she may claim or control, alleged to be that of the appellant, until the receiver can have opportunity to commence an action to recover the same, and prosecute it to execution.

Of this the appellant cannot complain. She is a third party. If the property is his, she ought to be restrained from transferring or disposing of it. If the order is void as to her, she cannot be injured—she may disregard it altogether in that case. If on the other hand, it is not void, she might have become a party to the proceeding for the purpose of defending her right in that respect, and if she did not have notice of an order to her prejudice, she yet has her proper remedy. It was said on the argument, that the appellant being her husband, he might interfere in her behalf and appeal for her. A sufficient answer here to that suggestion is, that he did not purport or profess to do so. No appeal, so far as appears, was taken by her; indeed, she was not a party to the proceeding in any way or for any purpose.

But, as the record is before us, with a view to a just interpretation of the statute, we deem it proper to say, that so much of the
(180) order in questions as forbids a transfer or other disposition of the property by Jane Wilkes, is in our judgment erroneous, upon the ground that she was not a party to the proceedings, and no order requiring her to appear and answer in respect to the property in question had been made, and she had no notice of such order.

The statute, (The Code, Sec. 497), provides, that "If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the Court or Judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution, but such order may be modified or dissolved by the Court or Judge having jurisdiction, at any time, on such security as he shall direct."

Very clearly this section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest," may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. In some way, the person to be affected adversely by an order or judgment of the Court, must have notice of the proceeding against him, so that he can appear,

and be heard in his own behalf. This section must be taken and construed in connection with Sec. 490, which provides that "the Court or Judge, may by an order, require such person or corporation, or any officer or member thereof, to appear at a time and place, and answer concerning" the property or debt alleged to belong to the judgment debtor. It moreover gives to the Court or Judge, authority in its or his discretion, to require the notice of such order to be given in "such manner as may seem to him or it to be proper." Notice must be given, not necessarily by summons, but as the Court or Judge (181) may direct, and when the party is before the Court to answer as required, the order forbidding "a transfer or other disposition of such property or interest," may be made. Thus two sections of the same statute may operate consistently and without working injustice.

So much of the order as requires the appellant to produce for examination the books in his possession and control, is substantially in accordance with what we said heretofore in *Coates v. Wilkes,* 92 N. C., 376, and the exception in that respect is therefore groundless.

It has been repeatedly and uniformly held by this and other Courts, that *supplementary proceedings* are largely equitable in their nature, and are in effect an equitable execution, whereby the property of the judgment debtor may be reached, that cannot be reached by the ordinary process of execution. In this case, the supplementary proceedings were begun within ten years next after the judgment was entered. It is process in the nature of an ordinary execution to enforce the judgment, and must have the like effect with such execution. We are therefore of opinion that the statute of limitation did not operate as a bar to the proceedings—*Spicer v. Gambill,* 93 N. C., 378—so that the third exception cannot be sustained.

The objection "that there is real estate upon which the judgment was a lien at the commencement of the supplementary proceedings," is without force, because it has heretofore been in effect decided, that a sufficient foundation for such proceedings did exist and appeared, and it has been upheld as sufficiently regular. Besides, if any question could now be raised in that respect, we would be of opinion that there was sufficient ground for it, the same state of facts appearing.

The order appealed from, in so far as it applies to the appellant, must be affirmed, and to that end let this opinion be certified to the Superior Court.

It is so ordered.

No error. Affirmed.

Cited: Green v. Griffin, 95 N.C. 52; *Bynum v. Powe,* 97 N.C. 378; *Gatewood v. Leak,* 99 N.C. 365; *Anthony v. Estes,* 99 N.C. 599; *Rice*

v. Jones, 103 N.C. 231; *Adams v. Guy,* 106 N.C. 277; *Skinner v. Terry,* 107 N.C. 109; *Osborne v. Wilkes,* 108 N.C. 674; *Bank v. Burns,* 109 N.C. 110; *Bank v. Gilmer,* 118 N.C. 670; *Bernhardt v. Brown,* 122 N.C. 594; *Evans v. Alridge,* 133 N.C. 380; *Edmundson v. Edmundson,* 222 N.C. 186.

(182)

S. OTHO WILSON ET ALS. v. H. I. HUGHES.

Claim and Delivery—Pleadings—Issue—Counter-claim—Warranty—Juror—Damages.

1. Strictly speaking, there is no such action under The Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of *detinue,* or to recover the value of the property, as in *trover* or *trespass.*
2. In an action for the specific recovery of a horse, the defendant pleaded as a counter-claim, that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that he was sound, which warranty was false, in consequence of which the defendant had been damaged; *Held,* that the counter-claim arose out of the transaction set out in the complaint, and was properly pleaded as a counter-claim.
3. The action of a Court is *in fieri* during the term. So, where a *tales* juror was challenged for cause on the ground that he had a suit pending and at issue, and it appeared that a judgment had been rendered in the suit to which he was a party at the same term, from which an appeal had been taken, but not perfected; *It was held,* that the challenge was properly allowed.
4. In an action for the specific recovery of a chattel, it is proper to submit an issue ascertaining the value of the chattel at the time the plaintiff sold it to the defendant.
5. Where an issue is submitted, to which no objection is made, the assent of both parties will be presumed.
6. The Court has the right, after the verdict is rendered, to propound questions to the jury for the purpose of ascertaining whether or not it should set aside the verdict.
7. In an action for the specific recovery of a horse, it appeared that the plaintiff sold the horse to the defendant for $60 in cash and his note, secured by a mortgage on the horse for $40. The plaintiff got possession of the horse in the action, and sold him for $20, but after considerable care and attention bestowed on him, sold the horse for $50. It further appeared that the horse was only worth $75 when sold, and that the plaintiff had gotten the larger sum by deceit, which was pleaded as a counter-claim; *Held,* that the defendant was only entitled to recover $5.00.

WILSON *v.* HUGHES.

CIVIL ACTION, for the specific recovery of a chattel, tried before *Clark, Judge,* and a jury, at August Term, 1885, of WAKE Superior Court.

The following is the case settled upon appeal for this Court: (183)

When the case was called for trial, plaintiff moved the Court for judgment on the pleadings, upon the ground that defendant's answer admitted that plaintiffs were the owners and entitled to the possession of the mare, the property in controversy. The motion was denied and plaintiffs excepted.

One Thos. G. Jenkins was called as a tales juror and was challenged by defendant for cause, the cause assigned being that said juror had a cause pending and at issue in said Court. The facts were, that the juror was a party to a cause, which had at a previous term of the Court been referred by consent. The referee had filed his report to this term, which report was confirmed and an appeal taken. Said case was the next preceding case to this one, and this case was immediately called when that case was disposed of, and the appeal therein had not been perfected, no bond having been given, and no permission obtained to appeal without bond.

The Court allowed the challenge for cause, and plaintiffs excepted.

The following issues were submitted:

1. Did the plaintiff warrant the horse to be sound?—Answer. No.

2. Did the plaintiff deceive the defendant by reason of misrepresentations or otherwise?—Answer. Yes.

3. What damage, if any, has the defendant sustained by reason of the breach of said warranty, or said deceit?—Answer. $75.00, value of the horse when sold.

The Court instructed the jury, that if they should find either the first or second issue in favor of the defendant, then, in response to the last issue, they should find the value of the horse at the sale.

There was no exception to the charge, nor any exception to evidence by the plaintiffs. The third issue, at the beginning of the case, was submitted, as follows:

"What damage, if any, has the defendant sustained by reason of breach of said warranty, or said deceit?"

The defendant's counsel first addressed the jury, and in his (184) opening speech was proceeding upon the third issue as framed, when his Honor from the bench interrupted counsel and said: "Upon reflection, I will suggest to counsel that it will be better to change the third issue, so that the jury may find the value of the horse when sold."

Defendant's counsel turned and faced the counsel for plaintiffs and the Court, and said: "The defendant has no objection to the change in the issue as suggested."

The counsel for the plaintiffs made no objection to the change, and counsel for the defendant proceeded to argue the third issue to the jury, stating that said issue was, "what was the value of the horse when sold?" without objection or interruption from plaintiffs' counsel. There was conflicting evidence as to the horse's value, some witnesses putting it at fifty dollars, others at one hundred dollars. The jury found in response to this issue, "seventy-five dollars, value of the horse when sold."

Judgment was signed, the verdict having by consent been rendered to the clerk. On the second day after the verdict, and after judgment signed, the plaintiffs moved for a new trial upon the ground that the response of the jury to the third issue was ambiguous and not responsive to the issue. The Court stated that it thought the response unambiguous and responsive. The counsel pressing the point, the Court replied: "It is a very intelligent jury, and they are now in Court, and I will ask them what they meant." Counsel for defendant objected that only eleven of the jury were in the box. The Court replied: "I am not taking the verdict of the jury—that has been done and judgment is signed—but merely to satisfy my own mind if there can be any doubt as to what the jury meant, I will ask the foreman." Thereupon the foremain said, "the jury meant exactly what they had responded, $75 value of the horse at the time of the sale, under the instruction given by the Court." Upon the verdict, the plaintiffs moved the Court for judgment for the costs of the action. Motion refused and exception by plaintiffs.

(185) Plaintiffs insisted that the defendant was not entitled to recover judgment against them upon the counter-claim set up in the action, and particularly not for the deceit, and if defendant had been so entitled to recover, he could only recover the sum of five dollars, and not the sum of thirty-five as embraced in the judgment. The evidence was as follows: The plaintiff Wilson, while on the stand, testified that when plaintiffs got possession of the horse, they advertised him for sale, and sold him at the court-house door in Raleigh, under the terms of the mortgage. At the time the horse was delivered to the defendant, he paid the plaintiffs the sum of $60 in cash, and gave his note for $40, secured by a mortgage on the horse; that the horse was bid off by the attorney of witness, for witness, at $20; that witness kept the horse two months, within which time the horse was greatly improved in flesh, he being very poor when taken from defendant, and badly affected with a disease known as scratches; that witness at the end of two months thereafter sold said horse for $50.

This was the only testimony on the subject." Motion for a new trial; motion overruled; exception and appeal by plaintiffs.

Mr. J. A. Williamson, for the plaintiffs.
No counsel for the defendant.

MERRIMON, J. (after stating the facts). We observe that this is called an "action of claim and delivery." Properly and strictly speaking, there is no such action. The action commonly so-called is an action to recover the possession of personal property—some specific chattel—and is of the nature of the action of *detinue* under the common law method of procedure. "Claim and delivery of personal property" is a provisional remedy, incident and ancillary, but not essential to the action. The object of such incidental provision, is to enable the plaintiff, upon giving an undertaking in double the value of the property in question, with approved security, as required by the statute, to obtain the immediate possession of the same, unless (186) the defendant shall give a similar undertaking and security for its delivery to the plaintiff, if it shall be so adjudged, and for the payment of such costs as may be adjudged against him in the action. Thus the property or the value of it, is made secure pending the action, in such way as to answer the purpose of the final judgment. This provisional remedy is peculiar to the Code method of procedure, and gives the action something of the nature of the action of *replevin* at the common law.

"Claim and delivery" of the property may be omitted, and the action may be simply to recover the possession of the specific chattel, as in *detinue*, or to recover the value of the property as in trover or trespass. In any case, it is incident to an action, and provisional only. The Code, Secs. 321-333. *Jarman v. Ward*, 67 N. C., 32; *Alsbrook v. Shields, Ibid.*, 333; *Hopper v. Miller*, 76 N. C., 402.

The Court very properly refused to give judgment for the plaintiff upon the pleadings, because, while the defendant in his answer admitted the allegations of the complaint, except so much thereof as alleged the unlawful possession and detention of the property in controversy, he alleged a counter-claim, and the plaintiff's reply to the same, raised issues of fact to be tried by a jury.

The defendant alleged in his counter-claim, that the plaintiff, for the consideration specified, sold and delivered to the defendant, some time before the bringing of the action, a mare, the subject of the action, representing her to be in all respects sound, and giving his warranty to that effect; that afterwards he discovered that the mare

was very unsound and of little value, and this the plaintiff well knew at the time he made the false and fraudulent representations of soundness to the defendant; and that he was thereby greatly damaged, etc. This alleged claim, if well founded, existed in favor of the defendant and against the plaintiffs, and there might be a several judgment as between them in respect thereto. It arose out of the transaction
(187) set forth in the complaint, as the foundation of the plaintiffs' claim, and was connected with the subject of the action. It might well be pleaded as a counter-claim. The Code, Sec. 244; *Bitting v. Thaxton,* 72 N. C., 54; *Walsh v. Hall,* 66 N. C., 233; *Hurst v. Everett,* 91 N. C., 399.

The exception based upon the ground that the Court allowed the defendant's challenge of the juror cannot be sustained. How the action to which the juror was a party was at issue, does not appear with certainty. The appellant ought, by his exception, to have made this appear with reasonable clearness. As he did not, it must be taken that issues of fact and law were raised by the pleadings, to be tried according to the course of the Court. If so, the juror's action, at the time he was challenged in this action, was still pending, and in the sense of the statute, rendered such juror ineligible in this action. What the Court had done in the action was *in fieri* during the whole term. The Court might set aside, change, or modify its judgment, and order a trial by the jury, or the appellant in that action might perfect his appeal, thus vacating the judgment. Besides, both actions were tried at the same term, it seems, and one just after the other, so that it might be, that the juror challenged having an action, and a party to this action, might collude to thwart the ends of justice. The very purpose of the statute allowing such cause of challenge, was to prevent such possible mischief.

The Court, during the trial, suggested to the parties that the issue in respect to damage be so modified, as that the jury might "find the value of the horse when sold." The parties made no objection, but it is plain from what was done and said, that they, the jury and the Court, accepted and acted upon the suggested modification, and it must be so taken. It had been better if the modification had at once been reduced to writing when suggested, but the issue, as changed, was distinct and simple. Indeed, the Court, under the circumstances, ought to have directed the Clerk to draw out the issues, as modified, after the verdict was rendered. The Court had authority to so direct,
(188) because the verdict was rendered by the jury and received by the Court, as if the modification had been drawn out in writing with the consent of the parties. Moreover, the Court had authority

to direct proper issues to be submitted, and this issue, as submitted, was a proper one.

What the Court said to the foreman of the jury, could not affect the regularity and validity of the verdict. The Court simply propounded an inquiry to him for the purpose of obtaining such information as would enable it to determine whether or not it ought to set the verdict aside, and direct a new trial. This it might do. The plaintiffs on the other hand might, with the same view, have shown, if they could, that they were prejudiced by the change of the issue. So far as appears, they did not suffer the slightest injury from it.

It was contended on the argument, that this action is for the "claim and delivery," of the property specified in the complaint; that it is peculiar and exceptional in its nature, and a counter-claim cannot be relied upon in it as a defence, because impertinent. This is a mistaken view. As we have said above, the action is simply one to recover the property, and the provisional remedy of "claim and delivery," brought into it, is incidental and ancillary, its purpose being to preserve the property until, and to answer the purpose of, the final judgment. There is no reason why the defendant in such an action may not rely upon any counter-claim he may have, whether it be legal or equitable or both, just as in other cases.

The allegations and admissions in the pleadings and the findings of the jury upon the issues submitted to them, develop fully the rights, legal and equitable, of the parties in respect to the matter in litigation. In view of the whole, we are of opinion that the Court gave judgment in favor of the defendant for too large a sum of money.

No objection was made to the sale of the mare, under the power of sale in the mortgage, by the plaintiff, so far as appears, nor was it suggested that she was worth more than $20 at the time of this sale. If the defendant did not approve of the sale, he ought to (189) have raised his objection in some proper way before the Court. If the mare was cured of a disease, and otherwise much improved after the last mentioned sale, and sold for $50, surely the defendant was not entitled to this advantage and increased value. It appears that the plaintiff, on account of the first sale, received $80. The jury found that the mare at the time of this sale, was worth but $75. The defendant then, in view of the facts as settled, was entitled to have from the plaintiffs, but five dollars, and to have judgment for only that sum; and to have the plaintiffs surrender the note for $40 to the end that the same might be cancelled.

Let a judgment be entered here to that effect. The plaintiff is entitled to judgment for the costs of the appeal. *Judgment accordingly.*

Error. Reversed.

Cited: Mfg. Co. v. Barrett, 95 N.C. 38; *Taylor v. Hodges,* 105 N.C. 349; *Guano Co. v. Tillery,* 110 N.C. 31; *Hall v. Tillman,* 110 N.C. 227; *Hall v. Tillman,* 115 N.C. 503; *Hargrove v. Harris,* 116 N.C. 419; *Smith v. French,* 141 N.C. 7; *Sewing Machine Co. v. Burger,* 181 N.C. 251, 259, 265; *Ins. Co. v. Griffin,* 200 N.C. 254; *Piano Co. v. Loven,* 207 N.C. 100; *McGee v. Frohman,* 207 N.C. 481; *Hancammon v. Carr,* 229 N.C. 54.

THEOPHILUS SLAUGHTER ET ALS. v. CALEB CANNON ET ALS.

Statute of Limitations.

1. An action to reopen an administration account and readjust a settlement made under the decree of a court of competent jurisdiction, in the absence of fraud, is barred within three years.
2. *It seems,* that parties to a decree, who accept benefits under it, cannot afterwards attack it, except for fraud.

CIVIL ACTION, tried before *Gudger, Judge,* at Spring Term, 1885, of the Superior Court of PITT County.

By consent of the parties, his Honor found the facts which are as follows:

(190) This action, begun on February 12th, 1883, by the plaintiff, claiming the personal estate of Theophilus Slaughter, which is, or ought to be, in the hands of the defendant Caleb Cannon, who upon the death of the executrix appointed therein without having completed her administration, was appointed administrator *de bonis non,* with the will annexed, against him and the other defendants, sureties upon his administration bond, is to impeach certain decrees made in the former court of equity, and reopen the administration account. There are numerous grounds set out in the complaint for assailing the integrity of the proceedings, conducted in said court of equity to their determination, which are not necessary to be specified, as the denial in the answer of allegations of fraud, collusion or other improper management by the solicitors of the parties litigant, are direct and positive, and co-extensive with the charges, and the facts are ascertained and found by the trial Judge with their consent.

The case sent up by the Judge is as follows:

That Theophilus Slaughter, domiciled in Pitt County, having executed a last will and testament, died in the year 1858, and administration *cum testamento annexo,* was granted to the defendant Cannon, who executed a bond in the sum of fifteen thousand dollars or there-

abouts. That at Spring Term, 1861, of the Court of Equity of Pitt County, a bill was filed by one class of the devisees under said will, against the other class, for a construction of the will, and an account and settlement of the same, which was transmitted to the Supreme Court for its decision, and by it decided at January Term, 1867. See *Martha Cooper and others v. Caleb Cannon, administrator and others,* Phil. Eq., 83. That all parties in interest were parties to this action. The plaintiffs therein were represented by counsel of their own employment, F. B. Satterthwaite and the Hon. Asa Biggs, respectable attorneys of that Court, who are since dead. The defendants were made parties by actual service of summons by publication, represented by counsel of their own selection, E. C. Yellowley and Col. George Singletary, the latter of whom has since died. That at Spring Term, 1867, of the Court of Equity of Pitt County, it was (191) referred to Louis Hilliard, the Clerk and Master of said Court, to take and state an account of the administration by Cannon of his testator's estate. That the referee reported to the Fall Term of said Court, showing a balance due by the administrator, on the 1st January, 1867, of $8,412.37. At the same Term, a decree was entered confirming the report, a judgment rendered for the balance reported, to be discharged in such notes and bank bills as the administrator had in his possession, which he had received from the sale of property of his testator. That before Spring Term, 1868, of said Court, the defendant administrator paid to the Clerk and Master, in notes and bank bills, the property of his testator, received from sales made by him, the sum of $4,148.00 under said decree. That at Spring Term, 1868, of said Court, a decree was filed in the cause, as follows: "And the parties being willing to make a compromise and settlement with the defendant as to the balance due from him, have agreed and do hereby agree, that if the defendant, Caleb Cannon, will pay into office, the sum of fifteen hundred dollars, cash, that the same shall be received in full of the balance due from the defendant Caleb Cannon. It is therefore ordered by the Court, by consent of the parties, that the Master may receive the said sum of fifteen hundred dollars, in full of the balance due from the defendant Caleb Cannon, and the Master is directed to divide and pay over the same, as well the proceeds of the bank bills, collections from the notes and the sales of property, among the parties interested, in proportion to their respective interests, and that he make report of the same."

That very shortly thereafter, the defendant Caleb Cannon, as administrator, paid to the Clerk and Master the sum of fifteen hundred dollars in cash, which with the proceeds of the sales of the bank bills, the collections from the notes and proceeds of the sales of land, was

paid over by said Hilliard, Clerk and Master in Equity, to Calvin Cox, his successor in office, by whom it was paid to these plaintiffs, and each one of them, in proportion to the interest of each in the
(192) estate of their testator, and receipted for upon the books of the office in separate receipts, signed by each, the last receipt bearing date October 21st, 1873.

That at Fall Term, 1883, and continually since, these defendants have had property sufficient above their exemptions and liabilities to pay the balance due at Spring Term, 1868. The following is a copy of one of the receipts, all of the others being identical, except as to the amounts, dates and signature of the party:

"Received of Louis Hilliard, Clerk for the County of Pitt, one hundred and twenty-eight and 40/100 dollars, it being my distributive share in the fund collected, belonging to the estate of Theophilus Slaughter, deceased, as per decree of the Court of Equity, made in the cause of *F. B. Satterthwaite, attorney, et al. v. Caleb Cannon, administrator de bonis non of Theophilus Slaughter, et al.*

her
ELIZABETH × TUCKER.
mark.

Witness:
JAMES W. FORBES.
July 30th, 1868.

This action was commenced on the 12th February, 1883.

Upon these facts his Honor rendered judgment that "the plaintiffs' action is barred," from which judgment the plaintiffs appealed.

Mr. J. A. Williamson, for the plaintiffs.

Mr. Jos. B. Batchelor, (Messrs. H. A. Gilliam & Son also filed a brief), for the defendants.

SMITH, C. J. (after stating the facts). Not a single fact is shown to exist which in any degree impeaches the fairness and good faith of the former proceedings to bring about a settlement of the testator's estate. Respectable and opposing counsel represented the parties to the suit. Reference was made to the clerk, to take and state
(193) the administration account, and he did so, making his report to the next Fall Term, 1867, of the Court, and showing in his, the administrator's hands, trust funds to the amount of $8,412.37.

A decree was entered confirming the report, and directing to be paid over by the administrator, the said sum, in bank bills and such notes as he had taken, in making sale of his testator's property. Before

Spring Term, 1868, he had paid into the Clerk and Master's office, in accordance with the decree, $4,148.00 of such funds, nearly one-half of the whole amount, and then the consent decree was entered, which is contained in the findings of the Judge. Very soon thereafter, the entire sum was paid into the office of the Clerk and Master by the administrator, in cash, which, with the other funds, on the retirement of the Clerk and Master, were passed over to Calvin Cox, his successor in office, or their shares in the funds paid to the plaintiffs, so that each has accepted his part of the whole.

The final decree at Spring Term, 1868, has thus not only been fully executed, and the plaintiffs, in receiving their portions of the fund, thereby given assent to what was done, but they have allowed the decree to remain undisturbed by any action on their part, for nearly thirteen years thereafter, and when most of the counsel, to whom is now imputed a want of fidelity to their clients, are dead, and their lips sealed against explanations or self-vindication.

The authorities cited in the brief of appellees' counsel, *Whedbee v. Whedbee,* 58 N. C., 392; *Spruill v. Sanderson,* 79 N. C., 466; *Timberlake v. Green,* 84 N. C., 658, fully sustain the ruling, that the present action, in the absence of fraud, is too late to be entertained, and is barred. Aside from the delay, and the consequences of the plaintiffs severally taking out of the office their parts of the fund, there seems nothing developed in the inquiry as to the facts, to sustain the numerous averments of fraud in the complaint.

No error. Affirmed.

(194)

STATE EX REL. ANNIE E. CARR, ADM'X, ET AL. v. W. F. ASKEW ET ALS.

Guardian and Ward—Liability of Bond—Trustee—Interest—Commissions—Jury Trial—Counter-claim—Set-off—Retainer.

1. Where a guardian has received money by virtue of his office, and for his ward, he cannot exonerate himself from liability by showing that the money so received was not the property of his ward, but was due to another person.
2. Where a father insured his life for the benefit of his two children, both minors, and one died shortly after the death of the father, and the guardian of the other received the entire sum due under the policy; *It was held,* that his bond was liable for this entire amount.
3. As a general rule, when a trustee has not only neglected to invest the fund, but has applied it to his own purposes, as by using it in his business, he will be charged with the highest rate of interest allowed by law; but when a guardian makes regular returns for a number of years, for a part

of which time he charges himself with the highest rate of interest, although he has used the funds in his own business, he will not be charged with the highest rate, but only with such rate as he might fairly be expected to have been able to make.

4. A guardian can only be charged with compound interest to the death of his ward.

5. A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward.

6. Where the sum received was $10,000, and there was no trouble or litigation connected with the estate, a commission of two and one-half per cent, on receipts, and five per cent. on disbursements was allowed.

7. Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, the expecting party has the right to have all *issues of fact which arise on the pleadings*, submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee.

8. While one who is sued by an administrator, cannot set up a demand in his favor against the plaintiff in his individual capacity, as a counter-claim or set-off, yet if the administrator is insolvent, and a portion of the recovery will belong to him in his individual capacity, such claim may be set up as a retainer in the nature of a set-off.

(195) This was a CIVIL ACTION, tried before *Clark, Judge,* at the Fall Term, 1885, of WAKE Superior Court, upon exceptions to the report of a referee.

Exceptions were taken to the report by both parties, and both appealed from the rulings of the Court thereon. The action was brought in the name of the State, upon the relation of Annie E. Carr, as administratrix of Minnie Moore, deceased, and Albert G. Carr, husband of said Annie, against William F. Askew, and the other defendants, who were his sureties, upon the several guardian bonds given by the said Askew, as guardian of Minnie Moore, to recover the amount alleged to be due from Askew as guardian aforesaid, to the plaintiff, as administratrix of her intestate, the said Minnie Moore.

The first bond bore date the 8th of March, 1875, and was in the penal sum of twenty thousand dollars, to which the defendants Rufus G. Dunn, James B. Dunn and George W. Swepson were sureties.

The second was in like penal sum, with John A. Cheatham, David Lewis, William A. Smith and George W. Swepson sureties, and dated March 5th, 1878; and the third was in the same penal sum as the preceding ones, dated September 13th, 1882, and was signed by W. K. Davis, David Lewis, and John Gatling as sureties.

Since the execution of these bonds, George W. Swepson died, leaving a last will, in which he appointed Virginia B. Swepson, his sole execu-

trix, who had the will admitted to probate, and has duly qualified as executrix thereof, and she was made a party defendant.

Minnie Moore died intestate and under age, in the year 1883, and prior to this action, the plaintiff Annie E. Carr, was duly appointed administratrix of the estate of the said Minnie.

Albert G. Carr is the husband of the said Annie E. Carr.

The plaintiffs assigned as breaches of said bonds, in that Askew, as guardian, had failed and neglected to secure and improve the estate of his said ward, and has refused to account for, and deliver up to the plaintiff, the estates and property of his ward, although (196) a demand was made upon him by her, prior to the commencement of this action, and she demanded that an account be taken of the moneys and property that has come, or ought to have come into the hands of the said Askew as guardian; and for judgment against the defendants for the penalties of said bonds, to be discharged upon the payment of the amount which shall be found due to the relator.

The defendant W. A. Smith first filed a separate answer, admitting all the allegations of the complaint, except the liability of the defendant Askew, as alleged in the complaint, for the reason he had no knowledge or information of the matter, sufficient to form a belief, but subsequently joins with the other defendants in a joint answer, in which all the material allegations set forth in the complaint are admitted.

They further alleged in their answer, 1st. That Minnie Moore, the plaintiff's intestate, was not in debt at the time of her death, and that the expenses of administration on her estate would not amount to more than five hundred dollars. 2d. That Minnie Moore left her surviving, two brothers of the half blood, and her mother, the plaintiff. 3d. That Annie E. Carr has no property, except what she may recover in this action; and 4th. That the said Annie E. Carr was indebted to the defendant W. F. Askew for money loaned in the sum of $2,854.90, and they demanded that the sum should be deducted from whatever amount may be ascertained in this action to be found due from Askew, as guardian of Minnie Moore.

Plaintiff's replying to the answer, deny the allegations therein, except the second, and allege that Minnie Moore left her surviving three brothers of the half blood, instead of two, as alleged, and they allege that if the defendant had any counter-claim, it was barred by the statute of limitations.

At the February Term, 1885, the Court, upon objection of W. A. Smith alone, ordered a compulsory reference to C. M. Busbee, Esq., to take and state the account of said W. F. Askew, as guardian of Minnie Moore, and to hear and report upon all matters apper- (197)

taining to said guardianship account, and report to the next term of the Court.

At the August Term, 1885, the referee made his report, accompanied by the evidence taken before him, and a full and detailed statement of accounts, and the following is his findings of fact and conclusions of law:

"1. That on the.....day of July, 1869, James A. Moore, the then husband of the plaintiff Annie E. Carr, died in the county of Wake, leaving two children, Minnie Moore and John C. Moore, both infants.

2. That on the 30th day of August, 1869, the defendant William F. Askew duly qualified as the guardian of said infants, Minnie Moore and John C. Moore, under appointment of the Probate Court of Wake County, and gave his bond as such guardian in the sum of twenty thousand dollars, with W. H. High, and Geo. W. Swepson the testator of the defendant Virginia B. Swepson, as his sureties.

3. That said infant, John C. Moore, died some time in the month of September, 1869, leaving him surviving his mother, the plaintiff Annie E. Carr, then Annie E. Moore, and his sister, the said Minnie Moore, who were his only next-of-kin.

4. That the said James A. Moore, at the time of his death, had a policy of insurance upon his life in the Ætna Life Insurance Company, in the sum of ten thousand dollars, "for the benefit of his wife, Annie E. Moore, so long as she remains in widowhood, and children," and the amount payable under said policy, upon the death of said James A. Moore, was nine thousand seven hundred and eighty-nine dollars and eighty-one cents ($9,789.81).

5. That the sum of sixty-five hundred and twenty-six dollars and fifty-four cents ($6,526.54), was paid by the said insurance company upon said policy, to the defendant William F. Askew, as guardian of the said infants, Minnie Moore and John C. Moore, on the 11th day of December, 1869, and on the same day, the sum of thirty-two
(198) hundred and sixty-three dollars and twenty-seven cents ($3,-263.27), was paid by the said insurance company upon said policy, to the plaintiff Annie E. Carr, then Annie E. Moore.

6. That on the 13th day of December, 1869, the plaintiff Annie E. Carr, paid to the defendant William F. Askew, as guardian of Minnie Moore, the sum of thirty-four hundred and seventy-three dollars and forty-six cents ($3,473.46), of which thirty-two hundred and sixty-three dollars and twenty-seven cents ($3,263.27), was the money received by her from said insurance company as aforesaid, and two hundred and ten dollars and nineteen cents ($210.19), was advanced by her out of her own funds in order that the amount in the hands of

the defendant William F. Askew, as guardian, might be ten thousand dollars.

7. That the defendant William F. Askew charged himself in his returns as guardian of Minnie Moore, with the sums of money received by him, as aforesaid, from the said Ætna Life Insurance Company, and the said Annie E. Carr, amounting, in all, to ten thousand dollars ($10,000), interest on one-half thereof to be paid to said plaintiff Annie E. Carr during her widowhood.

8. That on the 13th day of December, 1870, the defendant William F. Askew filed in the Probate Court of Wake County the following return:

WILLIAM F. ASKEW, *Guardian of Minnie Moore,*
Dr.

To cash ($10,000) received December 13, 1869, on life insurance policy on the life of James A. Moore, deceased..	$10,000 00
Interest twelve months to date.....	600 00
	$10,600 00
Interest paid to widow and ward, and tax receipt, $77.16....	677 16
	$9,922.84

One-half interest to be paid to Mrs. Annie E. Moore, widow (199) of said James A. Moore, as long as she remains in widowhood, and the other half to my ward.

(Signed) W. F. ASKEW,
Guardian.

Sworn and subscribed before me, this the 13th day of December, 1870.

(Signed) J. N. BUNTING,
Probate Judge.

9. That thereafter the said William F. Askew, as guardian of Minnie Moore, filed in said Probate Court, other returns.

10. That on the 8th day of March, 1875, the said William F. Askew renewed his bond as guardian of Minnie Moore, in the sum of twenty thousand dollars, with the defendants R. G. Dunn, J. B. Dunn and G. W. Swepson, the testator of the defendant V. B. Swepson, as sureties, as alleged in the complaint.

11. That thereafter, on the 5th day of March, 1878, the said William F. Askew renewed his bond as guardian of Minnie Moore, in said sum of twenty thousand dollars, with the defendants John A. Cheat-

ham, David Lewis, William A. Smith and the said Geo. W. Swepson, as sureties, as alleged in the complaint.

12. That thereafter, on the 13th day of September, 1882, the said William F. Askew renewed his bond as guardian of Minnie Moore, in said sum of twenty thousand dollars, with the defendants William K. Davis, David Lewis and John Gatling, as sureties, as alleged in the complaint.

13. That the plaintiff, Annie E. Carr, intermarried with her co-plaintiff, Albert G. Carr, on or about the 13th day of December, 1875.

14. That the said Minnie Moore died in the county of Durham, some time in the year 1883, still under the age of twenty-one; and the plaintiff Annie E. Carr duly qualified as her administratrix,
(200) under the appointment of the Clerk of the Superior Court of said county, prior to the institution of this action.

15. That the said defendant William F. Askew used and invested in his own business the entire sum of money received by him as aforesaid, amounting to ten thousand dollars, from the time it first went into his hands, and never otherwise invested the same.

16. That all the money which went into the hands of the said defendant William F. Askew, arose from the policy of insurance, except the sum of two hundred and ten dollars and nineteen cents ($210.19) before mentioned.

17. That from the 13th day of December, 1869, to the present time, money could have been loaned in Wake County, upon safe personal security, or real estate mortgage, at *eight per cent.* interest *per annum;* but taking into consideration the intervals occurring between the taking in and relending of loans, a continuous rate of *seven per cent. per annum* would have been the maximum that could have been realized.

18. That the said defendant William F. Askew, in his said guardian returns, charged himself with 6 per cent. interest on the money in his hands, from the 13th day of December, 1869, to the 13th day of December, 1870; with eight per cent. from the 13th December, 1870, to the 13th December, 1875; with seven per cent. from the 13th December, 1875, to the 13th December, 1878; and with six per cent. from the 13th December, 1878, to the 13th December, 1882.

CONCLUSIONS OF LAW.

1. That the defendants are liable to the plaintiff Annie E. Carr, as administratrix of Minnie Moore, for three-fourths of the amount received by the defendant William F. Askew from the Ætna Life Insurance Company, being four thousand eight hundred and ninety-four dollars and ninety-one cents, and are chargeable with the same in the account herein stated.

2. That the defendants are not liable to the plaintiff Annie E. (201) Carr, as administratrix of Minnie Moore, for one-fourth of the amount received by the defendant William F. Askew from the said Ætna Life Insurance Company, being one thousand six hundred and thirty-one dollars and sixty-two cents, the same being the individual and personal share of the plaintiff Annie E. Moore, of the portion of the fund received by the defendant William F. Askew, as guardian of Jno. C. Moore, deceased, and the same is not recoverable by her as administratrix in this action.

3. That the defendants are liable to the plaintiff Annie E. Carr, as administratrix of Minnie Moore, for the amount paid to the defendant William F. Askew, as guardian of Minnie Moore, by the plaintiff Annie E. Carr, being three thousand four hundred and seventy-three dollars and forty-six cents, the same having been received by him by virtue of his office as guardian of Minnie Moore.

4. That the defendant William F. Askew, in the statement of his account as guardian, is not entitled to any commissions upon his receipts and disbursements.

5. That in the statement of the account of the defendant William F. Askew, as guardian, he is chargeable with interest at the rate of seven per cent. per annum, except as to those years in which he charged himself with eight per cent. (from 1870 to 1875, both inclusive), and for those years he is chargeable with eight per cent.

6. That the plaintiffs are entitled to recover of the defendants, (in accordance with the statement of account hereto attached), the sum of ten thousand and fifty-nine dollars and six cents ($10,059.06), with interest at seven per cent. per annum on eight thousand four hundred and fifty-one dollars and ninety-two cents ($8,451.92) thereof, until paid, and the costs of this action.

The plaintiff excepted to the report of the referee:

I. For that he finds as a conclusion of fact, in the latter portion of section 17 of said report, the following: "but taking into consideration the intervals occurring between the taking in and re- (202) lending of loans, a continuous rate of seven per cent. per annum would have been the maximum that could have been realized."

The grounds of this exception are: 1st, that there is no evidence to support this finding; and 2nd, the finding is immaterial and impertinent in this case.

II. For that number 2 of the conclusions of law is erroneous, in that it does not charge the guardian, W. F. Askew, and the other defendants, as his sureties, with the $1,631.63 mentioned therein.

III. For that number 5 of the conclusions of law is erroneous, in that it does not charge the guardian, W. F. Askew, with eight per cent. during the whole time.

IV. For that No. 6 of the conclusions of law is erroneous, in that it fails to charge the defendants with the sum of $1,631.63, and compound interest thereon, from December 11th, 1869, said sum of $1,631.63 being left out of the calculation, and statement of account referred to in said section.

The defendant William F. Askew excepts to the report of the referee.

1. Because he does not find as a fact, that the sum of sixty-five hundred and twenty-six dollars and fifty-four cents, paid to the defendant William F. Askew by the Ætna Life Insurance Company, was received by said Askew, as the guardian of Minnie Moore and John C. Moore.

2. Because he finds as a fact, that on the 13th day of December, 1869, the plaintiff Annie E. Carr, paid to the defendant William F. Askew, as guardian of Minnie Moore, the sum of thirty-four hundred and seventy-three dollars and forty-six cents.

3. Because he finds as a fact, that the defendant William F. Askew, charged himself in his returns, as guardian of Minnie Moore, with the sums of money received by him, as aforesaid, from the Ætna Life Insurance Company and the said Annie E. Carr, amounting in all to ten thousand dollars.

(203) 4. Because the referee finds as a fact, that the plaintiff Annie E. Carr, intermarried with her co-plaintiff, Albert G. Carr, on or about the 13th day of December, 1875.

5. Because he finds as a fact, that the defendant William F. Askew, used and invested in his own business, the entire sum of money received by him as aforesaid, amounting to ten thousand dollars as aforesaid, from the time it first went into his hands, and never otherwise invested the same.

6. Because he finds as a fact, that from the 13th day of December, 1869, to the present time, money could have been loaned in Wake County, upon safe personal security or real estate mortgage at eight per cent. interest per annum.

7. Because he finds as a fact, that from the 13th of December, 1869, to the present time, a continuous rate of interest of 7 per cent. per annum would have been the maximum that could have been realized.

8. Because he does not find as a fact, that all the money which went into the hands of the defendant William F. Askew, arose from the policy of insurance for ten thousand dollars, on the life of James A. Moore, issued by the Ætna Life Insurance Company of Hartford,

Connecticut, and that the same was received by said Askew, under and by virtue of, and according to the terms of said policy.

9. Because he does not find as a fact, that from the 13th of December, 1869, to the present time, a continuous rate of 6 per cent. interest per annum, is all that could have been realized by the defendant Askew, on the fund in his hands as guardian.

10. Because he does not find as a fact, that from the 13th of December, 1869, to the date of the death of the plaintiff's intestate, a continuous rate of interest of 6 per cent. per annum, is all that could have been realized by said Askew upon the funds in his hands as guardian.

11. Because he does not find as a fact, that the defendant Askew paid taxes on the fund in his hands as guardian, from the time it was received by him to the present time, amounting in all to fifteen hundred dollars.

And the defendant William F. Askew demands that all issues (204) of fact made by the exceptions of the plaintiffs or defendants to the report of the referee, shall be tried by a jury.

These exceptions are either immaterial, or substantially embraced in those taken by the defendant Askew, except those taken to the refusal of the referee to allow the defendant Askew credit for commissions, and his refusal to allow a jury trial on the issues of fact made by the exceptions.

It was admitted by counsel that W. F. Askew was appointed guardian of Minnie Moore, and John C. Moore, minors, and children of James A. Moore, deceased, on the 30th of August, 1869, and entered into bond in the penal sum of twenty thousand dollars, with George W. Swepson and W. H. High as his sureties.

At the October Term, 1885, the cause coming on to be heard upon the report of the referee and exceptions thereto, the Court adjudged that the counter-claim set up by the defendants, did not contain facts sufficient to constitute a cause of action, and for that the counter-claim set up being against the relator of the plaintiff Annie E. Carr, personally, could not be maintained, and it was therefore dismissed.

That the defendant W. F. Askew was not entitled to, and that he be not allowed, a jury trial, upon the issues of fact raised by the exceptions either of plaintiffs or defendants to the report of the referee.

That plaintiffs' first and third exceptions to the report of the referee be sustained, and that the following, "but taking into consideration the intervals occurring between the taking and re-lending of loans, a continuous rate of seven *per cent. per annum* would have been the maximum that could have been realized," in the latter portion of section 17 of the referee's report, be and the same is hereby stricken out, the said finding being contrary to the evidence.

That all the other exceptions, as well those by plaintiffs as defendants, to the report of the referee, be overruled, and all the find-
(205) ings of fact and conclusions of law, except as hereinbefore modified by sustaining the first and third exceptions of the plaintiffs, be sustained and confirmed, and the case was recommitted to the referee to report the amount due from the defendant W. F. Askew, guardian of Minnie Moore, upon a calculation in accordance with this order.

The referee, at October Term, 1885, reported that the plaintiffs were entitled to recover the sum of eleven thousand three hundred and fifty-four dollars and twenty-nine cents, with interest at eight *per cent.* on nine thousand dollars and twenty cents, from the 31st day of August, 1885, until paid, and costs of action.

Judgment was therefore rendered by the Court against the defendant W. F. Askew and the above named sureties, for the sum of twenty thousand dollars, to be discharged upon the payment to the plaintiff, as administratrix of Minnie Moore, the sum so last reported by the referee to be due.

And it was further ordered and adjudged, that nothing in this judgment or the order heretofore made, should be held to prejudice the rights of the personal representative of John C. Moore, deceased, on account of the $1,631.63 and interest, mentioned in the second and fourth exceptions of plaintiffs.

The plaintiffs excepted to so much of the judgment rendered upon the original report of the referee at August term, 1885, for that said judgment overrules the plaintiffs' exceptions second and fourth to said report, and does not charge the defendants with the $1,631.63 and interest, in said exceptions mentioned.

And the defendants excepted to said judgment, because the Court dismissed the counter-claim of W. F. Askew; because it decided that the said W. F. Askew is not entitled to a jury trial upon the issues of fact raised by the exceptions to the report of the referee; because it decided that the first and third exceptions of the plaintiff be sustained; and that the following, "but taking into consideration the interval occurring between the taking in and re-lending of loans, a continuous rate of seven per cent. per annum would have been the maximum that could have been realized," in the latter portion of section 17 of
(206) the referee's report, be stricken out, the said finding being contrary to the evidence; because he decided that all the other exceptions to the report of the referee should be overruled; and because he sustains all the findings of fact and conclusions of law of the referee, to which the plaintiffs excepted.

From this judgment, both parties appealed.

Messrs. Samuel F. Mordecai, R. H. Battle, John W. Graham and W. W. Fuller (Mr. Thomas Ruffin was with them on the brief), for the plaintiffs.

Messrs. Spier Whitaker and Thomas M. Argo, for the defendants.

ASHE, J. (after stating the facts). This is the plaintiffs' appeal, but we find the exceptions of the plaintiffs and defendants so bearing upon each other, that we have deemed it most conducive to an understanding of the points raised and insisted on by either side, to consider on this appeal all the exceptions taken by either party.

The following facts were either not controverted, or were established by ample proof, taken before the referee: That James A. Moore, the first husband of the plaintiff Annie E. Carr, died on the ..... day of July, 1869, leaving two children, Minnie Moore and John C. Moore, minors of tender age. That the defendant W. F. Askew was appointed guardian of the said Minnie and John, on the 30th day of August, 1869; that said John C. Moore died in September, 1869, leaving as his only next-of-kin, his mother, the plaintiff, and his sister, the said Minnie; that the said James A. Moore, at the time of his death, had a policy of insurance on his life, for ten thousand dollars in the Ætna Life Insurance Company, "for the benefit of his wife, Annie E. Moore, so long as she remained in widowhood, and children;" that W. F. Askew, as guardian, received from the insurance company on the 11th December, 1869, $6,526.54, in full of all claims due by the com- (207) pany upon the life policy of James A. Moore, and that on the same day, the plaintiff Annie E. Moore (now Carr), received from the company $3,263.27, in full of all claims on the said policy due to her as widow of the said James A. Moore, and that she paid over the sum so received by her from the insurance company, and added thereto out of her individual funds, $210.00, to make the sum of $10,000.00 with which Askew, as guardian, charged himself, as received December 13th, 1869, in his return of December 13th, 1870, and that he continued to make returns upon that basis, until 1882, when he ceased to be guardian by the death of his ward; that he used this money of his ward in his own business without making any investment of the same.

The plaintiff's ground of exception is, that the Court overruled his 2nd and 4th exceptions, and in this we think there was error. The $1,631.63, which is the subject of this exception, was found by the referee to be a portion of the fund received by the defendant from the insurance company, due to John C. Moore, who died before the fund was received by the defendant, when he was no longer guardian of the said John C. Moore. But the receipt given by the defendant to the company, was signed by him as "guardian," without stating of whom he

was guardian, and as he was *then* guardian only of Minnie Moore, it must be intended he received it for her, especially as in his guardian return of 13th December, 1870, he charged himself with ten thousand dollars, as guardian of Minnie Moore, which was made up by the sum received by the defendant and plaintiff respectively, from the insurance company, and $210 added thereto by the plaintiff, to make up the $10,000. The defendant Askew is chargeable with this sum, because he received it for his ward, and charged himself with it as her guardian; for, it is held, when a guardian has received money by virtue of his office, and for his ward, he cannot exonerate himself from liability, by showing that the money was due to another, *Humble v. Mebane,* 89 N. C., 410, which was followed and approved in *Sain v. Bailey,*
(208) 90 N. C., 566, and *Burke v. Turner, Ibid.,* 588—and in this latter case it was held, that the sureties were also liable, and if he was chargeable with the money so received, it follows that he was also chargeable with compound interest thereon, until the death of his ward, which occurred in the year 1882. This disposes of the exceptions of the plaintiff, and we now proceed to consider those of the defendant.

The first exception cannot be sustained, because it was in evidence that John C. Moore died before any money was received from the Ætna Life Insurance Company.

His second exception cannot be sustained because it was expressly proved by the testimony of the plaintiff Annie E. Carr, that she paid to W. F. Askew as guardian of Minnie Moore, the sum of $3,473.46, the amount received by her from the insurance company, and the defendant Askew charged himself with it.

His third exception is met by the sworn returns of the defendant Askew, as guardian of Minnie Moore, to the Probate Court of Wake County, and by the testimony of the plaintiff.

His fourth exception is frivolous, for it is immaterial in the investigation of this case, whether the plaintiff was married to Albert G. Carr on the 13th day of December, or some other day, but if material, it was so alleged in the complaint and not denied.

His fifth exception is met by his own statement accompanying his return as guardian, to the Probate Court of Wake, on the 13th day of December, 1882, and verified by his oath.

His sixth, seventh, eighth, and tenth exceptions appertain to the allowance of seven per cent. interest on the amount received by the defendant as guardian. These exceptions, we think, cannot be sustained, for the reason that the defendant Askew, in his returns, had charged himself with eight per cent. from 1869, until the marriage of the plaintiff in 1875, and then with seven per cent. until the death of his ward in 1883, and after that with six per cent.; and for the further

reason, that the evidence taken by the referee upon that matter, varies from six to eight per cent., and we think it was reasonable (209) and just, under the proofs, that the intermediate sum of seven per cent. should be adopted as the average and maximum of interest with which the defendant should be charged, compounded until the death of his ward in 1883, and with simple interest after that time. As a general rule, when a trustee has not only neglected to invest the fund, but has applied it to his own purposes, as by using it in his trade, he may be charged with interest at the highest rate. Adams' Equity, 664. But in this case, the defendant had annually made a fair return for thirteen years, and had for a good portion of that time, charged himself with eight per cent. interest; that is a circumstance which might very properly have been taken into consideration by the referee, in exonerating him from being charged with the highest rate of interest.

His eighth exception is without merit. It is altogether unimportant whether the defendant received the $10,000 "under and by virtue of, and according to the terms of said policy," or not. It is sufficient to charge him with that amount, whether he received it all, directly from the insurance company, or a part of it, by donation to his ward, from the plaintiff. It suffices that he received that amount, and charged himself with it in his returns.

His eleventh exception in regard to taxes, cannot be sustained, for we must take it that the defendant paid no taxes on the fund in his hands, as taxes due upon the estate of his ward, or that he paid any taxes whatever on the fund, as he did not charge his ward with the taxes in his returns; for it is fair to presume, if he had paid them, he would have so charged them, as he seems to have been very particular and minute in his returns, in charging her with all the items of his disbursements.

The defendant further excepted to the referee's conclusions of law; all of which have been heretofore disposed of, in our decisions upon the exceptions above considered, except the second exception in the series, which is to the conclusion of the referee, that the defendant Askew "is not entitled to any commissions upon his receipts and (210) disbursements."

We think this exception should be sustained. It was held by this Court in the case of *Burke v. Turner,* 85 N. C., 504, "that a guardian is not entitled to commissions on money collected and used by him in his own business," but that was a case where the guardian not only used the money in his own business, but was guilty of gross negligence in not making his returns, etc. In this case, although the guardian used the money of his ward for his own purposes, he made his annual returns with strict punctuality and fairness for thirteen years, so that it might

be seen at all times for what sum he was liable to his wards, and he and his sureties were perfectly responsible. Although he violated the law, and abused the trust reposed in him, by the use of his ward's money, we do not think it was such gross malfeasance as should exclude him from the right to be allowed commissions. As the sum he received was large, and he had no litigation, and very little trouble, except in paying out small sums for the maintenance and education of his ward, we think he should have been allowed 2½ *per cent.* on the receipt of the $10,000; and five *per cent.* on his annual disbursements. This accords with the rule laid down by the Court in the case of *Graves v. Graves,* 58 N. C., 280.

Both parties excepted to the judgment of the Court. The plaintiff's exception was to the overruling of his exceptions to the report of the referee, Nos. 2 and 4, and these have already been disposed of by holding there was error in not allowing these exceptions.

The defendant excepted to the judgment:

1. Because the Court decided that the defendant Askew was not entitled to a trial by jury upon the issues of fact raised by the report of the referee.

2. Because it decided that the counter-claim of the defendant Askew be dismissed.

3. Because it decided that the sentence "but taking into consideration the interval occurring between the taking in, and re-lending of
(211) loans, a continual rate of 7 *per cent. per annum,* would have been the maximum that could have been realized," in the latter portion of referee's report, be stricken out.

4. "Because it decided that all the other exceptions by the plaintiff to the report of the referee should be overruled, and because it sustained all the findings of fact, and conclusions of law of the referee to which the plaintiff excepted." The ground of the first exception taken by the defendant to the judgment of the Superior Court, presents the very serious and important question, whether upon a compulsory reference, the parties have a right to have all the issues of fact raised by exceptions to the report of the referee, tried by a jury. Though it may not be considered entirely as an open question, it is at least a question involved in so much doubt, as to require a definite solution.

Among the first cases in which the sections of The Code giving to the Courts the right to refer cases to referees, was *Klutz v. McKenzie,* 65 N. C., 102, and there Chief Justice PEARSON, speaking for the Court, said, "the parties to a case referred, were not entitled to have the issues raised by exceptions taken by them before the referee, tried by a jury." This view is strongly maintained by RODMAN, Judge, in his dissenting opinion in *Armfield v. Brown,* 70 N. C., 32; and the Court in *Overby v.*

Fayetteville B. & L. Ass'n, 81 N. C., 56, and *Grant v. Reese,* 82 N. C., 72, very clearly intimates an inclination to support the decision in *Klutz v. McKenzie,* since the amendment to the Constitution of 1875, Art. 4, Sec. 8. In *Green v. Castleberry,* 70 N. C., 20, and *Armfield v. Brown, Ibid.,* 32, it was held that the parties had the right to have all such issues tried by a jury, but the opinion on that point in both of these cases, was an *obiter dictum.* The Constitution, Art. 4, Sec. 13, declares, "In all issues of fact joined in any Court, the parties may waive the right to have the same determined by a jury, in which case the finding of the Judge shall have the force and effect of a verdict by a jury." The contemporaneous construction of this section of the Constitution, may be gathered from the Acts of the Legislature upon the subject, passed some time after the adoption of the (212) Constitution.

In C. C. P., Sec. 221, The Code, Sec. 393, the Legislature has defined what is an issue of fact, to-wit, "an issue upon a material allegation in the complaint, controverted by the answer; or an issue upon new matter in the answer, controverted by the reply, or an issue upon new matter in the reply, except an issue of law is joined therein." It will be seen from this, that the Legislature of 1868, many of the members of which had been members of the Convention which adopted the Constitution in the same year, considered issues of fact, to be such issues as were raised by the pleadings. By C. C. P., Sec. 224, and The Code, Sec. 398, these issues of fact must be tried by a jury, unless a trial by jury be waived, or a reference be ordered.

By Sec. 244, C. C. P., The Code, Sec. 420, "all or any of the *issues in the action,* whether of fact or law, may be referred upon the written consent of the parties," etc. This is a trial by a referee, and as it is by consent, it has been held the parties waive a jury trial of all the *issues in the action;* that necessarily means all *issues raised by the pleadings.*

By Sec. 245, C. C. P., The Code, Sec. 421, provision is made for a compulsory reference in certain cases there enumerated, but it is expressly provided that the compulsory reference under this section, "shall not deprive either party of his right to a trial of *the issues of fact arising on the pleadings.*" The exception to this, is when questions of fact arise upon motion, etc., but we do not think this applies to facts arising on exceptions to a referee's report. If the reference is by consent, the parties waive their right to a trial by jury, and the referee is compelled to decide the whole case upon the law and facts raised by the pleadings; but if it is compulsory, the parties waive nothing, and are still entitled to a trial by jury, as if no reference had been made,

and when there is no reference, the trial by the jury, of course, is confined to such issues as are raised by the pleadings.

We are of opinion such was the intention of the framers of the Constitution of 1868.

(213) To put a different construction upon the section of the Constitution referred to, would open a wide door to prolixity and delay in legal proceeding, attended with confusion and triflingly vexatious controversies, which it was the policy of the new system of procedure to avoid, and whatever objection may have been entertained to such interpretation of the Constitution of 1868, it is removed, we think, as was intimated in the case of *Overby v. Fayetteville B. & L. Association,* 81 N. C., 56, by the amendment to the Constitution of 1875, Art. 4, Sec. 8. Our conclusion is, there was no error in the refusal of the Court below to allow the defendant to have the issues raised by his exceptions tried by a jury.

The next exception taken by the defendant, was to the dismission by the Court of the defendant's counter demand against the plaintiff, for an alleged indebtedness to him. Strictly, as a counter-claim, it cannot be set up against the plaintiff, because she is suing in this action in *autre droit,* and it has been held that a counter-claim for an individual debt, cannot in such a case be maintained. *Currie v. McNeill,* 83 N. C., 176; *Holliday v. McMillan,* 79 N. C., 315, same case 83 N. C., 270.

But here it is alleged by the defendant, that the plaintiff is indebted to him in a large sum for money loaned her, and that she is insolvent, and has no other means, wherewith to pay this indebtedness, except out of her share of the money which she seeks to recover from the defendant in this action, as administratrix of Minnie Moore. The plaintiff denies the debt, and also her insolvency, and pleads that if she is indebted to the defendant, the debt is barred by the statute of limitations.

These are issues of fact raised by the pleadings, and should have been submitted to the jury, not upon the ground of a counter-claim or equitable set-off, but a *retainer in the nature* of a set-off, which is founded upon the equitable principle, that it would be unjust and against conscience to allow the plaintiff, if insolvent, to receive a large sum of money from the defendant, in a portion of which she was interested, without having that interest, whatever it may be,

(214) subjected to the claim of the defendant, if established. Adams Eq., 508; *Pegram v. Armstrong,* 82 N. C., 326.

This exception, we think, was well taken, and should have been sustained, and the defendant is entitled to have these issues tried by a jury, and if found in his favor, should have the amount so found, deducted from the amount of the plaintiff's interest in the recovery from the defendant.

Our opinion is there were errors in the particulars herein indicated; and that the case be remanded to the Superior Court of Wake County, to the end that the following issues be submitted to a jury:

1. Is the plaintiff indebted to the defendant in the sum of $2,854.90, or any part thereof?

2. Is the same or any part thereof barred by the statute of limitations—and if only a part, what part?

3. Has the plaintiff any other means of paying her indebtedness to the defendant Askew, besides her interest in the recovery in this action?

And further, that after the verdict of the jury, the case be recommitted, that an account be taken of the indebtedness of the defendant to the plaintiff as administratrix of Minnie Moore, in accordance with the modification of the judgment of the Superior Court made in this opinion, and the further account of the interest of the plaintiff Annie E. Carr in the sum due by the defendant. Should the above issues be found in favor of the defendant, then such sum so found to be due from her, may be deducted from the amount of defendant's liability.

The Clerk of this Court will ascertain the aggregate amount of costs in both appeals, and there must be a judgment against the plaintiff and her sureties on the appeal for one-half of said costs.

Error. Remanded.

DEFENDANT'S APPEAL. (215)

This was the defendant's appeal, in the foregoing case, and the facts are the same.

ASHE, J. In this action, it was agreed that the summons, complaint, answer and other pleadings, the order of reference, the report of the referee including the evidence, the defendant's exceptions thereto, the judgments and defendant's exceptions thereto, shall constitute the defendant's case on appeal for Supreme Court.

And inasmuch as in that appeal we have deemed it advisable and proper to consider and adjudicate upon the exceptions of the defendant, as well as those of the plaintiffs, our determination upon the exceptions of the defendant in that case, must be taken and considered as our adjudications upon those exceptions on this appeal, and the same disposition made of them.

The case is remanded on the same ground and for as like purpose as in that case.

The Clerk of this Court will ascertain the aggregate amount of costs in both appeals, and there must be judgment against the defendant, and his sureties for the appeal, for one half of said costs so ascertained.

Modified and remanded. Remanded.

Cited: Grant v. Reese, 94 N.C. 731; *Young v. Kennedy,* 95 N.C. 269; *Beavans v. Goodrich,* 98 N.C. 223; *Yelverton v. Coley,* 101 N.C. 250; *McDaniel v. Scurlock,* 115 N.C. 298; *Fisher v. Brown,* 135 N.C. 200; *York v. McCall,* 160 N.C. 279; *Corporation Com. v. Bank,* 192 N.C. 370; *Corporation Com. v. Bank,* 193 N.C. 117; *In re Parker,* 209 N.C. 695; *Anderson v. McRae,* 211 N.C. 199; *Bartlett v. Hopkins,* 235 N.C. 167.

R. O. BURTON, JR., ADM'R., v. E. P. GREEN ET AL.

New Trial.

Where it appears that the notes of the trial have been lost, and the Judge certifies that he cannot make up the case on appeal without them, and the parties cannot agree on a statement of the case, and it further appears that the appellant is in no default in perfecting his appeal, a new trial will be granted.

(216) CIVIL ACTION, tried before *Avery, Judge,* at Spring Term, 1884, of the Superior Court of HALIFAX County.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

There was no statement of the case on appeal accompanying the transcript of the record which was docketed in this Court, and in answer to a writ of *certiorari* directed to him, the trial Judge made return that the notes made on the trial of the case were lost, and that he had no recollection of the matters which took place on the trial, and could not settle the case on appeal, without the lost notes.

Upon this return to the *certiorari,* the appellants moved in this Court for a new trial.

Mr. T. N. Hill, for the plaintiff.

Mr. W. H. Day, for the defendants.

MERRIMON, J. The appellant's counsel duly stated the case upon appeal for this Court, the counsel of the appellees suggested amendments and objections thereto, the Judge who presided at the trial was notified of such disagreement, and requested to settle the case upon appeal according to law. He took the trial papers and his notes of the trial and the evidence, for that purpose. The papers and notes of the trial were afterwards lost. The case has not been settled, and the Judge now states, that without them, he has not, and cannot obtain,

such information as is necessary to enable him to settle the case. It is not suggested by the parties, or either of them, that the lost papers may yet be found.

It must be taken that the *data,* necessary to enable the Judge to settle the case upon appeal, cannot be supplied. He declares he cannot settle it for the lack of such information. The appellant has been reasonably diligent in his efforts to prosecute his appeal upon its merits, and is unable to do so by no fault of his own. He ought not, therefore, to suffer prejudice. In such a case the only remedy is to grant a new trial, and this will be done. *Isler v. Haddock,* (217) 72 N. C., 119; *Sanders v. Norris,* 82 N. C., 243.

The counsel for the appellees suggested that the lost trial papers might be supplied, as allowed by The Code, Sec. 600, and the case might yet be settled, as the Judge who presided at the trial is yet in office, and indeed, he might do so, if he were now out of office. This might be so, but for the important fact, that the Judge declares that he cannot settle the case without his notes of the trial and the evidence. It does not appear that the parties can agree as to the facts and the grounds of exceptions taken in the course of the trial.

To the end that justice may be fairly done, the appellant being in no default, a new trial must be granted. Let this opinion be certified to the Superior Court according to law.

It is so ordered. *Venire de novo.*

Cited: Simmons v. Andrews, 106 N.C. 202; *Owens v. Paxton,* 106 N.C. 481; *McGowan v. Harris,* 120 N.C. 140; *S. v. Robinson,* 143 N.C. 624.

JOSEPHUS BAUM ET ALS. v. THE CURRITUCK SHOOTING CLUB.

Appeal—Statement of the Case.

1. No appeal lies to this Court, unless a judgment has been entered. So, where the Court intimated an opinion that the plaintiff could not recover, and directed the issues to be found for the defendant, but entered no judgment, the appeal will not be entertained.
2. In such case, the Court will remand the record, in order that the judgment may be entered.
3. The statement of the case on appeal should clearly point out the alleged error with sufficient certainty for the appellate court to understand them and so apply its rulings.

BAUM *v.* THE SHOOTING CLUB.

CIVIL ACTION for the recovery of land, tried before *Shepherd, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of CURRITUCK County.

(218) His Honor directed a verdict for the defendant on the evidence, and the plaintiffs appealed.

The facts appear fully in the opinion.

No counsel for the plaintiffs.

Mr. John Gatling, for the defendant.

MERRIMON, J. Upon examination of the record, we find that on the trial, "at the close of the evidence, the court being of the opinion that the plaintiff could not recover, directed the issue to be found in the negative." There was a motion for a new trial, which was denied. It seems probable that it was intended that a final judgment should be entered in favor of the defendants, but none appears. The plaintiff appealed, as the record shows, from the order denying the motion for a new trial. It is obvious that an appeal did not lie from this order.

As we can see that it was probably intended that a proper judgment should be entered, which was omitted by inadvertence, we deem it proper to remand the case, to the end that such judgment may be entered.

As the appeal may come before us again, we suggest that the case settled upon appeal is obnoxious to serious objection. No errors are formally assigned, nor does it appear with reasonable certainty, if at all, upon what grounds the court based its instructions to the jury. There was much evidence, documentary and oral. Its application and bearings are not pointed out, nor do the same appear from its nature and effect. The alleged errors must be assigned with such precision as that this court can certainly see them, and apply the law. Otherwise, the judgment will be affirmed.

Let the case be remanded. It is so ordered.

Remanded.

Cited: Holly v. Holly, 94 N.C. 640; *Cameron v. Bennett,* 110 N.C. 278; *Rosenthal v. Roberson,* 114 N.C. 596; *Carter v. Elmore,* 119 N.C. 297; *Chambers v. R. R.,* 172 N.C. 556.

(219)

THE SINGER MANUFACTURING CO. v. G. C. BARRETT.

Appeal Bond.

1. Where the record stated "plaintiff appealed. Notice waived. Bond filed," which was signed by the Judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount.
2. Where it appears in the record that the judgment appealed from was not entered until after the expiration of the term, and it also appears under the signature of the Judge, that the undertaking on appeal was filed, it will be presumed that the Court, by consent, allowed the bond to be filed without regard to time.
3. This rule only applies when the entries are made by the Judge. No such presumption arises when they are made by the Clerk.

MOTION by the defendant to dismiss an appeal, heard at the February term, 1886, of the Supreme Court.

The facts appear in the opinion.

No counsel for the plaintiff.

Mr. C. M. Busbee, for the defendant.

MERRIMON, J. The appellee moved to dismiss this appeal, upon the grounds, first, that the undertaking upon appeal was not justified in double the sum of money specified therein, and, secondly, that the undertaking was not given within ten days next after the term of the court at which the judgment was granted.

The first ground cannot be sustained, because in the case settled upon appeal, it is stated, that "from the judgment, plaintiff appealed,—notice waived. *Bond filed,*" and this is signed by the Judge. The implication from the statement is, nothing appearing to the contrary, that the court accepted the undertaking without objection from the appellee, who, it is presumed, was present in person or by counsel. Such an entry is treated as a sufficient waiver in writing of (220) a strict and formal justification. *Gruber v. Railroad Co.,* 92 N. C., 1.

And for the like reason, the second ground is without force. It seems that the judgment appealed from, was not entered until after the term, and about the 4th of December, 1885. It must be taken that this was by consent, and the Court by the like consent, allowed the undertaking, without regard to its date or time of filing, it, to be filed.

This case is different from that of *State v. Wagner,* 91 N. C., 521. In that case, the entry held to be insufficient, was made by the Clerk

of the Court. Here the Judge states that the bond was filed, and hence the presumption of waiver as to the time.

The motion to dismiss the appeal cannot be allowed. The case must stand for argument upon the merits in its order, at the next term.

Motion denied.

HIRAM GREGORY v. A. J. FORBES.

Appeal—Statement of the Case.

Where, upon the whole evidence, the Court intimates that the plaintiff cannot recover, and in deference to such opinion he submits to a non-suit and appeals, if the evidence is voluminous and complicated, the appellant must point out, in the statement of the case, the relations which one part of the evidence bears to another, and where he insists that one part of the evidence has a special effect, the view contended for by him should also appear in the case as having been called to the attention of the Court and denied, otherwise this Court will affirm the judgment.

CIVIL ACTION heard before *Shepherd, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of CURRITUCK County.

The plaintiff appealed.

(221) The facts upon which the appeal was disposed of, appear in the opinion.

No counsel for the plaintiff.
Mr. John Gatling, for the defendant.

MERRIMON, J. When this case was called for argument, no counsel appeared for the appellant. The very intelligent counsel for the appellee, informed us that he was unable to learn from the record, what questions of law were raised and decided in the court below, and what errors the appellant intended to assign, and so he declined to undertake to argue the case in the present state of the record.

It appears from the case stated, that "upon the whole evidence, the Court intimated that the plaintiff could not recover. In deference of this intimation, the plaintiff submitted to a nonsuit and appealed." No alleged errors are formally assigned, nor do grounds of error appear with reasonable certainty in the record. There is much documentary and other evidence, but its purport, bearings and application are not pointed out, and we are left in these respects largely to conjecture. We might, or might not, reach the merits of the case, if we were to undertake to hear and determine it in its present shape. The Court will not

act upon such confusion and uncertainty. The alleged errors must be assigned formally, or appear by reasonable implication and with reasonable certainty.

Where the Court intimates the opinion upon the whole evidence, that the plaintiff cannot recover, and he submits, in deference to the opinion of the Court, to a judgment of non-suit, and the evidence is simple, and its application and bearings are manifest, it will be sufficient to except generally to the ruling of the Court. In such a case, if there be error, the Court can see and correct it. But it is different where, as in this case, the evidence is voluminous and complicated. In such cases, the exceptions should point out the relations of one part of the evidence with another, when this is not apparent; (222) and where the appellant insists that a particular part of the evidence has a special bearing or effect, the view contended for by him, should appear as having been denied by the Court. This is essential to clearness, and a just decision of the questions the appellant intends to present by the record.

It is the duty of the appellant to assign error, and make the same appear, if there be any. Otherwise, ordinarily, the judgment will be affirmed. And therefore, as errors are not sufficiently assigned in this case, we might at once affirm the judgment. As, however, the appellant seems to have supposed that it was sufficient, under a loose but unwarranted practice, to send up the evidence as a mass in such cases, and have this court to search without chart or compass for any possible error of the Court in respect to it, we deem it but just and proper to afford him opportunity to make the case upon appeal more intelligible. To that end, the case must be remanded, unless the parties can agree to make the necessary amendments in this court. It is so ordered.

Remanded.

Cited: Holly v. Holly, 94 N.C. 640; *Asbury v. Fair,* 111 N.C. 258; *McDougald v. Lumberton,* 129 N.C. 203; *Midgett v. Mfg. Co.,* 140 N.C. 364; *Merrick v. Bedford,* 141 N.C. 505; *Chandler v. Mills,* 172 N.C. 368; *Chambers v. R. R.,* 172 N.C. 560; *McKinney v. Patterson,* 174 N.C. 489.

H. M. BROOKS, ET AL. v. J. L. AUSTIN, ET AL.

Appeal from Clerk to the Judge—Statement of the Case.

1. Where an appeal is taken from a decision of the Clerk to the Judge, the Clerk should prepare and send up to the Judge a statement of the case, embracing all the material facts passed on by him, and copies of all papers which came before him.
2. Upon appeals to this Court, it will not affirm the judgment for want of a statement of the case on appeal, where the errors appear sufficiently assigned in the record itself.

SPECIAL PROCEEDING heard on appeal from the Clerk, by *Shipp, Judge*, at Fall Term, 1885, of the Superior Court of UNION County.

(223) This special proceeding was brought for the purpose of having the land described in the petition sold for partition among the heirs-at-law of D. B. Austin, deceased. In the petition and the answers thereto, reference is made to an ante-nuptial agreement, made by and between the said Austin, and the *feme* defendant, Catherine Helms, who was his wife, and surviving widow, and who, since his death, has intermarried with the defendant A. M. Helms, but the same is not made a part of the pleadings, nor is it set forth as an exhibit thereto. It was, however, considered and construed by the Clerk in his judgment and order directing a sale of the land. He held that it was valid and operative, and excluded the said Catherine from all rights of dower in the land, and that she was entitled only to a specified interest therein in lieu of dower, year's support and share in the personal estate. From this judgment, she and her present husband appealed to the Judge, who upon consideration "sustained and approved" the rulings of the Clerk, and from his decision they appealed to this court.

Mr. D. A. Covington, for the plaintiffs.
Mr. J. T. Strayhorn, for the defendants.

MERRIMON, J. (after stating the facts). The counsel for the appellants excepted to the ruling of the Clerk, and likewise that of the Judge, in respect to the ante-nuptial agreement mentioned, but it does not appear affirmatively how the latter came before the court. A copy of the agreement is sent up as a part of the transcript of the record.

In this Court, the counsel for the appellees moved, at the present term, to affirm the judgment, upon the grounds that no error is assigned in the record, and there is no statement of the case on appeal for this Court.

The proceedings are certainly very informal, and do not present the exception to the decision of the Court appealed from, with precision; but we are of opinion that the grounds of error assigned informally, appear sufficiently in the record, to enable us to pass (224) upon their merits.

Regularly, when an appeal is taken from a decision of the Clerk, acting as and for the Court, to the Judge thereof, he should "prepare a statement of the case, of his decision, and of the appeal," and sign the same. This statement should embrace the material facts, copies of necessary paper writings, or such papers themselves, to the end the Judge may review the decision of the Clerk appealed from upon its full merits. The Code, Sec. 254. And upon appeal from the decision of the Judge in such case to this Court, there should be a statement of the case upon appeal as in other cases. The Code, Sec. 256.

But when the grounds of error appear sufficiently assigned in the record itself in terms or by necessary implication, without such statement upon appeal, the Court will consider and pass upon their merits. *State v. Crook,* 91 N. C., 536, and cases there cited; *State v. Byrd,* 93 N. C., 624.

It appears by necessary inference, that the ante-nuptial agreement was before the Clerk, and considered by him, and he based his judgment in part upon it, and it likewise so appears that it was considered and construed by the Judge upon the appeal to him. The informal exceptions to the rulings of the Clerk, and the decision of the Judge, appearing in the record, show, by plain implication, that the appellants deny the correctness of the construction placed upon the ante-nuptial agreement by them. The agreement is sent up as part of the transcript, not, it is true, in the orderly manner and connection in which it ought to appear, but still in such way as that this Court can see its purpose and connection, with sufficient distinctness to enable it to decide the questions in respect to it, intended to be presented by the appeal. It is not suggested that the copy of the agreement is not a correct one of the original passed upon by the Clerk and Judge, and it must be taken as such, and treated as if it were set out in its proper place, in connection with the errors assigned.

The appellees are not, therefore, entitled to have their motion (225) to affirm the judgment, for the causes stated, allowed. The case must be heard and determined upon the grounds of error as they appear informally assigned in the record. To this end it will be continued, and stand for argument at the next term. It is so ordered.

Motion denied.

Mfg. Co. v. Simmons, 97 N.C. 90; *Howell v. Jones,* 109 N.C. 103; *Clark v. Peebles,* 120 N.C. 32; *Comrs. v. Scales,* 171 N.C. 525; *Mason v. Comrs. of Moore,* 229 N.C. 628.

MARMADUKE RICKS v. W. J. PULLIAM, TRUSTEE, ET ALS.

Deeds—Fee Simple—Words of Inheritance—Construction—Warranty in Fee.

1. Where it is the manifest purpose of a deed to pass a fee, the Court will effectuate this purpose, if it can do so by any reasonable interpretation.
2. In the construction of deeds, the aim of the Court is to give effect to the intention of the parties, and to do so, it may transpose words and clauses of the instrument. Such transposition, however, must be reasonable, and render the whole instrument consistent and give effect to the obvious intent.
3. Where a clause of warranty is interjected between the words of conveyance and the words of inheritance in a deed, the latter will be construed so as to qualify the quantity of the title conveyed as well as the warranty, and a fee-simple will pass.

CIVIL ACTION to recover land, tried before *Connor, Judge,* at Fall Term, 1885, of the Superior Court of NASH County.

The only evidence of title produced by the plaintiff, was a Sheriff's deed, dated the 13th day of February, 1843, purporting to convey the land of R. H. Ricks to him, in pursuance of a sale thereof, made under an execution in the Sheriff's hands authorizing the same.

Before the date of that deed, and before the execution under which the sale was made created any lien upon the land in question, the said R. H. Ricks conveyed the same land to John E. Lindsey, Trus-
(226) tee, etc., by his deed, the material parts of which are as follows:

"This indenture, made and entered into this 14th day of February, 1838, by and between Ruffin H. Ricks, of the county of Nash, and State of North Carolina, of the one part, and John E. Lindsey, of the county and State aforesaid, of the other part: Witnesseth, that for and in consideration of the sum of ten dollars, to me, the said Ruffin H. Ricks, in hand paid by the said John E. Lindsey, the receipt whereof is hereby acknowledged, have bargained and sold unto him, the said Lindsey, the following named property, to-wit: All the lands and tenements whereon I now live, composed of several tracts, joining the lands of Dickerson Ricks, Matthew Vick, Turner

P. Westray and others, said to contain 410 acres; one other tract called the Gandy land, adjoining the lands of Matthew Vick, Amos Joiner, John Barnes and others, said to contain 700 acres more or less. Also all of my stock of cattle, sheep and horses, together with all my household and kitchen furniture, and all other of my goods and chattels of every description, together with the following negro slaves, to-wit: John, Minor, Harriet and Hager; the right and title of the aforesaid property I do warrant and forever defend unto him, the said John E. Lindsey, his heirs and assigns forever. In testimony whereof I have hereunto set my hand and seal this day and year first above written.

RUFFIN H. RICKS, (Seal).

Witness: JOHN H. VICK."

Nevertheless the above deed of sale is in trust for the following purposes, to-wit: "I, the said Ruffin H. Ricks, stands justly indebted to Samuel W. W. Vick, in the following sums, to-wit:" etc., etc. "Now if the said Ruffin H. Ricks, shall sell and truly pay and satisfy all of the aforesaid debts, together with the interest, and all such necessary expenses which may accrue in and about this instrument, on or before the 15th day of April, 1838, then this instrument to be null and void, and if otherwise, the said John E. Lindsey is fully au- (227) thorized and empowered to take into his hands and custody, all of the aforesaid mentioned property, or so much thereof as will pay and satisfy all of the within mentioned claims, and sell the same for cash, after giving twenty days' notice, by advertisement at three public places in the county of Nash, at the house of the said Ruffin H. Ricks; and the money arising from such sale, first to pay and satisfy the within mentioned claims, in the order as they are stated, and the balance to pay over to the said Ruffin H. Ricks, his order or assigns.

In testimony whereof, we, the said Ruffin H. Ricks and John E. Lindsey, hath hereunto set our hands and seals this the day and year first above written.

RUFFIN H. RICKS, (Seal).
JOHN E. LINDSEY, Trustee, (Seal).

JOHN H. VICK."

Afterwards, the said John E. Lindsey executed a deed for the same land, to Bennett Barnes, and the following is a copy of such parts thereof as are material here: "This indenture made this 11th day of November, A. D. 1841, between John E. Lindsey, of Nash County, and State of North Carolina, of the one part, and Bennett Barnes, of the county and State aforesaid, witnesseth: That for and in con-

sideration of the sum of two hundred dollars, to him, the said Jno. E. Lindsey, in hand paid, the receipt whereof is hereby acknowledged, have bargained and sold to him, the said Bennett Barnes, by virtue of a deed of trust executed to me by Ruffin H. Ricks, for certain purposes therein mentioned, on the 8th day of April, 1841, a certain tract or parcel of land, composed of several tracts, which was sold on the 8th day of April aforesaid, to the highest bidder for cash, at the house of said Ruffin H. Ricks, at which sale the aforesaid Bennett Barnes became the last and highest bidder at the sum of two hundred dollars for the said land and tenements, etc."

(228) "To have and to hold the said lands and premises, free and clear from all encumbrances made, had or done by me, my order or procurement; and further, I do warrant and forever defend the right and title of the aforesaid land and premises, to him, the said Bennett Barnes, his heirs, executors, administrators and assigns forever, so far as the said Ruffin H. Ricks had any right to the same at the time of executing the said trust, and at the time of selling the same under the said trust, and no further.

"In testimony whereof I have hereunto set my hand and seal this day and date above written.

J. E. LINDSEY, Trustee. [Seal.]

Signed, sealed and delivered in presence of

Attest: BYN. B. TUNNELL,
JOHN THORPE."

The defendants claimed title under these deeds, and other mesne conveyances.

The facts of the case settled upon appeal, necessary to be set forth here, are as follows:

"J. E. Lindsey died August 21st, 1883; this suit was brought Spring Term, 1884.

"The plaintiff insists that only a life estate passed by the deed from Ruffin H. Ricks to J. E. Lindsey, and from Lindsey to Bennett Barnes, words of inheritance only appearing in the warranty in said deeds, and that on the death of J. E. Lindsey, the fee simple belonged to the plaintiff, under his deed from the Sheriff.

"The defendant insists by proper construction and transposition of word 'heirs,' a fee simple was conveyed by Ruffin H. Ricks to J. E. Lindsey, and by Lindsey to Bennett Barnes, and that words of inheritance were omitted by mistake of the draftsman.

"It was agreed that if his Honor should render judgment in favor of plaintiff, that he should give judgment for the possession of the land and for one hundred and fifty dollars damages, and the costs.

"His Honor being of opinion, upon inspection of the deeds put in evidence, that it was the intention of the parties to convey a fee simple by said deeds, and also that a fee simple passed by the deed from Ruffin H. Ricks to J. E. Lindsey, rendered judgment against the plaintiff for costs." (229)

The plaintiff having excepted, appealed to this Court.

Mr. Hugh F. Murray, for the plaintiff.
Messrs. B. H. Bunn and Jacob Battle, for the defendant.

MERRIMON, J. (after stating the facts). We are of opinion that both the deeds in question contained words of inheritance sufficiently expressed, and that they each passed the fee simple. It is very manifest from their purpose, scope and terms, although confusedly expressed, that the parties to them respectively, intended to pass the fee. And if the Court can give them any reasonable interpretation that will effectuate this purpose, it must do so. In the construction of such instruments, the aim of the Court is to give effect to the intention of the parties. It seeks to do so. And with this view, it will have regard to the whole instrument, and not simply the orderly parts; it may, and ought, if need be, transpose words, clauses and sentences, and sometimes parts of sentences not in juxtaposition. Such transposition, however, must be reasonable, render the whole instrument consistent, and give effect to the obvious intent. *Stafford v. Jones*, 91 N. C., 189; Broome's Legal Maxims, 445.

The deeds before us are very confused in their provisions. While the general purpose of each is plain, their several parts are disjointed, disorderly and obscure. It was conceded on the argument, that they were ill drawn, informal and not punctuated at all. So that the court is left much at large to decipher the meaning, relation and bearing of their constituent parts.

As to the one first mentioned: The warranty clause is interjected between the operative words of conveyance and the words of inheritance. The latter were intended to apply and refer to, and be read in connection with, the words of conveyance, and fix the quantity of the title conveyed, as well as the clause of warranty—otherwise, they would be meaningless and mere surplusage. Why warrant the title to the heir, if it was intended that only a life estate should pass by the deed? In such case, the heir could have no estate —there would be no fee to warrant! But treating the words of inheritance as fixing the quantity of the estate conveyed, they would have meaning and operative force, and render the conveying clause of the deed, and the clause of warranty, consistent, and effectuate the (230)

intent. Thus interpreted, the clauses referred to must be taken as if they were written in the proper connection, thus, "have bargained and sold unto him, the said Lindsey the following named property, * * *, unto him the said John E. Lindsey, his heirs and assigns forever, the right and title of the aforesaid property I do warrant and forever defend unto him, the said John E. Lindsey his heirs and assigns forever."

And for like reason, the second deed mentioned must be taken as if written in the proper connection, thus, "To have and to hold the said lands and premises * * * to him, the said Bennett Barnes, his heirs, etc., * * * and further I do warrant and forever defend, the right and title of the aforesaid land and premises, to him the said Bennett Barnes, his heirs" etc.

It seems to us that such interpretation is not unreasonable; it renders material parts of each deed referred to, consistent with each other, while it gives just effect to the clear intent of the parties to each.

What we have said, is in effect sustained by numerous similar cases decided by this Court. We cite only that of *Stell v. Barham,* 87 N. C., 62, in which several others are referred to and commented upon.

The judgment must be affirmed.

No error. Affirmed.

MR. JUSTICE ASHE dissented from the decision of this case on the ground that it is not supported by the decision in *Stell v. Barham,* 87 N. C., 62.

Cited: Graybeal v. Davis, 95 N.C. 514; *Hicks v. Bullock,* 96 N.C. 169; *Winborne v. Downing,* 105 N.C. 23; *Anderson v. Logan,* 105 N.C. 271; *Saunders v. Saunders,* 108 N.C. 332; *Real Estate Co. v. Bland,* 152 N.C. 230; *Whichard v. Whitehurst,* 181 N.C. 81.

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(231)

J. W. GRANT, ADM'R. v. W. H. HUGHES, EX'TR.

Agreement—Accounts of Executors—Evidence—Statute of Limitations.

1. Where it was agreed by counsel that the Judge in the Court below might decide from the pleadings, admissions, and inspection of an account offered in evidence, whether the plaintiff was entitled to judgment, *It was held* in effect, submitting the case as a "case agreed."

2. The *ex parte* accounts of executors and administrators passed upon by the Probate Judge, are only *prima facie* evidence of correctness. They may be attacked by the next of kin, or any other person interested in the estate. (The Code, Sec. 1399).
3. Where an action is brought to compel a settlement of the estate of an intestate in the hands of his administrator, the administrator is a trustee of an express trust, and the statute of limitations does not apply.
4. The statute of limitations does not run, when there is no one *in esse* capable of suing.
5. Where an administrator pleaded a final account, taken *ex parte* by the Probate Judge, in bar of an action by the next of kin, but the answer was vague and indefinite, and contained unsatisfactory statements in regard to the administrator's dealings with the estate, *It was held*, that it was proper to order a reference to re-state the administration account.

CIVIL ACTION, tried before *Graves, Judge,* at Spring Term, 1885, of the Superior Court of NORTHAMPTON County.

It appears that in the month of July, 1861, John M. Calvert, of the county of Northampton, died intestate in that county, and on the first day of September of that year, Samuel Calvert was duly appointed and qualified as administrator of his estate, and took possession thereof.

Afterwards, Samuel Calvert, of the same county, died therein, in the year, 1881, as was at first supposed, intestate, and the defendant W. H. Hughes, was appointed administrator of his estate. Afterwards, however, it was discovered that he left a will, which was duly proven, and the defendant duly qualified as executor thereof. (232)

Before the beginning of this action, the plaintiff was appointed and duly qualified as administrator *de bonis non* of the first above named John M. Calvert, on the 27th day of December, 1881.

This action was brought on the 28th day of December, 1881, to compel an account and settlement of the estate of the intestate of the plaintiff, that came, or ought to have come, into the hands of Samuel Calvert, his administrator, now deceased, of whose will, the defendant is executor, and to recover such sum of money as may be ascertained to be due to the plaintiff.

The defendant, in his answer, admits the facts above stated, and pleads matter of defence as follows:

"And for a further defence to said action, and as a plea in bar thereto, the defendant says that his testator, the said Samuel Calvert, has fully administered the said estate of John M. Calvert, which came into his hands. That he has collected all of the assets belonging to said estate that could be collected; that he has paid all of the debts due by said estate; that he has paid over the balance in his hands to

those who were entitled to receive the same, to-wit: the widow and children of the said John M. Calvert; that he has filed his final account of his dealings with said estate in the Probate Court of Northampton County, on the first day of June, 1874, together with his vouchers, and also the amounts advanced as aforesaid, together with the vouchers for the same; that said final account was examined and approved by N. R. Odom, Probate Judge of Northampton County, and entered of record in said court; and the said vouchers filed therein, on said first day of June, 1874; that the same was in all respects full and fair and correct; that on said final accounting, there was a balance ascertained to be due said estate of $7,528.24, which belonged in equal parts to the widow and the two children of said John M. Calvert, they being his only heirs; that a large portion of said balance arose from
(233) the sale of the Rix and Underwood tracts of land, to-wit: $1,750 and $1,076.08, which said tracts of land have been claimed by, and are now in possession of the heirs of said John M. Calvert, and ought to be credited in favor of defendant.

"That of said balance there was found to be due the widow, on said final accounting, the sum of $1,266.84 of her third part, she having received the rest that was due her, as was shown by the vouchers filed as aforesaid; that of her third part of said balance, it was ascertained that E. V. Calvert, one of the children, had been paid the whole, and was in debt to the said Samuel Calvert in the sum of $226.31; that of his third part of said balance, it was ascertained that Matt. Calvert, the other of the said children, had been paid the whole by the said Samuel Calvert, and was in debt $1,314.54; that since said final accounting, the said Samuel Calvert has received on the claim against Motley & Bowers, for the stock of goods sold them, and which claim the said administrator thought at the time could not be collected at the date of said accounting and as reported, the sum of about $1,000, and out of said sum has fully paid off and discharged the balance due the widow as aforesaid, and has fully settled with the children for their part of the same; that the estate came into the hands of his testator during the uncertain period of the war, when it was difficult to make collections, and defendant alleges that the large balance, and the credits realized by his testator, and with which he charged himself in said final accounting, to-wit: the sum of $20,716.15—shows great diligence on his part, and places his administration of the estate above suspicion; that many of the bonds and accounts were insolvent by reason of the war, and the amounts realized on them sometimes the result of troublesome litigations; that the plaintiff's cause of action arose more than three years before the bringing of this action, and defendant pleads the statute of limitations; that the plaintiff's cause

of action arose more than six years before the bringing of this action, and defendant pleads the statute of limitations.

"This action was not commenced within ten years after the (234) cause of action accrued, and the defendant expressly pleads the statute of limitations."

To this part of the answer, the plaintiff replied as follows:

"The plaintiff, replying to the new matter set out in defendant's answer, says:

"1. That the facts set out in allegation No. 8 are not true, save and except so much thereof, as states that the said Samuel Calvert did, after said so-called final account, collect $1,000 on account of said estate; and the plaintiff further alleges, that at the time said final account purports to have been filed, to-wit: on June 1st, 1874, the widow of John M. Calvert was dead, and had been dead for a long time, to-wit: since the year 1868; and no administration was ever taken on her estate; that Matt Calvert, one of the children of said John M. Calvert, died before said account purports to have been filed; and no administration was taken out upon the estate of said Matt Calvert, until after the death of defendant's testator, to-wit: in 1873; and that the child of said John M. Calvert, to-wit: Virginia Calvert, was a minor under the age of twenty-one years at the time said final account purports to have been filed; and was under the age of twenty-one years at the time of the death of said Samuel Calvert."

It was admitted that the widow of John M. Calvert died in May, 1872; that Matt Calvert, one of the children, died in March, 1874; that E. V. Calvert, the other child, (now Mrs. Moore), was born July 6th, 1860; that no administration has ever been taken out upon the estate of the widow; and none upon the estate of Matt. Calvert, until after the death of Samuel Calvert, said administration being taken out on the 27th day of December, 1881; that plaintiff qualified as administrator *de bonis non* upon the estate of John M. Calvert before the commencement of this action; that Matt. Calvert was born the 1st of January, 1850; and that the said widow, Matt. Calvert and E. V. Calvert (now Mrs. L. L. Moore), were the only heirs and distributees of John M. Calvert.

In support of his plea in bar of an account, the defendant (235) introduced in evidence to the Court, the account filed by Samuel Calvert on the 1st day of June, 1874, before the Probate Judge. No other testimony was introduced by plaintiff or defendant.

Plaintiff's counsel then said that his Honor could decide from the pleadings, admissions and inspection of said account, whether the plaintiff were entitled to the judgment demanded by him, to which defendant's counsel agreed.

His Honor held that said account was a final account, but not a bar to plaintiff's action. His Honor overruled the plea of the statute of limitations, and gave judgment that the plaintiff was entitled to an account, as asked for in his complaint, and adjudged that the cause be referred to R. O. Burton, Jr., to state an account of the estate of John M. Calvert, which came, or ought to have come, into the hands of Samuel Calvert as his administrator, and report to the next term of the Court.

The defendant having excepted, appealed from this judgment to this Court.

Messrs. W. C. Bowen and Spier Whitaker, for the plaintiff.
Messrs. Thos. W. Mason and R. B. Peebles, for the defendant.

MERRIMON, J. (after stating the facts). It must be assumed that the parties agreed that the Court should take the papers, and upon the pleadings, admissions and inspection of the "account" relied upon by the defendant as a bar to the action, give such judgment as the law allowed. It would savor of trifling with the Court, to agree that it should simply decide that the plaintiff was or was not entitled to the judgment demanded in the complaint, and then stop without giving an appropriate judgment.

The obvious effect of the agreement as it appears in the record was, that the Court should accept and act upon the material facts, as they appeared in the record, and give such judgment upon the whole case—the law and facts—as the law might allow. It was not a case
(236) where the parties agreed to a "trial by the Court"—that is, to waive a trial by jury, and stipulate that the Court should find the issues of fact and law, as allowed by The Code, Secs. 416, 417. Practically, the parties submitted to the Court for its judgment "a case agreed," and it must be so treated.

The defendant alleges as matter of defence, and as a bar to the action, that his testator, in his life time, fully administered the estate of the intestate of the plaintiff, and "filed his final account of his dealings with said estate in the Probate Court of Northampton County, on the first day of June, 1874, together with his vouchers," and that this account was examined and approved by the Judge of Probate, and entered of record in that court, etc.

The account thus filed and approved, was not a bar to this action, nor would it be to an action by the next of kin, or indeed, of any person to be affected by it. It was not conclusive as to any person interested, whether it be governed by the law as it prevailed before or since the statute, (The Code, Sec. 1399), became operative. This

statute simply makes the approval of such account by the Clerk of the Superior Court, acting in his capacity as probate officer, "*prima facie* evidence of its correctness." It was an *ex parte* statement, and the statute only shifted the burden of proof as to what it contained, to those who might have occasion to question its correctness. *Villines v. Norfleet,* 17 N. C., 167; *Heilig v. Foard,* 64 N. C., 710; *University v. Hughes,* 90 N. C., 537; *Temple v. Williams,* 91 N. C., 82.

The Court properly held that the statute of limitation, invoked by the defendant, did not bar the action. The action is not brought upon the official bond as administrator of the testator of the defendant. It is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his life-time. He was a trustee of an express trust, and the statute of limitation did not apply.

Nor could the defendant avail himself of the equitable defence of lapse of time. The demand for an account and settlement of the estate was not, under the circumstances, a stale demand. (237) The administration began in September, 1861. The lapse of time next thereafter, until the first day of January, 1870, must be excluded, as directed by the statute. (The Code, Sec. 137). The widow of the intestate of the plaintiff died in May, 1872, and there has been no administration as to her, and, therefore, no one who could sue for her distributive share of the estate. There were only two of the next of kin, a son and a daughter. The son died in March, 1874, and there was no administration as to him, until the 27th day of December, 1881. The daughter did not come of age until the 26th day of July, 1881, and she became covert before she came of age. The testator of the defendant died in 1881.

This action was begun on the 28th of December, 1881, the day next after the plaintiff qualified as administrator. So that less than two and a half years ran against the widow in her lifetime; less than four and a half years against the son while he lived, and none against the daughter. The time during which there was no one capable of suing should not be counted. Obviously, therefore, lapse of time should not be allowed to bar this action. *Falls v. Torrance,* 9 N. C., 490; *Falls v. Torrance,* 11 N. C., 412; *Petty v. Harman,* 16 N. C., 191; *Ivy v. Rogers,* 16 N. C., 58; *Hodges v. Council,* 86 N. C., 181.

We think that the judgment directing an account, and ordering a reference to that end, was well warranted by what appeared in the case as submitted to the Court. Granting that the account filed by the testator of the defendant, as administrator of the intestate of the plaintiff, was *prima facie* evidence of its correctness, the facts admitted, and others stated in the answer, show very clearly that the estate was

not fully administered, settled and distributed, as it should have been, and as the law required. In one part of the answer it is stated, that he "paid over the balance in his hands to the widow and children" of his intestate—in another part it is stated, that on the "final accounting there was a balance ascertained to be due said estate of
(238) $7,528.24, which belonged in equal parts to the widow and the two children named;" that this sum, "arose from the sale of the Rix and Underwood tracts of land," that the heirs of his intestate were in possession of, and claimed this land, and the administrator ought to have credit on that account—in another part of the answer it is stated, that on the final account, it appeared that the widow's share of the balance was $1,206.84—that this share due her was paid, but to whom paid is not stated. It is further stated that since the "final account," he had collected from a source mentioned, about $1,000; "that many of the bonds and accounts were insolvent by reason of the war," what ones were solvent and what insolvent does not appear. The widow, as we have seen, died in 1872, the final account was filed in 1874; there was no administration on the estate of the widow. To whom was her distributive share paid? It does not appear. The son died in 1874, and there was no administration on his estate until December, 1881. With whom was there a final settlement as to his distributive share? The daughter was an infant. To whom was her distributive share paid? Who was authorized to receive it? How was the $1,000, collected since the "final account," distributed? The answer states, "that out of said sum he has fully paid off and discharged the balance due the widow as aforesaid, and has fully settled with the children for their part of the same." How and when? What proper vouchers did and could he get?

It thus appears from the defendant's answer, apart from the allegations of the plaintiff, that the "final account" relied upon, and the vouchers that must have been in a large part the basis of it, were vague, and indefinite, questionable and unsatisfactory. It is strange that the testator of the defendant, as such administrator, did not in his life time, apply to the Court by a proper proceeding, and have so large an estate settled under the supervision of the Court. Such a settlement would have been a finality. That he did not, and the "final account" relied upon was *ex parte,* are facts suggestive that an account should be taken.
(239) It may be, that the account when taken, will show that the estate was duly administered. We do not mean to suggest otherwise—what we decide is, that from what appeared, the Court properly directed an account to be taken, and ordered a reference for that purpose.

There is no error. To the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: Woody v. Brooks, 102 N.C. 338, 344; *Turner v. Turner,* 104 N.C. 571; *Allen v. Royster,* 107 N.C. 282; *Kennedy v. Cromwell,* 108 N.C. 4; *Brawley v. Brawley,* 109 N.C. 527; *Coggins v. Flythe,* 113 N.C. 108; *Bean v. Bean,* 135 N.C. 94; *Edwards v. Lemmond,* 136 N.C. 331; *Jones v. Wooten,* 137 N.C. 424; *Brown v. Wilson,* 174 N.C. 670; *Pierce v. Faison,* 183 N.C. 180; *Miller v. Miller,* 220 N.C. 461.

JOHN F. TURNER v. JOS. W. CUTHRELL, ET AL.

Injunction—Pleadings.

1. Where, in an action to obtain a perpetual injunction, the plaintiff appears to be acting in good faith, and sets out a *prima facie* case, and the defendant confesses and avoids the allegations of the complaint, and answers only on information and belief, the injunction should be continued to the hearing.
2. Pleadings should clearly and plainly allege the cause of action or defence, and where they fail to do so, the Court may, *ex mero motu,* direct them to be reformed.

CIVIL ACTION, heard by *Philips, Judge,* at Chambers, on December 9th, 1885, on a motion to continue a restraining order theretofore granted, to the hearing.

The chief purpose of this action is to obtain perpetual relief by injunction. The plaintiff moved at Chambers, upon notice, for an injunction pending the action, until the hearing upon the merits. At the hearing of the motion, the verified complaint and answer, and the exhibits thereto, were the only evidence before the Court. The Court made an order, of which the following is a copy:

"It is ordered and adjudged that the defendants, their agents (240) and attorneys, be restrained and enjoined till the hearing, from ejecting the plaintiff from so much of the land and premises set out and described in the complaint, as is in excess of the dower allotted to Penelope Turner; and that they be restrained and enjoined from ejecting him from said dower, till he shall have gathered the crop raised on said dower during the year 1885."

The defendants excepted and appealed. The facts sufficiently appear in the opinion of the Court.

Mr. R. O. Burton, Jr., for the plaintiff.
Mr. John A. Moore, for the defendants.

MERRIMON, J. Pleadings should have certainty, definiteness and precision. All the statements, allegations and averments, should be so exact, as to present clearly the precise cause of action, or ground of defence, and leave no doubt of the purpose of the pleading. This is essential to the intelligent and due administration of justice. In many instances the allegations of the complaint are very general, loose and indefinite, scarcely sufficient to enable the Court to see the party's right as he intends to allege it. In such cases, the opposing party should demur, if there be ground for demurrer, or move to have the pleadings made more definite and certain, and indeed, the Court might *ex mero motu* direct this to be done. It is a serious mistake of the Courts to tolerate and thus encourage bad pleading.

The pleadings in this case are indefinite. Much is left to inference and to be gathered from the drift of the allegations of the complaint and answer. The plaintiff does not state in terms, how his cause of action arises, but we can see that in substance and effect, he alleges that John P. Turner died in the county of Halifax in the year 1859, seized in fee of the tract of land in question, having purchased the same in the year 1854, from one Whitaker, and that the same descended to plaintiff and his two sisters, who were the only heirs-at-law
(241) of the said John P. Turner, deceased, subject to the right of dower of his surviving widow; that the latter had dower duly assigned to her, which embraced seventy acres of the land; that afterwards, in 1885, the widow executed to Wright Hayes, a mortgage deed purporting to convey the fee in her dower land, and as well the whole tract mentioned, to secure a debt of $110; that the plaintiff had, for about ten years, lived upon and had possession of all the land, and the widow lived with him as part of his family; that afterwards, the mortgagee named, by proper action for that purpose, obtained a decree of foreclosure of his mortgage, and an order for the sale of the land; that at the sale thereof the defendants became the purchasers; that the sale was confirmed, the purchase money paid, and a deed made by the commissioner to the purchasers on the 26th of May, 1885; that afterwards, and after the plaintiff had cultivated and matured his crop, planted before the time of the sale, part of it on the dower land, the purchasers caused a writ of possession to issue in their behalf, commanding the Sheriff to eject the widow, and put them in possession

of the land. The prayer is for a perpetual injunction as to so much of the land as is not embraced by the dower, and for general relief.

The defendants admit, on information and belief, that some time in the year 1854 the said John P. Turner, deceased, did purchase from the said Whitaker the land in question, but they allege, on like information and belief, that the deed for the land was never delivered; that after the death of Whitaker, in 1879, the deed was found among the latter's papers, and his niece handed the same to the plaintiff, and he had it proven and registered; they admit that dower was assigned to the widow as alleged; and allege upon information, that she had possession of the whole tract of land, claiming it as her own, and having the same listed for taxation in her name, for more than ten years; they further allege that the plaintiff had charge of the land as her agent, and listed the same for taxation, as alleged by them; that the plaintiff had knowledge of the mortgage, consented to and approved the same; that he was at the sale, and made no (242) objection thereto; that the crops of corn, cotton and peas, must have been planted but a few days before the sale, and the plaintiff had notice thereof.

If the allegations of the complaint are true, the plaintiff is entitled to relief, because the defendants got by their purchase only the life estate of the doweress in so much of the land as was assigned to her as dower. She had but a life estate in that part of it, and no title or claim to the remaining part. The mortgage deed passed only such title and right as she had. The plaintiff was no party to the action in which the order of sale of the land was made, and cannot, therefore, be justly affected by it, or final process therein. The writ of possession complained of, embraces the whole land, when it ought, properly, if the plaintiff is entitled as he alleges, to embrace only the dower tract.

The defendants, in effect, confess and avoid the plaintiff's cause of action. They admit the material allegations, and allege matter in avoidance thereof, and moreover, their defence is simply made on information and belief.

It appears reasonably, that the plaintiff has brought his action in good faith, and that he presents such a case as *prima facie* entitles him to relief. It would be very unjust to eject him from that portion of the land that apparently belongs to himself and sisters, without opportunity to assert his title and right to remain in possession. He may establish his right to the relief he seeks. It was, therefore, proper to grant the injunction pending the action, and until the hearing upon the merits. The Code, Sec. 338, *Heilig v. Stokes*, 63 N. C., 612; *Harrison v. Bray*, 92 N. C., 488.

As to the crops on the dower land, the evidence is vague and unsatisfactory. It seems that the defendants, at least tacitly, consented that the plaintiff might cultivate and mature them after the sale. If so, surely they ought not to take the whole crop, without any compensation to him who made it, even if they were entitled to have it at the time of their purchase, and as to that, we express no
(243) opinion. Any question in this respect may be decided properly on the trial, and the plaintiff required to account or not, as the right of the matter may then appear.

There is no error. Let this opinion be certified to the Superior Court, to the end that the Court may proceed in the action according to law. It is so ordered.

No error. Affirmed.

Cited: Whitaker v. Hill, 96 N.C. 4; *McDowell v. Construction Co.,* 96 N.C. 534; *Martin v. Goode,* 111 N.C. 290.

W. H. SMITH v. R. M. NIMOCKS.

Pleadings—Evidence.

1. Statements and admissions in the pleadings may be used as evidence against the party pleading them, but they must be introduced as evidence at the proper time, so as to give the party against whom they are used an opportunity to reply to and explain them.
2. The whole record is not in evidence. So much of the pleadings ought to be read to the jury, as may be necessary to explain and present the issues.
3. So where an amended answer had been filed, upon which alone the issues were raised, it was error to allow the plaintiff's counsel to read and comment to the jury on the original answer, which had not been introduced in evidence.

CIVIL ACTION, tried before *MacRae, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of JOHNSTON County.

This action is brought to recover damages for an alleged *malicious prosecution.* It appears from the case settled upon appeal, that on the trial, "In the course of his argument to the jury, the plaintiff's counsel was allowed to read the first and unverified *answer,*" of the defendant, the latter objecting. The Court overruled the objection and the defendant excepted.

The material part of the answer referred to is as follows:

"For a second defence and counterclaim

"I. That the plaintiff was, at the time of the institution of (244) this action, and is now, indebted to him in the sum of fifteen hundred dollars, and that said indebtedness arose out of the transactions set out in the complaint, and is connected with the subject of this action.

"II. That before the institution of this action, the plaintiff, wrongfully and unlawfully, detained certain personal property belonging to the defendant, to-wit: All the crop of cotton made by W. H. Smith in Johnston County in the year 1882, and wrongfully and unlawfully converted the same to his own use, and sold the same, and converted the proceeds thereof to his own use, and thereby became indebted to the defendant in the sum of fifteen hundred dollars, the value of said property so converted by the plaintiff, and that said indebtedness was subsisting at the time of the institution of this action, and arose out of the transaction set out in the complaint, and is connected with the subject of this action."

The following, among other issues, was submitted to the jury:

1st. Did the defendant procure the arrest of the plaintiff without probable cause, as alleged in the complaint?

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Mr. C. M. Busbee, for the plaintiff.
Mr. Duncan Rose, for the defendant.

MERRIMON, J. (after stating the facts). Statements and admissions in the pleadings in an action, may be evidence against the party making them, just as if he had made them in any other connection or manner, and if the same should be competent for any purpose, on the trial of the issues of fact, they may be received as evidence. There is nothing in the nature of a pleading, that necessarily places admissions in it of a party, on a footing different from what they would be, if made elsewhere. The pleadings ordinarily create and afford no immunity as to facts stated in them, when it becomes neces- (245) sary to use such facts as evidence. Indeed, pleadings themselves may be evidence in proper cases. *Adams v. Utley,* 87 N. C., 356; *Guy v. Manuel,* 89 N. C., 83; *Brooks v. Brooks,* 90 N. C., 142.

But such evidence must be introduced on the trial, at the proper time and in the proper way. This is necessary in order to afford the party to be affected adversely by it, just opportunity to explain, modify or correct it. He might be able to show that the admissions or statements were made by inadvertence, mistake or misapprehension, and the law allows him reasonable and orderly opportunity to

do so. It never tolerates undue advantage. *State v. Whit*, 50 N. C., 224.

It is a mistaken notion that the whole record, including the pleadings, in an action, is necessarily in evidence, and may be read to the jury as of course on the trial of issues of fact. The Court has charge and cognizance of, and it is its province to act upon the record, and apply the admissions of the parties, and such other evidence as may appear in it, according to law. The only office of the jury, ordinarily, is to act upon the issues of fact submitted to them by the Court. So much of the pleadings ought to be read to them, in that connection, under the direction of the Court, as may be necessary to present and point clearly, the nature and scope of the issue, but not for the purpose of evidence. If either party desires to have the benefit of the pleadings, or admissions of fact in them, he may, if the same be competent, introduce them, as indicated above, and only in that manner.

No doubt the Court might, in the exercise of a sound discretion, allow the pleadings or admissions in them as evidence, when competent, to be introduced after, in the order of the trial, the introduction of evidence regularly had been closed, but it would do so in such way as to give the party to be affected by it adversely, opportunity to be heard in respect to it. Any other course of practice would certainly contravene equal fairness and justice to the parties.

(246) In this case, there were two answers, one verified, the other not, and the Court allowed the counsel of the plaintiff, after the introduction of evidence had been closed, in the course of his argument to the jury, to read the latter to them, the counsel for the defendant objecting. Exactly for what purpose it was read, does not appear. But it could not have been for the purpose of explaining the nature of the issues or any of them, because, the answer read was a simple, broad denial of each of the allegations of the complaint, and it contained an alleged counterclaim. This answer was abandoned, and a second verified answer, in which the counter-claim was entirely omitted, supplied its place. So that no issue was raised in respect to the counter-claim, and none such was submitted. The obvious purpose was to take advantage of some express or implied admission or statement in the counter-claim alleged and abandoned, as evidence. It may be, it was read to show, by implication from it, that the defendant had the plaintiff arrested by virtue of the State's warrant, or as an implied admission of the substance of the allegations of the complaint.

It was intended to serve the purpose of evidence in some aspect of the case presented to the jury by the counsel, and as we can see that

it may have had material weight with the jury, adverse to the defendant, he is entitled to a new trial. The answer was not put in evidence, if it was competent at all, and the counsel had no right to refer to it, much less to read it in the course of his argument.

There are many other exceptions, some of them resting upon very technical grounds. We think that the most, if not all of them, are untenable, and it is not necessary to advert further to them.

There is error. The defendant is entitled to a new trial, and to that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Greenville v. Steamship Co., 104 N.C. 93; *Grant v. Gooch,* 105 N.C. 282; *Stephenson v. Felton,* 106 N.C. 119; *Smith v. Smith,* 106 N.C. 504; *Rumbrough v. Improvement Co.,* 109 N.C. 709; *Cummings v. Hoffman,* 113 N.C. 269; *Gossler v. Wood,* 120 N.C. 73; *Jordan v. Newsome,* 126 N.C. 557; *Page v. Ins. Co.,* 131 N.C. 116; *Mfg. Co. v. Steinmetz,* 133 N.C. 193.

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(247)

S. P. ARRINGTON v. ELLA R. BELL.

Married Women—Separate Estate.

1. Before the Marriage Act, (The Code Sec. 1826, Laws of 1871-'2 ch. 193, Sec. 17,) a married woman could charge her separate estate, for her personal benefit, or for the benefit of her estate, provided she did so in terms or by necessary implication. The only change made by this Act was, that the consent of the husband in writing was required in order to allow her to charge her separate estate.
2. Where husband and wife signed a note, which provided in terms that it should be paid out of the wife's separate estate, the consideration for which was a mule which was turned over to a cropper, renting the land of the wife, *It was held,* that the signature of the husband to the note was a sufficient assent in writing, and that the debt was a charge on the wife's separate estate.

This was a CIVIL ACTION, tried before *Philips, Judge,* and a jury, at the Fall Term, 1885, of WARREN Superior Court.

The action was brought to recover the value of a note under seal as follows to-wit:

"On the first day of November next, we or either of us promise to pay to S. P. Arrington, or order, seventy dollars for value received.

I, Ella R. Bell promising to pay out of my separate estate said amount. This March 14th, 1881.

(Signed,) P. H. BELL, (Seal.)
" ELLA R. BELL, (Seal.)"

The plaintiff alleged that the *feme* defendant, at the time of execution of the bond in suit, was in possession, as her separate estate, of several parcels of land lying in the county of Warren, which are described in the complaint, and that the note sued on was given for a mule, sold and delivered by the plaintiff to the said Ella R. Bell, of the value of seventy dollars, which was used to stock her farm and to improve her own separate estate, and prayed judgment that this note should be adjudged to be a charge on her separate estate, and that the same might be subject to the payment of the debt.

(248) The defendant admitted the execution of the bond and the consideration as stated in the complaint, but denied that the mule was used as alleged by the plaintiff, to stock her farm and improve her separate estate, and contended that the mule was worthless, and was sold to defendant P. H. Bell, to be used by him in cultivating a crop on the lands of said Ella R. Bell, his wife, which crop when raised, was the property of P. H. Bell.

The only issue submitted to the jury was: "Was the mule worthless at the time of the sale to the defendant," which they found in the negative, and the defendant Ella R. Bell contended that she as a married woman, was not liable for the payment of said note; and by consent of counsel, the Judge found the facts as follows:

1st. That the mule was bought by P. H. Bell, and the note executed by himself and wife, as set forth in the complaint.

2nd. That P. H. Bell bought the mule for the purpose of turning him over to a renter, living on the land of his wife, and said mule was so turned over, which he superintended and controlled for their joint benefit.

3rd. That P. H. Bell received from the renter one-fourth of the crops raised, and the profits of said land were used jointly by himself and wife.

4th. That P. H. Bell had no contract with his wife about the management of her farm.

5th. That P. H. Bell and his wife kept no accounts and had no separate money matters between themselves.

Upon these facts his Honor gave judgment against the said Ella R. Bell, and that the plaintiff have execution thereon, to be levied and collected of her separate estate, and not otherwise, and from this judgment she appealed.

Mr. R. H. Battle, for the plaintiff.
Mr. Jos. B. Batchelor, for the defendant.

ASHE, J. (After stating the facts). The Code, Sec. 1826 provides, that "no woman during her coverture, shall be capable of making any contract to affect her real or personal estate, except (249) for her necessary expenses, or for the support of her family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader." Laws of 1871-'2, ch. 193, Sec. 17. A married woman before that act, had the power to charge her separate estate for the benefit of her person or estate, provided it was done in express terms or by necessary implication. The act of 1871-'2 had no other effect upon her power over her separate estate, than to restrict it, by requiring the consent of her husband. Such is the construction given to the act by the Court in the case of *Pippen v. Wesson*, 74 N. C., 437, and we think that case and *Withers v. Sparrow*, 66 N. C., 129, are decisive of this question.

From the former case, the principle is clearly deducible, that a married woman has the power to contract a debt, or to enter into any executory contract, with the consent of her husband, when she charges her separate estate with it, either expressly or by necessary implication arising out of the nature or circumstances of the contract, and that it was for her benefit; and that the written consent of the husband was given, it is sufficient to show that he signed the contract with her.

And the latter case is authority for submitting to the jury the question whether the contract of the *feme* covert is for her personal benefit, or some advantage to her separate estate.

Here, by consent of the parties, the question of benefit was submitted to the Court, and it was found as a fact by the Court, that the mule for which the note was given, was bought by the husband for the purpose of being used by a lessee or cropper on the land of the *feme* defendant, for the purpose we take it, to make a crop, the one-fourth of which was to be paid to the husband and wife, and the profits of the farm were used jointly by the husband and wife, and if used by them for the support of the family, as we presume was the case, it was a contract for her benefit, as much so as if she had purchased the mule herself, and had the crop made with it on (250) her land and under her own supervision.

The fact as found by his Honor, that the defendants had no contract for the management of the farm, and kept no accounts and had no separate money matters between them, shows that perfect harmony and confidence existed between them as man and wife, and that she

confided the management of her separate estate to him, as a trusted agent, for their mutual support and benefit.

The contract we think comes fully up to the requirements of the law, to charge her separate estate, and the judgment of the Court below was fully warranted by the facts as found by his Honor.

The judgment of the Superior Court is affirmed, and as the judgment against the co-defendant P. H. Bell, not appealed from, stands on the record of that Court, this opinion must be certified to that Court, that the proper executions may be issued upon the judgment.

No error. Affirmed.

Cited: Flaum v. Wallace, 103 N.C. 313; *Farthing v. Shields*, 106 N.C. 299; *Jones v. Craigmiles*, 114 N.C. 616; *Sanderlin v. Sanderlin*, 122 N.C. 3.

WALLACE R. WARNER v. THE WESTERN NORTH CAROLINA RAILROAD CO.

Pleading—Negligence—Appeal—Aider.

1. Where the Court intimated that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiff asked leave to amend, which was granted on condition that the plaintiff pay cost and consent to a continuance, which conditions were declined by the plaintiff, who took a non-suit and appealed, *It was held*, that the appeal would lay.
2. A Railroad Company is bound to exercise reasonable care in seeing that the machines it furnishes to its servants are suitable and safe, and if it fails to do this, and one of its servants is injured, without fault on his part, the Railroad is liable.
3. If the Railroad is negligent in this respect, it is charged in law with notice of the unfitness of the machine, and cannot take advantage of its own wrong, and set up as a defence to an action for such injury, that it did not have notice on the defect in its machine.
4. Where in an action for damages for an injury caused by furnishing a servant with defective machinery, the complaint alleges that the defendant carelessly and negligently furnished a defective machine, in the furnishing of which the law holds the defendant to care and diligence, the legal implication is, that the defendant knew, or by reasonable diligence might have known, of the defect.
5. It is unnecessary to formally allege notice of such defect in the complaint, when facts are stated from which the law will imply notice.
6. A defective statement of a cause of action is aided if the defendant answer to the merit, and go to trial before pointing out the defect.

7. In an action by an administrator, under the statute, for damages for negligently causing the death of his intestate, the complaint need not allege that the intestate left next-of-kin.
8. There is a presumpion that every interstate leaves next-of-kin, and the party who wishes to negative the presumption, must aver and prove it.
9. In actions under the statute, for damages for negligently causing the death of the intestate, if there be no next-of-kin who are entitled to the recovery under the statute of distributions, the recovery goes to the University.

CIVIL ACTION, tried before *Montgomery, Judge*, and a jury, (251) at November Term, 1885, of the Superior Court of ROWAN County.

The plaintiff, suing as administrator of Carrington C. Warner, deceased, brings this action to recover damages from the defendant for injuries sustained by his intestate, occasioned by the alleged carelessness and negligence of the defendant, in placing the intestate, who was in his life time and at the time of the accident mentioned, in its employ as engineman, in charge of an unsafe, defective and insecure locomotive on its road, which locomotive, by reason of such carelessness and negligence, exploded, and instantly, the intestate was killed by the explosion, without negligence or lack of due care on his part.

The following is a copy of so much of the complaint as it is material to set forth here:

"II. That the plaintiff's intestate, on the seventeenth day of (252) July, 1884, at the time of the committing of the injuries hereinafter mentioned, was in the employment of the defendant, as engineer, upon a locomotive engine, the property of the defendant, driven by steam upon its said road; and that it was the duty of the defendant to provide a good, safe and secure locomotive, with good, safe and secure machinery and apparatus.

"III. That the defendant, not regarding its duty, conducted itself so carelessly, negligently and unskillfully in this behalf, that it provided and used an unsafe, defective and insecure locomotive.

"IV. That for want of due care and attention to its duty in that behalf, on the day last aforesaid, and in said State, and at or near the foot of the Balsam Mountains on the defendant's roadbed, and while the said locomotive was in the use and service of said defendant upon its said railroad, and while the plaintiff's intestate was working upon the same, in the capacity aforesaid, for the defendant, the boiler connected with the engine of said locomotive, by reason of unsafeness, defectiveness and insecurity thereof, exploded, in consequence whereof the plaintiff's intestate was then and there instantly killed, and without any negligence or want of care on the part of plaintiff's intestate."

The parts of the answer material here are as follows:

"III. Defendant denies allegation No. III.

"IV. Defendant admits that the deceased was killed by the explosion of a boiler, but denies that 'it was by reason of unsafeness, defectiveness and insecurity of the engine or boiler, or defendant's negligence.'"

For a further defence, the defendant says:

"1. Defendant says that the engine, the boiler of which exploded, had recently been inspected and put in good repair by the defendant, as it is informed and believes.

2. That it is informed and believes, that if there was any defect in the engine, or it was in unsafe condition, it became so after the inspection, without the knowledge thereof coming to this defendant.

(253) 3. That it is informed and believes, that there was unskilful management of the engine on the part of the deceased, and that he permitted some of its machinery to be tampered with, or altered, and this contributed to the accident.

4. That the machinery of the engine was altered or changed, or tampered with by some person, while in charge of the deceased, whereby the accident occurred, and that no report thereof was made by the deceased as engineer to this defendant.

5. That if there was any defect in the engine, or unsafeness, the deceased knew, or ought by reasonable care to have known it, and it was his duty to have reported it.

6. That if the accident occurred by the negligence of defendant's servants, they were the fellow-servants of the deceased."

The following is a copy of the case settled upon appeal:

"After the evidence closed, defendant's counsel stated that he should ask the Court to tell the jury, that there was not sufficient evidence to go to the jury to prove any knowledge on the part of defendant of any defect in the engine; that an advanced syllabus published in the papers showed this to be the proper practice, to make the objection when the evidence closed.

"The Court, previous to the introduction of any evidence, framed such issues as in the opinion of the Court arose on the pleadings, as the plaintiff and defendant had disagreed upon the issues. At the opening of the plaintiff's argument, (the plaintiff having the opening,) the Court stated to the counsel that the Court desired to hear him upon the point as to whether or not it was necessary to state in the complaint "that the defendant had knowledge of, or by reasonable diligence, or care, might have known of the defectiveness and unsoundness of the engine."

Plaintiff's counsel concluded his argument upon the law and facts, when defendant's counsel made the following points:

1. That the complaint did not allege that the defendant knew of the defectiveness of the engine, or might by reasonable diligence have known it.

2. It did not aver that plaintiff's intestate did not know it.

3. It did not allege that plaintiff's intestate left any next (254) of kin.

4. That there was not sufficient evidence to go to the jury of the knowledge of defendant that the engine was defective, and moved to dismiss on the first three grounds, and asked, if the case should go to the jury, the Court to charge that there was no evidence of knowledge on the part of defendant.

To this the Court replied: "In the opinion of the Court, there is evidence to go to the jury, but the Court thinks the complaint is defective. It ought to allege that the intestate of plaintiff left next of kin, among whom the recovery could be distributed, and the complaint ought to allege that the defendant knew, or by reasonable diligence might have known, of the defectiveness and unsoundness of the engine. That an issue upon this fact ought to be submitted to the jury, but the Court could not submit issues when there were no allegations to raise them."

The plaintiff proposed to amend. The Court said he could do so upon the payment of the costs.

The plaintiff asked if the costs were paid and the amendments made, could the trial proceed.

The defendant's counsel objected; that they relied on the points they had made and would be taken by surprise.

The Court stated the plaintiff could amend, as a matter of right, before answer, and the courts generally allowed amendments before trial, but after the trial was commenced, the Court thought that material amendments should be allowed upon terms. In this case the Court would not dismiss. The plaintiff could amend on the payment of costs, and as the defendant objects to the trial proceeding on the ground of surprise, a mistrial would be had.

The plaintiff replied: "We have confidence in our complaint, and upon these intimations of your Honor, we will take a nonsuit and appeal."

The plaintiff submitted to a judgment of non-suit and appealed to this Court.

Mr. Theo. F. Klutz, (Messrs. Kerr Craige and J. M. Clement, (255) *were with him on the brief), for the plaintiff.*

Mr. Chas. Price, (Mr. D. Schenck, was with him on the brief), for the defendant.

MERRIMON, J. (after stating the facts). (1) The objection taken on the argument here, that an appeal did not lie from the refusal of the Court to allow an amendment of the complaint without the payment of costs, is groundless. The appeal was not taken from the order denying the motion to amend. When the Court suggested that the complaint was defective, the plaintiff, as a cautionary step, asked leave to amend. The Court offered to grant leave on terms that the plaintiff declined to submit to, having confidence in the sufficiency of the complaint, and in effect, if not in terms, he insisted that it was sufficient. The Court intimated plainly that it was not, and the plaintiff, in deference to that opinion, submitted to a judgment of non-suit and appealed. This appears substantially from the statement of the case upon appeal, and in the record of the judgment it is expressly stated, that the Court being of opinion that the complaint did not state facts sufficient to constitute a cause of action, the plaintiff, in deference to that opinion, submitted to a judgment of non-suit. It is obvious that an appeal lay from such a judgment. *Hedrick v. Pratt, ante,* 101.

(2) The Court held that the complaint was fatally defective, in that it did not contain an allegation to the effect "that the defendant knew, or by reasonable diligence might have known, of the defectiveness and unsoundness of the engine."

If it be granted that such allegation was necessary in a case like this, we are of opinion that it was made in substance and effect in the third paragraph of the complaint, which alleges "that the defendant, not regarding its duty, conducted itself so carelessly, negligently and unskilfully in this behalf, that it provided and used an unsafe, defective and insecure locomotive."

(256) The defendant in placing locomotive engines upon its railroad for practical use, was bound to exercise at least reasonable care, caution and diligence, in seeing that they were suitable and safe. Hence, if it failed in this respect, and as a consequence an accident happened, whereby another was injured without fault on his part, it became liable to the party so injured in damages. If the defendant was not so careful, cautious and diligent, but on the other hand, was in such respect careless, incautious and negligent, it was thereby in law charged with notice of the unfitness, defectiveness and unsafe condition of the engine. The law does not allow a party chargeable with negligence, to take advantage of his own wrong, and say, in his defence, that he did not have notice of the unfitness and defects of

his dangerous engine, or other machinery. In such case, if he had been careful and diligent, then he would have had notice of such defects, and remedied them, and thus avoided accident and injury to others, occasioned thereby. When, in cases like this, it is alleged that a party has been careless and negligent in respect to a matter wherein he is bound to care and diligence, the necessary and legal implication is, that he knew, or might, by reasonable diligence, have known of the material defects and imperfections that gave rise to the injury complained of. So, that if the allegation of negligence should be proved on the trial in this and like cases, sufficient notice of such defects would be proven. It is unnecessary to formally allege notice, when the law implies the same from the circumstances and conditions necessarily attending the matter alleged.

The allegation of notice of the alleged defectiveness of the engine in the complaint was therefore sufficient.

There may be peculiar cases, and classes of cases, in which it is necessary specially to allege notice of defects that underlie and are essential to create the cause of action, but clearly this is not one of them.

But we may add, that if in alleging the cause of action in this case, a more formal and distinct allegation of such notice ought to have been made, the defendant waived all objection on that (257) account, by answering the complaint upon the merits and going to trial. In any possible view of the matter, the most that can be said is, that a cause of action was defectively stated in the complaint. The matter of notice omitted, as supposed, was only incidental to a principal material allegation—that of negligence—and might be waived, and any objection in that respect ought to have been taken in apt time by demurrer. It seems to us manifest, that if such objection could have been raised at all, (and we have seen it could not,) it was waived by the answer. *Garret v. Trotter*, 65 N. C., 430; *Johnson v. Finch*, 93 N. C., 205; *Halstead v. Mullen*, Id., 252.

(3) The Court held, also, that the complaint ought to have alleged that the intestate of the plaintiff left surviving him next-of-kin. In this we think there is error, first, because the statute gives the action and authorizes the recovery of damages in any event, if the liability of the defendant shall be established, and secondly, even if this were not so, the omission of the allegation was waived by the defendant's answer upon the merits.

In respect to the damages that may be recovered in this and like actions, the statute, (The Code Sec. 1500,) provides, that, "The amount recovered in such action is not liable to be applied as assets,

in payment of debts or legacies, but shall be disposed of as provided in this chapter (ch. 33, entitled Executors and Administrators) for the distribution of personal property in cases of intestacy."

It is plainly observable, that no particular person or class of persons, whether of the next-of-kin or not, are designated by the statute, to take. The language is broad and comprehensive, limited only by the provisions of the chapter referred to, in respect to the distribution of personal property, and excluding creditors and legatees. The damages when recovered, are to be not simply distributed, but *disposed of* as that chapter prescribes, and it distinctly provides, (The Code Sec. 1478,) first, for the distribution of the personal estate to the
(258) widow and children of the intestate, if there be such, and if there be none, nor the representative of children, then generally, to the next-of-kin in regular succession. The fourth paragraph of the section last cited, provides that, "If there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next-of-kin of the intestate, who are in equal degree, and those who legally represent them." This provision is plain and unmistakable—nothing is left to construction or conjecture. The presumption is, that the Legislature was advertent to all the provisions of the chapter of which Sec. 1500 cited, is a part, and understood their legal effect.

Thus it appears that the widow and children take first, but this is not more certain, than that the succeeding next-of-kin take in the order prescribed. There is nothing in the terms of the statute, nor is there any reasonable implication arising from it, that warrants the exclusion of any of them. It seems that its purpose is to give the action for the recovery of damages in the case provided, without reference to who may become the beneficiaries, excluding creditors and legatees. This view is strengthened by the fact, that while the statute giving the action, is in some material respects substantially like a similar English statute, and similar statutes in other States of the Union, in respect to the disposition of the damages when recovered, it is unlike most, if not all of them. They generally provide for designated classes, as the wife and children, and the measure of damages is made to depend, in some States, upon who takes the benefit of the same. In this State it is otherwise. The measure of damages is not determined by such consideration. It is expressly provided, that the plaintiff may "recover such damages as are a fair and just compensation for the pecuniary injury, resulting from such death." Injury to whom? Plainly such persons as the statute designates, and not to one class of them more than another. *Kesler v. Smith,* 66 N. C., 154; *Burton v. The Railroad Company,* 82 N. C., 504.

Nothing appearing to the contrary, the presumption was (259) that the intestate left next-of-kin surviving him, and whoever insisted upon the contrary was bound to aver and prove the fact. *University v. Harrison,* 90 N. C., 385; *Harvey v. Thornton,* 14 Ill., 217; Lawson on Presumptive Ev., 198. And as the next-of-kin generally, in the order prescribed, would take the damages recoverable, it was for this reason not necessary to allege that the intestate had next-of-kin. If he had not, and this fact could avail the defendant, it should have pleaded and proven it as matter of defence.

But if this were not so, the statute makes still further provision for the *disposition* of the damages when recovered. The Code, Sec. 1504, which is a part of the same chapter cited above, prescribes that, "All sums of money or other estate of whatever kind," etc., shall, if not claimed as therein indicated within ten years, go absolutely to the University.

We are unable to see anything in the terms or purpose of the statute, that warrants such interpretation of it as would exclude the University from taking the damages recovered in the absence of next-of-kin. The statute, (The Code, Sec. 1498), in broad and comprehensive terms, gives the action; Sec. 1499, prescribes in terms quite as comprehensive, that the damages recoverable shall be such "as are a fair and just compensation for the pecuniary injury resulting from such death," and Sec. 1500 prescribes that such damages shall not be applied as assets in the payment of debts or legacies, "but shall *be disposed of* as provided in this chapter, for the distribution of personal property, *in case of intestacy.*" It is observable that the damages are not simply to be *disposed* of as provided in this chapter for the *distribution* of *personal* property, but as *"in case of intestacy."* These latter words are significant, as tending to show a definite purpose, to make a complete disposition in any case, of the damages. As we have seen, in case of intestacy, the personal property of the intestate is to be distributed, first, to the widow and children, or the legal representative of such child or children as may be dead; if there be none, the representative of children; then to the succeeding next-of-kin generally, and if the classes thus entitled, do not claim it in the (260) way and within the time prescribed, it is just as certainly to be disposed of to the University.

It is said that the purpose of actions like this, is to provide for the widow and children of the intestate, and this is no doubt true, but it is likewise just as true and certain—the provision is plain—that their further purpose is to provide for the next succeeding next-of-kin, who, in many cases, have very little natural claim upon the intestate. The

purpose of such actions reaches certainly beyond the claim of those who are first entitled to the benefit of the labor and efforts of the intestate. It seems to have been part of the purpose of the statute giving the action and disposing of the damages recoverable in it, to give the latter to the University in case of the possible absence of next-of-kin. It has for a long period been the settled policy of the State, to dispose of unclaimed property in the hands of executors and administrators, to the University, and a like disposition is made of damages in actions like the present.

So, that in any case, the statute directs a disposition of the damages that may be recovered from the defendant in this action. It cannot, therefore, concern it to inquire who shall be entitled to take benefit of the same. It has no right or interest in that respect. Hence, it was not only not necessary, but it would have been improper, to allege in the complaint that there were next-of-kin of the intestate. Any issue raised in such respect, would have been beside the case, immaterial and improper.

There are cases in other States, in which it has been held that it must be alleged in the complaint that there are persons designated by the statute, who can take the damages when recovered, but in those States, the statute designated particular classes of persons to take, as the widow and children, or the father or mother. In such cases, it might be very proper to require such allegation, because, in the absence of persons to take, the action would not lie. These decisions,
however, are not uniform. In some States, as in Virginia, it
(261) has been held that such allegation was not necessary. *Railroad Company v. Whitman's Adm'r.*, 29 Grat., 431; *Matthews v. Warner*, Id. 570. In Indiana it has been held otherwise. *Stewart v. Railroad Company*, 21 Am. & Eng. R. R. Cases, 209. Pierce on Railroads, 392.

There is error, and to the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Sellars v. R. R., 94 N.C. 661; *Bowling v. Burton*, 101 N.C. 181; *Warlick v. Lowman*, 103 N.C. 126; *Hudson v. R. R.*, 104 N.C. 502; *Asbury v. Fair*, 111 N.C. 258; *Mizzell v. Ruffin*, 118 N.C. 71; *Dermid v. R. R.*, 148 N.C. 196; *Eddleman v. Lentz*, 158 N.C. 70; *Davenport v. Patrick*, 227 N.C. 688; *Trust Co. v. Deal*, 227 N.C. 695; *McCoy v. R. R.*, 229 N.C. 59; *Pack v. Newman*, 232 N.C. 400; *Murphy v. Smith*, 235 N.C. 462.

*JOHN H. McELWEE v. W. T. BLACKWELL ET AL.

Pleading—Complaint—Slander of Title to Trade Mark.

1. It is sufficient if the complaint states facts sufficient to show that a legal wrong has been done by the defendants, for which the law will afford redress.
2. In an action for slander of title to a trade mark, where the injury complained of is not so much the defamatory words, but was occasioned by positive acts and threats, by which the customers of the plaintiff were deterred from trading with him. *It was held* error to non-suit the plaintiff, because the complaint did not set out the actionable words.

CIVIL ACTION tried before *Montgomery, Judge,* at November Term, 1885, of the Superior Court of ROWAN County.

The facts appear in the opinion.

The plaintiff appealed.

Messrs. R. F. Armfield and John Devereux, Jr., for the plaintiff.

Messrs. Thos. Ruffin, John W. Graham, W. W. Fuller, M. L. McCorkle (Messrs. D. Schenck, Charles Price, T. C. Fuller, Geo. H. Snow and E. C. Smith were with them on the brief), for the defendants.

SMITH, C. J. This cause was called for trial, and the de- (262) fendants' counsel moved to dismiss the action, on the ground "that the complaint did not state facts sufficient to constitute a cause of action for slander of title, in that the words constituting the alleged slander, were not set forth in the complaint; and in that no special damages were alleged, and no facts stated or alleged showing special damages." The Court being of opinion and having so intimated, that the objection was well taken and fatal, the plaintiff, in submission thereto, suffered a non-suit and appealed, so that the only question to be considered, is, whether any action can be sustained upon the facts, assuming them all to be true, set out in the complaint.

It is not material to inquire, whether the case presented possesses all the requirements of the former action for slander of title in the complaint, upon which the argument for the defendants proceeds in pointing out the necessary and deficient averments to bring the action within the class, but is the plaintiff entitled to any relief in the premises, and have the defendants committed any actionable wrong in what they are charged to have done to the plaintiff's injury, for which the law affords redress.

*MR. JUSTICE MERRIMON having been of counsel for the defendants, did not sit on the hearing of this case.

The allegations in substance are, that the plaintiff is half owner of, and entitled to use, a certain recipe used in manufacturing and preparing smoking tobacco, which has acquired a high reputation among those who use and deal in the article, and built up a large and valuable trade for him.

That in identifying the smoking tobacco thus prepared by the plaintiff, he has for a series of years past, used upon packages containing it, a label and trade mark, of which a representation is given, and which he was in like manner entitled to use for such identification.

Article six of the complaint contains the *gravamen* of the charge, and is as follows:

"That the defendants from or about the said 12th day of September, 1870, and on divers other days from that to the present time, (263) well knew that the plaintiff claimed and was entitled to use, and was using, the said label, sign and trade-mark, on the packages and other means of containing smoking tobacco by him manufactured, but regardless of the rights of the plaintiff in and to the use and enjoyment of said label, sign and trade-mark, and with the wilful design to wrong and oppress plaintiff and destroy the value of his ownership in said label, sign and trade mark, said defendants falsely represented to certain persons who were the customers of plaintiff, and in the habit of buying from plaintiff large quantities of smoking tobacco, marked and labeled with his said label, to-wit: M. M. Wolf & Co., of Charlotte, N. C., and divers other customers of plaintiff, at the City of New York, Atlanta, Ga., New Orleans, La., and Norfolk, Va.; and elsewhere, and to many other persons, whose names are to plaintiff unknown, and to persons engaged in buying and selling tobacco, and to the public generally; that plaintiff had no right to the use of said label, sign and trade-mark; but that the defendants were the sole, exclusive and rightful owners, and entitled to the exclusive use of said label, sign and trade-mark, and defendants, as plaintiff is informed and believes, threatened to sue the said persons named as customers of plaintiff, and many other persons whose names are unknown to plaintiff, and all dealers in smoking tobacco, and the public in general, and to prosecute them in the Courts of the country, if they bought from plaintiff or his agents, or if they sold or offered to sell, any smoking tobacco manufactured by plaintiff and so marked and labeled with said label, sign and trade-mark; and the defendants thereby caused the said persons mentioned as the customers of plaintiff, and many other persons whose names are unknown to the plaintiff, and the public in general, to forbear and abstain from the purchase, sale and use of the said smoking tobacco so manufactured by plaintiff, and marked and labeled with his said label, sign and trade-mark,

thereby greatly damaging plaintiff's sale, and diminishing his profits, and injuring and almost destroying plaintiff's trade and business in the manufacture and sale of smoking tobacco, and in (264) further pursuance of their efforts to wrong and oppress plaintiff, and destroy the value of his ownership in the use of said label, sign and trade-mark, the defendants, in the latter part of the month of July, 1875, caused to be attached in the City of New York, in the hands of James M. Gardner & Co., consignees of the plaintiff, about 200 cases of smoking tobacco, manufactured by plaintiff, and bearing his label, sign and trade-mark, as aforesaid; whereby plaintiff suffered great loss, damage and reputation."

The concluding article avers the damage occasioned by the defendants' illegal conduct, and demands $50,000 as damages.

The plaintiff charges that the defendants, with knowledge of the plaintiff's asserted right to use the label in identifying his own prepared smoking tobacco, and thus increase his sales and assure a public support, and with the wilful purpose to wrong and oppress, and destroy the value of his title to the trade-mark, by which goods of his manufacture were known, said and did the things enumerated in his complaint, threatening to prosecute customers who continued to buy from him and sell, and thus diminishing his sales, and curtailing the business he had built up during many years. For all this alleged conduct, resulting in serious loss and damage, does the law give no remedy? Must the plaintiff submit to it in silence? If inducing others to violate his contract, is itself actionable when done with malicious motive, *Jones v. Stanly,* 76 N. C., 355, or persuading him to quit a service which he has undertaken, *Haskins v. Royster,* 70 N. C., 601, can the defendants, for doing much more for the intentional injury of the plaintiff, escape all legal responsibility for the consequence, to the wronged party?

In *Evans v. Harris,* 38 En. L. & Eq. Reports, 347, Martin B. puts this case: "Suppose a biscuit maker is slandered by a man saying that his biscuits are poisoned, and in consequence no one enters his shop. He cannot complain of the loss of any particular customer, for he does not know them, and how hard and unjust it would be, if he could not prove the fact of a loss, under a general allega- (265) tion of loss of custom."

This was said when the injury was the direct result of words spoken, and as in such case dispensing with specific allegations of damage.

In the present case, the *gravamen* consists, not so much in what was said defamatory of the plaintiff's title to the trade-mark, but in positive acts and threats, by which customers, and many of them are

named, were intimidated and deterred from purchasing the plaintiff's goods. We are not prepared to say that no cause of action is set out in the complaint, and to sustain the ruling under which the case was taken from the jury and the plaintiff forced to a non-suit. Possibly the proofs would have been even stronger than the allegations, and in such case, come within The Code, Secs. 272 and 276, as explained in *Halstead v. Mullen,* 93 N. C., 252.

Without definitely determining the sufficiency of the complaint in its present form, the Court erred in making this summary disposition of the cause, instead of permitting the trial to proceed, and for this reason, and without prejudice to the defendants in doing so, we reverse the judgment. Let this be certified.

Error. Reversed.

Cited: McKinnon v. McIntosh, 98 N.C. 92; *Caldwell v. Stirewalt,* 100 N.C. 205; *Harris v. Sneeden,* 101 N.C. 281; *Eddleman v. Lentz,* 158 N.C. 70; *Williams v. Parsons,* 167 N.C. 532; *Hunt v. Eure,* 189 N.C. 487; *Texas Co. v. Holton,* 223 N.C. 499.

VAN B. MOORE v. M. A. NOWELL ET ALS.

Judgment—Parties—Joinder of Causes of Action—Jurisdiction—Demurrer—Assignment of Error.

1. The assignee of a judgment can maintain an action on it in his own name.
2. While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising *ex delicto,* and are not embraced in Sec. 177 of The Code, forbidding the assignment of things in action not arising out of contract.
3. Where the cause of action set out in the complaint, was several judgments rendered by a justice of the peace, each for a less sum than two hundred dollars, but aggregating more than that sum; *It was held,* (1) That the causes of action were properly joined; and (2) That the Superior Court had jurisdiction.
4. It is the sum which is demanded in good faith which confers jurisdiction, and where the plaintiff's demand consists of several distinct items, it is the aggregate which constitutes the sum demanded and confers jurisdiction.
5. Although it is more orderly to state each cause of action in a separate and distinct allegation, yet if it fully appear from the complaint what each demand is, the failure to do so is not ground of demurrer.
6. Where an action was brought against three judgment debtors and the administratrix of a fourth, on the judgment, and the heirs-at-law of the

deceased judgment debtor were made parties, and the prayer for judgment was that execution issue against the three defendants who were alive, and that the administratrix of the dead one proceed to sell his land to make assets: *It was held*, that the heirs were unnecessary parties, and that the plaintiff was not entitled to his prayer for judgment against the administratrix to sell the land, but that this was not ground of demurrer by one of the other defendants.

7. The objection that a judgment on a demurrer is final and not that the defendant answer over, cannot be made for the first time in this Court.

8. The prayer for judgment does not fix the plaintiff's right, but the Court should grant such judgment as the allegations in the pleadings will warrant.

CIVIL ACTION heard on demurrer, before *Clark, Judge,* at (266) August Term, 1885, of the Superior Court of WAKE County.

The complaint was as follows:

The plaintiff above named, complaining of the defendants above named, alleges:

I. That on the 9th of June, A. D. 1879, one William K. Davis, as guardian of Mary A. Morehead, sued out and prosecuted against the defendants J. R. Taylor, John N. Bunting, Charles D. Upchurch and the intestate of the defendant Minerva A. Nowell, J. J. Nowell, he being then alive, in the court of a justice of the peace, acting in and for the county aforesaid, three several actions for the recovery of various sums of money, due by notes given for the rent of land, each note being for less than two hundred dollars, all of said (267) actions being within the jurisdiction of a justice of the peace; whereupon, upon consideration of the said court, it was ordered and adjudged, that the said William K. Davis, plaintiff as aforesaid, should recover of the said John R. Taylor, John N. Bunting, Charles D. Upchurch and J. J. Nowell, as follows:

In the first of said actions, the sum of $79.32, with interest on $69.50 from the said 9th day of June, 1879, and his costs of action. In the second of said actions, the sum of $155.62, with interest on $135.00 from the said 9th day of June, 1879, and his costs of action. And in the third of said actions, the sum of $80.34, with interest on $67.50 from the said 9th day of June, 1879, and his costs of action. All of which said judgments, the said William K. Davis, caused to be forthwith, to-wit: on the said 9th day of June, 1879, docketed in the office of the Superior Court of the county aforesaid.

The plaintiff is informed and believes, and so charges, that no part of the said judgments or any of them, has ever been paid, but the same now remain in full force and effect, and constitute and are a lien in law upon all the real estate then, on the said 9th day of June,

1879, owned by the said judgment defendants, any and all of them, or by them since acquired.

II. That on the 9th day of February, 1885, for value received, the said William K. Davis assigned and transferred, in writing, each and all of the three said judgments, to the plaintiff Van B. Moore, who is now the owner thereof, and the real party in interest.

III. That after the rendition and docketing of said judgments, as hereinbefore set forth, to-wit: on the ..... day of ....., 1882, the said J. J. Nowell departed this life, leaving the defendant Minerva A. Nowell, his widow, and the defendants Nellie G., James, Willie, and Henry Nowell, and Arnetta Adams, (born Nowell), wife of the defendant Thomas Adams, his children and only heirs-at-law.

(268) IV. That on the 18th day of September, 1882, the said Minerva A. Nowell was duly appointed and qualified as administratrix of the said J. J. Nowell, dec'd, and took upon herself the discharge of the duties of her said office.

V. That the said administratrix has not, since her said qualification, paid any part of said judgments or either of them, either to the said William K. Davis, as the plaintiff is informed and believes, or to the plaintiff, though she has been requested so to do.

VI. That at the time of the death of the said J. J. Nowell, he was seized and possessed, as of his own right, of the following real estate, as the plaintiff is informed and believes.

(Here the complaint sets out the various tracts of land.)

The plaintiff is advised and so insists, that the said judgments, and all of them, are, in law, a lien upon the real estate aforesaid, and entitled to payment out of the proceeds thereof when sold, before any other of the debts of the said decedent are paid, except such debts as may constitute prior liens thereon.

VII. The plaintiff has no knowledge as to the ages of the defendants, children and heirs-at-law of the decedent, the said J. J. Nowell, but he is informed that some, if not all, of the said children and heirs-at-law are infants under the age of twenty-one years. He therefore prays that their general guardian, Moses G. Todd, be ordered by the Court to represent the said infants in this action.

VIII. That Moses G. Todd is the duly appointed and qualified guardian of the said Nellie G., James, Willie and Henry Nowell.

Wherefore the plaintiff prays judgment:

I. That the defendant Minerva A. Nowell as administratrix as aforesaid, pay to the plaintiff the sum of three hundred and fifteen dollars and twenty-eight cents, with interest on two hundred and sixty-two dollars, from the said 9th day of June, 1879, together with the costs of said three actions, and the costs of this action to be taxed by the

Clerk of the Court, or in case she have not now in her hands sufficient assets of the estate of her said intestate, wherewith (269) to make such payment, that she forthwith proceed, according to law, to sell so much of said real estate as may be sufficient therefor.

II. That execution issue on the said three judgments against the said John R. Taylor, John N. Bunting and Charles D. Upchurch.

The defendant Upchurch demurred to the complaint on the following grounds:

1. That the judgments on which the plaintiff brings his action are not negotiable or assignable in law, so as to give the plaintiff a right of action at law in his own name thereon.

2. That the plaintiff is not a party to the judgments on which his action is brought, and was not a party to the action in which the said judgments were rendered by the justice of the peace, and has no legal right to sue on the said judgments in his own name.

3. That William K. Davis, the plaintiff, in whose favor the said judgments were granted, is not a party to this action.

4. That this Court has no jurisdiction of this action, for the reason that each of the several causes of action united in the complaint in this action, is for less than two hundred dollars, and is founded on a judgment of a justice of the peace, of which a justice of the peace has exclusive original jurisdiction.

5. That the plaintiff has improperly united several causes of action.

6. That the plaintiff does not, in his complaint, state each cause of action separately, but, in his complaint, compounds and states his several causes of action together.

7. That the plaintiff has united several causes of action in his complaint in which he demands different judgments against the several defendants to said action.

His Honor overruled the demurrer, and gave judgment final against the defendant Upchurch, from which he appealed.

Mr. John Gatling, for the plaintiff.

Mr. John Devereux, Jr., for the defendant.

MERRIMON, J. Judgments whether they be granted by a jus- (270) tice of the peace, or a court of record, are assignable either in writing or by merely verbal transfer, so as to pass the equitable title to them to the purchaser. *Winberry v. Koonce,* 83 N. C., 351.

The judgments mentioned and described in the complaint, were assigned to the plaintiff in writing, for value, and he became the complete equitable owner of them and the "real party in interest." The

person in whose name they were taken, has only the naked legal title to them, and he holds that for the plaintiff.

It is insisted, however, that the statute, (The Code, Sec. 177,) provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided, but this section shall not be deemed to authorize the *assignment of a thing in action not arising out of contract,*" and that the judgments are things in action not arising "out of contract."

We cannot concur in this view. Judgments are, it is true, not ordinarily and always and for all purposes treated as contracts, as was decided, in *McDonald v. Dickson,* 87 N. C., 404; but in the sense of distinguishing them from causes of action arising *ex delicto,* they are contracts, and are classed in the law as *contracts of record,* and of the highest dignity. They possess the quality of engagement, by implication and force of the law, on the part of the judgment debtor, to pay the sum of money adjudged to be due the judgment creditor. It is said, that contracts or obligations *ex contractu* are of three descriptions, and they may be classed, with reference to their respective orders or degrees of superiority, as follows: 1. Contracts of Record; 2. Specialties; 3. Simple contracts.

Contract of Record consists of *judgments, recognizances,* etc. Chitty on Cont. 3. See also the dissenting opinion of Justice RUFFIN, in *McDonald v. Dickson, supra.*

The term "contract," as employed in the statute just cited, is used in its broadest legal sense—in a fundamental sense—and im-
(271) plies and embraces all things in action, that have the nature or legal quality of a contract as defined by the law. It is employed in a leading and distinguishing sense, in the formation of a system of procedure.

Therefore, the judgments sued upon in this action, do arise out of contract, and the plaintiff, as assignee, may maintain an action upon them in his own name.

The appellant further insists, that as the judgments sued upon, are severally for a less sum than $200, the Superior Court has not original jurisdiction of them.

This objection is not tenable. The Constitution, Art. IV, Sec. 27, provides among other things, that, "The several Justices of the Peace, shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of all actions founded on contract, wherein the sum *demanded* shall not exceed two hundred dollars," etc., and the statute, (The Code, Sec. 834,) provides that "Justices of the Peace shall have exclusive original jurisdiction of all civil actions founded

on contract except: 1. Wherein the sum *demanded,* exclusive of interest, exceeds two hundred dollars," etc.

It will be observed that it is the sum *demanded* that fixes the jurisdiction, and it has been held that this implies the sum demanded in good faith. *Froelich v. Express Co.,* 67 N. C., 1; *Wiseman v. Witherow,* 90 N. C., 140. The phrase "sum demanded," implies the whole sum due to the plaintiff or plaintiffs, from the defendant or defendants in the action, for the same like and kindred accounts in nature, as if the whole sum demanded is $600, $100 of it due by open account, $200 by promissory note, and $300 by judgment. All these sums may be consolidated, and sued for in the same action, and thus consolidated, they would constitute the plaintiff's "sum demanded." And so also, if the sum demanded on each account, is less than $200, but in the aggregate more than that sum, they may be sued for as a single demand in the Superior Court, and it would have jurisdiction. There is no statute that forbids this in terms or by reasonable implication, and we can see no just reason why it may not be done. (272) Such practice would be convenient and economize cost and time in many cases. It was the common practice in this State, before the adoption of the present method of procedure, to consolidate two or more debts due the same plaintiff from the same defendant, each within the jurisdiction of a justice of the peace, and thus give the County or Superior Courts jurisdiction. We see no reason why the same practice may not now prevail. Indeed it has been held, in at least one case, that it may. *Sutton v. McMillan,* 72 N. C., 102.

The plaintiff is not, in such cases, obliged to sue in the same action for each sum so due to him, but he may do so. If, however, he should multiply actions in the same court for distinct sums of money so due him, on similar accounts, the Court might and would, no reasonable objection appearing, direct such actions to be consolidated. This ought to be done on the score of economy of time and cost, and to prevent vexatious litigation.

The plaintiff's demand is not very formally stated, but the Court can certainly see what it is, and what the several particular demands are, that constitute the whole. The defendant had such information as would enable him to make any defence he might have. This is sufficient, although it would have been better to make each allegation separate and formal. Perhaps the Court would have entertained and allowed a motion, made in apt time, to require the plaintiff to make his allegations severally, and more formal.

The appellant further contends that the appellee has united several distinct causes of action in his complaint, and demands different judgments against several defendants.

We think otherwise. The three judgments sued upon, were granted by a justice of the peace, in favor of the same plaintiff against the same defendants, and they were duly docketed in the Superior Court. The plaintiff in each of them, for value, sold and assigned them in writing to the present plaintiff. One of the judgment debtors died intestate, before the action was brought, and an administratrix (273) of his estate was appointed. The plaintiff brought this action against all the surviving judgment debtors, joining with them the administratrix, and the heirs at law of the intestate, and demanded judgment against the administratrix for the amount of the judgments mentioned, and that she sell the land of her intestate, and out of the proceeds pay the plaintiff's debts, and that execution issue against the other judgment debtor defendants. This demand for judgment was not a proper one, or one warranted by the complaint. Nor were the heirs-at-law necessary or proper parties, and no judgment could be given against them. But they were simply unnecessary parties, and being such, this could not defeat the plaintiff's action, nor was it ground for demurrer. The failure to demand a proper judgment, did not operate to defeat the plaintiff's action. The allegations of the complaint, notwithstanding immaterial and redundant matter, and unnecessary parties defendant, plainly indicated the proper judgment, and the Court, seeing this, could grant it, without regard to an inappropriate demand for judgment; or in the absence of any formal demand in that respect. It was the duty of the Court to give such judgment as the law allowed, in the case presented by the pleadings. *Dunn v. Barnes,* 73 N. C., 273; *Knight v. Houghtalling,* 85 N. C., 17; *Jones v. Mial,* 79 N. C., 164; *Jones v. Mial,* 82 N. C., 252.

The Court overruled the demurrer and gave judgment against the appellant. It does not appear affirmatively that it held that the demurrer was frivolous and therefore gave judgment. The counsel insisted here, that the Court ought to have given judgment that the appellant answer the complaint, unless it had first decided that the demurrer was frivolous.

There is no exception in the record raising any question in that respect, and it must be taken here, that the judgment was a proper one, and hence no exception was taken in the Court below. It is too late to raise the objection here. The judgment must be affirmed.

No error. Affirmed.

Cited: Keans v. Heitman, 104 N.C. 334; *Harris v. Sneeden,* 104 N.C. 377; *Brem v. Covington,* 104 N.C. 594; *Skinner v. Terry,* 107 N.C. 109; *Presson v. Boone,* 108 N.C. 87; *Maggett v. Roberts,* 108 N.C. 177; *McPhail v. Johnson,* 109 N.C. 573; *Hood v. Sudderth,* 111

N.C. 222; *Martin v. Goode,* 111 N.C. 289; *Johnson v. Loftin,* 111 N.C. 323; *Carter v. R.R.,* 126 N.C. 444; *Sloan v. R. R.,* 126 N.C. 490; *Ricaud v. Alderman,* 132 N.C. 65; *Davis v. Wall,* 142 N.C. 451; *Chatham v. Realty Co.,* 180 N.C. 507; *Williams v. Williams,* 188 N.C. 730.

(274)

WM. KIFF ADMINISTRATOR, v. SAMUEL WEAVER.

Donatio Causa Mortis—Promissory Notes—Parties—Mortgage—Administrators—Estoppel.

1. A *donatio causa mortis,* is a conditional gift, depending on the contingency of expected death. To constitute a *donatio causa mortis,* it must appear that the gift was made in view of the donor's death, that it is conditioned to take effect only on his death by his existing disorder, and there must be a delivery of the subject of the donation.
2. The equitable owner of bills, bonds and promissory notes can maintain an action on them in his own name, so the assignee of an unindorsed bond or note may bring an action on it in his own name.
3. The possession of an unindorsed negotiable note, payable to bearer, raises the presumption that the person producing it on the trial is the rightful owner thereof.
4. Bills, bonds and promissory notes, and all other evidences of debt, although payable to order and not endorsed, may be given as *donationes causa mortis,* and the donee may sue on them in his own name.
5. Where a bond secured by a mortgage is given as a *donatio causa mortis,* the mortgage goes with the bond even without a formal transfer of the security.
6. In an action by an administrator to recover certain bonds of his intestate, which the defendant alleged were given him as a *donatio causa mortis,* the defendant having possession of the bonds is not required to prove the gift by more than a preponderance of evidence.
7. While an administrator is estopped to deny the validity of an assignment of personal property made by his intestate in fraud of creditors, he is not estopped to deny a *donatio causa mortis.*
8. A *donatio causa mortis* partakes somewhat of the character of a testamentary disposition, but the assent of the personal representative is not essential to its validity. If needed to pay debts it may be recovered by the representative, but if there be a *residuum* of the gift after the payment of the debts, it goes to the donee and not to the intestate's estate.

This was a CIVIL ACTION tried before *Shepherd, Judge,* and a jury, at the Fall Term, 1885, of HERTFORD Superior Court.

The action was brought by the plaintiff as administrator of (275) James Kiff, deceased, to recover from the defendant, a number

of notes, and mortgages executed to secure them, payable to James Kiff, the plaintiff's intestate, as described in the complaint, which it is alleged the defendant unlawfully withholds from the plaintiff. The defendant admitted that he held the possession of the bonds and mortgages, but denied that he held them unlawfully.

For a further defence, he pleaded as a counter-claim, that he was then, and was at the commencement of the action, the rightful owner and in possession of the said bonds, notes and mortgages. That James Kiff, the intestate, during his lifetime and in his last illness and in contemplation of his death, and but a short time before his death, gave and delivered to the defendant, said notes, bonds and mortgages, to and for his sole use and benefit.

The following issue was submitted to the jury:

"Is the plaintiff William Kiff, administrator of James Kiff, the owner and entitled to the possession of the notes, bonds and mortgages mentioned in the pleadings?"

It was admitted the bonds, etc., in controversy before the alleged gift, were the property of James Kiff. There was evidence tending to show that James Kiff died on the 4th of November, 1882, that he had been ill for several days; that on Sunday preceding his death, he had despaired of all hope of recovery; that in the presence of several witnesses, on said Sunday, he handed the bonds in controversy, (said bonds were not endorsed and were payable to order,) to the defendant, his natural son, and told him he gave him the same, to take and collect them, and that he might have the money and bonds in case he died; that ever since the delivery of said bonds, the defendant has been in possession of them, claiming the same as his own, by virtue of said gift; that James Kiff died of said illness on the following Tuesday.

There was also testimony tending to show the circumstances of James Kiff; that he had two sisters, and other natural children;
(276) that at the time of the alleged gift he was indebted, and that he did not reserve sufficient property to pay such indebtedness.

No instructions were prayer for. Among other things, the Court charged the jury, that defendant must prove the gift by a preponderance of evidence, otherwise he was not entitled to a verdict. The Court also charged the jury, that they might consider the evidence of insolvency, along with the other circumstances, on the question as to whether the gift, as alleged by the defendant, was in fact made, but that if they found in favor of such gift, that the defendant would in this action be entitled to a verdict, notwithstanding the insolvency of the intestate, the Court holding that the gift, if made, related to the time of the delivery of the bonds, and that the administrator was

estopped to attack it as fraudulent. The plaintiff excepted to this part of the charge.

The jury responded in the negative to the issue submitted, and the plaintiff moved for a new trial; (1) Because of the charge of the Court as to the degree of proof required of the defendant, and, (2) Because of the charge of the Court as to the estoppel of plaintiff.

The motion was over-ruled and judgment rendered for the defendant, from which plaintiff appealed to Supreme Court.

Mr. B. B. Winborne, for the plaintiff.
Mr. David A. Barnes and J. B. Batchelor, for the defendant.

ASHE, J. (after stating the facts). A *donatio causa mortis,* in *Nicholas v. Adams,* 2 Whar. 17, is defined by Ch. Justice GIBSON, to be "a conditional gift, depending on the contingency of expected death, and that it was defeasible by revocation or delivery from the peril." To constitute a *donatio mortis causa* the circumstances must be such, as to show that the donor intended the gift to take effect, if he should die shortly afterwards, but that if he should recover, the thing should be restored to him. *Overton v. Sawyer,* 52 N. C., 6.

From this definition it results, that to constitute a *donatio* (277) *mortis causa,* there must be three attributes. 1st. The gift must be with the view to the donor's death. 2nd. It must be conditioned to take effect only on the death of the donor by his existing disorder; and 3rd, there must be a delivery of the subject of donation—1 Williams on Ex. p. 686.

The donation in this case, possessed all the qualities of a *donatio causa mortis.* The donor in his last illness, on the Sunday previous to his death on the Tuesday following, while despairing of all hope of recovery, handed the bonds and mortgages in controversy, in the presence of several witnesses, to the defendant, and told him that "he gave him the same, to take and collect them, and that he might have the money and bonds in case he died," and that the defendant then took the bonds and mortgages, and has had possession of them ever since.

The plaintiff contended in this Court, that the counter-claim could not be maintained, because the title to bonds, bills of exchange and promissory notes, could only be passed by endorsement or assignment, and could not be transferred by mere delivery, so that the delivery of the bonds did not vest the legal title in the defendant, and could not constitute a good *donatio causa mortis,* and that the counter-claim was therefore defective, because it did not state facts sufficient to constitute a cause of action, and in support of his posi-

tion, he relied upon the case of *Overton v. Sawyer,* 52 N. C., 6, where it was held, that bonds or sealed notes, given by delivery as a *donatio causa mortis,* may be recovered at law in an action of trover by the personal representative of the donor, and he also relied upon the cases of *Fairly v. McLean,* 33 N. C., 158, and *Brickhouse v. Brickhouse,* Ibid., 404. The two latter named cases, where actions of trover for the conversion of unindorsed promissory notes, the legal title to which could not, at that time, be transferred, except by indorsement, and the actions were at law.

But since that case was decided, a change has come over our system of legal procedure. Then an action had to be brought upon an
(278) unnegotiable or unindorsed bond, in the name of the assignor, because he was held by the assignment to acquire only an equitable interest, which could not be enforced in a court of law, yet even in that case, the court of law so far recognized the interest of the assignee, as to protect it against the acts of the assignor. *Long v. Baker,* 3 N. C., 128 (191), and *Hoke v. Carter,* 34 N. C., 324. But now, under the new system, the action on such an instrument, must be brought by the real party in interest. The Code, Sec. 177.

The construction put upon this section is, that the assignee of a bond or note not endorsed, is the proper person to maintain the action in his own name, because he is the real party in interest. *Andrews v. McDaniel,* 68 N. C., 385; *Jackson v. Love,* 82 N. C., 404; *Bank v. Bynum,* 84 N. C., 24; and that the possession of an unindorsed negotiable note payable, to bearer, raises the *presumption* that the person producing it on the trial is the real and rightful owner. *Jackson v. Love, supra,* and *Pate v. Brown,* 85 N. C., 166.

It is immaterial whether the action brought by the plaintiff is legal or equitable, for under the present system, the distinction in actions at law and suits in equity, and the forms of all such actions are abolished, and there is but one form of action. The Code, Sec. 133.

The complaint or counter-claim, which is in the nature of a cross action, must set forth the cause of action in a plain and concise statement of facts—The Code, Sec. 233, *Moore v. Hobbs,* 77 N. C., 65—and then the Court will give such relief as is consistent with the case made by the complaint and embraced within the issue. The Code, Sec. 425; *Knight v. Houghtalling,* 85 N. C., 17; *Oates v. Kendall,* 67 N. C., 241.

This action, then according to the statement of the facts set forth therein, may be either in the nature of detinue, or a bill in equity for the delivery of the bonds and mortgages, but as the defendant, as assignee by parol, has set up a counter-claim of the alleged *donatio causa mortis* of the bonds and mortgages, it presents the ques-

tion, whether the transfer of an unindorsed bond, creating only (279) an equitable title in the donee, is valid as a *donatio causa mortis.*

That the defendant's right of action, by his counter-claim, upon the unindorsed bond, is still an equitable claim notwithstanding—The Code, Sec. 133—see 1 Estee on Pleading, 122. In the case of *Overton v. Sawyer,* cited above, the learned Judge in the conclusion of his opinion, uses the following language: "The conclusion is not at all opposed by the decision of Lord Hardwick in *Baily v. Snelgrove,* 3 Atkins Rep. 214, that a bond for the payment of money may be the subject of a *donatio causa mortis.* That was a case in Chancery, and it was held that the equitable interest in the bond passed to the donor, which does not militate at all with the position, that the personal representative of the donor, could *at law* recover the value of the bond in an action of trover." This is undoubtedly an authority for the doctrine, that a bond without endorsement, is the subject of a *donatio causa mortis* in equity.

And the principle is fully sustained by the authorities. When this principle was first applied to the transfer of personal property, it was limited to chattels, which might be delivered by the hand. But as trade and commerce advanced, it was gradually relaxed, and was extended, first, to embrace bank notes, then lottery tickets, and securities transferable by delivery, such as notes payable to bearer or to order, and indorsed in blank, and finally to bonds. *Snelgrove v. Bailey, supra,* was the first case, we believe, in which the doctrine was extended to bonds. There, the donor had delivered a bond to the donee, saying, "in case I die, it is yours, and then you have something."

The administrator of the donor, filed a bill in equity against the donee, to have the bond delivered up. Lord Hardwick, before whom the suit was heard, holding that the bond was the proper subject of a *donatio causa mortis,* dismissed the bill, and the same eminent jurist, afterwards, in the great case of *Ward v. Turner,* 2 Ves. Sr., 443, said he adhered to that decision, and in reference to this case, Chancellor Kent said: "The distinction made by Lord Hardwick, (280) between bonds and bills of exchange, promissory notes and other choses in action, seems now to be adopted in this country, and they are all considered proper subjects of valid *donatio causa mortis* as well as *inter vivos.*" 1 Kent., 379. All evidence of indebtedness which may be regarded as representing the debt, whether with or without indorsement, are the subject of a *donatio mortis causa.* Redfield on Wills, Part II, 312, 313, and to same effect *Brown v. Brown,* 18 Conn., 410; Williams on Executors, 692; Iredell on Executors, 52.

It was at one time matter of considerable discussion in the Courts of England, whether a mortgage given to secure the payment of a bond, was the subject of a *donatio causa mortis*, and in the case of *Duffield v. Elwes*, 1 Bligh. (N. S.), 497, it was decided, upon appeal to the House of Lords, from a decision of Vice Chancellor Leach, that the delivery of the mortgage, as creating a trust by operation of law, was good as a *donatio causa mortis*. The same principle was admitted in the case of *Hurst v. Beach*, 5 Madd., Ch. 351, and a delivery of a bond and mortgage as a *donatio causa mortis* held to be valid, and the same doctrine was held in *Duffield v. Elwes*, 1 Bligh. (N. S.); 3 Pomeroy's Eq. Jurisprudence, Sec. 1148.

The mortgage need not be assigned. The assignment of the debt, note or bond, secured by the mortgage, even without a formal transfer of the security, carries the mortgage with it. 1 Estee's Pleading, Sec. 345. These authorities establish beyond all question that the bonds and mortgages in controversy, are the proper subject of a *donatio causa mortis*.

But the plaintiff contended there was error in the instructions given by his Honor to the jury, that the defendant must prove the gift by a preponderance of evidence, otherwise he would not be entitled to a verdict. He insisted that it being an equitable action, the defendant must establish the gift by clear and unmistakable proof, and cited several authorities to sustain that equitable principle. But admitting the principle, it has no application to a case like this. The
(281) possession of the bond and mortgages was *prima facie* evidence of ownership. The law raised the presumption from the fact of possession, and the *onus* was upon the plaintiff to rebut it. *Jackson v. Love, supra*, and the cases there cited.

The defendant further excepted to the instruction that the plaintiff, as administrator of James Kiff, was estopped to attack the gift as fraudulent. In this instruction there was error.

The plaintiff, to maintain his position, relied upon the case of *Burton v. Fairinholt*, 86 N. C., 260, where it is held. First, that a voluntary transfer of a chose in action by an insolvent donor to his children, without valuable consideration, is fraudulent and void, and the same may be reached in equity by creditors, and subjected to the payment of their debts, and secondly that an administrator is estopped by the act of his intestate.

But there is a distinction to be observed between a voluntary assignment of personal property *inter vivos* in fraud of creditors, and a *donatio causa mortis*. The latter does not take effect until after the death of the assignor, and is ambulatory and conditional, and revokable until his death, and is likened to a legacy, and in that respect

partakes somewhat of the character of a testamentary disposition of the property, so far as it is liable for the intestate's debts, but it differs materially from a will, in that the donee's title is derived directly from the donor, and the assent of the representative of the donor is not necessary to support his title, yet at the same time, the executor or administrator of an alleged donor, has corresponding rights, and accordingly, upon a deficiency of assets to pay the lawful claims of creditors, any gift *causa mortis* must give way, so far as may be necessary to discharge lawful demands." Schouler on Executors and Administrators Sec. 219, and the same author in Sec. 220, lays it down, that "the executor or administrator, representing these and other interests, against the express or implied wishes of the deceased himself, if need be, may procure all assets suitable for discharging demands of this character. But if any balance is left over, it goes, not to the next-of-kin, but to the donee, for the revocation of any gift for the benefit of creditors of the decedent, is only *pro tanto*." Schouler (282) on Executors and Adm's, Sec. 220, and the cases there cited in support of the text,—see also Pomeroy's Equity Jurisprudence, Sec. 1152; Iredell on Executors, p. 556.

Those authorities, except the last, apply the doctrine as well to assignments *inter vivos* as to *donatio mortis causa*. This Court, however, has adopted a different principle as to contracts *inter vivos*, as in the case of *Burton v. Farinholt, supra*. But as its application to a *donatio causa mortis* is an open question in this State, we are at liberty to adopt the principles enunciated in Schouler as above, which we do, because it is consistent with justice and equity, and the spirit of our existing system of jurisprudence.

There is no allegation in the complaint that these bonds, etc., were necessary for the payment of debts. Whether that is an objection that might be taken on demurrer, we do not decide. There is no demurrer in the case, and the question of insolvency was one of the elements of the plaintiff's ownership and right to recover, and there was proof that the estate of plaintiff's intestate was insolvent.

Our conclusion is, that the plaintiff had the right to recover the bonds and mortgages in controversy, and after applying them to the satisfaction of the debts of the intestate, to pay over to the defendant any balance that may remain.

The judgment of the Superior Court is reversed, and this opinion must be certified to the Superior Court of Hertford County, that an account may be taken of the indebtedness of the estate of James Kiff, and the assets that have come, or ought to come, into the hands of the plaintiff as his administrator, applicable thereto, to the end that

a final judgment may be rendered in the cause in conformity to this opinion.

Error. Reversed.

Cited: Jenkins v. Wilkinson, 113 N.C. 535; *Bresee v. Crumpton,* 121 N.C. 123; *Thompson v. Osborne,* 152 N.C. 410; *Trust Co. v. White,* 189 N.C. 283; *Hunt v. Eure,* 189 N.C. 487; *Trust Co. v. Trust Co.,* 190 N.C. 471; *Lister v. Lister,* 222 N.C. 560.

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(283)

P. E. PITTMAN, EXECUTRIX, v. C. A. CAMP, ET AL.

Evidence—Communications, etc., under Sec. 590.

1. It is not error to allow the plaintiff to ask one of his witnesses where he lives, with the purpose of showing that he lives with the defendant, when the Court does not allow the fact to be used to impeach the witness.
2. An executor is competent to testify to transactions between his intestate and the defendant of which he has knowledge, which are in favor of the estate of the intestate and adverse to the defendant.

CIVIL ACTION, heard before *Shepherd, Judge,* and a jury, at Spring Term, 1886, of the Superior Court of HALIFAX County.

The parts of the case settled upon appeal, necessary to understand the opinion of the Court, are as follows:

"In order to prove that defendant Camp had used part of the crop made on testator's land in 1883, the plaintiff introduced a witness, Henry Arrington, who testified, "I lived on testator's place the year he died. I hauled nine bales of cotton the fall of 1883, to Enfield for Camp." Upon his cross-examination, he testified, "Mr. Pittman, (meaning plaintiff's testator), had turned over the control of the plantation to Mr. Camp, first week in May, 1881." On his re-direct examination witness testified: "Mr. Pittman said he had given everything up to Mr. Camp." As soon as the witness had made the last answer, plaintiff's counsel asked him: "Where do you live now"? the defendants objected to the question, on the ground that it was only competent to impeach the witness, which plaintiffs could not do, and asked if that was not the purpose.

Plaintiff's counsel replied, "Your Honor can well see why I asked it," and made no further explanation. The Court admitted the answer, but not for the purpose of impeaching the witness, nor was the answer used for such a purpose in the argument of counsel, or during

the trial. Defendants excepted, and witness then answered: "I live at Mr. Camp's."

In order to disprove the contract set up by the defendant (284) Camp, the plaintiff, who is the executrix of the testator, and a legatee under his will, was introduced as witness for plaintiff, and after objection by the defendant, was permitted to testify as follows: "I saw my husband, (meaning her testator,) pay money to Camp; sometimes Camp would ask for money to pay hands; heard him ask for it."

For the same purpose, she was further permitted to testify, after objection by defendant, that "testator sold cotton in the summer of 1883; crops of 1881 and 1882, sold by Camp; my husband was afflicted, and had to get Camp to do it. He would bring the money and give it to my husband. In 1883, I don't know what he did with the money. In 1883, I heard my husband tell Camp that he wanted to have him, (my husband,) like he, (Camp,) was when he came there; that he had to go to him for all the money he got. Camp said yes. Mr. Pittman said he would show him that when the twenty bales of cotton was sold, he intended to have some. This conversation was some time before the cotton was sold."

The defendant excepted to the foregoing evidence, so far as it recited a conversation or transaction between the testator and the defendant Camp, in witness's presence. The Court ruled that she could testify as to any declaration made by Camp, although such declarations were made in a conversation between Camp and the testator. Defendants excepted.

Camp was alive at the trial, and testified in this action, denying the testimony of Mrs. Pittman, the plaintiff.

Verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. R. O. Burton, Jr., and W. H. Day, for the plaintiff.
Mr. John A. Moore, for the defendant.

MERRIMON, J. (after stating the facts). The question "where do you live?" and the answer to it, were of slight importance in any view of them. The evidence elicited was not irrelevant, (285) because it tended to identify the witness, and to show in some slight degree, his opportunity to be informed in respect to the matter about which he was testifying. If it tended to impeach the witness at all, as perhaps it did very slightly, it did so remotely and incidentally. The Court did not allow the question to be answered with the view to impeach, nor was the answer so used on the trial. So that, the exception in this respect, cannot be sustained.

The plaintiff testified as to what the defendant said to her intestate in his lifetime, and as to transactions between them, of which she had knowledge. It is obvious that she was not testifying adversely to her intestate, but against the defendant, and he was present and competent to testify in his own behalf, and contradict her. Indeed, he was examined, and did so, and hence suffered no prejudice.

It is not the purpose of the statute, (The Code, Sec. 590,) to exclude evidence "concerning a personal transaction or communication" between a surviving party and a deceased person, where the executor or administrator of the latter sues the surviving party, and offers to testify on the trial as to such "transaction or communication." The purpose is to prevent the surviving party from testifying in such respect, because, the deceased person, whose estate is to be affected, cannot be present to testify in his own behalf. The statute cited, expressly provides that such evidence cannot be given "*except* where the executor, administrator, survivor, committee or person so deriving title or interest, is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." *Peacock v. Stott,* 90 N. C., 518.

In this and like cases, the defendant is on the same footing as if the deceased party were alive and testifying in his own behalf. This exception of the appellant is therefore groundless, and the judgment must be affirmed.

No error. Affirmed.

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(286)

W. H. MORRIS & SONS v. T. J. E. HOCKADAY, ET AL.

Interest—Usury—Place of Contract.

1. If no place is agreed on for the performance of a contract, the *lex loci contractus* governs. If the place of performance is agreed on, the *lex loci solutionis* governs.
2. Where a bond was dated in North Carolina, but had no specified place of payment, *It was held* that it was governed by the usury laws of this State, and it is immaterial that the pleadings admit that the bond was delivered in Virginia.
3. If, in such case, it had appeared that the bond was given for goods purchased in Virginia, the rule would be different.
4. *Quaere,* whether the contracting parties can agree on a rate of interest, legal where the contract is made, but illegal where it is to be performed.

MORRIS *v.* HOCKADAY.

This was a CIVIL ACTION, heard before *Shepherd, Judge,* at Spring Term, 1886, of HALIFAX Superior Court, upon a demurrer filed by the plaintiff to the answer of the defendants.

The pleadings in the case are as follows:

1. That the plaintiffs, W. H. Morris, F. Morris, V. Morris and S. B. Morris are partners, trading under the firm name of W. H. Morris & Sons and have been such partners since on and before the 26th day of April, 1883.

2. That on the 26th day of April, 1883, the defendants, for value received, promised in writing, to pay to the order of the plaintiffs, under their firm name, the sum of four hundred and thirty-five dollars and sixty-five cents, on or before November 1st, 1883, with eight per centum interest from date. The following is a copy of said written promise:

$435.65. GASTON, N. C., April 26th, 1883.

On or before November first, 1883, we, or either of us, promise to pay to W. H. Morris & Sons, or order, four hundred and thirty-five dollars and sixty-five cents, with interest from date at 8 per cent. per annum. Value received.

THOMAS J. E. HOCKADAY, [Seal.]
SUSAN A. HOCKADAY, [Seal.]

3. That no part of said four hundred and thirty-five dollars (287) and sixty-five cents has been paid.

Wherefore the plaintiffs demand judgment against the defendants for the sum of four hundred and thirty-five dollars and sixty-five cents, with eight per centum interest thereon from the 26th day of April, 1883, till paid, and for costs.

The defendants, Thomas J. E. Hockaday and Susan A. Hockaday, answering the amended complaint of the plaintiffs, say:

1. That the first section thereof is true.

2. Answering the second section of plaintiff's complaint, these defendants say, that they did promise in writing on the 26th day of April, 1883, to pay to the plaintiffs, on or before November 1st, 1883, the sum of four hundred and thirty-five dollars and sixty-five cents, with interest at eight per centum per annum from date, but allege that the said promise in writing was delivered to plaintiffs, at the city of Norfolk, State of Virginia, and they are advised and believe, that the rate of interest collectable on said instrument, was regulated and governed by the laws of Virginia, and that said laws do not allow eight per cent. interest on such contracts as that described in the

pleadings; that where more than six per cent. is charged, no interest can be collected.

Wherefore the defendants demand judgment that they go hereof without day and recover their costs of the plaintiffs, and for such other and further relief as may be just.

The plaintiffs demur to the second section of the defendants' answer for insufficiency, in not stating facts sufficient to constitute the plea or defence of usury therein attempted to be set up, in this:

1. That there is no allegation that the debt for which the promissory note sued on was given, was contracted in the State of Virginia.

2. That there is no allegation that said note was made or executed in the State of Virginia.

3. That there is no allegation that the place of payment or performance of said note or contract was in the State of Virginia.

(288) 4. That there is no allegation that either of the makers or payees of said note lived in the State of Virginia.

5. That there is no allegation that said note was a Virginia contract, or other than what from its face and terms it is presumed to be, to-wit: a North Carolina contract.

Wherefore, the plaintiffs demand judgment against the defendants that the answer herein be dismissed, and that they recover of said defendants the sum of four hundred and thirty-five dollars and sixty-five cents, with eight per centum interest thereon from the 26th day of April, 1882, till paid, and for costs of this action, to be taxed by the Clerk.

His Honor sustained the demurrer, and gave judgment for the plaintiffs, from which the defendants appealed.

Mr. John A. Moore, for the plaintiffs.
Mr. A. J. Burton, filed a brief for the defendants.

ASHE, J. (after stating the facts). The note sued on bears date at Gaston, N. C., and the rate of interest expressed upon its face is eight per cent.

The defendants insist it is a Virginia contract; that the note was delivered to the plaintiffs at Norfolk, Virginia, and that they are advised and believe, that the rate of interest at eight per cent. is not allowed by the law of that State.

The defendant, by his demurrer, admits the fact to be true as stated, but contends that even if true, it does not make out a legal defence to his action. This presents for our consideration the question, whether the law of Virginia or of North Carolina governs the contract.

The following principles seem to be settled by the current of authorities: when a contract is made to pay generally, it is governed by the place where the contract is made. 1 Daniel on Negotiable Instruments, Sec. 881, *Arrington v. Gee,* 27 N. C., 590.

But when a contract states that the parties had in view another place where the contract was to be performed, the law of that place would govern. *Arrington v. Gee, supra.*

In other words, if no place is agreed upon for the performance (289) of the contract, the *lex loci contractus* prevails, and if the place of performance is stipulated, the *lex loci solutionis* governs. But Judge STOREY holds, that if a note be made *bona fide* in one place, expressly having an interest legal there, and payable in another place, in which so high a rate of interest is not allowed, it may be sued in the place where payable, and the interest expressed recovered, because the parties had their election to make the interest payable according to the law of either place; or to express the same thing differently, they may lawfully agree upon the largest interest allowed by the law of either place. If this be law, and it must be admitted it is very high authority, then there can be no question that the plaintiffs had the right to recover the amount of the note, with eight per cent. interest, but this principle is controverted by authorities equally high, and we do not undertake to reconcile the discrepancies, for we do not consider it necessary to resort to that principle in order to sustain the judgment of the Superior Court. For the principle is concurred in by all the authorities, that when no place is fixed by the contract for its performance, the *lex loci contractus* must govern the contract. In *Arrington v. Gee, supra,* Ch. J. RUFFIN used the following language: "For debts have no *situs,* and are payable everywhere, including the *locus contractus;* and therefore the law of that place shall govern, since it does not appear from the contract, that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the debt, unless it be that where the creditor may be found, since the debtor must find the creditor for the purpose of making payment. But manifestly this last can never be adopted, because it would vary with any change of domicile or residence of the creditor." Then, as was observed by Lord Brougham in *Dow v. Lippman,* 5 Clark & Fin. 1, "a contract payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it was expressed to be there payable. Being payable everywhere, the rule of interest must be determined by (290) the law of the origin, since there is nothing else to give a rule."

The doctrine here enunciated, is fully sustained by 1 Daniel on Negotiable Instruments, Sec. 881; 2 Parsons on Contracts, 586, 589; 2 Kent Com., 457; Story Conflict of Laws, Sec. 272.

But the defendants insist that their note was under seal, and the contract was not consummated until a delivery, and it is alleged, and admitted by the demurrer, that the note was delivered to the plaintiffs in Norfolk, Virginia. But we think that is altogether immaterial. If the defendant had stated in his answer, that the note was given to secure the payment of goods purchased by the defendants from the plaintiffs, who were merchants of the city of Norfolk, there would have been some force in the contention—for it is laid down in 2 Parsons on Contracts, 586, "if a merchant in New York comes to Boston to buy goods, and then returns there and gives his note for them, which specifies either Boston, or no place, for payment, it is a Boston transaction." But here there is no allegation that the plaintiffs at the time of the delivery of the bond, were residents of Norfolk, nor that the note was given in fulfilment of any contract made with them as citizens of that State. For aught that appears from the answer, the plaintiffs may have been residents of this State, or of some other State besides Virginia, and therefore, in the absence of any such allegations in the answer, and the bond on its face purporting to be a North Carolina contract, there is nothing in the answer to prevent the application of the rule of *lex loci contractus.*

Our opinion is, there was no error in the judgment of the Superior Court, and it is therefore affirmed.

No error. Affirmed.

Cited: Bank v. Land Co., 128 N.C. 194.

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(291)

WM. SEAY ET AL. v. WESLEY YARBOROUGH.

Appeal.

1. Where it appears that the papers had been taken from the Clerk's office, to enable the trial Judge to make up the statement of the case on appeal, but had not been returned in time for the appellant to get the transcript to this Court in time, a *certiorari* will be issued to bring up the appeal.
2. The Court papers should not be taken from their proper places, and the practice of removing them leads to confusion and delay.

CIVIL ACTION, tried before *Gilmer, Judge,* at Spring Term, 1885, of the Superior Court of HAYWOOD County.

SEAY *v.* YARBOROUGH.

At the last Term of this Court, the plaintiffs, (the appellees), moved to docket and dismiss the appeal, under Rule 2, Sec. 8, and at the same Term, after notice to the plaintiffs, the defendants moved to re-instate the appeal and for a writ of *certiorari*.

The facts appear in the opinion.

Mr. M. E. Carter, for the plaintiffs.

Messrs. Jos. B. Batchelor and Jno. Devereux, Jr., for the defendants.

MERRIMON, J. It appears that at the Spring Term, 1885, of the Superior Court of the county of Haywood, the plaintiff obtained judgment against the defendant, from which the latter took and perfected an appeal to this Court, but he failed to bring the same up to the last October Term, as regularly he should have done.

At the last mentioned Term of this Court, the appellee moved upon the certificate of the Clerk of the Superior Court, under Rule 2, Sec. 8, to docket and dismiss the appeal, which motion was then allowed.

Afterwards, during the same Term, the appellant gave notice (292) of a motion to be heard at the present Term, to set the order dismissing the appeal aside, and reinstate the latter upon the docket. He also filed his petition, stating in substance, that he had failed to bring up his appeal regularly, because the Court papers in the action had been taken from the proper files in the office of the Clerk, to enable the Judge to settle the case upon appeal; that the latter had failed to return the papers, and had not settled the case as he ought to have done, and hence, the Clerk could not send up a transcript of the record, nor could the appellant procure the same to be sent, or brought by himself, and he demanded proper relief, etc.

The material facts are in effect admitted, but the appellee insists that the appellant failed to state his case upon appeal within the time prescribed by law, and had not been prompt to urge the Judge to settle the case and return the Court papers to the office of the Clerk. It appeared, however, that the appellant's counsel did state the case upon appeal, shortly after the term of the Court at which it was taken, and served the same upon the counsel of the appellee, and the latter suggested amendments to the same, and delivered the case stated and the proposed amendment thereto, to the Judge, to be settled, and the Court papers were also handed to him. The counsel of both parties being present, agreed that the Judge should settle the case. It was stated in the argument, and not denied by the appellees' counsel, that the appellant had paid the costs of the certificate and the motion to dismiss the appeal.

The objection that the case upon appeal was not stated by the appellant, within the time prescribed by law, is without force, because the appellees' counsel suggested amendments thereto, and agreed that the Judge should settle the case. Obviously this was a waiver of such ground of objection. *Walton v. Pearson,* 82 N. C., 464.

The record was mainly in the papers of the action, and these the Judge had away from the file, so that the Clerk could not
(293) prepare and send to this Court a transcript of it within the time and as the statute required him to do, nor could the appellant, for the same reason, procure a transcript and bring it up himself.

We observe that much confusion and trouble grows out of the very prevalent practice of taking the papers in the action from their proper files, and away from the place where the court is held. Such practice ought not to be encouraged by the Court. The law contemplates that such papers are to remain on the files and in the proper places of deposit, and securely kept by the Clerk of the Court. In some cases they may be removed, but they should be removed only in the cases and strictly in the way allowed by law. This is the more important, as ordinarily, the record is in, and made up from the papers, when necessary to use properly certified transcripts of it out of the Court to which it belongs. If what the papers contain is needed, copies should be taken. *State v. Hunter, ante,* 829.

Frequent and grievous complaints come before us, that the papers in the action have been taken from the proper files, and kept away from the custody of the Clerks for months—sometimes, that they have been lost or mislaid, to the serious detriment of the parties interested. Such evil ought to be corrected promptly.

It was insisted on the argument, that the appellant failed to bring up his appeal to the term of this Court next after it was taken, and that he had not been vigilant in urging the Judge to settle the case and return the papers of the action to the Clerk's office.

We have seen that he could not bring up the appeal, and by no fault of his own. It was scarcely decent or proper for the appellant to urge the Judge to do his duty promptly—it was not his duty to do so; he had the right to expect the Judge would do his duty within a reasonable time, and he was not bound to take action until the term of this Court to which the appeal should have come. It appears that the case had not been settled, nor had the papers been returned as late as the 16th of December, about the time the circuit to which the appeal belonged, was called at the last October Term; but in
(294) a letter from the Judge to the Clerk of the Superior Court, dated 23rd November last, he says, "I'll do my best to get it

(the case settled upon appeal) in time for you to copy and send up." The appellant might therefore reasonably have hoped, up to the time of the filing of this application, that the appeal would come up during the Term. This certainly was reasonable excuse for failing to make the application until a late day in the Term. *Sparks v. Sparks*, 92 N. C., 359.

It appears to our satisfaction, that it was not owing to the neglect of the appellant that his appeal failed to reach this Court at the last Term. The order dismissing the appeal at the instance of the appellee, must therefore be set aside, and the appeal reinstated on the docket, and the writ of *certiorari* must issue, commanding the Clerk of the Superior Court to certify to this Court, the record in the action mentioned in the petition.

It is so ordered.

HODGES BROS. ET ALS. v. H. T. LASSITER ET ALS.

Certiorari.

Where the appellant serves his case on appeal in apt time, and the appellee files objections to it, and the appellant at once notifies the Judge, and asks him to fix a time and place to settle the case on appeal, which the Judge fails to do, a *certiorari* will be granted to bring up the appeal.

MOTION by the plaintiff for a writ of *certiorari*, heard at the February Term, 1886, of the SUPREME COURT.

The action was tried at Spring Term, 1885, of the Superior Court of HERTFORD County, before *Shipp, Judge*, and a jury, and resulted in a judgment for the defendant.

The facts appear in the opinion.

Messrs. B. B. Winborne and R. B. Peebles, for the plaintiffs.
Messrs. D. A. Barnes and W. D. Pruden, for the defendants.

MERRIMON, J. It appears that a judgment was entered (295) against the appellants in the Superior Court, from which they appealed. Their counsel duly stated their case upon appeal for this Court, and served a copy thereof on the appellee's counsel, who objected to the same, and suggested amendments in writing thereto. The Judge who presided at the trial, was promptly notified of such disagreement, and requested to designate a time and place when and where he would settle the case upon appeal. This he neglected to do.

Shortly afterwards, he was reminded by the appellants counsel that he had failed to settle the case, and he was again requested to do so, but he still failed and refused in that respect, for what cause does not appear.

The appeal was brought up to the last October Term of this Court, and at that term, the appellant applied for the writ of *certiorari*, to be directed to the Judge, commanding him to settle the case upon appeal, and certify the same to this Court.

The facts are not disputed, and accepting them as true, it was the plain and imperative duty of the Judge to settle the case upon appeal, after having given the counsel of the parties notice of the time and place when and where he would do so. That he did not, is matter of surprise to us. We cannot suppose, and hesitate to believe, that a Judge would wilfully refuse or neglect to discharge a plain official duty. We prefer, in the present state of the matter, to attribute his apparent neglect to some misapprehension of fact, or excusable inadvertence, which he will no doubt be prompt to correct upon notice, and it is probable that he will at once settle the case according to law. In any case, he should have opportunity to do so, before granting such measure of relief as would imply a gross neglect of duty on his part.

We do not deem it necessary here, to indicate the precise remedy applicable in possible cases, where the Judge wilfully refuses to settle a case upon appeal. It will be sufficient for the present, to grant the writ of *certiorari*, to be directed to the Clerk of the Superior Court,

(296) commanding him to certify to this Court the case settled upon appeal, when and as soon as the Judge shall file the same, and to certify a copy of this opinion to the Judge whose duty it was to settle the case. If then he shall still fail and refuse to do so within a reasonable time, the appellant will be at liberty to apply for further relief in this behalf. It is so ordered.

Certiorari ordered.

Cited: Chozen Confections v. Johnson, 220 N.C. 433.

STATE ON THE RELATION OF SCOTT & BURTON, ET AL. v. JOS. G. KENAN, SHERIFF, ET ALS.

Personal Property Exemptions—Complaint—Sheriff's Bond—Stare Decisis—Partnership.

1. Where a complaint alleges that a judgment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond, and a motion to dismiss because the complaint does not state facts sufficient to constitute a cause of action was properly refused.
2. One partner, with the assent of the other, is entitled to have a personal property exemption allotted to him out of the partnership property before the partnership debts are paid, and it is immaterial that he has individual property sufficient to make up the exemption.
3. The Court will adhere to former decisions, although not fully satisfied by the reasoning by which the conclusion is reached, unless it is clearly wrong, and calculated to lead to mischievous consequences unless corrected.
4. Each partner has a right, for his own exoneration, to have the partnership property applied to the payment of the joint debts, but the partnership creditors have no such equity.
5. The refusal of the sheriff to lay off the personal property exemption to a debtor on whose chattels he has levied, is a breach of his official bond, and an action thereon lies in favor of such debtor.

CIVIL ACTION, tried before *Boykin, Judge,* and a jury, at November Term, 1885, of the Superior Court of DUPLIN County.

This suit was commenced by the issue of a summons on the (297) 25th day of April, 1885, for a cause of action thus set out in the complaint. The defendant, Kenan, having been elected sheriff of Duplin County, on February 11th, 1885, as principal, and the other defendants as sureties, executed an official bond in the penal sum of $5,000, with condition required by law, which was accepted, and he inducted into office. A copy of the bond is annexed to the complaint. The plaintiffs, Jos. L. Burton and Ira J. Scott, constituting the partnership firm of Scott & Burton, on January 29th, 1885, made an assignment of their stock of goods to the plaintiff, Grisham, in trust, to secure certain debts due by them to the creditors therein named.

It is unnecessary to set out the answers, and the substance of the complaint only, is given below, because one of the exceptions is to the denial of the motion to dismiss, made upon the grounds that the complaint in the case "does not state facts sufficient to constitute a cause of action, founded on the sheriff's bond, against him and his sureties, in that no breach of it is shown."

The facts out of which the exceptions presented in the appeal arise are as follows:

The plaintiffs were partners in trade, and bought a bill of goods for a considerable amount, of the firm of Brown & Roddick, of the City of Wilmington, who recovered a judgment against the plaintiffs for the same, and on which an execution issued and was levied by the defendant sheriff, and the goods sold to satisfy the debt—the sheriff having previously demanded a bond of indemnity of Brown & Roddick, which was given. Separate actions were brought by the members of the plaintiff firm, but, on motion of the defendants, they were consolidated into one action, by order of the Court.

The plaintiffs, before said sale, had made an assignment, alleged to be fraudulent, to J. W. Grisham, who was also made a party plaintiff at the instance of Scott & Burton, and who was in possession of the goods, as their trustee, at the time of the levy and sale.

(298) After stating the election, qualification and induction of the defendant sheriff into office, the plaintiffs further allege in their complaint substantially as follows:

1. That the defendant sheriff executed a bond in the penal sum of five thousand dollars with the other defendants as sureties, with the following condition, to-wit:

"Now, therefore, if he shall well and truly execute and due return make, of all process and precepts to him directed, and pay out and satisfy all fees and sums of money by him received or levied by virtue of any process, into the proper office into which the same by the tenor thereof ought to be paid, or to the person or persons to whom the same shall be due, his, or her, or their executors, administrators, attorneys, or agents, and in all things will truly and faithfully execute the said office of sheriff during his continuance therein, then this obligation to be void, otherwise to remain in full force and effect."

(Signed and sealed by the sheriff and sureties.)

2. That the plaintiffs Ira J. Scott and Joseph L. Burton were doing business as partners, under the firm name of "Scott & Burton."

3. That on the 29th of January, 1885, Scott & Burton made an assignment to their co-plaintiff, J. W. Grisham.

4. That thereafter, to-wit, on the 5th of March, 1885, Brown & Roddick obtained judgment against Scott & Burton, and caused execution to be issued thereon and placed in the hands of the sheriff, who levied upon and sold the said goods thereunder.

5. That, after said assignment, and prior to said sale, each of the plaintiffs, Scott and Burton, with the consent of the other, claimed his personal property exemption, but the sale was made without laying off the same.

The plaintiffs demand judgment for five thousand dollars, to be discharged upon the payment of damages, and for general relief.

The defendants alleged, among other things, that Scott & Burton had themselves retained of their personal property, more than sufficient to cover their personal property exemption at the time (299) of making said assignment and sale.

The case coming on to be heard, the defendants moved to dismiss the action, upon the ground that the complaint does not state facts sufficient to constitute a cause of action against the sheriff and his sureties, in that no breach of the conditions of the bond is shown, and, upon argument of the matters of law arising, the Court overruled the motion and the defendants excepted.

The defendants then moved for a continuance, on account of the absence of certain witnesses, by whom they expected to prove that the plaintiffs Scott & Burton, at the time of said sale, had themselves retained property sufficient to cover their personal property exemption, but the Court ruled that the evidence was immaterial and incompetent, and the defendants excepted; thereupon the trial proceeded and resulted in a verdict and judgment for the plaintiffs, and the defendants excepted and appealed.

Mr. W. R. Allen, for the plaintiffs.
Messrs. H. R. Kornegay and John Devereux, Jr., for the defendants.

SMITH, C. J. (after stating the facts). I. The motion to dismiss for the alleged defects in the complaint, was properly overruled. It avers a distinct breach of official duty, in refusing to set apart the personal property exemptions to each, and upon his demand and consent that the other partner might have his also allotted out of the partnership property, when there was none other, exceeding one hundred dollars in value, out of which an allotment could have been made. Instead of recognizing and giving effect to this constitutional right of the judgment debtor, secured to him also by statutory regulation, the sheriff sold all the property levied on, and applied the proceeds to the execution in his hands. These allegations show a breach of official duty, followed by damage to the debtor, which admits of redress by action.

II. The second exception, based upon the proposition that the (300) exemption could not be taken out of partnership effects, while there were partnership liabilities outstanding and unprovided for, is equally untenable. The contrary has been expressly decided in *Burns v. Harris,* 67 N. C., 140, where a doubt entertained at the hearing of the appeal in the same cause at the preceding term, is resolved, and

the law thus explicitly laid down by READE, J.: "One of two partners cannot have a portion of the partnership effects set apart to him, as his personal property exemption, without the consent of the other partner or partners. But if the other partner or partners *consent, this may be done.* The creditors of the firm cannot object, because they no more have a lien upon the partnership effects, than creditors of an individual have upon his effects. In our case, the partners did assent." We are asked, however, to reverse this ruling, as at variance with rulings in many other States, and as resting upon unsound reason. The cases referred to and discussed in a recent work, Thompson on Homesteads, Sec. 194, et seq., are *Pond v. Kemball,* 101 Mass., 105; *Yuptel v. McFie,* 9 Kans., 30; *Gaylord v. Inhoff,* 26 Ohio St., 317; *Russell v. Lennon,* 39 Wisc., 570; *Bonsall v. Conely,* 44 Penn. St., 447, and several cases arising under the bankrupt law, decided in the Federal Courts.

The author also cites cases in harmony with ours, and prefaces the introduction of this branch of the general subject of his treatise, with these words:

"Do the same principles apply, when a single partner claims exemption out of partnership effects, or when a partnership firm claims out of such assets, the exemption allowed to a single debtor? If the question were *res integra* we should feel no doubt it ought to be answered in the affirmative,"—assigning his reasons therefor.

The rule prevailing here, is fully vindicated, the author thinks, in the able opinion of PORTER, J., delivered in the case of *Stewart v. Brown,* 37 N. Y., 350, largely quoted in the work. We should be reluctant to overrule a decision made nearly sixteen years since,
(301) if the reasoning by which the result is reached was not entirely satisfactory to us; for considerations of the highest moment, demand that the Court adhere to its adjudications deliberately made, and to preserve confidence in the stability of the law, as declared, preserved, and to depart only when the decision is clearly wrong, and calculated to lead to mischievous consequences unless corrected. But the ruling now controverted, upon the basis of adverse adjudications elsewhere, commends itself to our approval, as both sound in principle, and in harmony with the law relating to partnerships, as declared in other cases. The general subject has been so recently considered, and the authorities examined in *Allen v. Grissom,* 90 N. C., 90, as to render further discussion needless. The separate partners have a right, in order to their own exoneration, to have the joint property applied to the joint debts, and in its exercise the joint creditors reap the benefits, but no such equity resides in the creditors, as such, to have their demands first satisfied. When the partner refuses to avail himself of

this equitable right, and consents to an appropriation of the common property to the personal and separate use of one of them, the result is the same as if there were no joint liabilities, and each had a perfect right to his own share.

Putting the partnership creditors out of the way, there can be no legal obstacle to what is in effect an actual partition between them of so much as each receives as his exemption. Why should it not be so? The joint creditors have no more right to shift the burden from the joint, and put it upon the separate property, to the injury of the individual creditor, than he has to do the reverse and put the burden upon the joint property, to the injury of the former. Upon principle, then, we uphold and abide by the ruling heretofore made, as resting upon sound reason.

It is further maintained that the refusal to set apart the exempt articles, is an omission not embraced in the condition of the bonds in suit.

The laying off the demanded articles, is a positive act enjoined upon the appraisers, whom the Sheriff *must summon* in order that this may be done, and this official duty is directly connected (302) with his execution of the process. Moreover, the statute expressly declares, that "any officer making a levy, who shall refuse or neglect to summon and qualify appraisers, as heretofore provided, or who shall fail to make due return of their proceedings, or who shall levy upon the homestead, set off by said appraisers or assessors, shall be liable to indictment for a misdemeanor, and he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action." The Code, Sec. 516.

While the action is specifically given to the owner of the homestead by name, in the concluding clause, the preceding part of the section, extends it to all cases before provided for, and as well to the claimant of exempt personal, as the claimant of exempt real estate.

The condition of the bond is, that the officer "shall well and truly execute and due return make, of all process and precepts to him directed," and the appointment of appraisers to set apart the exemption, is a duty connected with, and inseparable from, the execution of the process, and thus is embraced in the terms of the condition. If it were not specially mentioned, the present case might come within the general clause, that the officer "will truly and faithfully execute the said office of Sheriff, during his continuance therein," for the conduct complained of, is within the scope and purpose for which the bond is given, and properly finds its place among the specifications it contains.

The ruling in *Crumpler v. The Governor,* 12 N. C., 52, is not repugnant to a construction of the concluding words of the condition, which extends them so far as to embrace the present official misconduct, for it is in the range of the duties specified. In that case, four bonds had been given by the sheriff, as three are now required, The Code, Sec. 2873, each intended to secure the performance of distinct specified duties imposed upon the officer, and the decision is, that such general words do not run over the bond, and take in duties provided for in another and different bond, but are confined to such as partake (303) of the nature of those specifically mentioned in each. This interpretation is correct, for otherwise the penalty to secure one set of duties, might be absorbed in covering delinquencies in others. For instance, the process bond might be exhausted in recovering taxes, when the tax bond proved to be insufficient, and so might the latter, when the defaults in executing process overflowed the limits of its penalty, and thus take away, or diminish, the security for the collecting and accounting for public taxes. The bonds are, therefore, regarded as intended to be distinct and separate securities, for different classes of official responsibility, and the one not to interfere with the others. The same doctrine is maintained in *Eaton v. Kelly,* 72 N. C., 110, wherein it is said, "it may now be considered settled, that they, (such general words), relate only to the true and faithful performance of the sheriff in the matters above separately mentioned."

Again it is argued, that the reason assigned for the refusal to continue, that is, that the testimony denied, would not be a defence to the action, is an error in law, entitling the appellant to a new trial.

We do not mean to admit that an insufficient reason given for requiring the trial to proceed, and denying the motion to continue, subjects the action of the Court in a matter of discretion to review in the appellate Court, but we concur with the Judge that such proof could not defeat the action. It is immaterial how much, or what other personal estate, the debtor possessed, the statute gives him the right, when his property is seized under execution, to select such, not exceeding the limits in value, as he may prefer to retain as exempt, a right reasonable in itself, and in no way prejudicial to the creditor, since all not exempt is exposed to his demand. The Code, Sec. 507. And this preference extends alike to joint and several property, under the conditions before mentioned. The exceptions we have considered are all that appear in the record, and we pass upon none others.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Stout v. McNeill, 98 N.C. 4; *Thornton v. Lambeth,* 103 N.C. 89; *Long v. Walker,* 105 N.C. 110; *McMillan v. Williams,* 109 N.C. 256; *Richardson v. Redd,* 118 N.C. 678; *Gorham v. Cotton,* 174 N.C. 728; *Farmer v. Head,* 175 N.C. 275; *Grocery Co. v. Bails,* 177 N.C. 299.

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WM. P. FORTUNE v. CHARLES WATKINS.

Deed—Right of Wife to Dower—Specific Performance.

1. Where a vendee who was married before the dower and homestead Acts, makes a contract to buy land, bearing date before the passage of those Acts, but the deed is not made until after their passage, his wife is not entitled to dower or homestead in such land, unless he be seized of them at his death, and a deed for them without her joinder conveys a good title.
2. Where a deed is made in pursuance of a contract to convey, it is referable for its operation to the time of the contract which it undertakes to comply with.
3. A wife is entitled to dower, under the statute, in equitable as well as legal estates.
4. The surrender of an unregistered deed or bond for title, is effectual to restore the legal or equitable title to the vendor, as between the parties, when no intervening interests have attached.
5. If in a contract for sale of lands, the vendee knows that the vendor is a married man at the time the contract is made, he cannot refuse to take the title because the wife refuses to join, and a court of equity will force him to take such title as the vendor can give.
6. The defendant agreed to purchase certain lands from the plaintiff, for a part of which the plaintiff held his (the defendant's), bond for title, and it was agreed that the said bond should be destroyed when the payments were made. The plaintiff's wife refused to join in the deed; *It was held,* no defence to an action by the plaintiff to enforce the contract.
7. It is sufficient in actions for specific performance, that the vendor is able to make title at the time of the trial.
8. The refusal of a judge to order a reference for the purpose of taking testimony upon matters of equity addressed to him, after issues have been submitted to a jury, and a reference has been made in regard to other matters, cannot be assigned as error, as it is a matter addressed to his discretion.
9. Where the jury found that the vendor used "strategy" in bringing about a contract for the sale of land, but they further found that the defendant was capable to transacting business, and that the land was worth nearly as much as the vendee agreed to pay for it, a court of equity will not refuse to enforce the contract.

(305) CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Fall Term, 1884, of the Superior Court of BUNCOMBE County.

On the 25th day of August, 1874, the parties to the action entered into a mutual agreement for the sale and purchase of the tract of land mentioned in the complaint, in pursuance of which, the defendant then paid three hundred dollars, and executed his three several notes under seal to the plaintiff, payable at one, two and three years from date, each in the sum of eighteen hundred and thirty-three dollars, and all bearing interest from date; and the plaintiff gave the defendant his bond, in the penal sum of eleven thousand dollars, with condition for making him a good title in fee to the premises, on payment of all the purchase money. The contemporary payment was not made in money, but in executing a title bond to the plaintiff, for a small tract then owned by the defendant, and of that estimated value, which constitutes a part, and is embraced within the boundaries of the large tract described in the plaintiff's bond, and to be reconveyed with the other on the terms therein set out.

The note earliest maturing, was assigned to one E. Sluder, who, as such assignee, put it in suit and recovered judgment for the amount due.

The plaintiff brought his first action on the second note after it became due, but before the maturity of the last, and on April 19th, 1879, a second action was instituted on this last bond, which actions, by consent, at Spring Term, 1883, were consolidated; and thereupon the plaintiff, retaining his complaint in the first action, and entering a *nol, pros.* as to the second cause of action therein contained, with leave of the court, put in an amended complaint, appropriate to his last action. The several complaints demand judgment for the amount due on the two notes; for the recovery of possession of the land, the subject matter of the contract, by a sale of the premises if necessary; and for general relief.

The answer filed to this amended complaint, admits the execution of the notes—alleging, however, that the contract was brought
(306) about, and the defendant induced to enter into it, by the artful and false representations, importunities and undue influence practiced by the plaintiff, a sharp, shrewd man, of large business experience, upon himself, whose mind had become enfeebled by intemperate habits, unfitting him for the management of his affairs, and taking care of his own interests,—and further and especially, that the plaintiff is unable to make the title required by his bond.

The defendant entered into possession of the premises at the time of the contract, and had the use and profits until the latter part of the

year 1877, when, without objection, a receiver was appointed, and he refusing to accept, another, E. H. Merrimon, was by like consent, substituted in place of the other, possession was surrendered to him, and he permitted the plaintiff, as his tenant, to occupy the land, and appropriate the profits thereof to his own use.

The following issues were extracted from the contestant allegations, submitted to, and passed on by the jury, at Spring Term, 1884:

I. Was the defendant, at the time of the contract of sale drinking heavily, so that he was not in a condition to properly comprehend the effect of the transaction?

Answer—No, defendant competent to make the contract.

II. If so, did the plaintiff fraudulently induce him, while in such condition, to enter into said contract?

Answer—We find the plaintiff used strategy in making the trade.

III. What was the value of the land, mentioned in the contract, at the date thereof?

Answer—Five thousand dollars.

At the same time, this order was entered: "Ordered by the Court, with the consent of parties, that it be referred to George A. Shuford, Esq., an attorney of this Court, to investigate and report upon the title of the plaintiff to the land mentioned and described in the pleadings.

"He shall report to the present term of the Court, the evi- (307) dence offered before him, his findings of fact and conclusions of law."

The referee proceeded at once to execute the commission—gave notice to the parties and their respective counsel—heard the witnesses, and reduced their testimony to writing—and made his report, with the evidence, during the same sitting of the Court. The result is thus reported:

"From said evidence I find the following facts:

"I. That the land described in the pleadings in this action, and for which Wm. P. Fortune executed bond for title to Chas. Watkins on the 25th day of August, 1874, is the land described and embraced in the deed of said Fortune to said Watkins, and that the whole of said land is included in said deed.

"II. That a portion of said land, to-wit: 300 acres, more or less, is the tract of land, mentioned, described and conveyed in the deed from Thomas L. Harris and wife to W. P. Fortune, and is also the land described and released to said Thomas L. Harris, by indenture and mutual conveyance between him and Wm. F. Davidson, Executor of Abel Harris, and is the same described in the will and codicil of Abel

Harris, devised by him to the said Thomas L. Harris, subject to the division provided for in said will and codicil.

"III. That a part of said land, to-wit: about 30 acres, is included in the tract of land, mentioned, described and conveyed in the deed from Wm. F. Davidson, Executor of Abel Harris, to said W. P. Fortune, and is also included in, and is a part of, the tract of land described and released unto said Executor, by Thom. L. Harris, by indenture between them, herein filed, and also in the will and codicil of Abel Harris, and is a part of the land directed by him in said codicil to be sold by his executor, after the provision therein provided for.

"IV. That the two tracts of land above mentioned, as described in deeds from Thos. L. Harris and Wm. F. Davidson, executors of Abel Harris, to W. P. Fortune, constitute the old Abel Harris place on Swannanoa river, and are included in the lands described in the
(308) deeds from Mary Tate to Samuel W. Davidson, and from Samuel W. Davidson to Abel Harris.

"V. That Wm. P. Fortune, the plaintiff, and those under whom he claims, and those holding written deeds, by or through him, have been in the actual, open, notorious and exclusive possession of that part of the land sold by him to defendant, which is covered by said two tracts of land conveyed to said Fortune by Thos. L. Harris and Wm. F. Davidson, since the ...., 1829, under claim of title, and under known and visible lines and boundaries.

"VI. That W. P. Fortune contracted for and purchased the said tract of land conveyed to him by Thos. L. Harris, in the month of September, 1866, and that said Fortune gave a bond for title in the sum of $....., and that said Fortune paid the purchase money for said land on the 30th day of September, 1867, and obtained a deed of conveyance therefor.

"VII. That Wm. P. Fortune purchased the said land conveyed to him by Wm. F. Davidson, in the month of September, 1866, for the sum of $2,325, that said Fortune paid $1,000 of the purchase money in the month of September, 1867, and made payments on the remainder, at various times, until the year 1873 or 1874, when he paid the same in full. That at the time of the plaintiff's sale to defendant, and at the date of the commencement of this action, the legal title to said land was not in the plaintiff, but that the same was conveyed to him on the 28th day of March, 1883.

"VIII. That Abel Harris left surviving him his widow, Elizabeth Harris, and that said widow is now dead.

"IX. That the signature to the bond for title herein filed, is the signature of the defendant Charles Watkins, and that the same is his bond.

"X. That the remainder of the land described in the pleadings, and sold by the plaintiff to defendant, not included in the said conveyance from Thomas L. Harris and Wm. F. Davidson to said W. P. Fortune, is covered by said bond of the defendant Chas. Watkins to the plaintiff W. P. Fortune. That said Fortune purchased said land (309) from said Watkins on the 27th day of April, 1867, and fully paid the purchase money for the same, before the first day of January, 1868, but that no deed for said land has ever been executed to said Fortune by said Watkins.

"XI. That a parole agreement was entered into between the plaintiff and defendant, at the time the plaintiff re-sold said land covered by said bond, to the defendant, to the effect that the plaintiff should execute no deed for said land re-sold, but should surrender to the defendant his bond for title to said land, on the defendant's complying with the conditions of plaintiff's bond to him for the lands described in the pleadings.

"XII. That the plaintiff W. P. Fortune, married on the 7th day of July, 1859, and that his wife is still living, and that he has not been divorced from her.

"XIII. That the defendant knew at the time he purchased the lands described in the pleadings from the plaintiff, that the plaintiff was a married man, and did not ask that the plaintiff's wife should join in the bond for title or deed of conveyance, to be executed in pursuance thereof.

"XIV. That the plaintiff has endeavored to obtain his wife's signature to the deed herein tendered to the defendant, but she has not signed the same or any other deed for said land, and has refused to do so.

"XV. That the plaintiff is seized of other lands, outside of the land sold to the defendant, of a value greater than one thousand dollars."

The referee arrived at the following conclusions of law:

"I. That the portion of the lands described in the pleadings, which is covered by deeds from Thos. L. Harris and Wm. F. Davidson to the plaintiff, having been in the actual, open, notorious and exclusive possession of said Fortune, and others under whom he claims, for more than thirty years, under known and visible lines and boundaries, a grant from the State for the same, is presumed, and also all necessary mesne conveyances to Mary Tate.

"I. That the deeds of Mary Tate to Samuel W. Davidson, (310) from Samuel W. Davidson to Abel Harris, devise of Abel Harris to his executor and Thos. L. Harris, the deed of mutual conveyance between Wm. F. Davidson, Extr., and Thos. L. Harris, and deed from said Wm. F. Davidson and Thos. L. Harris to Wm. P. Fortune, are

properly executed, duly proven and registered, and are effectual to pass the title to said land therein described to the said Wm. P. Fortune, the last vendee, and that said Fortune is seized in fee simple of that part of said land included in the land described in the pleadings and sold to the defendant, and has a valid, complete and indefeasible title to the same.

"III. That the said W. P. Fortune having purchased said land previous to the passage of the statute of March 2nd, 1867, restoring the common law right of dower, and before the statutes creating a homestead in lands, he can convey the same free from dower and homestead of his wife, without her joining in the deed of conveyance.

"IV. That the plaintiff having acquired the land covered by the bond for title to him from defendant, by purchase from the defendant, he, the said defendant, is estopped in this action to deny that he has title in himself for said land.

"V. That the land covered by said bond for title from defendant, having been purchased subsequent to the act of March 2nd, 1867, restoring the common law rights of dower, and the purchase money therefor having been fully paid, before the dower act of 1868-'69, the same is subject to the dower of the wife of the said W. P. Fortune, as defined and enacted in said statutes of March 2nd, 1867, and cannot be defeated or divested by a conveyance of said land, executed by said Fortune alone, or a cancellation of said bond; but that the same cannot be set apart to her as dower, while her said husband is seized of other lands of one-half its value, including the dwelling or mansion house in which he usually resides.

(311) "VI. That the defendant having full knowledge of the marriage of the plaintiff at the time of his purchase from the plaintiff, he is not entitled to have a rescission or cancellation of said contract, as to compensation for the right of dower of plaintiff's wife in the land covered by said bond.

"I conclude and decide, therefore, on the question of plaintiff's title, that the plaintiff is able to make a good, valid and indefeasible title to that portion of the land described in the pleadings, which is covered by deeds to him from Thos. L. Harris, and W. F. Davidson, Executors, free and discharged of any right of dower or homestead of his wife, without her joining in the deed of conveyance.

"That the plaintiff is able fully to comply with his part of the contract of sale by him to the defendant, of all the lands described in the pleadings, and that the deed herein tendered by him to the defendant, is in full compliance therewith, and that he is entitled to a specific performance of said contract and every part thereof, so far as the issue of title is involved."

The defendant filed the following exceptions to this report:

"I. The deed from Thos. L. Harris to plaintiff, dated Sept., 1867, then carried the legal title to plaintiff, and being a married man at that time, his wife, who is still living, by force of the statute, became entitled to dower, no matter when the contract of purchase was made.

"II. That this is so, more especially, for the reason that the whole of the purchase money was not paid until the time when the deed and legal title were acquired.

"III. That as to the W. F. Davidson part, the contract was made in 1866, the purchase money paid in 1874, and the deed obtained in 1883, and the plaintiff's wife had her right of dower in same.

"IV. That the contract contained in the bond from defendant to plaintiff, was after the dower act of March 2nd, 1867, and that therefore the plaintiff's wife was entitled to dower in that part of the land.

"V. That it matters not what other land the plaintiff may now (312) have, he cannot affect his wife's marital rights in any part of any of his lands, without her consent.

"VI. That in addition to the dower rights of the wife, she has also her homestead rights, as given by Article X of the Constitution of the State, and they cannot be taken from her without her consent, given as prescribed in said Article.

"VII. That the Davidson deed was not acquired till 1883, nearly ten years after the contract to convey to Watkins.

"VIII. That the plaintiff never offered or tendered a deed till September, 1883, long after the suits were brought."

The defendant also filed the following exceptions:

"In the trial before *Judge Graves,* only the issues which were to be passed on by the jury were submitted to and found by them.

"But the matters of equity, addressed to the Court as a chancellor, were not passed on, or attempted to be passed on by the Court, and we now ask that a reference be had to take testimony on those points, or such other course as the Court may direct, particularly with reference to whether the enforcement of the contract would be a hardship on the defendant, or unreasonable, iniquitous or unconscionable."

His Honor declined to give such reference, for the reason, among others, that the parties had an opportunity before *Judge Graves* at the last term, of tendering other issues than those passed upon by the jury, and also introducing testimony which appeared not to have been done.

The defendant's counsel then offered to show, by proof, that no such opportunity was had at the last term of the Court before *Judge Graves,* which was not allowed.

The Court thereupon over-ruled the defendant's exceptions, confirmed the referee's report, and rendered judgment in favor of the plaintiff for the amount of the two notes, and directed a sale of the premises for the satisfaction of said indebtedness, unless the defendant should otherwise discharge it before the first day of next term.
(313) It was also referred to the Clerk to inquire and report the value of the rents and profits of the premises, since passing into the possession of the receiver, and used and enjoyed with his permission by the plaintiff, which amount it is declared shall be applied in reduction of the aforesaid indebtedness. From this judgment the defendant appeals.

Mr. J. H. Merrimon, filed a brief for the plaintiff.
Mr. Theo. F. Davidson, for the defendant.

SMITH, C. J. (after stating the facts). The exceptions to be reviewed, eight in number, may be resolved into four general propositions in law.

I. The deeds of Thomas L. Harris and William F. Davidson, though made in fulfilment of an executory agreement, entered into, in each case, while the dower right of the surviving wife was confined to lands whereof the husband was seized and possessed at the time of his death, were in fact executed after the change restoring the right of dower as it existed at common law; and therefore these tracts were encumbered by the right of dower of the plaintiff's wife, contingent upon her survivorship.

II. The lands are further liable to her contingent claim of homestead, for the like reason.

III. The tract, mentioned in the defendants bond for title given to the plaintiff, is similarly encumbered, inasmuch as the dower right attached to the equitable estate thus vested in the plaintiff, and could only be restored to the defendant by her deed relinquishing it.

IV. No deed was tendered until in September, 1883, after both suits had been instituted.

1. The force and legal effect of the agreement and the rights and duties arising under them, must be determined by the law prevailing when they were made. The right of the vendee to have such title as the vendor could *then convey,* and the capacity of the vendor to convey his estate, free from the claims of dower or homestead
(314) afterwards given, in other words the absolute dominion of the owner over his own property, is too well settled to be open to controversy, and we will only refer to some of the adjudged cases.

Sutton v. Askew, 66 N. C., 172; *Wesson v. Johnson,* 66 N. C., 189; *Bunting v. Foy,* 66 N. C., 193.

The same doctrine applies to the homestead exemption. *Bruce v. Strickland,* 81 N. C., 267; *Reeves v. Haynes,* 88 N. C., 310.

From this it results, that a contract to convey, followed by a deed of conveyance, rests upon the same principle, and the deed is referable for its operation, to the time of the contract which it undertakes to comply with. *Bunting v. Foy, supra.*

These remarks dispose of the two propositions which embody the first three exceptions.

II. The fourth and fifth exceptions, comprised in the third proposition, rest upon a different basis, and are not entirely free from difficulty. The execution of the bond for title by the defendant to the plaintiff, transferred to him an equitable estate in the tract which it embraced, and to this the wife's inchoate right of dower at once attached, for, under the statute, she is endowable equally in trust and legal estates. The Code, Sec. 2103. This right, contingent upon her surviving her husband, can only be divested by a deed executed by both, in the manner prescribed for the conveyance of a *feme covert's* real estate. Her refusal to unite in the deed, creates the obstacle in the way of his passing the estate in this part of the land unincumbered, as seems to be provided in the plaintiff's bond. The referee finds that it was agreed by parol between the parties, at the time of executing the bond for title and the notes for the remaining purchase money, that the plaintiff should not make a deed for this part of the land, but should, instead, surrender to the defendant his title bond, in executing the contract to convey, when the purchase money was paid.

While this oral understanding, part of the general agreement carried out in the execution of the title bond and of the notes, cannot be allowed to control or modify the plaintiff's positive stipu- (315) lation to make title to all the land, including this with the other, it is a proper matter to be considered in determining whether coercive relief shall be refused, because of an objection founded upon this defect. The parties understood that the restoration of title to this part, was to be effected by the surrender to the defendant for cancellation of the executory contract, and such is the legal effect of this action, as between the parties themselves, and the principle is applied to an unregistered deed, given up to the maker and destroyed, when no intervening interests have attached to be affected thereby. So it is decided in the cases cited in the plaintiff's brief. *Hare v. Jernigan,* 76 N. C., 471; *Miller v. Tharel,* 75 N. C., 148; *Davis v. Inscoe,* 84 N. C., 396; *Austin v. King,* 91 N. C., 286.

But aside from the uncertainty of any future disturbance from an assertion of the dower right, dependent as it is upon the wife's surviving her husband, and choosing to demand that it be laid off upon this particular part, while other land, with the mansion house upon it, is open to her claim, the defendant, as the referee finds, at the time, knew that the plaintiff was a married man, and did not require that his wife should be a party to the agreement, nor anything more of the plaintiff, than his execution of the bond, and that with an understanding that the return of his own covenant to make title should be a compliance with the plaintiff's contract as to this tract, the legal estate in which remained in himself.

A recent author, referring to a demand of the vendee for specific performance of a contract to convey land, uses this language: "If the vendee knows that the vendor is a married man, he knows that his wife is entitled to dower, and that she cannot be compelled to release her dower right; and entering into the contract with such knowledge, he is not entitled, within the doctrine as well established, to ask any thing more than the husband can give. It is the vendee's knowledge, and not any notion of making a new contract for the
(316) parties, which prevents the purchaser from obtaining compensation. On the other hand, if the vendee entered into the contract in ignorance that the vendor was married, and under the supposition that the vendor could give an unencumbered title, then he ought to have a specific performance with an abatement from the price." Pomeroy on Specif. Perform., Sec. 461.

While this is said of a vendee seeking to have the vendor's contract executed, and does not apply to a case where the relation of the parties is reversed, and relief is demanded by the vendor against the vendee, it nevertheless asserts a proposition not altogether foreign to the present controversy. The present action looks to a judicial appropriation of property in the hands of a creditor, retained as security for his debt contracted in the purchase, to the discharge of the debt, if necessary.

As vendor and vendee stand in many respects in the same relation as mortgagee and mortgagor, when the estate is retained and held as a security for the purchase money of land, the action in this feature, is very like that of a proceeding for foreclosure and sale, and should be treated upon the same equitable principle.

We think, therefore, that the defendant will be sufficiently protected by the plaintiff's warranty deed, with covenants against encumbrances, present and prospective.

The last exception, based upon the plaintiff's failure to tender his deed before bringing suit, is untenable.

The rule is well settled, that it is sufficient if the vendor is able and prepared to convey title, even at the trial. *Hepburn v. Dunlop,* 1 Wheat. (U. S.), 179, 2 Story Eq. Jur., Sec. 777; *Hughes v. McNider,* 90 N. C., 249.

The refusal of the Judge to allow a reference for the purpose of taking testimony upon matters of equity addressed to him, after the submissions of issues of fact to the jury and their rendering responses thereto, and after the consent order of reference as to the plaintiff's title, rested in his discretion, and is not a reviewable error in law.

The parties went to the jury upon all controversies about (317) the facts deemed by them to be material, and the equitable functions of the Court are called into exercise upon their findings. The application was not allowed, for the reason that an opportunity had been afforded for the submission of all inquiries, if deemed material, and not being made use of when offered, the defendant cannot, of right, afterwards require the re-opening of controversies that ought then to have been settled. The reason assigned sustains the action of the Court.

The last and remaining inquiry, is as to the effect of the finding, that the plaintiff employed "strategy in bringing about the agreement," a term used in the operations of armies, conducted by a skilful commander, and implying tact and art in military manœuvering, and is not very appropriate to the transactions of civil life. If artifice and fraud were resorted to and used in inducing the contract, it would not be enforced against the wronged party. But in the light of the further finding, that the land was at the time worth $5,000, nearly as much as the price agreed to be paid, and that the defendant was "competent to make the contract," it must be inferred that the jury meant to say in their verdict, that it was brought about by acts, and perhaps representations, not in themselves unlawful, but such as are common to persons entering into contract relations, each endeavouring to make the best terms for himself in the transaction. Putting this interpretation upon the verdict, in the use of the term, it interposes no impediment in the way of enforcing performance of the contract. If it was intended to convey a meaning incompatible with fair dealing, and approximating to that conveyed in the word "stratagem," which implies artifice, trickery, deception, and perhaps even positive fraud practiced, it is enough for us to say, we are unable, in connection with associate findings, to give it this sense, and thus debar the plaintiff of redress. The verdict determines the facts, and we are not at liberty to go outside of it in search of others. *Shields v. Whitaker,* 82 N. C., 516; *Leggett v. Leggett,* 88 N. C., 108; *Wessel v. Rathjohn,* 89 N. C., 377; *Worthy v. Shields,* 90 N. C., 192.

(318) Upon a consideration of the whole case, we find no error, and must affirm the judgment. Modified as suggested in the opinion.

No error. Modified and affirmed.

Cited: Hobson v. Buchanan, 96 N.C. 446; *Gilmore v. Bright,* 101 N.C. 387; *Edwards v. Dickinson,* 102 N.C. 524; *Taylor v. Taylor,* 112 N.C. 31; *Gorrell v. Alspaugh,* 120 N.C. 368; *Farthing v. Rochelle,* 131 N.C. 568; *Rodman v. Robinson,* 134 N.C. 505; *Redding v. Vogt,* 140 N.C. 567; *Bethel v. McKinney,* 164 N.C. 76; *Sills v. Bethea,* 178 N.C. 317; *Veazey v. Durham,* 231 N.C. 356.

J. G. HOLMES v. THE CAROLINA CENTRAL RAILROAD CO.

Punitive Damages—Evidence.

1. Punitive damages are not recoverable, unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury.
2. Where the conductor of a Railroad Company, in obedience to the rules of the Company, ordered the plaintiff, who had purchased a first-class ticket, to occupy another car, not so comfortable as the one from which he was removed, but used no force or insult in removing him, *It was held* that the plaintiff was not entitled to recover punitive damages.
3. Where the plaintiff is aware of certain rules of a Railroad Company, and takes passage over the road for the purpose of violating these rules and bringing suit, his declarations to this effect, are admissible in mitigation of damages.

This was a CIVIL ACTION, tried before *Shipp, Judge,* at August Term, 1885, of MECKLENBURG Superior Court.

The action was brought by the plaintiff to recover damages from the defendant company, for an alleged injury sustained in consequence of having been wrongfully ejected from a car on the defendant's road. The plaintiff alleged, that prior to January the 4th, 1883, he had purchased of defendant a first-class ticket on said road, and that on the day aforesaid, he took his seat in a first class car on defendant's road, and soon after leaving Wilmington, going in the direction of Lumberton, the defendant's conductor came into the car, where he and several gentlemen were seated, and told them that was a car appropriated to ladies, and his orders were, that no one should be permitted to ride in that car, except ladies and their escorts. All the other gentlemen at once left, and went into the forward car, except plaintiff.

He remonstrated, and insisted that by his contract with the (319) company, he had the right to ride in that car, and insisted on maintaining his right. The conductor said that he was bound to comply with his instructions, and insisted that the plaintiff should comply with the regulations of the company, and approached him and laid his hand firmly but gently on his shoulder, and removed him to another car, which was not a first-class car, such as the defendant had contracted to carry the plaintiff in, but on the contrary, was deficient in all the comforts and conveniences usual in first class coaches. That it was filthy from constant use; was one half the size of a first class coach; was crowded with passengers; was filled with tobacco smoke, and was dirty, and improperly lighted; and he told the conductor he was sensitive to the odor of tobacco, and it was dangerous for him to inhale it; that he rode three hours on this car, and suffered great pain and mortification, etc.

The defendant admitted that the plaintiff was required to change his seat from the car appropriated for ladies, to another car used for the accommodation of gentlemen. It insisted that the car to which the plaintiff was transferred was a first-class car, and denied the allegations of the plaintiff that it was filthy and filled with tobacco smoke and other offensive odors, but, on the other hand, was furnished with comfortable seats, and was properly lighted; that the car into which the plaintiff was transferred was composed of two compartments, and divided by a close wooden partition, in the rear section of which smoking was not allowed, and was set apart for first-class passengers, while the other section was used for second-class passengers. It denied that the conductor at any time put his hand on the plaintiff for the purpose of coercing or removing him, or at any time offered him any indignity, by word or act, but at all times treated him with courtesy and politeness, and when the conductor formally required the plaintiff to remove into the forward car, there was no one present but the conductor, porter and the plaintiff.

The plaintiff testified that the car into which he was trans- (320) ferred from the "ladies car," was not a first-class car. It was low roofed, no ventilation, and no means of ventilation, except by the windows; the seats were low and dirty. It was poorly lighted with a kerosene lamp on one side, full of tobacco smoke and odors from the water closet. The air in the car was so very warm, that he had to raise a window to get relief from the smoke and odor and heat; that there was a crack between that and the smoking car, and the door being out of order, the smoke from the adjoining car was let into the one where he was sitting; that he was very sensitive to tobacco smoke, and when the conductor told him that he was required by his orders

to remove him into the car assigned for gentlemen, he told him that he could not resist him physically, but that he protested against his removal, and would do so until there was such a show of force as to compel him; that the conductor allowed him to remain and take a cup of coffee which he had ordered, and after he had finished with his coffee, the conductor approached him and placed his hand firmly but gently on his shoulder, and forced him to move into the other car; that the only injury he sustained from his ride in the car to which he was removed, was a slight nausea and headache from which he was relieved by hoisting a window.

The only other witness who was introduced by the plaintiff was C. B. Wright, who testified that he was on the car that night, and that the car used for gentlemen that night was not what is known to the travelling public as a first-class car, but that it was not disagreeable to him, nor was the tobacco smoke, which he could smell, offensive.

On the part of the defendant, Mr. Harden testified that he had been in the employment of the Raleigh and Gaston Railroad, in charge of the motive power. The car described by the witness, was loaned to defendant a short time before the 4th of January. It was in good order when it left Raleigh; it was newly painted, with comfortable plush seats; was ventilated from the top by approved patent
(321) ventilators, and that it was used on the Raleigh and Gaston Railroad as first or second class car, as the occasion required.

Mr. Clark, one of the gentlemen removed from the ladies car, testified that the car to which he and the plaintiff and the others were removed, was clean and comfortable; that he was sensitive to the smoke of tobacco, but did not detect the odor of tobacco that night in the car, and he suffered no discomfort that night in his ride on the car.

Dr. Clark's testimony was in substance the same. Mr. Murchinson testified, that he rode on the car that night from Wilmington to Lumberton; that the car was clean, had comfortable seats, water closet and lights; that he did not detect the odor of tobacco, or any other offensive odor from the water closet. He conversed with the plaintiff on the trip, after he came into the car; he seemed to be comfortable. He got off with plaintiff at Lumberton, and stayed with him that night. He seemed well, and not injuriously affected by his ride that night. He made no complaint. When the plaintiff came into the car, he heard him say that "he would make the defendants suffer for that night's work."

Captain Everett, the conductor, corroborated the testimony of the other witnesses for the defendant, as to the condition of the car with respect to cleanliness, and the absence of offensive odors.

He also testified, that he did not touch the plaintiff when he required him to leave that car, and when plaintiff said he was very sensitive to tobacco smoke, he told him if he put his objection on that ground, he might stay in the ladies' car, but he said he would not put it on that ground, and went into the objectionable car. This car was borrowed from the Raleigh & Gaston Railroad Company, for use while the passenger car of the defendant was undergoing repairs. There were no offensive odors on it that night. No smoking was allowed in it.

The defendant's counsel asked for several instructions, among which was the following, to-wit:

"The plaintiff is not entitled to recover in this action exem- (322) plary or punitive damages, upon his own statement of the facts and circumstances, and he can recover, if anything, only actual damages for such supposed suffering as may have been directly caused by the defendant's failure to furnish such accommodation as he was entitled to."

Instead of giving this instruction, his Honor in response to it, instructed the jury, "There is no allegation of any permanent sickness or injury, but you heard the testimony as to what he suffered, and if you should find there was a breach of contract, it is for you to determine what he suffered, and if you should find there was a breach of contract, it is for you to determine what damage he sustained. Take all the testimony, and then say whether he is entitled to any damages. It is contended on the part of the plaintiff that he was roughly treated. As I stated, the conductor had the right to enforce the rules of the company, but he had no right to eject the man with rudeness. If the conductor used improper force or rudeness on that occasion, the plaintiff might be entitled to exemplary damages, but if he used no more force than was necessary, the defendant would not be liable for vindictive or punitory damages. There was no malice shown. If you are satisfied the conductor treated the plaintiff with rudeness, or used unnecessary force in putting him out of the car reserved for ladies, you will take that into consideration in estimating the damages. It is your province to fix that, if the plaintiff is entitled to recover."

The jury returned a verdict in favor of the plaintiff for $475 damages, and there was motion for a new trial. Motion overruled, and defendant appealed.

Mr. R. D. Johnston, for the plaintiff.
Mr. Platt D. Walker, for the defendant.

ASHE, J. (after stating the facts). We are of opinion the defendant was entitled to the instructions asked, upon the question of damages,

(323) and there was error in the refusal of the Court to give the instructions, and also in instructions given upon that point.

Conceding that the jury were warranted in giving the plaintiff some damages, which we do not decide, but the amount of damages assessed by them was in such disproportion to the actual damage, if any was sustained by the plaintiff, that it is evident that the damages were intended to be, and were, punitive or exemplary in their character.

We do not think this was a case for exemplary damages.

Punitive damages are never awarded, except in cases "when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury." Thompson on Carriers of Passengers, 575; and to the same effect is Southerland on Damages, vol. 3, p. 270. According to the testimony of the plaintiff himself, there was no rudeness or unnecessary force, used by the conductor, in requiring him to leave the ladies car. His testimony on that point was, that the conductor, after the other gentlemen who had seats in the ladies car had gone into the other car as directed, he was allowed to remain until he drank a cup of coffee, the conductor came to him and placed his hand on his shoulder, *firmly but gently,* and forced him to move into the other car; that the conductor was a powerful man physically, and greatly his superior in strength, and he knew him personally, and they were on friendly terms. Where was the rudeness or unnecessary force? The statement that the conductor laid his hand gently upon his shoulder, excludes the idea of rudeness or force. Gently means softly, mildly; and rude means rough, insulting,—Webster's Dictionary. There was no rough act or insulting words used by the conductor, and there was consequently no rudeness nor unnecessary force, because there was no force at all employed. His Honor therefore erred in telling the jury, "if the conductor used improper force or rudeness on the
(324) occasion, the plaintiff might be entitled to punitive damages;" and again, "if you are satisfied that the conductor treated the plaintiff with rudeness, or used unnecessary force in putting him out of the car reserved for ladies, you will take that into consideration in estimating the damages."

He should have instructed them that there was no evidence either of rudeness or unnecessary force, or at least no such evidence of either, as would warrant them in assessing exemplary damages against the defendant, and if he was entitled to recover anything, it was only compensative damages, that is, such as were commensurate with the injury they might find, from the evidence, the plaintiff had sustained.

But, aside from the testimony of the plaintiff, which was on many points flatly contradicted by other witnesses, it was shown in evidence that there was no force whatever used on the occasion. Captain Everett, supported by the testimony of the porter, testified that he did not touch the plaintiff, and when the plaintiff told him that he was a gentleman of delicate organization, which was very sensitive to the odor of tobacco, or words to that effect, he told the plaintiff if he objected to going on that ground, he might remain in the ladies car, but the plaintiff declined to remain, preferring to subject his sensitive organization to the offensive odor of tobacco, rather than forego the chance of making some money out of the Railroad Company, by making them, as he threatened, "suffer for that night's work." Taking this evidence into consideration, it is very clear the plaintiff, if entitled to anything, was certainly not entitled to more than compensatory damages, and his Honor should so have charged the jury.

In a case very like this in Ohio, when a passenger was ejected from a Railroad car, and sued for damages, and it appeared that the rate of fare fixed by the company, was higher than that allowed by law; that the plaintiff tendered the legal rate; that upon his refusal to pay more, he was ejected from the cars, but without *rudeness* or *unnecessary violence;* that at the time he took passage, the plaintiff knew the rate established by the company, and expected to be (325) ejected from the cars, intending to bring an action for such ejection in order to test the right of the company to charge the established rate: Upon these facts, the plaintiff was held to be entitled to compensatory damages, and the company was permitted, for the purpose of mitigating the damages, to give in evidence subsequent declarations of the plaintiff, tending to prove that his object in taking passage on the cars, was to make money by bringing suit against the company for demanding more than the statutory rate of fare. *Cincinnati R. R. Co. v. Cole,* 29 Ohio St., 120.

In that case, the conductor had no right to eject the passenger, and it was held, the plaintiff was only entitled to compensatory damages, but that case is distinguished in some respects from this, for here it was very questionable, upon a view of all the testimony adduced, whether the plaintiff was entitled to any damages, but the jury found that fact against the defendant, and assessed exemplary damages, under what we think was an erroneous charge of the Court, and the plaintiff is therefore entitled to a *venire de novo.* Let this therefore be certified to the Superior Court of Mecklenburg, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Rose v. R. R., 106 N.C. 169; *Tomlinson v. R. R.*, 107 N.C. 330; *Hansley v. R. R.*, 115 N.C. 605; *McGraw v. R. R.*, 135 N.C. 267; *Ammons v. R. R.*, 138 N.C. 559; *Hutchinson v. R. R.*, 140 N.C. 127; *Ammons v. R. R.*, 140 N.C. 198; *Parrott v. R. R.*, 140 N.C. 548; *Wilson v. R. R.*, 142 N.C. 340; *Stanford v. Grocery Co.*, 143 N.C. 427; *Stewart v. Lumber Co.*, 146 N.C. 110; *Harvey v. R. R.*, 153 N.C. 581; *Warren v. Lumber Co.*, 154 N.C. 38; *Berry v. R. R.*, 155 N.C. 289; *Huffman v. R. R.*, 163 N.C. 173; *Webb v. Telegraph Co.*, 167 N.C. 487; *Motsinger v. Sink*, 168 N.C. 551; *Carver v. R. R.*, 169 N.C. 207; *Meeder v. R. R.*, 173 N.C. 60; *Gray v. Cartwright*, 174 N.C. 51; *Cottle v. Johnson*, 179 N.C. 429; *Holmes v. R. R.*, 181 N.C. 499; *Baker v. Winslow*, 184 N.C. 5, 7; *Ham v. R. R.*, 184 N.C. 324; *Tripp v. Tobacco Co.*, 193 N.C. 616, 618; *Picklesimer v. R. R.*, 194 N.C. 41; *Perry v. Bottling Co.*, 196 N.C. 691; *Bryant v. Reedy*, 214 N.C. 758.

STATE EX REL. J. A. DAVENPORT, TREASURER, ETC., v. G. W. MCKEE, ET ALS.

Evidence—Sheriff—Witness—Refreshing Memory.

1. The admissions and declarations of a sheriff made when settling his tax account with the County Commissioners, are admissible in evidence in an action on his bond for the non-payment of the taxes collected by him.
2. Such admissions may be proved by any person who heard them, and can state the substance of what was said.
3. It is perfectly well settled that while a witness can only testify to such matters as are within his own knowledge and recollection, still he may refresh his memory by reference to memoranda, and when the memoranda are in Court he may be forced to do so.
4. A witness can refresh his memory by reference to his memoranda outside of Court as well as when on the stand. So where a witness said that he could not testify to certain conversations without refreshing his memory by *data* made by him at the time of the conversations, which the trial Judge refused to let him do, and after retiring from the stand, he was recalled and stated that he could then testify to them, which was ruled out, *It was held* to be error. Any question as to the accuracy of his recollection would go to his credibility, but not to his competency.
5. A litigant should be allowed to prove his case in his own way, and by his own evidence. So, where the trial Judge refused to allow a witness to refresh his memory by certain memoranda, and then testify to certain conversations which the plaintiff wished to bring out, but told the plaintiff that he might introduce the memoranda themselves, which the plaintiff refused to do, and afterwards the defendant, when on the stand, testified that the conversations were substantially as it was proposed to prove them by the rejected witness, *It was held* to be error.

DAVENPORT *v.* MCKEE.

CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Au- (326) gust Term, 1885, of the Superior Court of CLEVELAND County.

This action is brought by the relator of the plaintiff, as treasurer of the county of Gaston, against the defendant sheriff and the sureties to his official bond for alleged breaches thereof, in failing to pay to the relator $2,216.14, money collected as taxes, and ascertained to be due to that county, and $2,500.00 penalty incurred in failing to pay the same according to law.

The defendant sheriff pleaded among other things, that he had paid the relator on account of the money so due, the sum of $1,700.00.

The following is so much of the case settled upon appeal, as is necessary to a proper understanding of the opinion of the Court:

The only issue submitted to the jury was: "Did the defendant G. W. McKee, as sheriff of Gaston County, pay to the plaintiff J. A. Davenport, treasurer of said county, seventeen hundred dollars, as set forth in the answer, and is he entitled to credit therefor?"

His Honor held, that in the trial of this issue, the burden of (327) proof was upon the defendant, and he was entitled to open and conclude. The defendant then offered in evidence a paper writing, purporting to be a receipt for $1,700 on the county fund tax, dated the 4th of December, 1882, signed by the relator as county Treasurer, and witnessed by one R. W. Query.

He then introduced said Query, who after testifying to the signature of the relator, etc., further testified that according to his recollection, the $1,700 was made up by the consolidation of other smaller receipts theretofore given by the relator, for taxes paid, amounting to about $1,300, and two county orders of about $100, and $300 in cash then paid.

The defendant then offered testimony tending to show the genuineness of the receipt, and without offering himself as a witness, stopped his case.

The relator of the plaintiff then offered himself as a witness in his own behalf, and denied that he had signed the $1,700 receipt on the 4th of December, 1882, or at any other time, or that there was such a thing as a consolidation of receipts on the 4th of December, 1882, or that he had received any part of $1,700, as claimed to have been paid up to that time, except $500 paid on the 6th of November, 1882, and produced a receipt for said $500, and swore that it was surrendered to him on the 6th of January, 1883, and that $200 in money was paid to him at the same time, and for said receipt so surrendered, and the $200 in money paid, he gave the defendant the $700 receipt exhibited in evidence, and for which he swore he gave the defendant credit in the settlement.

He also showed upon the face of the $500 receipt, an endorsement in these words: "This receipt surrendered the 6th of January, 1883," and another for $700, including this, given in the place of this, and swore that this endorsement was made in the presence of the defendant, McKee.

The plaintiff next offered as a witness, John F. Leeper, the Register of Deeds and Clerk of the Board of Commissioners of Gaston
(328) County, and proposed to prove by him, that the defendant George W. McKee, in an investigation of the matter of taxes involved in this suit, before the county commissioners theretofore, had offered himself as a witness, and testified that all the receipts against the county fund, including the said $500 receipt of November 6th, 1882, were surrendered to the plaintiff on the 4th of December, 1882, went into and formed a part of the $1,700 receipt, and that the $500 receipt of November 6th was not surrendered by him on the 6th of January, 1883.

Before calling for this testimony, the witness was asked the preliminary question as to whether he could state the substance of all the testimony of the defendant G. W. McKee, sworn to on that occasion. The witness answered that he could not, without refreshing his memory by reference to certain notes that he, the witness, had taken in writing upon said investigation before the commissioners, which notes he then had with him, and that these notes contained the substance of all the testimony of the defendant McKee on the investigation. That he, the witness, wrote the testimony down, while acting as clerk of the board of commissioners, at the time it was given, and in the presence of said defendant, but that the notes had not been read over to the defendant McKee, or signed by him.

The plaintiff then asked his Honor to allow the witness to refresh his memory by referring to his notes, and then to be allowed to testify as to the evidence of the defendant McKee, as above stated. This was objected to by the defendant, and the objection was sustained by the Court, the Court stating to the plaintiff that he might read in evidence the whole of the testimony of McKee, or any part thereof, as taken down by the witness in the investigation before the board of commissioners.

This the plaintiff declined to do, and excepted to the ruling of the Court in sustaining the defendants' exception.

Afterwards, during the examination of this witness, the plaintiff proposed to read the notes in evidence, stating at the time that he thought
it was incompetent, but thought he was entitled either to have
(329) the witness refresh his memory by reference to his notes, or to the notes themselves.

The reading of the notes was then objected to by the defendant, and the objection was sustained by the Court, his Honor stating that as the plaintiff himself thought it was incompetent, he ruled it out. The plaintiff excepted.

In the further progress of this trial, on the next or some subsequent day, the witness Leeper was introduced again by the plaintiff, and asked by him if he could recollect and state the substance of all that was sworn by the defendant McKee, in said investigation before the commissioners, as to the composition of the $1,700 receipt.

The witness answered that he could recollect and state the substance of all that was sworn by said McKee, as to the composition of the $1,700 receipt. This was objected to by the defendant. The objection was sustained and the plaintiff excepted.

The defendants, in reply, introduced G. W. McKee as a witness in his own behalf, and upon his cross-examination by the plaintiff, he was interrogated as to what was his testimony before the board of commissioners, in respect to the $500 receipt, the $700 receipt, and as to the composition of the $1,700 receipt in controversy.

In reply, the witness McKee stated that he did testify in said investigation, and that his statement there made, as to the several matters proposed to be proved as his evidence before the said board by the witness Leeper, were substantially the same as proposed to be proved by the said Leeper. The witness McKee was a day and a half upon the stand, and his testimony before the board of commissioners, as proposed to be proved by Leeper, was called out by interrogations severally put to him, as to each fact proposed to be proved by the said Leeper.

The jury rendered a verdict in favor of the defendant. Plaintiff moved for a new trial on the ground of error in the rulings of the Court, and the motion was denied. The Court then gave judgment in favor of the plaintiff, allowing the defendant credit for the sum (330) of money so found to have been paid, and the plaintiff appealed to this Court.

Messrs. Jos. B. Batchelor and Jno. Devereux, Jr., (Mr. Geo. F. Bason was with them on the brief) for the plaintiff.

Messrs. W. P. Bynum and R. W. Sandifer, for the defendants.

MERRIMON, J. (after stating the facts). Obviously, the admissions and declarations made by the defendant sheriff on his examination before the county commissioners, as to the receipt in question, were competent evidence in that respect against him and his co-defendants, especially, if as suggested, these tended to sustain the evidence of the

relator himself, and to contradict, impair, or destroy the force of that of the defendants.

Such admissions and declarations might be proven by any person who heard them, and could state what they were, or the substance of them. If the witness produced by the relator for that purpose, could not at first state what they were, and stated that he had written *memoranda,* from which he could refresh his memory, and then give the substance of them from his own recollection, the relator was entitled to have the witness thus qualify himself to testify, and have the benefit of his testimony. It is a well settled rule of law, that although a witness can testify only to such facts as are within his own knowledge and recollection, still he may refresh and help his memory by reference to a paper writing, memorandum or entry in a book, and, indeed, he may be compelled to do so, when the writing is present in Court. The purpose of such reference to the writing, whatever its nature, is not to supply facts, but to refresh, quicken and awake the memory of the witness, and thus enable him to testify of facts within his own knowledge and recollection. Human experience shows that it not infrequently happens, that a mere hint revives the distinct remembrance of facts and events, which, but for it, seemed to have been forgotten. *State*
(331) *v. Cheek,* 35 N. C., 114; *State v. Lyon,* 89 N. C., 568; *Cowles v. Hayes,* 71 N. C., 230; Greenleaf on Ev., Sec. 436, *et seq.*

The witness Leeper was asked if he could state the substance of all that the defendant had sworn on the former occasion mentioned. He, in effect, replied that he could not, without refreshing his memory by reference to certain written memoranda, made by himself, that he then had present, plainly implying that he could, if permitted to refer to it. The Court refused to allow the witness to thus refresh his memory. Why it did so, does not appear, and we are unable to see any reason for such ruling. Plainly, the relator was entitled to have the evidence of the witness, and to have him qualify himself to testify, if he could do so, by reference to the writing then present, as he said he could do.

And when afterwards in the further progress of the trial, the same witness was again introduced, and he then stated that he could recollect and testify as to all that was sworn by the defendant McKee on the former occasion as to the receipt referred to, he ought to have been allowed to testify, because he said that he could do so, and if he could, the relator was entitled to have the benefit of his testimony. The plain inference was, that he had reflected about the matter, and had recollection of the facts, or had refreshed his memory by reference to the memoranda mentioned by him in his first examination. He had the right to do so, and it was not necessary that he should refer to the

memoranda in the presence of the Court, or produce the same in Court, certainly not, unless the Court so required. When the witness stated that he had knowledge of the facts, that was sufficient,—he was then prepared to testify, and any question as to the accuracy of his knowledge and recollection, would not go to his competency, but to his credibility.

The Court told the relator that he might read in evidence the whole or any part of the testimony of the defendant McKee, as taken down by the witness Leeper, before the county commissioners, but the relator at first declined to do so, it seems, doubting its competency. It may be, that under the circumstances and for the purpose con- (332) templated, it was competent to receive it in evidence. *Ashe v. DeRosset*, 50 N. C., 299. *State v. Pierce*, 91 N. C., 606. But the relator had the right to have the benefit of the pertinent testimony of such competent witnesses as he produced on the trial. It was for the relator to determine what character of competent evidence he would introduce to prove his case—it was the office of the Court to determine its competency and application. The relator might wish to multiply and diversify the evidence produced by him, and he certainly had the right to do so, to a reasonable extent.

The fact that the defendants in reply, introduced the defendant McKee, and he stated that he had been examined on a former occasion before the county commissioners in respect to the receipt in question, and his statements then made were substantially the same as those proposed to be proven by the witness Leeper, did not have the effect to cure the error of the Court in refusing to admit the competent evidence offered by the relator and rejected. He had the right, in the order of the trial, to have the benefit of the competent testimony of his own witness, and to have his version of the facts. It may be, that he would have stated them differently in their detail and application. He might have added or omitted something that would have changed or modified the substance of McKee's testimony. The jury might have believed him more readily than McKee, and given more weight to his version of the facts. A party ought to be allowed to prove his case in his own way and by his own evidence, if he offers to do so as allowed by law and according to the course and practice of the Court. It is scarcely just, when competent evidence, offered by one party, has been erroneously rejected, to allow the opposing party, in his own way, in a different stage of the trial, to supply the evidence so rejected, by the testimony of the opposing party himself.

The witness Leeper ought to have been allowed to refresh his memory by reference to the written memoranda mentioned by him, and

(333) to testify, and he ought to have been allowed to testify when he was introduced the second time, and stated that he then had recollection of the facts and could state them.

There is error, and the plaintiff is entitled to a new trial. To that end let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

DEFENDANTS' APPEAL.

Appeal.

Where both parties appeal to this Court, and there is a new trial granted on one of the appeals, it renders the consideration of the other useless, and it will be dismissed.

This was the defendants' appeal in the preceding case. It was argued by the same counsel.

MERRIMON, J. In the case above named, both the plaintiff and defendants appeal. As we have decided that the plaintiff is entitled to a new trial, the result is to give the defendants the like benefit. So that we need not decide the questions presented by their appeal. It turns out that it was unnecessary, and it must be dismissed as having been improvidently taken. It is so ordered.

Dismissed.

Cited: Bryan v. Moring, 94 N.C. 693; *Burgess v. Kirby,* 95 N.C. 276; *Eigenbrun v. Smith,* 98 N.C. 216; *S. v. Jordan,* 110 N.C. 495; *Carson v. Blount,* 156 N.C. 104; *S. v. Bradley,* 161 N.C. 291; *S. v. Coffey,* 210 N.C. 564; *Steele v. Coxe,* 225 N.C. 730.

A. G. WEST v. T. E. REYNOLDS.

Appeals from Justices of the Peace—Appeal.

1. Officers of the Courts are not compelled to perform their duties, unless the fees prescribed by law are paid or tendered to them, but they must demand them before *laches* can be imputed to litigants.
2. So where, on appeal from a Justice of the Peace, the case was not docketed, because the fees for this service were not tendered or paid to the Clerk, but the Clerk did not demand his fees or notify the appellant that the

appeal would not be docketed unless they were paid; *It was held*, no error to allow the appeal to be docketed two terms after the regular time, and as soon as the appellant was notified that this had not been done.

3. *It is intimated*, that allowing, or refusing to allow, the appeal to be docketed, is discretionary with the trial Judge, and not the subject of review on appeal.

4. An appeal does not lie from an order of the Judge allowing an appeal from a Justice of the Peace to be docketed after the time allowed by the statute has expired.

CIVIL ACTION, pending in the Superior Court of BUNCOMBE (334) County, heard at Chambers by *Gudger, Judge,* on December 1st, 1885.

The plaintiff, on the 20th day of May, 1885, in an action before a Justice of the Peace, recovered judgment for $124.16 against the defendant, who appealed, and three days thereafter caused notice thereof to be served as required by law, and paid the fees due the Justice. Soon afterwards, the Justice deposited the papers, proceedings and judgment in the case, with the Clerk of the Superior Court, with notice of appeal. The Clerk placed them in an envelope, labelled "Appeal from Justice's Court, no fees paid," with other envelopes containing papers of the same kind. No fee was then, nor afterwards, demanded for docketing the cause; no intimation given that it would not be docketed without; nor had the defendant any notice or information of the rule adopted by the Clerk, and posted in his office, in which he required prepayment for services to be rendered. The cause was not docketed, through inadvertence of counsel, until two terms of the Court had expired, the business of the Court being such that it could not have been reached if the appeal had been entered in its proper place on the docket; and as soon as the omission was discovered, and the reason for official inaction known, the fee was paid, and notice served early in October of the appellant's intention to move the Court to order the docketing of the cause.

(335) These facts, based upon affidavits read on the hearing of the defendant's motion, are found by the Judge, and thereupon he ordered that the appeal be entered on the docket, and stand for trial at the next term. To this ruling the plaintiff excepts and appeals.

Mr. C. A. Moore, for the plaintiff.
Mr. M. E. Carter, for the defendant.

SMITH, C. J. (after stating the facts). It is the duty of the Justice from whose judgment an appeal is taken, to "make a return to the appellate Court, and to file with the Clerk, the papers constituting the

cause, within ten days after the service on him of the notice of the appeal," and this was done. The Code, Sec. 878.

So, when this is done, the Clerk is required to enter "the case on his trial docket," for trial at the ensuing term. Sec. 880.

It will be observed, that while the section which requires the service of the Justice, in perfecting the appeal by transmitting the papers, in express terms, declares that "no Justice shall be bound to make such return, until the fees prescribed by law for this service, be paid him;" no such provision is made in that relating to the action of the Clerk.

There is, however, a statute relating to all the officers, whose fees are determined and allowed, in the chapter entitled "salaries and fees," in the 2nd vol. of The Code, which provides that in civil suits, except when persons sue as paupers, "no officer shall be *compelled* to perform any service, unless his fee be paid or tendered." The Code, Sec. 3758. This clause excuses the refusal to perform any official duty, unless when the demanded fee allowed therefor by law, shall be paid in advance. But obviously, if this be a condition precedent to his acting, it should be made known to the appellant, and an opportunity be given him to make the payment and assure the performance of the required service. The very act of accepting the papers, about which he is to render
(336) the service, in silence, and without a word of explanation, may reasonably be expected to produce the impression that what is necessary, will be done in the matter. The officer is not *"compelled to perform"* the required service, but he may perform it, and dispense with the payment, and if he does not so intend, he should say so at the time, and not presume that the posting of the notice in his office, of an inflexible rule that he had adopted and from which he would not under any circumstances depart, would be known to every one. Had this been said to the Justice, we may well suppose that he would have communicated the fact to the appellant, and she thus would be enabled, by payment of the small sum of fifty cents, to make her appeal effectual. The fault lies largely in the omission of the Clerk to demand his fees when the papers were delivered to him, or afterwards to let the appellant know that the cause would not be put upon the docket until his fee was paid.

DILLARD, J., commenting upon this provision in the statute—but an embodiment of the common law—in a case where a *certiorari* was asked, to bring up a record from the Superior Court, and the Clerk had refused to furnish the transcript, unless his fees were paid, and they were not paid, uses these words: "We think then, that the demand of *simultaneous payment* of the fees by the Clerk, was proper in him, and the *plaintiff being notified thereof,* as we are to take it he was, from the fact that he does not negative such knowledge, it was great negli-

gence in him not to pay the fees, or otherwise so to arrange as to have the appeal papers come forward." *Andrews v. Whisnant,* 83 N. C., 446, 448.

Without adverting to the provisions of the statute, which prescribe the manner and limit the time within which the successive acts necessary to render an appeal from a justice effectual in reaching the appellate Court, or the circumstances under which relief will be afforded when some of these requirements are not observed, and how far this Court can supervise the action of the Judge in the Court below in giving or withholding such relief, we must dispose of the present appeal upon another ground. It is taken to action in the cause (337) preliminary to trial upon its merits, an initiatory step in this direction, involving no right, which, upon exception noted, may not be asserted and made available upon an appeal after final judgment, and therefore has been prematurely and unnecessarily taken. It stands upon the same general ground as a motion to dismiss a pending action which is refused, of which there are numerous cases, and the practice is well settled. *Railroad v. Richardson,* 82 N. C., 343, and other cases. In *Spaugh v. Boner,* 85 N. C., 208, RUFFIN, J., says: "We have therefore had no difficulty in reaching the conclusion, that the defendant's appeal should have been dismissed on the motion of the plaintiff; but have had serious doubts as to the point whether an appeal would lie from the refusal of the Judge in the Court below to dismiss it." This indicates the disposition of the Court, to disallow appeals from interlocutory rulings, when the alleged errors may as well be corrected upon a final determination of the cause and in a single appeal, so that all the matter in controversy may be settled at once. In this case, if the Court had refused the motion, and this was not an exercise of discretion confided to the Judge, an appeal of the defendant would be entertained, as in a dismissal of the action on motion, because otherwise the party would be, while put out of Court, without remedy. But when the ruling is in the progress of a cause, and its furtherance towards a trial upon its merits, there is no reason why we should be prematurely called on to exercise appellate power at once, as no injury results from the refusal.

"The correct practice," it is said in the opinion from which the extract has been taken, "in case of a refusal of the Court to dismiss the action, (that is, in retaining it, or, applying the rule to the present appeal, putting it on the docket so that it may be tried, and not summarily ended), is to note the exception and proceed with the trial, so that, on the appeal, this Court can have the whole case before it, and make such a decision as may at once dispose of it. The principle

(338) governs the present case, and the appeal must be dismissed, and the cause allowed to proceed in the Court below, to which end this will be certified.

Appeal dismissed.

Cited: S. v. Warren, 100 N.C. 493; *Blackwell v. McCaine,* 105 N.C. 463; *Ballard v. Gay,* 108 N.C. 545; *Lambe v. Love,* 109 N.C. 306; *S. v. Johnson,* 109 N.C. 854; *McClintock v. Ins. Co.,* 149 N.C. 36; *Dunn v. Clerk's Office,* 176 N.C. 52.

SUSAN MILLER v. E. T. CLEMMONS.

For syllabus see preceding case.

CIVIL ACTION, pending in the Superior Court of BUNCOMBE County, heard by *Gudger, Judge,* at Chambers, on September 24th, 1885.

The plaintiff appealed.

Mr. C. A. Moore, for the plaintiff.
No counsel for the defendant.

SMITH, C. J. The facts of this case are essentially the same as those in *West v. Reynolds,* preceding, and for the reason stated in the opinion in that case, it must be disposed of in a similar way. Appeal dismissed. Let this be certified.

Appeal dismissed.

A. A. LEEPER ET AL. v. MARIA J. NEAGLE.

Wills—Construction of—Partition.

1. The first great rule in the construction of wills is, that the intention of the testator must prevail, provided it can be effectuated within the limits which the law prescribes, and such intention is to be collected from the whole instrument.
2. The provisions of Sec. 2180 of The Code, prescribing that every devise of land is construed to be in fee, unless it shall be plainly intended by the will, or some part thereof, that a less estate is intended, while laying down a rule of construction, still leaves the question of the intention of the testator open for construction, and where there is a particular, and a

general paramount interest apparent in the same will, and they clash, the general interest must prevail.

3. Where a will devised to A the "north end of the house, the north kitchen, and what she needs of the smoke-house and lumber-house, and as much land as she can work her hands on," and the same will devised the same land to B; *It was held*, that A only took a life estate, and B the remainder in fee.
4. Such devise to A. standing alone, would have conveyed the fee.
5. Where one tenant in common has been ousted by his co-tenant, who brings an action of ejectment to recover the possession, the Superior Court has no jurisdiction to order a partition of the land.

This was an ACTION IN NATURE OF EJECTMENT to recover land, (339) tried before *Shipp, Judge*, at Spring Term, 1885, of GASTON Superior Court.

A jury trial was waived, and the case submitted to the Court to be tried upon the facts and law.

The record discloses the following facts: Andrew Neagle, who was the owner of the land in controversy, died on the ..... day of ....., leaving a last will and testament, the material parts of which are as follows: "I give and bequeath to my wife this end of the house, the north kitchen, and what she needs of the smoke-house and lumber-house; I give her a negro woman Fillis, Scott, George, Eliza, Bob, Milas. These I give to her to dispose of as she sees proper. I leave her as much land as she can employ her hands on, and what she needs of the barn and stable.

"2nd. I give to my son John E. Neagle, the plantation whereon I now live, and the Leeper plantation, and a negro man named Noah.

"4th. I give to my son John E. Neagle, and his mother, the plantation tools, and to go to my son John at the death of my wife, my wagon and cotton gin, gearing and screw, my wife to have the use of them when she needs them, and my threshing machine, also my stock of cattle, I give to my wife at her disposal." (340)

That at the time of testator's death, he resided in, and occupied the north end of his dwelling, which contained ..... rooms in the northern half and ..... rooms in the southern half, and there was a kitchen at the north, and a kitchen at the south end of the dwelling, and also a smoke-house, lumber, house, barn and stable upon said home place.

That after the death of the testator, John E. Neagle, the devisee of the home place, and also the executor of the will, executed the provisions of the will, and entered into and occupied the said house and land, with his mother, for a number of years, and while so occupying the premises, mortgaged the land to secure a debt due by him, and the

land was afterwards sold under the mortgage and execution, and was purchased by one Margaret S. Leeper, in the year 1869, who received a deed for the same. That the said Margaret Leeper, afterwards died intestate, and her title to said land descended to her two children, the plaintiff A. A. Leeper and Mary E. Leeper, who having intermarried with the other plaintiff, S. J. Selvey, died, having had a child born alive, which afterwards died, and the said Selvey claimed his wife's interest in the land, as tenant by the curtesy.

The plaintiffs contend, that if the will of Andrew Neagle is definite and distinct enough to give the defendant an estate in the land and the buildings thereon, it gives her only a life estate in the north end of the dwelling house, the north kitchen, and the necessary use of the other buildings mentioned, in common with John E. Neagle and those claiming under him, and the use and enjoyment of so much of the land, as can be cultivated by the negro force given to her. But that the defendant is in the occupation of the entire premises, claims it as her absolute property, and keeps the plaintiffs out of the possession, and they demanded to be let into possession, and to have a partition of said land, according to the respective rights of the parties.

(341) The defendant admits the possession, but denies the tenancy in common, and insists that she is the rightful owner of said land in fee simple, under the will of the testator, but consents to a construction of the whole will, to the end that there may be a final disposition of all matters in controversy.

The Court rendered the following judgment:

"This cause coming on for trial before *Shipp, Judge,* a jury being waived, and the same being argued by counsel and considered by the Court, the Court doth declare its opinion to be, that under the will, the defendant is entitled to an estate for her life, in so much of the tract of land, described in the pleadings as the "home place," "as she can employ her hands on," to-wit: the negroes named and given to her in the will, the same to include "this" or the north end of the dwelling house, and the north kitchen, and what she needs of the barn and stable.

"It is further declared, that said defendant is also entitled for her life, to what she needs of the lumber-house and smoke-house as described in the will.

"It is further declared, that the said defendant is to have the use of the cotton gin, gearing and screw, and the wagon, when she needs them.

"It is further declared, that the plaintiffs, according to their several rights, are entitled in fee simple to the residue of said tract of land and buildings thereon, including the smoke-house, lumber-house, cotton gin and screw, the said smoke-house, lumber-house, cotton gin and screw,

being, however, subject to the use of the defendant when she needs them, as hereinbefore declared.

"It is further declared, that the petitioners are entitled to a partition of the said tract of land in accordance with this opinion.

"It is further ordered, that J. G. Gullick, J. D. Moore and W. W. McLean be, and they are appointed commissioners to view the premises, and allot by metes and bounds in severalty, to the plaintiffs and defendant, so much of the premises, buildings and appurtenances thereto belonging, as they are respectively entitled to, as hereinbefore declared by the Court, and that the said commissioners report (342) in writing, under their hands and seals, their actings and doings in the premises, to the next term of the Court.

"It is ordered that each party pay half the costs."

From this judgment the defendant appealed.

Mr. W. P. Bynum, for the plaintiffs.
Mr. John Devereux, Jr., for the defendant.

ASHE, J. (after stating the facts). The rights of the parties in this action, depend upon the construction to be given to the will of Andrew Neagle under which they both claim, and after giving the case a careful consideration, we are led to the conclusion there was no error in the interpretation given to it by his Honor, in the judgment rendered by him in the Superior Court.

The first great rule, says Mr. Christian, in the exposition of wills, and to which all other rules must bow, is that the intention of the testator, expressed in his will, shall prevail, provided it can be effectuated consistently with the limits and bounds which the law prescribes—2 Black. Com., 381, note 15—and Chief Justice RUFFIN, in the case of *Proctor v. Pool*, 15 N. C., 370, said, "No 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;" and in *Lassiter v. Wood*, 63 N. C., 360, it was held that "the general and leading intention of the testator, must prevail, where it can be collected from the will itself, and particular rules of construction must yield something of their rigidity, if necessary, to effect this purpose."

In the will under consideration, it is evident that it was the intention of the testator, to give a fee simple in the land in controversy, to his son John E. Neagle, notwithstanding the devise of the north end of the house, the kitchen, etc., to the defendant.

Unquestionably, if this devise to the defendant had stood alone (343) in the will, by virtue of the act of 1784, The Code, Sec. 2180, she would have taken the fee simple therein. For the act provides, "When

real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, *or it shall be plainly intended by the will, or some part thereof*, that the testator intended to convey an estate of less dignity."

But the statute, while prescribing a rule of construction, still leaves the question open as to the intention of the testator, to be collected from the whole provisions of the instrument. The main and leading intention of the testator, to be gathered from the will, is to give the fee simple to his son John in the home place, which included the dwelling house, and the devise of one end of the house, etc., and "as much land as she can employ her hands on, and what she needs of the barn and stable," was secondary, and must be construed to be in subordination to the general devise of the whole—a different construction would derogate from what was the manifest intention of the testator, that is, that John shall have the fee simple in the home place. This interpretation is in accordance with the doctrine announced by the Court in *Ross v. Toms*, 15 N. C., 376, where it is held "when there is a particular and a general paramount interest apparent in the same will, and they clash, the general interest must prevail."

Applying this principle to the case under consideration, our opinion is, the defendant by the will of Andrew Neagle, took only a life estate in so much of the land described in the pleadings as the "home place," as embraces the northern end of the dwelling house and the north kitchen, and what she needs of the barn and stable, and so much of the land besides, as she can employ her hands on, to-wit, the negroes named and given in the will, and also what she needs of the lumber-house and smoke-house, and to have the use of the cotton gin, gearing and screw,

(344) and the wagon, when she needs them. And the plaintiffs, by their purchase at the sale under the mortgage and execution, are entitled in fee simple to the residue of said tract of land and buildings thereon, including the cotton gin and screw, to have the gin and screw, smoke-house and lumber-house, the houses to be subject to the use of the defendant, as tenant in common for her life in the described property, and thus far we sustain the judgment of his Honor in the Court below, and his judgment is affirmed to that extent.

But when his Honor proceeded further to adjudge that the plaintiffs were entitled to a partition, and to appoint commissioners to make the partition, he committed an error, and that part of his judgment must be reversed.

This is an action to recover the land in controversy, in nature of ejectment. The plaintiffs and defendant are tenants in common. The

defendant had ousted the plaintiffs, and the action is brought by the plaintiffs to recover the possession, to which their right entitles them.

It would be violation of all the established rules of practice and procedure, in an action like this, to render a judgment which appertains exclusively to proceedings for partition, which should be brought before the Clerk.

The judgment of the Superior Court is affirmed, except so much thereof as is herein reversed. The costs of the appeal must be paid by the plaintiffs.

Affirmed and modified.

Cited: Raines v. Osborne, 184 N.C. 601.

R. P. KING ET AL. v. JOHN W. WELLS ET AL.

Adverse Possession—Color of Title—Judge's Charge—Exceptions in a Deed.

1. Although the trial Judge lays down the law correctly in his charge, a new trial will be given, if the instructions are not applicable to the facts of the case, and not warranted by the evidence.
2. So where the Judge charged the jury, that if the defendant had occupied certain land adversely, under known and visible boundaries, for twenty years, they should presume *mesne* conveyances to him from the grantee of the State and those claiming under him, and there was no evidence of such possession, *It was held* to be error.
3. Where a wrong doer's possession of land is so limited in area as to afford a fair presumption that he mistook his boundaries, and did not intend to set up a claim within the lines of the other party's deed, it is a proper ground for presuming that the possession is not adverse.
4. So where the line was a long one, running over a wild, mountainous ridge, and the defendant had possession of less than a quarter of an acre, such possession was no evidence of an adverse possession of the entire lappage, in the absence of any evidence of a knowledge by the adverse party of such possession.
5. Where a deed conveying a large body of land contains the following words, "including all lands not heretofore sold," and a portion of the tract covered by the calls of the deed had been sold, such deed is not color of title to the tract previously sold, although embraced in its calls, and possession for seven years under it by the grantee will not give a good title.
6. In such case, the tract previously sold, is as much excluded from the operation of the deed, as if expressly excluded by metes and bounds.

(345) CIVIL ACTION, for the recovery of land, tried before *Gudger, Judge*, and a jury, at August Term, 1885, of the Superior Court of BUNCOMBE County.

The action was originally brought by Mary King, who filed the complaint herein, and at Spring Term, 1883, she having died since the beginning of the action, her heirs-at-law were permitted to make themselves parties plaintiff, and at the trial of the cause, by consent of the defendants, the said heirs adopted the complaint as theirs.

The plaintiffs claim to be owners in fee simple of a tract of land, set forth by metes and bounds in their said complaint, and alleged that the defendants were in the unlawful possession thereof.

The answer of the defendants denied that the plaintiffs are the owners of said land, and also denied that the defendants, or either of them, withheld the possession of the same from the plaintiffs.

(346) The plaintiffs introduced in evidence on the trial, a grant from the State to David Allison, dated November 29th, 1796, for a large body of land, and proved, and it was afterwards admitted by the defendants, that said grant covered the *locus in quo*. The plaintiffs also introduced a deed from James Hughey, sheriff of the County of Buncombe, to Jno. Strother, dated the 20th day of September, 1796, for all the land covered by said grant from the State to David Allison, and proved by J. M. Israel and J. M. Lowry, that the court-house in the County of Buncombe was destroyed by fire in the year 1864, and that a part of the records of the Court were destroyed. This evidence of the destruction by fire of the court-house, was introduced for the purpose of showing that Buncombe County was included in the provisions of Sec. 69 of The Code, and that the recitals in said deed should be deemed, taken and recognized, as true in fact, and as *prima facie* evidence of the existence and validity of all records referred to in said deed. There was no evidence that any search of the records of the court-house had been made, or of what deeds were destroyed. The plaintiffs further introduced a deed in fee simple, from Jno. Strother to Solomon Knight, dated Jan. 30th, 1802, for the tract of land in controversy; a deed from Solomon Knight to Jonathan King, dated October 11th, 1806, for the same land; the will of Jonathan empowering his executor to sell said land, and a deed therefor from J. F. King, executor of Jonathan King, to Mary King, ancestor of the plaintiffs, dated October 2d, 1866, and proved that the said Mary King was dead, and that the plaintiffs are her heirs-at-law, and also proved that Jonathan King, and those claiming under him, have been in actual, open and notorious possession of a part of said land, under said deed, claiming the same up to the lines thereof, which were, as plaintiffs insisted,

known and visible boundaries, from the date of his deed from Solomon Knight, to the commencement of this action, but had not been in possession of any part of the lap hereinafter mentioned.

There was a dispute as to the location of the land described in (347) the deed from Jno. Strother to Solomon Knight, and the *mesne* conveyances to the ancestor of the plaintiffs. The plaintiffs claimed the beginning corner to be at a white oak on the west side of a small branch, and the calls of the deeds under which they claimed, represented a tract of land in the shape of a parallelogram, the longest line running north and south, and including the *locus in quo*, which was a small triangle on the south-east of said tract, formed by two of the lines of said tract, and a line of the land of the defendant, which intersected the land claimed by the plaintiffs.

The defendants insisted that the beginning corner of the plaintiffs' land, was further west than the corner claimed by the plaintiff, and beginning at that point, and running according to the calls of the deeds under which they claimed, their title did not cover the *locus in quo*. The defendants introduced in evidence, a copy of a deed from the Register's office to James M. Lowry, Jno. H. Robinson and James M. Harbin, signed "David S. Reid, ex-Officio President Trustees U. N. C.," dated April 14th, 1854; a power of attorney from Lowry and Robinson to Harbin, dated August 8th, 1854; a deed from J. M. Lowry, John H. Robinson and J. M. Harbin, by J. W. Harbin, attorney, to Jno. W. Wells, dated October 6th, 1858. The plaintiffs objected to the introduction of the deed from David S. Reid to Lowry, Harbin and Robinson, for that it appeared to have been executed by him as President ex-Officio of the Board of Trustees of the University of North Carolina, and there was no evidence showing that he was Governor of the State of North Carolina, and was such President; and further, that there appeared no seal to said deed, either of David S. Reid or of the University. Objection was overruled, and plaintiffs excepted.

The defendants introduced evidence to show that the west, or northwest line of the said deed from Lowry, Harbin and Robinson, to John W. Wells, was located so as to include the *locus in quo*, which was a lappage, and claimed to be covered by the paper title of both parties, and that said Wells, and those claiming title under him, (348) had been in the actual possession of portions of the land covered by said deed to him from Lowry, Robinson and Harbin since 1844.

The evidence as to the possession of the lappage was conflicting. The defendant John W. Wells and another witness, introduced in behalf of the defendants, swore that twenty-four years ago, or in the Spring of 1861, said Wells moved out his fence, so as to cover about ¼

acre of said lappage, and that he had had possession of a small portion of the lappage since 1844.

There was other evidence, that in 1873, said Wells moved out his fence, up to the line, so as to include several acres of said lappage. The plaintiffs in reply, offered testimony to contradict the evidence that any part of the lappage was covered by the fence in 1861, but admitted that that built in 1873 did cover several acres of the lappage.

The plaintiffs asked of the Court the following special instructions:

"1. The occupation of the defendants, by their fence and field, is the measure of their possession, unaccompanied by a deed or some conveyance to them, and they cannot enlarge their possession by declarations of a claim up to certain boundaries. That the occasional cutting of timber, and the running of lines and marking of trees, are but trespasses, interrupting, but not divesting, the owner's constructive possession.

"2. That if the lands are located as the plaintiffs claim, and the plaintiffs have shown that they were sold and conveyed, prior to the dates of the deeds by the University to Lowry, Robinson and Harbin, and Lowry, Robinson and Harbin to Wells, then the lands in dispute have never been conveyed to the defendants or either of them, or any one under whom they claim, and they have no color of title by virtue of said deeds.

"3. That there is not sufficient evidence to show a possession by the defendants, and those under whom they claim, for twenty years, for the land in dispute, under and up to visible lines and boundaries,
(349) except so much as was occupied by the defendants' field, and as to the part covered by the field, unless the jury shall believe that the defendants have been in the actual occupancy of their field for more than 20 years, not counting from May 20th, 1861, to Jan. 1st, 1870, the plaintiffs will be entitled to recover."

The Court charged the jury as follows:

"That the deed from David S. Reid, to Lowry, Robinson and Harbin, was not color of title to any lands held by other titles, or held under contracts in writing with Robert and James R. Love, prior to the date of said deed. And no possession short of twenty years, exclusive of the time between the 20th of May, 1861, and January 1st, 1870, would ripen title to the lands excluded from the operations of said deed by said exception. And that if the jury should find, that the lands in dispute are located as the plaintiffs claim, and were sold and conveyed prior to the date of said deed, they were not conveyed to the said Lowry, Robinson and Harbin, and they, the said Lowry, Robinson and Harbin, had no title or color of title to the same, by virtue of their said deed.

"But that the deed from Lowry, Robinson and Harbin, to John W. Wells, was color of title to all the lands included in its boundaries; that the words used in said deed, *'including all lands not heretofore sold,'* were merely descriptive of the lands conveyed, and are not an exception. And that if the jury shall find that the said Wells, and those claiming under him, have been in possession for seven years, of any part of the lappage, the plaintiffs having no possession therein, then the title of said Wells would ripen to the whole of said lap, although they should find that the same had been previously conveyed, and was held by other titles at the date of said deed, and in such case, that they should find for the defendants, title having been admitted out of the State." Plaintiffs excepted.

"That if the defendant John W. Wells, and those claiming under him, had been in the continuous adverse possession of any part of the land, covered by plaintiff's deed, claiming the same up to (350) known and visible boundaries, for twenty years before the commencement of this action exclusive of the time from May 20th, 1861, to January 1st, 1870, claiming the same as his own, against all the world, and laying himself open to an action therefor, said Wells would have had a constructive possession for all the land, up to his known and marked lines, and that the jury should presume the necessary *mesne* conveyances to him from the grantee of the State therefor, although he had no deed, or paper title for the same." Plaintiffs excepted.

"That the deed from James Hughey, Sheriff of the County of Buncombe, to John Strother, was not valid as a link in the plaintiffs' chain of title, but was good as color. That the plaintiffs were required to show that the taxes of David Allison were due, and remained unpaid at the time of the sale of said land by said Sheriff; and to prove all the recitals in the deed, of things necessary for making valid said sale for taxes, otherwise the deed would not convey any title, but would give color merely." The plaintiffs excepted.

The following issues being submitted to the jury:

1st. "Are the plaintiffs the owners of the land mentioned in the complaint?" To which they responded: "They are not of that part included within the lines of the deed from Lowry, Harbin and Robinson to John W. Wells, but they are the owners of the lands beginning at the white oak stump, near the small branch."

2nd. "Are the defendants in possession of any part of said lands, and if so, of what part?"

To this the jury answered: "They are not in possession of any part of the lands, except that part included in the deed from Lowry, Harbin and Robinson to J. W. Wells."

The plaintiffs moved the Court for a new trial, which was overruled by the Court, and the plaintiffs excepted. Judgment was rendered for the defendants, to which the plaintiffs excepted, and insisted they were not, in the pleadings and finding of the jury, bound for the costs
(351) of the action. From this judgment, the plaintiffs appealed.

Mr. Chas. A. Moore, for the plaintiffs.

Mr. Theo. F. Davidson, for the defendants.

ASHE, J. (after stating the facts). There was a good deal of evidence offered on the trial, and numerous exceptions taken by the plaintiffs to the ruling of the Court upon questions arising upon inadmissibility of evidence, all of which, except those herein set forth, we think impertinent to the real merits of the controversy.

After stripping the case of all extraneous and irrelevant matter, it narrows itself down to the exceptions taken by the plaintiffs to the charge of the Judge to the jury, in his instructions as to the presumption of a deed after an actual possession of twenty years, and the bar of the statute, after an actual adverse possession of seven years with color of title.

Although his Honor laid down the principles of the law correctly, as appertaining to those questions, his instructions were not applicable to the facts of the case. For instance, his Honor charged the jury, that if Wells had possession of part of the land covered by plaintiffs' deeds, claiming the same up to known, and visible boundaries, for twenty years before the commencement of this action, exclusive of the time from May 20th, 1861, to Jan. 1st, 1870, claiming the same as his own, against all the world, and laying himself open to an action, he would have had a constructive possession of all the land, up to his known and marked lines, and the jury should presume the necessary *mesne* conveyances to him from the grantee of the State, although he should have no paper title." The facts of the case did not warrant this instruction. There was no evidence of an open and notorious possession of any part of the *locus in quo* by the defendant for twenty years, up to known and visible boundaries.

(352) It was in evidence that the Northwestern line of the deed to Wells, made by Lowry, Harbin and Robinson, had been run for Wells in 1844, when negotiating with the Loves for some adjoining land, but there was no evidence that he ever obtained any deed from Love for land up to that boundary, or that he ever claimed the land up to that boundary, until he obtained the deed from Lowry, Harbin and Robinson, which was executed on the 6th day of October, 1858. Nor

even then did he have such a possession of the lappage, as would amount to such an open, notorious and adverse possession, as would presume a deed from lapse of time, for Wells himself testified that he had possession of some part of the lappage since 1844; and about the year 1861, he moved out his fence, so as to take in about one quarter of an acre of the lappage, but he did not say how much he had in possession before that time. It must have been a very small portion, since when widened out it only reached to ¼ of an acre.

The witness Wells, did not state whether he took that possession in assertion of his rights, or through inadvertence as to the line. When there is a long line, running over a wild, broken mountainous ridge, such as that was, up to which the defendant obtained a possession, a small portion might be taken and held for years without any one knowing whether there was a trespass or not. Therefore, it has been held, that when the extent of a wrong doer's possession is so limited as to afford a fair presumption that the party mistook his boundaries, or did not intend to set up a claim within the lines of the deed of the other party, it would be a proper ground for saying that he had not the possession, or that it was not adverse. *Bynum v. Carter,* 26 N. C., 310; *Gilchrist v. McLauchlin,* 29 N. C., 310; *Harris v. Yarborough,* 15 N. C., 158. In this last case, RUFFIN, C. J., said: "I think that in such a case as this, there ought to be some evidence of the owner's knowledge of the claim, besides the mere possession of so small a parcel." But the defendant insisted, that if this possession, commencing in 1844, was not of such a character as to make it adverse to the plaintiff, he extended his fence in 1861, so as to embrace some quarter of an acre of the lappage, but that cannot help (353) the matter, for striking out the intermediate years, from the 20th of May, 1861, to the 1st of January, 1870, the defendant did not have twenty years' possession, prior to the commencement of the action on the 8th day of February, 1882. We think there was clearly error in his instructions on this point.

The plaintiff's next and most important exception, was to the charge of the Court, "that the deed from Lowry, Harbin and Robinson to John W. Wells, was color of title to all the land included in its boundaries; that the words used in said deed 'including all lands not heretofore sold,' were merely descriptive of the lands conveyed, and are not an exception,—and if the defendant had been in possession for seven years, of any part of the lappage, the plaintiff having no possession therein, then the title of said Wells would ripen to the whole of said lappage, although they should find that the same had been previously conveyed, and was held by other titles at the date of said deed."

This exception was well taken, and should have been sustained. The charge was erroneous.

Both parties claimed under the grant to Allison. The plaintiffs showed a long, uninterrupted possession, of some seventy-five or eighty years, by successive conveyances, of the land claimed by them, which the jury found covered the *locus in quo,* but neither they, nor those under whom they claimed, had ever been in the actual possession of the lappage.

The defendants claimed the adjoining tract, under a deed from the University, as escheated property, to Lowry, Harbin and Robinson, dated the 14th of April, 1854, in which, after describing the boundaries of a large body of land, there is the following reservation or saving, "within which there is much land held by other titles, and some tracts held under contracts in writing with Robert and James R. Love, which are excepted." And then in the deed from Lowry, Harbin and Robinson, to J. W. Wells, the defendant, bearing date the 6th of
(354) October, 1858, after describing the boundaries by courses and distances, there is a similar reservation or saving, expressed in the words, "including all lands not heretofore sold."

His Honor told the jury, that these words were not exceptive, but only descriptive of the land conveyed. It is true they were descriptive, but they were descriptive only of all the lands included in the boundaries, that were not included in the deeds and conveyances therebefore made to other persons. These lands were as much excluded from the operation of the deed to Wells, as if they had not been embraced within the sweeping boundaries of that deed. It not only did not profess to include them, but expressly excluded them from its operation, whenever it might be ascertained that they fell within the exception.

In the case of *McCormick v. Monroe,* 46 N. C., 13, where the exception in the deed was two hundred and fifty acres, out of 500 acres *previously granted,* Judge PEARSON speaking for the Court, said: "This would point to the means by which the description in the exception may be sufficiently certain to avoid the objection of vagueness, by aid of the maxim *id certum est, quod certum reddi potest.* It may be done by proving that a part of the 500 acres included in the plaintiff's grant, had been previously granted, and what part; and if such part covers the *locus in quo,* the defendant is not guilty of the trespass."

He further holds, that he who relies upon the exception, must support it by proof of the facts that bring it within the operation of the above maxim.

Upon this authority, we are led to the conclusion that the deed from Lowry and others to Wells, was not color of title to the land claimed

by the plaintiffs and included in the deeds under which they claimed title, for the reason, that the deed from Lowry and others to Wells, did not convey to him the land covered by the plaintiff's deed, so that although he may have had actual adverse possession of the lappage for more than seven years before action brought, he had no such color of title as ripened his possession into an absolute title.

Our opinion is there was error, and this must be certified to (355) the Superior Court of Buncombe County, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: McLean v. Smith, 106 N.C. 179, 190; *Bernhardt v. Brown,* 122 N.C. 591; *Barker v. R. R.,* 125 N.C. 599; *Williams v. Harris,* 137 N.C. 461, 462; *Stewart v. Carpet Co.,* 138 N.C. 63; *Lumber Co. v. Cedar Co.,* 142 N.C. 422; *Bowser v. Wescott,* 145 N.C. 66; *Featherston v. Merrimon,* 148 N.C. 205; *Jones v. Ins. Co.,* 153 N.C. 391; *Waldo v. Wilson,* 173 N.C. 693; *Vanderbilt v. Chapman,* 175 N.C. 13; *Kimbrough v. R. R.,* 182 N.C. 241, 244; *Gibson v. Dudley,* 233 N.C. 258, 259; *Price v. Whisnant,* 236 N.C. 385; *Paper Co. v. Cedar Works,* 239 N.C. 633.

STATE EX REL. M. N. PETTY v. J. O. ROUSSEAU, ADM'R, ET AL.

Infant—Contracts Executory and Executed—Verdict—Transferable Demands—Party in Interest.

1. Where an infant sold his claim against his guardian for a present consideration, and promised to give a receipt for it when he became of age, it is an executed, and not an executory contract.
2. Where an infant enters into an executory contract, express confirmation or a new promise after coming of age, must be shown in order to bind him; but where the contract is executed, ratification may be inferred from circumstances, and any acknowledgment of liability, or holding the property and treating it as his own, will amount to such ratification.
3. The Clerk has no right to take the verdict of a jury in the absence of the Judge, unless expressly authorized by the Court to do so.
4. Where, without authority, the Clerk took a verdict in the absence of the Judge, which was irresponsive to the issues, the Judge has the power to order the jury to retire and find another verdict, they not having dispersed, and there being no allegation that they have been tampered with.
5. Any claim or demand can be transferred, and the assignee maintain an action on it in his own name, except when it is to recover damages for a personal injury, or for breach of promise of marriage, or when it is

founded on a grant made void by statute, or when the transfer is forbidden by statute, or when it would contravene public policy.

6. The share of an infant in an estate in the hands of his guardian is capable to be assigned, and when so assigned, the assignee and not the infant is the proper relator in an action on the guardian bond.

CIVIL ACTION, tried before *Graves, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of WILKES County.

(356) The action was brought on the guardian bond of Benjamin F. Petty, against the defendant J. O. Rousseau as his administrator, and against A. L. Rousseau as his surety to said bond. B. F. Petty was appointed guardian of the relator and his brother and sister, who were infants, on the 16th day of July, 1861, and it was alleged there were some funds in the hands of the guardian, who was dead, due to his wards.

The defendant denied, at first, the execution of the bond. He also denied that there was anything due to the relator from his guardian; and as a further defence pleaded that the relator had no right to maintain this action, for the reason he had parted with his interest, if he ever had any, in the subject of the action, before its institution; and that the claim was barred by the statute of limitations, or presumed to be paid by lapse of time.

The following issues were submitted to the jury:

1st. Did defendant J. O. Rousseau's intestate and A. L. Rousseau, execute the bond sued on, as alleged?

2nd. Did the plaintiff assign his interest in the bond sued on to F. Doughton, or to any one, before the bringing of the suit, and did he, plaintiff, have any interest therein at the bringing of this action?

3rd. Had three years elapsed after the plaintiff came to the age of twenty-one years, before this action was brought?

The execution of the bond was admitted as alleged in the complaint, and that the action was brought within three years after the relator became of age.

One C. H. Doughton was introduced as a witness for the defendant, and it was proposed to show by him, that the relator, M. N. Petty, had sold all of his interest in the subject of the action, to F. S. Doughton, before the action was begun, and the relator had no interest in the matter in suit. The plaintiff objected to the evidence, but it was admitted by the Court, and the plaintiff excepted. The witness then testified, in substance, that Fleming Doughton was his son, and he married the sister of the relator, that after the death of R. F. Petty,

(357) M. N. Petty proposed to sell to F. S. Doughton, his interest in his mother's estate, that had come into the hands of his father,

B. F. Petty, as his guardian. Doughton said, "you are not of age, and cannot give a receipt." Petty said "he would sign when he came of age." They traded. Petty said "he would rather have a little now, than more hereafter." Witness could not recollect the price agreed on, but when Petty started to his home in Wilkes, Doughton let him have, in part payment, a mare and some money, and he thinks a mule, and after that Doughton paid him some more money on their trade, and after that Doughton bought the mare back, and paid him the money for her. The trade took place he thought in 1876, 1877, or 1878, but did not exactly remember when.

One Laxton testified, that the relator left the county of Wilkes in the Fall of 1881, and told him that he had sold all of his interest that came from his mother's estate to F. S. Doughton, and that he took stock for it; that he told him the same thing several times.

One Parks testified, that several years ago, the relator came to his father's house, and brought a bay mare and a mule, and a bridle and saddle, and said he had sold out to Doughton—that he traded the mare for a horse, and made a crop with it; does not know what he did with the horse, he swapped the mule for a horse, and witness bought the horse from him. Witness further stated, that he heard a conversation between the relator and witness's mother, in 1880. They were speaking about his property. She said, "You have sold out your interest to your brother Flem," (that is F. S. Doughton). He said, "Yes, but when a man sees he can get anything he wants it;" that he had a conversation with him, and he said the same thing. Witness stated that he swapped with Petty for a sorrel horse, which he had swapped another horse for. Does not know when relator came back from Alleghany, but it was two years before he swapped horses.

Parks, a witness, testified that the relator was born on the 12th of March, 1858. Relator told him that he had sold out to his brother Flem. He then had a bay filly and a mule; he swapped (358) the mule for a horse, and made one or two crops with it. In 1878 or 1879, he bought a large sorrel horse, which he said he got from F. S. Doughton, and had him for two years before he left the State in the fall of 1881. He did not know what he gave for the horse or how he paid for him.

The plaintiff asked the Court to instruct the jury: "That there was no evidence to show a sale, unless it was to F. S. Doughton, in 1876, when the plaintiff was an infant, and that at most, there was only an agreement to assign his interest when he became of age, and that was an executory contract, and that there was no evidence, or no sufficient evidence, to authorize the jury to find that he ever ratified the same."

The instructions asked for were not given as asked for. The substance of the instructions given to the jury was reduced to writing and read to the jury as follows:

"When you come to consider the second issue, it will be the duty of the defendants to show you, by a preponderance of evidence, that the relator of plaintiff had parted with his interest in the subject matter of this action, before it was begun. There is no evidence of any sale by the relator, unless it was to F. S. Doughton. A contract is only binding between parties competent to contract. The contracts of an infant are not absolutely void, but they are voidable, that is to say, although an infant may make a contract, he may, when he becomes of full age, avoid it, and set it aside, or he may affirm it after he becomes of age. Direct and express affirmation must be shown, if the contract is executory. If the contract is an executed contract, the affirmation may be inferred from circumstances."

After having read this, the Court added orally:

"If, at the time of the alleged contract between the relator and F. S. Doughton, the relator was not then twenty-one years old, he was an infant, and if he made a contract, it would not be binding, unless it was affirmed after he became twenty-one years old. You will inquire, then, whether there was a contract made, and whether it has (359) been affirmed. If you find that a contract was made, was it an executory contract, or an executory one? An executory contract is one not yet completed and finished, but something yet remains to be done. If the relator of the plaintiff agreed with F. S. Doughton that he would sell him his interest when he became of age, this would be an executory contract, and to make it binding on the relator of the plaintiff, then it would be necessary for the defendants to show a direct and express ratification of the agreement after the relator became of age. An executed contract is one in which nothing more remains to be done to complete the trade. If the relator sold his interest in the subject matter of this suit to F. S. Doughton, and received the pay for it, then it was an executed contract, and if the trade was so completed, it would still be an executed contract, if the relator promised to give his receipt for the money after he became of age. If you find the contract was an executed contract, made by the relator when an infant, it is still one he may set aside, unless he has ratified it. The affirmance of an executed contract made by an infant, may be shown by circumstances occurring after he arrives at full age. So here, if the contract was executed, and the relator kept the property which he had received, for an unreasonably long time after he became of age, and used it as his own, the jury may infer that he ratified the contract; but if he had

parted with, or wasted it before he became of full age, or offered to return it, no such inference can be drawn. In order to authorize the jury to infer an affirmance of the contract, the circumstances must show it."

To the refusal to give the instructions asked for, plaintiff excepted. To the instructions given, the plaintiff excepted.

This case was given to the jury late in the evening, and they had not returned their verdict when the Court took a recess for the day. Between eight and nine o'clock that night, the jury returned their verdict to the Clerk, in the absence of the Judge—counsel on both sides being present—and were discharged by the Clerk. In this verdict they found "yes" to the first issue, and "no" to the second and third issues.

Upon the opening of Court the next morning, one of the jurors, who sat upon the case, applied to the Court, and was discharged (360) from further service. The Judge then asked to see the verdict in this case, as returned by the jury the night before, and upon reading the same, asked if the juror just discharged "was one that sat upon the trial of this case," and upon being informed that he was, had him called back in the jury box, with the other jurors. He then stated that the responses to the issues were confused, and not fully responsive. He then proceeded to call the attention of the jury to the issues, and pointed out in what respect the finding was not fully responsive, and submitted the issues to them, telling them to retire and find how the matter was.

The plaintiff objected to the case being submitted to the jury again, and excepted to the action of the Court in doing so.

The jury, after being out a short time, returned their verdict, finding the first issue in the affirmative. In response to the second issue, they found that the relator "had sold to Doughton, and had no interest at the beginning of the action." The third issue was responded to in the negative.

There was a motion for a new trial. The motion was overruled, and judgment against the plaintiff, from which he appealed.

Mr. D. M. Furches, for the plaintiff.
Mr. C. B. Watson, for the defendants.

ASHE, J. (after stating the facts.) The record presents four questions for our consideration.

1. Was there error in the refusal of the Court to give the instructions asked by the plaintiff?

2. Was there error in directing the jury to reconsider their verdict and make it responsive to the issues?

3. Did M. N. Petty have the right to maintain the action as relator?
4. Was there error in the charge given by the Court to the jury?

Our opinion is, there was no error in the refusal to give the
(361) instructions asked by the plaintiff, nor in the instructions given by the Court. These exceptions, the first and fourth, will be considered together, as they involve the same questions.

The instructions asked, are predicated upon the fallacious assumption, that the contract made by the relator and F. S. Doughton was executory, and the relator being an infant at the time, there was not sufficient evidence to warrant the jury in coming to the conclusion that there was a ratification by the relator, after he became of age. But the evidence in the case is plenary, that the relator, while under age, sold to Doughton all his interest in his mother's estate, which had come to the hands of B. F. Petty as his guardian. There was no evidence that he would sell or assign this interest when he reached his majority, but the sale was absolute and for a consideration, for which he agreed to give a receipt for when he became of age. It was therefore an executed contract, and the principle applicable to the ratification of such a contract, is different from that which applies to an executory contract. His Honor, we think, clearly laid down the distinction in his charge to the jury, when he said: "Direct and express affirmation must be shown, if the contract is executory. If the contract is an executed contract, the affirmation may be inferred from circumstances," and in this he is fully supported by very high authority. Mr. Greenleaf lays it down, that "there is a distinction between those acts and words which are *necessary* to ratify an executory contract, and those which are *sufficient* to ratify an executed contract. In the latter case, any act amounting to an explicit acknowledgment of liability, will operate as a ratification; as in the case of a purchase of land or goods, if after coming of age, he continues to hold the property and treats it as his own. But in order to ratify an executory agreement, there must not only be an acknowledgment of liability, but an *express confirmation* or new promise, voluntarily and deliberately made by the infant, upon his coming of age, and with the knowledge that he is not legally liable. 2 Greenleaf Ev. Sec. 367; *Turner v. Gaither*, 83 N. C., 357.

(362) The charge of his Honor is further well supported by the decision of this Court in the case of *Alexander v. Hutchison*, 12 N. C., 13, where it is held by TAYLOR, C. J., and HALL, Judge, that it should be left to the jury to determine whether they could infer from the defendant's behavior, a clear and unequivocal assent to, and ratification of the contract. "It may be by *words*, it may be by *signs* or *acts*—anything which shows an acquiescence, or an *assent* of the

parties mind is sufficient." *Skinner v. Maxwell,* 68 N. C., 45. Here the relator received the consideration of the contract, which consisted of a horse, mule, bridle and saddle, and money, which from aught that appears, he never returned, and after the sale he admitted to different persons that he had sold his interest in his mother's estate to F. M. Doughton. He admitted the same thing, after he became of age, to Mrs. Parks, and her son, J. F. Parks, in 1880, and to Romulus Laxton, in the fall of 1881, and never expressed any regret or dissatisfaction with the sale.

Upon this evidence, the jury were well warranted in finding there was a ratification of the contract. The agreement to give a receipt after he became of age, formed no part of the contract of sale. That was only to be given as evidence of the receipt of the consideration.

The next question presented by the exceptions of the defendant is, was there error in directing the jury to reconsider their verdict, and accepting their verdict as reformed. When the Court took a recess for the day, it was getting late at night, and the Judge left the bench without authorizing the Clerk to receive the verdict. The Clerk then had no right to receive it in his absence, and even if he had directed the Clerk to receive it, it was competent for him after his return, if the verdict was not responsive to all the issues, and the jury being in Court, and there being no suggestion of tampering, or other improper influence, to order them to retire and render a proper verdict upon the issues, in the same manner as verdicts rendered in open Court. *Wright v. Hemphill,* 81 N. C., 33; *Willoughby v. Threadgill,* 72 N. C., 438; *Robeson v. Lewis,* 73 N. C., 107. "Calling the jury again into (363) the box, and instructing them to render a verdict responsive to the issues, was a matter within the discretion of the Judge." *Willoughby v. Threadgill, supra.* The Judge had to right to take that course, or discharge the jury, as he might deem most advisable. *Houston v. Potts,* 63 N. C., 41, but in that case it does not appear that the jury were in Court when the verdict was set aside; for aught that appears they may have been discharged, and were dispersed.

The remaining question to be considered is: Did M. N. Petty have the right to maintain the action as relator; and we are of opinion he had not the right. The evidence in the case, as we hold, was sufficient to warrant the jury in finding the fact that the relator had transferred his interest to Doughton, and the first inquiry in this connection is, was the interest of the relator such a right as might be assigned. The Code, Sec. 177, which provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided, and in case of an assignment of a thing in action, the action by the

assignee shall be without prejudice to any set-off etc., is a literal copy of a similar section in the New York Code. And Mr. Bliss, in his Annotated Code, 2 vol., 270, in commenting on this section of the Code, thus lays down in the rule with regard to what is or is not assignable:

"Any claim or demand can be transferred, except in one of the following cases: 1st. When it is to recover damages for personal injury, or for a breach of promise to marry. 2d. When it is founded upon a grant which is made void by a statute of the State, or upon a claim to or interest in real property, a grant of which, by the transferror, would be void by such statute. 3rd. Where the transfer thereof is expressly forbidden by a statute of the State or of the United States, or would contravene public policy."

The assignment in our case does not fall within either of these prohibited classes, and according to this very high authority, the claim of M. N. Petty was an assignable interest, and having been as-
(364) signed, he no longer had any interest in it. All that he had was transferred to Doughton, who was the real party in interest, and was the only person, under The Code, Sec. 177, who could maintain the action. It was so held in New York, in the case of *Sheridan v. Meyer,* 68 N. Y., 130, which was a case involving a similar question under the Code of that State, and it was there held that, "A plaintiff suing upon an assigned claim, is the real party in interest under the Code, if he has a valid transfer against the assignor, and holds the legal title to the demand: the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor."

In this State, before the adoption of The Code, it was held by this Court, PEARSON, C. J., delivering the opinion, that when a constable had a judgment for collection, and failing to collect, paid the amount of the judgment to the plaintiff therein, and then put the judgment in the hands of another constable for collection, the first constable had the right to maintain an action as *relator* on the bond of the second constable. *Garrow v. Maxwell,* 51 N. C., 529, and this was put upon the ground, that the first constable was the purchaser of the judgment —in other words, was the assignee of the judgment. And if under the law as it then existed, the assignee in such a case, had the right to sue as relator, *a fortiori* would he have that right under The Code, Sec. 177, which expressly provides that "every action must be prosecuted in the name of the real party in interest."

Our conclusion is, there is no error, and the judgment of the Superior Court must be affirmed.

No error. Affirmed.

Cited: Luttrell v. Martin, 112 N.C. 607; *Woodcock v. Bostic,* 118 N.C. 830; *Bresee v. Stanly,* 119 N.C. 281; *Cox v. R. R.,* 149 N.C. 88; *Grocery Co. v. R. R.,* 170 N.C. 248, 249; *Zageir v. Express Co.,* 171 N.C. 696; *Grove v. Barker,* 174 N.C. 748; *Guy v. Bullard,* 178 N.C. 230; *Lumber Co. v. Lumber Co.,* 187 N.C. 418; *Conrad v. Board of Education,* 190 N.C. 397; *Lipscomb v. Cox,* 195 N.C. 505; *Oil Co. v. Moore,* 202 N.C. 710; *In re Wallace,* 212 N.C. 493.

(365)

P. W. EDWARDS v. S. L. LOVE, ET AL. EXECUTORS.

Executors—Liability Individually.

1. Where expenses are incurred by an executor in carrying out directions contained in a will, they stand on the same footing as the expenses of administering the estate, and must be paid out of the assets, before legacies.
2. Where a will directed the executors to employ the plaintiff as agent to sell certain lands of the testator, and in obedience to such directions, the executors entered into a contract under seal with the plaintiff, *It was held,* that the executors were personally liable on the contract, but as it was entered into under the directions of the will, and the services rendered were for the benefit of the estate, payment might also be coerced out of the assets of the estate.
3. In such case, under our former practice, the plaintiff would have had to sue the executors on their individual liability in an action at law, and to enforce the liability of the estate, he would have had to go into a Court of equity, but since the adoption of the Code system, both reliefs may be administered in one action.

CIVIL ACTION, tried before *Graves, Judge,* upon exceptions to the report of a referee, at July Special Term, 1885, of the Superior Court of HAYWOOD County.

James R. Love, residing in the county of Haywood, died in the year 1863, owning numerous and large tracts of land, situate in said county, and in the counties of Jackson and Swain, known by the expressive term, *speculation lands,* as designating the purpose for which they had been acquired and held. Previous to his death, he executed a will, with several codicils, which has been duly proved, and therein he nominates as executors, Robert G. A. Love and Samuel L. Love, two of his sons, William H. Thomas, who had intermarried with his daughter, and has since become insane, and William L. Hilliard, who had intermarried with another daughter, all of whom accepted the trust, and entered upon the discharge of the duties imposed upon them. The executor Robert G. A. has since died.

(366) The testator, in his lifetime, had the plaintiff in his service, in looking after, surveying, and making contracts for the sale of said land, and in reference thereto, makes this provision in his will:

"And in relation to the Speculation Lands, it is my will and desire, that the sales shall continue, under the management of my executors, as though I was living, they receiving for their services the same that I am receiving (to-wit), twenty-five per cent. on the amount sold, and they are also to make titles, and Phillip W. Edwards is to be continued agent, as long as the executors and he can agree."

He was thus employed by the executors, and the plaintiff's present action, instituted on September 2d, 1880, is to recover compensation for services rendered, under a contract with him in these terms:

"Know all men by these presents, that we, W. H. Thomas, R. G. A. Love, Samuel L. Love, and W. L. Hilliard, executors of the last will and testament of J. R. Love, deceased, do hereby authorize and impower P. W. Edwards, to make contracts for the sale of lands belonging to the estate of the late J. R. Love, and known as the 'Speculation Lands,' lying in the counties of Haywood, Jackson and Swain, and in our names to execute bonds for titles thereto, and to take notes to secure the purchase money thereof, and to that end, to search out and survey the said lands, to the extent that he shall make contracts of sale of the same. And for such services, the said Edwards is to receive as compensation, as follows: For each tract of fifty acres or less, two dollars; for each tract over fifty, and not exceeding one hundred acres, three dollars; and for each acre in excess of 100 acres, the sum of one cent per acre. He is also to receive in addition thereto, the sum of five per centum of all amounts of sales made by him; and in further addition thereto, he is to receive for office work, in writing deeds and performing other clerical duties, when so requested or required by either of the undersigned, the sum of three dollars per day, and board and other necessary expenses. And the said P. W.

(367) Edwards is hereby required to report at the end of every three months, the number of acres so contracted and sold, where the same is situated, the purchaser thereof, and the price per acre, and the terms of sale, and also what moneys are collected by him on such sales. It is further understood and agreed by the said executors, that if the said P. W. Edwards, after having made energetic and honest efforts to sell said lands as above directed, but failed to do so on account of the pressure of the times and scarcity of money, and having given satisfactory evidence of the same to the executors, then the said Edwards, for such service, shall be paid the sum of two dollars per day, with the necessary expenses for self and horse. It is further understood that the said executors reserve to themselves the right to

call in this paper, and stop the sale of said lands, at any day that a majority of them see proper or deem it prudent so to do. And the said P. W. Edwards is to receive his said compensation out of the notes taken for the sale of said lands.

In witness whereof we have hereunto set our hands and seals this 18th day of December, 1874.

(Signed) R. G. A. LOVE, [Seal.]
SAM'L. L. LOVE, [Seal.]
W. L. HILLIARD, [Seal.]

This covenant and constitution of agency, was proved and registered on the 19th day of February, 1880.

At Spring Term, 1883, an order of reference was made to John A. Ferguson and W. L. Norwood, to take and state an account between the parties, and to report the evidence and their findings thereon, both of law and fact, to the next term of the Court.

The referees made their report accordingly, in which they find, upon an adjustment of their claims, to be due the plaintiff on May 5th, 1880, the sum of one hundred and fifty dollars and forty-three cents, whereof one hundred and twenty-two dollars and eighty cents is principal money, and moreover that the defendants, *as executors*, are not liable for any portion of the demand, nor does it consti- (368) tute a charge against the testator's estate in their hands.

Several exceptions were taken by the plaintiff to the report, all of which were abandoned at the hearing before the Judge, except the last, which is in these words:

"Said referees concluded as a matter of law, that the defendants are not liable as executors for any part of the amount found to be due the plaintiff, (as per their report), and that the same does not constitute a charge against the estate of their testator, the said J. R. Love, deceased. Whereas, they should have found that the defendants are liable, in law, as executors, for said debt, and for all claims due said plaintiff as their agent."

This exception was sustained, the ruling of the referees reversed, and it was adjudged that the plaintiff recover of the surviving acting executors, William L. Hilliard and Samuel L. Love, as such, the amount reported to be due, with interest on the principal money from July 13th, 1885, until paid, and that the costs, including the half of the joint allowance to the referees, before adjudged against the plaintiff, be taxed against the defendants, and declaring the same to be a charge upon their testator's estate.

From this judgment and ruling, the defendants appealed.

Mr. M. E. Carter, for the plaintiff.

Mr. A. W. Haywood, for the defendants.

SMITH, C. J. (after stating the facts). The covenant entered into by the defendants, as imposing a legal obligation, is personal to them, for they cannot by their own act, make it that of their testator. But the contract is made by them as trustees, in the discharge of a fiduciary duty created under the will, and assumed in their acceptance of office. The action would lie against them as individuals, and a recovery be had, while at the same time, the plaintiff has a right to have so much of the trust estate as is in their hands and applicable to the
(369) plaintiff's claim, used in its discharge. The proceeding is against them personally, the term "executors" only designating the capacity in which they have covenanted, and it is intended to enforce an obligation, entered into under the authority, and pursuant to the provisions of the will, and for the benefit of the testator's estate. Had the demand of what is truly due, been voluntarily met, the voucher for the payment would have been received as a proper disbursement, just as would be sums paid counsel, for aid in the management of the trust, or costs incurred in the *bona fide* prosecution of an action, which proves unsuccessful, in the interests of the estate, or in an unavailing resistance to an action against it.

As the fruits would benefit and enlarge the trust estate, so must moneys used in its defence, or in the assertion and enforcement of its supposed just demands, go to its impairment and diminution. If, then, the executors might have voluntarily paid the claim, why, when they refuse, may not the plaintiff coerce them to make payment out of the assets in their hands, produced by the plaintiff's rendered service?

The suit has a two-fold purpose: 1st, to establish the demand under the covenant; and, 2nd, to enforce its discharge out of the trust fund. What may have formerly required an exercise of both legal and equitable jurisdiction, to be sought in distinct forums, may now be secured in a single proceeding, in one tribunal. *Bank v. Harris*, 84 N. C., 206; *Mebane v. Clayton*, 86 N. C., 571.

"The primary jurisdiction of the Court," remarks RUFFIN, C. J., referring to a court of equity, in *Mitchell v. Roberts*, 17 N. C., 478, "is *in personam*, and although our statutes allow executions in equity, the nature of the decree is not altered, but only that process is substituted, at the election of the party, for that of contempt. The decree is against the defendant personally, regarding him, (the executor in this case), as a trustee, by reason of the fund in his hands, applicable to the plaintiff's satisfaction."

Again, when expenses are incurred by an executor, in carry- (370) ing out the directions contained in the will, they stand very much on the footing of those incurred by the testator himself, and like the expenses of administering the trust, have a prior claim upon the estate, and must be paid before legacies can be. This plain principle has been recognized and acted on in cases before this Court. Thus, in *Hardy v. Leary,* 43 N. C., 94, the testator directed that certain income should be used by his executor, in the support and education of his children. After his death, his widow married a second time, and this husband, the intestate of the plaintiff, sent to school and supported the children so provided for in the will, at his own expense, receiving payment therefor from the defendant, the testator's executor. It was held that to the extent of the income, devoted to this object, the plaintiff was entitled to be reimbursed the moneys thus reasonably expended by the intestate.

The same general principle is recognized in *Morrow v. Morrow,* 45 N. C., 148; and in *Little v. Bennett,* 58 N. C., 156. While thus, the defendants, with trust funds in hand applicable to the plaintiff's debt, (and there is no suggestion in the case to the contrary), may be compelled to appropriate them in its discharge, they are liable to an action on the contract as personal, irrespective of the possession of assets, and may be compelled to pay out of their individual estate. But this remedy does not take away the equitable right to proceed against them as trustees in possession of trust funds which are also liable. The concluding portion of the judgment, declaring the debt a charge upon the estate, imports, as we understand its terms, a mandate to the defendants to make the payment out of the trust fund, according to the contract.

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

No error. Affirmed.

Cited: Calvert v. Miller, 94 N.C. 603; *Froelich v. Trading Co.,* 120 N.C. 42; *Lindsay v. Darden,* 124 N.C. 309.

(371)

J. B. SUMNER AND WIFE v. W. J. SESSOMS ET ALS.

Judicial Sale—Impeaching decree Collaterally—Fraud—Evidence—Guardian ad litem—Record—Infant.

1. Where a sale of land is made under a decree of Court, is cannot be collaterally impeached in an independent action brought to recover the land. As long as the decretal order of sale and conveyance remain unmodified, the conveyance authorized by it must also stand, and such orders can only be impeached by a direct proceeding for that purpose.
2. Where land was sold to make assets, and the sale confirmed and title ordered to be made, and afterwards an action of ejectment was brought by one of the heirs, evidence in such action, that the land sold for an undervalue, is incompetent, the order confirming the sale being still in force.
3. In such case, the insufficiency in price would be cause for refusing to confirm the sale, but is no ground for annulling the deed in an action brought to try the legal title.
4. The fact that the purchaser at a sale of land to make assets, conveys the land to the administrator who made the sale, shortly thereafter, is very slight evidence, unless aided by other facts, to establish collusion between such purchaser and the administrator.
5. Where the person making a sale of land, purchases himself directly, the sale is void. But if he purchases through an agent, who afterwards conveys to him, the legal title passes, subject to the right of the parties interested, to divest it by a proper proceeding.
6. Where the record shows that a guardian *ad litem* was appointed, but it does not appear affirmatively that the infant was ever served, the defect must be taken advantage of in a direct proceeding to attack the judgment, and is not available in a collateral action.
7. The presence of a next friend or guardian *ad litem* to represent an infant, and his recognition by the Court, precludes inquiry as to his authority to act in a collateral proceeding.
8. Where it appears from the record that a person was a party to an action, when in fact he was not, the legal presumption that he was a party is conclusive, until removed by a correction of the record itself, by a direct proceeding for that purpose.

CIVIL ACTION, tried before *Avery, Judge,* and a jury, at January Special Term, 1884, of the Superior Court of BERTIE County.

(372) Reddin Jones died intestate many years since, seized and possessed of a large tract of land in Bertie County, which descended in equal parts to his daughters, Fannie, wife of Calvin Godwin, Lavinia, wife of Henry D. Godwin, and his son Andrew J. Jones.

The lands were subsequently divided among the co-tenants, under proceedings instituted for that purpose in the County Court, and their respective shares allotted in severalty to each. In the partition, lot

number 1, which is described in the complaint, and is claimed in the action by the *feme* plaintiff, was assigned to the said Andrew J. Jones, her father, whose estate therein, at his death in 1863, descended to her, his only heir-at-law. The plaintiff Bettie J., during her minority, intermarried with the other plaintiff, J. B. Sumner.

In December, 1870, Calvin Godwin, to whom letters of administration *de bonis non* on the estate of the intestate Reddin Jones, had been granted, filed his petition against said Fannie, Lavinia, Bettie J., Lawrence Askew, administrator of A. J. Jones, Lavinia, his surviving wife, and Celia Jones, widow of the intestate Reddin, praying for license to sell his lands for assets, in order to pay a large outstanding indebtedness, found to exist against the estate. The Clerk thereupon made an entry in these terms:

"Henry D. Godwin is appointed guardian *ad litem* to the infant defendants." The license and order of sale were granted, and to be made "for cash or on six months credit, as the petitioner might deem best for the estate."

The sale was made and reported, and thereupon a decree was entered as follows:

"In this case, it appearing to the satisfaction of the Court, that the land prayed for sale by Calvin Godwin, administrator *de bonis non* of Reddin Jones, was duly advertised according to law, and was sold in the town of Windsor, at public sale, on the 10th day of January, 1871; said land brought a fair price, and all parties acquiesced in the sale, and said land was bid off by Henry D. Godwin, for Celia Jones, widow of Reddin Jones, and is set down to her, the said (373) Celia Jones, at the sum of seven hundred and fifty dollars:

"It is therefore ordered and adjudged that Calvin Godwin, administrator *de bonis non* of Reddin Jones, be authorized to make and convey title to said land, by executing and delivering a deed of conveyance therefor to the said Celia Jones, the real and *bona fide* purchaser."

Besides the recitals in the decree, the report on which it is founded, contained a statement that the land was sold subject to the widow's dower—that the purchase money had been paid to the administrator, and that he had executed a deed for the premises to her.

This deed bears date February 25th, 1871, and on the 2nd day of April, thereafter, the said Celia conveyed the land to said Calvin Godwin, for the alleged consideration of seven hundred and fifty dollars.

No complaint is made of the proceeding instituted to convert the land into assets for the payment of debts, by the other heirs-at-law of the intestate Reddin, and the present action is brought to recover

the land assigned to the *feme* plaintiff's ancestor, in the partition among the co-tenants, upon an allegation that the proceeding, as to him and her, is void, and did not divest the estate therein, and the relief demanded is the recovery of possession, and an adjudication of the invalidity of the deeds from the administrator to the purchaser, and from her to him.

This summary recital of the facts in evidence upon the trial of the contested issue as to title, is sufficient for an understanding of the pertinency and force of the exceptions brought up for examination by the plaintiffs' appeal.

Mr. R. B. Peebles, for the plaintiffs.

Mr. W. D. Pruden, for the defendants.

SMITH, C. J., (after stating the facts). 1 Exception. The plaintiffs proposed to show that the land was worth much more than the
(374) sum for which it sold at the administrator's sale, with the view of impeaching the deeds referred to, and setting them aside.

This objection was made, on the ground that the parties to those deeds were not before the Court, and also because their validity could not be collaterally assailed, as proposed in this action. The objection was sustained, and the testimony for such purpose refused.

We concur in this ruling, and for the reason last assigned for the exclusion of the evidence. So long as the decretal orders of sale and conveyance remain unmodified, the conveyance authorized must also stand, unless impeached themselves in some direct proceeding, imputing collusion or fraud.

The insufficiency of price would have furnished cause for refusing to confirm the reported sale, but not after an adjudication that the *"land brought a fair price, and all parties acquiesced in the sale,"* for setting the sale aside, and annulling the deed therefor in an action to establish a legal title, as if they did not exist.

Nor was it competent, in connection with the fact that Celia Jones, the reputed purchaser, a little more than a month afterwards, made a conveyance of the land to the administrator, Calvin, at a small reduction in price. If the nullity of the purchase could be proved in this collateral proceeding, the evidence would have been competent to be heard, as tending to show collusion in the sale, in connection with other facts, but without their support, it would have been of the feeblest kind. For how does the sale and resale a month later, tend, with any convincing force, to establish the fact that the conveyances are the developments of a preconcerted arrangement among the three

persons participating in the transaction, to secure the property to the administrator making the sale. And if such collusion did exist and could be shown, the deeds would not be rendered void at law, and the legal title would nevertheless pass, subject to the right of the owner, and of creditors, to repudiate them, and to charge the administrator with an attaching trust. The intervening agency would give the conveyances the forms of law, and he might be held to abide (375) by the consequences of his own act, unrepudiated by those on whom alone devolved the right to make the election. It would be otherwise but for such agency, for as there must be two independent parties to a contract, he could make none with himself; and as there could be no sale, there could be no deed, and the bidding off would, in such case, be a nullity.

Such is not the legal result when an intermediate person receives and then reconveys the legal estate.

"It is an inflexible rule," remarks PEARSON, J., in *Patton v. Thompson*, 37 N. C., 285, "that when a trustee buys at his own sale, even though he gives a fair price, the *cestui que trust has his election* to treat the sale as a nullity, not because *there is*, but because *there may be fraud.*"

"His Honor was mistaken," is the language used by BOYDEN, J., in *Simmons v. Hassell*, 68 N. C., 213, "in holding that the sale of the Clerk and Master could be attacked in this collateral way. This is an action of ejectment, under our old system, brought to try the *legal title*, and not *any equitable claim* to the premises. The deed of the Clerk and Master passed the legal title to the purchaser, and this title can only be attacked by some proceeding in the nature of a bill in equity, and not by an action of ejectment."

So, in the recent case of *Froneberger v. Lewis*, 79 N. C., 426, where in the opinion the subject is carefully considered, and the previous adjudications examined, READE, J., thus speaks: "That a trustee or other fiduciary cannot purchase at his own sale, is an iron rule *at law*, nor indeed can any one else, because in every sale there must of necessity be two persons—a vendor and a vendee. It is equally true, that when there are two persons, a vendor and a vendee, as when a second person is substituted to *sell or buy, the sale is valid at law*, but in equity the substitution of a second person makes no difference, the validity or invalidity of the sale being determined by other consideration."

II Exception. The plaintiff also insists that the *feme* plain- (376) tiff was no party to the proceeding to make sale of the intestate's land, and such sale did not divest her estate in the land claimed in the complaint.

The proposition involved in this objection has been considered in *Hare v. Holloman, ante,* 14, rendering little more necessary to be said on the subject in addition.

The only complaint of the action of the Court in licensing the sale and directing title to be made pursuant to its terms, proceeds from the plaintiffs, while the other heirs are passive and acquiesce in what was done. A guardian *ad litem* was appointed for the infant defendant, whose acceptance and presence in Court must be assumed, in the absence of any indication in the record to the contrary, from the fact that the Court took jurisdiction of the cause and rendered judgment. It is true the record produced does not show that notice was served on the infant, or upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and if not, the judgment must stand, and cannot be treated as a nullity, until so declared in some impeaching proceeding, instituted and directed to that end.

The irregularity, if such there be, may, in this mode, be such as to warrant a judgment declaring it null, but it remains in force till this is done. The voluntary appearance of counsel in a cause, dispenses with the service of process upon his adult client. The presence of a next friend or guardian *ad litem* to represent an infant party, as the case may be, and his recognition by the Court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding, and requires remedial relief to be sought in the manner suggested, wherein the true facts may be ascertained. This method of procedure, so essential to the security of titles dependent upon a trust in the integrity and force of judicial action, taken in the sphere of its jurisdiction, is recognized in *White v. Albertson,* 14 N. C., 241;
(377) *Skinner v. Moore,* 19 N. C., 138; *Keaton v. Banks,* 32 N. C., 384, and numerous other cases, some of which are referred to in *Hare v. Holloman, supra,* all of which recognize the imputed errors and imperfections as affecting the regularity, and not the efficacy of the judicial action taken.

III Exception. The plaintiffs demanded an instruction to be given to the jury, to the effect that the proceeding under which the land was sold, was, for matter appearing upon its face, void, and the title being thus left in the *feme* plaintiff, the finding upon the first issue should be in the affirmative.

This was refused, and instead the jury were charged, that the judgment, and sale authorized by it, could not be treated as a nullity, but

must be deemed valid, until impeached by direct action. In this ruling, for reasons already stated, we find no error.

The proceeding, as shown by the disarranged and fragmentary parts produced at the trial, was instituted and conducted with great carelessness, and little regard to form, for which no excuse is offered, nor perhaps can be, but it is a sound and salutary rule, from which the Court could not depart, without hazarding the gravest consequences to the security of titles to property, that requires the correction of a wrongful judgment of a Court, invested with full jurisdiction over the subject, to be made by some action having direct reference to this object, and leaves it in full force until this is done.

In *Doyle v. Brown,* 72 N. C., 393, it is decided, that when the record shows one to be a plaintiff or a defendant, when in fact he was not, the legal presumption that he is properly present in the action, cannot be repelled, but is conclusive, until removed by a correction of the record itself, by a direct proceeding for that purpose.

In recognition of this principle, we sustain the ruling of the Court and affirm the judgment.

No error. Affirmed.

Cited: Cates v. Pickett, 97 N.C. 26; *Edwards v. Moore,* 99 N.C. 4; *Branch v. Griffin,* 99 N.C. 182; *Brittain v. Mull,* 99 N.C. 492; *Gibson v. Barbour,* 100 N.C. 197; *Spencer v. Credle,* 102 N.C. 75; *Coffin v. Cook,* 106 N.C. 378; *Whitehead v. Whitehurst,* 108 N.C. 461; *Turner v. Shuffler,* 108 N.C. 645; *Dickens v. Long,* 109 N.C. 170; *Maxwell v. Barringer,* 110 N.C. 83; *Isley v. Boon,* 113 N.C. 252; *Smith v. Gray,* 116 N.C. 314; *Sledge v. Elliott,* 116 N.C. 716; *Harrison v. Hargrove,* 120 N.C. 102; *Russell v. Roberts,* 121 N.C. 325; *Abbott v. Hancock,* 123 N.C. 102; *Murray v. Southerland,* 125 N.C. 177; *Smathers v. Sprouse,* 144 N.C. 638; *Rackley v. Roberts,* 147 N.C. 206; *Simmons v. Box Co.,* 148 N.C. 345; *Patillo v. Lytle,* 158 N.C. 98; *Phillips v. Denton,* 158 N.C. 302; *Harris v. Bennett,* 160 N.C. 343; *Pinnell v. Burroughs,* 168 N.C. 320; *Brown v. Harding,* 170 N.C. 261; *Banks v. Lane,* 171 N.C. 509; *Pinnell v. Burroughs,* 172 N.C. 186; *Starnes v. Thompson,* 173 N.C. 467; *Fowler v. Fowler,* 190 N.C. 541; *Downing v. White,* 211 N.C. 42.

(378)

WM. WARDEN ET ALS. v. NARCISSA McKINNON, ADMINISTRATRIX.

Special Proceeding—Creditor's Bill—Statute of Limitations—Parties.

1. A special proceeding, begun by way of a creditor's bill, for the settlement of the estate of a decedent and payment of his debts, continues until all the debts are discharged and there is a final judgment, and is not terminated by being left off the docket.
2. When such proceeding is allowed to drop from the docket without a final judgment being rendered, it may be brought forward on motion, to the end that unpaid creditors may assert their rights, and the proceedings be determined according to law.
3. When such motion is made, it should, strictly, be disposed of, before contested debts are put in issue. But when no objection is made, both questions may be disposed of at the same time.
4. The filing of a claim with the Clerk, by a creditor, gives him a standing in Court, in such proceeding, and is all he is required to do, unless the claim is contested.
5. If the administrator intends to contest any claim, he should do so when it is filed with the Clerk.
6. The litigation in respect to such contested claims is collateral to the special proceeding, and the termination of such collateral litigation does not terminate the special proceeding.
7. When a claim against an estate is filed with the Clerk, before whom such proceeding is commenced, the statute of limitations ceases to run against such claim from the time it was filed.
8. This special proceeding is equitable in its character, and the Court having general jurisdiction of the parties and subject matter, may make the next of kin and heirs-at-law parties, and compel the former to account for the personal property received by them, first, and then, if necessary, may order the real property to be sold to make assets to pay debts; or if the heir has sold the land and has the proceeds, the Court may compel an appropriation of the same, if it shall appear that the land was liable.

SPECIAL PROCEEDING, in the nature of a creditor's bill, commenced before the Clerk of the Superior Court of CUMBERLAND County, and tried before *MacRae, Judge,* at November Term, 1885, of the Superior Court for said county.

The facts are as follows:

(379) It appears that on the 16th day of May, 1860, Murdock McKinnon executed to Mildred Barclay, his single bond for $245.46, to be due one day after date.

The said Mildred died in the year 1862, in the county of Harnett, leaving a last will and testament, which was duly proven, and Leocadia J. Barclay and Kezia Barbee qualified as executrixes thereof.

The said Murdock McKinnon died intestate, in the county of Cumberland, in December, 1872, and William H. McKinnon was appointed and qualified as administrator of his estate. Afterwards, the latter was removed as administrator, and Narcissa McKinnon, on the 29th day of January, 1880, was, in his stead, appointed administratrix *de bonis non*. On the 27th day of April, 1876, William Warden, suing in behalf of himself and all other creditors of the said intestate, brought his special proceeding, as allowed by the statute, (Bat. Rev., ch. 45, Sec. 73), in the Superior Court of said county of Cumberland, against the said William H. McKinnon, while he was so administrator, to compel an account of his administration, and the payment of debts due such creditors respectively.

In that proceeding, sundry creditors presented their respective demands against the estate of the intestate, to the Clerk of the Court, the validity of which, with one exception presently to be mentioned, was contested by the administrator, and in respect to the same, issues of fact and law were raised, and litigation in that respect pended for several years, and until Fall Term, 1882, of the last named Court. These claims, or the most of them, were adjusted, and as to each, the entry, *"matter arranged,"* was made on the docket of the Court. The litigation, in respect to the last of these claims, was ended at Spring Term, 1883, of the Court. The administratrix *de bonis non* mentioned, was made a party defendant to said proceeding, shortly after her appointment.

By some arrangement, such of the demands mentioned, as were established, were discharged by the administratrix last mentioned.

The Clerk did not take and state an account of the dealings (380) of the administrator with the estate, nor was there any notice to parties to appear and except, if they should see fit, to any report. There was no final judgment in the proceeding, nor does it appear from the record that there was any order terminating or dismissing it from the current docket of the Court; but the appellants recite in their answer, rather than aver, that it "had been disposed of and dismissed from the docket." This does not appear from the record.

Afterwards, some time in the month of June, 1883, the appellees, as executrixes of the will of the said Mildred Barclay, deceased, filed their petition in the said Superior Court, "to re-open and rehear, and for other relief," the special proceeding above mentioned, in which they alleged in substance, that the first above named administrator, William H. McKinnon, well knew of the said bond of his intestate, made to their testatrix—that he told them there was no contest about

it, and he referred them to his counsel, who also informed them that it could not be paid pending the creditor's bill, but there was no contest over this note, and directed them to file it, or a copy of it, with the Clerk, in the said special proceeding, stating that there was no necessity for a suit, and that the note would be paid at the end of said proceeding—that accordingly, the Attorney of appellants, "took the said note to Alex. McPherson, the then Clerk, and delivered it to him, to be filed in the proceeding as a claim against the estate of Murdock McKinnon, dec'd, and the said Clerk made out a copy, to be placed on file, and retained the copy, and returned the note to the Attorney—that afterwards the copy of the note, and the bond itself were lost—that the appellant administratrix had knowledge of the note —that repeatedly the appellees had been assured, pending the said proceedings, that the bond would, at the end thereof, be paid, etc., etc. The appellees also caused a summons to be issued, to make the next-of-kin and heirs-at-law of the said Murdock McKinnon, parties defendant to their said petition, and parties to the said special (381) proceeding, and they appeared and answered the petition, admitting some of the allegations therein, and denying others;— denying the note—that it was filed in the proceeding as alleged, etc., etc.

Afterwards the Clerk of the Court, having heard the petition, answer, and affidavits, made an order, whereof the following is a copy:

"Petition in the cause, to reopen and rehear, and for other relief, under Sec. 133 C. C. P., filed by Leocadia J. Barclay and Kezia S. Barbee, ex's of Mildred Barclay, one of the creditors of Murdock McKinnon dec'd, v. Narcissa McKinnon, adm'x *de bonis non* of Murdock McKinnon, dec'd, and the heirs at law and distributees of Murdock McKinnon, dec'd, viz.: H. B. Butler and wife Narcissa, Susan T. McKinnon, William H. McKinnon and Martha McKinnon and Thos. H. Sutton, Esq., commissioner to sell for partition.

"This petition coming on to be heard, upon service of the summons and copy of petition, by way of notice to show cause, upon all the parties, on the 19th July, 1883, and being heard upon the petition, answers and affidavits and exhibits filed, after full argument from counsel representing the parties on both sides, it is considered by the Court, that the petitioners are entitled to the relief asked for, on the ground that their testatrix is an omitted creditor of Murdock McKinnon, dec'd, upon a claim against his estate, filed in the original special proceeding above entitled in 1876, and the Court is of the opinion and so declares, that the petitioners have merits, and that injustice has been done them, without laches on their part, in the

omission of their claim from the account and settlement in the said special proceeding, after having been filed therein with Alex. McPherson, Esq., the former Clerk of this Court.

"It is therefore adjudged and decreed, that said special proceeding be reopened and reheard, with leave to the petitioners to refile the evidence of their said claim, alleged to be a note under seal for $235.46, signed by Murdock McKinnon, and payable to Mrs. M. Barclay, with interest from one day after date, May 16th, 1860, (382) said note being now lost, and it appearing from the answer of the defendants to the petition, that the petitioners' claim is contested, the petitioners are directed to file their complaint, and the defendants their answer thereto, on said claim, in this office, and the issues joined, are directed to be transferred to the Superior Court docket for trial, at Term, before the Judge.

"It is further adjudged and decreed, that the interlocutory order of sale made by the Court, on May 9th, 1883, in an *ex parte* special proceeding before the Clerk, instituted by the defendants, the heirs-at-law of Murdock McKinnon, dec'd, for a sale for partition among his heirs, of the real estate mentioned therein, to-wit: the store house and lot No. 47, on Person St., in Fayetteville, and in which order the defendant Thos. H. Sutton, Esq., was appointed commissioner to conduct the sale, and make report thereof to this Court, be modified to this extent, viz., the said Thomas H. Sutton, Esq., is hereby directed, after selling said property for cash, at public sale, to pay into the office of this Court, seven hundred dollars of the proceeds of said sale, immediately thereafter, to be applied to the satisfaction of petitioners' claim, should it eventually be established, it having been made to appear to the Court, that the personalty in the hands of the administratrix *de bonis non* of Murdock McKinnon, is exhausted, and that she is without assets, upon a settlement had by her with the children of Murdock McKinnon, who are his distributees and heirs-at-law.

"From the foregoing order and judgment, the defendants, the heirs of M. McKinnon, deceased, and Thomas H. Sutton, commissioner, crave an appeal to the Superior Court; appeal craved in open Court; appeal granted; notice of appeal waived this 19th July, 1883."

Thereupon the appellees filed their complaint in the proceeding against the appellants, the administratrix, next-of-kin, and heirs-at-law of the said intestate, in which they alleged that the said bond had not been paid—that the same was still due and owing to them —that it had been lost, etc.; that the personal estate of the (383) intestate, of less value than $100, had been distributed to the next-of-kin—that the intestate died seized of real estate, more than

sufficient in value to pay the said debt, etc.; and they demanded judgment for the amount of the debt, for general relief, and for costs.

The appellants filed their answer to this complaint, and the following is a copy of the material parts thereof:

"5. That the administration of the estate of Murdock McKinnon has been finally completed, the distributees' shares having been paid out, and final settlement made with the proper persons, on the 9th May, 1883. That public advertisement was made by the administrator on the 15th of January, 1873; that refunding bonds were taken; that the creditors' bill was filed April 27th, 1876, and public advertisement of it made in May, 1876, and the defendants insist that the creditors' bill now be reopened for the benefit of the plaintiffs.

"6. That in the petition to reopen the creditors' bill, several causes of action, distinct and separate from each other, were improperly and illegally joined.

"7. That the plaintiffs' alleged cause of action, did not accrue within ten years next preceding the commencement of this action.

"8. That the plaintiffs alleged cause of action, did not accrue within seven years next preceding the qualification and advertisement of the administrator, (January 15th, 1873), and the commencement of this action.

"9. That more than seven years have elapsed since the bringing of the general creditors' bill, (April 27th, 1876), and the settlement of the estate, (May 9th, 1883), and the commencement of this action, (June 29th, 1883).

"10. That from the lapse of time, from the administration of the estate of M. McKinnon, and the bringing of this action, the action or proceeding is barred by the statutes of limitation protecting dead men's estates.

(384) "11. That by the action upon the alleged note, commenced June 6th, 1883, and application for injunctive relief therein, it is a legal discontinuance of any rights the plaintiffs may have had in this or any other proceeding, and the plaintiffs cannot therefore maintain this action.

"12. That the plaintiffs did not exercise due diligence in maintaining their alleged right, but were guilty of laches and cannot therefore maintain this action.

"13. That the Clerk of the Superior Court, when this action was first commenced, had no jurisdiction therein. [1] Because the original creditors' bill of Warden and others, had been transferred from his jurisdiction. [2] Because the Clerk cannot re-open a case for the purpose of impeaching a decree, as the plaintiffs' petition asked him to do; nor restore a lost record; nor set up or restore a note alleged

to be lost; nor grant relief for mistake, inadvertence or surprise under Sec. 133, because there was no judgment against the petitioners to be relieved of, and the action had already been removed to another Court of superior jurisdiction; nor order a sale of real estate to pay an alleged indebtedness, the legal existence of which is denied, nor re-open, modify, or rescind the decrees heretofore made in the settlement of defendants' intestate's estate, by petition, or otherwise in this action."

The appellees, in their petition to "re-open and rehear" the special proceedings above mentioned, among other things alleged:

"13. That on the 14th March, 1883, an *ex parte* proceeding was had by the said Narcissa McKinnon, administratrix *de bonis non,* of Murdock McKinnon, dec'd, and H. B. Butler and wife Narcissa, (formerly McKinnon,) Susan T. McKinnon, Martha McKinnon and William H. McKinnon, distributees of the estate, as well as the heirs-at-law of said Murdock McKinnon, in the nature of a final settlement before the Clerk of this Court, each of the five distributees, (the administratrix and widow included), received $15.79 as distributive share of balance of personalty on hand, to-wit, in all, $78.95, receipting for the same. That of this *ex parte* proceeding, the petitioners (385) had no notice whatever, nor did their counsel. It was filed in the office of Judge of Probate of Cumberland County, approved and recorded May 9th, 1883.

"14. That the children and heirs-at-law of said Murdock McKinnon, to-wit: H. B. Butler and wife Narcissa, (formerly McKinnon,) Susan T. McKinnon, Martha McKinnon and W. H. McKinnon, who are all of age and resident in Cumberland County, filed an *ex parte* petition for the sale of part of the real estate of the deceased, for partition, on May 9th, 1883, in this Court, before the Clerk, and obtaining a decree for that purpose, and their attorney, T. H. Sutton, Esq., was appointed commissioner to conduct the sale, who has advertised a sale for cash, of a valuable brick store on Person Street in Fayetteville, which is the only real estate not subject to the widow's dower, estimated value as per tax list $1,000.

"15. That the remaining real estate, all subject to the dower of Mrs. Narcissa McKinnon, widow of said Murdock McKinnon, which has been laid off to her, is a store house on Person St., estimated value, as per tax list, $1,000; a residence on Russell Street, Fayetteville, estimated value as per tax list, $750; a house and lot on Kennedy Street, Fayetteville, estimated value as per tax list, $400, all of which Murdock McKinnon died seized.

"16. That on hearing of these *ex parte* proceedings by the administratrix, and the distributees, by which the personalty was disposed of,

to-wit: the balance of money on hand, $78.95, and of the *ex parte* proceeding in which the heirs purpose to dispose of the only piece of unincumbered real estate, the first notice they, the petitioners, had of either proceeding, was after having their attention called to the advertisement of Mr. Sutton, as commissioner, published in the Fayetteville Observer, dated May 9th, 1883, these petitioners, who are both females, living in Raleigh, through their agent, C. C. Barbee, on the 6th of June, 1883, made a personal demand on Narcissa McKinnon, administratrix of Murdock McKinnon, for the said debt due
(386) the estate of their testatrix, giving her a full explanation of the circumstances, which demand she failed to comply with."

The following issues were submitted to the jury, and to the first they responded "Yes," to the second "No," to the third "Yes," to the fourth "No."

"1. Did Murdock McKinnon execute the note under seal mentioned in the first article of the complaint?" "Yes."

"2. Has said note been paid in whole or in part, and if in part, what part and when?" "No."

"3. Has said note been lost?" "Yes."

"4. Has plaintiffs' claim been barred by the statute of limitation?" "No."

The following is a copy of the material parts of the case settled upon appeal to this Court:

"After hearing the affidavits, and argument of counsel, upon the facts found by the Clerk and adopted by this Court, and upon defendants' motion that the presiding Judge proceed to find the facts, upon the affidavits, the Court declining to find any other facts, it was considered and adjudged, that the order of the Clerk be affirmed, and that a jury be empaneled to try the issue raised by the complaint and answer heretofore filed.

"To which defendants except."

The following special instructions were asked by defendants, which were refused, and defendants excepted:

"1. That the filing of the copy of the note with the Clerk, in the creditors' bill of W. Warden and others, is not such a filing as is required by law, and that the present claimants did not thereby become parties to this action, so as to prevent the statute of presumption of payment from running against the note, or that of limitations.

"2. That even if this were not so, still, the claimants must bring their suit within one year from the time when this suit was dismissed, and there is no evidence that this has been done."

The presiding Judge charged the jury as to the first issue:

"1. That while there was no testimony that any one saw (387) McKinnon execute the note; there was the testimony of Shaw, Barbee, and perhaps others, that they knew his handwriting; and there was no testimony to the contrary.

"2. That in this case, there was no presumption of payment under the statute; the presumption from the note being in the plaintiffs' possession, was rather that it had not been paid. The defendants relied upon circumstances offered, particularly upon an account found in M. McKinnon's book against Mrs. Barclay, but the Court thinks that this was not even a circumstance to go to the jury on this issue. On the whole, there is no testimony to leave to you on which to say the note has been paid.

"3d issue. If the jury believe the testimony, they must answer 'yes.' "

There was judgment for the plaintiffs, and the defendants appealed to this Court.

Mr. R. P. Buxton, for plaintiffs.

Mr. John Gatling, for defendants.

MERRIMON, J. (after stating the facts). It must be remembered that this is a special proceeding, brought in the Superior Court, before the Clerk thereof, by creditors, against an administrator, "to compel him to an account of his administration, and to pay the creditors (of his intestate) what may be payable to them respectively," as allowed by the statute (Bat. Rev., ch. 45, Sec. 73). The jurisdiction was that of the Court—not that of the Clerk. The latter acted as and for the Court. If there were exceptions to his decision, upon questions of law, an appeal lay to the Judge, and the decision of the latter became that of the Court. If in the course of the proceeding, issues of fact were raised, then the case was to be transferred to the civil issue docket, to the end that the issues may be tried in Term, under the supervision of the Judge. The issues being tried, and any questions of law arising before the Clerk, and decided by him, and there being an appeal from his decision, and that affirmed or (388) reversed by the Judge, then it was the duty of the Clerk to proceed, in the course of the proceeding, according to law, without a *procedendo*, or any order remanding the proceeding to the Clerk. This is so, because the jurisdiction is that of the Court, and not that of the Clerk. There is but one jurisdiction—that of the Superior Court. The Clerk, in special proceedings, superintends the pleadings, and makes all orders and decisions in respect thereto, and all orders, and

judgments in the course of the same, subject to the right of appeal mentioned, except in such respects, as to which action must be taken in Term, or before the Judge, as the statute directs. The Code, Secs. 251 to 257. *Brittain v. Mull,* 91 N. C., 498; *Jones v. Desern, ante,* 32.

In this case, the complaint having been filed, it was the duty of the Clerk to advertise, as directed by the statute, for all creditors of the intestate of the administrator, to appear before him on or before the return day, and file the evidence of their claims, and it then became the right of the creditor, and he was required so to do, to file his demand with the Clerk, as directed by the statute, if he would avail himself of the benefit of the proceeding. If the claim of a creditor was contested, then, in a proper way, it was to be put in question, as by complaint and answer, and if issues of law were raised, the papers were to be sent to the Judge; if issues of fact were raised, these were to be sent to the next term of the Court for trial. Bat. Rev., ch. 45, Secs. 73 to 84. These sections apply to this particular kind of special proceeding, and are slightly different from the provisions of the Code of Civil Procedure, applicable to such proceedings generally.

The procedure, in respect to claims so contested, is of, but only incidental to, the special proceeding, and although such incidental litigation of a contested claim may be ended, this does not terminate the proceeding—it continues untill all claims presented by creditors shall be settled and discharged according to law, in its course, and
(389) and there shall be a final judgment. Sundry creditors presented their respective demands to the Clerk, and it seems that all these, except one presently to be mentioned, were contested by the former administrator, and by his successor, the present administratrix, and the litigation lasted for several years. The termination of this litigation did not end the proceeding. It could only be ended regularly, after all the debts presented had been paid, if there were sufficient assets for that purpose. The appellees presented and filed with the Clerk their demand, shortly after the special proceeding began.

The Clerk, as and for the Court, and the Judge upon appeal, found as a fact, that they filed the bond in question with the Clerk, and the latter took note of it. This was sufficient to entitle the appellees to take benefit of the special proceeding. The filing of the claim was sufficient to give them standing as creditors in Court; that, indeed, was all they were required to do, if the claim was not contested, as it seems at first, it was not. The claim being filed, the special proceeding could not be properly terminated, until it had been paid. The long pendency of the proceeding, cannot be allowed to prejudice the appellees, because the

Clerk failed to take, state and report an account of the dealings of the administratrix with the estate; nor was any notice given them, as the statute required. They had the right, under the statute, to expect the account to be taken and reported by the Clerk, and notice to be given them of the same.

It does not appear from the record, that the special proceeding ever was terminated. There was no report of an account taken and stated, nor any notice given of such account, as the statute directed, nor was there any final judgment. It seems that it was simply allowed to be left off the current docket of proceedings. The appellants suggest in their answer, that it was "dismissed," but no order of dismissal appears in the record, and it must be taken there was none. There was no necessity, therefore, for the petition of the appellees to "reopen and rehear" the special proceeding. If it had been improvidently dropped from the current docket of the Court, a simple motion (390) ought to have been made, to bring it forward and before the Court, to the end it might be determined according to law. But the petition might be, indeed, was, treated as in effect such a motion, and the facts appearing as the Clerk found them to be, it was competent and proper for the Clerk to make the order to bring forward the proceeding, and allow the appellees to assert their rights as creditors therein, as in effect he did.

The appellants certainly were favored in being allowed, under the circumstances, to contest the existence of the bond in question, and to insist that it had been paid, or was barred by the statute of limitations, etc. The administrator ought to have contested the claim at first, if he intended to do so. The evidence sent up as part of the case on appeal, shows plainly, that he had notice of it, and that it had been filed. To contest it seems to have been an afterthought. Strictly, the appeal from the order of the Clerk, bringing forward the proceeding, etc., ought to have been heard and determined, before the pleadings—the complaint and answer—putting the demand of the appellees in issue, were filed; but as these pleadings were filed, and there was no objection made on this account, it was competent to dispose of the appeal, and try the issues of fact raised by the pleadings, at the same time in Term, as was done; because the Court had general jurisdiction of the matter, and the particular form and order of procedure was not essential, if the parties did not object.

The appellees, by filing the bond in question in the special proceeding, became identified with and of it, as creditors of the estate of the intestate, and time ceased to run against the bond, after the commencement of the proceeding. *Dobson v. Simonton*, 93 N. C., 268.

The proceeding began in the month of April, 1876. The bond was due on the 17th of May, 1860. So that it is obvious that no presumption of payment of it arose.

The time from the 20th of May, 1861, to the 1st of January, 1870, being excluded, ten years did not elapse next after the maturity (391) of the note, and before the commencement of the proceeding. It is likewise obvious, that the statutes relied upon as a bar to the rights of the appellees, could not have such effect. The bond in question was in, and of, and protected by the proceeding, from and continually next after it was filed therein.

The next-of-kin, and the heirs-at-law of the intestate, were before the Court, and pleaded, and it appears that they all have an interest in the proceeding. There is, therefore, no reason why they may not be held to account to the appellees in this proceeding. It appears that the next-of-kin appellants, received some part of the personal estate of the intestate in 1883. To this they were not entitled, while the debt in question was unpaid. They must, therefore, be required to account for the distributive shares received by them respectively. If this shall not be sufficient to pay the debt due the appellees, and proper costs, then so much of the money, the proceeds of the land sold or partitioned among the heirs-at-law of the intestate, as may be necessary, must be applied to the payment of the debt and costs, unless it shall appear that the real estate of the intestate was not, for some good cause, that may be shown, liable to make assets to pay debts.

It will be observed that this special proceeding is equitable in its nature, and the Superior Court has general jurisdiction of the parties, and the whole subject matter of the proceeding, including the next-of-kin and the heirs-at-law of the intestate, in respect to the personal and real estate of the intestate that has come to them respectively, and is necessary and liable to pay, and to make assets to pay, debts. The Court may, therefore, in this proceeding, compel the next-of-kin to account for the personal property received by them first, and, if need be, order the land to be sold to make assets to pay debts, if the same is so liable. If the heirs who have sold the land are before the Court, and have the proceeds of the sale, the Court may direct an appropriation of the same as assets, if it shall appear that the land was liable. Where the jurisdiction of the Court is complete, there is no reason why this may not be done, and indeed it ought to be done, with a view (392) to avoid circuity of action, economize costs, and facilitate the administration of justice. The Court will be careful, however, so see that no prejudice or injustice is done to any party by reason of such procedure.

The record is very voluminous and confused, and we have found it difficult to see clearly the scope and bearings of some of the appellants' numerous objections and exceptions, not clearly specified, but we think we have in effect disposed of all of them.

The judgment of the Superior Court must be so modified as to conform to this opinion, and to that end let the opinion be certified to the Superior Court. It is so ordered.

Modified and remanded.

Cited: Click v. R. R., 98 N.C. 392; *West v. Laughinghouse*, 174 N.C. 219; *Trust Co. v. McDearman*, 213 N.C. 144; *Gibbs v. Smith*, 218 N.C. 384.

R. T. GRAY, RECEIVER, v. R. G. LEWIS AND WIFE.

Reference—Parties—Account Stated—Receiver.

1. Where an account has been stated between parties, neither party can go back of such stated account, and bring into question transactions which took place prior to such statement, and embraced therein.
2. Under the former system, where legal and equitable rights were administered in separate tribunals, a Court of equity could not confer upon a receiver appointed by it, a capacity to sue in his own name not recognized in a Court of law, but this is changed since the adoption of the Code system, which authorizes the party in interest to sue in his own name.
3. A receiver appointed upon the dissolution of a corporation, or a trustee charged with the collection of its assets, can bring suit in his own name against a debtor of the corporation, or he can bring such suit in the name of the corporation.

CIVIL ACTION, heard upon exceptions to the report of a referee, before *Clark, Judge,* at August Term, 1885, of the Superior Court of WAKE County.

By a decree made at June Term, 1880, in the Superior Court of Wake County, in an action prosecuted by the State, on the relation of J. M. Harris and others, against The Mechanics' (393) Building and Loan Association, a corporation formed and acting under the laws of the State, it was declared to have forfeited its franchise and the corporation was dissolved. At the same time, the plaintiff was appointed receiver, to call in its resources and collect its debts, "by suit or otherwise, in his own name as receiver, and to hold the same subject to the further order of the Court," in order to a full settlement of its affairs. The present suit was accordingly begun on

February 2nd, 1881, to recover an alleged balance due from the defendant Robert G. Lewis, to the corporation, in the complaint stated to be $169.13, with interest at 8 per cent. on $156.65 from May 1st, 1875, and to foreclose a mortgage executed by himself and wife to secure his liabilities and covenants specified therein, and if necessary to that end, for a sale of the premises conveyed.

The demand is for a statement of account, judgment for the amount found to be due, and a foreclosure, with sale of the land, and for general relief.

The answer admits the dissolution of the corporation, the appointment of the plaintiff as receiver, the making of the mortgage, of which a copy accompanies the complaint, denies the specified indebtedness and demand of its payment, and in explanation says:

"It is true that the defendant R. G. Lewis made various payments on the mortgage debt, but it is not true that the defendants owed a balance of $169.13 on May 1st, 1875. The stock holders of the Mechanics Building and Loan Association appointed a committee of three, to audit the different accounts of the members, and amongst others, the committee audited the account of the defendant R. G. Lewis, (who was a member and share-holder of the said Association), and the said committee reported that the defendant R. G. Lewis, owed a balance to said Association on May 1st, 1875, of $37.73, and the report of said committee was adopted, and the members were authorized to settle in accordance with said report."

(394) The answer avers also, that "before the commencement of this action, the said plaintiffs' claim was satisfied, paid and discharged in full," and sets up a counter-claim, founded upon his antecedent transactions with the Association, and relations of himself as a member, towards it, upon which he demands judgment for $425.

At June Term, 1882, the following entry appears on the record:

"On reading and filing the pleadings in the cause, it is, on motion, ordered that it be referred to Chas. K. Lewis, Esq., * * * to hear and determine the whole issue in this cause."

In October of the same year, the plaintiff filed a replication to so much of the answer as sets up a counter-claim, denying the facts stated therein, an alleging that on the 31st day of January, 1872, the Association ceased to do business, since which it has exercised none of its corporate franchises.

On February 14, 1883, the referee having entered upon his duties, the defendants put in an amendment to their answer, in which they allege usurious charges of interest to have been made by the Association, and demand to be released from all interest whatever.

At March Term, 1884, the order of reference was modified as follows:

"The referee appointed by consent heretofore, being the son of the defendants, and the evidence taken before him being in conflict in some material respects, as is claimed by plaintiff, upon suggestions that it would be more desirable to have the evidence and the law arising therefrom passed upon by some disinterested party, by consent of the parties, it is agreed that W. H. Bledsoe, Esq., be substituted in the place of C. K. Lewis, the referee heretofore appointed, and said Bledsoe shall take the evidence as deposed to before said Lewis, referee, examine the same, find the facts, and decide the question of law arising thereon, and report the same to the Special Term of the Superior Court of said county to be held on the 17th day of March, 1884.

"And it is agreed by both the plaintiffs and defendants, that (395) exceptions to the report of said Bledsoe, shall be filed, if either party, or both, shall except, on or before Monday of the second week of said Special Term, and the same shall be heard during said Term.

"This shall not be considered as an arbitration, but a re-reference as to the matters mentioned, under The Code, and shall be made an order of Court."

At August Term, 1884, the referee's report was submitted, in which there is a series of findings of fact, ante-dating the action and report of the committee to the stockholders and their sanction thereof, and several conclusions of law deduced therefrom, of which it is only necessary to notice the referee's rejection of the counter-claim. There being no exceptions taken by the defendants to the report, this ruling eliminates the counter-claim from the controversy.

Upon a recommittal of the report to the referee, he makes some modifications in his supplemental report, extending over the same broad field of inquiry, to which the plaintiff also excepted, especially for that he admitted evidence, and acted upon matters of dealing between the Association and the defendants, which took place prior to the time of stating of the account by the committee and its approval by the stockholders, in May, 1875.

From a judgment in favor of the defendants, the plaintiff appealed.

Messrs. C. M. Busbee and A. W. Haywood, for the plaintiff.

Mr. Armistead Jones, for the defendants.

SMITH, C. J. (after stating the facts). The original reference, as will be seen, was that the referee should "hear and determine the whole issue in the cause," that is, the matter controverted in the pleadings. The complaint makes no claim for the unpaid check as a substantive

demand, but for an account and a recovery of what may be found to be due the Association. The answer disavows the amount of
(396) indebtedness alleged, and admits a smaller sum to have been arrived at in the examination of the committee, and the giving of full corporate consent to a settlement upon the basis of that report. The defendants' liability for the sum reported, $37.72, as the result of all preceding financial transactions between the defendant and the Association, is not denied by the plaintiff, while its alleged payment by the defendant is. The parties, not contesting in their respective pleadings, this sum to be the true balance resulting from an adjustment of the dealings, and then due, the referee should, this being a basis of action, have confined his inquiry to the single point of its alleged payment. And for like reasons the claim for the unpaid acceptance was not in the complaint, and is out of the scope of the reference.

The plaintiff's exceptions to the referee's report of matters of account which ante-date the action of the committee, of which the defendant was a member, and from which he did not dissent, and which matters ought to have entered, and we assume did enter, into the account stated by the committee, are well taken, and ought to have been sustained. In the Court's over-ruling them there is error, and judgment should have been given, there being no proof of subsequent payment, for the sum so ascertained in favor of the plaintiff.

The defendants' counsel insisted in the argument before us, that the plaintiff, as receiver, could not maintain the action in his own name, citing in support of his contention, *Battle v. Davis*, 66 N. C., 252.

It is true that under a system in which legal and equitable rights are administered in separate tribunals, a Court of equity could not confer upon a receiver or officer of its own appointment, a capacity to sue, not recognized in a Court of law. The decision referred to rests upon this distinction. It is otherwise in the present procedure, which requires the party in interest to sue in his own name.

(397) But The Code, Sec. 668, following a provision in the Rev. Code, Ch. 26, Sec. 6, similar in this feature of it, expressly authorized a receiver appointed upon a dissolution of a corporation, or a trustee charged with its property, "to collect the debts and property due and belonging to the corporation, with *power to prosecute and defend* in the name of the corporation, or *in the name of such receiver or trustee,* all such actions as may be necessary or proper for the purpose aforesaid." The statute answers the objection.

As the action can be more conveniently conducted in the Court below, the cause is remanded for further proceedings according to the law, as declared in this opinion, and the plaintiff will recover his costs.

Error. Reversed.

Cited: Boyd v. Ins. Co., 111 N.C. 374; *Davis v. Mfg. Co.*, 114 N.C. 327; *Smathers v. Bank*, 135 N.C. 413; *Millinery Co. v. Ins. Co.*, 160 N.C. 137; *Van Kempen v. Latham*, 201 N.C. 513.

F. C. FISHER ET ALS. v. THE CID COPPER MINING COMPANY OF NORTH CAROLINA.

Issues—Deed—Estoppel.

1. Where issues are raised by the pleadings, it is the duty of the Court to eliminate and submit them to the jury, and when this is not done, this Court will refuse to take cognizance of the cause upon such imperfect record, unless the issues in no wise affect the errors assigned.
2. So, where no issues were eliminated and submitted, but the Court below held that upon the evidence the plaintiff was not entitled to recover, and he took a nonsuit and appealed, the failure to submit issues was not material.
3. Where a deed throughout, including the covenants, appears to be the personal deed of the grantor, the word "agent," put after the signature and seal, is surplusage, and affords no evidence that the title was vested in any other than the grantor.
4. An estoppel arising out of the acceptance of a deed, is restricted to the estate which it undertakes to transfer. So, a grantee who claims under a deed which excludes the minerals to be found in the conveyed land from the operation of the deed, is not estopped to deny that his grantor had title to the minerals.

CIVIL ACTION, tried before *Montgomery, Judge,* and a jury, at (398) Fall Term, 1885, of the Superior Court of DAVIDSON County.

The facts appear in the opinion.

The plaintiffs appealed.

Mr. F. C. Fisher, for the plaintiffs.
Mr. Theo. F. Klutz, for the defendant.

SMITH, C. J. The plaintiffs claim to be owners of the minerals and mines found beneath the surface of the tract of land mentioned in their complaint, which mines are being worked by the defendant company, and the minerals removed and converted to its own use.

The action is to recover possession of the property, and damages for the alleged trespasses of the company.

The answer denies any right in the plaintiffs to the said minerals, and asserts title both to them and to the territory in which they are buried.

Thus a distinct issue is raised, which the record does not show was put in form, while the jury were empanelled without such issue, and proceeded to try the controversy as it appeared in the pleadings, in disregard of the statutory mandate, and the reiterated rulings of the Court, that it must be observed. *Rudasill v. Falls,* 92 N. C., 222; *Bowen v. Whitaker, Ib.* 367. Unless it is, it may become necessary to refuse to take cognizance of the cause upon such imperfect record. In the present case, the formal issues do not affect any inquiry into the alleged error upon which the appeal is founded. The intimation of the Court being that the plaintiffs had failed upon the proofs offered, to show any title to the property in themselves, or cause of action against the defendant, the plaintiffs suffered a non-suit and appealed from the ruling.

The plaintiffs proved that some of them were the heirs-at-law of Charles Fisher, deceased, and then proceeded to read in evidence, to estop the defendant, a deed from the said deceased to one Owen Gallimore—the will of the latter—a deed from the administrator of
(399) Cynthia Gallimore, devisee in said will, to Henry K. Grubb,—a deed from the latter and lease to Daniel Lindsay—a deed from said Lindsay and wife to Edmund L. Levy,—and a deed from Levy and wife to the defendant Company, by which the plaintiffs insist the land has been transmitted to the Company, all of the instruments except that just named, purporting, and in form sufficient, to convey an estate in fee.

The operative clause in the conveyance of said Charles Fisher, deceased, is in these words:

"Hath sold and conveyed, and doth hereby sell and convey, to the party of the second part, (Owen Gallimore), all that tract or parcel of land, lying and being in the County of Davidson and State of North Carolina, bounded" etc., giving the specific boundary lines, "containing 45 acres more or less."

"*The mines of minerals are excepted.* To have and to hold etc. To him the said party of the second part his heirs, and assigns forever." The deed bears date on May 13th, 1847, while the last to the company, was executed on November 25th, 1882. As the deed from Fisher has following his signature and seal, the suffix "agent No. Ca. G. M. Co.," while throughout, the instrument, including the covenants of seizin and warranty, is the personal act of the grantor, and no intimation of an agency or trust is intimated, we cannot entertain the suggestion that it affords any evidence itself, that the title was vested in any other than the grantor himself.

The argument here for the appellant, assumes that an acceptance of the conveyance of the land, is a recognition, operating to prevent the defendant from denying title in the deceased to the land conveyed, and equally, title to the property reserved, which is parcel of the land, and this separated from what is conveyed, unless it can show a superior title elsewhere acquired. *Christenburg v. King,* 85 N. C., 229; *Caldwell v. Neely,* 81 N. C., 114; *Ray v. Gardner,* 82 N. C., 146; *Spivey v. Jones, Ib.,* 179; *Leach v. Jones,* 86 N. C., 404.

If the parties claimed the whole land, extended upward and (400) downward, and all contained within its boundaries, or the same estate in the land, the estoppel would be operative, and the party having the superior title from the common source, would prevail. But such is not the case here. The conveyed and reserved parts are not one and the same thing. The grantor may have had himself, only an estate in the land to transfer, while the reserved minerals may have belonged to another. Precisely such were the relations of the succeeding owners, each being capable of passing an estate in the land, and not in the mineral deposits below the surface.

The estoppel is necessarily confined to the subject matter of the conveyance to which conflicting claims are asserted. There is no repugnancy or antagonism in them, and it is entirely consistent, that one party should have title to the mines, and the other to the lands outside of the mines. Hence the titles are traced up to a common, but not the same source. This view is in accord with adjudged cases.

In *Kissam v. Gaylord,* 46 N. C., 294, PEARSON, J., as an illustration, puts this case: "If A makes a deed to B for a tract of 1,000 acres of land, and it be admitted that B, under that deed, had acquired a good title to 500 acres, a part thereof, it does not follow that he has a good title to the other part. So if B (in the case put), makes a deed to C for 500 acres, a part thereof, although there is an estoppel as to the part covered by the deed, there is no ground for an estoppel as to the part not covered by it. It may be he did not include the whole, because he was aware of a defect in title as to a part."

Again, when a deed was made conveying a life estate only, and such life tenant conveyed the fee, it was held that the heirs of the first grantors could only recover the inheritance by showing that the ancestor had a deed purporting to convey the fee, or that he was in possession, claiming such estate. *Worseley v. Johnson,* 50 N. C., 72. In *Staton v. Mullis,* 92 N. C., 623, at page 628, it is said that "the act of accepting a deed from his father does not operate as an estoppel even *interpartes, beyond the estate conveyed,* upon the (401) plaintiff, nor is he thereby precluded from denying that any

reversionary estate remained in Frederick, for the instrument upon its face does not show that all the estate vested in him was not thereby transmitted to the plaintiff." *Osborne v. Anderson,* 89 N. C., 261. These cases rest upon the proposition, that an estoppel arising out of the acceptance of a deed, is restricted to the estate, as well as to the *corpus* which it undertakes to transfer.

The reservation here was necessary, since, if not made, the general words of description would have comprehended both the soil and minerals in it, and the exception may have been inserted, because the property was not in the grantor. We, therefore, concur in the ruling that the plaintiffs had failed to show title in themselves or any of them to the property claimed in the complaint. There is no error, and the judgment of non-suit must be affirmed.

No error. Affirmed.

Cited: Fisher v. Mining Co., 97 N.C. 96; *McAlpine v. Daniel,* 101 N.C. 558; *Bickett v. Nash,* 101 N.C. 583; *S. v. Boyce,* 109 N.C. 746; *Tucker v. Satterthwaite,* 120 N.C. 122; *Drake v. Howell,* 133 N.C. 166; *McCoy v. Lumber Co.,* 149 N.C. 3; *Bryan v. Hodges,* 151 N.C. 414; *Hill v. Hill,* 176 N.C. 197; *Wallace v. Bellamy,* 199 N.C. 765; *Vance v. Pritchard,* 213 N.C. 556.

P. C. CARLTON v. ROXANA SIMONTON.

Injunction—Subrogation—Surety.

1. A surety who pays the debt, is subrogated to all the specific liens and securities which the creditor has against the principal debtor.
2. A surety who has to pay the debt, has no equity to follow the specific property which the principal debtor purchased with the borrowed money.
3. Where the principal debtor borrowed a sum of money, which he deposited in a bank which soon afterwards became insolvent, and the surety had to pay the debt, the surety has no equity to enjoin the principal debtor from collecting the dividends from the insolvent bank, until he can recover a judgment.

Motion to continue a restraining order to the hearing, in a CIVIL ACTION, pending in the Superior Court of IREDELL County, heard
(402) by *MacRae, Judge,* at Chambers, in Salisbury, on the 19th of February, 1886.

The following facts appear from the record:

The action was brought to recover of the defendant, the sum of $6,832.04, alleged to have been paid by plaintiff upon a judgment in favor of the National Bank of Charlotte, against defendant as principal, and plaintiff and C. A. Carlton as sureties, upon a note for $10,000, a copy of which is set out in complaint.

The plaintiff filed an amended or supplemental complaint, setting forth that the money borrowed upon said note was deposited to the credit of defendant in the Bank of Statesville; that the Bank of Statesville became insolvent, and in a creditor's bill, now pending, a Receiver was appointed to take charge of its assets and distribute the same among its creditors.

That since the filing of the original complaint in this action, the defendant has been allowed to prove her debt against said Bank of Statesville, for the money so deposited, and an order has been made allowing her to draw from the Receiver, when assets come into his hands, thirty per cent. of her said claim, to make her equal with those creditors who have already been paid dividends from the assets, and that thereafter she share equally with the other creditors in the assets of said Bank; that the defendant is insolvent, and that plaintiff is entitled, with the other surety who has paid an equal amount with himself in favor of the Bank of Charlotte, to be substituted to the rights of defendant, and allowed to follow the fund in the hands of the Receiver, and subject it to the payment of his claim against defendant for money paid to her use.

Plaintiff, in his affidavit, states that he is apprehensive that defendant may be induced to dispose of her said claim upon said fund, as from her conduct in this cause, plaintiff is advised and believes that she will leave no effort untried to defeat his recovery, by assigning or disposing of her said claim, before in the course of the action, plaintiff can obtain judgment. And, therefore, plaintiff asks that she be enjoined.

Upon the hearing before him, his Honor refused to continue (403) the restraining order, and gave the following reasons:

"Leaving out of view the insufficiency of the plaintiff's averments of apprehension that defendant may dispose of her claim, and also the defendant's allegation of release, and of fraud on the part of the plaintiff, in the opinion of the presiding Judge, the plaintiff has shown no equity upon which he would be entitled to the injunctive relief prayed for. If the identical money, borrowed upon the note made by defendant, plaintiff and another, to the Charlotte Bank, was deposited in the Bank of Statesville to the credit of defendant, it became simply a debt owing by the Bank of Statesville to defendant.

"And if plaintiff was compelled to pay a part of the judgment rendered upon the note, he has simply a claim against defendant for money paid to her use; there were no securities in the hands of the creditor. The Charlotte Bank would have had no equitable lien upon this fund, by reason of the fact that the identical money borrowed from it was loaned to the Statesville Bank, and there is no principle of substitution or subrogation, upon which the plaintiff might be substituted to defendant's rights. There is no allegation of an intent upon the part of the defendant to dispose of her claim to defraud the plaintiff. It appears that she has already disposed of a part of the same by assignment to her counsel. She may have rights of personal property exemption in the same, or she may choose to pay other debts with the same.

"The restraining order heretofore made is vacated, and the injunction pending the litigation is denied, and it is adjudged that the plaintiff pay the costs of this application."

From this order the plaintiff appealed to this Court.

Mr. Theo. F. Klutz, for the plaintiff.

Mr. M. L. McCorkle, for the defendant.

MERRIMON, J. (after stating the facts). Manifestly the plaintiff fails to allege such a cause of action, and to state such facts, as
(404) entitle him to the relief by injunction which he seeks. Granting that the defendant loaned the money she borrowed from the First National Bank of Charlotte, and for which she executed her promissory note, to which the plaintiff was a surety, and which he had to pay, to the Bank of Statesville, it does not follow that the debt due to her from the latter Bank, was in any way, either in law or equity, specifically applicable to the payment of the debt due from the defendant to the First National Bank of Charlotte, or to the payment of the debt due from her to the plaintiff, if she is indebted to him, for the consideration and as he alleges. The latter bank had no lien upon the debt due her, nor any equitable right to follow the money it loaned to her into the hands of the Bank of Statesville. When she so borrowed the money, in the absence of any special agreement, or fraud, it became hers absolutely, and she might dispose of it as she saw fit, and just as she could any other money or property she might have unincumbered.

The plaintiff certainly had the right to be subrogated to any specific right, lien or security the creditor had, as to the debt due the defendant in question, but it is not alleged, nor does it appear that the creditor bank had any such right or security.

The plaintiff seems to think, that, as he, as surety, had to pay the debt of the defendant, he had the equitable right to have the debt due her, the consideration of which is the money she borrowed, the note for which he had to pay, applied to the payment of his debt against her. This is a misapprehension of the law. If a principal borrow money, give his note for the same with surety, and the surety afterwards is compelled to pay the note, this does not give the surety any lien or specific equitable right, to resort to and have the property, right or credit, the principal may have obtained with the very money he so borrowed, applied to the payment of his debt. In such case, the surety stands upon no better footing than any other creditor of the principal. The surety is simply a creditor of the principal without security. *Miller v. Miller,* 62 N. C., 85.

It would seem at first view, that in natural justice, the surety (405) ought to have the right to be substituted as the owner of the specific right or property the principal acquired with the very money he borrowed, because the surety indirectly, in effect, paid the consideration for it. But the complicated interests of society, the constant and rapid dealings of men with each other, the difficulty experienced in tracing the investment and application of money, and like considerations, make it necessary to treat the surety as an ordinary creditor, and to give his debt no special advantage over the just debt of any other creditor. It may be said, the surety, when he becomes such, does so voluntarily, and consents to accept the fortunes of the course of business transactions, good or ill.

The order appealed from must be affirmed, and to that end, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

S. C. RANKIN & CO. ET AL. v. MARY H. SHAW ET AL.

Homestead—Conveyance in Fraud of Creditors.

1. Since the passage of the act of 1885, ch. 359, a judgment is a lien on the homestead interest. *Quære,* whether this act affects causes of action accruing prior to its passage.
2. A debtor, who conveys his land in fraud of creditors, is still entitled to a homestead in the fraudulently conveyed land.
3. As creditors cannot reach the homestead for the satisfaction of their debts, no conveyance of it, although voluntary, can be in fraud of creditors.
4. In an action by creditors to have a deed, alleged to be voluntary and fraudulent, set aside, the answer set up the defence that the donor was

entitled to a homestead in the conveyed land; *It was held*, to be error to strike out the answer, and order the sheriff to lay off the homestead, and that a sale be made of the excess.

(406) CIVIL ACTION, in the nature of a creditor's bill, heard before *MacRae, Judge*, at November Term, 1885, of the Superior Court of CUMBERLAND County.

The plaintiffs having recovered several judgments against the defendant Mary H. Shaw, before a Justice of the Peace, and caused them to be docketed in the Superior Court of Cumberland County, in this action, begun on January 3rd, 1884, and prosecuted on behalf of all her creditors, seek to have set aside and declared fraudulent and void, a deed executed by her, previous to the attaching of their liens, wherein she undertakes to convey to the defendant Benjamin F. Shaw, her interest and estate in several tracts of land. The complaint avers that the debts on which the judgments were rendered, were contracted before the making of the deed, and that the recited consideration of five hundred dollars, was never paid nor intended to be paid, and the conveyance was wholly voluntary and inoperative against creditors, she being possessed of no personal property in excess of five hundred dollars, and owning no other land out of which the debts can be satisfied.

The answer essays to impeach the validity of the notes on which the judgments are founded; and also the judgments themselves, sets up a counter-claim, and among other defences not necessary to be considered, alleges, that the real estate so conveyed, is assessed for taxation at $683.33, and does not exceed in value that allowed by law as a homestead, and that as it was not accessible to final process, her disposal of it could not be in fraud of the rights of creditors, nor operate to cause hinderance or delay.

The Court, on moton of plaintiffs' counsel, directed to be stricken out of the answer the first article, and so much as sets up a counter-claim, as frivolous and impertinent, and proceeding to declare, upon the admissions in the answer, that the deed is "fraudulent and void as to creditors, except as to the homestead interest of the said Mary H. Shaw," adjudges that advertisement be made for other creditors, that

(407) the sheriff summon appraisers to lay off the homestead, and if there be any excess in the land, that he proceed to sell the same and make report to the Court.

From this ruling and judgment the defendants appeal, assigning several exceptions, and especially one to the ruling as to the fraudulent character of the deed, which is the only one passed on by this Court.

Mr. Duncan Rose, for the plaintiffs.
Mr. R. P. Buxton, for the defendants.

SMITH, C. J. (after stating the facts). In *Markham v. Hicks*, 90 N. C., 204, decided two years since, upon a full consideration of the subject, the Court uses this language in regard to the result reached:

"The estate of the debtor, remains after the allotment, as before, the same, whether it be in fee, for life, or for years. It is *this estate in its entirety* in the exempt land, which the creditor is not allowed to sell under final process, by the mandate of the Constitution, and to which no judgment lien now attaches, when the debt was contracted, or the cause of action occurred, since May 1st, 1877."

The clause of the sentence relating to the lien, has since become inapplicable by reason of the amendatory enactment of 1885, ch. 359, but the change in the law does not interfere with so much of the proposition as precedes.

It is manifest that if the plaintiffs were to sue out execution, and proceed to enforce their judgments against the lands, treating the attempted disposition of them as void, by reason of fraud, the debtor would be entitled, as against them, to her full homestead, as if no deed had been made, and as to so much as should be ascertained to be exempt, her conveyance could not be in fraud of her creditors, for the simple reason that this part was not accessible to final process. *Duvall v. Rollins*, 68 N. C., 220; *Crummen v. Bennet, Ibid.*, 494; *Arnold v. Estis*, 92 N. C., 162; *Pate v. Harper, ante*, 23.

If the whole area of the land should be covered by the allot- (408) ment, the officer could do nothing, and must return his process unacted on, without resulting benefit to the creditor. The present proceeding is but another form of final process, and must be subject to similar conditions. It must be equally ineffectual, if the fact be that upon an allotment, all the defendant's land will be required for her homestead exemption. The averment in the answer raises this issue, and if found to be true, arrests the action, as it would further proceedings by the Sheriff. This defence ought, therefore, to have been disposed of before rendering final judgment, and not left to be contingent upon the action of the Sheriff. If there is no excess, the cause can proceed no further, and no declaratory judgment should have been made in advance, to fit unascertaned facts, as they might be determined thereafter. The act of March 11th, 1885, restoring the lien of a docketed judgment upon land set apart as a homestead, and in subordination thereto, if affecting the present case, (and this is by no means admitted), will not aid the plaintiffs, for the action to enforce it is in

abeyance, and the statute of limitation, as to the claim, suspended until the homestead exemption terminates.

There is error in refusing to have the defence tried, for the further prosecution of the cause is dependent upon it. The judgment must be reversed, and a new trial had in accordance with this opinion. Let this be certified accordingly.

Error. Reversed.

Cited: Dortch v. Benton, 98 N.C. 191; *Jones v. Britton,* 102 N.C. 169, 177, 180, 201; *Etheridge v. Davis,* 111 N.C. 295; *Vanstory v. Thornton,* 112 N.C. 209; *Younger v. Ritchie,* 116 N.C. 784; *Bevan v. Ellis,* 121 N.C. 233; *Rose v. Bryan,* 157 N.C. 174; *Kirkwood v. Peden,* 173 N.C. 464; *Grocery Co. v. Bails,* 177 N.C. 300; *Sample v. Jackson,* 225 N.C. 382.

R. AND T. L. KNIGHT v. E. B. HOUGHTALLING, ET ALS.

Writ of Assistance.

1. A Writ of Assistance is in the nature of an equitable *habere facias possessionem,* and only issues out of Courts of equity, when land has been sold under a decree, and the *terre-tenant* refuses to give possession to the purchaser.
2. The writ is never granted except when the case is clear, and notice has been given to the person in possession of the land.
3. All that is required to obtain the writ, as against the parties and those claiming under them by conveyance made *pendente lite,* is to show a presentation of the deed, and a demand for the possession, and a refusal. The demand for possession is in all cases necessary, but the presentation of the deed may be waived by the conduct of the person in possession.

(409) Petition filed in the SUPREME COURT in the above entitled action, by R. W. Winston and T. L. Hargrove, the purchasers at the sale made under the decree of this Court in said action, heard at February Term, 1886, of the Supreme Court.

This was a petition for a WRIT OF ASSISTANCE, filed in the case of *Knight v. Houghtalling,* which was decided by the Court at the October Term, 1884, and reported in 85 N. C., 17. It was a civil action to foreclose a mortgage. There was a judgment in the case, at October Term, 1884, against the defendants, one of whom was William H. Wood, the defendant in this petition, directing the land conveyed in the mortgage to be sold for the payment of the judgment. The Clerk of this Court

was appointed commissioner to effect the sale. He made the sale on the 14th day of September, 1885, when Robert W. Winston and Tazewell L. Hargrove, the petitioners, became the purchasers, and the said commissioner made his report of the sale, and the compliance of the purchasers with the terms of the sale, to the October Term, 1885, of this Court, when the said report was confirmed by the Court, and title ordered to be made by the commissioner to the purchasers. In pursuance of said order, a deed for the land was duly executed by the commissioner to the said Winston and Hargrove, which was soon thereafter registered in the Register's office for the County of Granville.

The petitioners allege in their petition, that they had applied to William H. Wood, who was in the actual possession of said land, and had been since before the judgment in the action of *Knight v. Houghtalling,* to surrender to them the possession of the same, which he positively refused to do, as shown by the affidavit of Robert Winston, which accompanies the petition. The affidavit states that he met Wood on the 18th of January, 1886, and told him that he and Tazewell Hargrove had purchased the land, and had a deed for the same, (410) which was registered, and they wanted possession. Wood replied in an angry tone, "Well, sir, I am going to hold to that land, and your trouble has just begun, and don't you forget it."

The petitioners also supported their petition by the affidavit of J. N. Lyon, a deputy sheriff, who served a written notice of the purchase and deed, and a demand by the petitioners, on the said Wood, for the possession of the land on the ..... day of January, 1886, when the said Wood said, "They may think they have stolen the land, but they are badly mistaken, and it will be late when they get it." Upon this state of facts, the petitioners prayed that this Court would grant them a writ of assistance.

Mr. E. C. Smith, for the petitioners.
Mr. D. G. Fowle, for the respondents.

ASHE, J. (after stating the facts). We are of opinion, upon the facts of the case as stated in the petition and accompanying affidavits, that the petitioners are entitled to the writ.

The writ of assistance is a novel process in this State. We believe it is the first time an application has been made to any Court in this State for such a writ. But it has been frequently used in several of the States.

It may be termed an equitable *habere facias possessionem,* for it is only issued from courts of chancery, and only in these cases when the courts have by their decree, caused lands to be sold, in which case they

will complete the sale, by putting the purchaser in possession, when it is withheld by the defendant, or any one who has come into possession *pendente lite.* It is never issued except when the case is clear, and upon notice to the person in possession,—and it "is held to be the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the Sheriff's deed." Herman on Executions, Sec. 353, and cases referred to on
(411) margin. It is said by the same authority, in Sec. 354, that "all that is requisite to obtain a writ of assistance, as against the parties, and those claiming under them after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it." A demand of possession it would seem, is always necessary, but the presentation of the deed to the party in possession may be dispensed with, when it is waived by the conduct of the parties, as in this case, when the party in possession was informed of the sale, the purchase, and the deed as registered, and he makes no question as to these facts, but positively refuses to surrender the possession, and sets at defiance the demand of the purchasers.

We are of opinion the petitioners are entitled to the writ, *and it is so ordered.*

Writ allowed.

Cited: Coor v. Smith, 107 N.C. 431; *Exum v. Baker,* 115 N.C. 244; *Wagon Co. v. Byrd,* 119 N.C. 464; *Williams v. McFadyen,* 145 N.C. 159; *Clarke v. Aldridge,* 162 N.C. 329; *Davis v. Pierce,* 167 N.C. 137; *Lee v. Thornton,* 176 N.C. 210; *Bank v. Leverette,* 187 N.C. 746; *Warehouse Co. v. Willis,* 197 N.C. 477; *Bohannon v. Trust Co.,* 207 N.C. 164; *Alexander v. Thompson,* 211 N.C. 126; *Gower v. Clayton* 214 N.C. 310.

W. L. WHITE v. ANN JONES ET ALS.

Costs.

Where there is a fund in Court, which is afterwards adjudged to belong to the plaintiff, and pending the controversy an order is made allowing a reference fee in the cause, which is paid out of the fund, and the final judgment is against the defendant for all of the costs, this sum so paid, is properly taxed in the costs, and must be paid by the defendant.

Motion in a cause pending in the SUPREME COURT, heard at February Term, 1886, thereof.

The facts appear in the opinion.

Messrs. R. F. Armfield and John Devereux, Jr., for the plaintiff.

Mr. D. M. Furches, for the defendants.

SMITH, C. J. At the last Term of this Court, upon the coming in of the report of the Clerk, William H. Bagley, to whom it was referred to reform and correct the account before made out, in (412) accordance with the rulings thereon, it was adjudged, that upon the payment into the office, of the sum of $4,049.20, ascertained to be in the hands of the receiver, the Clerk pay over to the plaintiff W. L. White, $2,845.13, and to the defendant Jesse Bledsoe, $1,204.07, first deducting the costs which may be due by each, from his share, "in this Court, or the Superior Court of Wilkes County, in this action." An allowance was therein made of $25 to the Clerk for his report, and it was further adjudged that the said Jesse Bledsoe also pay the costs of the plaintiff's appeal.

There had been allowed to M. L. McCorkle, the former referee, the sum of $150, for his services in executing an order of reference, which was paid out of the fund, and should according to the final judgment, have been paid by the said Bledsoe, and this done by deducting that amount from his share, to replace the moneys so paid, and this would be accomplished by leaving that sum in the office, to enlarge the plaintiff's share. We so adjudge, and direct this to be done. The plaintiff's motion to this effect is allowed.

Motion allowed.

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*JOHN A. LILLY, ET ALS., v. C. W. WOOLEY, ADMINISTRATOR, ET AL:.

Administrators—Heirs—Real and Personal Assets.

1. The personal assets of a decedent are first applicable to the payment of his debts, and only such debts as are left unpaid after exhausting the personal assets, can be satisfied out of his real estate.
2. If the personal assets are wasted or misapplied by the administrator or executor, and he should be removed, the administrator *de bonis non* must exhaust the administration bond, or the estate of the executor, before he can proceed against the land in the hands of the heir or devisee.

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

3. Where the personal estate is insufficient, or when it consists of slaves, which after being delivered to the next-of-kin, were lost by the *vis major* of war, the land becomes liable for the debts, and payment may be enforced against any tract, leaving those whose property may be taken, to obtain contribution from the other heirs or devisees, according to the respective value of the lands held by them.

4. The rule which puts the personal in front of the real estate in the payment of debts, has reference to cases where both are in the jurisdiction of the Court.

5. So, where an administrator had paid the entire personalty over to the next-of-kin, before paying all of the debts, and he and the sureties on his administration bond were insolvent, except one surety, who was a non-resident, creditors can subject the land in the hands of the heirs, before they have exhausted the non-resident surety, and it is immaterial that such surety frequently returns to this State on visits.

(413) CIVIL ACTION, in the nature of a creditor's bill, tried before *MacRae, Judge,* at Spring Term, 1884, of the Superior Court of MONTGOMERY County.

This is an action, in the nature of a creditor's bill under the former practice, was commenced on August 11, 1877, and is prosecuted to subject the personal estate of the intestate William P. McRae in the hands of the defendant, C. W. Wooley, his administrator, if sufficient can be found, and if not, the lands descended to the heirs-at-law, who are also defendants, to the extent of an ascertained deficiency, to the payment of his debts. The complaint alleges that payment had been made by the administrator out of the personal estate, to the distributees, which ought to have been applied to the liabilities of the intestate, that ought by these, to be now accounted for to the creditors. Upon the coming in of the answers, an order of reference was entered, without prejudice, to the Clerk, with directions to state the administration of the defendant Wooley, and to ascertain and report the payments made by him, on the distributive shares of the defendants. The report was accordingly made, and at Spring Term, 1883, John A. Lilly, the creditor who began and prosecutes the action, filed a single exception, which was sustained, and the indebtedness shown in the transcript from Montgomery Superior Court, de-
(414) clared to be subsisting and in force against the intestate's estate.

At Spring Term of the following year, the administrator filed exceptions also, and it was agreed that the issues arising upon the pleadings, should be passed on by the presiding Judge, instead of a jury. Thereupon the Court found the facts, and made rulings of law thereon as follows:

"I. That on the 11th of August, 1877, the defendant C. W. Wooley, and all the sureties upon his bond, as administrator of the estate of

W. P. McRae, deceased, were insolvent, except Wilborn Lassiter, and that said Lassiter had converted his property into money, and removed to the State of Florida, but frequently returned to North Carolina on visits; that he was not insolvent, though a debt could not be collected out of him by the ordinary process of execution, but that he always had money.

"And upon the foregoing facts found, it is considered that the said Lassiter being solvent and frequently in this State, said bond was not insolvent. Plaintiff excepts.

"II. That this action is not barred by the statute of limitations:

"1. As to the administrator, because he had not paid over all the assets to the distributees, the referee having found a balance still in his hands. Due advertisement was made by the administrator for claims against said estate.

"2. As to the distributees, because they cannot set up the statute, unless the administrator can do so.

"Defendants except.

"It is admitted that the guardian has not obtained judgment against the administrator, as alleged.

"And it is therefore considered and adjudged that the plaintiffs have judgment against defendant C. W. Wooley, for the amount of their claims as reported by the referee, and that the other defendants go without day."

From which judgment the plaintiffs appeal to the Supreme Court.

Mr. John Devereux, Jr., (Mr. Jos. B. Batchelor was with (415) *him), for the plaintiffs.*

No counsel for the defendants.

SMITH, C. J. (after stating the facts). It is a well understood rule in the administration of the estate of a deceased debtor, that his personal property must be first applied and exhausted, and the residue only of unpaid liabilities, can be satisfied out of his real property. If the representative into whose hands the personal effects come, make a distribution among the legatees or next of kin, he is personally answerable therefor to the creditors. *Bland v. Hartsoe,* 65 N. C., 204.

If the assets are wasted or misapplied, and the representative removed for misconduct, his successor, administering *de bonis non,* must sue on the administration bond and collect the amount of the *devastavit,* if the sureties are solvent, before he can proceed against the devised or descended lands. *Latham v. Bell,* 69 N. C., 135. And his application for license to sell the decedent's lands will be refused, if the money so

misapplied can be replaced by an action against the former representative, and his official sureties. *Carleton v. Byers,* **70 N. C., 691.**

When there is no personal estate, or it is insufficient to pay the debts of the decedent, or when consisting in slaves, it is lost by the *vis major* of war, without default of the representative or of the legatee or next of kin, to whom they have been delivered, the land becomes chargeable with the debts, and may be sold for their payment. *Hinton v. Whitehurst,* 71 N. C., 66, and payment may be enforced against any tract for the satisfaction of the indebtedness, leaving those, whose property may be taken, to obtain contribution according to the respective values of the other lands held by devisees or heirs.

In the present case, the obligors executing the administration bond, except one, are insolvent, and he, though possessed of property in another State, has none in this, and has become, since he executed the bond, a resident in Florida, and not accessible to process issuing
(416) from a home court. The Court ruled that this fact was a bar to any remedy against the debtor's real estate, until the remedy against the solvent surety has been exhausted. No decided case or authority has been adduced to sustain the ruling, and the proposition does not command our approval. We do not understand the law to be, under the adjudications of the Courts, that the creditor here residing, must pursue his remedy upon the administration bond, against a surety to it in a distant State, and exhaust this source, before he can resort to the debtor's real estate, found in this State. The rule which puts the personal in front of the real estate, in payment of debts, has reference to cases where both are within the jurisdiction of the Courts, and can be reached by process, and not to cases where only the latter can be thus subjected. The policy of the law, looks to the payment of debts due to home creditors, out of such property, whether real or personal, of the non-resident debtor, within the limits of the State, as is under jurisdictional control, and capable of being thus marshalled. It would be unreasonable, when the means of enforced payment, out of the debtor's lands, are here furnished, to force resident or other creditors, to follow the person and property of a surety, liable, not in person for the debt, but a guarantor of the fidelity of a principal, who has wasted or misapplied trust funds in his hands. The requirement that the personal property of the deceased must be first applied, or redress sought upon the bond given for its proper administration, and representing it, cannot, upon any just principle, be extended to a case where these resources are not accessible to the process of the Court.

The difficulties arising from permanent absence of both person and property, (for we do not attach importance to the fact that he fre-

quently visits the State), are scarcely less formidable in the way of coercing payment, than insolvency itself. When the Courts of the State can give its creditors redress upon property here, it will not drive them to seek it in a foreign tribunal. This is the policy which underlies our attachment laws.

It was error, therefore, to refuse judgment against the heirs- (417) at-law, subjecting the land fund to the payment of what could not be made out of the personal estate, and the ruling in this regard must be reversed. As the cause can be proceeded with to greater advantage and convenience in the Court below, it is remanded. Let this be certified.

Error. Reversed and Remanded.

Cited: Syme v. Badger, 96 N.C. 207; *Lee v. Beaman,* 101 N.C. 299; *Brittain v. Dickson,* 104 N.C. 554; *Alston v. Hawkins,* 105 N.C. 6; *Clement v. Cozart,* 107 N.C. 700; *Brown v. McKee,* 108 N.C. 395; *Miller v. Shoaf,* 110 N.C. 325; *Lee v. McKoy,* 118 N.C. 526; *Privott v. Wright,* 195 N.C. 182.

A. SPEER, ET ALS. v. J. H. JAMES, ADMINISTRATOR, ET ALS.

Sale of Lands for Assets—Statute of Limitations—Heirs.

Where an administrator files a petition to sell the lands of his intestate to make assets, if the debts to be paid have not been reduced to judgment, the heir may plead that they are barred by the statute, but when the demand has been reduced to judgment against the administrator, the heir is bound by the judgment unless he can show that it was obtained by collusion and fraud, and is barred by it from setting up any matter which might have been pleaded by the administrator as a bar in the suit against him.

CIVIL ACTION, in the nature of a creditor's bill, tried before *Montgomery, Judge,* and a jury, at Spring Term, 1886, of the Superior Court of YADKIN County.

This action, begun on January 18th, 1882, as a creditor's suit, is prosecuted against the administrator and heirs-at-law of John Douglas, deceased, the intestate debtor, to enforce a sale of the descended lands for the payment of his debts. The only issue submitted to the jury was this:

Are the plaintiff's claims, or any of them, barred by the statute of limitations, or presumption of payment?

(418) Under instructions, the jury found against all the claims, except the judgment in favor of D. E. Dobbins, administrator of Jesse Dobbins. The plaintiff offered in evidence a judgment in favor of A. Speer, for the sum of thirty-three dollars and eighty-three cents, against the defendant J. H. James, administrator of John Douglas, recovered before a Justice of the Peace on the 19th day of November, 1880. The summons before the Justice was issued on the 3rd day of March, 1880. The cause of action was founded upon a bond under seal, due one day after date, and dated January 6th, 1863.

Also, judgment in favor of J. M. Jones and J. H. Williams, executors of C. W. Williams, for the sum of thirty-two dollars and ninety-one cents, against said administrator, recovered before a Justice of the Peace on the 3rd day of March, 1880. The summons before the Justice was issued on the 19th day of January, 1880. The cause of action was founded on a bond under seal, executed by the said John Douglas, on the 7th day of August, 1862, and due one day after date.

Also, judgment in favor of Tennessee Phillips, for the sum of nine dollars, against said administrator, recovered before a Justice on the 7th day of February, 1880. The summons before the Justice was issued on the 17th day of January, 1880. The cause of action was founded on a bond under seal, executed by the said John Douglas, deceased, on the 6th day of September, 1862, due one day after date.

It was agreed that the said John Douglas died intestate in the month of February, 1873, and that letters of administration were granted to the defendant, J. H. James, on the 21st day of August, 1879.

The plaintiffs insisted that the defendants were bound by the judgments rendered by the Justices, and that the time elapsing from the death of the said John Douglas, to the time of the qualification of the defendant J. H. James, as administrator, should not be computed in counting the time that raises the presumption of payment or statute of limitations.

(419) His Honor held that the judgments against the administrator were not binding on the heirs-at-law of the deceased, when the summons issued after the time had elapsed raising the presumption of payment or statute of limitation, and that the time elapsing between the death of said John Douglas, and the appointment of J. H. James, administrator, should not be counted out; and instructed the jury to render a verdict for the defendants heirs-at-law, to all the claims, except the one in favor of John Mackie, assigned to Dobbins, on which no contest was made.

The plaintiffs, A. Speer, Jones & Williams and Tennessee Phillips, excepted to his Honor's ruling, and appealed to the Supreme Court.

Mr. C. B. Watson, for the plaintiffs.

Mr. John Devereux, Jr., (Mr. J. B. Batchelor was with him), for the defendants.

SMITH, C. J. (after stating the facts). The question presented by the appeal is, whether the heirs-at-law can go behind the judgments recovered against the administrator, and set up as a defence to the bonds, the statutory presumption of payment, arising from the lapse of time since their maturity, in like manner as if no action had been prosecuted, and no judgment rendered thereon. The ruling of the Court, we presume, was predicated upon the decision in *Bevers v. Parks*, 88 N. C., 456, it which it is held that in any proceeding instituted by the personal representative of a deceased debtor, against his heirs or devisees, to convert by sale the descended or devised lands to the payment of debts barred by the statute of limitations, which defence the latter will not set up, the defendants may avail themselves of the bar to defeat the action. In this case, judgment, had been recovered against the plaintiff as administrator, and had itself become barred by the lapse of time. But the Court, near the close of the opinion, adds: "It is not necessary that we should decide, nor do we undertake to do so in this case, how far the heir may be bound *by a valid subsisting judgment* against the administrator, or to what extent he may contest the (420) validity of the demand on which it is founded."

The inquiry thus suggested and left unresolved, is presented in the present appeal for our determination. Before proceeding to consider it, it may not be amiss to refer to *Baker v. Webb*, 2 N. C., 43, the only case bearing upon the subject found in our own adjudications. In this case, the plaintiff's title to the land sued for, was derived from a sheriff's sale, and deed to a purchaser from whom he claims, under an execution issued in 1772, upon a *judgment recovered against the executors* of the deceased debtor, and which commanded the sheriff to *"levy of the goods and chattels, lands and tenements in the hands of the executors,"* etc. The parties in whom the real estate of the deceased had vested, do not appear to have been in the action, and the proceeding was under the statute, 5 George, 2 ch., 5, which made lands in the hands of the heir, liable for the ancestor's debts, and it was in reference to the contention that such a sale would pass the estate in the lands, that the words recited were used by Judge Macay.

Soon after this decision was made, perhaps in consequence of it, was passed the act of 1784, Potter's Revisal, ch. 226, which, after declaring the existence of doubts, "whether the real estate of deceased debtors in the hands of their heirs or devisees, should be subject to the payment

of debts upon judgments obtained against the executors or administrators, in order therefore to remove such doubts in future, and to direct the mode of proceeding in such cases," proceeds to enact:

"That in all suits at law, where the executors or administrators of any deceased person shall plead fully administered, no assets, or not sufficient assets to satisfy the plaintiff's demand, and such plea shall be found in favor of the defendant, the plaintiff may proceed to ascertain his demand, and to sign his judgment; but before taking out execution against the real estate of the deceased debtor, a writ or writs
(421) *scire facias,* shall and may issue, summoning the respective heirs and devisees of such deceased debtor, to show cause why execution should not issue against the real estate, for the amount of such judgment, or so much thereof, as there may not be personal assets to discharge; and if judgment shall pass against the heirs or devisees or any of them, execution shall and may issue against the real estate of the deceased debtor in the hands of such heirs or devisees, against whom judgment shall be given as aforesaid."

Section 5 provides that when the plea of a want of personal assets shall be found in favor of the defendant, the heirs and devisees thus brought in, may contest the truth of such findings, and upon their plea that the personal representatives "have sufficient assets, or have wasted or concealed the same, the Court shall order the trial of a collateral issue" between them, which, if found against such personal representative, "the original plaintiff shall have execution, not only against the goods and chattels of the deceased debtor, but against the proper goods, chattels, lands and tenements of such executors or administrators; any law or custom to the contrary notwithstanding."

The method of procedure provided in this statute, as the means of access to the real estate, and by a sale and conversion in separate actions, at the instance of creditors, attended as it was with great expense and inconvenience, prevailed until the passage of the act of January 14th, 1847, which substitutes a single proceeding by the personal representative against those to whom the lands have been devised or descended, for license to sell, and appropriate the proceeds in aid of the personal assets in payment of the decedent's debts, and is still in force. The Code, Sec. 1436, *et seq.* The superseding enactment was manifestly not intended to change the relations of the heir towards the party suing to subject the lands, or to confer new rights, not possessed when the process was by the *scire facias,* but leaving him as he was before, to set up such defences as were then available, to substitute a single and more convenient proceeding for the sale of the land, conducted by the executor or administrator, for and as representing

all the creditors. The act of 1784, was intended to give the heir (422) a day in court—an opportunity to be heard, in showing why the land should not be sold, and to settle the doubt whether this could be done, as contended in the case referred to, without his presence. The inquiry then is, what will the heir say when he is brought into Court by the service of the *scire facias,* "why execution should not issue against such real estate for the *amount of such judgment,* or so much thereof as there may not be personal assets to discharge?"

Very soon after the enactment, it was held to be unnecessary to issue any process to the *administrator,* as he continued in court until every controversy which the heir might raise by his plea that the administrator has, or ought to have, assets, is settled. *Alston v. Summer's Heirs,* 3 N. C., 404, (609).

In *Trimble v. Jones,* 7 N. C., 579, a plea by the heirs that the descended lands had all been sold to satisfy prior judgments, was declared to be no defence, because the judgment is not rendered against the *heirs personally,* but *against the lands,* and such plea is but a defence of the titles of the purchasers, acquired under such sale, which the creditor, by a second sale, may dispute, and this he cannot do, unless allowed to proceed. Delivering the opinion, HALL, J., says: "The heirs are at liberty to plead many pleas when the *scire facias* is served on them, which, if true, would prevent judgment passing against them. They might plead that the executor or administrator had not fully administered, but had assets; that the judgment against the executor or administrator was obtained by fraud, etc." But it is not intimated that the judgment is inoperative as to them, and that they could interpose any objection, as if none had been rendered, to the demand in its original form. The judgment is considered when infected with no fraud, or the result of collusion, as *establishing the debt,* and to put it out of the way, must itself be impeached. It is the duty of the personal representative to protect the deceased against unfounded claims, and in the absence of evidence of fraud or collusion, it must be presumed he has done so, in an adversary action, and hence, when (423) not assailed by the heir in the manner allowed, subsists in full force, for subjecting all the estate of the debtor, *real as well as personal,* the one after the other, to the payment of his liabilities.

The very language of the process shows this limitation upon admissible defences, for it summons him, not to show cause why judgment should not be entered, but "why execution shall not issue for the amount of such judgment," ascertaining and determining, when *bona fide,* the fact of the indebtedness. The practice, we believe, under the act, has been uniform and consistent with this interpretation of the law, during

the sixty years of its operation, and we know of no adjudication to the contrary. In *Carrier v. Hampton,* 33 N. C., 307, RUFFIN, C. J., referring to the question of assets raised by the heir, says: "That is a collateral issue, and the creditor stands by awaiting the result, for the sake of the right of the other parties as between themselves; for the law supposes the creditor is to be paid at all events, by the one side or the other, whichever has the estate of the debtor, that is then chargeable; and to that end, if the issue be found against the executor, it gives the creditor execution *de bonis testatoris, et si non, de bonis propriis.*

The same principle that governed in the former, enters into and qualifies the existing statutory mode of proceeding against the land, and the same and no other defences are open to the *terre-tenant* in either. His relations to the adversary party, remain the same and unchanged. If he could not before, neither can he now, raise issues concluded by the judgment, unless the judgment itself be impeached.

In the present case, the defendants, who have the inheritance, seek to disregard the judgments as nullities, and to set up a presumption under the old law, raised from the lapse of time, or full payment of the bonds, reduced to judgments a short time before the commencement of his suit, and just after the expiration of ten years from their maturity,

(424) deducting the time of the suspension of the acts of limitation, whereof during six years, there was no administration on the debtor's estate after his death, and no one to sue. In *Moore v. Edwards,* 92 N. C., 43, it is held, that in a creditor's suit, one of them cannot go behind a judgment, recovered in another action by a different creditor against the administrator, and contest the validity of the original claim, because the cause of action was then barred by the statute of limitations and might have been defeated, had the defence been set up; though any creditor may resist another's demand, when in consequence of a deficiency of assets to pay all, he is interested in having it excluded, and pleads the bar. *Wordsworth v. Davis,* 75 N. C., 159; *Oates v. Lilly,* 84 N. C., 643; *Dobson v. Simonton,* 93 N. C., 268.

If an interested creditor may not go behind the subsisting judgment, why shall the *terre-tenant* be allowed to do so, when there is no suggestion of fraud, collusion, or any unfairness practiced in procuring it?

So a judgment against an administrator, is evidence of the debt, both against him and the sureties on his bond, when put in suit against all. *Armistead v. Harramond,* 11 N. C., 339, decided before the act of December 31st, 1844, and *Strickland v. Murphy,* 52 N. C., 242, decided since its passage. The Code, Sec. 1345. And why should it be otherwise, when the debtor's own land is to be made liable?

We distinguish this case from that of *Bevers v. Parks, supra,* in that the defence arose after judgment, and its validity was not called in question as a binding judicial determination, while here the judgment itself is treated as a nullity. We cannot extend the former ruling to the facts of this case. There is error, and there must be a new trial. Let this be certified to the Court below.

Error. Reversed.

Cited: Syme v. Badger, 96 N.C. 210; *Andrews v. Powell,* 97 N.C. 171; *Smith v. Brown,* 99 N.C. 385; *Halliburton v. Carson,* 100 N.C. 111; *Lee v. Beaman,* 101 N.C. 298; *Smith v. Brown,* 101 N.C. 349; *Brittain v. Dickson,* 104 N.C. 551; *Proctor v. Proctor,* 105 N.C. 224; *Lassiter v. Upchurch,* 107 N.C. 415; *Long v. Oxford,* 108 N.C. 281; *Woodlief v. Bragg,* 108 N.C. 573; *Tilley v. Bivens,* 112 N.C. 349; *Byrd v. Byrd,* 117 N.C. 525; *Lee v. McKoy,* 118 N.C. 523, 525; *Hinton v. Pritchard,* 126 N.C. 10; *McArthur v. Griffith,* 147 N.C. 547; *Best v. Best,* 161 N.C. 516; *Barnes v. Fort,* 169 N.C. 435; *McNair v. Cooper,* 174 N.C. 567.

(425)

THE BLACKWELL DURHAM TOBACCO CO. v. J. H. McELWEE.

Trade-Marks—Injunction—Pendency of Another Action.

1. While the Court is slow to pass upon disputed issues upon *ex parte* affidavits, yet where, in a motion to continue a restraining order to the hearing, it appears that the injury sought to be enjoined, is continuous, and the damage very difficult of ascertainment, or when the damage is irreparable, the Court will act upon the proofs, and continue the restraining order, if an apparent case is made out, unless continuing the order to the hearing would work greater injury to the defendant than is reasonably necessary for the protection of the plaintiff.
2. In common injunctions, where proceedings at law are arrested by the injunction, the rule is to dissolve it, when the allegations in the complaint are fully and fairly denied by the answer; but special injunctions, which are in aid of a suit pending, and whose object is to secure to the plaintiff the benefit of the action, will not be dissolved, when it appears to the Court, by affidavits or otherwise, that there is probable ground for the primary equity, and a reasonable apprehension of irreparable loss.
3. The answer under the present practice, in an application to vacate an injunction, is itself but an affidavit when verified, and the plaintiff may introduce other affidavits to support the allegations in his complaint.
4. Under the present practice, the answer is not, as it was formerly when responsive to the bill, and fair and frank in its statements, conclusive on the subject of the dissolution of an injunction, but only has the effect of an affidavit.

5. The defendant is not bound to plead a set-off or counter-claim, but may make it the subject of an independent action.
6. In order to support the defence of another action pending, the two actions must be between the same parties. So, where the defendant in one suit, is the plaintiff in another, in both of which actions the title to the same trade-mark is brought in question, the pleas of another action pending will not avail him in an action by the assignee of the defendant in the first suit in regard to the title of the same trade-mark.
7. *It seems*, that the name of a town or locality cannot be exclusively appropriated as a trade-mark.

Motion to dissolve a restraining order, theretofore granted in a CIVIL ACTION, pending in the Superior Court of DURHAM County,
(426) heard before *Shepherd, Judge,* at Chambers, in Louisburg, on the 1st of May, 1885.

His Honor continued the injunction to the hearing, and the defendant appealed.

The facts appear in the opinion.

Messrs. W. W. Fuller, John W. Graham and E. C. Smith, (Messrs. Thos. Ruffin, T. C. Fuller and Geo. H. Snow, were with them on the brief), for the plaintiff.

Mr. John Devereux, Jr., (Mr. Jos. B. Batchelor was with him), for the defendant.

SMITH, C. J. The present action, begun on April 11, 1885, is prosecuted for the two-fold purpose of restraining the further use by the defendant of a trade mark or device, in which the plaintiff claims an exclusive proprietary right, upon packages and boxes of tobacco of defendant's own manufacture, and to recover damages for its past unauthorized use. The plaintiff's trade-mark, shown in an exhibit accompanying the complaint, is impressed upon smooth polished paper, of a peculiar color, in gilt letters, forming the sentence, "Genuine Durham Smoking Tobacco," the first two words above, and the last two below the picture, a side view of a fair sized bull, and followed by the names of preceding manufacturers, to whom the plaintiff succeeds in the alleged right to the sole use of the label. The defendant uses a similar label, upon the same kind of paper, upon his own package of manufactured tobacco, bearing the words, "Genuine Ante-Bellum Durham Smoking Tobacco," with a like form of a bull, interposed between the words "Bellum" and "Durham," and separating them into lines above and below the figure, and followed by the defendant's name and place of business at "Statesville, N. C."

The essential similarity in the trade-marks and devices used by the contestant parties, clearly shows an invasion of the plaintiff's proprietary right, and this seems not to be controverted, if, as alleged, by prior appropriation on the part of those from whom the (427) plaintiff claims it, it is exclusive in them.

In *Blackwell v. Wright,* 73 N. C., 310, the plaintiff, a precedent claimant of the same trade-mark, prosecuted an action against the defendant for a similar alleged infringement in the use of the words, "The Original Durham Smoking Tobacco," with the representation of the head only, and not the full form, of some bovine animal. It was decided that the defendant had violated no right of the plaintiff's in using his peculiar label, and the Court said: "Nor can the word 'Durham,' the name of the town where both parties are doing business, be exclusively appropriated as a trade-mark. The word 'genuine' is unlike the word 'original,' used by the defendant, and the words 'smoking tobacco,' a thing in general use by that name, of course is not pretended to be the subject of appropriation."

The opinion delivered by Mr. Justice BYNUM concludes as follows: "To our mind, the plaintiff does not disclose a case which entitles him to injunctive relief, or to an action for damages. The term 'Original Durham Smoking Tobacco' seems a fair set-off to 'Genuine Durham Smoking Tobacco,' etc."

The infringement of the plaintiff's proprietary right, if any has been made, consists essentially in the appropriation by the defendant to his own use, of the figure of the bull, to which the description of the kind of goods, and the attached name of the manufacturer, are merely incidental. Such seems to be the result of the ruling in the former suit, there being no such resemblance between the figure of the head or front part of the animal, and his full form, as was calculated to deceive a purchaser, and subtract from the sale of the plaintiff's own manufactured goods. The present defendant, unlike the defendant in the other case, exhibits upon his label the same full sized side view of the bull, and unless he has authority to do this, is invading the plaintiff's rights in the premises. It is a very unsatisfactory way of settling a disputed fact, averred and denied in the pleadings, and upon which the whole controversy depends, by the introduction of (428) *ex parte* affidavits, upon a preliminary motion for a restraining order, instead of upon issues tried at the final hearing, upon evidence taken, and subject to cross examination, so often necessary in eliciting the whole truth of the matter. But when, as here, the injury is continuous, and the damage very difficult of estimate, if reparable when ascertained, it is the duty of the appellate Court to act upon the proofs

adduced, and interpose for the plaintiff's protection, when an apparent case for relief is shown, unless in doing so the restrained party may be subject to greater damage than is reasonably necessary for the plaintiff's security. In this view, and upon examination of the evidence, it seems plain, that while the plaintiff has, the defendant has not, the right to the use of the trade-mark, in the sale of manufactured smoking tobacco, which each is engaged in selling, and that pending the action and before the final hearing, the defendant ought not to be allowed to use the figure of the bull, as he is now using it, upon his labels, on the plaintiff's giving an adequate undertaking, with sureties, for the defendant's indemnity against all losses in sales which he may sustain in consequence of the temporary injunction.

The appellant's exceptions, five in number, are as follows:

"1. That his Honor erred in granting the motion to continue the injunction, when defendant's answer was fair and candid, and in response to the complaint, and it unequivocally denied plaintiff's right and title to the exclusive use of the trade-mark from using which the defendant is restrained.

"2. His Honor erred, because the record of the suit in Iredell Superior Court, which is a part of the record in this case, shows that at the time of the bringing of this action, there was another action pending in Iredell Superior Court for the same cause of action, and in which plaintiff might have had this injunctive relief, if entitled to it.

"3. His Honor erred in hearing affidavits on the part of plaintiff to prove his title, when it was denied in the answer.

(429) "4. His Honor erred in granting the continuance of the injunction, because it was a great and unreasonable hardship on defendant.

"5. Because any loss of plaintiff by defendant user of the trade-mark, even if wrongful, could be compensated in securing damages."

The proposition involved in the first exception, rests upon a misapprehension of the practice in equity. The distinction is overlooked, between common and special injunctions, which are explained in *Heilig v. Stokes*, 63 N. C., 612; *Jarman v. Sanders*, 64 N. C., 367, and numerous other cases. In the former class, when proceedings at law are arrested by an interlocutory restraining order, the rule was to dissolve the injunction when the plaintiff's allegations were fully and fairly denied, and this necessarily so, since in such case there is no evidence to sustain it. *Dyche v. Patton*, 43 N. C., 295; *Capehart v. Mhoon*, 45 N. C., 30; *Mimms v. McLean*, 59 N. C., 200; *Jones v. McKenzie, Ibid.*, 203; *Perry v. Michaux*, 79 N. C., 94.

But a special injunction in aid of a suit begun, and to secure to the plaintiff the full benefit of its successful prosecution, as contemplated in The Code, Sec. 334, *et seq.*, is allowed, "when it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or *continuance of some act*, the commission or continuance of which during the litigation, would produce injury to the plaintiff." Sec. 338, par. 1. And so it may be continued, when upon affidavits it is made to appear so to the Court, that there is probable cause in regard to the primary equity, and a reasonable apprehension of irreparable loss unless it remain in force. *Blossom v. Van Amringe*, 62 N. C., 133.

The answer, under the present practice, in an application to vacate or modify an injunction issued upon the complaint and its supporting affidavits, is itself but an affidavit when verified, and then the plaintiff may produce other proofs in support of the order—The Code, Sec. 344 and Sec. 345—and this presupposes action on the part of the Judge, based upon the consideration of all the evidence. The (430) answer is not now, as formerly, when responsive to the bill, and fair and frank in its statements, conclusive upon the question of a dissolution of the restraining order, but in the words of the statute, (Sec. 344), "A verified answer has the effect only of an affidavit." *Howerton v. Sprague*, 64 N. C., 451. So as to new matter in avoidance. *Wilson v. Mace*, 55 N. C., 5.

I. The next exception is, that the relief sought, could have been obtained in another precedent action, wherein the same controversy arises, and the relations of the litigant parties are reversed.

There is no obligation imposed upon the defendant to bring forward a set-off or defence to an action. He may make it the subject of an independent action of his own.

II. The parties to the actions are not the same.

The first is brought by the present defendant, McElwee, against three persons, William T. Blackwell, Julian S. Carr and J. R. Day, who, as parties to the firm of Wm. T. Blackwell & Co., are charged with infringing his right to use the same trade-mark, while the present suit is prosecuted by an incorporated company, which claims an exclusive property in the trade-mark, derived from the original owner, through the said Blackwell. There is then no former pending suit, which obstructs the prosecution of this. *Williams v. Clouse*, 91 N. C., 322; *Pendleton v. Dalton*, 92 N. C., 185.

The remaining three exceptions are disposed of in what has already been said.

We by no means intend to interfere with the ultimate determination of the conflicting claims to the trade-mark upon the final hearing on the proofs. We only say, upon the *present* aspect of the case before us, there is reasonable ground for interposing to prevent the continued use of the trade-mark, until that issue is tried. Let this be certified.

No error. Affirmed.

Cited: McElwee v. Blackwell, 101 N.C. 194; *Dickens v. Long,* 109 N.C. 172; *Moore v. Sugg,* 112 N.C. 235; *Shankle v. Whitley,* 131 N.C. 169; *Mauney v. Hamilton,* 132 N.C. 306; *Solomon v. Sewerage Co.,* 133 N.C. 150; *Cobb v. Clegg,* 137 N.C. 159; *Taylor v. Riley,* 153 N.C. 203; *Zeiger v. Stephenson,* 153 N.C. 530; *Cook v. Cook,* 159 N.C. 50; *Sanders v. Ins. Co.,* 183 N.C. 67; *Tobacco Asso. v. Bland,* 187 N.C. 360; *Cameron v. Cameron,* 235 N.C. 85; *Huskins v. Hospital,* 238 N.C. 361.

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(431)

L. J. NORMAN v. ICE SNOW, ET ALS.

Certiorari—Appeal.

1. Where, by agreement, the trial Judge takes the papers and renders judgment in vacation as of the Term, the appeal should be Term of the Supreme Court next after the Term of the Superior Court as of which the judgment is rendered.
2. A *certiorari* in *lieu* of an appeal, will not be granted when applied for after the Term to which the appeal should have been brought has expired.

Application by the defendant for *certiorari* in *lieu* of an appeal, filed at October Term, 1885, of the SUPREME COURT.

The action was tried at Spring Term, 1884, of the Superior Court of SURRY County, before *Gilmer, Judge.*

The material facts are substantially these: An action was pending in the Superior Court of the County of Surry, at Spring Term, 1884, thereof. In pursuance of an order before that term made therein, certain land had been sold, and report of the sale made. The plaintiff moved to set the sale aside and vacate the order authorizing the same, which motion was then argued, and it was agreed by the parties, that the Court might take time to consider of it, and in vacation, give judgment as of the Term mentioned.

Afterwards, in October of the same year, the Court made an order setting the sale aside, and directing a resale of the land. From this order, the defendants and the purchasers at the sale, appealed to this Court.

Mr. Geo. V. Strong, for the plaintiff.
Mr. C. B. Watson, for the defendants.

MERRIMON, J. (after stating the facts). The appellants and appellee having failed to agree upon a statement of the case upon appeal, the Court did not promptly settle the case upon appeal as it (432) ought to have done. It seems, that the Judge took the papers for the purpose, in February, 1885, and kept them until some time in the present year, when he settled the case for this Court.

At the last October Term of this Court, (December 1st), this application was made, and prior to that time, no steps had been taken here to bring up the appeal.

Strictly, the appeal should have been brought up to the October Term, 1884, of this Court, for the appeal was taken from an adjudication made as of Spring Term, 1884, of the Superior Court. It appears that the order appealed from, was made shortly before the Fall Term, 1884, of the last named Court. Nevertheless, the appeal might have been brought up promptly to the proper term here, although the case had not been settled upon appeal, and a *certiorari* might have been applied for to bring up the case when settled. This was not done, however, nor was it brought up to the Spring Term, 1885, of this Court, nor were any steps taken for that purpose, until the filing of this application at the last October Term.

If it be granted that there was reasonable excuse for failing to bring the appeal here at the first Term after which it was taken, and if it could not after that be brought, because the Judge who made the order appealed from, had the papers away from the Clerk's office for nearly a year after he first received them, to settle the case upon appeal, this was no reasonable or sufficient excuse for failing to make this application at Spring Term, 1885. It might, so far as appears, just as well, and ought in any case, to have been made at that Term. It was not a matter of discretion with the appellants when they would bring up their appeal. The appellee had rights to be regarded—he had the right to have it heard and determined according to the course of the law, and to this end the appellants were bound to prosecute their appeal with reasonable diligence, and to be vigilant in that respect. In *Suiter v. Brittle*, 92 N. C., 53, this Court said: "The rule is plain and well settled, that appeals must be brought to the next Term of this Court after they are taken, and if for any cause they fail to get (433) here, proper steps must be taken at that Term to bring them up, else the appeal will be lost. There may be possible cases where this rule might be relaxed, but this case is clearly not one of them." *Pittman v. Kimberly*, 92 N. C., 562.

No facts appear that take the present case out of the ordinary rule. The fact that the Judge had the papers in the action, so that a transcript could not be sent up, was no excuse for failing to make this application at least at the Spring Term, 1885. That the papers were absent from the proper files in the Clerk's office; that the Judge had so long delayed to settle the case upon appeal; was imperative cause for making the application at the Term last mentioned. It was the duty of the appellants to apply then, and the law so required, if they would thereby save their lost appeal. As the facts appear, it was manifest neglect that it was not then made, and the appellants lost their appeal, and, as well, their right to the writ of *certiorari* as a substitute therefor. The application must be denied, and the petition dismissed. It is so ordered.

Motion denied.

Cited: Burrell v. Hughes, 120 N.C. 278; *Todd v. Mackie,* 160 N.C. 359.

C. A. LITTLE v. B. A. BERRY ET ALS.

Executors—Administrators with the Will Annexed.

Where the executor dies, the next-of-kin, in the order named in the statute, or his appointee, is entitled to administration with the will annexed, in preference to the highest creditor.

Petition for the appointment of an administrator, heard on appeal from the Clerk of the Superior Court of BURKE County, by *Avery, Judge,* at Chambers in Morganton, on July 17, 1885.

(434) This was a petition to the Clerk of the Superior Court of Burke County, by C. A. Little, to be appointed *administrator de bonis non, cum testamento annexo,* of John Sudderth, deceased.

John Sudderth died on the ..... day of ....., 1865, leaving a last will and testament, in which he appointed Joseph Corpening, W. J. Sudderth, and —— Sudderth executors thereof. All of the executors qualified, and took upon themselves the burden of executing the will, but each of them died intestate, and C. A. Little was appointed administrator of Joseph Corpening, and R. J. Halliburton administrator of W. J. Sudderth. The testator left three children surviving him, to-wit, W. S. Sudderth, John R. Sudderth, and A. E. Sudderth, who intermarried with R. D. Combs, of whom A. E. Combs alone survives.

LITTLE *v.* BERRY.

This was a contest before the Clerk, between the different claimants, for the right to administer upon the estate of John Sudderth. There was a notice served on R. D. Combs and wife, the latter of whom was the next-of-kin of the said John Sudderth, to show cause why they should not be held to have renounced their right to administer on his estate, and why the petitioner C. A. Little, as the highest creditor, should not have the letters of administration issued to him. A. E. Combs and R. D. Combs appeared before the Clerk, and insisted that she, as next-of-kin, was entitled to the administration, and had the right to designate some suitable person to be appointed in her place, and accordingly did designate B. A. Berry, as a competent and suitable person to be appointed.

The Clerk, holding that the appointment of an administrator, under the circumstances of the case, was a matter within his discretion, appointed B. A. Berry, administrator *de bonis non* of John Sudderth, *Cum testamento annexo,* who gave bond as required by law. From the ruling of the Clerk, C. A. Little appealed to the Judge of the district, and the cause coming on to be heard before *Avery, Judge,* at Chambers, on the 17th day of July, 1885, and being heard upon argument of counsel for all parties to the proceeding, and the Court having by consent taken the papers in the case until the Fall Term, 1885, (435) of the Superior Court of Burke County; and the Court being of opinion, and holding, that the Clerk erred in appointing B. A. Berry administrator as aforesaid, after finding as a conclusion of law, that Anna E. Combs had the first right to administer, as the only surviving child of said John Sudderth, and assigning as a reason for said appointment, that R. D. Combs and wife had designated said B. A. Berry, as a suitable person to administer in their stead: It was therefore considered and adjudged that the judgment of the Clerk be reversed and vacated, and that the matter be remanded to the Clerk, to the end that he may proceed to appoint an administrator of the estate of said John Sudderth. From the judgment of the Court, B. A. Berry appealed to this Court.

Mr. C. M. Busbee, for the plaintiff.
No counsel for the defendants.

ASHE, J. (after stating the facts.) The judgment of his Honor in the Court below, reversing and vacating the judgment of the Clerk, seems to have been founded upon that ground, that the Clerk granted letters of administration *de bonis non, cum testamento annexo,* to B. A. Berry as the appointee of Combs and his wife. His Honor con-

cedes that Combs and his wife, as next-of-kin, were entitled to the letters, but that they had no right to designate the person who should be appointed in their stead, and it was error in the Clerk to grant the letters to Berry, on the ground it was a matter within his discretion. We are informed by the pleadings in the case, that John Sudderth died in 1865, but there is nothing in the case to show when his will was proved, or when his executors were qualified, and it is therefore uncertain whether the letters testamentary were granted to his executors before the 1st of July, 1869, or not—and hence we are unable to see whether the law applicable to granting of administration, in force
(436) before that time, applies to this case. If the letters were granted prior to that time, then by reference to the case of *Sutton v. Turner*, 53 N. C., 403, we find that it was held by this Court, that "The right of any person to the grant of administration upon the estate of a decedent, depends upon the statute on that subject, which applies only to the cases of persons dying intestate. Whenever the deceased has left a will, the Courts of Ordinary have a discretionary power, in the event of there being no executor named in the will, or if those nominated die, or refuse to qualify, to appoint any person to administer with the will annexed." Under this decision, the Clerk had the discretionary power to grant letters to Berry. But we confess we do not comprehend how such a construction could have been given to the statute. For the statute referred to, was Rev. Code, Ch. 46, Sec. 2, which expressly provides that where there is a will, and the executor shall refuse, etc., that administration shall be granted to the widow, etc. It reads, "When any person shall die intestate, or having made a will, if the executor shall refuse to prove the same or qualify, administration shall be granted to the widow, and after her to the next-of-kin, or to both, at the discretion of the Court." The learned and painstaking Judge who spoke for the Court in that case, could not have had the statute before him when he wrote the opinion. But even Homer would sometimes nod. If, however, the will was proved, and letters testamentary were granted after the 1st of July, 1869, then The Code, Sec. 2160, applies, by which it is provided that, "If there is no executor appointed in the will, or if at any time, by reason of death, incompetency adjudged by the Clerk of the Superior Court, renunciation actual or decreed, or removal by order of the Court, or on any other account, there is no executor qualified to act, the Clerk of the Superior Court may issue letters of administration with the will annexed, to some suitable person or persons, in the order prescribed in the chapter entitled Executors and Administrators," and the order there prescribed is "1st. To the husband or widow. 2nd. To the next-of-kin in the order

of their degree, etc. 3rd. To the most competent creditor, etc. (437) 4th. To any other person legally competent."

According to these provisions of The Code, R. D. Combs and his wife were clearly entitled to letters of administration *d. b. n. c. t. a.* on the estate of John Sudderth, as his next-of-kin, and, being so entitled, they had the right to decline the letters, and designate some suitable person to be appointed in their place and stead. In *Wallis v. Wallis,* 60 N. C., 78, which was a contest like this, between the widow and one of the highest creditors, for letters of administration on the decedent's estate, and they were granted to the widow; but it appearing that she was only seventeen years old, an appeal was taken to the Superior Court, and thence to this Court, where PEARSON, C. J., delivering the opinion, held that she could not be appointed until she arrived at full age, but that the Court might have granted letters of administration to some other person *durante minore aetate,* so that when she arrived at full age, the general letters of administration could be granted to her, or the Court might have granted administration to such person as she should appoint. *S. P. Ritchie v. McAuslin,* 2 N. C., 220.

But take the case either way, whether the letters were granted before or after the first of July, 1869, we think, by reference to the statutes and the decisions cited, the Clerk had the right to appoint the person designated by the next-of-kin, in preference to the largest creditor, and it can make no difference whether he should have assigned, as a reason for his judgment, that it was a matter of discretion, since he exercised it in favor of the appointee of the next-of-kin.

There is error, and the judgment of the Superior Court is therefor reversed, and that of the Clerk affirmed. Let this be certified to the Superior Court of Burke County.

Error. Reversed.

Cited: Williams v. Neville, 108 N.C. 561; *In re Meyers,* 113 N.C. 548; *Boynton v. Heartt,* 158 N.C. 491, 495; *In re Estate of Smith,* 210 N.C. 624; *In re Estate of Loflin,* 224 N.C. 232.

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C. W. GRIFFIN v. J. C. HASTY ET AL.

Negotiable Instrument—Contracts—Consideration—Public Officer—Sheriff.

1. The transferee of a negotiable instrument after maturity, takes it subject to all the defences to which it was exposed when held by the transferror.
2. Contracts will not be enforced when resting on a consideration against good morals, public policy, or the common or statute law.
3. When the illegal consideration enters into and forms a part of one entire and indivisible consideration, or if there be several stipulations in the contract, some legal, and some illegal, the entire contract is void.
4. A contract to indemnify a public officer for doing an act which he ought to do is valid; one to indemnify him for doing an act which he ought not to do, or for omitting to do an act which he ought to do, is void.
5. Where there is real doubt as to the ownership of personal property and the sheriff's right to sell, he may refuse to do so unless the plaintiff in the execution indemnify him.
6. Where, in such case, there are several judgment creditors, some of whom refuse to give the indemnity, the sheriff may apportion the proceeds of the sale among such as indemnify him, to the exclusion of the others.
7. Where a sheriff had levied on personal property, alleged to belong to the judgment debtor, and upon its being claimed by a third person, released the levy and took a bond to indemnify him, in case he should be amerced, such bond of indemnity is void.

CIVIL ACTION, tried before *Shipp, Judge,* at Fall Term, 1885, of the Superior Court of *Union* County.

This action, begun before a justice of the peace, and removed by defendants' appeal to the Superior Court, is for the recovery of the amount due on a note under seal, executed by the defendants, to J. W. Griffin, sheriff of Union County, and assigned by him to the plaintiff, for a valuable consideration. The claim is resisted upon an allegation of illegality in the consideration, and in the transaction in which
(439) it originated. The pleadings before the justice are drawn out at great length, and the facts upon which the defence rests, stated in detail. After several continuances, the cause came on for trial at Fall Term, 1885, and it was agreed that the Judge should take the papers, find the facts, and render judgment at Chambers.

His Honor found the facts as follows:

"The note in suit was given to J. W. Griffin, who was at the time Sheriff of Union County. He then had in his hands an execution against the defendant Hasty, in favor of one Houston, which was levied upon personal property, which property was claimed by another person, who had a mortgage on it, and asserted his title to it; the defendant

in the execution resisted the officer at the time he took possession for the purpose of sale. The officer was the deputy of the Sheriff, and, when resisted, immediately telegraphed to the Sheriff. Thereupon the Sheriff went to the place, some distance from the town. The Sheriff had previously advertised the property for sale, and had taken bond for its delivery, and had postponed the sale, from time to time, at the request of the defendant in the execution.

"When the Sheriff went to the place, he and the defendant had some negotiation, and agreed to settle upon the following terms:

"The defendant was to pay so much money at the time, and give a note for the balance of the judgment, embracing costs of transportation, etc.

"The note in suit was given in consideration of the above agreement, with the further understanding that it was not to be paid, unless the Sheriff was amerced for failure to sell. He was afterwards amerced and paid the same.

"The note was transferred to the plaintiff, after maturity, for a valuable consideration.

"There was a payment upon the note, before suit brought, of the sum of $2.00.

"The mortgagee, one of the defendants in this action, was (440) present at the time of the contest between the deputy Sheriff and Hasty, asserting his rights as above stated, and signed the note in suit."

The Court thereupon rendered judgment in favor of the plaintiff, from which the defendants appealed, and filed the following exceptions:

The judgment is not warranted by the findings of fact, and ought to be in defendants' favor, for that it appears therefrom that the instrument sued on was taken by the sheriff in violation of a duty which he owed the plaintiff in the execution, and was, moreover, against public policy, as an indemnity for avoiding to do that which the law, as well as the mandate of the Court, enjoined upon him to do.

The second exception is to the failure to credit the debt with the payment of two dollars, and is admitted by the appellee.

Mr. D. A. Covington, for the plaintiff.

Messrs. Payne and Vann, filed a brief for the defendants.

SMITH, C. J. (after stating the facts). As the plaintiff took the note under an assignment made after its maturity, it passes into his hands, subject to all the infirmities and defences to which it was exposed when held by the assignor.

It is an established principle governing the law of contracts, that they will not be enforced when resting upon a consideration against

good morals, public policy, or the law, common and statutory, and it is expressed in the maxim *ex turpi causa, non oritur actio.* This vitiating result follows, when the illegal purpose enters into, and forms a part of an entire indivisible consideration. *King v. Winants,* 71 N. C., 469. If it be the basis of several stipulations, some legal and some illegal, the whole contract is infected and rendered void. *Lindsay v. Smith,* 78 N. C., 328.

(441) An illustration of the rule is afforded, in the case of a sheriff having final process in his hands, and finding property subject to seizure, in the possession of the judgment debtor, to which a third party makes claim. An indemnity given the officer for proceeding to levy and sell, in the *bona fide* purpose of contesting the validity of the opposing claim, is effectual for his protection, while such indemnity given by the claimant to induce the officer to forbear, and not proceed with the execution, would be inoperative. The distinction is, that in one case, the security is given in furtherance of official duty; in the other, in obstructing its performance.

"An agreement to induce a public officer to omit the performance of his duty is void." Chitty on Contracts, 221. A contract to indemnify a sheriff for doing that which he ought to do, is good; a contract to indemnify him for doing that which he ought not to do, is void. *Blackett v. Cressop,* 1 Lord Ray, 278, Plowden 64. *Denson v. Sledge,* 13 N. C., 136—opinion of TOOMER, J., 141.

In *Pearson v. Fisher,* 4 N. C., 72 (460), the sheriff was held to be personally liable for not proceeding to sell a slave, which he had levied on as the property of the judgment debtor, and which had been surrendered, upon the finding of a jury summoned by him to try the title, that the slave belonged to the son of the debtor, it appearing on the trial that the slave was liable to seizure and sale, and the plaintiff had tendered to the officer an indemnifying bond, in case he made the sale. To same effect is *State v. Tatom,* 69 N. C., 35. The reasons for the difference are these:

Unless the officer will sell, the plaintiff cannot test the validity of the asserted opposing claim to the property, and thus a fraudulent instrument might be made the means of defeating the execution of any practical results, as if it were *bona fide* and effectual. It is true, in equity, he may have relief without sale, by a decree declaring the claim fraudulent, and directing a sale, but the creditor has an

(442) equal right to proceed at law, and subject the debtor's property, which he has fraudulently attempted to transfer to another, to the satisfaction of his judgment. In case of real doubt, the Sheriff may require an indemnity before proceeding to incur a personal respon-

sibility, and if refused, decline to act. And so, when having several executions against the same debtor, some of the plaintiffs will, and some will not give the indemnity when demanded, the officer may apportion the fruits of his action among those of the first mentioned class, to the exclusion of the others. *Dewey v. White,* 65 N. C., 225. The subject is fully treated in a recent work—Murfree on Sheriffs, chapter 13, Secs. 580 to 635, inclusive—where the legislation of the different States is set out and explained, rendering its further discussion needless. The cases cited in the argument, 2 Chitty on Contracts, 999; *Foster v. Clark,* 19 Pick., 329; *Shotwell v. Hamlin,* 23 Miss., 156, when carefully examined, will not be found at variance with the general doctrine, and if they were, would not be allowed to overrule the adjudications of this Court, based as we believe, upon sound reasoning and correct principle.

Now in the application of the principle to the facts of the present case.

The execution had been levied upon personal property as belonging to the debtor. It had been before advertised for sale, and bond taken for its delivery at the time and place of sale. The Sheriff's deputy was resisted by the defendant when he took possession for the purpose of selling. A third party asserted a title to the property under a mortgage deed. Upon receiving information from the deputy, the Sheriff came, and after some negotiation, he and the defendant came to an agreement, by which the defendant was to pay a certain sum in money, and give his note for the balance of the judgment. The note in suit was given in consideration of the agreement, and upon condition that it should not be paid, unless the Sheriff was amerced for dereliction of official duty, and he was subsequently amerced and has paid the same.

It is most manifest to us, that this transaction was wholly (443) unauthorized, and entirely repugnant to official duty. Its very and sole purpose, was to protect him in disregarding its requirements and violating the mandate of the law. He might, under these unexpected circumstances, have foreborne further action, until he could obtain indemnity from the plaintiff. But instead of this, he surrenders the property, undertakes to compromise and settle the plaintiff's demand, and then seeks to secure his own immunity, in a bond to reimburse what he may have to pay for not performing the mandate in the process directed to him. The illegality is so apparent as to require no further elucidation. *Sharp v. Farmer,* 20 N. C., 255; *Blythe v. Lovingood,* 20 N. C., 20; *Covington v. Threadgill,* 88 N. C., 186.

It must be declared that there is error in the ruling. The judgment must be reversed, and a judgment here entered upon the facts found for the defendant.

Error. Reversed.

Cited: Burbage v. Windley, 108 N.C. 362, 363; *McNeill v. R. R.,* 135 N.C. 734; *Vinegar Co. v. Haun,* 149 N.C. 357; *Pfeifer v. Israel,* 161 N.C. 410; *Alston v. Hill,* 165 N.C. 258; *Respass v. Spinning Co.,* 191 N.C. 812; *Lamm v. Crumpler,* 233 N.C. 722.

THOMAS LONG, ADM'R, ET AL. v. J. A. JARRATT, ADM'R, ET AL.

New Action—Judicial Sale.

1. Where the Court has gotten jurisdiction over the parties and subject matter of an action, it will not permit a new and independent action to be brought to settle the same rights. The parties cannot by consent give the Court jurisdiction of such new action, and when the facts appear, the Court should *ex mero motu* dismiss it.
2. A purchaser at a judicial sale, bears a certain relation to the action in which the sale is made, and he must enforce any rights he gets by such purchase by a motion in the pending action, and his assignee and the heirs-at-law of such assignee must do the same.
3. So where a purchaser at a sale to make land assets, assigned his bid, and his assignee paid the purchase money, but did not get a deed, and after his death, his administrator and heirs-at-law brought suit against the administrator who sold the land and the heirs-at-law of the intestate whose land was sold, to have a deed executed; *It was held,* that the relief must be obtained by a motion in the original cause in which the land was sold, and the action should be dismissed, and this was so, although the objection was not taken in the Court below.
4. In such case, the new action will not be treated as a motion in the original cause.

(444) CIVIL ACTION, tried before *Graves, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of YADKIN County.

It appears from the allegations of the complaint, and the admissions in the answers, that the land, the title to which the plaintiffs seek to have made to them, was sold under and in pursuance of an order of the late Court of Pleas and Quarter Sessions of the county of Yadkin, made in a proceeding brought by the administrators of R. C. Puryear, deceased, against his heirs-at-law, to sell the same to make assets to pay debts of the intestate. After that Court was

abolished, the proceeding was duly transferred to the Superior Court of the county mentioned. The land was sold on a credit, on the 16th day of June, 1868, and John D. Kelly became the purchaser thereof, at the price of $2,010. This sale was afterwards confirmed by the Court, the title to the land being withheld until the purchase money should be paid. The plaintiffs allege that after the sale mentioned, the purchaser named, with the assent of the administrators mentioned, sold and assigned his bid to W. W. Long, the intestate of the plaintiff Thomas Long, administrator, and the ancestor of the other plaintiffs, he agreeing to pay the purchase money just as the purchaser had obliged himself to do, and by arrangement, the bid was in form assigned to one of the administrators, until Long should pay the purchase money. They further allege, that the latter, in his lifetime, paid in various ways, and at different times, nearly or quite all the purchase money for the land, and they ask that the administrator, to whom the bid was assigned for Long, be declared a trustee for the plaintiff's heirs-at-law; for an account; to be allowed to pay any balance of the purchase money ascertained to be due, and to have title made to them.

No defence was set up in the answer, that relief could be (445) obtained by motion in the original cause.

There was a judgment for the defendants, and the plaintiffs appealed.

Messrs. Jos. B. Batchelor and John Devereux, Jr., for the plaintiffs.
Mr. C. B. Watson, for the defendants.

MERRIMON, J. (after stating the facts). The proceeding in which the land was sold has not been terminated by any final order or decree, nor will it be, until the purchase money for the land shall have been paid, and a proper order entered, directing title to be made to the purchaser, or to the person to whom he may have transferred his bid. That proceeding is still pending, in contemplation of law, and if it has been allowed to disappear from the current docket of the Court, it may be brought forward upon motion therein for that purpose.

By means of that proceeding, the Court has complete jurisdiction of the administrators of R. C. Puryear, his heirs-at-law, and the land in question, for the purpose of completing the sale of the land, and it ought to exercise its jurisdiction over the parties and subject matter of the proceeding, until the matter shall be determined according to law. The Court ought not, and will not, in another proceeding or action, take jurisdiction of the same parties and the same subject matter, and do therein what ought properly and regularly to be done

in the incomplete proceeding. The law requires consistency in procedure, and in the exercise of jurisdictional authority. It avoids and prevents confusion and multiplicity of actions in respect to the same cause of action, and it will not allow its purpose in these respects, to be defeated by the consent, assent, or inadvertence of parties. Hence it will not tolerate the inconsistency and practical absurdity, of suspending or stopping an action before it is completed, and do what ought legitimately to be done in it, in another and distinct action.
(446) Therefore, when the Court sees its jurisdiction, already attached as to the same parties and the same subject matter, in a former action not yet ended, interfered with by another subsequent action, in respect of a matter that ought properly to be considered and determined in the former action, the Court ought, *ex mero motu*, to refuse to proceed in respect to such matter, and send the parties complaining, to seek their remedy and relief in the former and proper action, and if the subsequent action has reference to such matter only, it ought at once to be dismissed, as having been improvidently brought.

Now, obviously, the plaintiffs could have appropriate and adequate relief in the proceeding in which the land was sold. They really, in effect, seek to have the title to the land made to them, as the assignees of the bid of the purchaser at the sale. By the accepted bid of the purchaser, he put himself in relation with the proceeding, and could take benefit under it, and his assignee, W. W. Long, in his lifetime, placed himself in the like relation, and since his death, his administrator and heirs-at-law take his place, the administrator to pay the balance of the purchase money, and the heirs-at-law to receive the title to the land under the order of the Court. The chief remaining purpose of the proceeding, is to compel the payment of the purchase money, and upon the payment thereof, to direct the title to be made to the purchaser, or to the person to whom he transferred his bid, or his heirs, and if the money shall not be paid, then to order a resale of the land. *Mauney v. Pemberton*, 75 N. C., 219; *Chambers v. Penland*, 78 N. C., 53; *Lord v. Beard*, 79 N. C., 5; *Childs v. Martin*, 69 N. C., 126; *Gray v. The Railroad Co.*, 77 N. C., 299.

While we think the plaintiffs have to some extent misapprehended the nature of their alleged rights, it is not proper to determine their merits here. They can seek and obtain such relief as they may show themselves entitled to, in the proceeding in which the land was sold. One of its necessary purposes was to do what the plaintiffs seek to have done by this action, and the Court will not take jurisdic-
(447) tion for the same purpose in this action, pending the former proceeding, for the reasons already stated.

There may be cases in which relief that might be obtained in a pending action, may be obtained in a distinct subsequent one, but this is not one of them. Here, one of the leading purposes of the pending proceeding, was to compel the payment of the purchase money of the land, if need be, and to make the title therefor to the purchaser or his assignees.

Nor will this action be treated as a motion in the former pending proceeding. The pleadings are not adapted to such purpose, nor were they so intended. Such practice as that suggested, has been tolerated in a few peculiar cases, but it is cumbersome and confusing, and ought not to be encouraged. Every action ought to serve its just legal purpose, or fail because it does not.

The Court ought not to have determined the action upon the merits of the alleged cause of action—it ought simply to have dismissed the action, upon the ground that the plaintiffs should have sought relief by motion or petition in the proceeding mentioned.

The judgment must therefore be reversed, and an order entered here dismissing the action without prejudice to the plaintiffs' right to their remedy indicated. *It is so ordered.*

Reversed. Dismissed.

Cited: Morris v. White, 96 N.C. 93; *Albertson v. Williams,* 97 N.C. 268; *Jones v. Coffey,* 97 N.C. 350; *Rogers v. Jenkins,* 98 N.C. 131; *Knott v. Taylor,* 99 N.C. 516; *Smith v. Fort,* 105 N.C. 454; *Bost v. Lassiter,* 105 N.C. 496; *Wilson v. Chichester,* 107 N.C. 391; *Herman v. Watts,* 107 N.C. 652; *Curtis v. Piedmont Co.,* 109 N.C. 405; *Alexander v. Norwood,* 118 N.C. 382; *Williams v. McFadyen,* 145 N.C. 160; *Campbell v. Farley,* 158 N.C. 43; *Allen v. Salley,* 179 N.C. 151; *Construction Co. v. Ice Co.,* 190 N.C. 582; *Weir v. Fowler,* 196 N.C. 271; *Bank v. Broadhurst,* 197 N.C. 370; *Cason v. Shute,* 211 N.C. 196; *Ex Parte Wilson,* 222 N.C. 102; *Dwiggins v. Bus Co.,* 230 N.C. 237; *Reece v. Reece,* 231 N.C. 322, 323; *McCollum v. Smith,* 233 N.C. 16; *Cameron v. Cameron,* 235 N.C. 85; *McDowell v. Blythe Bros.,* 236 N.C. 398.

Q. S. METCALF v. J. W. GUTHRIE.

Arbitration and Award—New Action.

1. Where an agreement to submit a matter in controversy in a pending action to arbitration, is not made a rule of Court, but in accordance with an independent agreement made outside of the action, the failure of either party to abide by the award, furnishes a new cause of action for the recovery of damages at law, or for specific performance, in a proper case, in a Court of equity.
2. In either case, the remedy must be sought in a new action, and cannot be obtained by setting it up in a supplemental complaint in the action pending.
3. A cause of action which occurred after an action was instituted, cannot be interjected in the pending action by a supplemental complaint, although it relates to the subject matter of the pending action.
4. Where an agreement to submit the matters in controversy to arbitration has been made a rule of Court, the award may be set aside for fraud, insufficiency in not disposing of all the matters referred, and for other adequate causes.

(448) CIVIL ACTION, tried before *Gudger, Judge,* and a jury, at August Term, 1885, of the Superior Court of BUNCOMBE County.

The plaintiff commenced his action for the recovery of the land mentioned in his complaint, by suing out a summons, on February 24, 1881, and on the return day thereof, March 14, the parties entered into an agreement under seal as follows:

"In this cause, it is agreed by the parties hereto, that it be referred to William Eller, James Hemphill and Wiley Roberts, as arbitrators, to settle all matters of dispute in issue, which will appear from the pleadings to be filed in this cause, between the parties, and their judgment, or the judgment and findings of any two of them, shall be final between the parties, and upon their said findings, the Court shall enter judgment in favor of the party for whom they shall find. It is also agreed, that the said arbitrators shall employ Berry Holcombe, as a surveyor, in running the lines of the land in dispute, or any other lines which may be necessary to the ascertainment and settlement of the matters herein referred. It is further agreed, that the Court shall adjudge the party, against whom the said arbitrators shall find, to pay the costs of this reference, the costs of this suit, and any damages which the said arbitrators may report against the party failing. Witness the hands and seals of the parties, March 14, 1881."

(449) "It is agreed that J. R. Neill, of Yancey County, be substituted for Berry Holcombe, as surveyor in the foregoing arbitration. Witness our hands and seals, March 15th, 1881."

The arbitrators made the following award:

"The undersigned arbitrators, to whom was referred all matters in dispute in the above entitled case, find that the plaintiff Q. S. Metcalf is the owner in fee simple of the land sued for in this action, and ten dollars damages."

The pleadings were filed at the same term, no notice being taken of the agreement, in either the complaint or answer, the latter asserting title in the defendant, and his possession for more than seven years, of the part of the land claimed by the plaintiff. At Spring Term, 1882, leave was granted to the plaintiff to amend, and set up the agreement and award, in a supplemental complaint, and to the defendant to amend his answer. The supplemental or amended complaint was filed at Spring Term, 1883, setting forth therein the facts connected with the arbitration, and the action of the arbitrators under the agreement, as well as the refusal of the defendant to comply with the award, and demanding its enforcement by the Court.

The answer put in at the same time, denies that the defendant is in possession of any land belonging to the plaintiff, while the former answer admits his possession, and asserts title, "to the part of the land claimed by the plaintiff," and in response to the plaintiff's further allegations in regard to arbitration, avers, giving the particulars in detail, misrepresentation, fraud, and deceit, practiced in procuring defendant's assent to, and his signing the agreement, and that the award is deficient, in not disposing of all the matters in dispute as shown in the pleadings, "to be filed in the cause."

The original pleadings, to the adjustment of which the agreed reference was directed, simply put in issue the title to the land, which each claims to be in himself, and the dependent results as to damages committed, and profits derived therefrom; and these are disposed of in the award.

There was a judgment for the plaintiff, and the defendant (450) appealed.

Mr. Chas. A. Moore, for the plaintiff.
Mr. J. H. Merrimon, filed a brief for the defendant.

SMITH, C. J. (after stating the facts). The reference to arbitrators was not made under a rule entered in the cause, so that judgment could be rendered on the award, and enforced as in other cases—*Simpson v. McBee,* 14 N. C., 532; *Moore v. Austin,* 85 N. C., 179—but was under an outside and independent arrangement, substituted in place of the action, to settle and dispose of one and the same controversy. The disavowal of the agreement, and refusal to abide by the

award on the part of the defendant, furnished a new cause of action for the recovery of damages at law, and relief could have been obtained in equity, by a decree for specific performance, in adjusting the boundary. *Thompson v. Deans,* 59 N. C., 22; *Crawford v. Orr,* 84 N. C., 246.

But in either case, the remedy must be sought in a new action, because the right to sue, arises out of a transaction subsequent to the institution of the present suit. It could not be obtained by a supplemental or amended complaint, for the obvious reason that the cause of action did not then exist. Had the award disposed of the subject matter of the action, and the plaintiff proposed to continue its prosecution, it would have been a defence, brought forward by answer, as if payment, release or other after occurring defence were to be set up. The proceedings in reference to the award, have no proper place in the cause, and the new issues raised in the supplemental complaint, which alone were submitted to and passed on by the jury, were wholly irrelevant to the cause of action existing when the suit was brought. Had the award been under a rule of Court, the motion for judgment thereon might have been resisted upon such grounds as impeach its validity, and met by a counter-motion
(451) to set it aside for uncertainty in its terms—*Duncan v. Duncan,* 23 N. C., 466—insufficiency in not disposing of all matters referred—*Cullifer v. Gilliam,* 31 N. C., 126—excess of authority, incapable of being separated from that which was referred—*Cowan v. McNeely,* 32 N. C., 5—and for other adequate causes.

The proper issues were such as arose out of the controverted facts, other than those in the supplemental complaint, and the answer to its allegations—for unless the award could be made effectual in determining the action, it must proceed as if no arbitration had taken place. It cannot aid the action, except, if at all, as evidence upon proper issues, referable to the commencement of the action. The contract to refer is executory, and may be the basis of a new action, but, not being made under the jurisdiction of the Court, it cannot be enforced as a rule, in determining the present action, unless as a settlement to put an end to it. Let this be certified.

Error. Reversed.

Cited: Jackson v. McLean, 96 N.C. 479; *Long v. Fitzgerald,* 97 N.C. 44; *Kelly v. R. R.,* 110 N.C. 433; *McLeod v. Graham,* 132 N.C. 475; *Peele v. R. R.,* 159 N.C. 62; *In re Estate of Reynolds,* 221 N.C. 451.

J. S. BURWELL, ADM'R, v. THE RALEIGH & GASTON RAIDROAD COMPANY.

Common Carrier—Negligence—Judge's Charge—Evidence.

1. It is not error for the Court to limit its charge to the facts as presented by the evidence. The trial Judge is not called on to present the case to the jury in any aspect not presented by the pleadings or evidence.
2. In an action against a common carrier for injury to property while in transit, the bill of lading and manifest, showing that the property was received by the defendant in good order, is *prima facie* evidence against the defendant, but it is not conclusive, and may be rebutted.
3. It is not negligence for a Railroad Company to place freight, liable to be injured by water, on an open flat car, when the size of the box in which it is packed renders it impossible to put it in a box car, and precautions are taken to protect the property from the weather.
4. When the allegation of negligence is that the property was injured by water while in transit, evidence is admissible that no rain fell while the property was on the defendant's road, and that the car on which it was being transported was not allowed to be stopped near any water tank.

CIVIL ACTION, tried on appeal from the judgment of a Justice (452) of the Peace, before *Shepherd, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of VANCE County.

The facts are as follows:

The plaintiff seeks to recover $150, damage to a theatre drop curtain, while in transit over defendant's railroad.

It was in evidence that the said curtain was shipped from Columbia, South Carolina, to Henderson, North Carolina. The agent at Columbia, South Carolina, gave to one Cramer, the artist who painted the curtain and the agent of the plaintiff, a bill of lading, agreeing to convey the curtain to Henderson, over the Charlotte, Columbia & Augusta Railroad, and by connecting lines to Henderson. It was in evidence that the box containing the curtain was delivered in good order by the Charlotte, Columbia & Augusta Railroad to the Carolina Central Railroad, at Charlotte, North Carolina, and by the Carolina Central Railroad to the Raleigh & Augusta Railroad at Hamlet, and thence it was conveyed by said Raleigh and Augusta Railroad to Raleigh, and then by the defendant Railroad to Henderson, North Carolina, and delivered to plaintiff's intestate, in a damaged condition, being damaged by water. There was also some evidence tending to show that the last mentioned two Railroads are one continuous line; also evidence tending to show that the several Railroads over which the box passed, were separate and independent, but connecting with each other.

M. J. Robards, the agent at Henderson for the defendant, testified, that he collected freight for the entire line, and that it was proportioned between the different roads, $2.30 in all, and 95 cents for the defendant road.

It was further in evidence, that the box in which the curtain was, was marked "keep dry" in several places, and that defendant
(453) Railroad shipped the same on a flat car, and, was protected only by a tarpaulin. There was evidence tending to show that the tarpaulin was sufficient to protect the box from the weather; that there was no rain during the period of the passage from Hamlet to Henderson; that the time was only two days from Hamlet to Henderson; that the box was too long to be placed in a box car, and that proper care was taken of it during the transit from Hamlet to Henderson, and while in Raleigh that the car did not stop near a water tank while filling the boiler. There was other evidence of due care on the part of the defendant.

It was further in evidence, that the said flat car on its arrival in Raleigh, was run into the yard of the defendant Company, with said box on it, and with the tarpaulin over it, and remained there all night.

It was further in evidence, that the said drop curtain was on the road ten days between Columbia and Henderson; that the manifest given to the conductor of defendant road, and the Raleigh & Augusta road, did not state the condition of the box when received at Raleigh or at Hamlet, and the agent at Henderson testified, that had it been in bad order when received at Raleigh, the manifest would have so stated. The plaintiff objected to all evidence tending to show that the said drop curtain was not damaged during the period of its passage over defendant's road or the Raleigh & Augusta road.

The following issues were submitted to the jury by consent of the parties:

1st. Was the said drop curtain damaged while in the custody of the defendant?

2nd. If damaged while in the custody of defendant, was it by reason of the negligence of the defendant?

3rd. What damage has the plaintiff sustained?

The only instructions asked by plaintiff were as follows:

1. That proof that it did not rain on the goods while in transit from Raleigh to Henderson, does not rebut the presumption that they were injured while in the custody of the defendant, the delivering company.

(454) 2. That a stipulation by a Railroad Company against liability for damage caused by its negligence, is void, and it is

liable notwithstanding, if the damage was caused by reason of want of due care on its part.

The Court gave these instructions, and with the qualification of the first as follows: "but it may be considered by the jury, as evidence, in connection with all of the circumstances deposed to by the witnesses, as tending to show that they were not injured while in the custody of the defendant."

The Court, on the issue as to negligence, among other things, charged the jury, that if the box was too long to be placed in a box car, and it was placed on a flat car with a tarpaulin spread over it so as to fully protect it from rain or dampness, and that if it was in the custody of the defendant, or the R. & A. Railroad, (if such latter road was operated as a continuous line, by and under the control of the defendant), for only two or three days, and that during the whole time it was in such custody it was protected in the manner described, and that they allowed no water to be thrown upon it, and did not stop the car so near the water tanks on the road, that water could be thrown upon it, that they would be warranted in finding that the presumption of negligence would be rebutted.

To this part of the charge the plaintiff excepted, and also the failure to give the first instructions without qualifications.

The jury found the first two issues in the negative, and to the third issue they responded "nothing."

The plaintiff moved for a new trial, because of the charge as excepted to, and also because the Court failed to charge the jury, that if the goods were received in apparently good order at Columbia, that defendant was estopped to say that they were not injured while on its line, whereas the Court charged that it made out a *prima facie* case against the defendant, and because the Court failed to charge, that if the jury believed that the manifest showed that defendant receipted for it in good order at Raleigh, that defendant was estopped to deny that it was damaged before it reached Hen- (455) derson; also because the Court admitted the testimony tending to show that the curtain was not damaged on defendant's road, the same being objected to by plaintiff at time it was offered.

There was judgment for the defendant, and the plaintiff appealed to this Court.

Mr. H. T. Watkins, for the plaintiff.
Mr. Edward C. Smith, for the defendant.

MERRIMON, J. (after stating the facts). The defendant was not bound to transport the box containing the goods alleged to have been

damaged, in a box car. It was, however, bound to keep the box dry, free from exposure and injury, while the same was in its care and custody. The Court, in effect, so instructed the jury. The plain import of that part of the instructions excepted to, was, that if the jury believed from the evidence, that the defendant, under the circumstances, in the way, and by the means pointed out, of which there was evidence, kept the goods dry and free from damage while the box containing the same was in its care and custody, then any presumption of negligence was rebutted.

The counsel contended on the argument, that the instruction was not broad enough—that the injury might have been done otherwise than by water, and the jury might have so found, under proper instructions. This objection is not tenable, because it was not alleged or suggested that the goods were injured otherwise than by wetting them. The Court was not called upon to present the case to the jury, in an aspect not presented by the pleadings or the evidence.

It seems to us too plain to admit of serious question, that the defendant had the right to offer any competent evidence on the trial, going to show that the property in question was not damaged while on its line of road, and in its care and custody. The receipt and manifest were evidence going to prove a *prima facie* case of liability
(456) against it, but they were not conclusive. It was competent to disprove the case so made.

The evidence that it did not rain on the box while in transit over the defendant's line of road, obviously tended to prove that it did not get wet while in its custody, and the Court properly instructed the jury that they might consider that fact, in connection with the other evidence, and this was not an improper modification of the first special instruction asked for by the defendant. *Dixon v. Railroad Company,* 74 N. C., 538. *Williams v. Railroad Company,* 93 N. C., 42.

So the judgment must be affirmed.

No error. Affirmed.

Cited: Knott v. R. R., 98 N.C. 80; *Meredith v. R. R.,* 137 N.C. 487.

JAMES M. HARDIN v. JESSE RAY, ET AL.

Execution Sale—Surety—Ejectment—Pleading.

1. When a deed of trust is executed to a surety to indemnify him, the interest of the principal debtor in the land conveyed, is not liable to be sold under an execution issued on a judgment obtained on the same debt, by the creditor.
2. Where in an action of ejectment, the defendant sets up an equitable defence, the plaintiff may reply equitable matter in rebuttal, although not set up in the complaint.
3. A surety has the right to call on the principal debtor to indemnify him from anticipated loss, before he has actually paid the debt.
4. So where a debtor conveyed land to his surety to indemnify him, and afterwards the creditor sold the same land under an execution issued on a judgment obtained on the same debt, at which sale the surety purchased, and brought ejectment, *It was held*, that the interest of the debtor was not liable for sale under execution, but before he could be entitled to a decree for a reconveyance, he must pay the amount for which the surety was liable, although the surety never paid it.

CIVIL ACTION, to recover land, tried before *MacRae, Judge,* (457) on exceptions to the report of a referee, at Spring Term, 1885, of the Superior Court of ASHE County.

This was a civil action to recover land brought by the plaintiff J. M. Hardin, against the defendant, to recover the land described in the complaint.

It was stated in the judgment of the Court below, that it was admitted that R. T. Hardin had been made a party plaintiff.

The complaint was in the usual form of an action to recover land, alleging title in the plaintiff and the withholding the possession by the defendant.

The defendant answering the complaint, alleged that he had been the owner of the land in fee simple, and conveyed it to R. T. Hardin, to secure certain debts he owed him, and to indemnify him against loss, by reason of his having stood his security to some debts due by him to others; that he had paid up all the debts to R. T. Hardin, and nearly all for which said Hardin was liable as his surety; that about a year before the purchase of the land at Sheriff's sale by J. M. Hardin, R. T. Hardin and defendant came to a settlement, and said Hardin expressed himself satisfied with the payments made by the defendant on the debts so intended to be secured in the deed, and redelivered the deed to the defendant with the following indorsement, to-wit: "I assign the within deed to Jesse Ray, and hereby convey to him all my right, title and interest in the land herein conveyed to

me the.....day of....., 1872," signed R. T. Hardin, and attested by two witnesses, but it was not sealed. That it was the intention of Hardin by this arrangement, to divest himself of all interest in the land, and release his interest in the same to the defendant, and he insisted that the agreement should be specifically performed.

The plaintiff replied to the answer of defendant, and admitted the ownership of the land by the defendant as alleged, and that the deed was executed to secure debts due by the defendant to R. T. Hardin, and to indemnify the said Hardin against liability, as surety (458) for the defendant on other debts due by him. He denied that he purchased the land at Sheriff's sale, under an execution against R. T. Hardin. He admitted that he signed the assignment on the deed, as alleged in the answer, but insisted that it had no seal, and that he was induced to sign it by the false representation of the defendant, that he had paid up all the debts secured in the deed, and all of those for which the plaintiff, as surety, was indemnified against by the deed. He denied that after this settlement, R. T. Hardin had no such interest in said land as was liable to be sold under execution, and he alleged that before the beginning of this action, the defendant had been declared a bankrupt, and before the filing of his petition, one Willis, as administrator of Eli Fann, recovered judgment against the defendant before a Justice of the Peace for Ashe County, and the same being duly docketed in the Superior Court of said county, execution was issued thereon, and was levied on the land mentioned in the complaint, and the same was sold, and the plaintiff became the purchaser, and took the Sheriff's deed for the same, before the bringing of this action.

By consent of parties, the case was referred to E. L. Vaughan, to state an account and make report. He reported, that after taking proof as to the mutual accounts of defendant and R. T. Hardin, that the plaintiff was indebted to the defendant in the sum of $19.06, and that there was still due from the defendant on the Fann debt, for which R. T. Hardin was surety for the defendant, the sum of $43.77, and deducting the $19.06 from that amount, it left a balance due the plaintiff of $24.71, to secure which, the deed from the defendant to the plaintiff was executed, and for which the plaintiff was still liable; and he found as a fact, that at the time the deed was re-delivered, that the plaintiff and defendant acted upon the belief that the plaintiff was fully discharged from all liability on the debts the deed was executed to secure, and, as a conclusion of law, he held that the redelivery of the deed by the plaintiff to the defendant, under a mistake of fact by the parties, did not divest the plaintiff's title, but

the same subsists for his protection, until the balance of the (459) debt was paid.

The defendant excepted to the report of the referee:

I. In that he deducts the defendant's account, balance due from plaintiff, of $19.06, from the balance due on the Fann debt of $43.77, which is unpaid.

II. For that he finds the deed executed by the defendant to plaintiff, was made to secure the Fann debt; whereas, in fact, the said deed was made to indemnify the plaintiff, for losses he might sustain by becoming the defendant's surety.

III. For that the referee found that the land sued for, is still liable for the sum of $24.71, the balance due on the Fann debt, when in fact the said amount has not been paid by the plaintiff.

The Court rendered the following judgment:

"This cause coming on to be heard, upon the report of the referee and exceptions thereto, and being heard, and it being admitted that R. T. Hardin has been made a party to this action, the finding of fact by the referee being adopted by his Honor, it is considered by the Court, that the said report be in all respects confirmed, and it is adjudged by the Court, that the title to the lands described in the complaint, is in J. M. Hardin, as a security for the payment by the defendant Jesse Ray, of the sum of twenty-four dollars and seventy-one cents, and interest, upon a judgment in favor of R. B. Willis, administrator, vs. R. T. Hardin; and it further appearing to the Court, that since the report of the referee has been filed, the said sum, and interest and cost, has been paid by said Jesse Ray, and credited upon said judgment; It is ordered, that the deed from Jesse Ray to R. T. Hardin, and the deed from William Latham, sheriff, to J. M. Hardin, for the lands described in the complaint, be delivered up into the hands of the Clerk of this Court and cancelled, upon the payment by Jesse Ray of all the cost of this action, including an allowance by consent of forty dollars to E. L. Vaughan, Esq., for taking and settling the account."

From this judgment, the defendant appealed.

No counsel for the plaintiff. (460)

Mr. D. G. Fowle, for the defendant.

ASHE, J. (after stating the facts). The pleadings, and the entire proceedings in this case, are such a departure from the regular and orderly practice of our courts, that we feel some hesitancy in going into a consideration of the case.

But as there is enough appearing from the confused and imperfect statement of facts, to enable us to reach the justice and equity of the case, we have concluded to pass these imperfections by, and decide this case upon its merits, so far as they can be ascertained.

According to the plaintiff's own showing, and the finding of the referee, J. M. Hardin, the original plaintiff in the action, acquired no title to the land in controversy by his purchase at the sheriff's sale. For it is alleged in the plaintiff's replication, that he purchased it at a sale by the sheriff, under an execution issued against the defendant Ray, upon a judgment obtained against him by one Willis, as administrator of Fann, and the land at that time was subjected to the trust executed by the defendant to R. T. Hardin, to secure that debt, as found by the referee, and that there was still a balance due and unpaid, and that being so, the interest of the defendant Ray was not the subject of execution and sale. *Sprinkle v. Martin,* 66 N. C., 55; *Thompson v. Ford,* 29 N. C., 418; *Harrison v. Battle,* 17 N. C., 537.

In this view of the case, there was error in the judgment of his Honor, in adjudging that the title to the land described in the complaint was in J. M. Hardin. But this error does not materially affect the result. For as the referee found that the deed of trust was executed to secure the Fann debt, among others, the legal title was in R. T. Hardin until the balance of $24.71, found to be due on that debt, was paid.

The exceptions of the defendant to the report of the referee, we think, were properly overruled by the Court. The defendant
(461) having set up an equitable defence to that action, the plaintiff then had the right to reply any equitable matter in rebuttal, which might avail him. Therefore, he had the right, if the deed of trust only gave him an indemnity against his liability as surety on the Fann debt, "without waiting for actual loss, to call on the defendant to indemnify him against impending injury." *Burroughs v. McNeill,* 22 N. C., 297. The referee, therefore, did right to deduct the $19.06, found to be due from the plaintiff R. T. Hardin to the defendant, from the $43.77, found to be still due on the Fann debt, for which the said Hardin was liable, and in this view, it would make no difference, whether the deed of trust was executed to secure the Fann debt, or to indemnify the plaintiff R. T. Hardin, as the defendant's surety on that debt.

Our conclusion is, there was error in the judgment of the Superior Court, in that it was adjudged "that the title to the lands described in the complaint, is in J. M. Hardin, as a security for the payment by the defendant Jesse Ray, of the sum of twenty-four dollars and seventy one cents and interest, upon a judgment in favor of R. W.

Willis, administrator vs. R. T. Hardin." There was error in this part of the judgment, for there is no allegation in the pleadings by the plaintiffs, or either of them, that J. M. Hardin purchased the land at execution sale under such a judgment, but on the other hand, it is expressly alleged by them, that J. M. Hardin purchased at a sale under an execution against the defendant Ray, and as the Court found the fact, that the Fann debt, with interest and costs, had been paid by the defendant since the report of the Referee had been filed, there was error in ordering that the deeds from Jesse Ray to R. T. Hardin, and from Willis Latham, sheriff, to J. M. Hardin, should be delivered up into the hands of the Clerk, to be cancelled. The judgment should have been, and is so modified, that R. T. Hardin and J. M. Hardin, shall re-convey the land described in the complaint, to the defendant Jesse Ray, upon the payment by Jesse Ray of all the costs of this action, including an allowance of forty dollars to E. L. Vaughan for taking and settling the account, and the (462) case is remanded to the Superior Court, that the judgment of the Superior Court, as herein modified, shall be carried into execution.

Modified and remanded.

Cited: Mayo v. Staton, 137 N.C. 681; *White v. Carroll,* 146 N.C. 234.

L. M. SCOTT AND WIFE v. J. H. QUEEN AND WIFE, ET ALS.

Estoppel—Guardian and Ward—Correction of a Deed.

1. A guardian invested the funds of her two wards in land, taking the deed in her own name. The wards, upon a settlement, took a deed for equal portions of the land from the guardian, and gave her a release. More was due to one ward than to the other. *It was held,* that the ward to whom the larger sum was due, was not estopped by the release, from having the deed corrected, so that it should convey to her the proportion of the land, which the amount due her, bore to the amount due the other ward.
2. In such case, as the guardian is not interested, a mutual mistake on her part need not be shown in order to have the deed corrected.

CIVIL ACTION, tried before *Avery, Judge,* at Fall Term, 1885, of the Superior Court of BURKE County.

The facts appear in the opinion.

There was a judgment for the defendants, and the plaintiffs appealed.

Mr. C. M. Busbee, for the plaintiffs.
No counsel for the defendants.

SMITH, C. J. Mary McElrath, mother of the *feme* defendant, the *feme* plaintiff, and J. J. McElrath, was duly appointed guardian to the two last named, and as such, came into possession of the sum of eight hundred and eighty dollars, their joint trust estate, which she used in the purchase of the lands described in the complaint,
(463) and caused the title to be made to her. Her son J. J. McElrath, died intestate, in 1863, without having a settlement with his guardian, or receiving his portion of the trust estate, leaving his two surviving sisters, his distributees and heirs-at-law. The said Mary, in closing her administration of the trust estate, and to obtain her discharge from liability therefor, on April 22nd, 1859, executed to her two daughters, a deed for said lands, and took from them and their husbands an acquittance, which two instruments are as follows:

"This deed, made this 22nd day of April, 1859, by Mary McElrath, of Burke County, State of North Carolina, to her two daughters, Margaret Queen and Victoria C. Scott, of Burke County, and State of North Carolina, witnesseth, that the said Mary McElrath, who was formerly the guardian of the said Margaret Queen and Victoria C. Scott, in consideration of the sum of eight hundred and eighty dollars of her ward's money, received and paid for the lands hereinafter described, and further other sums of money received by her as guardian of her said daughters, and which is now released by them, the sum of five dollars now paid by the said Margaret and Victoria C., the receipt of which is hereby acknowledged, hath bargained and sold, and by these presents do bargain, sell and convey, to the said Margaret Queen, wife of Henderson Queen, and Victoria C. Scott, wife of Lucius Scott, and their heirs, several tracts of land in Burke County, State of North Carolina, adjoining the lands of John McElrath, Sr., and the heirs-at-law of the late Robert McElrath and others." (Description of the tracts omitted.) "To have and to hold the aforesaid tract of land, and all the privileges and appurtenances thereto belonging, to the said Margaret Queen, wife of Henderson Queen, and Victoria C. Scott, wife of Lucius M. Scott, and their heirs and assigns, to them and their only use and behoof, and the said Mary McElrath, doth covenant that she is seized of said premises in fee, and has the power to convey the same in fee simple; that the same are free from incumbrances, and that she will warrant and defend the said title to the same, against the claims of all persons whatsoever. In testi-
(464) mony whereof, the said Mary McElrath has hereunto set her hand and seal the day and year above written."

The acquittance was as follows:

"This receipt witnesseth, that whereas, Mary McElrath was duly appointed guardian of her two daughters, Margaret and Victoria C. McElrath, and as guardian, received into her hands various sums of money due them from their father's and grandfather's estate, and from Edward J. Erwin, late Clerk and Master of the Court of Equity for Burke County, the proceeds of certain lands, sold under a decree of said Court, as the property of the heirs of Robert McElrath, for partition, which was due the said Margaret and Victoria, as two of the heirs and tenants in common; and whereas, the said Mary McElrath purchased at the sale of said land, two of said tracts, and afterwards another part of a tract thus sold from the estate of Robert J. McElrath, and invested the money of her said wards in said lands, and took the conveyance to herself, and whereas, the said Margaret has arrived at the age of twenty-one years, and has married Henderson Queen, and the said Victoria C. has attained the age of twenty-one, and has likewise married Lucius M. Scott; and whereas, on the settlement of the said Mary McElrath's guardian account with her said wards, the said Mary and her said daughters and their said husbands, have settled and adjusted all claims which they or either of them may have had against said Mary McElrath, guardian as aforesaid. And the said Mary McElrath, in consideration of the same, and inasmuch as her children's money was invested in said lands, has this day conveyed the said land to them and their heirs in fee simple. We therefore hereby release and relinquish all claims and demands, we, or either of us have against the said Mary McElrath, by reason of her said guardianship. Given under our hands and seals this 22nd day of April, 1869.

VICTORIA SCOTT, [Seal.]
LUCIUS M. SCOTT, [Seal.]
MARGARET QUEEN, [Seal.]
J. H. QUEEN, [Seal.]"

The complaint alleges that the conveyance was put in its (465) present form, under an erroneous belief of the guardian, that her daughters had an equal share in the trust fund, whereas the *feme* defendant had none until her brother's death, and then, dividing his moiety equally between his sisters, she succeeded to one-fourth only of the common fund, while the *feme* plaintiff had her original moiety increased to three-fourths, and that it was the guardian's intention to convey the estate in the lands in like proportions, and thereby discharge her liabilities to each. So she states in her answer, but is un-

able to explain how she came to mistake her relations in this respect towards them.

It is not averred in the complaint that the mistake was mutual, or that the instrument itself was not put in the form intended and understood by all; but that the grantor, under a misapprehension of her own financial obligations, made the deed to the two daughters for equal interests. It seems to have been an arrangement originating with her, and carried out with full deliberation and care, and the alleged mistake was discovered in 1871. The long delay in bringing the action—some twelve years—is accounted for and explained, by the fact that a compromise (verbal, we understand), was effected, and a divisional line agreed on and run, under which each has been put in possession of her part, and had the use of it since, from which the defendants have recently departed, refusing to recognize it.

There is no averment nor intimation that the misapprehension was brought about by any word or act of the defendants Queen and wife, or of either, and that the entire transaction does not effectuate the common purpose, as then understood by all.

The action has for its object the reformation of the deed, so that the estate in the lands shall vest, three-fourth parts in the *feme* plaintiff, and one-fourth part in the *feme* defendant Margaret, and then for a partition in this proportion between the tenants. The Court submitted issues made in the pleadings to the jury, in response to which they find that the lands in dispute were purchased by the guardian with the trust funds belonging to her wards Victoria C.
(466) and J. J. McElrath, and held by them in equal shares. The Court ruled that the plaintiffs were estopped by the release, and gave judgment against the plaintiffs, from which they appeal and present that ruling for review.

The substantial controversy is between the two sisters, grantees, and the reformation of the deed is demanded to readjust their respective interests in the estate conveyed. It is a matter of indifference to the grantor, whether the instrument remain in its present form, or be reformed, since however the litigating parties may be affected, her estate in either case is divested and gone. It would seem therefore, not to be so important to ascertain whether she made the alleged mistake as to the conveyance, as it is to ascertain whether there was a common mistake among the grantees taking under the deed, so as to make it inequitable for the one to retain more of the fruits of the invested trust funds, than her proper share therein. The action must then be regarded as prosecuted, not so much to rectify the deed, as to compel the adjustment of equities between the beneficiaries receiving the estate. It is unnecessary to invoke the aid of an estoppel, since

it is not proposed to impeach the settlement and release, and reassert a discharged liability resting upon the mother previously, but to rearrange the interests acquired in the land, upon the basis of their equitable claims upon the funds invested in its purchase. The recitals in the instruments, clearly indicate an intent to substitute the land in place of the funds, as the property to whom those funds belong, and according to their several shares and interests therein. In other words, the mother voluntarily undertakes to do what the daughters, following their moneys into the investment, instead of enforcing a personal obligation, could have compelled the trustee to do, and in such case, their relative interests would be unchanged. The deed upon its face, manifests, in its erroneous recital of facts, and in its entire scope, a purpose to transfer to the land, the claims which each had to the moneys thus used, and in the same relative proportion to each. The rectification of the deed in this particular, does not in any wise dis- (467) turb the settlement of both with their mother, or re-open any controversy with her about her administration of the trust estates. As to her, what has been done, remains intact and final. There is error in the ruling and in the judgment rendered, for which there must be a new trial, and it is so ordered. Let this be certified.

Error. Reversed.

MARY RIPLEY, GUARDIAN, v. ISAAC ARLEDGE ET ALS.

Evidence—Execution Sale—Dormant Judgment.

1. Is is discretionary with the trial Judge to allow a party to introduce his evidence in any order which he may desire.
2. The admission of immaterial evidence cannot be assigned as error.
3. Under the former practice, a purchaser at an execution sale on a dormant judgment, got a good title, when he was a stranger to the judgment.
4. In such case, the dormant judgment was only voidable, and the sheriff was bound to obey it, although it might be set aside at the instance of the defendant, before property had been purchased under it.

CIVIL ACTION, to recover land, tried before *Avery, Judge,* at Fall Term, 1885, of the Superior Court of HENDERSON County.

The plaintiff claimed title under a sheriff's deed, dated the 13th day of June, 1870, executed to him as purchaser at a sale had by said sheriff, under an execution issued upon a judgment in favor of Jesse McMinn, against C. F. Townsend and others; and the defendant, for

his defence, relied upon a deed executed to him by said Townsend, dated the 10th day of June, 1866.

The following issues were submitted to the jury:

(468) "1. Is the plaintiff the owner of the land in controversy?

"2. Was the defendant in the wrongful possession of said land, when the action was brought?

"3. What is the plaintiff's damages?"

It was admitted that both parties claimed under C. F. Townsend, and that J. H. Ripley was the only heir-at-law of J. W. Ripley, now dead, and that Mary Ripley was the regularly appointed guardian of the said J. H. Ripley; and that the defendant claimed under a deed executed by C. F. Townsend to Isaac Arledge, dated June 10th, 1866, which was put in evidence.

The plaintiff, in support of the title of her ward, offered in evidence a deed from T. W. Taylor, sheriff, to J. W. Ripley, reciting a judgment and execution, in the case of *Jesse McMinn v. C. F. Townsend and others*, for $269.60. The defendant objected to the introduction of the deed, but the Court admitted it, reserving the question as to its effect, till the plaintiff should offer the record of the judgment, etc., recited therein, which the plaintiff proposed to do. The defendant excepted to the evidence. The Clerk of the Superior Court was introduced as a witness, and testified that he was Clerk, and that the papers then offered in evidence by the plaintiff, were records of the Superior Court of Henderson County, on file in his office. The first record offered in evidence, was the judgment in the case of *Jesse McMinn v. C. F. Townsend and others*, for $269.60, with interest on $250, from April 1st, 1861, rendered at the Spring Term, 1861, of the Superior Court of Henderson County.

Several executions, issued at various intervals, were then offered, some of which were levied upon the lot in question, but in each case, the benefit of the levy was lost by *fi. fas.*, subsequently issued, until 1866, when an execution was issued on the 30th day of March of that year, tested of the Fall Term, 1865, and returnable to Spring Term, 1866, which the sheriff returned levied upon the lot in controversy, on the 12th of May, 1866.

The next evidence offered, was an entry on the execution docket, showing that a *ven. ex.*, with a *fi. fa.* clause, had been issued

(469) from Fall Term, 1867, returnable to Spring Term, 1868, and issued on the 1st day of January, 1868, reciting a levy on the lot in question, and on three hundred acres of land, lying on the French Broad river. On the execution the sheriff returned, "Suspended by Ordinance of Convention."

The plaintiff then offered a memorandum on the judgment, in these words: "Alias *ven. ex.* and *fi. fa.*, issued to Spring Term, 1870, dated 19th February, 1870," and also an entry on the return of the said process, in the following words, to-wit: "Sold C. F. Townsend's interest as described in this *fi. fa.*, in a house and lot in the town of Hendersonville, on the 3rd day of June, 1870, to J. W. Ripley, he being the last and highest bidder, at the sum of $499.75, apply on this *fi. fa.* $400.65, balance applied on other executions." (Signed) T. W. Taylor, sheriff.

Mr. Pace, the Clerk of the Court, then testified that the *venditioni exponas,* under which the sale was made in 1870, was regularly issued by him, according to the recitals in the deed, and was returned by the sheriff, with the indorsements entered of record, and put in evidence as given above. That the said *ven. ex.* could not now be found in the office, after diligent search, and according to the recollection of the witness, he last saw it when he gave it to the defendant Arledge, to be examined by his counsel in another action then pending, in which Arledge was plaintiff. There was a good deal of evidence offered on the trial, upon the question whether the judgment under which the plaintiff claimed title, had been satisfied before the sale by the sheriff. There was a motion for a new trial, which was overruled. There was no exception taken to the charge of the Court, nor was there any request for additional instructions to the jury by defendant's counsel.

There was judgment for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.
Mr. A. Jones, for the defendant.

ASHE, J. (after stating the facts). In the Superior Court, the (470) case was made to turn entirely upon the question whether the judgment under which the plaintiff claimed title to the lot in controversy, was satisfied before the sale by the Sheriff, but that point was settled by the verdict, which found all the issues, under the charge of the Court, in favor of the plaintiff.

There were only two exceptions taken by the defendant in the Court below. The first was to the introduction of the Sheriff's deed by the plaintiff—but there was no ground for that exception, except as to the order in which the plaintiff should set forth his documentary evidence of title, and that was a matter in the discretion of the Judge.

The other was to the admission of the *ven. ex.*, issued in 1867, without the leave of the Court. There was no merit in this exception. It would not have affected the plaintiff's title in the least, if it had been excluded, for it was soon followed by another *ven. ex.* reciting the

same levy, to-wit: that made on the 12th of May, 1866. There was no exception at the time to the charge of the Judge, and no request for additional instruction by defendant's counsel, nor was there any objection except those above referred to, taken to any of the evidence offered on the trial.

But in this Court the defendant excepted to the charge of his Honor, insisting there was error in the instructions given to the jury. His Honor, among other things, had instructed the jury, "that if any part of the judgment was still unsatisfied, the sale was valid, and passed a good title to the purchaser, and the jury should answer the first issue 'yes,'" the effect of which was to find that the plaintiff, J. H. Ripley, was the owner of the land in controversy.

The defendant alleged there was error in this instruction, contending, that even admitting the judgment was unsatisfied, the plaintiff had failed to establish his title to the land by the proofs he had offered. He contended that after levy upon the land on the 12th of May, 1866, the plaintiff had sued out a *fi. fa.*, and by so doing had lost the benefit of the levy, and that no subsequent levy that
(471) might be made, could divest the title which the defendant had acquired by the deed executed to him by C. F. Townsend on the 10th of June, 1866. This would no doubt be true, if the position of the defendant was sustained by the facts of the case; but unfortunately for his position, the record does not show that any such execution ever issued, after the 12th of May, 1866. This levy was made under an execution bearing *teste* Fall Term, 1865, and returnable to Spring Term, 1866. The next process, was a *ven. ex.* with a *fi. fa.* clause, issued Feb. 5th, 1867, *tested* at Fall Term, 1866, and returnable to Spring Term, 1867. Then a *ven. ex.* with a *fi. fa.* clause was issued from Spring Term, 1867, returnable, we must assume, to Fall Term, 1867, by which a levy was made, as we infer, under the *fi. fa.* clause, upon three hundred acres of land, the property of the defendant, lying on the French Broad river, for the next execution issued, as shown by the record, was a *ven. ex.* with a *fi. fa.* clause, *tested* of Fall Term, 1867, returnable to Spring Term, 1868, issued the 1st of January, 1868, in which was recited the levy of the 12th of May, 1866, on the town lot, and the levy of the 11th Sept. 1867, on the 300 acres of land. No execution appears to have been issued after that, until 1870, when the *ven. ex.* was issued under which the land was sold by the sheriff. This must have been issued from Fall Term, 1869, returnable to Spring Term, 1870, which was then held in the month of June, so that the last *ven. ex.* was issued more than a year and a day after that issued on the 1st of January, 1868, returnable to the Spring Term of that year. But this could not affect the title

of the plaintiff, for it has been decided by this Court, that a purchaser under an execution issued on a dormant judgment, will get a good title, when he is a stranger to the judgment. The execution is only voidable, and the sheriff is bound to obey it, though it may be set aside at the instance of the defendant. *State v. Morgan,* 29 N. C., 387; *Weaver v. Crier,* 12 N. C., 337; *Oxly v. Mizle,* 7 N. C., 250; *Dawson v. Shepherd,* 15 N. C., 497. But it is further held, that "it is erroneous to set aside an execution issued upon a dormant (472) judgment, when property has been purchased under it." *Murphy v. Wood,* 47 N. C., 63. In *Torkinston v. Alexander,* 19 N. C., 87, the Court held, that "the levy operates as a lien, which sets apart the land levied on, for the satisfaction of the creditor's judgment," and as was held in *Smith v. Spencer,* 25 N. C., 256, the levy put the property in the custody of the law, until the debt should be paid, as against the defendant in the execution, and the levy creates a lien on the land, as did the judgment, when a writ of elegit was issued upon it, under the statute of Westminster 2nd, and that writ might be sued out to enforce the lien at any time, without regard to the "year and a day."

It was there held, that a purchaser from the defendant, was in no better condition than his vendor—it being the "direct operation of a lien created by execution, to prevent the defendant from defeating the execution by alienating, and to give the process the same effect against the property in the hands of the purchaser, as in those of the debtor himself."

But be this as it may, there was no exception taken upon this point, either in the Court below, or in the argument before this Court. Our conclusion is, the plaintiff has made out his title to the land in controversy, and the opinion of the Court is, there was no error. The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

Cited: Cowen v. Withrow, 114 N.C. 559; *Earnhardt v. Clement,* 137 N.C. 93; *S. v. Smith,* 218 N.C. 342.

J. M. VAUGHAN, EXECUTOR, v. SAMUEL J. LEWELLYN, ET ALS.

Reference—Practice—Evidence—Confidential Relations.

1. The order of reference was as follows: "In this cause the order of reference heretofore made herein having been mislaid, it is agreed between the parties that D. C., Clerk of this Court, proceed to take and state an account," and "if not found, that an order be made as of the last term *by consent* according!" *Held*, that this makes a reference *by consent*.
2. The decision of the Judge in revising the report of a referee, is reviewable as to questions of law, but not as to the findings of fact.
3. When the vendor agrees to convey land to the vendee on the payment of the purchase money, which is deferred by the terms of the agreement, the burden of proving such payment is in the vendee, and such contract does not create any confidential relations between the parties, or raise any presumption of payment from slight proofs, which would be insufficient without the aid of such artificial presumption.

(473) This was a CIVIL ACTION, tried before *Graves, Judge*, at the July Term, 1885, of the Superior Court of Rockingham County.

The facts were as follows:

The plaintiff alleges that his testator, P. Black, being the owner of the tract of land described in the complaint, and containing one hundred and ninety-six acres, on February 14th, 1871, entered into an agreement with the defendant Samuel, for the sale of the same, at the price of seven hundred dollars, for which sum the sealed note of the said Samuel was taken, payable one day after date, and reciting as well the consideration for which it was given, as that the title should remain in the vendor until all the purchase money was paid. At the same time, the testator executed his bond to the vendee, and therein binds himself and his heirs, upon payment of the bond with accrued interest, to make a deed, conveying a good and sufficient title in the said land to the *feme* defendant, the vendee's wife. The plaintiff further avers, that while his testator, in his life time, was always ready and willing to comply with his covenant obligation, the purchaser failed to pay any part of the money so due, except the small sum of $41.86, which is credited on the note of date June 1st, 1877. The present action is to recover judgment for what is due on the note, and, if necessary, for an order of sale of the land for its satisfaction.

The defendant's answer admits the series of facts alleged, in reference to the contract and the sealed instruments mentioned,
(474) but avers that the debt has been paid in full, and asks that the plaintiffs be required to make title to the *feme* defendant, according to his contract.

There was an order of reference made in the cause, which being lost or mislaid, was replaced by an agreement as follows: "In this cause, the order of reference heretofore made herein, having been mislaid, it is agreed between the parties that D. Settle, Esq., the Clerk of this Court, proceed to take and state an account between the parties in this cause, upon the issues raised by the pleadings, and that in case the said order is hereafter found, this reference shall be governed by the terms thereof; and if not found, that an order be made, as of the last term, *by consent,* according to the rights of the parties under the pleadings." To this is attached the signatures of the attorneys in the cause.

Voluminous testimony was taken and reported by the referee, with his findings of fact and conclusions of law, to-wit:

"1st. That Samuel J. Lewellyn, one of the defendants named in the pleadings, did, on February 14th, 1871, execute and deliver to the plaintiff's testator, P. Black, his bond of said date, due and bearing interest one day after date, in the sum of $700, being purchase money for the land described in the pleadings.

"2nd. That at the time of executing said bond, the said Black executed and delivered his undertaking to the said Samuel J. Lewellyn, obliging himself upon the full payment of said bond, with interest, to execute to the defendant, Sally Lewellyn, a good and sufficient title to the land named in the pleadings.

"3rd. That the following payments have been made on said bond, to-wit:

"On.....day of March, 1871,.....$200.00.
"On 1st day of June, 1877,..... 41.86."

The referee found as conclusions of law:

"1st. That the defendants are still indebted to the plaintiff in the sum of $700, with interest thereon from February 14th, 1871, at six per cent. per annum till paid, subject to a credit of $200 (475) March 15th, 1871, and a credit of $41.86 June 1st, 1877, the amount due being the sum of $503.00, with interest thereon from March 15th, 1871, subject to a credit of $41.86 as of June 1st, 1877."

The defendants filed a series of exceptions to the report, which with the rulings of the Court upon them are as follows:

"The defendants above named except to the conclusions of law and fact as found by the referee herein, as follows:

"1. For that the referee did not give defendants credit for $30.00 as shown by Exhibit 'G,' filed herein, paid as thereon stated.

"2. For that the referee did not give defendants credit for $38.00 paid, as stated by the witness, Mrs. Sarah Adkins.

"3. For that the referee excluded the testimony of A. L. Lewellyn, witness of defendants and their son, after proof that the estate of his father was insolvent.

"4. For that the referee failed to give defendants credit for the items mentioned in Exhibit 'B,' filed herein.

"5. For that the referee refused to exclude the testimony of T. W. Martin.

"6. For that the referee refused to exclude the testimony of P. D. Price, a legatee under the will of plaintiff's testator, and a party in interest.

"7. That the referee, in his third conclusion of fact, finds that only $241.86 have been paid on the bond, whereas the evidence shows that in addition to these payments, there are those which are shown in Exhibit 'B,' filed herein, and the further sums of $30.00 and $38.00, referred to in exceptions two and three.

"8. That the referee finds that the land has not been paid for in full, whereas the evidence shows, by admissions of the plaintiff's testator, the entire purchase money has been paid.

"9. The defendants except to the referee's conclusion of law, in that he finds that there is a balance of purchase money due; of $503.50, with interest thereon from March 15, 1871, at six per cent., subject to a credit of $41.86 as of June 1st, 1877."

(476) At the hearing the Court entered the following judgment:

"This cause coming on to be heard, upon the exceptions as filed by the defendants, after argument of counsel, it is adjudged by the Court that exceptions 1, 2, 3, 7, 8 and 9 be sustained. Exception 4 is considered in connection with exception 8, and the said exception 4 is partly sustained and partly overruled, and the Court doth find that the whole of the purchase money has been paid and no more. Exceptions 5 and 6 are overruled.

"It is further ordered by the Court, that the plaintiff in this action, execute to the defendant Sallie Lewellyn, a good and sufficient deed in fee simple to the land mentioned in the pleadings, upon the registration of the title bond described in the complaint.

"It is further ordered, that the plaintiff pay the cost of the action, to be taxed by the Clerk."

The defendant Samuel having died before the taking the account, the objections to the report came from his surviving wife, and so much of the case on appeal as is deemed material to their being understood is this:

Upon the hearing of the exceptions before his Honor, (as before the Referee), the defendants assumed the burden of showing from the evidence, that payment had been made in full. But in the course of the plaintiff's argument, in response to that of the defendant first heard, his Honor announced, that inasmuch as the evidence of the plaintiff disclosed that the testator—the vendor, P. Black—had taken from Samuel Lewellyn, pending the contract, bonds for rent, to-wit: in the sum of $78.66, balance for the rent of the land for the years 1871 and 1872, and $50 for the rent for the year 1873, and had, a few days before the testator's death, in February, 1881, issued a summons against Samuel Lewellyn for one hundred dollars, for rent for the year 1880, which said rent bonds were held by the testator as unpaid, except a credit of $30 endorsed thereon May 26, 1875; that although the plaintiff had offered evidence of these writings to show non-payment of purchase money, such course of dealing by the vendor with the vendee, under all the proof in this case, (477) showed that there was a relation of confidence existing between the vendor and vendee, like that between mortgagor and mortgagee, and under the ruling in *McLeod v. Bullard;* and transactions between parties standing in such relations, were looked upon with suspicion, and under such relations, slight proof of payments would raise presumptions of payment, and the Courts would require a *fair accounting* on the part of the vendor, under the circumstances of this case.

The Court sustained the exceptions, and announced that the judgment would be to recommit the report, to be corrected, upon the evidence already taken, without giving either party the right to offer any additional evidence. Thereupon, in order to avoid a recommittal, at the request and by the consent of both parties, the Judge undertook to reform the report according to his ruling sustaining the exceptions, and rendered judgment, although the plaintiff insisted that his Honor should find specifically, what items in Exhibit "B" he allowed as credits, and what items therein he disallowed.

And from the rulings and judgment so rendered, the plaintiff appealed and assigns as errors in said judgment as follows, to-wit:

"1. For that in arriving at such judgment, his Honor held the plaintiff to the burden of the proof of the non-payment of the purchase money, putting the testator in the relation of a fiduciary under a presumption of fraud, though the evidence in the case shows clearly and fully, that the purchaser was continually in possession of the premises from the date of the contract.

"2. For that his Honor sustained exception 2, without adequate proof.

"3. For that his Honor sustained exception 3, and held competent the testimony of A. S. Lewellyn, son of Samuel J. Lewellyn, deceased.

"4. For that his Honor in considering exception 4, in connection with exception 8, sustained exception 4 in part and overruled it in part, thus making a mixed finding of fact and law, so as to arrive at
(478) the conclusion that all of the purchase money had been paid, without making articulate his findings as to which items of 'Exhibit B' were true, and which were not, so that his findings would admit of an intelligent review.

"5. For that his Honor sustained exceptions 7, 8 and 9."

Messrs. Mebane and Scott, for the plaintiff.
Mr. Jos. B. Batchelor, for the defendants.

SMITH, C. J. (after stating the facts). The form of the substituted order is intended to be similar to the first, and we think makes a reference *by consent*, under The Code. *Atkinson v. Whitehead*, 77 N. C., 418; *Overby v. The B. & L. Asso.*, 81 N. C., 56; *Grant v. Reese*, 82 N. C., 72, and such it seems to have been deemed and acted on by counsel.

The Court, when revising the report of a referee, who acts under a consent order of reference, upon issues both of fact and law raised by exceptions, exercises to this extent, the jurisdictional functions appertaining to the jury, as well as those appertaining to the Judge. In this dual capacity, he passes upon the competency of evidence that he hears or refuses to hear, as he does upon its effect as proof, direct or inferential, of a disputed fact. His rulings upon the law are reviewable, while his findings of fact are not, in the appellate Court. The Code, Secs. 422 and 423. In like manner, he exercises the two-fold jurisdiction when a trial by jury is waived, and the determination of the entire cause is submitted to him. Const., Art. 4, Sec. 13.

We propose to consider, in deciding the appeal, the error assigned in the first exception to the final ruling, which is alleged to have contributed largely in coming to the conclusion that full payment had been made. It is presented to us in the aspect of an instruction to the jury in an ordinary trial, and if it would have involved a reviewable error in such case, so it is when the erroneous rule is seen to have guided his own action in determining a question of fact.
(479) In the expressive words of the late Chief Justice, "He, as Judge, is to admit or reject evidence, and is to charge himself upon the questions of law applicable to the case; and is then, as jury, to find the facts and *render a special verdict*. The same is the mode of procedure before a referee." *Perry v. Tupper*, 74 N. C., 722.

In exercising a revisory power over a referee upon exceptions, which limit its range, the same general principle governs the Judge in passing upon the facts and law of each, and while reviewing the report, he may "set aside, modify, or confirm the same, in whole or in part," an appellate jurisdiction attaches to his rulings in matters of law only.

Confidential relations, in our opinion, are not formed between parties to an agreement for the sale and purchase of land, simply because the payment is deferred and the title retained as a security for the purchase money. Nor are any business transactions occurring between them afterwards, shown, out of which such confidential relations can arise. The burden of showing the discharge of the obligation to pay, in this, as in other cases, rests upon him who is to make the payment, and it is not removed or diminished by any facts proved. "Slight proofs of payments," do not "raise presumption of payment," but the evidence must be sufficient and satisfactory to establish the fact that payment has been made, without the aid of the artificial presumption to which the Court resorts to aid and help out defective proof.

The rule growing out of confidential relations, when they exist—*McLeod v. Bullard*, 84 N. C., 515, on the re-hearing—applies to any advantage or interest acquired by the superior, over the inferior or dependant party, from the act of the latter, and assumes that it has been obtained by undue influence, which must be met by evidence that the transaction was fair, and the concession voluntary. How is the rule invoked here, in aid of the defendant? What act has been done, which the plaintiff seeks to take benefit under, and which is deemed to be involuntary and unfair in favor of the defendant? There is none to which the presumption is appropriate, if such relations (480) as supposed, did subsist between the parties. It is called into requisition here, not to put out of the way some obstacle arising out of the defendant's act, not to defeat some right or claim acquired from him, but to dispense with needed proof, which the plaintiff is unable to furnish, of an affirmative fact. There is no presumption to be repelled, but absent proof to be supplied.

The ruling in *McLeod v. Bullard, supra,* at either hearing, is not a precedent for the present ruling. In that case, with the relation of mortgagor and mortgagee, there were others clustering around it, which without stopping to enumerate, will be found in the last report in the opinion, showing the fiduciary relations, and warranting the production of some evidence, beyond that of the deed exhibited, that there was no fraud practiced in procuring its execution.

It is true, there are some things in common in the relation of mortgagee and mortgagor, and vendor and vendee of real estate. There is an indebtedness from the one to the other, and the estate is held by the latter, as a security for its payment. But there are also essential differences. The equity of redemption in the mortgage, may be sold under execution. The reserved estate of the vendor, while any of the purchase money remains due, prevents the sale of the equitable estate of the vendee under such process. But without enumerating other differences, it is difficult to see, how the mere fact that one owes for purchased land, and is to have a deed for it when it is paid for, can produce such a condition of dependence, as will authorize a presumption that payment has been made, in the absence of the proof required in other cases of creditor and debtor.

As there is error in giving more force and effect to evidence than it intrinsically possessed, by introducing the artificial rule of presumption in its support, a new trial must be awarded, and in order thereto, let this be certified, that the Court may again hear and pass upon the exceptions to the report.

Error. Reversed.

Cited: Battle v. Mayo, 102 N.C. 435; *Nissen v. Mining Co.,* 104 N.C. 310; *Fertilizer Co. v. Reams,* 105 N.C. 291; *Holt v. Johnson,* 128 N.C. 68; *S. v. Jackson,* 183 N.C. 700; *Coleman v. McCullough,* 190 N.C. 594; *Contracting Co. v. Power Co.,* 195 N.C. 651; *Davis v. Dockery,* 209 N.C. 274; *Anderson v. McRae,* 211 N.C. 198.

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(481)

WILLIAMS, BLACK & CO. v. MARY A. WHITING.

Notice—Mortgage—Decree for a Sale.

1. Where a case has been heard in the Supreme Court, and certified to the Court below to proceed with according to law, no notice is necessary of a motion for judgment in conformity with the certificate. There is no necessity for notice, when the case comes on for trial at a regular term of the Court.

2. Under the terms of a contract to buy land, the vendee was to have the title conveyed to her upon the payment of a certain portion of the purchase money, at a future day, and then execute a mortgage to the vendor to secure the residue, the payment of which was still further deferred. Litigation arose as to the amount which had been paid upon the first instalment, and the demand of the vendor was considerably reduced. *It was held,* that the entire time of credit having expired, the vendor was

entitled to a decree of sale, the vendee not tendering the balance of the amount ascertained to be due.

CIVIL ACTION, heard before *Philips, Judge,* at Fall Term, 1885, of the Superior Court of EDGECOMBE County.

The facts appear in the opinion.

The defendant appealed.

Messrs. Geo. Howard and E. R. Stamps, for the plaintiffs.
Messrs. J. L. Bridgers and J. J. Martin, for the defendant.

SMITH, C. J. Upon the hearing of the former appeal, for a reversal of alleged erroneous rulings upon exceptions to the report of the commissioners, made under an order of reference, 92 N. C., 683, this Court declared that the account rendered "must stand," and directed the rulings to be certified to the Court below, "to the end that judgment be entered, and further proceedings therein had, in accordance with this opinion." At the ensuing Fall Term of the Court of Edgecombe County, the plaintiffs' counsel moved for judgment for the entire debt, and a decree for foreclosure and sale, in order to its discharge.

The motion was resisted by defendant's counsel, on two (482) grounds:

I. Because no notice in writing had been given that it would be made—though verbal information of the intention had been communicated by one of the counsel to the other.

II. Because under the contract, when the first five notes, the last maturing on the 31st day of December, 1882, were paid, title was to be made to the defendant, and the premises reconveyed by her to the plaintiff, to secure the two last instalments of the purchase money, and the delay in complying with the terms of the agreement, was caused by the overclaim of the plaintiffs, which was adjusted under the reference.

There was no tender of the balance due on the five earliest maturing notes, nor offer to pay the same into Court. The Court allowed the motion, adjudged to be due the plaintiff the sum of $26,114.41, with interest from the first day of the term at 7 per cent., on $18,630.56, the principal money thereof, and directed a sale of the land, by certain commissioners appointed for the purpose, on certain conditions which, as not affecting the merits of the appeal of the defendant, need not be stated. The sufficiency of the exception to the motion, are alone before us for consideration, and these we now proceed to examine and dispose of.

In our opinion neither exception can be sustained.

I. The judgment was an act done in the progress of the cause, in pursuance of the direction of the appellate Court, and following as a matter of course, the confirmation of the report. Certainly no previous notice of intention to make such a motion is required. A party present in the action by service of process on him, is deemed ready to meet any application, appropriate to the stage of the action reached in its prosecution. *Clayton v. Jones,* 68 N. C., 497; *University v. Lassiter,* 83 N. C., 38.

Even when Sec. 218 of the C. C. P., required five days notice of an application for judgment against a party who had put in a frivolous demurrer, answer or reply, (and this provision is not now found in the correspondent Sec. 338 of The Code), it was held to have
(483) been dispensed with by the amendatory legislation, making process in civil actions returnable to the Court in Term time. *Stone v. Latham,* 68 N. C., 421; *Clayton v. Jones, Supra.*

In *Erwin v. Lowery,* 64 N. C., 321, RODMAN, J., referring to the notice, says: "We would be inclined to hold that there is no necessity for notice, when the case comes on regularly for trial, at a term of the Court."

II. The next objection rests upon a clause in the agreement sought to be enforced in the action, by which, in case the five notes first falling due, were paid at maturity, the last of them maturing on December 31st, 1882, the land was to be conveyed to the defendant, and she, at the same time, to mortgage it to the plaintiffs to secure the two notes of $7,500 each, representing the remaining purchase money, with a power of sale in the mortgagees, in the event of any default in respect to them. The appellant's contention is, that the delay in meeting the five notes, was occasioned by the excessive and unjust demands made, the adjustment of which, has rendered the reference necessary, and she insists that the same time, or at least some further time, should be allowed, in which to make provision for the ascertained indebtedness.

But all the notes have now become due, and had the appellant discharged her first obligations, and the conveyance and reconveyance been made accordingly, there would now reside in the mortgagees the right to advertise and sell, which could at once be exercised, and most assuredly the default of the debtor, cannot place her in a better condition than if she had been faithful to her engagement. After this troublesome litigation, ending in an ascertained debt of large amount now overdue, there can be no satisfactory reason for deferring the sale, or ending the present, and compelling the institution of a new suit, to accomplish the same general purpose of subjecting the land,

the title to which remains in the plaintiff, to the payment of the purchase money.

The defendant does not offer to pay any money into Court (484) or to the plaintiffs, as a condition of longer delay, and this when her own default has led to the present action.

There is no error, and the judgment must be affirmed. This will be certified for further proceedings in the Superior Court, for the same reasons assigned for this disposition of the cause upon the first appeal.

No error. Affirmed.

Cited: Coor v. Smith, 107 N.C. 431; *Coleman v. McCullough,* 190 N.C. 593; *Burns v. Laundry,* 204 N.C. 146.

L. FRINK v. KATE STEWART, ET AL.

Injunction—Trespass—Pleadings.

1. An injunction to restrain the defendant from committing trespasses on land alleged to belong to the plaintiff, will not be granted, when it is apparent from the complaint and affidavits, that the trespasses are very trifling, and if continued, will not work irreparable injury to the plaintiff.
2. Under the Code practice, an injunction is still an extradordinary and provisional remedy, and it will not be granted before the plaintiff has exhausted the ordinary remedies, unless the Court can plainly see that the plaintiff is about to suffer an irreparable injury.
3. In such case, it is not sufficient for the plaintiff to allege in general terms that the injury will be irreparable, but he must set out such facts as will enable the Court to see what the injury is, and the probability that it will happen.

Motion to continue an injunction to the hearing, in a cause pending in the Superior Court of BRUNSWICK County, heard by *MacRae, Judge,* at Chambers, in Lumberton, on April 14th, 1885.

His Honor refused to continue the injunction, and the plaintiff appealed.

The facts appear in the opinion.

Mr. P. D. Walker, for the plaintiff. (485)
Messrs. Waddell and Elliott, filed a brief for the defendants.

MERRIMON, J. We think it very plain that the plaintiff is not entitled to relief by injunction. He alleges simply, repeated trespasses,

of slight importance, on a small portion of his land, and it is plain to be seen from the complaint, that they are not such as have done, and that the probable continuance of which, will do him, irreparable injury—indeed, such injury done or anticipated, is not alleged. It is apparent from the complaint and the affidavits produced in support of the motion for an injunction, that the trespasses complained of, if indeed they are such, are of no great moment, and are such as can be easily compensated for in damages.

It moreover appears, that the substantial question at issue between the parties, is whether or not a public street or highway, passes over a portion of a lot of land owned by the plaintiff. The alleged trespasses consisted in the removal of certain posts, which the plaintiff caused to be erected in and across the alleged street, on his own land, and the passing and repassing over the same of vehicles, etc.

The plaintiff seems to make such repeated trespasses, and the alleged fact that the defendants are both "pecuniarily irresponsible," the main ground of his application for an injunction.

But he has not tested the effectiveness of his simple legal remedy. This is the only action he has brought, so far as appears, and it is probable that a recovery of damages by him, will suffice to prevent further trespasses. Indeed, the nature of the controversy, as developed by the complaint and affidavits, obviously suggest that such a recovery would have such effect.

The defendant, in her affidavit, avers that her co-defendant is her servant man, and that she "is not insolvent, but has property amply sufficient to meet any damage which may be awarded against her, and is entirely free from debt." So that the allegation that the defendant is pecuniarily irresponsible, is negatived, if indeed, such allega-
(486) tion could help the plaintiff in such a case as this.

The Court will not grant relief by injunction, in case of simple trespass, and when it appears that the plaintiff can have adequate remedy, and compensation in damages for the injury sustained. To entitle him to such relief in the first instance, he must allege, and it must appear, that he will, or may, probably suffer irreparable injury in some way if it shall not be granted. And it is not sufficient to allege such injury in general terms—it must be done by such specific allegations of facts, as will enable the Court to see that such injury will, or may, happen. It is a mistaken notion that seems to prevail extensively, that relief by injunction may be had in almost any case, and as a matter of convenience, under the Code method of procedure. On the contrary, it is only to be granted when and where adequate relief cannot be had without it. It is extraordinary and provisional in its nature

and purposes. *Thompson v. Williams,* 54 N. C., 176 *Gause v. Perkins,* 56 N. C., 177; *Bell v. Chadwick,* 71 N. C., 329; *German v. Clark, Ibid,* 417; *Dunkart v. Reinhardt,* 87 N. C., 224.

The counsel for the appellant, cited and relied upon *Lumber Co. v. Wallace,* 93 N. C., 22. That case is not in point here. It is peculiar, and very unlike this in its facts, and the application of the law. The injunction was granted in aid of the receivership, and the provisional relief was allowed, because of the inadequacy of the defendant's remedy without it.

The order denying the motion for an injunction must be affirmed, and to that end, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: Bond v. Wool, 107 N.C. 153; *Land Co. v. Webb,* 117 N.C. 481; *S. v. Fisher,* 117 N.C. 739; *Porter v. Armstrong,* 132 N.C. 67; *S. v. Haynie,* 169 N.C. 283; *Clinton v. Ross,* 226 N.C. 689.

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(487)

KATE STEWART v. L. FRINK.

Highways—User—Dedication.

1. A street in a town may become a public highway by the continued use of it for twenty years. Such use must be adverse and of right, and not by the tacit or express permission of the owner.
2. In order to show such adverse user, it is necessary to show that the public authorities have done some act, such as keeping it in repair, to put the owner on notice.
3. The mere use of a way over land for a long number of years, does not constitute it a highway, nor does a mere permissive use of it imply a dedication. The use must be adverse to the owner, and as of right, manifested by some appropriate action of the proper public authorities.

Motion to continue an injunction to the hearing, made in a cause pending in the Superior Court of BRUNSWICK County, heard before *MacRae, Judge,* at Chambers in Lumberton, April 14, 1885.

The facts appear in the opinion.

His Honor granted the motion, and the defendant appealed.

Messrs. Waddell and Elliott, filed a brief for the plaintiff.

Mr. P. D. Walker, for the defendant.

MERRIMON, J. A road, way, or street in a town, may become a *public highway* by the continued use of it by the public for twenty years, not simply by permission, tacit or express, of the owners of the land over which it passes, but adversely to them, and as of right. That is, the proper public authorities must have exercised authority and control over it in some way to be seen, as by superintending and keeping it in proper repair, adversely to the owners of the land. The presumption of right in favor of the public, will not arise, unless the proper public authorities, as authorized by law, shall do something that
(488) puts the owner of the land on notice that his right is denied, and to assert the same by action, if he shall desire or see fit to do so. It would be unjust, as well as ungracious, to take advantage of his generous permission to use his land for public convenience, and the law will not allow this to be done.

When, however, the public assumes and exercises authority and control over the road, and the owner of the land makes no opposition, and twenty years elapse, conclusive presumption arises against him in that respect. Hence, in *State v. Purify,* 86 N. C., 681, the Court says: "A *public highway* is one established by public authority, and kept in order by the public, under the direction of the law; or else it is one used generally by the public for twenty years, and over which the public authorities have exercised control, and for the reparation of which they are responsible."

In *Kennedy v. Williams,* 87 N. C., 6, Justice RUFFIN said: "According to the current of decisions in this Court, there can be in this State no *public highway,* unless it be one either established by the public authorities, in a proceeding regularly constituted before a proper tribunal, or one generally used by the public, and over which the proper authorities have exerted control for the period of twenty years; or one dedicated to the public, by the owner of the soil, with the sanction of the authorities, and for the maintenance of which they are responsible." It may be added, that other highways may be established by legislative enactment. All the decisions of this Court are to the same effect. *State v. McDaniel,* 53 N. C., 284; *Boyden v. Achenbach,* 79 N. C., 540. Now, applying what has been said to the present case, it seems to us, that the plaintiff has failed to show that she is entitled to the provisional relief she demands. It is not contended that the street or way in question, was established under any town or county authority, as allowed by statute. It is not alleged in the complaint, nor does it appear from the affidavits produced in support of the motion for an injunction, that the public used it adversely to the owners of the land over which it
(489) passes, as of right. Indeed, so far as appears, while it had been

used generally, as a convenient pass-way, no public authority—county or town—had ever exercised any supervision or control over it at all. The use of it—which had been for a great many years—forty or fifty—was simply permissive on the part of the owners of the land. No public authority ever assumed supervision or control over it, or kept it in repair. It was an open way, immediately along the river front or beach, that everybody, who chose to do so, passed over at will, but not as of right.

The mere fact that the defendant knew that the people generally passed over the way, and that he occasionally passed over it himself, cannot, as seems to be contended, be treated as a dedication of his land to the purpose of a highway. *Boyden v. Achenbach, supra; State v. Jones, supra.*

A dedication of land to the purpose of a *highway*, must appear by some act of the owner of it, that indicates expressly or by plain implication, a purpose to create a *right* in the public to use it adversely to him, and as of right. He must do some act that indicates his concession, and yields the use of the land for such purpose, and the proper public authority must, in some way, take control over it, thus manifesting a recognition and acceptance of the owner's dedicatory concession. The mere use of a way over land, does not constitute it a *highway*, nor does a mere permissive use of it imply a dedicatory right in the public to so use it. The use must be adverse to the owner, and as of right, manifested in some appropriate way by the properly constituted public authority.

It appears from the plaintiff's complaint, and as well from the affidavits produced by her, that the way in question was not a *highway*, and her supposed right therefore, has no existence. She alleges no cause of action, and therefore the injunction was improvidently granted.

It would seem that the way ought to be a *highway*, but whether it ought or not, is not a question for our decision—it is our province to simply declare and apply the law. If the proper authorities (490) of the town deem it necessary to make it so, they can easily do so.

The order granting the injunction must be reversed, and to that end, let this opinion be certified to the Superior Court of the County of Brunswick. It is so ordered.

Error. Reversed.

Cited: S. v. Summerfield, 107 N.C. 898; *S. v. Wolf,* 112 N.C. 894; *Hemphill v. Board of Aldermen,* 212 N.C. 188; *Chesson v. Jordan,* 224 N.C. 291; *Lee v. Walker,* 234 N.C. 695; *Rowe v. Durham,* 235 N.C. 161.

DAVID E. SANDLIN v. R. W. WARD, EXECUTOR, ET AL.

Mistake—Quia Timet—Covenant Not to Sue.

1. Courts of equity do not correct mistakes in law, unless when other equitable elements occur, such as surprise, undue influence, imposition and the like.
2. A party is not entitled to relief on the ground of surprise, when he had the advice of counsel in doing the act complained of.
3. If a creditor by a binding contract, gives time to the principal debtor, or varies the contract in any other particular, the surety will be discharged, but when the principal debtor cannot enforce such covenant or contract against the creditor, as a defence or cause of action, the surety will not be discharged.
4. A covenant not to sue one obligor, does not release a co-obligor.
5. Where the plaintiff purchased a bond, executed by two obligors, and at the vendor's request executed to him a covenant not to sue one of the obligors, which covenant he was assured by his vendor would not operate as a discharge of the other obligor, and afterwards fearing that it would so operate, brought an action to have such covenant cancelled, *It was held*, that the complaint did not state a cause of action.

CIVIL ACTION, tried before *Gudger, Judge,* at Spring Term, 1885, of ONSLOW Superior Court.

The plaintiff in his complaint alleged:

I. That Geo. J. Ward and Robert White, both of the County of Onslow, and both now dead, were on the 18th day of May, 1877, and for a long time before, since the 3rd November, 1856, indebted
(491) to Williams Humphrey, now long since dead, by a note, a copy of which is as follows:

"$3,471.50. One day after date, we or either of us, promise to pay to Williams Humphrey, or bearer, three thousand four hundred and seventy one dollars and fifty cents, for value received. Nov. 3rd, 1856.

(Signed) G. J. WARD, (Seal.)
" ROBT. WHITE, (Seal.)"

II. That the said George J. Ward, died some time during the early part of the year A. D., 1860, leaving a last will and testament, in which are named three executors, but of whom only one, the plaintiff is informed and believes, the defendant Richard W. Ward, has ever acted or qualified as such executor, and has acted as such ever since the said last will was admitted to probate, some time in the year 1860.

That the said Williams Humphrey died some time during the year A. D. 1865, leaving a last will and testament, of which Lott W. Humphrey and D. A. Humphrey, sons of said Williams Humphrey, are the executors.

III. That the aforesaid Robert White, died intestate, sometime during the year A. D. 1867, and Jasper Etheridge was, as plaintiff is informed and believes, appointed his administrator, by the Court of Pleas and Quarter Sessions of Onslow County, some time during the year 1867, and said Etheridge acted as such administrator, until his death, some time in December, 1876, and after the death of said Etheridge, the defendant Henry Sandlin, Jr., was appointed administrator *de bonis non,* of the said Robert White.

IV. That the plaintiff, and one Silas W. Venters, had given their two joint and several notes to said White, dated the 9th day of January, A. D. 1866, each for one thousand dollars, and payable, the one of them nine years after date, and the other of them ten years after date, which notes were unpaid at the death of said White, and which still remain unpaid, but which the said Etheridge alleged were not found among the papers and effects of said White, and which have thus far not been forthcoming.

VI. The plaintiff avers, upon information and belief, that the (492) said Robert White, died very little indebted, if at all, otherwise than by said Williams Humphrey note, and the entire assets of the estate of Robert White, other than the two notes given by the plaintiff and Silas W. Venters to said White, and which remain unpaid as mentioned in Article IV of this complaint, if they are available as assets, will not exceed, if they should equal in value, one hundred dollars.

VII. That at Spring Term, 1877, of the Superior Court of Onslow County, the said Lott W. Humphrey, who is a lawyer, a very intelligent business man, and who has ever been the active executor of his father, the said Williams Humphrey, offered to sell to the plaintiff, the said Williams Humphrey note. The negotiation, treaty or bargaining which finally resulted in the sale of said note to plaintiff, was conducted entirely and solely on the one side by the said Lott W. Humphrey, and on the other by the plaintiff. In the progress of it, the said Humphrey held out to plaintiff, as an inducement to purchase it, the great advantages the ownership of said note would give the plaintiff, as a debtor on the two notes given by the plaintiff and Venters to Robert White, and his ability to hold said claim, as a debt of the estate of Robert White. Influenced by this inducement, the plaintiff concluded with Lott W. Humphrey, a bargain for the purchase of said note, which agreement or bargain was to this effect: Lott W. Humphrey was then to cause to be passed or transferred to the plaintiff, the ownership of the note mentioned in said Article I, free and unincumbered, and, in consideration thereof, the plaintiff agreed to give his note for seventeen hundred and fifty dollars.

That after this bargain was concluded, and on the same day, and before the execution of his note to Humphrey, he requested him, as a favor, to execute an agreement not to sue the executor of George J. Ward on the Humphrey note. The said L. W. Humphrey assured the plaintiff that the agreement would not amount to a release or discharge of either party to said note, and the plaintiff could, notwith-
(493) standing its execution, hold and use it as a set-off against the note the administrator of White held against him and Venters. Influenced by this assurance and advice, he consented to execute the agreement, as a favor to said Humphrey, believing, as he had been informed, that the estate of Ward was insolvent. The agreement was in the following words and figures:

"Whereas, I have purchased of D. A. and Lott W. Humphrey, executors of Williams Humphrey, a note of which the following is a copy:

"$3,471.50. One day after date, we, or either of us, promise to pay to Williams Humphrey, or bearer, three thousand four hundred and seventy-one dollars and fifty cents, for value received.

(Signed), G. J. WARD, (Seal).
ROBERT WHITE, (Seal).

Nov. 3rd, 1856.

"I hereby covenant not to sue the executors of George J. Ward thereon, this 18th day of May, 1877.

(Signed), D. E. SANDLIN, (Seal)."

That there was no consideration whatever for this agreement, it was given purely as a favor to said Humphrey; that none of the parties intended that the instrument should, or could operate as a release to either White's or Ward's estates; that it was done in great haste, during court week, and either through surprise, ignorance or mistake, fails to carry out the intentions of the parties. Lest, therefore, the instrument should be held to be a release to the administrator of White, and thereby defeat plaintiff's recovery upon the Humphrey note, he invokes the aid of the equity jurisdiction of the Court, that it be adjudged that the instrument purporting to be a covenant, be delivered up and cancelled, and be declared by the Court to be a nullity, or reformed, so as to carry out the intentions of all parties thereto; and for such other relief as the premises may warrant.

(494) The defendant Sandlin was removed from the office of administrator of Robert White; and —— Sandlin, appointed in his place, was permitted by the Court to make himself party defendant, and allowed to file an answer. The defendants all filed answers to the

complaint, at very great length, admitting some of the allegations therein, and denying others. They admitted that Ward and White executed the note to Humphrey, but that White was only surety in the same. They pleaded the presumption of payment from the lapse of time, and that the action on the note was barred after seven years, under The Code. The case was not submitted to a jury, and no evidence adduced in support of any of the allegations or denials in the pleading. But the Court dismissed the action, because the complaint did not contain facts sufficient to constitute a cause of action; and the plaintiff appealed.

Mr. W. R. Allen, for plaintiff.
No counsel for defendants.

ASHE, J. (after stating the case). The action of the plaintiff is founded literally upon the principle of *quia timet*, without any of the elements of the equitable remedy recognized by the Court in such cases. With counsel present advising him and drawing the papers, he executed an instrument, by which he covenanted not to sue the executor of G. J. Ward, deceased, but he subsequently has his fears aroused, by consultation with his counsel, that he may possibly have, by mistake of law, executed an instrument by which the estates of both the obligors to the Humphrey bond, may be discharged from liability on the same, and he brings this action, invoking the equity jurisdiction of the Court, to correct the mistake. He does not allege that White was surety to the Humphrey notes, but simply expresses an undefined apprehension that he may be, and if so, that he will set up the covenant in discharge of his liabilities. An action so vague and uncertain in its statements, cannot be sustained.

But even if the facts had been stated with more certainty and (495) precision, the plaintiff would have been met by a principle of equity that would have defeated his application for relief. He alleges there was a mistake in drawing up the covenant, and it was not intended to release White from his liability on the note, and he asks the Court to correct the mistake. But the mistake is one of law, and not of fact, and a Court of Equity never corrects mere mistakes of law, save in exceptional cases, when the mistake is mixed up with other equitable elements, as in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise. Story Eq. Jurisprudence, Secs. 137 and 138.

The plaintiff says he was induced to execute the covenant through ignorance, surprise, mistake, and the confidence he had in Mr. Humphrey. His ignorance is no excuse, for every man is presumed to know

the law, and we do not see how he can be relieved on the ground of surprise, for he had two counsel present, advising him at the time, one of whom drew up the covenant. Nor does his misplaced confidence in Mr. L. W. Humphrey afford him any excuse. When Mr. Humphrey offered to sell him the note for half price, and by looking at it he could see that it was more than ten years old, it should have put him on his guard, and greatly weakened the confidence he had in the advice of Mr. Humphrey, to favor whom he executed the covenant. The contract was made with Humphrey. Ward was not present, nor does it appear that he had any knowledge of the transaction, or that the covenant has even to this day been delivered to him by Humphrey. Then there was no misrepresentation by any one, and if any imposition, is was practiced upon him by Humphrey, who was a stranger to the subject intended to be affected by the covenant, and no imposition, or even fraud, practiced by him, could affect the relation between the plaintiff and the estates of White and Ward. The execution of the covenant then, was a pure mistake of the law, and when that is so, there is no ground for relief in a Court of Equity. In the case of *Bank of United States v. Daniel,* 12 Peters, 32, 55, 56, when the main
(496) question was, whether a mistake of law was relievable in Equity, it being stripped of all other circumstances, the Court held it was not. *Hunt v. Rousmaniere,* 1 Peters 15; Story Eq. Ju., Secs. 116 and 138; *Storrs v. Barker,* 6 John, Ch. 169-70.

But notwithstanding the plaintiff is not entitled to the relief demanded, it does not follow that he must lose his debt against the estate of White, unless he has lost his remedy by lapse of time, as a statutory bar. For, conceding that the covenant is valid as between the plaintiff and the executor of Ward, White was either a co-obligor or surety. If a co-obligor, the covenant cannot have the effect to discharge his estate. It was not a release, but only a covenant not to sue, which has been held by the Court not to discharge a co-obligor. *Winston v. Dalby,* 64 N. C., 299; *Russell v. Adderton, Ibid.,* 417.

But if White was surety, a different rule applies.

Under the last authority cited, it was held that such a covenant would discharge the sureties. And it is a general rule in equity, that where the creditor acts in such a way as directly to impair or destroy the relation of the principal to the surety, as by a release to the principal, or a covenant not to sue him, or issue execution, or giving further time, the surety is discharged. Adams' Eq., 106. But this rule is subject to exceptions, as when the creditor, in agreeing to give time, expressly reserves his remedies against the sureties, or when the agreement not to sue, or to give time, is of such a character, that the principal could have no remedy for its breach or non-performance against

the creditor. In such cases, it is held the surety is not discharged, as when there is a parol promise not to sue, or to give time, without a consideration moving from the principal. The question in every such case, is whether the agreement to give time, or to vary the contract in any other particular, could have been enforced by the principal against the creditor, either as a defence or as a cause of action, for if it could not, there will be no discharge. *Rees v. Berington,* Hare & Wallace's Notes to Leading Cases in Equity—Note referring to American decisions, and numerous American cases there cited in support (497) of the doctrine. If that be the correct doctrine, and it is too well established by the overwhelming weight of authority to be questioned, then the estate of White is not discharged by the covenant not to sue the executor of Ward; for the covenant has no validity. The executor of Ward cannot maintain an action upon it. It is a covenant with no one, the covenantee is not named. It is of the essence of a bond to have an obligee as well as an obligor; it must show upon its face to whom it is payable, and the defect cannot be supplied by showing a delivery to a particular person. *Phelps v. Cole,* 29 N. C., 262; *Graham v. Holt,* 25 N. C., 300. To constitute a deed, there must be persons able to contract, and be contracted with, for the purpose intended by the deed; and also a subject matter to be contracted for; all which must be expressed by sufficient names. 2 Black. Com., 296.

In this view of the case, independent of the defects in the complaint, there was no necessity for seeking a reformation of the covenant. There is no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Kornegay v. Everett, 99 N.C. 35; *Berry v. Hall,* 105 N.C. 165; *White v. R. R.,* 110 N.C. 461; *Pelletier v. Cooperage Co.,* 158 N.C. 407; *Braswell v. Morrow,* 195 N.C. 131.

CHARLES McDONALD v. J. H. CARSON ET ALS.

Issues—Evidence—Notice—Sheriff—Production of Papers—Witness—Judge's Charge.

1. It is the duty of the Court to see that all material controverted matters contained in the pleadings, are eliminated and submitted to the jury in the form of issues.
2. The submission to the jury of an immaterial issue, when it cannot be seen how it prejudiced the appellant, is not assignable as error.

3. Where the fact in issue is whether a certain contract was made or not, conversations and declarations made by one of the contracting parties, about the time it was claimed that the contract was made, are admissible in evidence when they tend to show that such a contract was made.
4. The official acts and returns of a Sheriff are acted on without proof of his signature, in a Court in which he is an officer.
5. A return by the sheriff on a notice to produce a paper in these words, "Executed by delivering a copy," implies a delivery to each party to whom the notice is addressed, and is sufficient.
6. The Court has the power, by virtue of Sec. 578 and Sec. 1373 of The Code, to order the production of proper papers, pertinent to an issue to be tried, and in the possession of the opposite party.
7. Where a party directs a letter to be written from a draught prepared by himself, the copy so made, and not the draught, is the original paper, and notice to produce the draught is not necessary before introducing the letter in evidence.
8. The party introducing a witness, endorces his general credit, and will not be allowed to impeach his general moral character, but he may show that the facts are different from those testified to by the witness, and *it seems* that this rule applies when one party puts his adversary on the stand.
9. It is not necessary for the trial Judge to give the prayers for instructions to the jury in the very words of the prayer. It is sufficient if he gives their substance, when they are proper, and fairly explains the law to the jury, as applicable to the evidence.
10. A prayer for instructions to the jury from the defendant, that upon the whole evidence the plaintiff is not entitled to recover, is not proper under the present system of practice. Now the jury do not find for one party or the other, as formerly, but respond to certain issues, and upon their finding on these issues, the rights of the parties depend.
11. A general exception to an entire charge, is not in conformity to the rule, but the exception should point out the specific portion of the charge deemed erroneous.

(498) CIVIL ACTION, tried before *MacRae, Judge,* and a jury, at January Term, 1886, of the Superior Court of CABARRUS County.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

The facts are fully stated in the opinion.

(499) *Messrs. W. W. Fleming and C. M. Busbee, (Mr. H. S. Puryear was with them on the brief,) for the plaintiff.*

Messrs. Paul B. Means and John Devereux, Jr., (Messrs. D. Schenck and Chas. M. Price were with them on the brief,) for the defendants.

SMITH, C. J. The action is to recover compensation for services alleged to have been rendered to the defendants, in bringing about and effectuating a sale of a valuable gold mine belonging to them, and

known as the "Rudisill Mine," under a contract, whereby, if the sum of $35,000.00, the price to be demanded, was obtained, the plaintiff was to have a commission of ten *per cent.* thereon. The defendant James H. Carson put in an answer at the return term of the summons, in which, passing in silence the allegations of defendants' ownership of the property, and the denied demand made on them by the plaintiff for payment, he controverts all those contained in sections 2, 3, and 4, which aver the making the contract with the plaintiff, and his agency in a subsequent sale of the mine. The other defendants subsequently filed a joint answer, adopting that of their associate. Two issues were prepared and accepted by the Court, to be submitted to the jury in these words:

"I. Did the defendant J. H. Carson contract with plaintiff, for himself and the other defendants, that they would ask $35,000 for the Rudisill Gold Mine, and that if the plaintiff would aid them in the sale of said property, by inducing and bringing any parties to them to purchase said property, and that if a sale was effected by the defendants to the parties so induced and brought by the plaintiff, or through the agency and aid of the parties so induced and brought by the plaintiff, the defendants would pay the plaintiff a commission of ten *per cent.* on the amount for which the mine would sell?

III. "If yes, what damage has the plaintiff sustained?"

During the argument, a third issue was submitted by the Court, numbered II. in the record, as follows:

II. "Was a sale of said mine effected by defendants to Lara- (500) bee and Smart, (alleged purchasers,) or to one of them; or through the aid and agency of them, or one of them, to other parties? If yes, for what sum?"

The jury responded in the affirmative to the first issue, "yes, $35,-000.00" to that submitted by the Court; and to the other, "$35,000.00 with interest from date of sale."

I. The defendants' first exception is to the action of the Court in preparing the issue numbered II.

There is not only no error in this, but it was the duty of the Court to see that all material controverted matters contained in the pleadings, were eliminated and put in the form of issues, as commanded by the statute. *Rudasill v. Falls,* 92 N. C., 222. *Arnold v. Estis, Ibid.,* 162. *Bowen v. Whitaker, Ibid.,* 367.

In the last case, MERRIMON, J., who delivered the opinion, in reference to a remark of the Judge who tried the cause in the Court below, "that it was supposed to be the duty of counsel to tender issues, and for the Court to settle them in case of disagreement," says: "This cannot be treated as dispensing with a due observance of the statute.

It was the duty of the Court to see that the trial proceeded according to its mandatory requirements. Having authority, it should have required the counsel to frame the issues, and reduce them to unity, or, if for any cause failing to do this, the Judge presiding should have done so, *before or during the trial.*"

It was, moreover, a necessary issue in developing the merits of the controversy. The first inquiry related to the contract between the parties, and its provisions; the other, as to damages. That introduced, supplied an obvious omission, by extending the inquiry to the sale made by the defendants and the price obtained.

If the issue was material, it ought to have been submitted, and if needless, as its prejudicial tendency is not apparent, it is not assignable as error. *Perry v. Jackson,* 88 N. C., 103.

(501) The second and third exceptions are taken to the plaintiff's testifying to conversations with the defendant Wadsworth, in reference to the price set upon the mine, which took place about a year before the contract with the plaintiff, and about the time of making it, as irrelevant. These exceptions were properly overruled. The information related to the mine—the price put upon it—the disposition of the owners to sell—and the plaintiff's communicating the fact that he had parties that would examine the mine with plaintiff's son. Wadsworth's reply to his inquiry about paying him a commission was: "You see Mr. Carson. He is half owner of the mine now. Any arrangement you may make with him will be satisfactory to myself and Mr. Miller." Certainly this testimony was pertinent to the question of the making of the alleged agreement with Carson, denied and in dispute.

IV. The exception numbered IV. is not set out so that we can understand and pass upon its force, unless it be to the admission of secondary evidence of the contents of a letter written by him to Wadsworth. Thereupon the plaintiff introduced a notice bearing this caption:

STATE OF NORTH CAROLINA, } Superior Court.
CABARRUS COUNTY. }

CHARLES McDONALD, Plaintiff,
against
J. H. CARSON, J. W. WADSWORTH and R. MILLER, Defendants. } Notice.

To the defendants above named:

"Take notice that you are hereby requested to produce on the trial of the above entitled action, now pending in the Superior Court of Cabarrus County:

"1st. The letter written by C. McDonald, the plaintiff above named, to the defendant J. W. Wadsworth, of date the 7th day of February, 1879. Unless said letter is produced, its contents will be offered in evidence by the plaintiff," etc. (The rest of the notice refers (502) to other papers.)

"To James H. Carson, Secretary etc., John W. Wadsworth and R. H. Miller."

(Signed) C. McDONALD, Plaintiff.

The notice has the following endorsement:

"Executed by delivering a copy, March 7th, 1885.

"C. A. POTTS, Sheriff."

The defendants insisted that there was no evidence of service of the notice on Wadsworth.

The sheriff makes this return to the notice, to be used in the Court of which he is an officer, and his official acts and returns are recognized, without proof to his signature.

In *Holding v. Holding*, 4 N. C., 324, SEAWELL, J., delivering the opinion, says: "The law considers every Court cognizant of the official to whom it authorizes such Court to direct its precepts; and when return is made, the officer is presumed in law, to have come personally in Court, and then to have been recognized in virtue of his commission, and hence it was unnecessary at common law, to make any return upon the writ otherwise than 'Executed,' or the like." The same official recognition of his acts, extends to his service of notice by statute.

"When a notice shall issue to the sheriff, his return thereon that the same has been *executed*, shall be deemed sufficient evidence of the service thereof." The Code, Sec. 940, which is the Rev. Code, ch. 31, Sec. 121, condensed.

The term used in the return, "Executed by delivering copy," necessarily implies a delivery to each of those to whom the notice is addressed, as otherwise it would be but a partial and uncompleted service.

V. The objection to the introduction of a deed from defendants to one J. H. Whiting, conveying the gold mine property, is without force. It shows the sale on which the plaintiff relies for the recovery of his claim.

VI. and VII. The next objection was to the order of the (503) Court, requiring the defendants to produce the contract of sale, preceding the execution of the deed entered into between them and Whitney, and which was one of the documents whose production was demanded in the concluding words of the notice already considered, but omitted in setting it out.

This power of requiring the production of proper papers pertinent to the issue, and in possession of an adversary party, has been long and beneficially used in the trial of actions at law, by virtue of positive statute. It is still possessed by the Court. The Code, Secs. 578 and 1373, and cases cited at the foot of those sections, among the more recent of which are *McLeod v. Bullard,* 84 N. C., 515; *Commissioners of Forsyth v. Lemly,* 85 N. C., 341; *Coates v. Wilkes,* 92 N. C., 376.

VIII. During the cross-examination of the defendant Wadsworth, testifying for himself and co-defendants, the witness said, "Plaintiff never wrote me about it," referring to the mine. "I received a letter from the plaintiff making certain inquiries." The defendants then interposed an objection which was overruled.

The letter purporting to be that of the witness, exhibit "D" in the transcript, was then produced, and the witness denied having written it himself, but thought it was a copy of one he wrote, and that it was sent by his direction. The letter was addressed to the plaintiff, and refers to the sale of the land. The objection is, that this is but a copy, and no notice had been given to produce the original. If this identical writing was sent by the witness's direction to the plaintiff, it is the original and only communication between them. The words used are spoken to the plaintiff, not those in what is called the original or primary draught. *Banks v. Richardson,* 47 N. C., 109.

This exception is disposed of in what has already been said about the formation of the issues.

X. An instruction was asked, "that when a party to an action puts a witness on the stand and examines him, he cannot deny his
(504) credibility, and this principle applies to the plaintiff's examination of the defendant Carson." The Court in response said, "This is not exactly true. When the witness is a defendant, he may be contradicted." If we correctly understand the charge, that the statements of fact by the witness could not be controverted, as that would impeach his credit, it was properly refused. The rule is, that by introducing a witness, you indorse his general credit, and will not be allowed to impeach his general moral character, for that would be imposing upon the jury, but the facts may be shown to be different from those as understood and represented by the witness. No estoppel preventing this, results from his being introduced and examined.

"A party may prove," we quote the language of Chief Justice RUFFIN, "that the fact is not as it is stated to be by one of his witnesses; for that is merely showing a mistake, to which the best of men are liable." *Spencer v. White,* 23 N. C., 236.

Again, it is said in *Strudwick v. Brodnax,* 83 N. C., 401: "A party is not precluded by the statement of one of his witnesses, from showing

by others, the facts to be different, but he is not at liberty directly to assail his reputation for truth, and thus destroy his credit before the tryers." And other cases are there cited.

This is the rule which we understand the Judge to lay down, when he says that the witness *"may be contradicted,"* and in doing this, he undertakes to limit the sweeping words of the prayer, which, uncorrected, were calculated to mislead the jury.

Instructions were further asked, which in substance are the following:

I. "If the contract entered into with Carson for the defendants, was in terms as represented in the plaintiff's testimony, he cannot recover, there being no evidence of payment of the purchase money specified in either of the contracts with Whitney and his associates.

II. "If this be declined, that if the contract be such as is mentioned in the preceding prayer, the plaintiff is entitled, if he recovers, to ten *per cent.* only on $2,000, the sum paid by Whitney and (505) his associates, with interest from August 29, 1879.

III. "If the jury find the contract to be, that the plaintiff should bring or introduce to defendants, a party or parties as purchasers of the mine, and that $35,000 as purchase money was to be paid in cash, the plaintiff cannot recover.

IV. "If W. J. Smart negotiated the sale to Whitney and others, as defendants' agent, the plaintiff cannot recover upon such sale.

V. "So far as the plaintiff is concerned, Smart could, as such agent, negotiate the sale, and at the same time be one of the several purchasers, or take a beneficial interest under the contract, and this whether his name was known in the transaction or not."

The instructions were refused, and the Court, after stating the contention of the parties, proceeded to charge the jury thus:

"In order to make plain the matter to be passed on by you, certain questions, called issues, are submitted to you to answer.

"The first is,—was such a contract made, as is described in the complaint? The question is not whether *any contract* was entered into between the parties, but was *this contract,* that is, was a contract substantially the same as this, entered into between them. If it was that plaintiff was to bring them a party who would pay cash, it is not this contract."

After referring to the conflicting testimony about the contract, the Court continued:

"The burden of proof is upon the plaintiff. If he has satisfied you, by a preponderance of evidence, that such a contract was made between them, you will answer—"yes." To have made this the con-

tract, it must have been the understanding and assent of both the contracting parties, not what one or the other understood it to be.

"Then you will proceed to inquire as to the answer to the second issue. The plaintiff says that this contract was made, and that afterwards he introduced Larabee and Smart to the defendants, and that negotiations ensued between the defendants and Larabee and
(506) Smart, one or both of them, and in consequence of such negotiations, a sale was made at $35,000.

"Now is that so? Or if a sale under these circumstances *was made,* what was the amount for which the property sold?

"There is much conflicting testimony as to what sale, if any, was made. It is for you to answer the question. If a sale was made to Larabee, or Smart, or to either; or if either aided defendant in making a sale of the property, and such sale was made with the assistance of one or both, you must answer, yes.

"By a sale is meant the transfer of the property for a consideration —not conditionally, and the conditions afterwards performed—but an absolute sale for value.

"A consideration is implied in a deed, because a deed is under seal, and a seal imports a consideration. The plaintiff testifies that there was an absolute sale, and that a deed passed the title out of the defendants, for the consideration of $35,000.

"The defendants, or some of them, testify to certain matters, somewhat complicated, but which amount to an allegation that much effort was made to sell—contracts made, and deeds executed—a stock company organized—and that certain parties who had agreed to buy the property, not having paid all the purchase money, became owners of stock in the company, which represents what had been paid; that the company was dissolved, the property sold and bought in by defendants, who are again owners.

"The negotiations having in effect failed, the burden is on the plaintiff. How is it—yes, or no? If yes, for what sum? If you answer this question in the affirmative, and ascertain the sum for which the property was sold, you will proceed to answer the third issue.

"The answer will be given by a calculation of 10 *per cent.* on the sum for which the property sold, and interest.

"If the plaintiff has not by preponderant testimony, satisfied you that such contract is as alleged in the complaint, and set out in the first issue, you will answer the issue, 'No,' and need not trouble yourselves to answer the other issues."

(507) The reproduction *in extenso* of so much of the charge as bears upon the exceptions, is sufficient to show, without comment,

that the case was fairly and fully presented to the jury, and the law explained and applied to the different aspects of the evidence. There is no error in the refusal to give the instructions asked. This is not required, when in substance, the charge responds to so much of the instruction as is correct and proper.

In *Rencher v. Wynne,* 86 N. C., 268, it is said that "while a Judge is not required to give an instruction in the very words in which it is prayed, even when correct in law, yet it is to be expected that he will declare the law, as applicable to the facts in proof, and any reasonable inference that may be drawn from them, in order to an intelligent and rightful determination of the issues before the jury."

We advert to a feature in the form of instructions asked, in the first four of which, the demand is, upon the preceding assumed state of fact, that the Court shall tell the jury that the plaintiff cannot recover. This rests upon a misapprehension of the present practice, as we have before remarked in another case, and is corrected in the charge. The jury respond to the issues of fact, and upon their findings, depends the *question of law,* for the Court to decide, whether the plaintiff is entitled to judgment, that is, to recover. All the material facts upon which the plaintiff's right of recovery depends, must be found by the jury, when issues are submitted to them, and upon the facts thus ascertained, the law determines the result, and the Court declares the law. The verdict is not now, as under the old system, for the one party or the other, but it settles the controverted allegations, and presents the facts for the judgment of the Court.

We may further observe, that an exception to a whole charge is not in conformity with the rule, but it should specifically point out the portion deemed objectionable, and not open a wide field to be explored, to find something obnoxious to objection, in the argument upon the appeal, when if the objectionable matter had been brought to the attention of the Court upon the trial, it might have been rectified. It is only necessary to recall what is said in *Bost v.* (508) *Bost,* 87 N. C., 477, on page 481.

We find no error in the record, and the judgment must be affirmed.

No error. Affirmed.

Cited: Houck v. Adams, 98 N.C. 522; *Cummings v. Barber,* 99 N.C. 340; *Leak v. Covington,* 99 N.C. 569; *Mace v. Life Asso.,* 101 N.C. 132; *Burwell v. Sneed,* 104 N.C. 122; *McKinnon v. Morrison,* 104 N.C. 362; *McAdoo v. R. R.,* 105 N.C. 151; *Braswell v. Johnston,* 108 N.C. 152; *Bottoms v. R. R.,* 109 N.C. 72; *Cornelius v. Brawley,* 109 N.C. 549; *Chester v. Wilhelm,* 111 N.C. 316; *Alexander v. R. R.,* 112 N.C.

732; *Isley v. Boon*, 113 N.C. 252; *Smith v. R. R.*, 114 N.C. 763; *Simmons v. Allison*, 118 N.C. 777; *S. v. Mace*, 118 N.C. 1248; *Wagon Co. v. Byrd*, 119 N.C. 469; *Tucker v. Satterthwaite*, 120 N.C. 121; *Witsell v. R. R.*, 120 N.C. 558; *Willis v. R. R.*, 122 N.C. 909; *Norton v. R. R.*, 122 N.C. 934; *S. v. Freeman*, 213 N.C. 379; *Cotton Co. v. Reaves*, 225 N.C. 443, 444; *S. v. Moore*, 230 N.C. 649; *Lumber Co. v. Sewing Machine Co.*, 233 N.C. 412; *S. v. Tilley*, 239 N.C. 252.

T. B. LOFTIN, ADMINISTRATOR, v. JOHN W. ROUSE, ET ALS.

Jurisdiction of the Clerk—Amendments—Appeal.

1. Where, in special proceedings, the pleadings are made up before the Clerk, and upon joinder of issues are transferred to the Court in Term, the Judge has power to allow amendments, or he may stay the trial and remand the papers to the Clerk, in order that he may consider a motion to amend.
2. In such case, an order remanding the papers to the Clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right, and cannot be appealed from.

SPECIAL PROCEEDING, transferred to the Superior Court in Term, heard by *Avery, Judge,* at Fall Term, 1885, of LENOIR Superior Court.

The facts appear in the opinion.

The plaintiff appealed.

Mr. W. R. Allen, for plaintiff.

Mr. Geo. V. Strong, for defendants.

MERRIMON, J. This is a special proceeding brought in the Superior Court of the county of Lenoir, by the plaintiff, to sell land of his intestate, to make assets to pay debts, etc.

The pleadings were made up before the Clerk, acting as and for the Court, as allowed by The Code, Sec. 251, and issues of fact (509) were raised, to be tried by a jury. Thereupon, the Clerk transferred the "case to the civil issue docket for trial of the issues at the ensuing Term of the Superior Court," as required by The Code, Sec. 256.

Afterwards, in Term time, the counsel for the defendants Pelletier and wife, moved the Court to amend the answer of these defendants, by inserting a more unequivocal denial that plaintiff's intestate was

indebted at all, and by setting up a defence, which they alleged had just come to their knowledge, that the note, upon which the judgment mentioned in their answer was rendered against plaintiff, was executed without consideration, as appeared upon its face, and that it did not appear from the petition, that there was other outstanding indebtedness, and that the answer already filed, denied the validity of that judgment, or the debt on which it was founded.

The same counsel also moved "to amend, to the end that an account should be taken." The attention of the Court was not called, and no objection was taken, to the want of a statement of the issues by the Clerk. The Court ordered that the cause be remanded to the Clerk, to the end that an account might be taken, and that the pleadings might be amended, if the Clerk should deem it proper.

The Court held, that where one of the issues was, whether there was any valid indebtedness, it should be ascertained first whether there was any indebtedness, and a finding for the defendants on that question, might obviate the necessity of trying the issue of fraud.

From the judgment of the Court the plaintiff appealed to this Court.

Regularly, in special proceedings like this, the pleadings should be made up and perfected by the Clerk, acting as and for the Court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. His decision of issues of law or legal inference, may be reviewed upon appeal to the Judge at Chambers or in Term, and issues of fact raised by the pleadings, must be tried (510) in term time, under the superintendence and direction of the Judge. *Brittain v. Mull,* 91 N. C., 498; *Wharton v. Wilkerson,* 92 N. C., 407; *Jones v. Desern, ante* 32.

The statute, (The Code, Sec. 256), requires that "the case" shall be transferred to the civil issue docket for the trial of issues of fact. When so transferred, it is properly before the Court in term for trial, and only for the trial of the issues raised by the pleadings. Necessarily, the Court must see the pleadings—see that they are perfected, and what issues are raised by them. It could not otherwise proceed with the trial. If the Court should see that the pleadings were imperfect, it might and ought to stay the trial of the issues, and direct the Clerk to perfect them according to law. And so also, if a party should satisfy the Court in Term, that he might be entitled, or probably ought to be allowed, to amend his pleading, the Court might in its discretion, with a view to the ends of justice, so stay the trial, and direct the Clerk to consider of a motion to amend, and allow or disallow the same, just as if the case had not been transferred to the civil

issue docket. We can see no just reason why the Judge in term, shall not exercise such discretionary power. There might be cases in which such a course as that indicated should be taken. This discretionary power is of the nature of that to allow amendments generally, and the proper exercise of it is not generally reviewable in this Court.

We think however, that the Court in Term, should not do more than to direct the Clerk to proceed to perfect the pleadings and allow or disallow amendment according to law. If the Clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the Judge would become that of the Court. It was the duty of the Clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above.

(511) The purpose of the Code of Civil Procedure, is to expedite the hearing and disposition of matters cognizable by special proceeding, and hence, such of its provisions as require *civil actions* to be proceeded with in term time, do not embrace, for the most part, such proceedings, and hence, also, the extensive powers of the Clerk, acting as and for the Court, in conducting them.

The order appealed from was interlocutory merely, and in any view of it, it would not destroy or impair a substantial right of the appellant to delay his appeal until final judgment. Moreover, as we have seen, the order was one the Court had power in its discretion to make, and the exercise of that discretion is not reviewable in this Court.

The appeal did not lie, and hence must be dismissed.

Appeal dismissed.

Cited: Glover v. Flowers, 101 N.C. 141.

SAMUEL C. WHITE, CASHIER, ETC., v. M. E. UTLEY, ET ALS.

Appeal.

1. The rule is reiterated, that appeals which present for review only fragments of the case, instead of the case in its entirety, will not be entertained.
2. So, where pending a reference, the defendant moved before the referee to make new parties, which motion the referee certified to the Superior Court for its action, where the motion was allowed, and the plaintiff appealed, the appeal was dismissed.

WHITE *v.* UTLEY.

MOTION in a cause, heard before *Clark, Judge,* at August Term, 1885, of the Superior Court of WAKE County.

After the dismissal of the former appeal of the plaintiff, for the reason that it was prematurely taken, in the midst of an unexecuted order of reference, 86 N. C., 415, the cause was recommitted to the same referee, and he was directed to proceed under the for- (512) mer order. The general facts are stated in the report in that appeal, and do not require repetition.

John G. Williams, the president of the bank, and trustee in the conveyance made by the defendant William Utley, in June, 1869, of two tracts of land, and a considerable personal estate, to secure money borrowed of the bank, died in February, 1879, and at the instance of E. R. Stamps, who was brought into the cause by a supplemental complaint, in which it is alleged that he had purchased the equity of redemption in the lands, under an execution sale against the defendant William Utley, the heirs-at-law of the deceased, of whom the wife of said Stamps was one, were made parties defendants also, and filed their answer in 1885. This was done before the referee, and without objection. While the matter was pending before the referee, the plaintiff objected to the taking of the account of the administration of the trust fund by the deceased, because his personal representatives were not parties. Thereupon, the defendant William Utley, asked leave of the referee to make the representatives parties. The referee declined to give leave, for an alleged want of power, and certified the application to the Superior Court for its action. It was there allowed, the plaintiff's motion for judgment refused, and from these rulings the plaintiff again appealed.

Mr. D. G. Fowle, for the plaintiff.

Messrs. J. A. Williamson and E. C. Smith, for the defendants.

SMITH, C. J. (after stating the facts). There is no reason for entertaining the present appeal, which did not apply to the other appeal. The matter is before the referee, undisposed of, and the proposed introduction of the executors of the deceased, was in furtherance of its essential object, a full and final determination of the controversy. We reiterate what was before said, when the cause was in this Court:

"The inconvenience of a partial adjudication, followed by an (513) appeal, and this from time to time repeated, so as to *present for review successively, fragments of the case,* instead of the case in its entirety, are numerous, and inconsistent with the system of practice,

which aims to bring litigation, without needless delay and expenses, to a termination."

The amendment proposed, prejudices no substantial right of the plaintiff, and was asked to remove the grounds of his objection to taking the account of the trustee's administration of the trust fund, the principal object of the reference. The bank is substantially the party in interest, and the plaintiff in the action.

The original loan to the defendant William Utley, according to the averments in his answer, was made out of the funds of the bank, and to secure it, he conveyed two tracts of land, and much personal property, to John G. Williams, its president, and so designated in the deed, as trustee. The lands are the subject matter of his covenant with the defendant Mary E., the sale of which, to pay her notes for the purchase money, is demanded in the action. The funds received under the deed in trust, and with which the trustee is sought to be charged in payment of the indebtedness of both, is the object of inquiry in the reference. It is now in progress, and the result not ascertained. The entire alleged identity in interest of both the president and cashier with the bank, as its agencies in the transaction, seem to require the examination pending before the referee, to be completed and reported, so that the controversies between the various parties may be fully understood, before the rendition of judgment. It was therefore properly refused at this stage of the proceeding, and as the ruling "affects no substantial right" of the plaintiff, neither it, nor the allowance of the amendment, authorizes the appeal. The principle has been so often acted on as to require no reference.

The case of *Merrill v. Merrill,* 92 N. C., 657, is not an authority adverse to the present ruling. There it is held, that the action came to an end by the death of the administrator, and could not be
(514) retained and prosecuted by the administrator *de bonis non,* and his cause of action being different, no amendment as to parties was allowed for the purpose of continuing the cause in Court. This is not the effect of the present amendment, and its allowance resides in the breast of the Court.

From either ruling, therefore, the appeal is unauthorized, and must be dismissed.

Let this be certified, to the end that the cause may proceed from the point at which the interruption occurred.

Remanded. Dismissed.

Cited: Blackwell v. McCaine, 105 N.C. 463; *Guilford v. Georgia Co.,* 109 N.C. 313; *Jones v. Beaman,* 117 N.C. 262; *Cement Co. v.*

Phillips, 182 N.C. 439; *Raleigh v. Edwards,* 234 N.C. 531; *Burgess v. Trevathan,* 236 N.C. 159.

BENJAMIN PHIPPS, ET ALS., v. A. J. PIERCE, ET ALS.

Exceptions on Appeal—Evidence—Statute of Limitations.

1. The Court reiterates the rule, that no exceptions will be considered on appeal, except such as appear in the record and were made in the Court below.
2. While mere hearsay or declarations are not admissible as evidence to prove facts, yet when there is a claim and assertion of ownership, which can only be proved by acts and words of the claimant, such acts and accompanying words, stand on the same footing, and are admissible for this purpose.
3. When the cause of action occurred before the 24th August, 1868, the statute of limitation in force before that time applies.
4. Under the law as then in force, a grant from the State was presumed after an adverse possession of the land for thirty years; and it was not necessary that the possession should be continuous, or that there should be connection or privity among the successive occupants. This is now altered by The Code, Sec. 139, par. 1.

CIVIL ACTION, for the recovery of land, tried before *MacRae, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of ASHE County.

The facts appear in the opinion. (515)

There was a verdict and judgment for the plaintiff, and the defendants appealed.

No counsel for the plaintiffs.

Mr. D. G. Fowle, for the defendants.

SMITH, C. J. It would be unnecessary to reiterate the rule, long and uniformly adhered to, which limits the appellate jurisdiction of this Court, to such exceptions as are shown in the record to have been taken in the Court below, including an instruction which lays down a false proposition of law, but for the wide range of the argument for the appellant. Very much of this discussion has been directed to objections, which upon the case presented, might be appropriate, and perhaps successfully maintained at the trial, but were not then taken, and do not, in consequence, come under review. It is not material

that the case purports to contain all the evidence, for the rule remains inexorable, and our jurisdiction is exercised only in correcting assigned errors made by the Judge who tried the cause, and no other evidence ought to be sent up, and if it is, it cannot be considered, except it tends to elucidate the alleged erroneous rulings, of which, when presented, we take cognizance, and correct when found to be well taken. Any other course would lead to embarrassing consequences, which the adoption of the rule, and the practice under it, are intended to prevent. "For the best reasons," remarks RUFFIN, C. J., "it is entirely settled that the Court can take no notice of an error, not apparent in the record, that is *in the pleadings, verdict or judgment, unless the appellant except to it at the trial.*" *Garret v. Hunsucker*, 34 N. C., 254-259. To the same effect, see *State v. Langford*, 44 N. C., 436; *State v. Jenkins*, 51 N. C., 19; *Grace v. Hannah, Ibid.*, 94.

In *State v. Jenkins*, BATTLE, J., in reference to a case stated on appeal, as in substance a bill of exceptions, says: "The facts set forth in it, are taken to have been stated with reference only to the (516) errors assigned by him, to have been committed on the trial. Nothing ought to appear therein, except what is necessary to raise the questions as to the sufficiency of the alleged errors."

Again, reciting a provision in the Revised Code, transferred to The Code, Sec. 957, which declares that "in every case the Court may render such sentence, judgment and decree, as on inspection of the whole record, it shall appear to them, ought in law to be rendered thereon," in the same opinion, it is added: "It is manifest that this cannot apply to the bill of exceptions, which, although it is made a part of the record, embraces, and is intended to embrace, only such *alleged errors* in the proceedings on the trial, as the appellant may think proper to assign and set forth therein."

We reproduce the remarks, to correct a practice which is becoming too common in this Court, to base objections upon an examination of the facts stated in the case, which perhaps could have been, at the trial, successfully taken, and were not; or, if taken, do not appear in the record. And we repeat our purpose to maintain this salutary and just rule, in passing upon appeals.

The plaintiffs, in deducing title, read a deed made in December, 1804, by the Sheriff of Ashe County, to John Cox, reciting a sale for taxes, and conveying a tract of land, represented to contain forty acres, and bid off by Gideon Welborn, lying on "Grassy Creek; beginning at a white oak, a corner of the old survey, running South, 100 poles, to a birch in a small branch; then West, 64 poles, to a stake; then North, 100 poles, to a stake; then to the first station."

The plaintiffs then introduced an instrument under seal, purporting to be an agreement for the division of the lands of John Cox, among his heirs, dated April 20th, 1821, and proved and registered the next year, to which the defendants objected for irrelevancy, and, being overruled, excepted. We are unable to see any resulting harm from the admission of this paper, since it does not appear to include the tract in dispute.

The plaintiffs further exhibited a deed from Zachariah Baker, (517) bearing date, July 29th, 1823, to William Phipps, the ancestor of the plaintiffs, conveying the forty acre tract, by the same words of description as those used in the first mentioned deed.

The defendants also introduced a deed from Jonathan Baker to Solomon Spencer, for 208 acres, with defined boundaries, dated March 27th, 1830; and again, a deed from the latter dated March 12th, 1862, to H. J. Pierce, for a tract of 251¾ acres. They also offered a grant to David Blevens for 76 acres. There were other deeds, and much testimony heard from both parties as to the location and boundaries of the lands, and of the exercise of acts of ownership, which it is not necessary to set out in detail, except so much as relates to the ruling upon the admissibility of certain declarations, received after objection. Benjamin Phipps testified, that he bought 130 acres that belonged to his father-in-law, adjoining the disputed land on the north; that the fence on the north side was all shoved off, and about the 14th of April, 1847, he put a new fence there, and sowed it in oats; that he then moved the fence a little higher up on the house tract or path; that his father, William Phipps, told him to put the fence on the old house tract if he wanted to; that Spencer was talking about proceedings, and it was his, (Phipp's,) and for him (witness) to move up the fence, which he did, and took in a rod, or one and a half rods of the land in dispute, in 1847. The reception of the declarations of William Phipps was objected to, and the objection overruled.

Manifestly this is not hearsay or narrative evidence, offered to establish the truth of the fact declared, but evidence of a claim and assertion of ownership, which can only be shown by acts and words, which in this respect, stand upon the same footing. The direction to the son, and his obedience, make him the agent, and his acts, the acts of his principal, in assertion of his claim to the premises in the removal of the fence. When he said the fence was his, he merely meant to give authority to his order of removal, and the order and act themselves mean as much. There is no error in this.

Every instruction asked for the defendant, was given in the (518) very words, and without qualification.

To those given at the instance of the plaintiffs, and those given *ex mero motu* by the Court, no exception appears to have been taken.

The second issue was withdrawn, upon the admission of defendants' counsel, that they were in possession of part of the forty acres, as set out in the plat, and the sole issue, found in the affirmative, left to the jury, was to the plaintiffs' title to the land and right of possession thereof.

It is argued here, that there was an erroneous statement of the law, as applicable to the facts of this case, in so much of the charge as declares, that "in order to entitle them to recover possession, the plaintiffs must show either an occupation of the land under visible lines and boundaries for thirty years—*there need be no connection between the persons occupying the land,* nor need the *occupancy be continuous, but it must be for thirty years before bringing the action.*"

The direction is not in conformity with the requirements of The Code, Sec. 139, par. 1, which prescribes a limitation within which the State must bring a suit for land. *Price v. Jackson,* 91 N. C., 11-15. But it is in entire harmony with the pre-existing law, as expounded in many adjudged cases. *Candler v. Lunsford,* 20 N. C., 542; *Melvin v. Waddell,* 75 N. C., 361; *Davis v. McArthur,* 78 N. C., 367; *Cowles v. Hall,* 90 N. C., 330.

The question is, whether the case is governed by the former rule of presumption of a grant, or that introduced in the Code of Civil Procedure. The latter, in terms, provides "that it shall not extend to cases where the right of action accrued before that date, (August 24th, 1868), but the statutes in force previous to that date, shall be applicable to such actions and cases." Sec. 136.

There was, before the recent change in the law, no statute barring an action brought by the State, yet an effect was attributed to an adversary possession of land for a long period of time, of divesting title out of the State, upon the unrebuttable presumption, from
(519) the delay, of the issue of a grant, *Davis v. McArthur, supra,* so that the State could not maintain an action; or in other words, was barred, as if there were an applicable statute of limitations.

So the time began to run within which the State must enter or bring suit, or in the words of the act, "the *right of action*" accrued before that date, and hence the former laws are applicable. The concluding sentence of the section, that the *statutes* in force previous to that date, "shall be applicable to such actions and cases," cannot abridge the import of what goes before, but must be understood to leave the preceding law, in such cases, unchanged and in force. This view is not in conflict with the decision in *Price v. Jackson, supra,*

which merely declares that the plaintiffs could not bring their case within the provisions of either law, and consequently could not recover.

There is, therefore, no error in the instruction complained of.

We pass only upon exceptions disclosed in the record, and none others.

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

No error. Affirmed.

Cited: Carroll v. Barden, 97 N.C. 192; *Ferrell v. Thompson,* 107 N.C. 426; *Asbury v. Fair,* 111 N.C. 257; *Barber v. Buffaloe,* 122 N.C. 131; *May v. Mfg. Co.,* 164 N.C. 265; *Foster v. Holt,* 237 N.C. 497.

ELIZA R. DEPRIEST v. JAMES L. PATTERSON, EXECUTOR.

Exceptions to Report of Referee—Scale.

1. Where, in this Court, a reference is made to the Clerk to state an account, an exception will not be heard upon a motion to confirm the report, which was not taken in the Court below, nor on the first hearing in this Court.
2. Although such exception cannot be taken, yet if the Court can see from the report, that it acted under a misapprehension of the facts in the first hearing, it will *ex mero motu* modify its ruling, when it is plain that it will work great injustice.
3. Where a fund was paid to an administrator in Confederate money, out of which fund he makes payments to the distributees; *It was held,* that it would be unjust to apply the scale to the amount received by the administrator, but not to apply it to payments made out of the very fund to the distributees.

CAUSE RETAINED in this Court, heard upon exceptions to the (520) report of the Clerk, at February Term, 1886, of the SUPREME COURT.

The case is reported in 92 N. C., 399 and 402, to which reference is made for the facts.

Mr. D. M. Furches, for the plaintiff.
Mr. B. F. Long, for the defendant.

SMITH, C. J. It is obvious from inspection of the reformed account which is reported by the Clerk, that through inadvertence or otherwise, the item of $370 with accrued interest, the subject of the defendant's first and material exception, has been misplaced in being entered as a

credit to the executor in the general administration account, instead of in the personal account with the *feme* plaintiff. The exception in this respect is well taken, and must be sustained. This will render other corrections dependent on the transfer from one to the other account necessary, and we find them made in the body, and as part of the exception, showing the aggregate indebtedness of the defendant to the plaintiff. The Clerk reports the accounts in the two-fold aspect of scaling and not scaling the $500 paid the plaintiff in 1864, and accumulated interest; to the one mode of stating which, the plaintiffs except, and to the other the defendant excepts. We cannot entertain the plaintiffs' exception, for the reason it was not taken in the Court below, nor suggested here at the original hearing of the appeal. The practice in this regard is fully established upon repeated adjudications. *White v. Clarke,* 82 N. C., 6; *Williams v. Kivett, Ibid.,* 110; *State v. Hinson, Ibid,* 597; *State v. Hardee,* 83 N. C., 619, and numerous other cases. While we must observe the rule, in refusing to recognize the plaintiffs' right to make the exception, we feel at liberty, when our at-
(521) tention is called to the unjust and injurious consequences of our ruling, upon other portions of the account, if left undisturbed, so to readjust our ruling upon the account, as to make it just, fair and reasonable. The $500 advancement was made the next year after the time when the Confederate funds, derived from the charge for the Beggarly notes, are charged to the defendant. It must be assumed that the payment to the plaintiff was made out of these funds, and it would be manifestly wrong to *scale them,* including what was paid the plaintiff, in the defendant's favor, and give him full credit for the sum so paid, unreduced by the application of the scale. This would be to put the difference in the defendant's pocket, without equivalent or consideration for so doing. When the executor stood charged in the general account, with the face value of the Beggarly securities, there was no ground for the plaintiff to complain, if the advancement to her, if chargeable at all, should be entered also for the full amount. The scaling of the one, renders the scaling of the other necessary, and such is their interdependence, that the Court must, in justice, adjust the one to the other, and this to give the intended effect of their ruling, that the Beggarly fund must be reduced by applying the scale. The interest upon the advancement, of course stands upon the same footing as the principal money. The same scale by which the Beggarly fund is reduced, must be applied to the sum advanced in the same currency, with interest, and not as of the date when it was received. This is an equitable adjustment of the matter, and a necessary consequenc of our former ruling, in regard to the charge against the defendant.

The other exceptions not disposed of in what we have said, are overruled, and upon the reformation of the account, there may be judgment entered up according to the result, as it may be ascertained by the Clerk. The former Clerk is allowed $20.00 for his report.

Re-committed.

(522)

T. Y. LYTLE v. THOMAS LYTLE, JR., ET ALS.

Statement of Case on Appeal—Exceptions—Order of Restitution.

1. The third clause of Sec. 412, does not allow the appellant to assign error for the first time in this Court. It regards the instructions of the Judge as excepted to, whether the exception is formally made at the trial or not. But such exceptions, if relied on by the appellant, must appear in the case stated; otherwise, he cannot avail himself of them in this Court.
2. When a party is put out of possession of land, or compelled to pay money, under a judgment which is afterwards reversed or set aside, the Court will restore the party to the possession of the land, and give him a remedy for the money thus paid.

This was a motion for judgment and writ of restitution, in an action pending in the Superior Court of McDOWELL County, heard by *Avery, Judge,* at the Spring Term, 1885, of said Court.

A judgment had been rendered in the same action, at Spring Term, 1882, of the Court, under which the defendant was turned out of possession of a tract of land in contention between the parties, and had been compelled to pay twenty dollars. At Spring Term, 1884, said judgment was vacated and set aside. The Court, on hearing the motion, gave judgment in favor of defendants for twenty dollars, the amount admitted to have been paid, and for restitution.

From this judgment, plaintiff appealed.

No counsel for plaintiff.

Mr. John Devereux, Jr., (Mr. Jos. B. Batchelor was with him,) for defendants.

MERRIMON, J. We are apprehensive that we may not reach the whole merits of this appeal. It was not argued before us for the appellants, and the record is so confused and obscure, in many respects, that we find it difficult to ascertain what are the questions (523) intended to be presented for our consideration. No errors have been specified, and we are left entirely to view the case settled upon appeal by the Court, without guide or compass.

It would seem that if it is worth while for a party to appeal, he should assign errors, as the statute plainly directs, so as to gain the full benefit of what he ought to realize by it. It is folly to do so otherwise. This Court can only take notice of, and act upon, what appears in the record, and correct such errors as are properly assigned. This is due alike to the appellant and appellee, and, as well, to the due administration of justice. A practice that leaves the case at random as to the questions to be reviewed and decided, is vicious and unjust to all parties, while it does not comport with the proprieties of judicial procedure. Exceptions should be taken in the Court below, and *appear* to be taken, and in apt time.

The Code, Sec. 550, among other things, provides in respect to settling the case upon appeal, that the appellant "shall cause to be prepared a concise statement of the case, embodying the instructions of the Judge as signed by him, if there be any exception thereto, and the requests of the counsel of the parties for instructions, if there be any exception on account of the granting or withdrawing thereof, and stating separately in *articles numbered*, the errors alleged." This provision should be observed, at least substantially, in every case, unless, *first*, when the ground of error is sufficiently assigned in the record itself, without a statement of the case for this Court on appeal; or *secondly*, where the objections are that the Court had not jurisdiction, or the complaint does not state facts sufficient to constitute a cause of action; or *thirdly*, where it appears upon the face of the case settled upon appeal, that certain instructions specified, were asked and refused, or certain instructions were given, and were deemed, informally, excepted to, as provided in The Code, Sec. 412, sub. div., 3. The provisions of rule 7, (92 N. C., 847), are no less important, and should be observed.

(524) The clause of the statute last cited provides, that "if there shall be error, either in the refusal of the Judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to, without the filing of any formal objection." This clause does not, as some gentlemen of the bar seem to suppose, give the appellant the right to assign error for the first time in this Court, and without regard to whether or not exception was taken in the Court below. It will be observed that this provision is part of the section that prescribes *when and how* exceptions shall be taken, and its purpose is to require that the instructions refused or given, whether asked or not, shall be treated as excepted to, although the same were not formally objected to on the trial *at the time* the same were refused or given. But such instructions so excepted to, must appear specifically set forth in the case settled upon appeal, and this

Court will then correct any error in law in refusing the instructions prayed for, or in those given. But it will not go beyond that, and allow exceptions to be taken here for the first time, otherwise than as above indicated. The statute does not contemplate or allow such indefinite latitude as to the assignment of error; and besides, it would be unjust to the adverse party, to allow exceptions to be taken in this Court, that might have been obviated by amendment or otherwise in the Court below. *Fry v. Currie*, 91 N. C., 436.

In this case, no particular errors are assigned. It appears from the case settled upon appeal, that a judgment had been entered against the appellee, and thereupon process issued, by virtue of which the appellant was placed in possession of a tract of land, specified in the pleadings, which had been in the possession of the appellee and claimed by him, and the latter, also, paid to the former, or to his counsel for him, twenty dollars, part of the recovery.

Afterwards, the Court set the judgment referred to aside, upon the ground that it had been improvidently granted; and, at a subsequent term, directed that the appellee be restored to the possession of the land, by the writ of restitution, and gave judgment in his (525) favor and against the appellant, for the money paid by the latter in discharge of the judgment so set aside.

In this we discover no error. It is well settled, that where a party is put out of possession of land, in pursuance of a judgment or order improvidently granted, or is required to pay money, and the judment is afterwards declared void or is set aside, the Court will promptly, as far as practicable, restore the party complaining to the possession of the land, and give him remedy for the money so paid. The law forbids injustice, and it will not allow its process to work injury to a party against whom it goes by improvidence, mistake or abuse. It will always restore such party promptly, and place him as nearly as may be in the same plight and condition as he was before the process issued. This is due alike to the integrity of the law, and to the party asking relief. *Dulin v. Howard*, 66 N. C., 433; *Perry v. Tupper*, 70 N. C., 538; *same case*, 71 N. C., 387; *Love v. Martin*, 81 N. C., 38; *Meroney v. Wright*, 84 N. C., 336.

The judgment must be affirmed. To that end, and to the further end that any further appropriate proceeding may be taken in the action, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: Pleasants v. R. R., 95 N.C. 197; *Justice v. R. R.*, 96 N.C. 412; *Carroll v. Barden*, 97 N.C. 192; *Allen v. Griffin*, 98 N.C. 121; *Burwell v. Sneed*, 104 N.C. 122; *McKinnon v. Morrison*, 104 N.C. 362; *R. R. v.*

R. R., 108 N.C. 306; *Bank v. Miller*, 184 N.C. 597; *Winborne v. Lloyd*, 209 N.C. 487; *Hall v. Robinson*, 228 N.C. 46.

VICEY TAYLOR, ADM'X, v. THE CRANBERRY IRON AND COAL COMPANY.

Statute of Limitation—Injury Causing Death.

1. The action for damages for an injury resulting in death, given by Sec. 1498 of The Code, must be brought within one year after the death of the injured person, or it will be barred.
2. The provision of this statute, limiting the time within which the action must be brought, is not a statute of limitations. The statute confers a right of action which did not exist before, and it must be strictly complied with. As there is no saving clause as to the time of bringing the action, no explanation as to why it was not brought will avail.

(526) CIVIL ACTION, tried before *Avery, Judge,* at Fall Term, 1885, of the Superior Court of MITCHELL County.

This action was begun on the second day of November, 1883. The plaintiff alleges in the complaint, that she is the widow of Nelson Taylor, deceased; that in his life time, her said late husband was employed by the defendant to work in its iron mine, and while so at work on the 13th day of August, 1881, he was killed by the falling in of a large mass of stone, in the tunnel way, occasioned by the alleged carelessness, neglect and wrongful act of the defendant, in failing to properly guard against such casualty, as it was bound to do, etc.

The defendant answers, and pleads that this action was not begun "within one year after the death of the said husband," etc.

Upon the pleadings, the Court held that the plaintiff could not recover, and gave judgment for the defendant, and the plaintiff appealed.

No counsel for the plaintiff.

Mr. Samuel F. Mordecai, for the defendant.

MERRIMON, J. (after stating the facts). The action is brought under The Code, Sec. 1498, which provides, that "whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or suc-

cessors, shall be liable to an action for damages, to be brought within *one year after* such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing death, amount in law to a felony."

This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the Statute gives it. Why the action was not brought (527) within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun.

The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons, and as more than one year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must therefore be affirmed.

No error. Affirmed.

Cited: Best v. Kinston, 106 N.C. 206; *Roberts v. Ins. Co.,* 118 N.C. 435; *Hartness v. Pharr,* 133 N.C. 571; *Gulledge v. R. R.,* 147 N.C. 236; *Gulledge v. R. R.,* 148 N.C. 569; *Hall v. R. R.,* 149 N.C. 110; *Trull v. R. R.,* 151 N.C. 547; *Dowell v. Raleigh,* 173 N.C. 200; *Reynolds v. Cotton Mills,* 177 N.C. 426; *Capps v. R. R.,* 183 N.C. 185; *Hatch v. R. R.,* 183 N.C. 620; *McGuire v. Lumber Co.,* 190 N.C. 809; *Brick Co. v. Gentry,* 191 N.C. 641; *Tieffenbrun v. Flannery,* 198 N.C. 399, 401; *Curlee v. Power Co.,* 205 N.C. 647; *George v. R. R.,* 210 N.C. 60; *Webb v. Eggleston,* 228 N.C. 578; *McCoy v. R. R.,* 229 N.C. 59; *Wilson v. Chastain,* 230 N.C. 392; *Colyar v. Motor Lines,* 231 N.C. 319.

OLLY SPARKS v. S. B. SPARKS ET AL.

Husband and Wife—Divorce—Condonation—Agreement to Live Separate.

1. If the wife commit adultery, and the husband afterwards lives with her, and keeps up the connubial relations, a divorce will not be granted.
2. Whether deeds for separation between husband and wife, are against public policy and void in this State, *quære.* It would seem, that under Sec. 1831 of The Code, they are valid for some purposes at least, but even if they

are void, while the Courts may refuse to carry them out, they will not undo any act of the parties which they may have done for this purpose.

3. The rule that the Courts will never aid a party, when the contract is *contra bonos mores*, is only departed from, when oppression, imposition, hardship, undue influence, or great inequality of condition or age is shown.

4. Where a husband and wife executed a deed of separation, a part of the consideration of which was, that the husband should relinquish his estate by the curtesy in a part of the wife's land, and that she should convey another portion of her land to a trustee for him in fee, which was done, the wife cannot maintain an action to have her deed to her husband's trustee cancelled, on the ground that the deed of separation was against public policy, in the absence of any undue influence or oppression exercised by the husband to obtain the deed.

(528) CIVIL ACTION, tried before *Graves, Judge,* and a jury, at Fall Term, 1883, of the Superior Court of YANCEY County.

During the progress of a suit instituted by the plaintiff against the defendant, for a severage of the marital relations subsisting between them, a compromise arrangement was entered into between them of the following import: "Whereas, the said Olly Sparks, being the wife of said Samuel B. Sparks, has brought suit against the said Samuel B. Sparks, for divorce and alimony and the recovery of certain lands belonging to the said Olly, *feme* plaintiff, which suit is now pending in the Superior Court of Madison County in said State; And whereas the said party defendant, Samuel B. Sparks, is tenant by the curtesy, and holds such interest in the lands claimed by said Olly in said action: Now, in consideration that the said Samuel B. Sparks has relinquished his interest, as such tenant by the curtesy, of, in and to a certain portion of land owned by said Olly, and has joined in a conveyance to Batis Randolph, son of said Olly Sparks the *feme* plaintiff, the said Olly Sparks agrees by these presents, to enter a *nol. pros.* in said suit, without costs to the said Samuel B. Sparks, and release him from all claims to dower, alimony or any other claim or right which may have accrued to her, in consequence of her marriage with the said Samuel B. Sparks. In testimony whereof, the said Olly Sparks and Samuel B. Sparks have hereunto set their hands and seals. And the said Samuel B. Sparks binds himself that he will not attempt to exercise any control over the person or property of the said Olly Sparks, either which she now owns or may hereafter acquire, sealed with our seals.

S. B. SPARKS, (Seal.)
OLIVE SPARKS, (Seal.)

Test: G. B. MOODY.

This instrument was duly acknowledged before the Judge of probate, and the private examination of the *feme* taken, upon whose certificate it was, on April 25, 1874, admitted to registration.

At the time of its execution, and just afterwards, the parties (529) executed a deed, conveying a certain other tract of land, belonging to the *feme* plaintiff, estimated to contain fifty acres, and within special boundaries, for a recited consideration of three hundred dollars, to R. H. Penland, one of the defendants, who let the defendant into possession of the premises, and he has since received the rents and profits thereof.

The defendant, after the execution of the agreement first mentioned, in an action against the plaintiff, prosecuted in the Superior Court of Mitchell County, obtained a judgment, divorcing him from the plaintiff, and annulling their marital relations.

The plaintiff avers that no consideration of any kind was paid or received for the conveyance to Penland, and that in the transaction in which she participated, she was unduly influenced by her husband, and the financial difficulties brought on, in her effort to get rid of his tyrrany and selfish conduct. The demand is, that the agreement, as involving a contract for separation, be declared void, and also the deed to said Penland, executed in carrying it into effect, and the latter be declared a trustee for the plaintiff.

The defendant in his answer, admits the execution of the agreement and deed set out in the complaint, and says that all was done at the solicitation of the plaintiff, her friends, relations and advisers; that at the time of their intermarriage in 1860, the plaintiff had two children by a former husband, one of whom soon died, and the other, the said Batis Randolph, still survives, and one child, Zebulon V. Sparks, has been born to them since; that soon after the birth of this child, the defendant entered into the service of the Confederate States, and was absent some eighteen months; that upon his return, he found that the plaintiff, about seventeen months after he had left, had given birth to another and an illegitimate child, and her affections had been withdrawn from himself; that after his own child was born, as he then had an estate for life in his wife's lands, he put valuable improvements upon them, in the expectation of reaping the benefits thereof in possession and use; that the arrangement detailed in the complaint (530) was brought about through the said Batis, after he had arrived at full age, her uncle, B. S. L. Dayton, and others, from whom came the suggestion of the compromise, which was to this effect:

The plaintiff and defendant were to unite in a deed to said Batis, for about sixty acres of the land owned by her, including the dwelling house and improvements, and the plaintiff was to release her estate to the defendant in the remainder of the tract, consisting of about fifty acres. This agreement was carried out in the execution of the first

mentioned instrument, of the deed to Batis, and of that to Penland, who received the title in trust for the defendant, and to convey to him.

The defendant further denies all imputations upon his conduct and good faith in all that occurred. Batis Randolph was made a party plaintiff in the action, and thereupon a jury was empanelled to pass upon the following issues, and rendered their verdict upon each as follows:

"I. Was the plaintiff induced by force of the defendants, or either of them, to join in the execution of the deed to the defendant Penland? Answer, No.

"II. Was it a part of the consideration which induced the execution of the deed to Penland, that the defendant Sparks and his wife should thereafter live separate from each other? Answer, Yes.

"III. Was the consideration, or any part of it, which induced the defendant Sparks to execute the deed to the plaintiff Batis Randolph, that the *feme* plaintiff should join in making the deed to the defendant Penland? Answer, Yes."

Upon the undisputed facts, and the findings of the jury, it was adjudged by the Court, that the said deeds and agreement be annulled and that the plaintiff, Ollie Sparks, is the owner in fee of the lands sued for, and entitled to the possession thereof, as well as the rents and profits thereof, since the rendering of the decree of divorce, to be ascertained hereafter.

From this judgment the defendant appeals.

(531) *Mr. R. H. Battle, for the plaintiff.*

Mr. John Devereux, Jr., (Mr. Jos. B. Batchelor was with him,) for the defendant.

SMITH, C. J., (after stating the facts). It is to be observed, that the alleged agreement, held by the Court to enter into and vitiate the entire transaction, so as to render both deeds inoperative, is not in any written form, but rests entirely in parol. Not a word is said about the separation of the parties, unless it be found in the defendant's stipulation, that he will thereafter "not attempt to exercise any control over the person or property" of his wife, which may pre-suppose their future living apart. Again, it would seem that the separation had already taken place, and existed when the arrangement was entered into. The *feme*, during her husband's absence, had committed adultery, and had he kept up their connubial relations, it would have been a condonation of her proved faithlessness to her marriage vows, and he would have been refused a divorce *a vinculo matrimonii*. This the law did not

require of him, and the absolute separation was afterwards secured by the judgment of the Court, in his action against her.

The ruling of the Court was probably founded on the case of *Collins v. Collins,* 62 N. C., 153, in which READE, J., after an examination of authorities, announces the conclusion arrived at in these words: "We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of, or after separation, are *against law and public policy, and will not be enforced.*"

It may admit of question, in view of subsequent changes in the law of marriage, in respect to the property rights of the woman, whether the proposition, in its unlimited extent, can now be upheld. A voluntary separation, under some circumstances, is recognized as a legal condition, out of which may arise certain powers to be exercised over her estate.

"Every woman who shall be living separate from her husband, (532) either under a judgment of divorce by a competent Court, or *under a deed of separation, executed by said husband and wife, and registered in the county in which she resides,*" etc., shall have the effect of making her a free trader. The Code, Sec. 1831.

This act of legislation, passed in February, 1872, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a *possible legal separation* of the parties, by voluntary agreements, and defines her condition and rights resulting therefrom. If such a case can exist and be upheld by law, the facts of that before us would be one. The wife had, during her husband's absence, kept up an adulterous intercourse, the fruit and proof of which was found in the birth of a child, whose support was to become a burden upon the husband. Their continued living together thereafter in the marriage relation, was not required by any consideration of law or public policy, and would have denied to him the right to a judicial final separation, which he afterwards obtained. The decision in the case referred to, is in general terms, that such contracts, merely as such, have no binding obligation which will be enforced, because public policy favors the preservation of the nuptial tie, and is opposed to any arrangement between the parties by which its resultant duties are evaded.

But the principle is, that such an agreement will not be enforced, at the instance of either party, not that what may have been done in carrying out its purpose will be undone by the Court. It will not assist, when its aid is asked, or in the words of the Court, its provisions

"will not be enforced in *this Court*"—a Court exercising equitable functions. The rule that refuses to compel the execution of such a contract, for similar reasons refuses to relieve from the consequences of what the parties have done under it, in giving it full effect.

In *York v. Merritt,* 77 N. C., 213, the plaintiff sued to recover a tract of land, which under an unlawful and corrupt agreement, had (533) been conveyed by the defendant to the plaintiff. The Court, READE, J., speaking for it, said: "When both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is *against public policy, or contra bonos mores,* the Courts will not enforce it in favor of either party." The same ruling was made when the case came up on a second appeal, 80 N. C., 285.

The rule is departed from, when one of the parties acts "under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offence." They must be in *pari delicto.* 1 Story Eq., Sec. 300; *Pinckston v. Brown,* 56 N. C., 494; *Wright v. Cain,* 93 N. C., 296.

But the jury negative the plaintiff's averment that she was induced to execute her deed to Penland, from force used by the defendant, or (as the issue was submitted in this form, and responded to in the negative), by the exercise of any undue means on his part.

And the acknowledgment in the certificate of probate, stands in this respect uncontradicted. We do not see, in the deeds themselves, whereby the husband surrenders his estate by the curtesy in one tract, and acquires the fee in another tract, such inequality and evidence of oppression and wrong, as entitles the plaintiff to the relief she now demands. She has herself committed a grievous, if not unpardonable wrong to her husband, rendering their separation inevitable, and in view of it, they parted, and did what she now seeks to undo, and that separation has been made permanent by a judgment of the Court. Under the circumstances, this Court is not called on to intervene. The judgment must be reversed and the action dismissed, and it is so ordered.

Error. Reversed.

Cited: Smith v. King, 107 N.C. 276; *Basket v. Moss,* 115 N.C. 462; *Cram v. Cram,* 116 N.C. 294; *Edwards v. Goldsboro,* 141 N.C. 72; *Ellett v. Ellett,* 157 N.C. 164; *Archbell v. Archbell,* 158 N.C. 413; *Pierce v. Cobb,* 161 N.C. 302; *Lancaster v. Lancaster,* 178 N.C. 23; *Morris v. Patterson,* 180 N.C. 486; *Moore v. Moore,* 185 N.C. 333; *Smith v. Smith,* 225 N.C. 194.

(534)

GEO. W. LAMB v. WM. H. SLOAN.

Burning Woods—Issues—Intent.

1. In an action for damages under the statute for wilfully firing the defendant's woods, by which the plaintiff's woods were burnt, (The Code, Sec. 52 and Sec. 53), the setting fire to the woods without notice, is the ground of the action, and by a waiver of the notice, the plaintiff will lose his cause of action under the statute.
2. If, in such case, the firing of the woods was necessary, as for instance, for the protection of the defendant's property, no cause of action for damages arises under the statute.
3. The waiver of notice in such case, does not affect the cause of action for the penalty prescribed in the statute, nor is it any defence in an indictment for the misdemeanor.
4. In actions for damages under the statute, the defendant cannot show that he used reasonable care in firing his woods, and reasonable diligence to prevent the fire from damaging adjoining woodlands. If he fails to give the statutory notice, and damage ensues, the cause of action is complete.
5. It is no defence to an action for damages under the statute, for the defendant to show that the plaintiff has already recovered the penalty imposed by the statute, and that in addition thereto, that he had been indicted for the misdemeanor.
6. Where the defendant in such case, admits that he set fire to his woods without giving the statutory notice, nothing else appearing, the law presumes that he did it wilfully.
7. Where it appears from the record that the issues were not eliminated in writing and submitted to the jury, but simply, "that the jury found all issues in favor of the plaintiff," a new trial will not be granted, unless objection was taken at the trial.

CIVIL ACTION, tried before *Gudger, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of BLADEN County.

The Code, Sec. 52 and Sec. 53, provides that, "No person shall set fire to any woods, except it be his own property, nor in that case, without first giving notice, in writing, to all persons owning lands adjoining to the wood lands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to (535) extinguish such fire, before it shall reach any vacant or patented lands, near to or adjoining the lands so fired."

"Every person wilfully offending against the preceding section, shall for every such offence, forfeit and pay, to any person who will sue for the same, fifty dollars, and be liable to any one injured, in an action, and shall moreover be guilty of a misdemeanor."

It is alleged in the complaint, that the defendant, at a time specified, was the owner of a tract of land, adjoining the land of the plaintiff—

that the former wilfully set fire to the woods on his own land mentioned, without first giving the plaintiff two days notice of his purpose in that respect—that the fire extended to, and spread over a large area of the plaintiff's land mentioned, burning his woods and destroying many valuable pine trees, boxed and the boxes filled, and the faces of the trees covered with raw turpentine a large quantity of valuable lightwood, and a tar kiln, to his great damage, etc.

The following is the material part of the case settled upon appeal for this Court:

"Defendant admitted that on the 10th February, 1880, he set fire to his own woods, adjoining the lands of the plaintiff, and that he had not given the plaintiff two days notice in writing of the intended burning of his said woods. He further testified that he gave directions to one of his agents, (his clerk), to employ hands to look after the fire, so as to prevent its spreading. On cross-examination, defendant offered to prove by the plaintiff, who became a witness in his own behalf, and by the records of this Court, that the plaintiff has sued for and recovered the penalty prescribed by the statute, and also that Sloan was indicted for the misdemeanor prescribed in the statute, and that the plaintiff in this case, was in said indictment, the prosecuting witness. This was overruled, and defendant excepted. The Court charged the jury, 'that the statute requires effectual care to be taken to extinguish the fire, set by one to his own woods, so that the party must extinguish it at all events, otherwise his care is ineffectual, and he must pay the (536) penalty. His best exertions to extinguish the fire will not do, and if the jury should be satisfied from the evidence, that the fire which burned the plaintiff's land, was communicated from the fire set out by defendant in his own woods, the plaintiff would be entitled to recover such actual damages as he had sustained. That the defendant must show, by a preponderance of evidence, that the means employed by him to secure or extinguish the fire, were effectual, that is, that the fire was extinguished or secured against spreading.' The defendant excepted. Verdict for plaintiff. Judgment in favor of plaintiff, and defendant appealed."

Mr. W. R. Allen, for the plaintiff.

Mr. H. R. Kornegay, for the defendant.

MERRIMON, J. (after stating the facts). The plaintiff does not seek by this action, to recover damages from the defendant on the ground that the latter so negligently and carelessly set fire to, and burned the woods on his own land, as that the fire communicated with and burned

the woods on the adjoining land of the former. It is not his purpose to obtain redress for the breach of a common law right. The action is founded upon the statute (The Code, Secs. 52, 53), set forth above.

This statute is remedial as well as penal and criminal. Its purpose is, to prevent any person from setting fire to any woods not his own; and not to his own, without first giving at least two days' notice of his purpose to the owners of adjoining woodlands, so that they may be prepared to encounter and resist successfully, possible danger to their woods and property from such fire. And if such notice shall not be given, the statute in that case, gives the party injured specially, a right of action, whereby he may recover such actual damage as he shall sustain from the fire, at all events, and without regard to whether or not the defendant was negligent or careless in setting the fire to his own woods and controlling the same. The wilful firing of the woods, without notice, in the case provided for, is made the ground of (537) this action, in favor of the party injured, and therefore it is, that he may waive the notice, and thus lose this right of action, as was decided in *Roberson v. Kirby,* 52 N. C., 477.

Hence also, if the firing were of necessity, as if it were necessary for the protection of the property of the person setting fire to his own woods, such cause of action would not arise, because the firing would not be done wilfully in the sense of the statute. *Tyson v. Roseberry,* 8 N. C., 60.

Such waiver of notice could not, however, affect the penalty incurred, or the misdemeanor committed, by a wilful violation of the statute.

These are intended to effectuate the public purpose of the statute, and no one has a right to waive notice as to them. *Wright v. Yarborough,* 4 N. C., 687; *Roberson v. Kirby, supra.*

It was not sufficient that the defendant "gave directions to one of his agents, (his clerk), to employ hands to look after the fire, so as to prevent its spreading." Having set fire to his woods, without first having given the plaintiff at least two days' notice thereof, he made himself liable for such damages as the latter sustained by the spread of the fire to and upon his adjoining woodland. Reasonable diligence on the part of the defendant in his efforts to keep the fire under control, would not relieve him from this cause of action; he made himself responsible at all events for the harm his fire did the plaintiff.

The very purpose of the statute was to give the plaintiff a right of action, in which the defendant could not defend himself successfully, by showing reasonable care and diligence on his part, in respect to the fire, as he might do, if the plaintiff had sued for a breach of his

common law right. Otherwise, the statutory right of action would be nugatory. At common law, the plaintiff could maintain an action for such injury, if the defendant could not show that he exercised reasonable care and diligence in setting fire to his woods, and in controlling the fire after it was set.

(538) The statute intended to give an additional right of action and remedy.

Accordingly it was clearly not competent for the defendant to prove that the plaintiff had sued him for, and recovered the penalty, and that he had been indicted for the misdemeanor, the plaintiff being the prosecutor, under the statute. As we have said, these were intended to effectuate its public purpose. The plaintiff could only recover in this action actual damages.

There are some cases in which the plaintiff may recover vindictive damages, and the defendant may show in mitigation of such damages, that he has been convicted and punished for the offence out of which the plaintiff's cause of action arose, but obviously, this is not such a case. *Smithwick v. Ward,* 52 N. C., 64. No question was raised as to the *wilful* purpose of the defendant. This seems to have been conceded. Indeed, as he admitted that he set fire to his woods, adjoining the lands of the plaintiff, and gave no notice in that respect, nothing else appearing, the law implied the intent.

In looking through the record, we find that the issues of fact raised by the pleadings, were not reduced to writing and set forth in the record, and the verdict of the jury is, that they "find all issues in favor of the plaintiff." This is, as we have repeatedly said, bad practice, that the Courts ought not to tolerate in any case. If the defendant had objected at the trial, on this account, it is clear that he would have been entitled to a new trial. *Bowen v. Whitaker,* 92 N. C., 367.

No error. Affirmed.

Cited: Mizzell v. Mfg. Co., 158 N.C. 269.

LYDIA PATTERSON v. J. W. WADSWORTH, ADMINISTRATOR.

Appeal from the Clerk—Removal of Administrator—Amendment.

1. Where on appeal from an order or judgment of the Clerk, the Judge rules that there is error, it is the duty of the Clerk to proceed to enter the proper judgment without any formal order directing him to do so.

2. An amendment will not be allowed, when its effect would be to evade or defeat the provisions of a statute.
3. Where an amendment was allowed, which could only be done upon affidavit, but the record is silent as to whether an affidavit was filed or not, the affidavit is presumed to have been filed, upon the ground that that which is not shown to be wrong is presumed to be right.
4. Where an application was filed to remove an administrator, and no answer having been filed, the Clerk refused the motion, and on appeal the Judge reversed the order and remanded the case, the Clerk has power to allow an answer to be filed.

APPEAL from a judgment of the Clerk, heard before *Mont-* (539) *gomery, Judge,* at August Term, 1885, of the Superior Court of ROWAN County.

This was a proceeding begun before the Clerk of the Superior Court, in the nature of a motion in the cause, by petition for the removal of John W. Wadsworth, administrator of Chauncey Bennett, deceased.

On the 17th day of April, 1885, a notice was duly served upon the defendant, citing him to appear before the said Clerk of the Superior Court, on the 27th day of April, 1885, and answer the petition of the plaintiff, and show cause why he should not be removed as such administrator. On the 27th day of April, plaintiff accordingly appeared in person and by counsel, and the defendant failed to appear either in person or by counsel, and the matter coming on to be heard upon the petition of plaintiff, there being no answer to the petition, plaintiff's counsel moved for the removal of defendant as administrator, and that his letters of administration be revoked. The motion was refused by the Clerk, and plaintiff appealed. At Spring Term, 1885, of Rowan Superior Court, the matter came up upon said appeal before *McKoy, Judge,* and after a hearing of the matter, counsel for both plaintiff and defendant being present, his Honor rendered judgment that the Clerk was in error in his ruling, and remanded the matter back to the Clerk, directing him to proceed according to law. On the 9th day of June, 1885, the matter was again heard by the Clerk, when defendant's counsel came (540) in and asked to be allowed to answer the petition, which motion was allowed and plaintiff appealed. At August Term of the Superior Court, the matter came up for hearing before *Montgomery, Judge,* and being heard, his Honor affirmed the judgment of the Clerk, allowing defendant to answer, from which judgment the plaintiff appealed to the Supreme Court.

Messrs. Lee S. Overman and E. C. Smith, for the plaintiff.
Messrs. Chas. Price and J. A. Williamson, for the defendants.

ASHE, J., (after stating the facts). When the petition in this case came on to be heard, the Clerk refused to make the order of removal, and on the appeal the Judge held there was error, and remanded the case, directing the Clerk to proceed according to law. That, after the judgment of his Honor that there was error, was his duty, without any directions from the Judge. But what was the proceeding to be pursued according to law? The effect of the ruling of his Honor, evidently was to restrict the Clerk from any other judgment in the case than that the defendant should be removed from office, if the case should remain before him, in the same state it was in when the appeal was taken. But when the case was remanded, it was then before the Clerk, as if no appeal had been taken, except that he was concluded from rendering another judgment of like import upon the petition standing alone.

On the 9th of June, 1885, the matter was again heard by the Clerk, and, upon motion of defendant's counsel, he was permitted to file an answer, to which the plaintiff excepted, and appealed. This presents the question whether there was a proceeding according to law.

"As a general rule, every Court has ample power to permit amendments in the process and pleadings of any suit pending before it. The exception in this, is when the amendment proposed would (541) evade or defeat the provisions of a statute." *Cogdell v. Exum,* 69 N. C., 464. But the plaintiff insists that the permission to the defendant to answer, was an evasion of Sec. 283 of The Code, by which Clerks were allowed to enlarge the time of pleading, upon good cause shown by affidavit.

In this case, it is stated, the permission to answer was allowed upon the motion of the defendant, but it is not stated that the motion was unsupported by an affidavit, and in the absence of any statement to the contrary, the action of the Court is presumed to be right, upon the principle that what is not shown to be wrong, must be presumed to be right.

There is no error. Let this opinion be certified to the Superior Court of Rowan County, that the case may be remanded to the Clerk of that Court, to be proceeded with according to law.

No error. Affirmed.

Cited: Avent v. Arrington, 105 N.C. 388; *Jefferson v. Bryant,* 161 N.C. 408; *Mann v. Mann,* 176 N.C. 362.

N. R. JONES v. SAMUEL P. ARRINGTON.

Taxes—Statutory Power—Statute of Limitation.

1. Where an Act allowed a sheriff to collect unpaid taxes due for preceding years, but provided that the power conferred should be exercised by a day certain, fixed in the Act, and the sheriff instituted proceedings in accordance with the terms of the Act prior to that day, but by reason of the defences put in by the taxpayer, the sheriff is entitled to exercise the statutory power, although the time limited by the Act has expired.
2. In an action by a sheriff, under authority conferred by a statute, against a landlord for certain unpaid taxes, which it was the duty of a tenant, since dead, to pay, it is competent to show by the administrator of such tenant, that he had looked over the papers of his intestate and had found no receipt for the taxes.
3. Where the taxpayer does not pay his taxes, and the sheriff is forced to advance the amount due, in order to settle his tax list, this is not a payment of the tax, as it is not an officious Act of the sheriff, and the statute of limitations does not run against the debt, when the sheriff is authorized by an Act of the Legislature to collect unpaid taxes.

CIVIL ACTION, tried before *Philips, Judge,* and a jury, at Fall (542) Term, 1885, of the Superior Court of WARREN COUNTY.

There was a verdict and judgment for the plaintiff and the defendant appealed.

Mr. R. H. Battle, for the plaintiff.

Mr. Jos. B. Batchelor, for the defendant.

SMITH, C. J. When this cause was before the Court on a former appeal, 91 N. C., 125, it was decided that the act of February 6, 1883, under the authority of which the plaintiff was proceeding in the collection of the taxes assessed during the several years mentioned, was not in violation of the Constitution. The action was begun on November 30, 1883, and is again before us upon other assigned errors.

The concluding clause of section one declares, that "the power and authority hereby granted, shall cease on the first day of January, *Anno Domini,* one thousand eight hundred and eighty four."

The defendant, before entering upon the trial of the issues, moved to dismiss the proceeding, upon the ground that the time within which it could be maintained had expired. The motion was over-ruled, and to this the plaintiff's first exception is taken.

We concur in the interpretation put upon the act, as requiring action during the limited period by personal demand upon the tax-payer, and if refused, by resort to the process pointed out. It does not mean

that the action begun, must be terminated during the year allowed. Such a construction might defeat the purpose of the act altogether, by delays which could be interposed in the progress of the proceeding, through continuous appeals, and in other ways. The case before us is an illustration. The suit, commenced in November, 1883, was carried by the defendant's appeal to the Superior Court of Warren, where a decision was rendered adverse to the plaintiff, and (543) reversed on his appeal to this Court. It was again tried at Fall Term, 1885, and is again before us on the defendant's appeal.

If the contention of the defendant be entertained, the action came to an end before it ever reached the Superior Court, by reason of the defendant's own act of removal to a higher jurisdiction. Such is not in our opinion, a fair and reasonable construction of the statute, and the plaintiff has not lost the remedy which it provides for his reimbursement of moneys which he has been compelled to pay for a delinquent tax-payer.

The cause was then submitted the jury upon two issues, which, with the response to each, are as follows:

I. Have the taxes claimed by the plaintiff been paid, or any part of them?

Answer—No.

II. Is the plaintiff's claim, or any part thereof, barred by the statute of limitations?

Answer—No.

The parties to the suit were examined, each for himself, and gave conflicting evidence upon the first issue, the plaintiff testifying that one H. J. Jones, a tenant of the defendant, occupying the assessed land, and since deceased, who had agreed with defendant to pay the taxes, had in fact paid only $103.81, while the residue now demanded had not been paid. The defendant, on the contrary, testifying that the plaintiff himself told witness about the time of the death of his tenant, that the latter had paid the taxes due on the land, as he was under covenant obligations bound to do.

II. EXCEPTION. The plaintiff then proposed to prove by one P. H. Allen, who had administered on the estate of the intestate lessee, that in examining his effects, no tax receipts for taxes from 1873, to 1881, were found. The inquiry, on objection, was allowed, and to this ruling defendant's second exception is made.

The negative evidence sought to be elicited, was in support of the plaintiff's testimony that the said taxes had not in fact been paid, and as a circumstance in that direction.

The witness answered, that he found a receipt for one bale (544) of cotton, to be applied to taxes; that this was the only tax receipt he could recollect having found; that he threw aside many papers regarded as of no value, and did not know that they were; that he thought that some of them were old receipts, but does not remember seeing any tax receipt among them; that he thinks he sent the receipt found, to one White, to be delivered to the defendant.

The defendant being recalled, stated that he had never seen such paper, but that after the plaintiff demanded the arrears of taxes, he had asked Allen to examine his intestate's papers for such receipts.

The testimony is not very significant, but it was nevertheless competent, as it might be reasonably presumed, that evidence of other payments, had such been made, would have been preserved with that in reference to the bale of cotton, as well to protect the estate from a further demand for the tax, as for a voucher in settlement with the defendant. It was not error to admit the testimony.

The Court charged the jury, that the first issue, as to the payment of the taxes, was a question of fact for them; that they must find from all the evidence whether the taxes had been paid or not. That there being no difference between the parties as to the second issue, to-wit: the bar of the statute of limitations, this became in this proceeding, a question of law for the Court, and if the jury should find that the taxes had not been paid, then the Court charged them that they were not barred by the statute of limitations, and they would so find.

The defendant's third exception, is to the ruling against the defence arising under the statute of limitations.

In view of the rulings in *The Railroad Co. v. Commissioners of Alamance,* 82 N. C., 259, the appellant's counsel does not insist upon the bar as an obstruction to the State's enforcement of unpaid taxes due to it, but argues that the plaintiff's claim is in the nature of an action for the recovery of money paid by him to the defendant's use, and cannot be prosecuted after three years from (545) such payment. This is a misconception of the legal aspect of the case. The State still demands the unpaid tax, and its collection is made through the same, and such other instrumentalities as would be employed, if the money, when received, went into the public treasury. The tax has never *been paid,* and the liability of the land therefor discharged, but the plaintiff has been obliged to *advance* the money. It is not an officious and voluntary act, but a coerced official duty performed, and none of the consequences of an unauthorized and officious payment follow. The authority is given to collect unpaid

taxes due the State and county, to reimburse its officer, who has been forced to pay them before he could collect. The matter in controversy in the appeal has been settled in previous adjudications, and we do not find it necessary to reconsider them in the present appeal. There is no error. This will be certified for further proceedings in the Court below.

No error. Affirmed.

Cited: Wilmington v. Cronly, 122 N.C. 386, 388; *Berry v. Davis,* 158 N.C. 175; *New Hanover County v. Whiteman,* 190 N.C. 333; *Hunt v. Cooper,* 194 N.C. 267, 268; *Guaranty Co. v. McGougan,* 204 N.C. 15; *Callahan v. Flack,* 205 N.C. 106; *Charlotte v. Kavanaugh,* 221 N.C. 266; *Raleigh v. Bank,* 223 N.C. 304; *Miller v. McConnell,* 226 N.C. 34.

STATE ON THE RELATION OF THE CAROLINA IRON COMPANY v. W. C. ABERNATHY, SHERIFF, ET ALS.

Corporation—Evidence—Records.

1. While regularly authenticated copies of records, and entries in the nature of records, should be used as evidence, yet the records themselves are also competent.
2. The original record of incorporation, made by the Clerk, in pursuance of the provisions of ch. 16 of The Code, in the book kept in his office for that purpose, is admissible in evidence to prove the fact of incorporation. The letters of incorporation are evidence, but not the only evidence, to prove that fact.

(546) CIVIL ACTION, tried before *Philips, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of GASTON County.

This action is brought for an alleged breach of the official bond of the defendant sheriff. It is alleged in the complaint, and denied in the answer, that the relator was and is a corporation, duly created and organized under the laws of this State, authorizing the creation of corporations for specified purposes.

On the trial, the relator "offered, in evidence of its incorporation, a book kept by the Clerk of the Superior Court of Gaston County, entitled 'Record of Incorporations,' and offered to show by the Clerk, the record in said book, of the incorporation of the relator of the plaintiff, under the general law for forming corporations as set out in The Code, ch. 16, Sec. 677, *et seq.*"

This evidence was objected to by the defendant, as being inadmissible and incompetent, upon the ground that the letters of incorporation themselves, or a certified copy thereof, was the best evidence competent and admissible to prove incorporation under the general law, contained in chapter sixteen of The Code. This objection was sustained and the evidence excluded.

The relator, in deference to the ruling of the Court, submitted to a judgment of non-suit and appealed to this Court.

Mr. R. W. Sandifer, for the plaintiff.
Mr. W. P. Bynum, for the defendant.

MERRIMON, J., (after stating the facts). The statute, (The Code, Sec. 677,) prescribes how certain business and other corporations may be created, where three or more persons shall execute articles of agreement, under their hands and seals, for the purpose prescribed, and Sec. 678, requires that such articles of agreement shall be recorded by the Clerk of the Superior Court, in a book to be kept for that purpose in his office, and marked "Record of Incorporations." Section 679 provides, that after such articles shall have been recorded, "the Clerk, under the seal of the Superior Court, shall issue letters, declaring said persons and their successors, to be, and thenceforth they shall be, a corporation, for the purpose and according to the terms (547) prescribed in said articles," etc., and Sec. 682, provides, that "all such letters, issued under the authority of this chapter, (The Code, ch. 16,) and copies thereof, certified by the Clerk of the Superior Court of the county where the same are recorded, shall in all cases be admissible in evidence, and the letters aforesaid, shall in all judicial proceedings, be deemed *prima facie* evidence of the complete organization and incorporation of the company purporting thereby to have been established."

The letters thus made evidence, are in substance and effect, the articles of agreement recorded, accompanied by the appropriate certificate of the Clerk, verified by the seal of the Superior Court. Therefore, when the letters, or a duly certified copy thereof, are not offered on the trial of an action, but the "Record of Incorporations," containing the record of such formal letters issued, is present, the latter, as to the letters, is competent as evidence, just as the letters issued, or a properly certified copy thereof, would be if introduced. The execution of the articles of agreement, the recording of the same, and the issue of the letters declaring the corporators a body corporate, are the things essential to the creation of the corporation. The statute makes these recorded things, embodied in the form of letters, under

the seal of the Court, or an authenticated copy thereof, *prima facie* evidence of the complete organization of the corporation. Surely, the record or entry itself, is as certain and effective as a copy of it. Indeed, the record itself, and the fact that a copy of it issued, constitute the substance and life of the letters, and when the statute provides that these shall be such *prima facie* evidence, it implies that the record itself shall be. When these essential things appear, that is sufficient, whether they appear in the book of records duly identified, or in a certified form.

In a somewhat analogous case, this Court held that "letters of administration do not contain matter distinct from the record. They are a mere copy of it, with the addition only of a certificate that they are a copy, verified by the seal of the Court." *Haskins v.* (548) *Miller,* 13 N. C., 360. In that case, the plaintiff insisted that the letters of administrations should be produced, but the Superior Court decided otherwise, and allowed the minute-record of the County Court, showing the appointment of the administrator, to be put in evidence to prove his appointment, qualification and authority, and this was held to be sufficient, without producing the formal letters issued.

While generally and regularly, authenticated copies of records, and entries in the nature of records, should be used as evidence instead of the records themselves, it is settled that the records are competent and are the better evidence when pertinent. *State v. Voight,* 90 N. C., 741; *State v. Hunter, post,* 829.

We are therefore of opinion, that the Court should have received the "Record of Incorporation," rejected, and it appearing from the same, that the record in question was sufficient for the purpose contemplated by it, and from it, or by other competent evidence, that a formal copy of it had been issued, that this constitutes *prima facie* evidence of the complete incorporation and organization of the corporation.

There is error. Let this opinion be certified to the Superior Court, to the end that further steps may be taken in the action according to law. *It is so ordered.*

Error. Reversed.

Cited: Marshall v. Bank, 108 N.C. 642; *Riley v. Carter,* 165 N.C. 336, 338; *Blalock v. Whisnant,* 216 N.C. 420; *Cox v. Wright,* 218 N.C. 348.

EMPIRE DRILL COMPANY v. T. J. ALLISON, SHERIFF.

Conditional Sales—Registration.

1. It is not sufficient to designate a contract by a certain name, in order to give it a particular effect. It must contain constituent elements for the purpose intended.
2. Where it appeared from the terms of a contract, that the intention was to appoint an agent to sell certain goods, although the contract is termed a conditional sale, the contract will be interpreted as making an agency, and need not be registered.

CIVIL ACTION, pending in the Superior Court of IREDELL (549) County, heard by consent, by *MacRae, Judge*, on a case agreed, at Chambers in Salisbury, on February 18th, 1886.

The plaintiffs brought this action to recover thirteen Empire Grain Drills, which they allege they had deposited with Baker & Woods, merchants in the town of Statesville, as their agents, to be sold for and on account of the plaintiffs, under and in pursuance of the agreement, whereof the following is a copy, which drills, the defendant, as sheriff, seized as the property of James B. Woods, successor in business to Baker & Woods, and refused upon demand, to surrender them to the plaintiffs:

"This agreement, made and entered into, this the 23rd day of February, 1884, by and between the Empire Drill Company, of Shortsville, Ontario County, New York, of the first part, and Baker & Woods, of Statesville, North Carolina, of the second part, witnesseth: That the said Empire Drill Company, for the consideration hereinafter mentioned, have this day bargained with the party of the second part, for the conditional sale of the following described property, viz.: Thirty Empire Drills, eight hoes eight inches, and grass seeder with hoes, each $78. To be shipped from Shortsville, New York, on or before August 15th, 1884, to be sold in the following territory, and no other, during the season of 1884; Iredell, Alexander and Wilkes counties, in North Carolina.

"1. Said party of the second part, hereby agrees, to settle with the Empire Drill Company, for all drills sold by them in Spring sales, on the 1st day of June, 1884, so far as is possible, and to make full settlements of all accounts made under this contract, on the 1st day of November, 1884.

"For all drills paid for in cash, and remitted, with exchange, to the party of the first part, on or before June the 1st., 1884, on Spring sales, and November 1st, 1884, on Fall sales, a discount of five per cent. will be given from the above prices.

"3. Party of the second part also agrees, to sell all drills for cash, or to purchasers for notes, the notes to be drawn upon banks
(550) furnished by party of the first part, and payable to their order, at some bank or express office, and endorsed by party of the second part, as follows: 'For value received, we hereby guarantee the payment of this note, and wave protest, demand and notice of non-payment thereof.' All notes to bear interest, and to mature not later than November 1st, 1885. The said party of the second part, shall be liable as guarantor, on all notes taken under this contract, whether their names be on such notes or not.

"4. If there be any drills on hand at the time of settlement, not exceeding one quarter of the whole number ordered, the party of the second part, shall pay for them in cash, or give a good approved note, due 188...., with interest from....., or shall deliver said unsold drills at the railroad depot, when notified to do so, in as good condition as when received, free from all back charges for freight, storage, taxes, insurance, etc., as the party of the first part shall elect.

"5. Said party of the second part further agrees to order of the said Empire Drill Company, as many drills in addition to the above, as the trade in the territory herein mentioned will demand, and pay for them at the same prices and terms as above, and to pay for all extras, sold at retail prices, less 25 per cent; said drills and extras to be delivered on board cars at Shortsville or Baltimore, and party of the first part to pay all freight and charges on same to Statesville.

"6. The party of the second part also agrees, that so far as possible, they will make a full and complete settlement with purchasers at the time of the delivery of the drills to them, and to leave no drill with customers, without properly adjusting it for the work intended, and not become interested in the sale of any other drills.

"7. The party of the second part also agrees, to canvass the territory personally or by deputy, and sell said drills to actual purchasers, in good faith, in the territory as mentioned above, and no other, and to forfeit commission on each and every drill sold in any other
(551) agents' territory, to the agent in whose territory said drill is sold.

"8. For full compensation for commissions, and in full payment for every duty performed as agent, the party of the second part may retain, at the settlement, from the proceeds of sales made by them in the above territory, all over the amount which the party of the first part is to receive by the terms of this contract, the said amount retained, to be in cash and notes, in the *ratio* proportionally as received from customers.

"9. It is hereby understood by and between the parties to this contract, that the title and ownership of all drills furnished by the party of the first part, shall be and remain in said Empire Drill Company, until paid for by the party of the second part, or sold for use to actual purchasers in good faith, and then all proceeds of sale of such drills, whether in cash, or notes, or accounts, are the property of said Empire Drill Company, to be remitted to them without delay, less the compensation as above mentioned. Said party of the first part shall be liable for damages, if, by reason of accident or any cause, they should not be able to fill all the orders given by the party of the second part. The party of the first part reserves to themselves the right to revoke this contract at any time, if the party of the second part shall fail to discharge any of the obligations entered into as above, or if the first party have reason to believe the second party unable to perform the same, and upon the revocation of this contract, all indebtedness of the second party shall then be due. The said Empire Drill Company further agrees to furnish the party of the second part, a reasonable amount of printed matter, free of charge, except for transportation on the same."

The following instructions are made a part of this contract. "We will not pay for any newspaper advertising unauthorized by us, neither will we pay for any printing of any kind whatsoever, except that furnished from our office. We will endeavor to ship by the cheapest route, making the freight as low as possible, but will not be responsible for any charges, neither will we agree to deliver drills at any specified rate of freights. We guarantee our goods (552) against defect in workmanship and flaws, and will replace such parts as may prove defective from these causes."

The facts of the case were agreed upon by the parties, and submitted to the Court for its decision upon them, (a jury trial having been waived), as follows:

"1. That the drills in controversy were the property of plaintiff.

2. That they were delivered to Baker & Woods, under the written agreement set out in the pleadings, and that they came into the hands of James B. Woods, as successor to said firm, he having bought out the property, and assumed the obligations of said firm, he having been a partner in said firm of Baker & Woods, and that said written agreement was not registered.

3. That they were seized by the defendant as the property of the said James B. Woods, under the executions named in the pleadings.

4. That after the seizure, and before the commencement of this action, plaintiffs demanded possession of said drills, which was refused by the defendant."

The Court, upon consideration, being of opinion that the agreement mentioned did not constitute a conditional sale, gave judgment for the plaintiffs, and the defendant appealed to this Court.

Mr. Geo. F. Klutz, for the plaintiff.
Mr. R. F. Armfield, for the defendant.

MERRIMON, J., (after stating the facts). The statute, (The Code, Sec. 1275), provides, that "all 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."

(553) Prior to the time when this statute became operative, "conditional sales" of personal property, that is, sales, whether the contract of sale was reduced to writing or not, in which it was stipulated, that although the property agreed to be sold, was placed in the possession of the bargainee, and used by him, the title to the same should not pass to him, but should remain in, and be retained by, the bargainor, until the bargainee should pay the price agreed to be paid for it, were upheld in this State, as valid against all persons claiming under the bargainee, without registration. Such sales became frequent, and a public grievance. They were the source of much fraud, and many fraudulent practices. The bargainee having possession of the property, and being the apparent owner, easily obtained credit on the faith of it, and when it became necessary to resort to it to satisfy his just debts, he would take shelter behind the bargainor, who retained the title. To cure this evil, the statute cited was passed. The bargainor really retained the title to the property so sold by him, only as a *security* for the purchase money due him for it. The Legislature, therefore, deemed it just and salutary, that he should be required to reduce the contract of sale to writing, and register the same, just as creditors are required to do, who take the lien created by chattel mortgages. *Brem v. Lockhart,* 93 N. C., 191.

The defendant insists that the agreement set forth in the complaint is, in substance and effect, a contract of conditional sale of the property in question, by the plaintiffs to Baker & Woods, therein named, and as it was not registered as the law required, the property was subject to be levied upon and sold as the property of J. B. Woods, who succeeded to the rights of the firm named. If this construction is well founded, the plaintiffs, it is conceded, cannot recover.

The agreement is not skilfully worded, nor does it set forth clearly the precise purpose of the parties to it, but, in our judgment, it

appears with reasonable certainty from its scope, tenor, several parts, and terms, that it was their purpose to constitute the firm of Baker & Woods, the agents of the plaintiffs, to sell their drills (554) within the territory specified.

The mere recital in the agreement, that the plaintiffs "bargained with the party of the second part, for the *conditional sale*" of the property mentioned, did not necessarily imply such sale. Whether there was or not, depended upon the nature and legal effect of the agreement as a whole. It is not sufficient to designate a contract by a certain name to give it a particular effect—it must contain constituent elements for the purpose intended, as well as the name—the former are essential, the name is not.

The agreement does not, in terms, purport to convey the drills to Baker and Woods. The phrase, "have bargained with the party of the second part, for the conditional sale," is awkward, and to ascertain its meaning, must be taken in connection with other provisions bearing upon it, and thus viewed, it implies sales made for the plaintiffs in the way prescribed. It is obvious, that the general purpose of the plaintiffs, was not to sell the drills to the firm, to be used by them for practical purposes, but to put them on the market within a designated territory. Hence, the drills were to be shipped to the firm "to be sold"—not to be used by them, and the absolute title was to pass to the purchaser, whether he paid cash at once, or gave his note for the purchase money. The firm were required to account to the plaintiffs for all proceeds of sales of the property, whether cash, or notes taken, and the notes were to be taken payable to the plaintiffs; and all the cash, notes and accounts were to be theirs. The firm were to receive commission as agents, in a way specified, and to account to other like agents, if they should sell drills outside of the territory designated.

It will be observed that the firm were not required to pay for the drills shipped to them "to be sold," they were only required to be guarantors of the notes they might take for the plaintiffs, and they might, in the discretion of the plaintiffs, in a contingency specified, be required to pay for a limited number of drills, but these stipulations were plainly intended to secure caution and in- (555) dustrious effort on the part of the firm, as agents.

These, and other less important provisions and stipulations, determined the character of the agreement, and show that it was intended to, and did in legal effect, constitute Baker & Woods agents of the plaintiffs to sell the drills in controversy.

The express reservation of title by the plaintiffs, in the ninth clause of the agreement, was cautionary, and intended to preclude the pos-

sible construction that a "conditional sale" to the firm was intended.

The Court properly interpreted the agreement. There is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

Cited: Millhiser v. Erdman, 98 N.C. 298; *Kornegay v. Kornegay,* 109 N.C. 190; *S. v. Caldwell,* 127 N.C. 526; *Lance v. Butler,* 135 N.C. 422; *Chemical Co. v. Edwards,* 136 N.C. 79; *Starr v. Wharton,* 177 N.C. 324; *Finance Corp. v. Hodges,* 230 N.C. 583; *Montague Bros. v. Shepherd Co.,* 231 N.C. 555.

SUSAN KING v. JOHN R. PHILLIPS.

Contract—Compromise—New Promise—Departure.

1. It requires the assent of both parties to make a contract. So, when a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such.
2. An action cannot be maintained on a new promise to pay a debt secured by a bond, while the bond is still in force.
3. Where an action is brought to enforce payment of a bond, and a new promise is relied on to rebut an alleged compromise and satisfaction, the complaint should declare on the bond, and the new promise be relied on to rebut the compromise.

CIVIL ACTION, tried before *Avery, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of LENOIR County.

On the 9th day of September, 1878, the defendant executed his note under seal to R. W. King, and therein covenanted to pay
(556) him or his order, the sum of one thousand dollars, with interest from date at the rate of eight *per centum per annum.* It bears a credit, endorsed as of January 31st, 1882, and paid in the life time of the obligee, who died leaving it among his effects in this condition, and it passed into the hands of Anthony Davis, his executor. The defendant also paid to the latter, on the 29th day of November, 1883, the further sum of nine hundred and seven dollars, which is also endorsed as a credit, and the note was then assigned and delivered to the plaintiff, the widow of the testator, as part of her share in his personal estate. The present action was instituted on March 30th, 1885, to enforce payment of the residue of the debt.

The defendant in his answer, alleges that he paid to the testator the annual interest accruing, to-wit, $104.00 during the first three years, and paid the last sum credited, $907.00, under an agreement that it was to be a full discharge of the obligation.

The plaintiff in her replication, denies the alleged payment, and says that after the transfer of the note to her by the executor, the defendant promised to pay the note, and asked one B. W. Cannady to compute and ascertain the interest due, in order that he might do so.

Issues were thereupon framed and submitted to the jury, which, with their several responses, are these:

"1. Did the defendant pay to R. W. King the interest on the note sued on, as it accrued, for the first three years after said note was executed?

"Answer—no.

"2. Did the defendant agree with Anthony Davis, executor of R. W. King, to pay all of the principal and interest, except the interest for said first three years, and in pursuance of said agreement, actually pay to said Davis $907, on the 28th day of November, 1883?

"Answer—Yes.

"3. Did the defendant, after said note was assigned to plaintiff as one of the next of kin of said R. W. King by said executor, agree with plaintiff to pay said note?

"Answer—Yes." (557)

The defendant's counsel contended, that upon the verdict, judgment should be entered against the plaintiff for costs; and that if the plaintiff be allowed to have judgment, it should be only for $312, the interest accruing during the three years, and interest on that sum from the date of the new promise, if that should be fixed, and if not, without such interest.

The Court rendered judgment for the amount appearing upon the face of the note, allowing the two endorsed credits, as payments made at their respective dates. From this judgment the defendant appealed.

Messrs. A. J. Loftin, Geo. Rountree and M. A. Gray, for the plaintiff.
Mr. W. R. Allen, for the defendant.

SMITH, C. J. (after stating the facts). It will be observed, that while the finding upon the second issue, is that the defendant, recognizing his liability, agreed to pay, and did pay, the indebtedness, except the three years interest, it is not found that the executor accepted the sum paid in satisfaction of the debt.

The verdict establishes the fact that the defendant denied any further liability on the bond, and refused to pay more than $800, the principal, with interest since the $500 payment, yet it does not find that the executor did more than receive and credit the sum which the debtor admitted and was willing to pay, and this he might well do, without compromising a right to the excess, and leaving unadjusted these differences, as to its existence and amount. The testimony of the parties to the transaction, is really not in conflict, for neither says it was done under an agreement that the payment should discharge the full obligation. The executor says, "I did not agree that the payment discharged the note, and would not surrender it. I refused to surrender the note, because after allowing the indorsed payment of $500, the payment of $907 would not discharge what appeared to be due."

(558) The defendant testifies, "I proposed to Davis that I would pay $800, with interest from the date of the $500 payment, and I claimed that only $800, the principal, was due at the date of that payment, and the interest on $800 from that time. Davis took the $907 and *entered it as a credit* on the note. * * * Davis said *I cannot give you the note,* because some back interest appears to be due."

We refer to the evidence, not that it may be considered on the appeal, but to ascertain the true meaning of the verdict upon the second issue, in the light thus shed upon it, and that it was not intended to go beyond the limits of declaring that the defendant refused to pay or recognize his liability for more, and not the assent of the executor to a settlement of the claim.

In this sense, there has been no compromise, no accord and satisfaction—for these require concurring minds. It is not "what either thought, but what both agreed," that forms contract relations between parties. *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249; *Bailey v. Rutjes,* 86 N. C., 517.

The defendant insists, that to permit a recovery upon the alleged promise to the plaintiff, which the jury find to have been made, is an unauthorized departure from the case made in the complaint, which avers the cause of action to be founded on the note, and its nonpayment.

We think there is no departure in this, and that the evidence is to repel the allegation of full payment. The debt is not barred, and still subsists to sustain the action for the recovery of what is still due. Indeed, it cannot be maintained upon a parol promise to pay a debt secured by bond, while the bond itself remains in force, and not being barred, can be sued on. *Wilson v. Murphey,* 14 N. C., 352.

The new promise is but a recognition of a continued covenant liability, and the evidence of it seems to repel the contention that a compromise was understood and intended to be brought about, under the Act of March 17th, 1875. The Code, Sec. 574.

There is no error, and the judgment rendered in the Court (559) below is affirmed, and the plaintiff will have judgment here for her debt and interest, as well as costs, against the defendant, and the sureties to his undertaking on the appeal.

No error. Affirmed.

Cited: Kerr v. Sanders, 122 N.C. 638; *Lumber Co. v. Lumber Co.,* 137 N.C. 436; *Leffel v. Hall,* 168 N.C. 409; *Potato Co. v. Jennette,* 172 N.C. 4.

JAMES NICKELSON v. WM. H. REVES.

Contract—Parol Evidence to Vary.

1. Parol evidence is not competent to engraft on a contract which has been reduced to writing, other terms and conditions, contemporaneously made, except where the contract was comprehensive, and a part of it only was reduced to writing and it was not intended to include the entire contract.
2. Where the defendant entered into a contract to make title to the plaintiff to a tract of land, described by metes and bounds, upon the payment of certain notes, and the plaintiff executed his notes to the defendant, reciting that they were for the purchase money, the defendant cannot show by parol evidence that at the time the contract was made, it was agreed by parol that the land should be surveyed, and if found to contain a larger number of acres than was supposed, that the vendee should pay an additional sum.

CIVIL ACTION, tried before *Graves, Judge,* and a jury, at August Term, 1885, of the Superior Court of STOKES County.

The parties to the action entered into an agreement for the sale of a tract of land, owned by the defendant, to the plaintiff, in pursuance of which, the latter executed his three several notes under seal, each in the sum of sixty-two dollars, and bearing date on November 7th, 1874; the first with two sureties, becoming due on the 1st day of May next ensuing; the second without surety, falling due on November 7th, 1875; the last maturing a year later, and all bearing interest at the rate of eight *per centum per annum* from date. The notes (560) all recite as their consideration, that they are parts of the pur-

chase money for the land. On the same day, the defendant entered into the following covenant with the plaintiff:

"Know all men by these presents, that I, William H. Reves, of Wilkes County, in the State of North Carolina, am bound and firmly held unto James Nickelson, of Stokes County, State aforesaid, in the sum of three hundred and seventy-two dollars, good and lawful money, to the payment of which I bind myself, my heirs and assigns, well and truly to be made, signed with my hand and seal, and dated this 7th day of November, 1874.

"The conditions of the above obligations are such, that whereas, the above bounden W. H. Reves, has this day bargained and sold unto the said James Nickelson, a certain tract or parcel of land, in the county of Stokes, on the waters of Mountain branch, adjoining the lands of Pendleton Lisk and others, and known as the Edmund Smith place, and containing by the deed, sixty acres, more or less, for the sum of one hundred and eighty-six dollars, and the said James Nickelson has executed his notes for the same, in three equal instalments, bearing even date with these presents, the first note for sixty-two dollars, and due the first day of May, 1875, on interest from date at eight per cent., the second note, for same amount, and due 7th November, 1875, on interest from date at eight per cent., and the third note, for same amount, and due on 7th November, 1876, on interest from date at same interest as above.

"Now, if the said James Nickelson, his heirs or assigns, shall well and truly pay and discharge the first note, and the interest accruing thereon, at the time of its falling due, or within thirty days thereafter, then he, the said Nickelson or assigns, to hold the possession and occupation of said land and premises, until the last note falls due, and if the said James Nickelson, his heirs or assigns, shall well and truly pay and discharge both the last notes and the interest accruing thereon, at the time of the last note falling due, or within thirty
(561) days thereafter, then the above bounden W. H. Reves, his heirs and assigns, to make, or cause to be made, unto the said James Nickelson, his heirs or assigns, a good and lawful deed of conveyance to the above described tract of land, with all its appurtenances, and the above bond to be null and void, otherwise to remain in full force and virtue, but in the event of the said Nickelson failing to pay the first note at the time specified above, or the said Reves failing to collect said note by process of law, then the said Nickelson to pay rent, at customary rates, for the year 1875, and surrender the possession of said land and premises to the said Reves or assigns, on the first day of November, 1875. In witness whereof the said W. H. Reves has hereunto set his hand and seal the day and date above written."

The plaintiff alleges that he has paid the several bonds given for the purchase money, and demanded of the defendant a conveyance of the land in execution of his contract, which being refused, the present action is prosecuted to enforce it.

The defendant, not denying the allegations contained in the complaint, resists the demand, and says: That having removed to the county of Wilkes, he caused the tract in controversy to be offered at public sale, with other tracts, upon the following terms, in substance, announced to the bidders: The purchase money to be paid in three equal installments, with interest at eight *per cent.* from date, and maturing respectively on the 7th day of May next, on the 7th day of November, 1885, and on the same day and month in the next year; and it was agreed that the purchasers, including the plaintiff, should take a title bond, and give notes for their bids, and that the sale was by the acre, and the present tract was bought by the plaintiff, at the price of three dollars per acre, with the privilege of taking his tract as containing the sixty-two acres specified in the defendant's deed, or of having a survey at his expense, and paying at that rate for the number of acres ascertained thereby to be in the tract.

The answer also avers, that after paying his first two notes, the plaintiff refused to pay the last, electing to have the survey made, under the reservation referred to; that the defendant (562) thereupon caused the tract to be surveyed, and it was found that the tract contained 69 acres, seven in excess of the number stated in the deed, whereby the plaintiff became liable to pay the further sum of twenty-one dollars for such excess, and agreed to take a conveyance of the whole land, and pay the additional amount, that plaintiff paid the remaining note, and refused to pay more, demanding a deed from the defendant therefor, that the defendant then offered to convey sixty-two acres for the money paid, or the whole sixty-nine acres, when paid the amount due for seven acres over running the first estimate of quantity, and now submits to comply with his covenant.

On the trial, (the matters set out in the answer, being denied in the plaintiff's replication), the following issue was submitted:

"Did the plaintiff and the defendant, after the execution of the title bond, and bonds for the purchase money, described in the pleadings, make a different contract and agreement as to the payment of the tract of land in controversy, as set forth in the answer?"

The jury, under the rulings of the Court, rendered a verdict in the negative. From the judgment rendered on this finding, the defendant appealed.

No counsel for the plaintiff.
Mr. C. B. Watson, for the defendant.

SMITH, C. J. (after stating the facts). The rulings complained of by the appellant, are in refusing to allow the jury to hear oral testimony to show that:

I. The plaintiff refused to pay the last maturing note without a survey, and agreed to pay for any surplus over 62 acres, should it be found, and demanded such survey, under the original conditions of sale.

II. When defendant tendered the deed, the plaintiff offered to pay for any excess over the supposed quantity, at the rate of three dollars for each acre.

(563) III. The actual survey showed such excess, and when the surveyor announced upon a rough estimate, that there were more than 62 acres in the tract, plaintiff paid his last note.

Both parties impressed upon the surveyor, the necessity of care and accuracy in his calculations, which he used, and drew the deed accordingly. The plaintiff then agreed to pay for the increased number of acres. The jury were directed to find the issue in favor of the plaintiff, and such was their verdict.

The exceptions rest upon a single proposition, the right to depart from the terms and conditions of the respective written contracts, executed by each to the other, and professing to embody their agreement, and introduce other provisions, upon parol proof of what transpired at the time; or to substitute and engraft a further and subsequent stipulation upon the bonds.

There is a class of cases, where the original agreement was comprehensive, and part of it only executed, not intended to include the whole, and the omitted part has been allowed to be proved by oral testimony. Such are the cases of *Twidy v. Saundeson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 368; *Kerchner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57.

Perhaps the recent case of *Sherrill v. Hagan,* 92 N. C., 345, affords as much support to the contention of the appellant, as any other of the adjudications of this Court; but a brief analysis will show that it does not furnish a precedent.

There, the vendor made a deed for the land contracted to be sold, and which he represented to contain as much as 350 acres, at the same time agreeing with the vendee, that in case the land did not contain as many acres, he would refund, to the extent of the deficiency, at the rate of $5.71¾ per acre. It was held, that this was a separate contract, not embraced, nor intended to be embraced, in the deed,

nor required to be in writing, and as such, could be enforced. It is not essentially different from the case of *Manning v. Jones, supra,* and rests upon the same general principle. It is an inexorable rule in the law of evidence, that the terms of a written contract, cannot be changed or modified by any contemporary parol agree- (564) ment or understanding, so as to make it different from what it professes on its face to be.

It is effective upon a just and reasonable interpretation of its own terms, and this for the reason, that the writing is presumed to embody all the stipulations by which the parties intend to be bound.

The subject has been considered in *Ray v. Blackwell, ante,* 10, to which we add a few references to cases of recent date. *Etheridge v. Palin,* 72 N. C., 213; *Wilson v. Sandifer,* 76 N. C., 347.

In the present case, the plaintiff covenants in his bonds, to pay a definite sum for the land, while the defendant, with equal explicitness, binds himself to make the deed, on payment of the plaintiff's notes for that specified purchase money. The bonds profess to contain the contracts of the parties with each other, as expressed in sealed instruments, and the appellant proposed to engraft upon them other terms, and thus modify and change their effect. Testimony of this kind was ruled out, as inadmissible for any such purpose.

It is not a case where the writing, as a deed or note, is in partial performance of an antecedent agreement, accepted as a partial execution only, and leaving in full force the unexecuted part.

There is no error in the ruling, and the judgment must be affirmed. It is so ordered.

No error. Affirmed.

Cited: Parker v. Morrill, 98 N.C. 235; *Meekins v. Newberry,* 101 N.C. 19; *Bank v. Moore,* 138 N.C. 532; *Faust v. Rohr,* 167 N.C. 361.

JOHN W. WILEY v. GEORGE W. LOGAN.

Excusable Negligence—Printing Record.

1. The spirit and equity of Sec. 274 of The Code, apply to the Supreme Court, and same relief will be administered here as in the Superior Court, upon a proper case.
2. There is a well recognized distinction between the negligence of a party and that of his attorney. The omission of an attorney, retained in a cause, to perform his duty, makes a case of excusable negligence for his client.

3. The rule that the negligence of an attorney will not be visited on his client, applies with greater force to appeals in the Supreme Court than to actions in the Courts below, because the client is not required to give his personal attention to his appeal in the Supreme Court.

4. So where an appellant employed counsel to attend to his appeal, who failed to have the record printed, and the case was dismissed, *It was held* excusable negligence on the part of the appellant, and his appeal would be reinstated.

(565) MOTION by the plaintiff to reinstate an appeal on the docket of this Court, heard at February Term, 1886, of the SUPREME COURT.

The appeal was dismissed at the last Term, because the record had not been printed.

The petitioner represents that a judgment was rendered against him in favor of defendant, at the October Term, 1885, of Mecklenburg Superior Court, from which he took an appeal to this Court, and all the necessary steps, under the law and rules of this Court, were taken to perfect the same, and it was duly docketed in this Court.

That he was a plain farmer, and knew nothing about the rules requiring the record to be printed. That he employed a lawyer who practiced in this Court to represent his interest on the appeal, and was promised by him that he would do so; that he fully supposed if anything more was to be done, than what had been done, or should be required, that his counsel would notify him of the same; and the petitioner further states, that had he been notified of any rule requiring the record to be printed, he would promptly have caused the same to be done. But he never received such notice, and was greatly surprised when he learned from reading the certificate sent down to the Superior Court, that his appeal had been dismissed on
(566) account of the failure to have the record printed. He further represents, that he is advised and believes, that he has meritorious grounds of appeal, and he now avers his willingness and ability to comply with the rule of this Court in this behalf. Wherefore he prays that his appeal be reinstated upon the docket of this Court.

Messrs. R. H. Battle and Samuel F. Mordecai, for the plaintiff.
Mr. W. P. Bynum, for the defendant.

ASHE, J. (after stating the facts). It is held that the spirit and equity of the provisions of Sec. 133 C. C. P., The Code, Sec. 274, extend to this Court, and the same relief will be administered in like

cases in this Court, as in the Superior Court. *Wade v. City of New Bern,* 73 N. C., 318; *Horne v. Horne,* 75 N. C., 101. The question then is, do the facts set forth in the petition, constitute such a case as would entitle the petitioner to relief in the Superior Court.

This Court, in several cases, has recognized a distinction between the negligence of an attorney and that of the party to the action. In the former case, it has been held that the omission of an attorney, retained as counsel in a cause, to perform his duty as such in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated. This interpretation was first given to this section of The Code, in the case of *Griel v. Vernon,* 65 N. C., 75. In that case, the party retained an attorney to enter a plea for him, which the attorney neglected to do, and it was held that the omission of the attorney to perform an engagement to do such an act as that, was a surprise on the client; and this case was followed by the cases of *Bradford v. Coit,* 77 N. C., 62; *Mebane v. Mebane,* 80 N. C., 34; *Wynne v. Prairie,* 86 N. C., 73, where the above cited cases are reviewed and approved—and in the more recent case of *Ellington v. Wicker,* 87 N. C., 14, in which the same distinction is recognized, and the case of *Wynne v. Prairie,* referred to with approval.

If the neglect of an attorney in the Superior Court will excuse (567) a party, much more should it have that effect in the Supreme Court, for the parties to an action in the Superior Court, are required to be present in Court, and give their attention to their action; but the parties to an appeal in this Court, are not required to be present, and, in fact, are rarely ever present. The entire management of the case after the appeal is taken, is necessarily entrusted to the counsel employed. He is expected to perform all the duties devolving by law upon an attorney in the management of the cause, and if in the progress of the cause, necessity for the personal attention of his client should arise, it is his duty to communicate the fact to him, and his omission in this respect, should not be imputed to his client as inexcusable negligence. Here, the petitioner was a plain farmer, living at a distance from Raleigh. He had taken the pains to have his appeal perfected, and employed a gentleman of the bar, of high standing in his profession, who was in the habit of attending this Court, and his attorney had promised him that he would attend to his interest in this Court; but his attorney for some reason, failed to attend the Court, and his appeal was dismissed for the want of printing the record, under a rule of this Court which he had never heard of before.

We think these facts constitute a case of excusable negligence, and his appeal ought to be reinstated, and it is so ordered.

Motion allowed.

Cited: Bowen v. Fox, 99 N.C. 129; *Griffin v. Nelson,* 106 N.C. 238; *Gaylord v. Berry,* 169 N.C. 736; *Schiele v. Ins. Co.,* 171 N.C. 431.

RICHMOND PEARSON, EXTR., ET ALS. v. SAMUEL M. CARR.

Mortgagor—Vendor and Vendee—Contract.

Where a mortgagor sold a portion of the mortgaged land, and assigned the bonds given for the purchase money to the mortgagee, who had actual notice of the transaction, and who afterwards acquired title to the land, *it was held,* that the mortgagee could not collect the bonds, and at the same time deny the power to the mortgagor to make the sale.

(568) CIVIL ACTION, heard upon exceptions to the report of a referee, by *Graves, Judge,* at Spring Term, 1884, of the Superior Court of BUNCOMBE County.

The facts are as follows:

N. W. Woodfin became indebted to Richmond M. Pearson, in two several notes, whereof the principal money, in the aggregate, was three thousand eight hundred and sixty-four dollars and ninety-two cents, and to secure the same, on February 2nd, 1867, conveyed to him, by deed of mortgage, a large tract of land in Buncombe County, consisting of several hundred acres, with condition of avoidance, if the indebtedness should be paid before March 4th, 1868. Woodfin retained possession, and on November 25th, 1871, entered into personal covenant relations with the defendant, whereby he sold to the defendant a part of the tract, supposed to contain fifty acres, for the price of eight hundred dollars, of which two hundred were to be paid, and were paid, before the twenty-fifth day of the next month, and notes in equal sums given for the residue, to mature at one and two years, and stipulated to make title when they were paid. These notes were assigned to the said Richmond M. Pearson by Woodfin, on the 25th day of January, 1873, and on the same day, the latter received, for his assignee, the sum of two hundred dollars, which was entered as a credit on the last note.

Another note of the defendant, for one hundred dollars, executed to one Peter Fore, was also endorsed to said Richmond M., and became his property, before it became due.

The land embraced in the mortgage, under a decree of foreclosure, made in an action prosecuted in the Superior Court of Buncombe County, for that purpose, was sold on July 9th, 1872, and purchased by the mortgagee, through an agent, for four thousand four hundred and six dollars and seventy-three cents, and the title conveyed accordingly.

The present action was commenced on April 6th, 1874, for the recovery of the amount due on the two notes transferred by Woodfin, as set out in the first complaint, and as set out in an amendment thereto, both filed at the return Term of the summons, (569) for the recovery of the note assigned by the said Fore.

The record contains a further amended complaint, filed by the plaintiff's attorneys, and with their firm signature, McLoud & Pulliam, at Fall Term, 1875, wherein it is in substance alleged, that the plaintiff, previous to the 25th day of November, 1871, was, and still is, the owner of the land described in the contract of that date, made by Woodfin with the defendant; that it was entered into by Woodfin, as his agent, and the notes were executed to him, acting in such capacity; that the notes, excepting the sum of two hundred dollars, paid at the time of the delivery to plaintiff, remained due for the full amount; that the plaintiff has always been, and still is, "ready, able and willing" to perform the agreement on his part "on payment of the remainder of said purchase money, with interest, to convey to the defendant the premises aforesaid." The demand is for judgment:

I. That defendant perform said agreement, and pay the residue of the purchase money, and

II. That if the defendant will not accept the conveyance, and pay what he owes, the premises to be sold, and the proceeds of sale applied in discharge of indebtedness, and for costs.

At the end of the complaint is the following entry, after stating the style of the cause:

"Amended complaint, filed Fall Term, 1875, Buncombe Sup'r Ct., *nol. pros.*, June 25th, 1883, offered as evidence by C. A. Moore for defendant."

The defendant answered, admitting the execution of the three notes, and avering that four hundred dollars had been paid of the purchase money, and all of the note given to Fore discharged, and declaring his readiness to comply with the covenant and contract obligations assumed in the purchase of the land.

At August Term, 1881, the defendant, with leave of the Court, amended his answer, and set up a claim for damages, and for use and occupation after the plaintiff's re-entry and resumption of possession,

to which a replication was put in, denying the charges, and
(570) asserting similar claims against the defendant. The replication was withdrawn, pending the reference, in June, 1883, and the defendant amended his answer before the referee, wherein, repeating the averments of the plaintiff in that behalf, he demands a specific execution of the contract for the sale of the land bought by him from Woodfin, declaring his readiness and ability to comply with its terms.

At Spring Term, 1882, the plaintiff's death having occurred more than four years before, his executor, Richmond Pearson, was admitted a plaintiff in his stead, and the defendant allowed further to amend his last answer, by an allegation of the proof and registration of the contract. A year later, Peter Fore was allowed to come in and interplead. In June, 1883, the substituted plaintiff put in a replication to the answer, which set up a counter claim, and insisted on an enforcement of the contract as made, on behalf of the deceased, and controverting other allegations of the defendant. This bears the signature of the other attorneys, to-wit: of F. A. Sondly and J. H. Merrimon.

The cause was referred, after a consent order, by which the heirs-at-law of the deceased testator, *nominatim*, are introduced into the cause as associate plaintiffs, and the former referee displaced by the appointment of another, who is directed "to take and state the testimony and the facts, as found by him, and his conclusions of law thereon," and make report. The reference is of "all the issues arising upon the pleadings," and the order is signed by counsel of each party, and also by the presiding Judge. The referee proceeded, in the execution of the order, to take the evidence, which, with his findings both of fact and law, was reported to the Court. We reproduce so much (and this in a summary way), as pertain to the controversy, and the points presented in the appeal.

The contract with Woodfin was personal, and he acted under no authority from the testator in making it. The two notes were assigned in a settlement between them, in January, 1873, the assignee having
notice, conveyed in the indorsement, that they were given for
(571) the tract of land sold to the defendant, and of Woodfin's inability to make title.

Carr bought in good faith, and in the belief that Woodfin could convey the estate, except so far as he is affected with constructive information of the mortgage, by reason of its registration. There was no communication between the testator and the defendant, in reference to the transaction with Woodfin. The firm of A. T. & T. F. Davidson, as attorneys, were employed by the deceased, but were not

retained by his executor, and the replication to the answer put in by them, was unauthorized and without the sanction of the executor. It was withdrawn on the hearing before the referee. This pleading asserts an abandonment by the defendant of his contract with Woodfin on his removal from the State, and a surrender of the premises, with other averments as to damages, use and the like.

The amended complaint of Fall Term, 1875, demanding specific performance of the contract, as made in the interest of the testator, and as to which the *nol. pros.* was entered, was prepared and put in under a misapprehension of facts, "in relation to the contract between Woodfin and Carr, as well in respect to the persons between whom the contract was made, as in respect to the amount which Carr was to pay for the land."

The plaintiffs have failed to tender a conveyance of title, according to the terms of the contract with Woodfin, as has the defendant, to pay or offer to pay, what is still due from him therefor.

The referee rules as conclusions of law:

I. The plaintiff is not entitled to judgment upon the two notes of November 25th, 1871.

II. He is entitled to judgment upon the Fore note, with interest, subject to a counter-claim for permanent improvements.

III. The plaintiffs should be allowed the sum of $105 and six years' interest, $37.80—the value of the rents and profits accruing during the defendant's possession, after the testator acquired title under the judicial sale.

IV. The defendant should be allowed $131 and six years' (572) interest, $47.16, for permanent improvements put on the land in good faith, and in the expectation that Woodfin could and would comply with his stipulation.

V. The defendant is not entitled to judgment for specific performance against the plaintiffs.

VI. The plaintiffs should have judgment for $123.39, with interest, that being the difference between the opposing claims of the parties, with interest computed to July 25th, 1883, and the cost of the action.

The defendant files numerous exceptions to the report, of which, upon his appeal, it is necessary to notice only such as involve matters of law or legal inference, since the others are settled by the action of the Court. These exceptions were all sustained, except those numbered 9 and 10, which were overruled, and judgment rendered as follows:

I. That the plaintiff executor recover $330, the residue of the purchase money due for the land.

II. That the plaintiffs, heirs-at-law of the testator Richmond M. Pearson, execute to the defendant, a good and sufficient deed to pass an estate in fee in the land described in the contract and pleadings, and after probate, deposit the same with the clerk to be delivered to the defendant, upon his payment of what he still owes of the purchase money, as herein declared.

It is further adjudged and decreed, that the defendant have ninety days from the rising of this Court, to pay the said purchase money into the office of the Clerk of this Court, for said Richmond Pearson, executor of R. M. Pearson, deceased, and if at the expiration of said ninety days, the purchase money be not paid as aforesaid, that then the said lands be sold, by and under the direction of W. R. Young, a commissioner hereby appointed for that purpose, at the court house door in said county, at public auction, for cash, after giving notice of the time and place of such sale, as required by law of Sheriff's selling land under execution, and that he forthwith report said sale to this Court for confirmation.

(573) It is further adjudged, that after said sale has been duly confirmed by this Court, the said W. R. Young make a good and sufficient deed in fee of said lands to the purchaser or purchasers.

It is further adjudged, that there be deducted from the proceeds of said sale, the sum remaining due for the purchase money of the land, and that the balance be paid to the defendant S. M. Carr, or to his attorneys of record in this cause.

It is further adjudged, that the plaintiff, Richmond Pearson, executor of R. M. Pearson, have and recover of the defendant the sum of one hundred and sixty-four dollars and twenty-five cents, the amount of the Carr note, with interest upon one hundred dollars from July 25th, 1884, until paid.

It is further adjudged, that the defendant pay the costs of this action, to be taxed by the Clerk.

From so much of this judgment as refuses to allow the plaintiff to recover upon the amount of the notes to Woodfin; and as denies the plaintiff the right to enter a *nol. pros.* to the amended complaint; and that seeks a specific execution of the contract, and admits the defendant's counter-claim for its enforcement, the plaintiffs appeal.

Mr. Jos. B. Batchelor, for the plaintiffs.
Mr. C. A. Moore, for the defendant.

SMITH, C. J. (after stating the facts). The testator having accepted the transfer of the notes, with full knowledge of the purposes for which they were given, and having by his acquirement of title to the

land, the means of giving the contract full effect, ought not to be allowed to collect the moneys due, as the vendee, as he proposes to do. The contract, though in form made with Woodfin, is recognized in the complaint, filed in the testator's lifetime, and more than two years before his death, as in truth made with himself through Woodfin's agency, and the Court declare, in opposition to the finding of the referee, that it "was not filed under a misapprehension of facts," so that whether the *nol. pros.* was rightly allowed by (574) the referee or not, it remains in the record, as a positive admission of the testator's equitable liability to the defendant, for the agent's undertaking.

Moreover it was a concession to the defendants' counter-claim to have title made to him on his payment in full of the ascertained residue of the purchase money.

The referee's statement of the accounts between the parties, in reference to other matters in controversy, is sustained by the Court, and they are embodied in the final judgment. This is conclusive of the facts, and we discover no error in law therein.

The cause from its inception and during its progress, has undergone many modifications, until it found repose in a general reference. The investigations of the referee have been careful, painstaking and thorough, and the results conveyed in his report. Under the correcting hands of the revising court, his errors have been rectified, and in our opinion substantial justice is meted out in the final judgment of the court, and of this the plaintiffs have no just grounds for complaint. It must therefore be affirmed.

No error. Affirmed.

DEFENDANT'S APPEAL.

This was the defendant's appeal in the foregoing case, and the facts are the same.

Mr. Jos. B. Batchelor, for the plaintiffs.

Mr. C. A. Moore, for the defendant.

SMITH, C. J. What has been said in disposing of the plaintiffs' appeal, renders unnecessary any extended consideration of that taken by the defendant. His exceptions, except two, are sustained by the Court, and these two are untenable. The rights of the (575)

parties are in our opinion, properly ascertained and determined in the ruling of the Court, and in the final judgment that he have the land, on full payment, and that it be sold to make such payment, if it becomes necessary by his default.

There is no error, and the judgment is affirmed.

No error. Affirmed.

JOHN BURGESS ET ALS. v. E. J. KIRBY ET ALS.

Judgment—Irregular—Motion in the Cause.

1. When an action has been heard upon its merits, and nothing remains to be done but to give judgment, unless one of the parties suggests good ground for delay, it is the duty of the Court to render a final judgment.
2. So where, in an action brought to recover land, after the verdict was rendered, the Court refused to sign judgment, and ordered the action to be continued, in order that the plaintiff might move to have a judgment affecting the land, rendered by another Court, set aside: *It was held* to be error.
3. In such case, the Court has the power, on application of the plaintiff, to continue the case for this purpose, but it cannot do so, against the wishes of both parties, of its own motion.
4. A judgment cannot be collaterally attacked for irregularity, except for such as renders it absolutely void. The proper remedy to correct an irregularity, when it does not render the judgment void, is by a motion in the cause.
5. Where it is sought to attack a judgment for fraud, if the action is not determined, it must be done by a petition in the action, but if the action has been determined, it must be done by an independent action.
6. Where it appears in the record that all the defendants were served, and it does not appear that any of them were infants, the judgment is, on its face, regular, and if any of the defendants wish to set up infancy, it must be done by a motion in the cause, to set the judgment aside for irregularity.
7. Where land is sold under a decree of Court, all parties to the decree are bound by it, and cannot attack it collaterally, unless it is void on its face.

(576) CIVIL ACTION, tried before *Gilmer, Judge*, and a jury, at January Special Term, 1886, of the Superior Court of DURHAM County.

The substance of this case, as presented by the record, is this: The plaintiffs allege, that George W. Trice, now deceased, in his lifetime, executed and delivered to the plaintiffs Martha Burgess formerly, and at the time of such delivery, Williams, and Joseph J. Williams,

her son, a deed, whereby he conveyed to them the tract of land described in the complaint, which deed not having been registered, was lost. This action was brought against the heirs-at-law and the administrator of the said Trice, to compel the heirs to execute and deliver to the plaintiffs last mentioned, a proper deed, in place of that lost. The defendants mentioned made no defence.

In the course of the action, the other defendants, upon their application to the Court, suggesting that they had an interest in it, were made parties, and allowed to plead. In their answer, they allege that the said administrator brought his Special Proceeding in the Superior Court of the county of Wake, to sell the land in question to make assets to pay debts of his intestate—that therein a decree was duly entered, directing a sale of the land—that a sale thereof was made, and they became the purchasers—that this sale was reported to, and confirmed by the Court, and title to the land was duly made to them. They further allege, that the plaintiffs have no interest whatever in the land, and that moreover, they were proper parties defendant in the Special Proceeding mentioned, and are bound by the orders and decrees therein, and estopped from setting up any claim to the land.

The plaintiffs admit the Special Proceeding mentioned, and the sale of the land in pursuance of a decree therein made, and the purchase thereof by the defendants last mentioned; but they allege that the Court did not, in that behalf, obtain or have jurisdiction of the plaintiffs, Martha Burgess,—then Williams, and Joseph J. Williams; that the latter was an infant, under twenty one years of age, pending that proceeding, and had no general guardian; that (577) no guardian *ad litem* was appointed for him, nor was summons duly served upon him. They further allege that the Special Proceeding and the decrees and orders therein, were irregular and invalid, and demand that they be "vacated and set aside," and that the purchasers of the land be declared trustees for them, etc.

On the trial, the jury found in response to issues submitted to them, that the said Trice did execute and deliver to the plaintiffs, Martha and Joseph J. Williams, a deed for the land in question, as alleged; that this deed, not having been registered, was lost; that the plaintiff Joseph J. Williams became twenty one years of age on the 3rd day of January, 1884, after the termination of the Special Proceeding mentioned; and that at the sale, the purchasers of the land had notice of the claim of the plaintiffs under the lost deed mentioned.

The plaintiffs put in evidence on the trial, a transcript of the record of the Special Proceeding mentioned, from which it appeared that a summons was issued in the proceeding against the plaintiff's, Martha,

and Joseph J. Williams, and the same was served upon them by the sheriff and return thereof made. The said Joseph J. was not described in the summons, or in any part of the record, as an infant.

It appears that the Court, "being of opinion that he could render no judgment in the premises, declaring the judgment of the Superior Court of Wake County to have been irregularly rendered, and that the same should be set aside; declined to render any judgment, but continued the cause until the plaintiffs should take the proper steps in Wake Superior Court to have said judgment declared irregular and set aside." To which ruling both parties, plaintiffs and defendants, excepted, and appealed to this Court. This is the plaintiffs' appeal.

Mr. John W. Graham, for the plaintiffs.
Messrs. R. H. Battle and Thos. M. Argo, for the defendants.

(578) MERRIMON, J. (after stating the facts). The whole case had been heard upon the merits, preparatory to final judgment. Nothing remained to be done to that end, and both the plaintiffs and defendants insisted that the judgment of the law should be entered by the Court, the former contending that it should be as proposed by them, and the latter as by them. The Court, however, declined to grant any judgment, but made an order staying further proceedings in the action, until the plaintiffs "should take proper steps in Wake Superior Court to have said judgment, (that in the Special Proceeding mentioned), declared irregular and set aside." The plaintiffs did not ask for such stay—indeed they did not desire it, and plainly intimated that they did not deem it necessary, and would not take steps in a different tribunal, as suggested by the Court. If the plaintiffs had asked for such stay, it may be that the Court, in its discretion, could have granted it, but it seems to us very clear, that as neither party desired it, but on the contrary, insisted upon judgment, the Court ought to have granted it. When the case has been heard upon its merits, and nothing remains to be done but to give judgment, it is the duty of the Court to proceed at once to grant and enter it, neither party suggesting good cause for delay, unless the Court should desire to take time for further consideration.

A chief purpose of an action is to obtain the judgment of the law, in respect to the matter in litigation, and when the parties have pleaded, and have been fully heard according to the course of the Court, the party entitled, has the right to have it granted and it is error to refuse it—both parties insisting upon judgment—to enable one of the parties to take some action in another judicial tribunal, or elsewhere, suggested by the Court, not necessary to the final judgment,

and especially is this so when that party signifies his purpose not to take such action. The Court can, in the exercise of its discretion, continue the case for a proper cause, of which it is the exclusive judge, but it ought not to do so for one not pertinent to, but beside, the action.

No doubt the Court might, in the course of the action, at the (579) instance of the parties, or one of them, or in some cases, *ex mero motu,* direct the proceeding to be stayed, until something shall be done by the parties or one of them, or by some one, under the direction of the Court, necessary to a final judgment; but this power would be subject to the right of the plaintiff, in a proper case, to have a judgment of non-suit, or his action dismissed.

But it does not follow from what we have said, that the plaintiffs were entitled to the judgment demanded by them. The Court properly suggested that it could not declare the judgment in the special proceeding mentioned irregular, and set it aside. That judgment could not be attacked collaterally for such irregularity in it, or in the proceeding leading to it, as did not render it absolutely void. If it was merely voidable for irregularity, the proper remedy was a motion in the proceeding itself to set it aside for such cause. It could not be done in another proceeding or action in the same or a different Court. *Keaton v. Banks,* 32 N. C., 381; *Vick v. Pope,* 81 N. C., 22; *Williamson v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 466. It would be otherwise if the judgment should be attacked for fraud. In that case, if the action were not determined, the judgment might be attacked for such cause by a proper petition in the action, but otherwise it could only be done by another and independent action. *Peterson v. Van,* 83 N. C., 118; *England v. Garner,* 84 N. C., 212; *Williamson v. Hartman, supra.*

It is true, that a judgment absolutely void, may be so treated and disregarded whenever and wherever it may come in question; but the judgment in the Special Proceeding under consideration was not void; upon the face of the record, it was regular and valid. At most, it was only voidable for irregularity not apparent. It does not appear from the record that the plaintiff Joseph J. Williams was an infant. On the contrary, he and his mother, the plaintiff Martha, were made parties to the proceedings by the service of a summons, and if he was an infant, that fact did not render the judgment void. (580) It would, for that cause, be only voidable, and might be set aside by a proper motion in the proceeding. *Turner v. Douglass,* 72 N. C., 127; *England v. Garner,* 90 N. C., 197, and cases there cited.

The plaintiffs Martha and Joseph J., were parties, as appears, to the special proceeding mentioned, and bound by the decree therein.

The land in question was sold in pursuance of that decree, and the contending defendants claim title under it. The plaintiffs are, therefore, estopped by the record to deny the title of the defendants to the land. They had opportunity in the proceeding to allege and establish their right to the land by virtue of the alleged lost deed, or otherwise. They were made parties to the end they might do so, and as they did not, they are now estopped to claim title, while the record stands unimpeached by a proper proceeding. *Gay v. Stancill,* 92 N. C., 455.

It is said that, nevertheless the parties plaintiffs last mentioned, have the right to have the alleged lost deed re-executed to them. Wherefore? If the lost deed was found, or its place supplied by another, it could not enable the plaintiffs to assert title to the land under it, in the face of the record in the Special Proceeding mentioned. So far as appears from any allegation in the complaint, they have no longer the slightest interest in it, and the Court will not do a vain and nugatory thing. If the plaintiffs had alleged and proven some right they could assert by, or a benefit they could derive from, the deed they seek to have re-executed, it might be otherwise.

The purpose of this action is not to attack the judgment in the Special Proceeding for fraud. Fraud is neither alleged nor proven.

So that, as the plaintiffs refused to act upon the suggestion of the Court, it ought to have given judgment dismissing the plaintiff's action, without prejudice to their right to move to set aside the judgment in the special proceeding, and if that shall be done, then to take steps to have the lost deed reëxecuted, and to assert any right they might have by virtue of it.

(581) There is error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Neville v. Pope, 95 N.C. 350; *Morris v. White,* 96 N.C. 93; *Brittain v. Mull,* 99 N.C. 492; *McLaurin v. McLaurin,* 106 N.C. 334; *Earp v. Minton,* 138 N.C. 204; *Hargrove v. Wilson,* 148 N.C. 441; *Pinnell v. Burroughs,* 168 N.C. 320; *Starnes v. Thompson,* 173 N.C. 468; *Clark v. Homes,* 189 N.C. 707, 708.

JOHN ATKINS v. S. W. WITHERS AND WIFE.

Fraud and Undue Influence—Confidential Relations.

1. There is a clear distinction between transactions between persons standing in fiduciary relations to each other, and those between persons bearing no such relation. In the first case, the law presumes fraud, and the burden is on the party denying it to rebut it. In the other case, he who alleges fraud must prove it.
2. The presumption of fraud in dealings between persons standing in fiduciary relations arises, not because the Court can see that there is, but because there may be fraud.
3. The fiduciary relations from which the law presumes fraud are, executors and administrators, guardian and ward, trustees and *cestui que trust*, principal and agent, mortgagor and mortgagee, brokers, factors, etc., attorney and client, and husband and wife.
4. The relations subsisting between parties who have agreed to marry are not such as to raise a presumption of fraud in dealings between them.

CIVIL ACTION, tried before *Avery, Judge*, and a jury, at Spring Term, 1885, of the Superior Court of HARNETT County.

This action was upon a bond for payment of a sum of money, made by the *feme* defendant, then Virginia McNeill, since married to S. W. Withers, of the following tenor:

$259.77.

One day after date, I promise to pay Dr. J. W. Atkins, or order, two hundred and fifty-nine 77/100 dollars, for value received for the purchase money for a tract of land, known as the West land, for a full description, see deed made from said Atkins to me, the above amount to bear interest from date of deed, 23d February, 1876.

This the 22d February, 1878.

(Signed) VIRGINIA MCNEILL, [Seal].

Witness: H. C. MCNEILL.

The execution of the bond was not denied—the defence relied (582) on was, that the execution was procured through fraud and undue influence exercised by plaintiff over the *feme* defendant.

Issues were framed and passed upon by the jury, which, with the responses thereto, were as follows:

1st. Is the land described in the bond sued on as the "West land," the same as the land described in the deed executed by John West to Neill McNeill on the 8th day of August, 1828?

Answer—Yes.

2d. Was the execution of the bond sued on procured by fraud or undue influence on the part of the plaintiff?

Answer—No.

After reading the bond in evidence, with the credit endorsed of $20.24 on 9th of June, 1880, the plaintiff next read in evidence, for the purpose of establishing the consideration, a deed from himself to the *feme* defendant, then Virginia McNeill, for 148 acres of land in Harnett County, dated 23d February, 1876, the consideration expressed being $259.77. And for the purpose of identification of the land as the "West land," he read in evidence a deed for 148 acres of land in Harnett County (then Cumberland), dated 8th August, 1828, made by John West to Neill McNeill, the father of A. S. McNeill, also a deed from A. S. McNeill, father of *feme* defendant Virginia, to plaintiff Dr. J. W. Atkins, dated 10th February, 1876, for this same land, the wife of A. S. McNeill joining in the conveyance—all proved and registered.

It was in evidence, that this land fell to A. S. McNeill in the division of his deceased father's estate, that it was known as the "West land," and was in his possession when he and his wife made the deed to plaintiff, and was then worth $450.

The plaintiff also read in evidence two judgments in his favor, in a justice's court, against A. S. McNeill, and docketed in the Superior Court of Harnett, as follows:

(1) One judgment for $88.77, with interest from 1st February, 1876.

(583) (2) One judgment for $171.00, with interest from 1st February, 1876.

Aggregating $259.77.

To such judgment was appended a memorandum on the Docket, "Satisfied by deed to West land."

(Signed) J. W. ATKINS.

Mrs. M. V. McNeill testified: That she was the widow and administratrix of A. S. McNeill, who died in September, 1876, and that she found this original bond among his valuable papers after his death. That Dr. Atkins inquired if she had found such a note, and asked to see it. That she got it, and handed it to him, and he put it in his pocket. She inquired of him what he intended to do with it. He said he would arrange the note, so as it would give her no further trouble. That she looked upon plaintiff as her very best friend. That he advised her husband about his business during his last illness, and advised her about her business after her husband's death, and about her business as administratrix. That she got the note back from Dr.

Atkins again afterwards. Did not remember at what time. Witness had seen the note sued on before. Made the payment credited on the note. Defendant Virginia did not direct her to make the payment.

Mrs. Virginia Withers testified: That she is one of the defendants. Was Virginia McNeill. That she and her father, A. S. McNeill, signed the note read in evidence by defendant. That she did so under his instructions, in February, 1876, and had not seen it again until today. That she also signed the note in suit. Her brother, H. C. McNeill, brought it to her in Johnston County. That she got the deed from Dr. Atkins to herself when she signed the original note, and received no consideration for giving the second note.

H. C. McNeill testified: That he had seen the note in suit before. That he received it from plaintiff, unsigned, upon occasion of a visit to Johnston County, where his sister was keeping school. Dr. Atkins told him to take it down to her, and get her to sign it, and it would relieve my father's estate from the note he had signed. (584) I did so, and returned the note to him, signed by her. Dr. Atkins stated that in consequence of some debt father owed him, that father had made him a deed. Also, that he never expected to push Virginia for the note. That father's estate was threatened with a great many suits. That she had better make a new note, making the land responsible, and leave his name off, and he, Dr. Atkins, would hold the land for her benefit. The plaintiff looked upon us as almost one of the family—and was so regarded by the family—was second cousin on both sides, and our family physician, and a suitor of Virginia.

Mrs. Virginia Withers, recalled by the defendant, testified: That she signed the note in suit, because her brother, H. C. McNeill, told her if she signed it, it would relieve her father's estate from liability on a note signed by him. Witness was not then married. Was born in August, 1856. Was of age when she signed the last note, but was not of age when she signed the first note. Was on kind terms with plaintiff—their relations were of the most pleasant and confidential kind. She thought he was undertaking as a friend to secure the land for her.

On cross examination, the witness testified:

"I own the land and rent it out, it has been in the family a long time. Dr. Atkins never took possession. I took possession at my father's death, in September, 1876. I have never paid any money for this land. The deed to me was made in February, 1876. I did not ask my mother to make the payment on the note in suit. I did not pay the taxes on the land until the last few years. The plaintiff never mentioned the note to me but once. My mother had written

to me that she had made the payment. The plaintiff wrote afterwards, and I replied that I had heard of the payment, and have promised to pay. I thought then that I owed the money—I know I had signed the note—I had heard that the plaintiff was insisting that the land was bound for the note, and therefore I agreed to pay.

(585) Exception 1st. The plaintiff then offered himself as a witness in his own behalf, and proposed to show by his own testimony, what occurred between A. S. McNeill, father of the *feme* defendant Virginia, and dead at the time of the trial, and the witness, in reference to the original bond, read in evidence by the defendants. To the proposed evidence the defendants objected, as incompetent under Sec. 590 of The Code.

The plaintiff urged its reception on the ground that the defendant, Virginia, had been allowed to testify, without objection, as to what her father said, when she signed the original bond with him at his request, and had thus opened the door to plaintiff's evidence, if otherwise incompetent by reason of death of A. S. McNeill, under section 590 of The Code; that said section was not applicable, inasmuch as the estate of A. S. McNeill was not concerned in this litigation, the defendant not claiming under him as heir, devisee, administrator or assignee. Besides, fraud was imputed to the plaintiff, and he was entitled to make explanations, and also, because Mrs. McNeill, the administratrix, had been examined and testified, as before stated, for defendants.

Objection of defendants was overruled by the Court, and the defendants excepted.

The plaintiff then testified: A. S. McNeill was in debt to me for borrowed money and medical attention. He told me that he wanted to pay off his debts. That he owed witness and had no money to pay him. Wanted to pay him in land. I said I did not want any land. He told me to take judgment against him in Justice's Court. A few days afterwards, witness obtained judgments and had them docketed in Superior Court. Afterwards, A. S. McNeill told witness that he would give him a conveyance to the "West land" to satisfy these judgments. Witness agreed to take the land, but told McNeill that the land was worth more perhaps than the debt, but that he did not want it. McNeill executed a deed to witness, (the deed read in evidence by the plaintiff), and witness entered "satisfaction" of

(586) the judgments on record, being the same read in evidence by the plaintiff. Witness told McNeill's daughter, Virginia, the defendant, that the land might be a home for her. She was then living with her father. He had previously told McNeill that any of his children might have it. She said she would see her father. They

gave witness a bond. Witness had told her if she would give a bond, he would not ask for the money till she was married. Witness declined to take the bond in the form it was given, remarking that he wanted it to express on its face, that it was given for this land, otherwise he would be in the same condition as before. I never gave up any debt. I got the original note or bond from Mrs. M. V. McNeill, and returned it by her son. A. S. McNeill was in straightened circumstances, and I was willing to release docketed judgments for simple note of hand. The note in suit has never been paid, the only money received is credited. I never heard of any allegation of fraud until this suit. There has never been any offer to return to me the land. I never told H. C. McNeill that I never intended to collect this note.

There was evidence offered by the defendant tending to prove that the land was worth considerably more than the amount of the bond; that A. S. McNeill was, at the time of the transaction, in straightened circumstances; that the plaintiff was doubly related to the defendant Virginia, and was engaged to be married to her at the time of signing the bond; that the plaintiff was the medical attendant upon A. S. McNeill during his last illness, which was protracted, and covered the time of the transaction; was his intimate friend and companion, and was the confidential friend and adviser of himself and family; that the defendant Virginia had been in possession of the land, without interruption, since her father's death, and that the plaintiff had never been in possession.

The defendant asked his Honor for the following special instructions:

1st. That if the jury shall believe that the plaintiff was the (587) confidential friend and adviser of the family, including the *feme* defendant, that then any advantage taken of the defendant in any business transaction between the plaintiff and defendant, would constitute fraud.

2nd. That if the relationship of confidential friend and adviser is established to the satisfaction of the jury, then the burden of proof is on the plaintiff to show that the transactions are fair, and that no advantage was taken of the *feme* defendant.

3rd. That if the note sued on was obtained by the representation on the part of the plaintiff, that the same was for the benefit of the *feme* defendant, and the same was not true, then the transaction would be fraudulent.

These instructions his Honor declined to give. Defendants excepted.

On the issue of fraud, the Court charged the jury as follows:

The execution of the note sued on is admitted, and nothing more appearing, the plaintiff would be entitled to recover.

The defendants allege, however, that the execution of the note under seal, or bond sued on, was procured by fraud, or undue influence, on the part of the plaintiff. The burden is upon the defendants to show, to the satisfaction of the jury, that the execution of the bond was so procured.

If the bond executed by A. S. McNeill and Virginia McNeill, was found among the papers of A. S. McNeill after his death, the fact that it was in his possession, would have raised a presumption that it was satisfied, but such presumption could be rebutted by evidence showing that it was not in fact paid or released.

If A. S. McNeill had paid and discharged said bond, or if the plaintiff had surrendered said bond to him, and agreed with him to release the obligors from payment, and the defendant Virginia, by reason of her confidence in the plaintiff as her general adviser, or affianced lover, was induced by false representations made by plaintiff, (in person or through his agent), to believe that by executing
(588) the bond sued on, she would relieve her father's estate from embarrassment, then the jury would respond to the second issue in the affirmative.

The fact that the plaintiff was the confidential friend of defendant Virginia, or sometimes her adviser, or that there was an engagement to marry subsisting between them, were circumstances that the jury might consider in determining whether the execution of the bond sued on was procured by undue influence or fraud.

Unless plaintiff has been shown to be her general agent, the law would not presume that there was fraud or undue influence.

If the original bond was not satisfied by payment or surrender, but entrusted to A. S. McNeill, with an understanding that it was still due, and the bond sued on was given in lieu of it, the jury would respond to the second issue in the negative.

Defendants excepted.

There was a verdict for the plaintiff upon both issues. A rule for a new trial was asked for on following grounds:

1st. Because his Honor allowed the plaintiff to testify, after objection, to transactions and communications between himself and A. S. McNeill.

2nd. Because his Honor refused the special instructions asked for defendants.

3rd. Because his Honor failed to charge the jury that the original bond, having been signed when the defendant Virginia was under age, was voidable, and the defendant was not bound on the same after she

attained her majority; that the possession of the land not having been changed, the price for the same being grossly inadequate, the near relationship of the parties, were each and all badges of fraud.

4th. Because his Honor's charge was too general in terms, and did not direct the jury with sufficient particularity as to the facts of the case.

There is a judgment on the verdict in favor of the plaintiff, from which the defendant appealed.

Mr. J. H. Flemming, for the plaintiff. (589)
Mr. Geo. V. Strong, for the defendants.

ASHE, J. (after stating the facts). The defendant having abondoned his first exception, which was assigned as a ground for a new trial, we will consider the other grounds assigned in the order in which they were taken.

The first in order was, that his Honor refused the instructions asked, the first and second of which were, that if the jury should believe that the plaintiff was the confidential friend and adviser of the family, including the *feme* defendant, that any advantage taken of the defendant in any business transaction between the plaintiff and defendant, would constitute fraud; and secondly, if any such confidential relationship should be established, the burden of showing that the transaction was fair, and no advantage was taken, is on the plaintiff.

His Honor properly refused to give the instructions as prayed. He instructed the jury, that the execution of the note sued on being admitted, and the defence relied upon being fraud and undue influence, exercised in procuring its execution, the burden was upon the defendant to show to the satisfaction of the jury, that its execution was so procured. The proposition contained in the instructions asked by the defendants was, that if such a relationship as that alleged should be proved to have existed, and any undue influence was used by the plaintiff to obtain it, then the bond was void in law, but his Honor denies the proposition, and charged that it was a question for the jury to determine and the *onus* was on the defendant.

There is a well marked distinction in transactions between persons standing in fiduciary relations to each other, and those between persons who do not bear such relations. In the one case, the law presumes the fraud, and the Court pronounces the transaction void, as a legal question, unless the presumption is rebutted, and in that case the *onus* is upon him who alleges the fraud of the transaction. In the other case, it is a question of facts for the jury, and the

(590) *onus* is upon him who alleges the fraud or undue influence. This distinction is clearly recognized in the case of *Huguenin v. Basely*, 2 White and Tudor L. cases Eq., 406 and notes.

The cases in which the law will presume fraud, arising from the confidential relations of the parties to a contract, are, executors and administrators, guardian and ward, trustees and *cestui que trust*, principal and agent, brokers, factors, etc., mortgagor and mortgagee, attorneys and clients, and to those who have been added, we think very appropriately, husband and wife. The rule is founded on the special facilities which, in such relation, the party in the superior position has of committing a fraud upon him in the inferior situation, and the law looking to the frailty of human nature, requires the party in the superior situation, to show that his action has been fair, honest and honorable, not so much because he has committed a fraud, but that he may have done so. Bigelow on Frauds, ch. 5; Baily on Onus Probandi, 324. The class of cases here mentioned are the only cases in which the Courts have assumed to declare void, a contract arising out of the confidential relations of the parties.

But the learned counsel for the defendant insists, that there should be added to these classes, the relation subsisting between a lover and his affianced, and has permitted his wonted zeal, in behalf of his client, to lead him to the unchivalrous conclusion that, in that relation, the man holds the superior position, and the affianced is so much under his influence, that the law looks with suspicion upon any contract made between them, and will throw the burden of showing its fairness upon him. We know of no such principle of law, and the counsel has failed to furnish us with any authority to support his position. Fraud in such a contract, like all others not falling within one of the above-mentioned clauses, where undue influence is alleged, presents a question of fact for the jury, and the *onus* is on the plaintiff. It is not in the province of the Court to pronounce it fraudulent, as insisted by the defendant, in the second and third instruc-
(591) tions asked. There was, therefore, no error in the Court's refusing to give the instructions, and submitting the question of undue influence to the jury.

The defendant offered some evidence tending to show the exercise of undue influence on the part of the plaintiff, growing out of his being the friend and adviser of the family, and the delicate relations in which he stood to the *feme* defendant, but the plaintiff, on the other hand, offered his own testimony, which, if believed, the transaction was shown to be fair and honorable, and the jury gave credence to his testimony, and rendered a verdict in his behalf. That was conclusive upon that point.

The third instruction asked, was, that if the note sued on was obtained by the plaintiff upon false representation to the defendant, that the same was for *her benefit,* it was void.

Upon the facts of the case, his Honor could not have given this instruction, for it was a transaction which has certainly enured to her benefit. The deed for the land, which is the consideration of the bond, was executed by the plaintiff to the *feme* defendant, on the 23d of February, 1876, and she has had the possession of it ever since, without paying anything for it, except a small sum paid by her mother, and the land, which was worth at the time of the conveyance $450, was sold to her for the sum of $259.77, being the amount of the debt due originally from her father to the plaintiff. The defendants keep the land, worth twice the amount of the sum agreed to be paid for it, and, without offering to return it to the plaintiff, endeavour to escape the payment of its price, by charging the plaintiff with falsely representing that the transaction was for the *feme defendant's* benefit. The exception was not worthy of consideration.

The third ground assigned for a new trial, was, that the *feme* defendant was under age when she gave the first bond, and she was not bound on the same when she attained her majority, and the fact that the possession of the land was not changed, the price inadequate, and the relationship of the parties, were each and all badges of fraud. There is not the shadow of merit in this exception, and the counsel here did not press it.

The contract made in defendant's infancy was ratified by (592) her giving a new bond and keeping the land after she became of age, and it is the first time we have heard the position seriously urged in a court of justice, that a bargainee could set up the inadequacy of the price paid by her for land as a badge of fraud.

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Cole v. Stokes, 113 N.C. 274; *In re Patrick's Will,* 162 N.C. 520; *Sorrell v. Sorrell,* 198 N.C. 465.

M. C. MISENHEIMER v. P. A. SIFFORD, ADMR. ET ALS.

Will—Charge upon Land.

1. Where a testator devised land to one of his sons, provided he should maintain his mother comfortably during her life, the support of the mother is a charge upon the rents and profits of the land, and not a condition, the non-observance of which will defeat the devise.
2. Where, in such case, upon the death of the devisee, the person who was to be supported was taken charge of by the plaintiff, who received all the rents and profits of the land for that purpose; *It was held*, that the plaintiff could make no further claim on the land, under the will.

CIVIL ACTION, tried before *Montgomery, Judge*, and a jury, at August Term, 1885, of the Superior Court of ROWAN County.

Michael Bostian died in the year 1850, leaving a will, in the second clause of which he devises certain of his real estate as follows:

II. "I wish my executor to pay all my just debts out of my personal estate, and funeral expenses; and I give and bequeath to my son Audren A. Bostian, my plantation I now live on, with all the appurtenances thereunto belonging; provided he maintain his mother during life comfortably, and shall give her houseroom and firewood, and all necessaries of life, during her life or widowhood; if (593) she marries, he shall be free from the above maintenance."

The devisee took possession of the land, and supported his mother until his death in 1869, when the plaintiff voluntarily removed her to her own house, and has cared for and maintained the said Christina ever since, and until her death in April, 1884, receiving during the interval, all the rents and profits of the devised land. This was done by the plaintiff of her own accord, and not at the instance of the defendant P. A. Sifford, administrator of the intestate devisee, A. A. Bostian, or of any other defendant, nor had the plaintiff made demand on them for means of supporting the said Christina, or for other compensation than that derived from the land. In the year 1882, the defendant Harvey Sloop, who had intermarried with the defendant Charlotte, the daughter and only heir-at-law of the intestate A. A. Bostian, to whom said land had descended, proposed to the plaintiff to take her to his house and support her, which the plaintiff refused to accede to, because she was unable to be removed.

The present action, under the amended complaint, is prosecuted to establish the plaintiff's claim for compensation for such maintenance, in excess of what has been received, and the amount thereof, to charge the land therewith, and for its sale, if necessary, to the satisfaction of her demand. The answer denies the claim against the personal

estate of the devisee, or as a charge upon the land, and also sets up the bar of the statute of limitations to its enforcement, for a longer period than three years before the institution of the suit, on May 5th, 1884.

The Court was of opinion, and so ruled, that there could be no recovery for the plaintiff's services and outlay, for a period beyond three years; that for two of those years she could not sustain her claim, because of the refused offer made by defendant Harvey, to maintain and take care of said Christina; and further, that, upon the averments in the complaint and the proofs, the plaintiff's undertaking and expenditure being voluntary and officious, no obligation for remuneration had been incurred, for which the defendants personally were liable, or the devised land chargeable. In sub- (594) mission to this ruling, the plaintiff suffered a non-suit, and appealed to this Court.

Mr. Lee S. Overman, for the plaintiff.

Mr. Thos. F. Klutz (Messrs. Kerr Craig and J. M. Clement were with him on the brief), for the defendants.

SMITH, C. J. (after stating the facts). Very much of the argument for the appellant, in this Court, was directed to the construction of the will and the effect of the provision for the support of the testator's wife upon the devised estate. We do not deem it necessary to pursue this inquiry, since, if it were a defeating condition, it is not apparent how this would enure to the benefit of the plaintiff, if there were any one to enforce it; while deeming it to fix a charge upon the land, would be more in consonance with the evident general purpose of the testator, in making provision for the support of his surviving wife. *Wellons v. Jordan,* 83 N. C., 371. The words used in *Gray v. West,* 93 N. C., 442: "Arey Gray is to have her support out of land," were held not to constitute a charge on the *corpus* of the land, but a right to get her support "out of the rents of it, or the use or occupation thereof."

It affirmatively appears, that the devisee during his life, met the requirements of the will, in taking care of his mother, and the plaintiff, herself received all the fruits and product of the land accruing thereafter, while in her charge and at her expense, so that, unless the substance of the land is to be used by conversion into money, to supply the inadequacy, the beneficiary has had the use of the land.

Nor is it suggested that the defendant, Charlotte, who as heir of her father, the devisee, succeeded to the inheritance, ever refused or neglected to provide for her grandmother, as he had before done. The plaintiff, actuated it would seem, by an apprehension that she would

not be as well taken care of, and might suffer from inatten-
(595) tion, took her home, and was content to have the profits of the property applied to her maintenance, not demanding further compensation for her services and expenditures in that behalf. We see no ground whatever upon which the claim now asserted against the land, or against the defendants, can be sustained. There is no underlying agreement, expressed or implied, by which the plaintiff can, by doing what the owner of the land is required to do, substitute herself in place of the beneficiary, and enforce her rights as against it. Moreover all the immediate rents and profits have been thus applied, and so far as appears, were sufficient and satisfactory compensation to the plaintiff. But if inadequate, it was all that the land could yield, and is the full measure of the plaintiff's claim against it.

We therefore sustain the ruling of the Court and declare there is no error, and the judgment of non-suit must be affirmed.

No error. Affirmed.

Cited: Tilley v. King, 109 N.C. 464; *Perdue v. Perdue,* 124 N.C. 163; *Helms v. Helms,* 135 N.C. 169; *Whitaker v. Jenkins,* 138 N.C. 480; *Cuthbertson v. Morgan,* 149 N.C. 80; *Marsh v. Marsh,* 200 N.C. 749; *Bailey v. Land Bank,* 217 N.C. 515; *Patterson v. Brandon,* 226 N.C. 91.

ARA BRITTAIN v. S. E. MULL ET ALS.

Clerk—Special Proceeding—Appeal.

1. When a Special Proceeding comes before the Clerk, it is his duty to transfer the matter, if issues of fact are joined, to the civil issue docket, in order that the issues may be tried by a jury.
2. In such case, when the issues are tried, it is the duty of the Clerk to proceed at once to act upon the case, without waiting for any order of the Judge.
3. So when certain issues of fact were joined in a special proceeding, which were carried to the civil issue docket and tried, and at a subsequent term the plaintiff, moved before the Judge in Term for an order affording the relief demanded which was refused, and on appeal this order was affirmed, on the ground that it was the duty of the Clerk to proceed and when the certificate went down, the Clerk entered a judgment refusing the relief, on the ground that he could only act under an order of the Judge, which on appeal to the Judge, was affirmed. *It was held* to be error, as the Clerk should have proceeded to act on the merits of the case, just as if there had been no appeal.

BRITTAIN *v.* MULL.

SPECIAL PROCEEDING, heard on appeal from an order of the (596) Clerk, by *MacRae, Judge,* at Chambers in Morganton on May 28, 1885.

This is a Special Proceeding, brought by the plaintiff in the Superior Court of Burke County, to obtain dower. The appellant filed her petition to that end, before the Clerk of the Court. The defendants answered, raising issues of fact and questions of law, and among other things, they allege that the petitioner joined the administrator of her deceased husband, and his heirs-at-law, in a special proceeding to sell the land, in which she claimed dower, to make assets to pay debts, and in that proceeding, she had by express stipulation, "waived" her right of dower; had received her share of the fund raised by a sale of the land, and was estopped to claim dower in this proceeding. The petitioner replied, that at the time of the alleged "waiver," and the judgment in the proceeding referred to, she was insane, and incapable of giving her assent in that respect; that she was entrapped, and the judgment was fraudulent and void as to her.

At the Fall Term, 1881, of that court, the following issues were submitted to the jury, to which they responded in the affirmative:

I. "Did the plaintiff, by her agreement in the clerk's office, in 1877, waive her right of dower in the land?"

II. "Was such waiver void by reason of plaintiff's mental incapacity?"

The clerk did not then proceed, as he ought to have done, to take further action in the matter.

But at a subsequent term, the petitioner moved, "1st. To strike papers from the files.

"2nd. To remand cause to the probate court.

"3rd. To have dower assigned the plaintiff."

The Court denied these motions, and the petitioner appealed to this Court. In that appeal, (*Brittain v. Mull,* 91 N. C., 498), this Court affirmed the order appealed from.

The Superior Court, at a subsequent Term, made simply this (597) entry: "Judgment according to certificate of Supreme Court filed."

At a subsequent day, in vacation, counsel for the petitioner moved before the clerk of the court, that he make an order directing the "assignment of dower to the plaintiff in the above entitled case, in accordance with the decision of the Supreme Court herein filed."

The clerk declined to take any action, upon the ground that he could not act in the matter, as the Court, (the Judge,) had made no order, other than simply "judgment according to certificate," and

overruled the motion for dower. Thereupon, the petitioner excepted and appealed to the Judge in Term, and that Court, after reciting that it was of opinion that the clerk had decided the motion substantially upon the merits of the whole matter, (notwithstanding the clerk had said and decided that he could not act, for the reason stated,) affirmed the order appealed from, and the petitioner thereupon appealed to this Court.

Mr. E. C. Smith, for the plaintiff.
Mr. Armistead Jones, for the defendants.

MERRIMON, J. (after stating the facts). When this case was before us by a former appeal, we did not then decide that the appellant was, or was not entitled to dower as she claimed to be. That question was not then presented. We said in plain terms, that "the issues having been passed upon by the jury, and their finding entered of record, the clerk seeing this, in the course of procedure in the proceeding, ought to have taken further action in that behalf, according to law, without any special instruction from the Court. The findings of the jury put the issues of fact out of his way, and accepting the facts in issue as found by the jury, he should have taken further action." *Brittain v. Mull,* 91 N. C., 498.

When, therefore, the certificate of the opinion of this Court went down to the Superior Court, it should have been filed, and (598) the judgment of affirmance entered, as it appears was done.

The Clerk, acting as and for the Court, ought then, without any order of the Court made by the Judge, in or out of Term, to have proceeded in the proceeding to take further action, just as if no appeal to this Court had been taken. That is, he ought to have decided any question properly presented by the pleading and the findings of the jury upon the issues tried before the Judge in term. Among these, we can see—the jury having found that the appellant was insane at the time the alleged "waiver" was given in the proceeding collateral to the present one—that he ought to have decided, first, whether or not the alleged "waiver" operates as a bar to the appellant's right of dower; and secondly, could the "waiver" and judgment in the proceeding other than this, referred to, be attacked collaterally in this proceeding, and whether or not, as the petitioner was insane at the time the "waiver" was given, it and the judgment were absolutely void as to her. He ought to have decided these, and perhaps other questions presented, and either party would have had a right to appeal from his decisions to the Judge at Chambers, and the decision of the Judge, in that case, would have prevailed as the

judgment of the Court, unless an appeal should have been taken from his decision to this Court, which might be done.

The Clerk misapprehended the nature of his duties. He seems to have thought that he was exercising jurisdictional functions, separate and distinct from those of the Superior Court, whereas he was not called upon to do so; he was to act as and for that Court, and so acting, his decision would stand as that of the Court, unless there should be exception thereto and appeal taken to the Judge, as indicated above. The statute makes it the duty of the Clerk "to hear and decide all questions of practice and procedure in this (the Superior) Court, and all other matters, whereof jurisdiction is given to the Superior Court, unless the Judge of said Court, or the Court at a regular Term thereof, be expressly referred to." The Code, Sec. 251. This provision applies to special proceedings, and (599) how and why it applies is explained in *Jones v. Desern, ante,* 32.

It was not the duty of the Judge in Term, after the issues were tried—there being no question of law to be decided,—to direct the Clerk what to do, or to make an order remanding the case to the Clerk. The latter ought to have proceeded without an order, and heard and determined the case upon its merits, subject to the right of appeal to the Judge. *Brittain v. Mull, supra.*

We are not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury, because they have not been decided by the Clerk, acting for the Court, and, upon appeal, by the Judge. They are not before us. If the Clerk should decide that the appellant is estopped by the "waiver," and the judgment in the proceeding in which it was given, then it would seem that he would dismiss the petition, unless she should appeal to the Judge. If, on the other hand, he should, for any reason, decide that she is not barred, the defendants in the proceeding would have the like right of appeal. This, however, is merely suggestive. It will be the duty of the Clerk, acting for the Court, to decide whatever question may be presented, and to make all proper orders.

We think the Court erred in holding that the Clerk had virtually decided the case upon its merits. It is true, he recites a history of the proceedings preparatory to his order denying the motion to have dower assigned, but he expressly declined to act, and decide the case upon its merits, upon the ground, that he was of opinion, that he could not act until the Judge had taken further action and made some order. The order overruling the motion is plainly based upon this ground. The appellant, obviously, has the right to have the questions

of law raised, decided according to the course of procedure prescribed by the statute.

The order of the Court made in term must be reversed, and the Court will direct the Clerk to proceed in the proceeding according to law. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: *S. c.*, 99 N.C. 488.

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(600)

R. S. CALVERT ET ALS. v. J. S. MILLER ET ALS.

Partnership—Surviving Partner—Appeal.

1. After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interests of all persons interested.
2. While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, *bona fide*, for the interest of the common property, he may pay them out of the common fund.
4. So where on the death of a partner, the partnership had a large amount of unfinished work and raw material on hand, which could only have been disposed of at a sacrifice; *It was held*, that creditors advancing means to the survivor, in good faith, to enable him to finish the work, and use up the raw material, are entitled to payment out of the partnership assets.
5. Exceptions which do not appear in the record, will not be passed on by this Court.

CIVIL ACTION, heard before *Montgomery, Judge,* upon exceptions to the report of a referee, at Fall Term, 1885, of the Superior Court of IREDELL County.

The plaintiffs, claiming to be creditors of the partnership firm of Calvert & McKee, which, consisting of James L. Calvert and John F. McKee was formed in January, 1876, and terminated in the same month of the next year, by the death of the partner first named, prosecute their suit against the defendants S. A. Sharpe and J. S. Miller, trustees in several deeds, dated respectively in May, August and November, and the said S. A. Sharpe and C. A. Carlton, trustees in a deed dated before that last mentioned, and in the same month, for an account and appropriation of the joint assets, to their several

demands. These deeds were executed by the surviving partner, the defendant McKee, who after the death of his associate, continued for several months to carry on the same business, in order, as alleged, to complete the unfinished work, by using the material on hand, and making a settlement of the common business, to the ad- (601) vantage of all interested, during which interval, were contracted some of the debts now asserted against the partnership effects.

In pursuance of an order of reference to R. A. McLaughlin, with whom, by consent, Harry Bingham was afterwards associated, they made their report to Spring Term, 1885, accompanied with the evidence taken in executing the inquiry.

The plaintiffs excepted to the failure of the referees to find and state the facts in regard to several of the claims specified, inasmuch as the evidence shows that the debts were incurred by the surviving partner, acting as such, in the management and settlement of the partnership business, devolved upon him.

The defendants, other than McKee, also filed several exceptions, of which the two first, are based upon the proposition that the debts specified in them were made after the dissolution, and were not binding upon the firm, but personal to the partner who contracted them.

The second exception, embodying those numbered 3 and 4, relates to matters of fact determined in the Court below, with which we are not disposed to interfere, and which may be left out of view in the appeal.

At Fall Term, 1885, upon an order of re-committal for further findings of fact, a supplemental report was returned, and upon consideration thereof, this judgment was entered.

"It is ordered and adjudged, that the exceptions of the defendants Sharpe, Miller and Carlton, be overruled, and that the exceptions of the plaintiff be sustained, except as to the R. T. Early debt, and as to this debt, the plaintiff's exception is overruled, and that said reports be confirmed."

The Court finds, after a careful investigation, that the debts of R. W. Turbyville, J. E. Colvert, R. S. Colvert, J. F. Van Pelt, and J. W. Paston & Co., amounting to $519.11, and also the debt of Joseph H. Thompson, were contracted by John F. McKee, surviving partner of the firm of Colvert & McKee, after the dissolution of said firm by the death of J. L. Colvert, and that the goods and services for which all these debts were contracted, were used in the firm (602) business, as then carried on by said McKee, and they were absorbed by and entered into the fund now charged in this account, as assets of the firm of Colvert & McKee, and the Court finds all the

facts in reference to these debts, the same as found by the referees in their report, and that said debts are, as charged, in the assets of the firm. The Court also finds as a fact, that the property of the firm of Colvert & McKee, and sold by the defendants, to be the same in value as found by the referees, to-wit: $2,144.15. It is therefore considered and adjudged by the Court, that the plaintiff recover of the defendants, S. A. Sharpe, J. S. Miller and C. A. Carlton, the value of the property of the firm of Colvert & McKee, as found by said referee and as found by this Court, to-wit: two thousand, one hundred and forty-four dollars and fifteen cents, ($2,144.15), and that said sum be distributed among the several creditors of the firm of Colvert & McKee and J. F. McKee, surviving partner of said firm, according to their respective amounts, as found by the referees in their report. And that the plaintiff recover of the defendants the cost of this action, to be taxed by the Clerk of this Court against said defendants, including fifty dollars to R. A. McLaughlin and twenty-five dollars to H. Bingham, referees in this action.

From the rulings and judgment of the Court, the defendants Miller and Sharpe appeal.

Mr. R. F. Armfield, for the plaintiffs.

Mr. D. M. Furches, for the defendants.

SMITH, C. J. (after stating the facts). The record shows that a single ruling in law is brought in controversy, and that is, the right of those debts incurred by the surviving partner, in prosecuting the joint business in order to an advantageous settlement of the partnership affairs, to share with such as were contracted in the life time of both, in the distribution of the partnership assets.

(603) Assuming that the continuance of the business was in good faith, and with reasonable grounds for expecting better results than could be obtained by a prompt sale of the common property, with unfinished work and unused material on hand, we do not think the defendant was bound to pursue the latter course, with its apprehended sacrifices. A surviving partner must proceed to settle up the joint estate and business devolving upon him, in the manner deemed most conducive to the interest of all. Any further operations he may have, must be directed to the primary and controlling object of a prompt and early settlement and disposal of the funds.

"Although as to future dealings," remarks STORY, "the partnership is terminated by the death of one partner, yet for some purposes, it may be said to subsist, and the rights, duties, powers and authorities

of the survivors remain, so far as is necessary to enable them to wind up and settle the affairs of the partnership." Story Part., Sec. 344.

The author does not pretend to say that such survivor can enter into a contract that shall personally bind the deceased partner or his estate, for the power to do this, ceases with the dissolution, but that expenses incidental to the settlement, and properly incurred in making it, are a charge upon the effects of the firm, and will be paid out of them.

In the case of an executor, who, in executing the trusts imposed by the will, outside of those that pertain to the general duties of administration, incurs expense, the payment is recognized as a proper credit, and even the creditor is allowed to assert his claim to the fund made or argumented by his services, as we have decided in *Edwards v. Love, ante,* 365.

We have not adverted to the point made in the appellants' brief, not embodied in the exceptions, as to the efficacy of the deeds made by the defendant McKee, of May 20th, and August 31st, to the defendants Miller and Sharpe, to indemnify them, as sureties on his individual note, executed to the late Anderson Mitchell, for money borrowed to put in, and put in the firm, at its formation, as a means of its discharge, because that question is not pre- (604) sented in the case on appeal. It may be, that such disposal and use of the money by the firm, would recognize a liability, sufficient to warrant an appropriation of the partnership effects to its payment, as attempted in the deed. But we forbear all expression of opinion upon the point, as well as upon the right of the surviving partner, unrestrained by the representative of the deceased, to dispose of the funds, in payment of his personal liabilities. This debt is omitted in the final judgment directing payment of the specified debts out of the funds, more than sufficient for the purpose, but to this no specific exception is taken. Judgment will accordingly be entered in favor of the several creditors, against the defendant McKee, Miller and Sharpe, for the respective sums due them.

There is no error in the rulings brought up for review, and they are affirmed.

No error. Affirmed.

Cited: Barber v. Buffaloe, 122 N.C. 131.

D. M. RIGLER v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Contributory Negligence—Railway Crossing.

1. Where the plaintiff's negligence contributes to the injury of which he complains, and for which he seeks to be compensated in damages, he cannot recover; and the same rule applies when it is shown that both parties are in fault.
2. Where highways cross railways, the law requires a reasonable degree of care and diligence in both the public and the corporation in the use of the crossing, and negligence in the corporation will not excuse a traveller approaching the crossing, from using that degree of care and circumspection, necessary to secure his safety.
3. Where a traveller is approaching a railway crossing, with an unobstructed view of the track in both directions, it is his duty to look both ways, and if he attempts to cross in front of an advancing train, and receives injury, he cannot recover, and the failure of the engineman to give the precautionary signal, when it does not contribute to the accident, does not impose a liability on the corporation.
4. Although a person injured by a railroad train, be in fault to some extent, yet he can recover, if the injury could not have been avoided by ordinary care on his part.
5. Railroad corporations are not required to stop their trains, when a vehicle is seen by the engineman approaching a crossing in order to allow it to pass the track in front of the train.
6. Negligence can be attributed to a railroad company, only when it has notice of the emergency, in time, by the use of ordinary diligence, the means being at hand, to avoid the accident.

(605) CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Fall Term, 1885, of MECKLENBURG Superior Court.

The plaintiff alleged in his complaint, that in crossing the railroad of the defendant, near the city of Charlotte, in a wagon drawn by one horse, and when he had reached, and just passed the road, being retarded by an unforseen and unavoidable accident, the defendant carelessly and negligently caused one of its locomotives, with one or more cars attached, to approach and pass rapidly over the said crossing, at great speed, and by reason of said negligence, the locomotive and train ran against the plaintiff's wagon, breaking it to pieces, and dragging and injuring his horse, rendering him useless for a time, and permanently impairing his usefulness.

The defendant, in its answer, denied that it carelessly and negligently caused one of its trains of cars, on the day specified, to approach and pass rapidly over said crossing. It also denied that

the plaintiff, or his property, was injured or damaged through the fault or negligence of the defendant.

And for a further defence, it said, if the plaintiff or his property was injured or damaged at all, in the manner as set forth in the complaint, the plaintiff contributed thereto, by causing his horse to back his wagon upon said railroad crossing, and thereby came in collision with the defendant's train, which train was in full view of plaintiff, prior to said crossing.

The following evidence was offered before the jury:

D. M. Bigler, the plaintiff, testified for himself, that on the (606) 16th day of July, 1881, he was going to his farm, about one mile from the city of Charlotte, in a wagon drawn by one horse, and was accompanied by a colored boy, and a white child, his nephew. The way to the farm was down Tryon street, then turning to the left, across the railroad of the defendant, on a private crossing, which had been used by himself and the former owners of the farm to which he was going, for many years. When near this crossing, witness saw, on the tract towards Charlotte, at the mouth of the cut, and about three hundred and fifty yards distant, an engine with a car attached. He drove across the track, the horse passing over the track, and the wagon also. The rear end of the wagon barely passed the track, when the horse shied and backed. Witness struck the horse, and the horse moved forward, but did not clear the track. The horse backed three or four times, while witness was endeavoring to urge him forward and off the track. While this was going on, witness looked up the track, and noticed that the engine was then at Palme's crossing, some three hundred yards distant in the direction of Charlotte. When the engine was near, or at the gravel pit, which is from 170 to 180 yards from the crossing where plaintiff's horse shied, the engineer sounded the danger signal. At that time the horse was backing, and the wagon was on the track. When he saw that the engine would strike the wagon, the colored boy jumped from the wagon, and witness grasped his nephew to throw him from the wagon, at the same time jumping from the wagon himself. Immediately, the engine struck the wagon, breaking it into pieces, and dragged the horse four or five yards. The train, when it struck the wagon, was running at the rate of 20 miles an hour, and the wagon was carried, with his nephew, on the pilot of the engine, 124 steps when the engine was stopped.

The track was straight from the cut where he first saw the train, to the crossing where the accident occurred, and the view on either side was unobstructed.

The grade of the road from the cut to his crossing, (where (607) the accident occurred,) was slightly ascending. He was from

twelve to twenty yards from his crossing when he first saw the train, (at the mouth of the cut). He did not know, and could not tell whether it was moving or not. When his horse was first crossing, the train was three hundred yards distant. The witness then testified to the amount of his damages, and the plaintiff rested.

The defendant introduced as a witness one Syphron, who testified that he was a locomotive engineer, and had been engaged in the business for ten or twelve years; and was running the engine spoken of by the plaintiff at the time of the accident. As he came out of the cut, he saw Rigler turning out of Tryon street, and noticed that he was looking at the train. When the engine got within fifty yards of Rigler's crossing, witness saw Rigler stop near the crossing; noticed that he whipped his horse and started to cross. He blew brakes and reversed the engine. Rigler got across. Horse backed and the accident occurred. He saw Rigler forty yards from the track, near some bushes. He stopped between the bushes and the track, looked at the train, and then struck his horse. The engineer was then fifty yards from the crossing. There were no air brakes on the engine. It was from 217 to 310 yards, from this crossing to the cut from which he first saw the plaintiff. When 250 yards from the crossing he blew the brakes, and got the engine under tolerably fair control. When Rigler stopped, he blew off brakes. When he started again, the engine was within fifty yards of the crossing, and was reversed then. The gravel pit is 75 or 100 yards from Rigler's crossing. He had worked in machine shops, and had served as fireman on an engine four years, and considered himself competent to run an engine.

Witness further testified, that this was a pay train, consisting of an engine, tender and coach. The coach had air brakes on it, but on the engine there were no appliances for working the air brakes. This was a freight engine. The company has air brakes only on its
(608) passenger engines. The train started from the yard and stopped first at the bridge, fifteen or twenty yards from the mouth of the cut spoken of on the direct examination; was running ten or twelve miles an hour when he first saw Rigler. Ran thirty or forty yards from the starting point, when he first blew brakes. Was then running fifteen or twenty miles an hour. The speed slackened and was running ten or twelve miles an hour when he blew brakes off. Rigler was twenty-five or thirty yards from the crossing when he stopped. He was running fifteen miles an hour when he struck the wagon. He could not stop the engine within 150 yards. He stopped the engine about fifteen yards south of the crossing, when the wagon body fell from the pilot. If air brakes had been on the train, and in use, he

could have stopped the train in 75 or 80 yards. This train being a pay train, was classed in the rules of the company as a passenger train, and by those rules, its maximum rate of speed was fixed at thirty-five miles per hour. That he was keeping a good lookout as he went down the track.

One Smith, a witness for the defendant, testified that he was treasurer of the defendant Company, and was on the train at the time of accident. When the first signal was given, he was in the front part of the coach, and when the second signal was given, witness went to the door at the other end of the coach, and when he looked out, the accident had happened. The train was running at fifteen miles an hour when he heard the first signal; that he had known Syphron, the engineer, and he had the reputation of being a good locomotive engineer.

The defendant then introduced one Isaac Goode, who testified that he was brakesman on the train, and was at end of coach next to the engine, and put on and off brakes when signalled to do so; that he had put on brakes twice and put off brakes once when the accident occurred. This was the evidence for the defendant.

The plaintiff, introduced in reply, testified that he did not stop at all when approaching the crossing; that the engine whistled at the cut, and then again at or near the gravel pit, when it (609) sounded the danger signal; that he had measured the distance, as before testified to by him.

J. M. Kendrick, witness for plaintiff, testified that he measured the distance from Rigler's Crossing to the point where the wagon dropped from the engine, and found the distance to be 109 steps.

Here the testimony closed.

His Honor intimated that upon the testimony, plaintiff could not recover, and that he would so instruct the jury. In deference to this opinion, the plaintiff submitted to a non-suit, and there was judgment accordingly, from which the plaintiff appealed.

Mr. Platt D. Walker, for the plaintiff.
Mr. Geo. E. Wilson, filed a brief for the defendant.

ASHE, J., (after stating the facts). The plaintiff contended that it was through the negligence of the defendant Company that he sustained the injury complained of, and the defendant, on the other hand, insists that no negligence is to be imputed to it, and if the plaintiff's property was injured, as alleged in his complaint, it was caused by his contributory negligence, in attempting to cross the road when he saw the car approaching.

The question of primary importance in the case is, did the plaintiff's negligence contribute to the injury of which he complains? If it did, then the great weight of authority is, that he cannot recover; and it is equally so, when both parties are at fault.

It is the duty of each party to use a reasonable degree of foresight, skill, capacity, and actual care and diligence, to enable each to use the privilege of crossing—but still, negligence on the part of the railroad company, will not excuse any one approaching a crossing, from using that degree of care and circumspection, which is necessary to secure his safety.

(610) When a traveller is approaching a railway crossing, with an unobstructed view of the track in both directions, it is his duty to look both ways, and if he advances to the point of intersection, and attempts to cross in front of the approaching cars, and receives an injury, such conduct will constitute negligence, so as to preclude him from recovering. Thompson on Negligence, 426, and the numerous authorities there cited. To the same effect is Pierce on Railroads, 331 -323. The same rule has been adopted by this Court. In *Parker v. R. R. Co.,* 86 N. C., 221, it was held that, one crossing a railroad track, must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to the alleged injury, does not impose a liability upon the company—and in *Manly v. W. & W. R. R. Company,* 74 N. C., 655, the rule is thus laid down by RODMAN, Judge: "When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself." But the rule is subject to the qualification, that the injured party, although in fault to some extent, at the same time, may notwithstanding this, be entitled to damages for an injury which could not have been avoided by ordinary care on his part. "When the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission, not occurring at the time of injury, the action for damages is maintainable." But the evidence in this case, even that of the plaintiff himself, does not bring his case within the scope of either of the qualifications. According to his testimony, the train was running at the rate of twenty miles an hour, and at that rate must have reached the crossing in two or three minutes from the time it was seen approaching by

the plaintiff, and yet, with a train coming in full view, at that speed, he attempted to cross the track with a wagon. It seems (611) to us, that no man of common prudence would have made the attempt to cross under such circumstances, but would have made a halt, and waited until the train had passed. But the plaintiff seems to have made his calculation as to the time it would take the train, coming at the speed he describes, to reach the crossing, and without taking into his calculation the abatement of the speed by putting on the brakes, he made the attempt to cross, and had succeeded in doing so, and would have been safe, if it had not been for his horse backing the wagon on the track, just at the time the train was passing. The attempt to cross the road under the circumstances, not only showed a want of due care on the part of the plaintiff, but reckless conduct, that amounted to gross negligence; and although he was in no fault in the backing of the horse on the track, if he had not attempted to cross, in the face of the impending danger, the accident of the backing of the horse on the road would not have happened, so we are of the opinion his contributory negligence was the cause of his injury, and that being so, it can make no difference whether negligence is imputable to the defendant or not. But we think the defendant company did all that was in their power, and all that could be expected of them to have been done under the circumstances, to prevent the catastrophe.

When the engineman saw the plaintiff approaching the track, he blew the brakes on at the distance of 250 yards, and when in 170 yards, he sounded the danger signal. When the plaintiff stopped, he blew off the brakes, and then, when in fifty yards of the crossing, we take it, when he saw the horse backing, he blew on the brakes again, and reversed his engine, but it was too late to stop the engine in so short a distance.

It was a freight engine, and had no appliances for working the air-brakes. With air-brakes, he might have stopped it within 75 or 80 yards, but without them, it could not be stopped short of 150. Air-brakes were used by the company on the passenger engines only.

The plaintiff insisted that it was negligence in the company, (612) in not having air-brakes on the engine, but even air-brakes would have been ineffectual to prevent the collision, for the necessity of reversing the engine the second time, did not occur, according to the evidence of the engineman, until the train was within fifty yards of the crossing, and was not stopped until it had run one hundred and twenty-four steps below the crossing, as testified by the plaintiff.

The defendant, it seems to us, did all that was necessary to prevent the injury, except to stop the train, or bring it to the lowest speed, until the plaintiff could pass. That the law did not require him to do. The engineman sounded the danger signal in full time for the plaintiff to take warning—the brakes were put on twice in the distance of two hundred and fifty yards, and the speed of the train, whose schedule time was thirty-five miles an hour, and was then running at the rate of fifteen or twenty, was reduced to twelve miles an hour when it passed the crossing. Negligence can only be attributed to a company, when it has notice of the peculiar emergency, in time, by the use of ordinary diligence, the *means being at hand,* to avoid the collision. *Railroad v. Hunter,* 32 Ind., 335, 364.

And in *Wilson v. Railroad,* 90 N. C., 69, which was an action against the company for killing a mule, the Judge in the Superior Court, charged the jury: "If the engineer saw the mule that was killed, a quarter or half a mile ahead of the train, and the mule left the track when the train was a quarter of a mile away, and the engineer had reason to believe that the mule was no longer in danger, and afterwards the mule ran upon the track, in front of the engine, then the defendant was not guilty of negligence, unless the engineer could, by *using the appliances* at his command, have stopped the train, after the mule had jumped upon the track the second time, so as to prevent the killing." The instruction was affirmed by this Court.

We hold that there was no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

Cited: Walker v. Reidsville, 96 N.C. 385; *McAdoo v. R. R.,* 105 N.C. 150; *Doster v. R. R.,* 117 N.C. 662; *Purnell v. R. R.,* 122 N.C. 848; *Pinnix v. Durham,* 130 N.C. 363; *Royster v. R. R.,* 147 N.C. 351; *Horne v. R. R.,* 170 N.C. 658; *Redmon v. R. R.,* 195 N.C. 770; *Eller v. R. R.,* 200 N.C. 531; *Godwin v. R. R.,* 220 N.C. 285.

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(613)

SALLIE MORRIS v. AUGUSTIN MORRIS, ET ALS.

Husband's Rights in Wife's Property.

1. Marriage, prior to the adoption of the Constitution of 1868, conferred on the husband, the *vested right* to reduce into possession and convert to his own use, the personal property of the wife, belonging to her at the time of the marriage.

2. But this marital right does not attach to personal property acquired by the wife after the Constitution of 1868 went into effect, even in cases when the marriage took place before that time.
3. By marriage and the birth of issue capable of inheriting, the husband became tenant by the curtesy of his wife's land, and entitled to the rents and profits thereof.
4. This was not altered by the Act of 1849. The Code, Sec. 1840—as to marriages which took place after the Act went into operation.
5. When payment is not unreasonably delayed or neglected by the administrator or executor, and he has not refused to refer the matter in controversy, pursuant to The Code, Sec. 1426, no costs will be awarded against him.

CIVIL ACTION, tried before *Clark, Judge,* at August Term, 1885, of the Superior Court of WAKE County.

The facts are as follows:

The plaintiff, the surviving wife of William Morris, with whom she had intermarried before the late civil war, on his death, in 1882, instituted the present action against the defendants, his administrator and heirs-at-law. In her complaint, she alleges that her intestate husband, in his life-time, used eight hundred dollars of her separate estate, in the purchase of, and payment for, a tract of land of about two hundred and fifty acres, situated in the county, and known as "Tipper's Cross Roads tract," and wrongfully, in disregard of her rights, took the title to himself. She demands that the (614) heirs-at-law be declared to hold as trustees to secure said amount, and that the land, or so much of it as may be necessary, be sold for its payment.

The answer, admitting the plaintiff's relation to the intestate; his ownership of the land; his death and intestacy; and the descent to the defendants, other than the administrator, his heirs-at-law, controverts the allegation on which the asserted equity of the plaintiff depends. It further sets up an estoppel, alleging that since the intestate's death, the plaintiff, by due course of law, in a proceeding against the said defendants, has caused her dower in said land, and in an acre lot belonging to the deceased at Oberlin, to be assigned to her, the judgment therefor remaining in force and unreversed.

Upon the coming in of the answer, the plaintiff obtained leave and amended her complaint, therein charging that the intestate received of her separate estate, and never accounted for the same, the sum of eight hundred dollars, and demanded judgment therefor against his administrator. To the complaint as amended, the defendants demurred, upon the ground of the improper joinder of two distinct and independent causes of action, with no common liability resting upon

them. There was a severance ordered, and the administrator, Syme, put in an answer to the amendment which sets out a cause of action against him only, in his representative capacity, and says he has no knowledge, or information as to the facts therein alleged, sufficient to form a belief of their truth.

The case was then submitted to the jury, and upon the trial, the plaintiff's evidence was to the following effect:

The plaintiff's mother died in 1866, leaving real and personal estate, to which the plaintiff thereby became entitled. There was issue of her marriage with the intestate, born alive, but who had afterwards died. In 1874, the intestate received of his wife's distributive share in her mother's personal estate, the sum of forty dollars, derived from the sale of a cow and her increase, from the plaintiff's brother,
(615) who paid the money. In the same year, the brother gave the plaintiff an ox, which her husband sold for twenty dollars. He also rented out the inherited land of his sister, for a period of ten successive years, from 1870 to 1880, and paid over the annual rent money to the deceased. In 1877, he was paid the further sum of one hundred and seventy-one dollars and ninety cents by the administrator of the plaintiff's mother, on account of her distributive share therein. The intestate, in 1880, received, also, forty-eight dollars, in money, derived from the sale of his wife's land. The "Tipper's Cross Roads tract," was bought in or about the year 1879.

The plaintiff introduced three witnesses whose testimony, as presenting the merits of the controversy, is set out in the record thus:

Asa N. Blake, a witness for plaintiff, said that he was present when an agreement was made, in 1880, between plaintiff and defendant's intestate, at which time it was agreed that plaintiff should sell the land she had inherited from her mother, and the proceeds should be invested in a lot in Oberlin village, near Raleigh, for plaintiff. Witness heard defendant's intestate say, that he bought the lot in Oberlin, and took the title in his own name, and that this was like all the land he had; that all he had was bought with his wife's money, and belonged to his wife; that he did not invest his own money in land, and that he was going to have it fixed so that she could hold it; that if he were to die it would go to his folks. Witness had heard him, in talking, while speaking of the Tipper's tract of land, call it his land, and immediately correct himself and say, "not my land, Sallie's land," referring to the plaintiff. He had come to Raleigh twice to have the matter fixed up, but could not see his lawyer.

Len. H. Royster, witness for plaintiff, said he had heard defendant's intestate say on a dozen different occasions, that he did not own a foot of land himself; that he bought the Tipper's Cross Roads tract

with his wife's money, for her; that he did not invest his own money in land.

John McDade, a witness for plaintiff, said that he had heard (616) defendant's intestate say, on many occasions, the last time only three days before his death, that he did not own a foot of land himself; that all the land he had, belonged to his wife, and was bought with her money. Witness had heard defendant's intestate call the Tipper's Cross Roads tract his land, and then correct himself immediately, and say "Sallie's land," referring to plaintiff. Witness had heard defendant's intestate say, three days before his death, that he was going to make his will and leave his property to his wife.

The defendant offered no evidence, and demurred to the plaintiff's evidence, and his Honor withdrew the case from the jury.

After argument, his Honor decided that the plaintiff was only entitled to judgment for the value of the ox, with interest, and for the value of the land, with interest thereon from the death of defendant's intestate.

The final judgment was entered in form as follows:

"This action coming on for trial, before the Court and a jury, and the plaintiff having introduced evidence, to which the defendant demurred—and there being no proof of any unreasonable delay on the part of the defendant in paying the amount recovered by the plaintiff in this action:

Hereupon, it is adjudged, that the plaintiff recover against the defendant the sum of sixty-eight dollars, with interest on $20.00 thereof from July 1st, 1874, and on $48.00 thereof from the 1st day of December, 1882, until paid, and that she recover no costs of defendant.

From this judgment the plaintiff appealed.

Mr. J. H. Fleming, for plaintiff.
Mr. R. H. Battle, for defendants.

SMITH, C. J. (after stating the case). We find no error in the rulings of the Court. The husband's right to receive and appropriate to his own use, his wife's distributive share in her mother's estate, was vested, under the law then in force, of which no subsequent (617) legislation could deprive him, without his consent. This marital right does not, however, attach to personal property coming to the wife, after the Constitution of 1868 went into effect notwithstanding the marriage relation was entered into before. *Kirkman v. Bank of Greensboro*, 77 N. C., 394; *Citizens National Bank v. Green*, 78 N. C., 247; *Holliday v. McMillan*, 79 N. C., 315; *O'Connor v. Harris*, 81 N. C., 279.

In the case last cited, it is held, not only that the husband could collect and apply to his own use his wife's choses in action acquired before the change introduced in the Constitution, but one claiming as assignee under an assignment made by him in 1873, could exercise the same right for his own benefit.

It is equally true, that the deceased, by the birth of issue, became tenant by the curtesy initiate, to a separate estate for his own life, in his wife's land, the usufruct or profit of which, during that period, was absolutely and exclusively his own property. This has not been questioned in this State, since the decision in *Williams v. Lanier,* 44 N. C., 30, and others following that case, *Halford v. Tetherow,* 47 N. C., 393; *Childers v. Bumgarner,* 53 N. C., 297; *McGlennery v. Miller,* 90 N. C., 215; *Osborne v. Mull,* 91 N. C., 203.

It is insisted by the counsel for the appellant, however, that the act of January 29th, 1849, (The Code, Sec. 1840,) which exempts from execution any interest of the husband in his wife's real estate, and disables him from selling or leasing the same, without her consent, when the marriage has taken place since the third Monday of November, 1848, has had the effect of destroying all estates by the curtesy, and rendering the wife's real estate separate property in her.

The contrary has been so often and uniformly held, and the estate by the curtesy recognized as subsisting in the husband, when the statute had become operative, that we will be content with a reference to some of the cases most in point. *Houston v. Brown,* 52 N. C., 161; *Long v. Grœber,* 64 N. C., 431; *Jones v. Carter,* 73 N. C., 148;
(618) *Wilson v. Arentz,* 70 N. C., 670; *Jones v. Cohen,* 82 N. C., 75; *State v. Mills,* 91 N. C., 581.

In the case last mentioned, ASHE, *J.,* uses this forcible and clear language, in stating the true rule:

"If he was married, and the land acquired by his wife before the adoption of the constitution of 1868, and the act called the 'marriage act,' he was a tenant by the courtesy initiate, notwithstanding the act of 1848. *Houston v. Brown,* 52 N. C., 161; and if he was the tenant by the curtesy initiate, he was necessarily entitled to the possession, *Wilson v. Arentz,* 70 N. C., 670; and if entitled to the possession, he had a right to the pernancy of the rents and profits," etc. It is then manifest, that the money received by the intestate from his wife's distributive share in her mother's personal estate, and from rents of her land, belonged to him, and whatever he may have intended or said in reference to these funds, they did not thereby become the plaintiff's, and his personal representative cannot be held responsible to her demand therefor. It is otherwise as to the ox given her, and

sold by the intestate, and as to the sum received upon the sale of her land, to the interest of which latter sum only, was he entitled during life.

The intestate died in December, 1882, and letters of administration issued on his estate in 1883, at what time is not stated, but necessarily before July 19th, when the suit was commenced. Nor does it appear that the administrator ever contested his intestate's liability for the sums adjudged to be due plaintiff. The case is very like that of *May v. Darden,* 83 N. C., 237, and must follow the ruling there made.

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

Cited: Hobson v. Buchanan, 96 N.C. 447; *McCaskill v. McCormac,* 99 N.C. 551; *Kirkpatrick v. Holmes,* 108 N.C. 209; *Thompson v. Wiggins,* 109 N.C. 509; *Walker v. Long,* 109 N.C. 511; *Taylor v. Taylor,* 112 N.C. 138; *Benbow v. Moore,* 114 N.C. 273; *Cobb v. Rasberry,* 116 N.C. 139; *Fowler v. McLaughlin,* 131 N.C. 211; *Hallyburton v. Slagle,* 132 N.C. 948; *Whitaker v. Whitaker,* 138 N.C. 208; *Richardson v. Richardson,* 150 N.C. 551; *Perry v. Stancil,* 237 N.C. 445.

(619)

W. G. NANCE AND WIFE v. THE CAROLINA CENTRAL RAILROAD COMPANY.

Carriers of Passengers—Negligence—Contributory Negligence—Demurrer—Complaint.

1. It is not contributory negligence *per se,* for a passenger to alight from a train which has almost come to a full stop, at a regular passenger depot.
2. It is negligence in a railroad company, if its engineman suddenly and violently moves a passenger train, at a time and place where passengers may be expected to be getting on and off the train, and this is so, although the train has not come to a full stop, but is very slowly moving.
3. Although the allegations in a complaint are indefinite, yet if it contains facts sufficient to give the defendant such information as will enable him to intelligently make his defence, the complaint is not demurrable. If necessary, the Court will order the plaintiff to make the allegation more specific.

CIVIL ACTION, heard upon demurrer, by *Avery, Judge,* at Spring Term, 1886, of the Superior Court of CLEVELAND County.

The complaint was as follows:

"The plaintiffs complain and allege:

"1. That the defendant is a corporation, created, organized and doing business, under the laws of the State, under the name aforesaid, and at the time hereinafter named being such corporation, was a common carrier of passengers for hire, between the town of Shelby in the county of Cleveland and a depot or station in said county on the line of said road called Waco.

"2. That on or about the 14th day of June, 1884, said defendant received the *feme* plaintiff, M. M. Nance, into its car for the purpose of carrying her therein, as a passenger from Shelby to Waco for the sum of twenty-five cents, paid to it by the said *feme* plaintiff; and the said *feme* plaintiff expressly notified the conductor of the defendant's train, at the time of paying the fare charged, that she wished to stop and get off the train at said depot or station, Waco,
(620) and the said conductor promised and agreed that the train would be stopped and she allowed to get off at Waco.

That the said Waco is a regular station or stopping place for passengers to get on and off of the trains of the defendant.

"4. That on said day and while the said *feme* plaintiff was a passenger on the defendant's train, having paid the fare as aforesaid, the whistle of the defendant's engine sounded the usual signal for stopping at Waco, being near thereto, at the usual place, and the *feme* plaintiff, relying upon the custom of the defendant and the express promise and agreement of the conductor of the train, made to and with her as aforesaid, and after the train commenced slacking its speed, prepared to get off of the train at Waco, and went to the rear of the car, and believing and having sufficient cause for believing, as aforesaid, that the car would be stopped at the usual place of stopping, the car having already slackened its speed to nearly a full stop, and when there was no real or apparent danger in her doing so, she went out on the rear platform of the car for the purpose of getting off, and perceiving that the car had reached the usual place of getting off and had come to almost a full stop and where it was safe and without danger for her to do so if there had been no default or carelessness on the part of the defendant, the female plaintiff attempted to step from the platform of the car to the said depot platform; but as she stepped, or was in the act of stepping the speed of the train, in violation of the agreement of the conductor and the reasonable expectation of the *feme* plaintiff, and the usual custom, was negligently, carelessly, wilfully and suddenly increased instead of stopping, and in fact not stopping at all, by which said sudden, violent, careless and negligent and unexpected increase of speed, the *feme* plaintiff was violently thrown from the train to the ground and was thereby seriously and

permanently injured in her person, to-wit: her side, back and breast were bruised, her hip joint was dislocated, the pelvis bone broken, her womb was badly injured, and she received other internal injuries, by reason of which many wounds and injuries she has (621) become a permanent invalid or nearly so.

"5. That the male and female plaintiffs at the time of the said injuries and now are husband and wife.

"Wherefore the plaintiffs demand judgment against the defendant for ten thousand dollars.

"For a second cause of action the plaintiffs complain and allege:

"1. That the allegations and facts stated in the first, second, third and fifth paragraphs of the first cause of action are true, and are therein made part of the second cause of action as though specifically stated.

"2. That the defendant, in violation of its contract and in disregard of its usual custom and duty, refused and failed to stop its train at Waco a sufficient time for the female plaintiff to get off said train, but carelessly, negligently and willfully passed by said depot or station without stopping, to the great damage of the plaintiffs, to-wit: five hundred dollars.

"Wherefore plaintiffs demand judgment for five hundred dollars."

To this complaint the defendant demurred as follows:

"The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that:

"1. That the complaint shows upon its face (article 4 of first cause of action) that *feme* plaintiff was guilty of contributory negligence at the time of the alleged injury, in that her jumping from defendant's car while the same was in motion, and without the instruction so to do of defendant or its agent, was the proximate cause of the alleged injury to her.

"2. That complaint in first cause of action fails to specify and describe the nature and character of the injury complained of with sufficient particularity.

"3. That complaint in second cause of action is too vague and uncertain, also in that it does not allege or describe the nature or character of the injury complained of, nor how the alleged (622) damages arose, nor whether because of injury to the person of the plaintiff W. G. Nance, or to the person of the *feme* plaintiff, and is generally too vague, indefinite and uncertain.

"4. That no part of said complaint described with sufficient particularity how or in what manner the alleged injury or damage occurred, nor the nature and extent thereof.

"5. That there is now another action pending in this court returnable to the same term growing out of the facts set forth in the complaint in this cause."

His Honor overruled the demurrer, and gave judgment that the defendant answer, from which it appealed.

Mr. W. P. Bynum, for the plaintiffs.

Mr. John Devereux, Jr., (Messrs. A. Burwell and P. D. Walker also filed a brief,) for the defendant.

MERRIMON, J. For the purpose of deciding the questions of law raised by the demurrer, the facts alleged in the complaint must be taken as true, and so accepting them, we are of opinion that the demurrer was properly overruled.

It was the obvious duty of the defendant to stop its train at the station named, and permit the plaintiff to get off safely. The usual signal for stopping there was given, and the speed of the train was slackened, preparatory to a stop. It was proper—certainly not negligent on her part—at the signal, to prepare to get off the train promptly, and as its speed grew slower and yet slower, until it came *nearly—almost, to a full stop,* to go out of the car on its platform, and step to the platform of the depot, if the latter was conveniently near for this purpose, as it seems, from the pleadings, it was. By *nearly—almost—to a full stop,* is meant very slow, a slight, gentle, creeping movement—one perceptible, and yet not such as would jerk, jostle, shake, embarrass, or cause an ordinary person to stagger, stumble, or fall, in stepping along in a car, or off one to a conveniently
(623) near platform, or to the ground, at a convenient place. A person of ordinary prudence and strength, could easily and safely step along in, and off, a car so moving, without encountering necessary or probable peril. It might not be very cautious to do so, but surely it would not be such lack of caution and care, as to be negligence, or contributory negligence, as contended by the appellant. Very certainly, it would not be negligence *per se.*

Moreover, the station named was a regular stopping place, at which passengers got on and off the passenger trains of the defendant. The conductor of the train was expressly informed that the *feme* plaintiff desired to get off there, and he promised that the train should stop, so that she might do so. She had the right to expect that the conductor would see that she got off safely. The train stopped only in the way described—that is, by coming *nearly—almost to a full stop.* Why such stop? The reasonable inference was, that it was intended by

such stoppage to let passengers get on and off the train; at least, the *feme* plaintiff might draw such inference. There was, therefore, at least an implied suggestion from the conductor, that she could do so. She might reasonably act upon the faith of such suggestion. She had the right to believe that she could get off safely and properly, and as she had such right, to attempt to get off as she did, was not contributory negligence on her part. *Lambeth v. Railroad Co.*, 66 N. C., 494; *Turrentine v. Railroad Co.*, 92 N. C., 638; *Manly v. Railroad Co.*, 74 N. C., 655; *Bircher v. Railroad Co.*, 98 N. Y., 28.

The principal allegation of negligence is, not that the train was not completely stopped, but that while the *feme* plaintiff stepped, or was in the act of stepping, from it to the depot-platform, as she might reasonably do, the speed of the train was negligently, violently and unexpectedly increased, whereby she was violently thrown from the car to the ground and injured. This is the substantial ground of complaint. Such sudden, violent and unexpected movement of a train, while passengers are getting on and off a car, is negligence, whether the train be completely stopped, or creeping along. The almost uniform and necessary effect of such movement, is to (624) throw passengers off their balance, and frequently to loose them from such supports as they may have, and cast them headlong to the ground, or against a wall or post. The defendant was bound to guard against such sudden or violent movement of its train, at the time and place indicated, and as it did not, it must be held responsible for the consequences.

The allegation of injury in the complaint, might have been more definite and specific, but it is such as that the Court can see the nature of the injury—that it is serious, and such as would naturally much endamage the plaintiff. It gives the defendant such information as will enable it to make any defence it may have. This is sufficient. A material allegation so made is not demurrable. It might be that the Court would, on proper application, if need be, require the allegation to be made more specific.

The second cause of action is very informally alleged, but we think that the demurrer as to it cannot be sustained for the causes assigned.

Taking the allegations of paragraph two, in connection with the allegations of the first cause of action, referred to in paragraph one, a cause of action is informally, in substance, stated. This cause of action is not that the *feme* plaintiff sustained physical injury, but that the defendant failed to stop and let her get off the train, as it engaged and was bound to do. This is the allegation embodied, not in very apt words, and surrounded by some redundancy in the allega-

tion, in the second paragraph, aided by the other allegations referred to.

That the allegations of the second cause of action are not stated, as required by the rule of this Court, (Rule VIII, Sec. 2), is not assigned as cause of demurrer. What effect this may have in the further progress of the action, unless the defect shall be remedied, remains to be seen.

Let this opinion be certified to the Superior Court, that further proceedings may be had in the action according to law. It is so ordered.

No error. Affirmed.

Cited: Comrs. of Burke v. Comrs. of Buncombe, 101 N.C. 525; *Knowles v. R. R.,* 102 N.C. 63; *Cawfield v. R. R.,* 111 N.C. 600; *Watkins v. R. R.,* 116 N.C. 967; *Hodges v. R. R.,* 120 N.C. 556; *Skinner v. R. R.,* 128 N.C. 437; *Denny v. R. R.,* 132 N.C. 342; *Graves v. R. R.,* 136 N.C. 4; *Whisenant v. R. R.,* 137 N.C. 353; *Peterson v. R. R.,* 143 N.C. 266; *Allen v. Traction Co.,* 144 N.C. 290; *Whitfield v. R. R.,* 147 N.C. 241; *Roberts v. R. R.,* 155 N.C. 90; *Kearney v. R. R.,* 158 N.C. 527; *Thorp v. Traction Co.,* 159 N.C. 37; *Bane v. R. R.,* 176 N.C. 249; *Stamey v. R. R.,* 208 N.C. 670.

(625)

LEWIS J. KIRK v. THE ATLANTA AND CHARLOTTE AIR-LINE RAILWAY COMPANY.

Negligence—Fellow-Servants.

1. Where an employé is injured by the negligence of a fellow-servant, the common master is not liable for the injury.
2. A foreman, who directs the work of the other servants, is as much a servant as those whose work he superintends, and if the common master has a general supervision of the work, he is not liable for the foreman's negligence, although the injured servant is obliged to obey the foreman's orders.
3. The term fellow-servant includes all who serve the same master, work under the same contracts, derive authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades and departments of it.
4. A person cannot be heard to say, that work which he has voluntarily agreed to do, is not within the scope of his employment. When he agrees to act with other employés, he becomes their fellow-servant, so far as to introduce between them, the same rule of legal responsibility, and this rule applies to one who is voluntarily assisting the servants in their work.

5. So where it appeared that a yard-master had the general management of making up, switching and receiving trains; *It was held*, that a car-repairer was his fellow-servant, and the company was not liable for an injury, resulting from his negligence.

CIVIL ACTION, tried before *McKoy, Judge,* and a jury, at August Term, 1884, of the Superior Court of MECKLENBURG County.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The facts appear in the opinion.

Mr. W. P. Bynum, for the plaintiff.

Messrs. R. D. Johnston, D. Schenck and F. H. Busbee, (Messrs. H. C. Jones and C. M. Busbee, were with them on the brief), for the defendant.

SMITH, C. J. The complaint imputes negligence to the defendant company, in the management of a shifting engine, in charge of an engineer, whereby it came in contact with a stationary car, (626) and the impulse of which put others in motion, under which the plaintiff, then engaged in inspecting, by direction of the foreman of the round-house, was run over, and his arm crushed, so as to require amputation; and for this injury, demands compensatory damage. The answer denies the imputation of negligence, and avers contributory negligence on the part of the plaintiff in producing the result. It also sets up the further defence, that if there was a want of due care in moving the engine, it was the act of a fellow-servant, in the same general employment, for the consequences of which, the company, the common principal of both, is not responsible.

The issues prepared and submitted to the jury were:

"(1) Whether the plaintiff's injury was caused by the defendant's negligence?

(2) Was the plaintiff's negligence contributory thereto; what damages is he entitled to?"

The Court refused an issue tendered for the defendant: "was the injury caused by the negligence of a servant of the company—if so, what one?" and the defendant excepted thereto.

The testimony offered, tended to show the following facts:

The plaintiff's general employment was that of a carpenter, and he had been often sent out, as he was on the occasion when he was hurt, to inspect cars, and report upon their condition and fitness for immediate use. To this service he made no exception that it was not within the scope of his employment. The yardmaster, B. T. Thomp-

son, at the junction, had the general management, making up, switching, receiving and delivering trains. He had ordered Harris, the engineer in charge of the switch engine, to stop at the eating house, seven car lengths from the cars under inspection. It was the custom for the switch engine to remain, and not move until the inspection was finished, and the engineer informed of the fact. One Todd was the regular inspector, acting at the time, the plaintiff assisting in place of one Clark, who was sick. It was the duty of Todd to notify
(627) the yard-master when the examination was over, and then for him to communicate the fact to the engineer, that he might proceed. One John Smith, a colored man, was an assistant of the yard-master, and when directed, would convey messages and give signals to the engineer, when the yard-master was present, that the way was clear, and he could proceed. On this occasion, Smith gave the unauthorized and premature order, as it is termed, to the engineer Harris, who thereupon put his engine in motion, and caused the car under which the plaintiff was inspecting, to crush his arm, no notice having been given him of what was about to be done, and he not seeing or hearing of the approach of the engine, until the impact took place.

The blame then rests upon Smith, primarily for giving the order, and it is perhaps shared by Harris, in heeding and acting upon it, as coming from that source, and A. P. Brown the fireman.

It was admitted by the counsel for plaintiff, that Harris the engineer, Brown the fireman, Thompson the yard-master, and Smith, his assistant, were fellow servants of the plaintiff, and the Court directed the jury, that "if the injury resulted to the plaintiff, without fault on his own part, from the negligence of an employé or fellow servant, occupying the same level with the plaintiff Kirk, when the Air-Line Company used due care in the selection of such fellow servants, then the jury could not say from this, that the injury resulted from the carelessness or negligence of the Air-Line Company."

Then after defining a fellow-servant, as "one upon an equality with the injured person, under the same or common control, engaged in a common employment, or in the same line of employment," the charge proceeds to subjoin a qualification of the general rule of non-liability of the common master, in these words: "But if one of the employees has the right to give orders, and the other, by his employment is bound to obey the orders, then the person who has the right to give an order, which the other ought to obey, under the
(628) contract of employment which he has taken upon himself, these are not fellow-servants, but the man who has the right to give

the orders, is a *middle man*, and whether vice-principal or not, if Kirk was injured by the carelessness or negligence of one occupying this position, which gave him the right to order, and which order Kirk, by the nature of his employment, ought to obey (if he has shown his right to recover in other particulars), and he is without fault on his own part, he is entitled to your verdict for such damages as you think he has shown, and to which he is entitled."

The first observation suggested by the charge, is the omission of the Court to tell the jury, between which of the parties, and the plaintiff servant, the relations of middle-man and subordinate, which exempt the defendant from the protection of the general rule, and subject it to direct accountability for the injury sustained. Between the plaintiff, and those to whose immediate precedent action the injury is attributed, the relations are conceded to be those of fellow-servants, and in one view properly so conceded, and the charge, if it has any support in the evidence, must have reference to the yard-master, under whose general superintendence all the movements and operations at the station are placed. But it was not from any inattention or act of his, that the mischief proceeded. He gave no false information, nor did he issue any improvident order on the occasion, so far as the testimony reveals his conduct, but the culpability abides upon Smith or Harris, or upon both, and these are co-employees, for whose conduct in the discharge of duty, their common superior is not answerable.

But is the charge correct, in stating the proposition of law, and is it appropriate to any aspect of the testimony? Is it true that when among fellow-workmen, one has authority to direct and control the work of others, as in all cases a general superintendence must be vested in some one, in order that the efforts of each may be in harmony, and tend to one practical result, where many are employed, this person becomes a *middle man* representing as an agent, their common principal, and imposing on him a personal responsi- (629) bility for the agent's individual misconduct, or want of proper care and caution, in conducting the business? If this were so, the subordination necessary among numerous workmen, engaged in the same general business, would practically neutralize the rule itself, for control and direction must rest in some of them, or confusion and conflict would ensue. It is not always easy to determine the dividing line, to be crossed, which takes an employé out of his class, and changes him into a middle-man, who represents the superior, and bears his relation to the other employees, so that his negligence becomes, in legal effect, the negligence of the superior towards the latter.

The true principle is thus stated by ASHE, J., delivering the opinion in *Dobbin v. Railroad,* 81 N. C., 446:

"To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, purchase material, etc. He must be an agent, clothed in this respect, with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a "middle man," who, as well as the laborer, is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a fellow-servant, in the sense of that term as used by the Courts, because he represents the master in his authority to direct, control, and manage the business."

This descriptive language is used by a recent author in defining this intermediate employé who assumes and exercises the functions of the employer: "When, however, the employer leaves everything in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the employers negligence, for which the latter is liable." Whar. Neg., Sec. 229.

(630) Appended to the section is a note, numbered 3, in which the recognized rule in England, and generally prevailing in this country, is declared to be, "that the term fellow-servants includes all who serve the same master—work under the same control—derive authority and compensation from the same source—and are engaged in the same general business, though it may be in different grades and departments of it."

The operation of the principle is not altered by the fact that the servant, chargeable with negligence, is a *servant of superior authority, whose lawful directions the other is bound to obey.* In *Feltham v. England,* L. R. 2, Queen's Bench 33, decided in 1866, the defendant was a maker of locomotive engines, and had many hands in his employment, among whom was the plaintiff. In the course of the work, a travelling crane was used to hoist the engines, and convey them to tenders for their carriage. The crane moved on a tram-way, resting on beams of timber, and supported by piers of brick work, which had been recently repaired, and partly rebuilt, and the brick work was fresh. In using the work, the piers gave way, and then the beams broke from the strain cast upon them. The accident occurred at the first using of the crane. There was no evidence of any defect in the crane, or negligence in the manner of using it, or that the engine was

unreasonably heavy; nor was there of the defendant's personal privity or interference, but his manager or foreman was present, and directed the hoisting. The traveller was worked by three men at one end, and three at the other. When moving along, the crane oscillated, and the foreman, thinking it not worked properly, directed the men to stop, as they did for a brief moment, and then to move on again, and, just before, he had ordered the plaintiff to get on the engine and clean it. He did so, while it was in motion, and, while thus occupied, some mortar fell, the pier gave way, and the engine fell, breaking the plaintiff's arm. The Court said: "We think the foreman, or manager, was not, in the sense contended for, the representative of the master. The master still retained control of the establishment, and there was nothing to show that the manager or foreman was other (631) than a fellow-servant of the plaintiff, although he was a servant having greater authority," quoting, with approval, what was said by WILLES, J., in *Gallagher v. Peper,* 33 L. J. C. P., 335, "A foreman is a servant as much as the other servants whose work he superintends."

In *The O. & A. R. R. Co. v. Murphy,* 53 Ill., 336, the facts were not unlike those in the case before us. The person, for causing whose death the company was sought to be held responsible in that case, was one of several workmen in its service, under the immediate charge of a foreman, whose duty consisted in examining trains on their arrival at the station, and making needed repairs. He and a fellow workman had been engaged in "jacking up" and repairing a car in a freight train, and having finished, had started for the shop in which their tools were kept, when in passing down the rails of the main track, he was struck by a switch engine, with such violence as to cause his death soon afterwards. The engine was used on the station grounds, and although under the immediate control of the yard master, was used as well for other purposes, as for switching cars to be repaired. When a car needed repair, the foreman would advise the yard-master, and the latter would have the switch engine move the car to such place in the yard, as he thought proper, and the foreman would have the needed repairs made.

Upon these facts it was held, that the deceased and the engineer managing the engine, through whose negligence the injury was received, *"were fellow-servants in such a sense as to subject them to the operation of the well established rule, which refuses a remedy against a common master, in favor of one employe, who receives an injury, through the carelessness of another, while in the same line of duty."*

The cases are so numerous and uniform that we refer to but one other, where the doctrine is carried much further, perhaps too far for

us to give it our approval. *Wander v. B. & O. R. R. Co.*, 32 Md., 410.

(632) Nor do we give force to the argument that places the plaintiff's service in the duty of the inspector, outside of those which he assumed as a carpenter. He made no objection to the service, had a dozen times before, as he himself states, undertaken it as incident to his employment, and voluntarily. He therefore stands upon the same footing, as if this service was within the scope of his agreement. One who volunteers to act with other employees, becomes one himself, so far as to introduce between them, the same rule of legal responsibility.

Thus in *Skipp v. East Co. R. R. Co.*, 9 Exch., 223, where the force employed, was insufficient to perform the service of attaching carriages of the baggage trains to the locomotive engine, but the plaintiff undertook to assist in the work, and while so engaged, was injured, it was held, that as he had before, for several months, been employed in this particular service, and had not made any complaint on the subject, he had no redress on the company.

So it was held in *Degg v. The Midland R. R. Co.; Hurls' & Norm,* (Exch.) Reports, 773, that the rule of law, that the master is not responsible to the servant, for injury, occasioned by the negligence of another servant, in the course of their common employment, *"applies to the case of a person who is injured whilst voluntarily assisting the servants in their work."* Accepting this as a correct exposition of the law, we find it difficult, in the scant and unsatisfactory evidence before us, to fit the instruction to the proofs; and if not erroneous in itself, it was certainly calculated to mislead the jury, in determining the real and material issue involved in the controversy. We cannot perceive from the testimony, that Thompson, or any one else, is lifted from his position as a co-servant, to that of a representative of the company, in an agency which makes it responsible for his negligent omissions, or careless conduct, under the legal definition of a *"middle-man;"* or, if there was evidence to warrant the finding of the fact, that it was to his negligence the accident was owing, so as to apply the rule to the plaintiff's case.

(633) The immediate cause of the injury was the premature movement of the engine by Harris, and preceding and producing the movements, was the false direction given by Smith, upon one or both of whom, liability for the consequences rests, and between them and the plaintiff, the relation of fellow-servants is admitted to exist. It may be that, upon a fuller development, it will appear that the mishap is directly or indirectly owing to the want of attention and care on the part of some one, who may be proved to be a middle-man, but

this was not shown, so as to render pertinent the instruction given in such general terms; nor was the instruction, that the right to give an order, resting in one employé, and the duty of obedience to it, imposed upon another, of itself, created the relation out of which springs the defendants accountability to the latter, for an injury suffered.

Without considering other exceptions, this fundamental error in the ruling, entitles the defendant to have another jury, who shall be properly advised as to the law, to pass upon the case.

The verdict must be set aside, and a *venire de novo* awarded, in order to which, let this be certified to the Court below.

Error. Reversed.

Cited: Scott v. R. R., 96 N.C. 437; *Kirk v. R. R.*, 97 N.C. 85; *Hobbs v. R. R.*, 107 N.C. 3; *Rittenhouse v. R. R.*, 120 N.C. 547; *Pleasants v. R. R.*, 121 N.C. 495; *Bryan v. R. R.*, 128 N.C. 390; *Olmstead v. Raleigh*, 130 N.C. 245; *Cook v. Mfg. Co.*, 182 N.C. 212, 214, 215, 216; *Cook v. Mfg. Co.*, 183 N.C. 51; *Richardson v. Cotton Mills*, 189 N.C. 654.

J. L. WILLIAMS AND WIFE *v.* J. W. JOHNSTON, ET ALS.

Assignment of Error—Agent—Husband and Wife.

1. The rule is again stated, that exceptions must be specific, and directly point to the ruling alleged to be erroneous, or they will not be considered, unless they be to the Judge's charge, when he undertakes to explain the law to the jury, and does so erroneously.
2. The mere fact that a wife has constituted her husband her general agent, does not warrant a presumption that she authorized him to settle a debt due her, in a manner which enures entirely to his own benefit.
3. When there is no error apparent in the record, this Court will not interfere with the judgment upon speculative reasoning as to how the jury arrived at their verdict.

CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at (634) January Term, 1886, of the Superior Court of HALIFAX County.

There was a verdict and judgment for the plaintiffs, and the defendants appealed.

The facts appear in the opinion.

Mr. R. O. Burton, Jr. (Messrs. Spier Whitaker and R. B. Peebles were with him on the brief), for the plaintiffs.

Messrs. John A. Moore and W. H. Day, for the defendants.

SMITH, C. J. When this case was before us on a former appeal, 92 N. C., 532, upon the single issue of the payment of a debt due the *feme* plaintiff by the sale of trees to her husband for his individual use, he being her general business agent, this Court thus declared the law:

"An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal. It implies a trust and confidence, that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established."

Again, "An agency involves integrity and fidelity in the agent, an exercise of power not for his own, but in the interest, and for the intended benefit of him who confers it." *Williams v. Whiting,* 92 N. C., 691.

Upon the second trial awarded, these issues were submitted and passed upon by the jury:

"I. Has the plaintiff's judgment, described in the complaint been paid? Answer, No.

"II. Has any part thereof been paid, if so how much? Answer, $14.80."

It was conceded that $153.75, proceeds of a sale of land to William Smith, and $28.37, derived from certain notes, had been thus appropriated, and these were withdrawn from the consideration of the jury.

(635) The controversy was mainly directed to an inquiry, as to the number of trees cut on the defendants' land by the plaintiff, James L., for his own use, and to supply his own steam mill, and whether the price contracted to be paid, should be applied to his wife's judgment debt. The plaintiff James L., fixed the number at 476, while the defendant made the number much larger, sufficient indeed, to discharge the whole judgment. There was conflicting testimony as to the contract and mode of payment, the defendants' evidence tending to prove that the application of the money was, by the contract, to be credited on the judgment, and also declarations of the *feme* plaintiff were shown, to the effect that the trees had been paid for, and had cost her husband nothing, and further, that "she bought the trees of her uncle John W. Johnston, with the intention of his paying her an old debt." The plaintiffs, on their examination, contradict these statements—both denying that any authority to thus dispose of the money was given by the *feme* to her husband; the said James L. denying that he made any such contract in purchasing the

trees, and the wife denying that she made the declaration imputed to her by the witness.

The Court charged the jury, as follows: A husband may be the agent of his wife, for the purpose of managing her business, including the collecting and settlement of her debts due to her, and she may authorize him to take trees, or other property in part or in full satisfaction of her indebtedness, but if she merely authorizes him to collect her debts, and this is the extent of the agency, he has no right to bind her by an agreement to discharge the debt by the delivery of trees or other specific property, unless she afterwards received the property, or assents to and ratifies the act of her agent. A married woman has no right to make a contract to bind her personal or real property, unless it be in writing, and with the written assent of her husband, but she may collect and receive what is due her without such written consent, and she may, without such written consent, authorize her husband to collect her debts, as her agent, and receive payment thereof, either in money, or property. What was the (636) agency, if any here? This you must infer from the alleged declaration and act of Mrs. Williams, and all the circumstances in evidence; if the defendant has failed to satisfy you by a preponderance of evidence that Williams was the agent of his wife to collect this judgment, you will find against him. If he was such agent, and it was simply to collect the debts and nothing more, then he could only receive money, and you will find the first issue in the negative, but if you are satisfied that she afterwards knew of the alleged agreement to take trees in payment, and having such knowledge, assented thereto, and permitted her husband, as her agent, to receive such trees, in pursuance of such agreement, then the defendant is entitled to credit for the trees, at contract price, and you will so find.

But, if you find that Williams had authority from his wife to receive property, other than money, in payment of the judgment still he had no right to apply such property to his own use, and if the agreement was that the trees were to be used by Williams in his own business, and there is no evidence to the contrary, it would be a misapplication of the property, and this being known to the defendant, and there is no evidence to the contrary, it would be a fraud upon her rights, and it would be no payment, unless subsequently, after having full knowledge of the transaction, Mrs. Williams assented to, and ratified the same.

If you should find that the trees were paid for by Williams, by the account of Williams against J. W. Johnston, which Williams has exhibited, then there was no settlement of the judgment sued on, by the trees.

The plaintiff asked the Court to charge the jury, that there is nothing in the evidence of Mrs. Williams, to show that she authorized her husband to make the agreement claimed by the defendant, or that she ratified it after it was made, if made at all. The Court charged the jury that there is nothing in the evidence of Mrs. Williams
(637) to show that she expressly authorized her husband to make the agreement claimed by the defendant, or that she ratified it after it was made, if made at all, but the jury may consider the testimony as to her husband having full control of her affairs, in connection with the other evidence, as to the extent of the agency, and other circumstances deposed by the witnesses."

At the close of the charge the defendant handed up a written request for the following instructions:

"If J. L. Williams, with the consent of his wife, had full management and control, without restriction, of the debt declared on, he had a right to collect the judgment in timber trees; and if he so received them, the payment of the trees was valid."

The Judge remarked, that the request came too late, and declined to give it, but on examining it, remarked that it was probably covered by the charge.

Upon the rendition of the verdict, the defendants moved for a new trial, upon the ground of the exceptions taken, and for errors in the charge. The motion was overruled, and judgment rendered, from which the defendants appealed.

We have too often said to need repetition, that exceptions must be specific, and directly point to the ruling alleged to be erroneous, and intended to be reviewed, or they will not be considered. The only exception is that arising under the words of the statute. The Code, Sec. 411, par. 3, and interpreted in *Fry v. Currie,* 91 N. C., 456, to apply only to such an instruction as involves "an erroneous statement of the law," several and distinct, as such.

In *Bost v. Bost,* 87 N. C., 481, the appellant insisting upon his right to enter a general exception to the charge, it was sent up, *in extenso,* and the Court said: "We cannot recognize this method of assigning errors, and bringing them up for review. It is neither just to the appellee, nor to the trial Judge, to remain silent until the final result of the trial is reached, and then seek for error, which if brought to notice, might have been corrected at once; still less can a single exception be taken and entertained in the appellate Court, to
(638) an entire charge, traversing perhaps the whole case, and consisting of a series of propositions, to none of which it is specifically addressed."

The departure from this wholesome rule, made in The Code, will not be allowed, beyond the assigned limits therein established.

The specific instruction, except so far as it is covered in the charge, was properly withheld, since it is repugnant to the principle laid down in the other appeal, unless under the qualifications mentioned in the charge. To be binding upon the wife, she must have conferred authority to do the act, or recognized and sanctioned it, after full information of the transaction, and this is not an inference warranted by the mere constitution of a general agency in the management of her business.

Exception is taken to the expression in the charge, "and there is no evidence to the contrary," that is, in opposition to the testimony that the trees were to be used by the husband in his own business. The evidence adverted to in the argument for appellant, tending to show that the *feme* consented to let the purchase money go in reduction of her judgment, is not inconsistent with the proof that the husband bought and used the trees, even if they were to be paid for with her means for him.

It was suggested for the plaintiffs, that the jury, in estimating the amount paid, have in fact allowed credit for the trees, according to the number stated by the said James L. to have been cut and used. The result is reached by deducting from the price of the 476 trees at 25 cents each, $119.00, the account claimed by him $104.20, the excess is the precise sum $14.80 found by the jury to have been paid by the defendants.

This may be so, but the reasoning is speculative, and forms no basis for judicial action. We put our decision upon the ground, that there is no error for correction in the appeal, set out in the record.

The judgment must be affirmed.

No error. Affirmed.

Cited: Leak v. Covington, 99 N.C. 569; *S. v. Cross,* 101 N.C. 787; *McKinnon v. Morrison,* 104 N.C. 362; *Shober v. Wheeler,* 113 N.C. 377.

(639)

*THOS. D. HOLLY v. SALLIE P. HOLLY, ET ALS.

Appeal—Assignment of Error.

1. Exceptions must be taken, and the alleged errors assigned in the case, or they must appear in the record proper, specified with reasonable certainty.
2. Where no errors were assigned in the case, and none appeared in the record proper, but it appeared that counsel for both sides had agreed that all the papers in the cause should constitute the case on appeal, the case was remanded, in order that error might be properly assigned.

PROCEEDING to procession land, heard on appeal from the Clerk, before *Connor, Judge,* at Fall Term, 1885, of the Superior Court of BERTIE County.

The plaintiff appealed.

The facts upon which the appeal was disposed of in this Court, appear in the opinion.

Mr. C. M. Busbee, for the plaintiff.

Mr. John Gatling, for the defendants.

MERRIMON, J. The appellant, in the Court below, made application to have a tract of land, of which he is the alleged owner, processioned, as allowed by the statute. (The Code, Secs. 1926, 1927, 1928). The freeholders and processioner appointed in that behalf, made report of their proceedings, to which numerous exceptions were taken by the appellee. These exceptions were overruled by the Clerk of the Court, and he gave judgment confirming the report. On appeal to the Judge, he reversed the judgment of the Clerk, sustained the exceptions, and gave judgment quashing the report, from which the appellant appealed to this Court.

(640) No case for this Court on appeal is stated, and no alleged errors are specified in the record, in terms or by reasonable implication. The record is confused and voluminous. We cannot see what the supposed errors complained of are. Indeed it seems that the appellant was dissatisfied with the judgment, and by his appeal, he intended to make one sweeping exception to all the rulings of the Judge, in respect to the exceptions mentioned, and through them to the whole proceeding. Such loose and pointless practice cannot be allowed. Exceptions must be taken, and the alleged errors assigned, as prescribed by the statute, (The Code, Sec. 550), or they must

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

appear in the record proper, specified with reasonable certainty. The statute plainly so requires, and besides, this is essential to intelligent and just procedure. *Baum v. Shooting Club, ante,* 217; *Gregory v. Forbes, ante,* 220.

We would be strongly inclined to simply affirm the judgment, but for the fact that it appears that the counsel of both parties "agreed that the summons, and all papers filed in the cause, including the notices, the plat, etc., be sent up and constitute the case on appeal." It seems to have been intended, that the appellant might find and point out in this Court, any error he could, or the Court might search for and discover any it could. The law does not allow this to be done. Error must be assigned, either in terms, or by reasonable implication.

As the counsel for the appellee consented to such a method of stating "the case on appeal," we think the case should be remanded, to the end that errors may be properly assigned, if the appellant shall see fit to do so. By consent of parties, this may be done in this Court. It is so ordered.

Remanded.

Cited: S. v. Farrar, 103 N.C. 413; *Asbury v. Fair,* 111 N.C. 258.

(641)

J. H. WILSON, ET ALS. v. C. J. LINEBERGER.

Executors—Agreements Between—Covenants—Specific Performance.

1. A contract between administrators or executors, that the estate shall be managed by one of them alone, is against public policy, and void.
2. A necessary allegation which has been omitted from the complaint, is not supplied by pleading over to the merits.

PETITION to re-hear, heard at February Term, 1886, of the Supreme Court.

The case is reported in the 92 N. C., 547, and the petition was filed by the plaintiffs.

The petition to re-hear was asked on the following grounds:

"1st. In that the Court erred in deciding that the contract sued on contained mutual and dependent covenants, to be performed by J. H. Wilson and E. C. Wilson, his wife, and that the plaintiff's complaint did not state a cause of action, because it did not allege that said

J. H. Wilson and E. C. Wilson, had performed, or were ready, willing and able to perform, the covenants on their part in said contract; whereas the petitioners allege, that from the face of the said contract, it appears that the covenants to be performed by said J. H. and E. C. Wilson, are entirely distinct and independent from the covenant of the defendant which it is sought to enforce in the action.

"2nd. In that the complaint does allege, with sufficient certainty, the readiness of the plaintiffs to perform their covenant.

"3rd. In that it appears from the record in this action, that the defence was not raised either by demurrer or answer, but that the defendant answered to the merits, whereby the petitioners respectfully suggest, that the defect in the complaint, if any, was aided by the answer, and could not be taken advantage of by the defendant in this Court, for the first time.

(642) "4th. In that the effect of the judgment of this Court, is to prevent the infant plaintiff from enforcing the said contract in this action, whereas it appears from the record, that the said contract contains no covenant on the part of the said infant of any kind whatever, to be performed by him; and it does appear that the covenant in said contract, which this action is instituted to enforce, was made to secure to said E. C. Wilson, in her representative capacity, as administratrix of J. L. Lineberger, the moneys in the hands of the defendant C. J. Lineberger, as co-administrator of said estate, and that said infant is one of the distributees of said estate, and entitled to enforce the said covenant."

The contract was as follows:

"This contract, made this the 24th day of August, A. D. 1874, between J. Harvey Wilson, Jr., for himself and as agent for his wife E. C. Wilson, parties of the first part, and Caleb J. Lineberger, party of the second part, witnesseth: That the said parties of the first part, for the consideration hereinafter mentioned, do hereby covenant, stipulate and agree, to sell unto the said party of the second part, his heirs and assigns, the interest of the said E. C. Wilson in all that tract and parcel of land, lying, situate and being in the county of Gaston, State aforesaid, on the waters of the South Fork of the Catawba River, adjoining the lands of Lee Smith, Mrs. E. C. Wilson, Wesley Stroup and others, and known as the Woodlawn Mills tract of land, containing one thousand (1,000) acres, more or less, including the improvements, machinery and fixtures erected or placed thereon, the interest of the said E. C. Wilson therein, and herein contracted to be conveyed, being one undivided fourth part thereof.

"And the said party of the second part, for and in consideration of the premises, hereby covenants, stipulates and agrees, to and with the said parties of the first part, to pay unto them, the said parties of the first part, at the time of the execution of the conveyance above mentioned, the sum of nine thousand dollars, solvable as follows, to-wit: six thousand dollars at the time of the execution (643) and delivery of the deed of conveyance aforesaid to him, by the said parties of the first part, and the balance, to-wit: the sum of three thousand dollars, to be paid at the expiration of two years from the date of the execution of said deed, with interest thereon from said time, at the rate of eight per centum per annum, interest payable annually, which said sum of three thousand dollars is to be evidenced by the promissory note of said party of the second part, bearing even date with that of the execution of the deed aforesaid, and for the purpose of securing the payment of said indebtedness, the said party of the second part, doth hereby covenant, stipulate and agree, to and with the said parties of the first part, to execute and deliver to them, a mortgage upon all his interest, right and title, in and to the premises above described, with power of sale, in case the said party of the second part, should fail well and truly to pay the said indebtedness at maturity, and the interest thereon as it yearly accrues. And the said parties of the first part, upon the payment of six thousand dollars as aforesaid, by the said party of the second part, and also in compliance with the other stipulations hereinafter set forth, do hereby covenant, stipulate and agree, to and with the said party of the second part, his heirs or assigns, the interest of the said E. C. Wilson in the above described premises, (said interest being one undivided fourth therein as aforesaid,) to convey by deed of bargain and sale in fee simple, with covenants of general warranty and seizin. And it is further the agreement between the parties hereto, that an account of the partnership effects of the firm of Lineberger, Rhyne & Co., be taken immediately after the execution of these presents, and that one-fourth of the manufactured goods belonging to said firm, be delivered by the said party of the second part to the said parties of the first part.

"It is the further agreement between the parties hereto, that after taking the account aforesaid, one-fourth of the cotton, as per grade, found on hand belonging to the said firm, be likewise delivered to the said parties of the first part. And it is further (644) the agreement between the parties hereto, that the residue of the personalty belonging to said firm, be divided, and the one-fourth part thereof, in value, be paid over to the said parties of the first

part, within ninety days after the execution of the deed of conveyance by the said parties of the first part as aforesaid, said valuation to be ascertained by reference to an inventory taken between C. J. Lineberger and A. P. Rhyne, upon a settlement had between them in the adjustment of their respective interests in the personal property of said firm of Lineberger, Rhyne & Co.

"And it is the further agreement between the parties hereto, that one-fourth in value of the notes, accounts and moneys belonging to the firm of Lineberger, Rhyne & Co., be turned over to J. Harvey Wilson, Jr., one-fourth thereof to A. P. Rhyne, and one-half thereof to C. J. Lineberger for collection, and the parties hereto agree to use due diligence in collecting the same, and to meet within ninety days from this date, and upon convenient intervals thereafter, and make statements as to the amounts collected thereon, and a division of the same among the parties so entitled according to their respective interests therein.

"And it is further the agreement of the parties hereto, that C. J. Lineberger, administrator of J. L. Lineberger, is to file his account of the administration of the estate of his intestate, with the Judge of Probate of Gaston County, immediately after the execution of these presents, and at the date of the execution of the deed of conveyance as aforesaid, to turn over to E. C. Wilson, one of the parties of the first part, (who is also his co-administrator upon said estate), all the assets which may have, or should have come into his hands, as administrator aforesaid, and upon filing said account by the said party of the second part, the amount found due the estate of J. L. Lineberger, the said party of the second part, agrees to deliver to the said parties of the first part, his promissory note therefor, payable two years from the date of these presents, secured by a mortgage upon the premises above described, bearing interest at the rate of
(645) eight per centum per annum: *Provided, nevertheless,* that the said parties of the first part, shall execute and deliver to the said party of the second part, a good and substantial bond, in the penal sum of five thousand dollars, conditioned to save the said party of the second part entirely harmless from any and all acts done now or hereafter by the said E. C. Wilson, as the administratrix of the estate of J. L. Lineberger, details to be set forth in said bond.

"It is the agreement of the parties hereto, that the manufactured goods, agreed to be delivered to the said parties of the first part, are to be such only as are manufactured by the firm of Lineberger, Rhyne & Co., said goods to be delivered at the date of the execution of the deed of conveyance of the premises above described.

"In testimony whereof, we hereunto set our hands and seals the day and year above written.

J. HARVEY WILSON, JR., (L. S).
E. C. WILSON, (L. S).
(By J. H. Wilson, Jr., her Atto. in fact.)
C. J. LINEBERGER, (L. S)."

"The terms of the above contract are duplicated and furnished both parties.

"It is further agreed by the party of the second part, that the indemnifying bond referred to in this contract, and to be given to C. J. Lineberger as administrator, shall be acceptable with the names of the parties of the first part signed thereto.

J. H. WILSON, JR.,
C. J. LINEBERGER."

The portion of the complaint which the plaintiffs relied on as a substantial allegation of performance of the covenant, was as follows:

"Plaintiff's aver a readiness and willingness to fulfil said contract on their part; by giving the defendant their penal bond for his indemnity, whenever he is ready to perform said contract on (646) his part; and hereby offer to perform any order made by this honorable Court, in that matter."

The answer, after denying that the defendant was liable to account at all, proceeded as follows:

"That the defendant has not turned over the assets of his administration to plaintiff, or given his note, with mortgage, as stipulated for, for the reason that he has since ascertained that there are still claims of considerable amount outstanding against the estate of the intestate. And he has since been sued for more than $5,000.00. That since said agreement was entered into, the plaintiffs have mortgaged all of their estate for more than it is worth, as defendant is informed and believes, and should defendant be forced to pay over to them the amount in his hands, and judgment should be given against him for these claims, the defendant would lose said amounts."

The answer did not contain any allegation that the plaintiffs had not performed their covenants.

The case has been repeatedly before the Court, and is reported in 82 N. C., 412; 83 N. C., 524; 84 N. C., 836; 88 N. C., 416, and 92 N. C., 547.

Mr. John Devereux, Jr., (Messrs. Jos. B. Batchelor and Geo. E. Wilson, were with him on the brief), for the plaintiffs.

Mr. W. P. Bynum, (Mr. R. W. Sandifer, also filed a brief), for the defendant.

SMITH, C. J. The covenant, the specific performance of which, as a means of enforcing a lien upon the real estate described in the pleadings is demanded, embraces two distinct interests, one wholly personal to the contracting parties, the other the trust estate committed to the joint administration of the *feme* plaintiff and the defendant. The payment of the deferred purchase money for her share in the land sold, is to be secured by the conveyance of the estate of the debtor, thus charged, by a mortgage deed, while the de-
(647) fendant, left in charge of the trust estate of the deceased intestate, J. L. Lineberger, is forthwith to render an account of his administration, execute to his associate, the *feme* plaintiff, his note, bearing interest at the rate of eight *per cent.*, payable in two years, and to be secured in like manner by mortgage of the same land. Preliminary to the ascertainment of the sum for which the defendant would be liable, it became necessary to have the partnership settled, whereof the intestate was a member, in order that his portion, as well as what was due under the guardianship committed to the defendant, might be entered as credits upon the administration account proper. The protracted and complicated controversies which had to be, and have been, settled, during the progress of the cause, have grown out of the administrations, and have necessarily delayed the execution of so much of the contract, as related to the ascertaining of the value of the assets of the intestate for distribution to the parties entitled. During this period, the duties common to both, acting as trustees under their joint appointment, have rested upon *one*, and the funds have not had the joint care and supervision intended. As understood by the plaintiffs, the obligation of the defendant covers the two preliminary, as well as the final accounts to be stated.

Not only does this arrangement comprehend the retirement of the administratrix from the management, with a view to her being absolved from responsibility in the premises, but the mixing up of personal and trust matters in one and the same contract, may possibly lead to antagonism, a result not sanctioned in a Court of equity, and we may repeat what is said in *N. C. R. R. Co. v. Wilson,* 81 N. C., 223, "The law frowns upon any act on the part of a fiduciary, which places interest in antagonism to duty, or *tends to that result.*"

It is in this aspect of the case, we used the language repeated in the opinion now under review. "We are not prepared to uphold the

contract in this feature, as one entitled to a specific performance, if its validity were now open to question." Such equitable relief is not of positive right, to be demanded, but it is afforded under (648) general rules of equitable action, it is true, in the exercise of a sound discretion, by the Court.

But aside from this, without needless repetition, we adhere to the reasoning pursued in the opinion, and now called in question, upon which the Court refused to decree a specific execution of the contract upon the first hearing of the appeal. Notwithstanding the able and exhaustive argument, and copious learning brought to bear upon the point, our convictions remain unchanged of the effect of the absence of averments necessary in sustaining the present claim, and which are not, because of their essential nature, waived by pleading over, as now contended.

We therefore adhere to our former ruling, and affirm the judgment.

Affirmed.

W. G. EGERTON, ADMINISTRATOR, v. CHAS. CARR ET ALS.

Deed—Construction—Trust—Evidence.

1. The intestate of plaintiff executed the following instruments: "The following notes I leave in trust with my son-in-law, Elias Carr, to be equally divided between my daughters, M. H. H., V. V. W. and P. D. A., after my death," etc., which was duly proved and registered; *It was held*, that the instrument was, in form and effect, a deed of conveyance, operating at once, and that it was irrevocable.
2. Such instrument operated to pass a present equitable interest to the defendant Carr, coupled with a trust, which can be enforced against him when the time for division of the fund arrives.
3. The technical rules relating to land, which require a legal estate in the trustee, to which the trusts may adhere, do not apply to unendorsed notes for money, especially since, under our present system, the equitable owner *must* sue on them in his own name.
4. The near relationship of the parties furnishes a sufficient consideration, if one was necessary; and acceptance of the trust by the trustee furnishes a consideration for its enforcement against him.
5. The deed creates an *executed*, as distinguished from an *executory*, trust, and leaves nothing further to be done, except to distribute the fund among the *cestui que trust*.
6. When the *character* of the instrument, upon inspection, is left doubtful, parol evidence is admissible to show the intention of the maker.

(649) CIVIL ACTION, tried before *Phillips, Judge,* at Fall Term, 1885, of the Superior Court of WARREN County.

On the 13th day of March, 1880, Maria A. Kearney, the intestate of the plaintiff, being the owner of sundry notes for the payment of money, which had been before placed in the hands of the defendant, as her agent, executed the following instrument in writing, in reference thereto:

"The following notes I leave in trust with my son-in-law, Elias Carr, to be equally divided between my daughters Martha H. Harris, Valeria Virginia Williams and Polly Dawson Alston, after my death, to-wit:

1st.	Against	M. K.	Williams,	dated	June 7th, 1879, for $60.
2d.	"	"	"	"	Oct. 1st, 1875, for $200.
3d.	"	"	"	"	Aug. 12th, 1874, for $200.
4th.	"	"	"	"	Oct. 15th, 1874, for $200.
5th.	"	"	"	"	June 3d, 1875, for $150.
6th.	"	"	"	"	Dec. 20th, 1877, for $60.
7th.	"	Lucy E.	Polk,	"	Oct. 8th, 1877, for $200.

Witness my hand and seal, this 13th day of March A. D., 1880.

(Signed) MARIA A. KEARNEY, [Seal].

Witness: S. D. TWITTY."

The instrument was proved by the oath of the subscribing witness, on August 15th, 1884, and registered soon after.

At the time of the execution, the maker expressed to the defendant, then in possession, her wish that the notes should be kept by
(650) him until her death, and then delivered to the parties named. The notes were payable to her, and remained unendorsed.

She never applied to the defendant for these papers, but subsequently gave him another bond for about $1,100.00 against Parker, Watson & Co., as to which she said she wanted to make a further trust. The intestate died in 1883. The defendant has caused new notes be executed in renewal, which with that orally delivered to him, he still holds, and refuses, on plaintiff's demand, to surrender or account for to the administrator.

This action is for the recovery of the notes specified in the writing, or their value, or of those substituted in the place of the original and to the issue: "Is the plaintiff the owner of the notes or bonds set forth in the pleadings?" The jury under instructions of the Court, answered "Yes."

From the judgment rendered according to the verdict, the defendants, among whom are the three named daughters, appeal.

Mr. L. C. Edwards, for the plaintiff.

Mr. Jos. B. Batchelor, (Mr. John Devereux, Jr., was with him on the brief,) for the defendant.

SMITH, C. J. (after stating the facts). To be effectual, the sealed instrument can operate only in one of three ways, either:

I. As a testamentary disposition of the fund; or,

II. As a gift *inter vivos* of it to a trustee, for distribution among the intended beneficiaries, at the donor's death, the interest meanwhile accumulating; or,

III. As a *donatio causa mortis,* revocable during the donor's life, which partakes of the nature of both.

I. It cannot be upheld as a testamentary disposal of the notes, for the single sufficient reason, that it has not the required number of attesting witnesses; as a will whether professing to pass real or personal estate, must be made in the presence of not less than two subscribing witnesses, nor has it the requisite of a holographic paper. The Code, Sec. 2136.

II. It is not a gift *causa mortis,* for this must be given in (651) prospect of approaching death, and not only was the donor not ill at the time, but she lived three years afterwards.

A *donatio causa mortis,* is said by BATTLE, J., delivering the opinion in *Overton v. Sawyer,* 52 N. C., 6, to be, "not a legacy, which requires the assent of the executor to vest the legal title in the donee, but it is a gift *made in contemplation of death,* which upon delivery, passes the legal title at once to the donee, upon condition to be void if the donor do not die."

III. If effective in passing an equitable interest in the securities then held by the defendant Carr, (and the notes not being endorsed, none other could vest,) the instrument must be deemed to be a deed of conveyance, operating at once, and irrevocable, and creating an equity in the daughters, capable of being enforced, when the time for division among them arrived. The Court, on the trial, ruled that the writing, upon the face and in the light of surrounding circumstances, was, and was intended to be, testamentary, and as it was legally insufficient to operate as a will, it could not operate at all, and was void. The jury were accordingly directed to find the issue in favor of the plaintiff, and such was their verdict.

In passing upon the legal character and effect to be given to the act of the deceased in making the writing, we must not lose sight of the wholesome rule, which, in the language of GASTON, J., "requires the Courts to be benignant in the interpretation of solemn and de-

liberate acts, so that they may avail, *if possible,* rather than perish altogether."

The execution of the instrument was careful, and with a well defined intent, not only conveyed in its terms, but orally made known at the time, to make a present provision for conferring a future benefit upon the object of the donor's bounty.

It purports to convert an agent into a trustee, and to attach trusts, which the defendant Carr, by his assent, accepts and agrees to discharge. The trusts involve the retention and management of the securities thereafter, not, as before, for the donor's benefit, and
(652) under her control, but to account for and pay over their accumulations, at her death, thus vesting a present right in the donees, to have the fund secured, but not to be put in their possession, until the happening of a future specified event, which must occur, though at an uncertain day.

The funds which the donor declares, "I leave" in the hands of the trustee, becomes his, to hold and manage, and finally to divide among the daughters, for which ends an equitable interest at once is vested in him.

The only feature which gives a testamentary aspect to the paper, and upon which its nullity is made to depend, is found in fixing the period of enjoyment at the donor's death, while most of them point to a present and *inter vivos* act.

It is but a partial disposition of the intestate's estate. A person is designated to manage the funds during her life, and whose functions cease with their delivery over when she dies, while the functions of an executor begin, just where those of the trustee end. There is no reservation of authority or of interest in them thereafter, such as are implied in a gift *causa mortis.* These are the qualities of a deed rather than of a will, and no attempt is made to put the instrument in the form required for the latter.

"It does not follow," we quote again from the opinion of the same learned Judge, delivered in *Thompson v. McDowell,* 22 N. C., 463, "because an instrument is to *produce important results after death,* that therefore it must be *testamentary.* To render it testamentary, it is essentially necessary that it should be made to depend on the event of death, as *necessary to its own consummation.*"

There were many features in the instrument, about which this was said, which were clearly testamentary, while there were others indicating action to be taken during life, and it was held to be a deed.

The safest test for determining the character of a written paper, must be found in its provisions; whether it professes to be one or the other in name, is not at all conclusive. *Henry's Executors v.*

Ballard, 4 N. C., 397; *Will and Test. of Belcher,* 66 N. C., 51. (653)

In the latter case, the Court, in referring to the other, inadvertently says the decision was that the instrument was testamentary, whereas it was upheld, not to be a will, but a deed, the Court not having cognizance of the former.

When the character of the instrument, upon inspection, is left doubtful, the intention of the maker may be ascertained by the aid of parol evidence of surrounding circumstances. *Robertson v. Dunn,* 8 N. C., 133; *Clayton v. Liverman,* 29 N. C., 92.

Assuming, then, as we think to be manifest, that the instrument is, in form and effect, a deed, is there any legal impediment in the way of its operating to pass an equitable interest, coupled with legal power in the defendant, and a trust which can be asserted against him? We do not see any such impediment. The technical rules relating to land, which require a legal estate in the trustee, to which declared trusts must adhere, are not applicable to transfers of unendorsed notes for the payment of money, and more especially since under our present system, the equitable owner not only *may,* but *must* sue in his own name upon them to recover the moneys due. The Code, Sec. 177; *Abrams v. Cureton,* 74 N. C., 523; *Willey v. Gatling,* 70 N. C., 410.

The relationship of the beneficiaries to the donor, their mother, furnishes, if one were necessary, a sufficient consideration for the conveyance, as does the defendant's acceptance of the trust, an adequate consideration for its enforcement against him.

The whole subject is elaborately examined in the notes to *Ellison v. Ellison,* 6 Vesey, 656, as found in 1 White and Tudor's Leading Cases in Equity, 167, cited in the appellant's brief.

But the aid of a court of equity is not asked to enforce a duty assumed, and afterwards repudiated by the trustee, for he resists the plaintiff's demand, in order that he may execute that duty freely to the *cestui que trust,* and carry out the donor's intent. The deed is an executed, in distinction from an executory instrument, and accomplishes its purpose by a direct transfer of the notes, and leaves nothing further to be done, except the distribution among the (654) objects of the donor's affection and bounty.

The action is predicated upon the absolute nullity of the deed, or a supposed reserved power of revocation in the donor, or upon the idea that if the instrument cannot prevail as a testamentary disposition, it shall fail altogether. We do not concur in either view.

There is error, and there must be awarded a *venire de novo,* and in order thereto this will be certified.

Error. Reversed.

Cited: Ivey v. Cotton Mills, 143 N.C. 194; *Chapman v. McLawhorn,* 150 N.C. 167; *In re Southerland,* 188 N.C. 328; *Fawcett v. Fawcett,* 191 N.C. 681; *Bank v. Sternberger,* 207 N.C. 819.

E. J. SELLARS, ADMINISTRATOR, v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Negligence.

1. The existence of negligence, upon a given state of facts, is generally to be ascertained and declared by the Court, but cases may occur, where facts are so inseparably mixed in giving a complexion to the result, as to require submission to the jury.
2. Where there is a junction of two roads, one using the track of the defendant, and the defendant provided a switch at the juncture, which always kept its track open and in good condition; *It was held,* that the defendant was not required to keep a watchman or guard at the switch.
3. While the highest degree of care is required of railroads, in providing against accidents which may be foreseen, they are not required to provide against such as no reasonable degree of foresight would suppose likely to happen.
4. To render the defendant liable, the injury must be the natural and probable consequence of the negligence, such as under the circumstances, ought to have been foreseen by the wrong doer, as the natural consequence of his act.
5. Where one railroad corporation allows another to use its track by running its own trains over the consenting companies road, and thus exercising the franchise of the latter, such consenting company remains liable for the negligence of the servant of the other company, as much as it would be for that of its own.
6. This principle does not extend to cases where the cars of the other company are not rightfully on the defendant's road.
7. Where the defendant road allowed another to use its track for a short distance in getting to a station, and some cars on the road became detached from a train, and run on the defendant's road, in consequence of which an accident occurred, and the plaintiff's intestate was killed; *It was held,* that the defendant was not negligent, and the action would not lie.

(655) CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Fall Term, 1884, of the Superior Court of MECKLENBURG County.

The plaintiff's intestate, in the service of the defendant company as fireman, on the night of December 5th, 1882, was in that capacity, on one of its trains running towards Spartanburg, in South Carolina,

at a speed of twenty miles an hour, when, about a mile and a half distant from that place, it came in contact with two loaded flat cars, with such violence, as to shatter the engine, and so injure the intestate, that he died a week afterwards at his home in Charlotte. The track from this point to Spartanburg, ascends a grade of sixty or seventy feet to the mile, until reaching the depot, it finds a level of one hundred and fifty feet or more. Some two hundred yards before reaching the depot, the defendant's track is intersected by, and connected with that of the Spartanburg, Union and Columbia Railroad Company, which we shall for brevity designate by the word "Columbia," and thence to the depot, the road is used by both. At the junction, a safety switch was placed and maintained by the latter, for its own convenience, of such construction, that it never interfered with the running of the trains of the defendant, and was temporarily displaced by the Columbia company, to admit the passage of its cars on the defendant's track, when necessary. No switch tender was required for re-adjustment, and the presence of a watchman dispensed with, to prevent derailment from its displacement.

The ascent from the switch on the Columbia track towards Main street, was still steeper, and for half a mile was at a grade of about ninety feet to the mile. The switch has long been in use, and no inconvenience has resulted to the operations of the defendant (656) company.

The two loaded lumber cars had been brought to Spartanburg by the defendant, and there placed in charge of officers and agents of the Columbia Company, for transportation over a portion of its road, and were removed on it, some distance from the junction, so that the defendant's employes had no longer any control over them. The engineer and servants of the Columbia company, being in exclusive possession of these cars, and two others of its own, found the power of the engine insufficient to move the four cars, forming a single train, further up the steep acclivity of their road, detached the former two, and blocked their wheels to keep them stationary, until the other two cars could be drawn up. In order to exert the moving force of the engine to its fullest capacity, and make a fresh start, the slack had to be taken up by backing, in doing which the chocked cars were struck, the props behind their wheels displaced, and they commenced their downward descent towards the switch, passing which they ascended the slope of the defendant's road, until the momentum acquired being exhausted before arriving at the level of the depot, they commenced the retrograde movement which carried them by the switch, and to the place where the collision occurred.

A brakeman attached to the Columbia moving train, when he observed the retrograde motion of the blocked cars, ran "with all his might," as he expresses it, to the switch, to arrest the return of the loosed cars, but they had passed it before he got there, and were proceeding on their course.

The colliding train was due at Spartanburg at 8 p. m., and while the precise moment of striking is not stated, it would seem to have been just about the time when the lumber cars came to a stand-still. The night was so dark that an object of their size was visible to the lookout on the colliding engine, only when about one hundred feet distant. These are the material and untraversed facts developed in the testimony heard at the trial.

(657) There was a verdict and judgment for the plaintiff, and the defendant appealed.

Mr. Platt D. Walker, for the plaintiff.

Messrs. R. D. Johnson, C. M. Busbee and F. H. Busbee (Messrs. D. Schenck and Chas. Price were with them on the brief), for the defendant.

SMITH, C. J. (after stating the facts). If the action had been brought against the organization to the mismanagement and inexcusable negligence of whose servants the intestate's injuries, and consequent loss of life, are directly attributable, there would be no legal defence against its successful prosecution, and the recovery of damages. But it is a different question, when the claim is asserted against the defendant. Its servants had no control over the cars, which had been delivered to the servants of the Columbia company, nearly an hour previous, nor could they exercise any authority over the action of the latter. The inquiry now is, wherein is found the acts or omissions of the defendant, or its employés, out of which springs its responsibility to the plaintiff's intestate, or to the plaintiff, and how the negligence of the servants of the other company can be legally imputed to the defendant, so as to subject it to the claim for compensatory damages.

The first issue submitted to the jury was in this form: Was the death of the plaintiff's intestate caused by the negligence of the defendant? The response rendered being in the affirmative.

The series of instructions asked for by the defendant, present the case in its different aspects upon the evidence, underlying all of which, is the comprehensive proposition, that no negligence on the part of the defendant's servants is shown, entitling the plaintiff to the recovery of damages from it. This requires of us to examine the direc-

tions of the Court, and the grounds upon which the jurors were authorized to act, in imputing negligence to the defendant's servants, for which their principal is liable.

The Court instructed the jury, that there was no negligence (658) in the defendant, in allowing the other Company to use their switch in making connection between the roads, to facilitate the interchange of freight between them. "But," says the Judge, restating the evidence, and assuming the facts to be as stated, "it was the duty of the defendant to have a watchman at that junction, or some signal, provision, or appliance, to prevent such accidents as this, and to provide for the safety of its employés, such as the intestate, running its trains upon the main track."

The existence of negligence upon a given state of facts, is generally to be ascertained and declared by the Court, though cases may occur, in which they are so inseparably intermixed, in giving a complexion to the result, as to require a submission to the jury, and their general response, under appropriate instructions for their guidance from the Court. When the severance is practicable, as in this case, the Judge must declare the presence or absence of negligence in the transaction, as found by the jury, and it is a reviewable error, when he makes a wrongful decision in the premises. Now, was it the defendant's duty to have a watchman, signal provision, or appliance at the junction, to guard against such an unforeseen accident as happened on this occasion? It was not necessary to prevent a derailment of its own trains, for it was a self-adjusting contrivance, that kept its track always in proper position. Its trains ran with the same safety over this, as over any other portion of its track, and the security to persons on them was in no manner jeoparded by the connection.

Was a signal at this point more needed than elsewhere? Was it within the compass of reasonable foresight and sagacity, that such an accident from such a cause, might take place, which ought to have been provided for and guarded against? An obstruction might be found upon any part of the road, but are watchmen to be distributed throughout its entire length, to look out for such, and give timely warning to approaching trains? We do not think these carrier corporations are held to such measure of responsibility, and their pub- (659) lic usefulness would be greatly impaired if they were, while the highest degree of diligence and sagacity is expected in providing against accident which may be reasonably foreseen, in securing not only safe and substantial cars and moving force to propel them, but in preserving their road in good order, and free from apprehended dangers over which their trains are to pass.

Thus, in *Hardy v. Railroad,* 74 N. C., 734, when, after an unprecedented rainfall, a culvert was insufficient to let the water pass, and in consequence, an embankment ten feet high was washed away, into which a passing train plunged, and the plaintiff's intestate suffered an injury resulting in death, it was decided that there was negligence in not looking out, during the next ten hours, for injuries to the road-bed, that might have been supposed to have been caused by the storm, and repairing the break, or signaling an approaching train, and thus averting disaster; and the principle was applied to an employé of the defendant.

In *Battle v. Railroad,* 66 N. C., 343, two cars were left on a grade of the road, passing through the enclosed pasture lands of the owner of the mule, so insecurely fastened, that it would be easily set in motion. A calf had been before killed by a similar escape of blocked cars, which was notice to the road of the danger. The lower car became unfastened, and, running down the slope, met and killed the mule, and the company was held to be liable for the loss. In these cases, the neglect and want of care proceeded directly from the defendant's own servants, and consisted in positive acts of carelessness on their part.

The principle is thus stated, as governing the relations between a company, and one sustaining injury from the spread of fire, caused by sparks igniting a lot of cross-ties on the side of its track: "To render the defendant liable, the injury must be the natural and probable consequences of the negligence; such a consequence as, under the surrounding circumstances, might, or ought to have been foreseen by the wrong doer, as likely to result from his act." *Doggett v. Railroad,* 78 N. C., 305.

(660) We have not been referred to any case in our own courts, or a well-considered adjudication elsewhere, that imposes so stringent a liability as is required to sustain the ruling now reviewed. Public policy demands the enforcement of every just obligation upon those public agents, who have in charge the property and persons of others, and we are not in the least degree disposed to relax them. But we are utterly unable, on the facts in this case, to impute pecuniary or other culpability to the defendant or its employés, in producing the disastrous results that followed the escape of cars, not in their own charge, but wholly under the control of those of another and disconnected company.

Appreciating this difficulty, the argument for the appellee, seeks to make the defendant liable for the want of care and vigilance in the servants of the other company, upon the ground of their being

permitted to use the defendant's track, pursuant to the ruling in *Aycock v. Railroad,* 89 N. C., 321, and supporting references, found on page 330.

It is there held, upon authority and sound reason, that a company, permitting another company to use its track in running its own trains over the consenting company's road, and thus exercising the franchise of the latter, remains liable for the consequences of mismanagement, to the same extent as it would be for such mismanagement of its own servants in running its own trains.

The principle does not extend to the present case. The obstructing cars were not on the defendant's road by their consent, and their presence was an invasion of the defendant's proprietary rights. The small part of the track used by defendant's consent, from the junction to the depot, over which the descending cars passed, was not on this occasion, and lawfully, used by the defendant's permission, for the cars were running at random, under no control, and such use was never consented to; and besides, the damage was done on a part of the road which the Columbia Company had no authority or license to use, in a lawful manner even.

As we have said, a guard was not needed for any purpose of (661) the defendant at the switch, for such a mishap could have no more been foreseen, than the intervention of a wilful and lawless act of aggression from a stranger could have been anticipated.

Would a light or signal at the place have been of any avail in averting the catastrophe more than a mile distant? Was there any delay in the effort to give information of the danger to the coming train? What then, could have been done, which was omitted, after the cars started on their mission of ruin and death, to arrest their progress, or give warning to the train, so near the depot? We are unable to see how blame for the terrible result, certainly falling upon others, can attach to the defendant.

There is error in this part of the charge as applied to the undisputed facts, as understood and declared by the Court.

We find it unnecessary to solve the interesting question of the plaintiff's right to maintain the action in this State, putting our decision upon other grounds. The subject is touched on in *Warner v. Railroad, ante,* 250.

There must be a new trial. Let this be certified to that end.

Error. Reversed.

Cited: Grant v. R. R., 108 N.C. 471; *Emry v. R. R.,* 109 N.C. 592, 613.

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

Printing Record.

Where there was an honest misunderstanding between counsel in regard to making up the case on appeal, and the case had not been made up when the case was reached in this Court, the record having been docketed without a case, and counsel for the appellant supposed that there was no necessity of printing the record until the case came up, but the appellee moved to dismiss, which was allowed, *It was held*, a proper case to re-instate and allow the record to be printed.

(662) MOTION by the plaintiff to re-instate an appeal on the docket, dismissed at the last Term because the record was not printed, heard at February Term, 1886, of the SUPREME COURT.

The plaintiff in this case, had taken an appeal from a judgment rendered in the Superior Court of Orange County, to the October Term, 1885, of this Court, and when the case was called for argument, on motion of the defendant's counsel, the appeal was dismissed, upon the ground that the record had not been printed as required by rule 2, Sec. 11 (6) and (7).

At the close of the October Term, 1885, a motion was made by the plaintiff's counsel to reinstate the case upon the docket of this Court, and for a *certiorari* to the Clerk of the Superior Court of Orange, to send up a full and complete transcript of the cause, and at this Term, the motion of the plaintiff being called for argument, the plaintiff offered the affidavit of his counsel in support of his motion, the material parts of which are in substance: That he, the counsel, after the judgment in the Superior Court of Orange, in the spring of 1885, by agreement, was to make out the statement of the case, and it was his understanding, that an indefinite time was given for making out the case on appeal. But the counsel having been engaged in causes in the adjoining counties, he postponed the making up the case until summer, when owing to long continued and severe illness in his family, he was compelled to postpone it again until the fall of 1885, when he made out the statement, and served it on the opposing counsel, who refused to accept it, and endorsed upon it, "that it had not been served in the time required by the statute." This was the first intimation had by the counsel, that there was a misunderstanding in regard to the time to be allowed to make up the case. He then forwarded the statement to his Honor, Judge Shepherd, who did not return it in time for the call of the 5th district, and he did not consider, under the rules of the Court, that any part of the record should be printed, until the statement of the case was filed. That the plain-

tiff is now ready and able to have the record printed, and asks that case be reinstated on the docket.

That a motion was made, supported by the affidavit of his (663) counsel, in November, 1885, and again on the 23d of December, 1885, to have the case reinstated, and for a *certiorari* to be issued to the Clerk of the Superior Court of Orange, but both affidavits had been misplaced.

The counsel for defendant filed an affidavit, in which he denied that there was any agreement as to the extension of time, and further stated that Judge Shepherd, at the close of the circuit where the case was tried, read in the hearing of the counsel of both parties, a statement of the case as made by him, but the counsel of the plaintiff refused to accept it as the statement of the case, saying he had no right to make up the case, and that rather than accept his statement, they would prefer having no statement at all. The counsel for plaintiff then presented to the defendant's counsel, the "case" as made up by them, which he refused to accept, because not made within the time prescribed by the statute.

Messrs. A. W. Graham, John Manning and E. C. Smith, for the plaintiff.

Mr. John W. Graham, for the defendant.

ASHE, J., (after stating the facts). We do not think the plaintiff is entitled to the writ of *certiorari*. In fact, we do not see how it could benefit him, if issued under the circumstances, and he seems to have come to the same conclusion, for his counsel, in the affidavit filed in behalf of his client, does not ask for the writ, but only that the case be reinstated.

There is some ground for this relief. There seems to have been an honest misunderstanding between the counsel of the parties, as to an agreement for the extension of time to make up the "case on appeal," and then there was an untoward miscarriage in making up the appeal, in which the plaintiff was in no fault, and when we add to this, the conclusion of his counsel, that there would be no necessity for printing the record before the statement of the case should be put on file, we think the plaintiff has offered a (664) sufficient excuse for his apparent *laches*, and that his case should be reinstated. And *it is so ordered.*

Motion allowed.

A. B. WARE AND WIFE v. A. R. NESBIT ET ALS.

Evidence—Husband and Wife—Privy Examination—Judge's Charge.

1. Formerly, the privy examination of a *feme covert* was held to give to the acknowledgment of her deed the sanctity of a judicial proceeding, but this has been changed by statute, and the acknowledgment and privy examination are now open to be attacked collaterally.
2. In an action to impeach the deed of a married woman for duress, declarations made to her in the absence of the defendants are competent, when they go to show essential facts laid before her, which induced her to execute the deed.
3. Where no exceptions were taken to the charge in the Court below, and it does not appear that the trial Judge has made an error in the law as laid down to the jury, exceptions to the charge made for the first time in this Court, will not be considered.
4. Where it is found by the jury, that a mortgage executed by husband and wife, of the wife's property, was obtained by duress practiced on the *feme*, it is error to cancel the instrument entirely, but it should still be left operative as to the husband's interest.

CIVIL ACTION, tried before *McKoy, Judge,* and a jury, at Fall Term, 1884, of the Superior Court of RUTHERFORD County.

The plaintiffs, on the 16th day of August, 1877, executed their two joint notes under seal, in the aggregate sum of $335, to the partnership firm of A. R. Nesbit & Bro., which consisted of the defendants A. R. Nesbit, W. B. Nesbit, and W. J. Friday, in renewal of an indebtedness, before contracted by the plaintiff A. B. Ware. At the same time, the plaintiff made a deed to the defendant Reuben McBrayer, conveying an undivided one-ninth interest, belonging
(665) to the *feme* plaintiff, in a tract of land descended from her mother, in trust to secure and provide for the payment of said notes, and with a power of sale, to be exercised when required by the creditor, in case of default, after November 1st, of that year. The notes not having been paid, the trustee sold the interest so conveyed, at public sale, in March, 1878, and it was purchased by the defendant A. R. Nesbit, and a deed therefor made to him by the trustee. On February 6th, 1882, under certain proceedings instituted by the tenants in common for partition, and pursuant to a decretal order in the cause, the entire tract was sold for $5,125.00; the corresponding fractional part whereof, represents the estate of the *feme* plaintiff in the land.

The plaintiffs, in their complaint, allege that the execution of the notes and of the deed in trust, appropriating the *feme* plaintiff's interest in the land, was procured by extortion and pressure brought

to bear upon her, by the plaintiff's proceedings in an action against her husband, to force the result, and by which her own volition was paralyzed and overcome. These averments are denied in the answer; and from this conflict of statement was elicited the issue submitted to the jury, and by them, under instructions of the Court, found in the affirmative, to-wit: "Were the notes and mortgage deeds set forth in the complaint, executed by Esther Ware and A. B. Ware to Reuben McBrayer, under duress?"

It was in evidence on the trial, that the plaintiff A. B. Ware, in the Spring of 1877, formed a mercantile co-partnership with one Durham, and in April, purchased of the defendants Nesbit & Bro. five or six hundred dollars worth of goods, partly for cash, and partly on credit. In this way, his indebtedness originated, and to recover it, suit was brought, and the plaintiff A. B. Ware arrested and held to bail, upon affidavit of the defendant A. R. Nesbit, that the contract giving credit was superinduced by false and fraudulent representations of the purchasers, as to his resources and means of payment. These imputed fraudulent representations were denied by the plaintiff.

On examination of said A. B. Ware, testifying for the plain- (666) tiff, he was asked to state the circumstances under which he was arrested. The defendants interposed an objection to the evidence, which was overruled, and the witness stated that he was arrested by the Sheriff of Cleveland County, on July 31st, 1878, and on giving bond, with surety, was released.

Afterwards, the sureties told witness, that unless he compromised the debt, they would surrender him and send him back to jail. This evidence was also objected to, the defendants not being present, but admitted by the Court. His wife knew this fact. This was also received after objection overruled. Witness then testified that the *feme* plaintiff was present when the arrest was made, and knew that the sureties had threatened to deliver him up to the sheriff; that she was in delicate health, with a babe about one year old at her breast.

There was a judgment on the verdict, directing the bonds and mortgage to be cancelled, and the defendants appealed.

Messrs. Jones and Hardwick filed a brief for the plaintiffs.
Mr. R. D. Johnston, for the defendants.

SMITH, C. J. (after stating the facts). We reproduce so much of the testimony, as shows the pertinency and bearing of the evidence to which exception was taken. It is quite manifest that what transpired and was known to the *feme* plaintiff, was competent, in proof

of the agencies which are alleged to have been instrumental in bringing about that state of mind, in which her volition and moral freedom were lost or impaired. The declarations offered, are not merely such in their narrative form, but essential facts before the *feme,* which led to acts, and which in elucidation of those acts, were entirely proper, as much so as her feeble condition and susceptibility to influence. The statement of the *feme* plaintiff herself, in regard to the circumstances under which she signed the notes and executed the deed, in which her own real estate was conveyed for their security and payment, are similar, but more in detail. It is thus set out in the case:

(667) "The plaintiff Esther J. Ware, was then introduced as a witness on her own behalf, and stated that she was in delicate health at the time she executed the deed in question; had a child about one year old at her breast; that the sheriff of Cleveland arrested her husband at his home in Shelby; that she was present when it was done, and was greatly excited; that after that he gave his bond and was released. When it was started up again, my husband told me about it. Objected to and admitted." Exception by defendants.

"It was admitted by defendants, that the land was the land of Mrs. Ware; that she consented to sign the deed under the fear that her husband would be sent to the common jail, or she would not have signed it; that she owned the one-ninth interest in the lands in Rutherford County; inherited it from her mother."

Upon cross-examination, witness stated that she was examined by Mr. T. D. Lattimore, Clerk of the Superior Court of Cleveland County, and told him she signed the same freely and voluntarily, and without fear or compulsion on the part of her husband, or any one else, as stated on the certificate; that she was perfectly willing to convey her lands to keep her husband from going to jail; that she never saw the defendants, or any of them, and never had any conversation with them; that last summer or spring, her husband told her that a lawyer had said that she could get her land back, and they then instituted these proceedings, to get it back.

There was much conflicting testimony offered for the defendants, and it was shown that the clerk before whom the probate of the deed was taken, fully explained its provisions to the plaintiff Esther, and that, as is set out in the official certificate, it was acknowledged by her to have been voluntarily executed.

The Court charged the jury as follows:

"A married woman's land can only be conveyed by deed, executed by herself and her husband, and done freely and voluntarily, and without any force or fear of her husband or any other person what-

soever, and this is perpetuated and completed under our laws, by her privy examination, before the Clerk of Superior Court, (668) as in this case.

"When a deed signed by both husband and wife is acknowledged before the Clerk, and he takes the privy examination, then this is a judicial determination, and can only be set aside for duress, force, fear, fraud, or false and fraudulent representations on the part of those for whose benefit the deed was made. That the deed was made to keep her husband from going to jail, is not that duress which would avoid a deed, if she preferred to execute this mortgage, rather than have her husband go to jail. It can only be avoided from force, or fear, or wrong done to bring about the arrest or unlawful act, which was calculated to delude or deceive or mislead her about the truth of the transaction.

If the defendant Nesbit & Bro. had a *bona fide* claim against A. B. Ware, and upon that, sued out an arrest and bail, and took A. B. Ware into custody, and he gave bail for his appearance at Mecklenburg Court, and A. B. Ware interceded with his wife, by fair and honest representations, and without force or putting her in fear, she made and executed with her husband, a mortgage on her own land to secure the debt, with a full knowledge of the facts, and to procure the release of her husband, then there would be no duress. Duress is some act that takes away the free will of the wife, or deception by false and fraudulent representations, used to attain the execution of the mortgage. If the Nesbits resorted to the arrest and bail, when not entitled to that remedy, and either by false statements or fraudulent acts, procured the arrest of the husband, or if the arrest was made with the unlawful purpose to procure the mortgage, and by that instrumentality operated upon the mind of the wife, so as to wrongfully put her in the position of choosing between the imprisonment of her husband, or executing a mortgage on her land to secure the debt, then the false statements and wrongful arrest of the husband, and thereby obtaining the mortgage in order to secure the debt, would be duress."

Certain written instructions were asked by the appellants (669) when the testimony was concluded, but were withdrawn after the delivery of the general charge, and are not in the record.

The directions to the jury as to the law, are quite as favorable to the defendants as they can ask, and the *feme* plaintiff is held to a rigid accountability, scarcely less than if she were a *feme* sole, for her acts, and the disability of her condition, affords her as little protection from their consequences in the execution of her deed.

Formerly, the acknowledgement of execution of a deed by a married woman, with her privy examination, was held to give to it the sanctity and conclusiveness of a judicial proceeding, but it is otherwise now, and her deed, like that of her husband, is now exposed to impeachment, on the same grounds as his. *Jones v. Cohen,* 82 N. C., 75. The present is an impeaching action, having for its object, the annulling of what was done by the plaintiff, and her restoration to her former rights.

There was no instruction asked that there was no evidence of the duress alleged, and this point is not before us. Nor can we notice the defects imputed to the instructions given, for no correction was suggested—none pointed out,—and the appellants seem to have been content with the entire charge. There is no false proposition of law, in itself considered, which will warrant an exception first taken in this Court, as said in *Fry v. Currie,* 91 N. C., 436, and other subsequent cases.

There is no error in the record, and the judgment must be affirmed, except in so far as it directs the cancelling of the notes and deeds, which remain effective, so far as the said A. B. Ware is individually concerned, and are inoperative only as to the *feme* plaintiff.

Modified and affirmed.

Cited: Ferebee v. Hinton, 102 N.C. 105; *Edwards v. Bowden,* 107 N.C. 61; *Spivey v. Rose,* 120 N.C. 166; *Butler v. Butler,* 169 N.C. 591; *Lee v. Rhodes,* 230 N.C. 193.

(670)

*THOMAS D. HOLLY AND D. BELL, EXRS. v. SALLIE D. HOLLY ET ALS.

Will, Construction of—Negotiable Note, Presumption of Ownership—Rents—Reversion.

1. By his will the testator bequeathed as follows: "I hereby give, remise and leave to my brother W. J. H., all claims and demands of whatever kind I may have against him at my death;" *Held,* that this bequest did not embrace two notes which were found among the testator's papers at his death, executed by G. W. W., payable to W. J. H., and not endorsed.
2. The possession of an unendorsed negotiable note, raises a presumption of fact as between the holder and payor, that the holder is the owner. But this presumption does not arise as between the holder and the payee, who has the legal title.

*SMITH, C. J., did not sit at the hearing of this case.

3. Another clause of the will was as follows: "I give and devise my Willow Branch farm and fishery * * * to my nephew T. D. H., his heirs and assigns." The testator before his death leased the fishery by articles *inter partes* to J. W. and J. M., for two years, with a right to the lessees to continue the lease for five years, they agreeing to pay an annual rent of $500—the payments to be made 1st of June of each year. No separate bond was taken for the rent of each year; *Held*, that the rent which became due after the death of the testator followed the reversion to the devisee.

CIVIL ACTION, tried at Fall Term, 1885, of the Superior Court for BERTIE County before *Connor, Judge.*

The facts were as follows:

The purpose of this action, is to have certain clauses of the will of Augustus Holly, deceased, construed. It appears that he died on the 27th day of May, 1882, leaving a last will and testament, which was duly proven.

Sundry bequests are made by the will, and among them one in the following words:

8. "I hereby give, devise and leave, to my brother, William J. Holly, all claims and demands of whatever kind I may have against him at my death."

At the time of the death of the testator, he had in his posses- (671) sion two single bonds—one of $500, and the other for $1,000; each executed by George W. Womble, and made payable to William J. Holly. The latter claims these bonds as his property.

The case upon appeal for this Court, states that the following issue was submitted to the jury:

"Were the Womble notes, described in the complaint, the property of Wm. J. Holly at the death of Augustus Holly?"

"Upon this issue, the plaintiff introduced the notes themselves, under seal, payable to Wm. J. Holly or order, not endorsed, but which it was admitted were found by the executors of Augustus Holly, at his death, among his papers. The will of the said Augustus Holly was also in evidence. No other evidence was before the Court. Upon this evidence, the Court instructed the jury to find the said issue in the affirmative."

To the instruction thus given, the residuary legatee excepted.

The fourteenth clause of the will is as follows:

14. "I give and devise my Willow Branch farm and fishery, and my Union Mill and mill site, and my lands known as Piny Woods Lands, to my nephew, Thomas Holly, his heirs and assigns."

Before his death on the 25th day of October, 1881, the testator, by articles of agreement *inter-partes,* leased to John Wilson and

Josiah Mizell, the "Willow Branch Fishery," mentioned in the devise above set forth, for the term of two years, with the right in the lessees to continue the lease for five years, and the lessees, on their part, stipulated to pay an annual rent of $500, the first payment to be made on the first day of June, 1882, and the subsequent rents to be paid in June of each succeeding year during the lease, but no separate bond or note was taken for the rent so agreed to be paid. The rent for the first year was paid before it was due, to the testator, in his lifetime.

The devisee named, insisted that the rents mentioned in the lease, went with the land, and came to him as part of the reversion,
(672) by virtue of the devise. The Court so held, and the residuary legatee excepted.

The Court advised and directed, that the bonds mentioned belonged to William J. Holly, and that the rent for the Fishery passed to the devisee, Thomas D. Holly, and the residuary legatee appealed to this Court.

Mr. John Gatling, for plaintiff.
No counsel for defendant.

MERRIMON, J., (after stating the case). The case states, that the notes under seal in question, payable to William J. Holly or order, and unendorsed, were found among the papers of the testator at the time of his death, and this and the will, constitute all the evidence in respect to the ownership of them before us, and all that we are at liberty to consider in passing upon the first exception of the appellants.

In view of the evidence, the terms of the bequest recited above do not embrace these bonds. They did not, upon their face, nor in any legal or equitable aspect of them, constitute any claim or demand, in whole or in part, of any kind, in favor of the testator, and against William J. Holly. So far as appears, they were made payable to him or his order, but he did not endorse them, nor did he promise or oblige himself to become responsible for, or to pay them, or any part of them, in any contingency, nor is there any presumption that he did. Of themselves, they constitute no claim against him. The bequest embraces only "claims and demands" against him. He is not, therefore, entitled to the bonds as part of the bequest to him.

Then, did the bonds belong to the estate of the testator? Accepting the evidence as true, this question must be answered in the negative. The testator was *prima facie* the owner of them, except as against the payee who held the legal title to them. *Robertson v. Dunn,* 87 N. C., 191.

Unquestionably, the complete equitable title to, and the sub- (673) stantial ownership of, a note or bond, negotiable by endorsement, may, without endorsement, be passed by the payee or obligee, to another person, by a sale and delivery thereof, and in this State, the purchaser thus becomes so thoroughly the owner, that an action upon the note or bond so transferred, can only be maintained in the name of the real or equitable owner. The Code, Sec. 177. *Andrews v. McDaniel,* 68 N. C., 385; *Alexander v. Wriston,* 81 N. C., 191.

As the substantial interest in the note or bond may thus pass to the purchaser without endorsement, and he may collect it without action, or sue for the same in his own name, or sell it again, and it may thus be sold to different persons indefinitely, a just and reasonable presumption of fact arises, that the person in possession of it, is the substantial and equitable owner thereof. Such presumption is not conclusive, but it is sufficiently strong to put the person claiming it adversely to him in possession thereof, to proof to rebut the presumption, except that this does not extend to him to whom it was made payable, and who, therefore, in the absence of endorsement holds the legal title. The possession and claim is evidence of ownership.

Such a presumption seems necessary and expedient, under the present method of civil procedure in this State, which require civil actions generally, to be prosecuted in the name of the real party in interest, and that the legal and equitable rights of litigants shall be administered in the same action, when need be.

In *Jackson v. Love,* 82 N. C., 405, the Chief Justice, discussing the subject now under consideration, said: "This recognition of equitable ownership of a negotiable bond or note, as property, seems to place it upon the footing of other personal property, and admits the application of the rule, which infers title from possession, until the presumption is met and overcome by rebutting evidence." He further said, that "the Judge in the Court below held, that the denial in the answer, of the plaintiff's title, had the effect of requiring from him, proof beyond and in addition to the production of the note. In this we think he misconceived the legal effect of the (674) conflicting pleadings. The denial destroys the force of an allegation, and puts the controverted facts in issue. It would do the same, in case the endorser or bearer brought the action in his own name. But in neither case is the denial evidence against, nor the plaintiff's allegation evidence for, the truth of the disputed fact, to be considered by the jury. The issue is eliminated and presented in the form of a simple inquiry as to the plaintiff's ownership of the note in suit. The burden of proof rests upon him, and upon the authorities, the presumptive evidence is furnished, when the note is produced and read

in support of his title. As there was nothing shown to repel its force, the presumption should have prevailed, and the plaintiff was entitled to the verdict." That case is very much in point here.

We therefore think the Court properly instructed the jury to find the issue submitted to them in the affirmative. *Prima facie,* the bonds belonged to the testator in his lifetime, except as against the payee who had the legal title.

The second exception is untenable. The lease was for years, and in the articles of agreement creating it, the lessees expressly covenanted to pay to the lessor an "annual rent" of $500.

Obviously, it was not the intention to create a debt due from year to year, distinct from and without regard to the lease. The latter, and the rents agreed to be paid, were of each other, and were intended to go together; the one was not distinct from the other.

In such case, it is settled, that the rents that come due after the death of the testator, follow the reversion to the devisee. *Kornegay v. Collier,* 65 N. C., 69; *Rogers v. McKenzie, Ibid.,* 218; *Nixon v. Coffield,* 24 N. C., 301.

Let this opinion be certified to the Superior Court. *It is so ordered.*

No error. Affirmed.

Cited: Thompson v. Onley, 96 N.C. 13; *Ballinger v. Cureton,* 104 N.C. 478; *Triplett v. Foster,* 115 N.C. 336; *Johnson v. Gooch,* 116 N.C. 68; *Vann v. Edwards,* 130 N.C. 72; *Worth v. Wrenn,* 144 N.C. 663; *Timber Co. v. Wells,* 171 N.C. 265; *Pate v. Gaitley,* 183 N.C. 263; *Hayes v. Green,* 187 N.C. 777; *Mercer v. Bullock,* 191 N.C. 217; *Perkins v. Langdon,* 231 N.C. 390.

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(675)

W. E. BROADNAX ET ALS. v. WILEY BAKER ET ALS.

Ferry—Damages—Highway—Navigable Stream—Penalty.

1. The franchise of keeping a public ferry is so incident to riparian ownership, that it can be granted to none but those who own the land at one of the termini, unless such proprietor refuse to exercise it, when it may be granted to another, upon his making compensation to the owner, and this is so, even when the termini are public roads.

2. Every subtraction from the profits of a ferry, by conveying its customers over the stream, with or without charge, is an injury for which an action will lie.

3. In such case, it is the diminution in the number of customers who would use the ferry, and the consequent reduction of tolls, which is the measure of damages recoverable against such wrong-doer.
4. The essential elements of a ferry franchise, is the exclusive right to transport persons, with the horses and vehicles and such personal goods as accompany them, from one shore to the other.
5. A public ferry is protected by the statute. The Code, Sec. 2049, from all interference with the proper enjoyment and use of the franchise by the erection of another ferry.
6. Navigable waters, constituted as highways, are not ascertained here as in England, by the extent of the ebb and flow of the tide, but for their capacity for floating boats used as instruments of commerce.
7. Such waters do not lose their character as navigable, because interrupted by falls, if they can be used for the purposes of commerce both above and below.
8. The essential idea in a ferry, is the crossing of a stream or other body of water from shore to shore.
9. The public have the right to the use of navigable streams, which are used as highways, in passing up and down it, from one point to another.
10. A court of equity will never enforce a penalty, although it be imposed by a statute, and a party who seeks relief in a court of equity in a case for which the statute has provided a penalty, must seek only his actual damage.
11. Where the plaintiff granted a ferry franchise from two points, opposite each other, on a large stream, *it was held*, that he could not enjoin and recover damages from a party who used the stream as a highway in conveying freight from points up the river, although one of these points was within the statutory distance of five miles.

MOTION to continue a restraining order to the hearing, in a (676) case pending in the Superior Court of NORTHAMPTON County, heard by *Phillips, Judge,* at Chambers in Jackson, on October 16th, 1885.

The plaintiffs, W. E. Broadnax and E. W. Wilkins, the other plaintiff being their lessee, are the owners of a ferry, which for more than fifty years has been operated by their ancestors and themselves across the Roanoke river at Gaston, between its opposite banks in Halifax and Northampton counties, terminating at public roads in each. It is recognized as such, and the tolls are regulated by the county authorities. The Roanoke is a large stream, navigable for more than forty miles above Gaston by boats of light draught, but obstructed below by a rock bottom, projecting towards the surface, over which the waters rush and fall in rapid descent, until at Weldon 12 miles below, they become smooth and quiet, and are again navigable.

The defendants own batteaux, which are propelled by poles up and down the river, and are employed in conveying freight, from a point

near the warehouse of the Raleigh and Gaston Railroad Company, a short distance below the ferry landing, on the south bank of the river, receiving and delivering such freight at various landing places above, for forty miles in this State, and in Virginia, some fourteen or more, for the transportation of which they make charges and receive compensation.

All the points on the river, touched by the boats for transportation purposes, are more than five miles above the ferry, except one, known as Mason's Landing, which is distant about two miles, and the defendants' business consists mainly in conveying supplies, brought on the railroad for farmers and other residents near the river, and farm products received for delivering to the said road, for further transportation to markets on the seaboard. The testimony is abundant, to the convenience of the defendants' line by water, and to the burden of land transportation by wagons, to any other accessible point of communication with railroads. The boats of defendants make trips up and down the river, from two times a week, to a less number, according to the distance they have to go, and the amount of
(677) freight to be carried. These batteaux draw, when loaded, eighteen inches of water, and have capacity for twenty bales of cotton of four hundred and fifty pounds each.

Voluminous evidence, in the form of affidavits, was read before the Judge upon the hearing of the plaintiffs' application for a restraining order, to operate until the trial of the cause, as to the effect of the defendants' line of transportation, in subtracting from the tolls of the ferry, and as to how much of the freight, but for its interference, would have found its way to the railroad over the ferry, and was in consequence lost. There was formerly a railroad, connecting with the Raleigh and Gaston Railroad at Gaston, and leading thence towards Petersburg, at its junction with the Petersburg and Roanoke Railroad, but it has for many years been discontinued. Upon the hearing of the plaintiffs' motion, the Court granted an injunction against the defendants' operating between the starting point and Mason's Landing, or any other landing place within five miles of the ferry.

From this order the defendants appeal to this Court.

Mr. C. M. Busbee, for the plaintiffs.
Mr. W. H. Day, for the defendants.

SMITH, C. J. (after stating the facts). The franchise of keeping a public ferry, and demanding toll for transportation, resides in the State, and is so incident to riparian ownership, that it can be granted to none others than those who own the land at one or the other of its

terminal connections, unless such proprietor or proprietors refuse to exercise it; when it may be conferred upon another, who can only obtain the right to use the soil for the purpose, by making compensation, and this even when those termini are public roads. *Pipkin v. Wynn,* 13 N. C., 402. This right to demand tolls in operating a ferry, sanctioned by the county authorities, with whom the power to establish it is deposited, exists at the common law, and every (678) subtraction from its profits, by carrying its customers over the stream, for or without charge, is an injury for which an action will lie. It is the diminution in the number of customers that would use the ferry, but for the interference, and reduction of tolls, which measure the damages recoverable against the wrong doer. So, by the common law, it was necessary to show "that the termini of the plaintiff's ferry were between the points of such person's departure and destination, as were in his route, and would have been passed by him, but for the defendant's wrongful interference." PEARSALL, Judge, in *Taylor v. W. & M. R. R. Co.,* 49 N. C., 277.

To remove difficulties in the way of proofs, the General Assembly passed an Act by which it is provided, that if any unauthorized person shall pretend to keep a ferry, or to transport for pay *any person or his effects* within ten miles, reduced to five by the amendatory Act of March 12, 1883, ch. 381, of any ferry (being on the same river or water), which is already, or hereafter shall be, appointed, such person so pretending to keep a ferry, or transporting any person or persons or their effects, shall forfeit and pay the sum of two dollars for every such offence, to the nearest ferryman. Revised Code, ch. 104, Sec. 31.

Substantially the same enactment is contained in The Code, Sec. 2049.

The essential element involved in a ferry franchise, is the exclusive right to transport persons, and horses and vehicles with which they travel, as well as such personal goods as accompany them, from one shore to the other, over the intervening water, for the toll.

A public ferry, then, says ABINGER, C. B., in *Hussey v. Field,* 2 C. M. and R. (Exch.), 432, is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills." An invasion of this exclusive right, is not only restrained by the statutory prohibition against the erection and operation of another ferry, but the transportation for pay, of persons or their effects, that is, as we understand the latter word, the accompanying personal (679) goods under their direct control, is forbidden within the prescribed distance above and below. The establishing of a new com-

peting ferry, is absolutely disallowed, while other methods of transportation become penal, only when compensation is charged.

The defendants, according to the plaintiff's own showing, convey no persons for toll, and charge only for freight carried up and down the river, between the railroad and the numerous landings above, some even in the State of Virginia. They in no proper sense maintain a ferry, nor is their business of the same nature, even assuming the plaintiff's exclusive franchise to extend to and embrace the carriage of freight, as such, and as a separate and independent article of commerce. The defendants exercise the common right to use a navigable water, which unites two States, without the special concession of the State or county authorities.

"It does not follow," we quote again from the opinion of Lord Abinger, "from this doctrine," (the right of a ferry proprietor to be protected against an unlawful interference with his franchise by near and competing ferries), "that if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, *as a public highway*, from or to all the towns or places upon its banks, and obliges them upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other."

Not unlike language is used by the Supreme Court of the United States, Swayne, Justice, delivering the opinion, in the elaborately argued and well considered case of *Conway v. Taylor*, 1 Black 603. There, a ferry franchise was possessed by a riparian proprietor on the Kentucky shore, to run a ferry across the Ohio river at Newport, and in that State, as here, there were statutory prohibitions against the establishment of other ferries within one and a half miles over that river, and within a mile upon any other stream, nor was any
(680) new ferry to be granted within a city or town, unless required by an accumulation of business, to which the afforded facilities were inadequate. In reference to the rights acquired under the authority of Kentucky, to run the ferry and transport thence to the opposite river bank in Ohio, without the correlative right to do this from the latter shore, the Court say:

"Those rights give them no monopoly, under all circumstances, of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those then prosecuting the business of commerce, in good faith, without the regularity or purpose of ferry trips, and seeking in no wise to interfere with the enjoyment of their franchise."

In *McRee v. W. & R. R. Co.,* 47 N. C., 186, the colonial legislature authorized the construction of a bridge over the North East branch of the Cape Fear river, and forbade the keeping of any ferry, or the building of any bridge, or the setting any person or persons, carriages, cattle, hogs, or sheep, over the river for fee or reward, within six miles of its location. The charter of the defendant company authorized the construction of a railroad over the tract of country which made necessary a pass-way over the river, and within the six miles mentioned. The action was for the penalty given for a violation of this conferred privilege, and the Court held, that if a construction was to be put upon the enactment, which would arrest all improved future modes of transportation, demanded by increased wealth, population and business, the monopoly would be in antagonism to fundamental principles, and "contrary to the genius of a free State." Bill of Rights, Secs. 22 and 23; *Washington Toll Bridge Co. v. Commissioners,* 81 N. C., 491.

But the defendants are in the exercise of a common and undelegated right, to use the waters of a navigable river as a highway, in the carriage of goods, not primarily in the crossing, as a ferry is operated, from shore to shore, and between fixed landing places, but up and down the stream, there being a single stopping place within the prescribed limits. The right to use navigable waters, is superior (681) to any incident to the ownership of the shores, and this, even when enlarged by the grant of an exclusive ferry or other franchise annexed to them. *Lewis v. Keeling,* 46 N. C., 299.

Navigable waters, constituting highways, are not ascertained here, as they are in England, an island accessible to ocean tides, by the extent of their ebb and flow, but by a more practical test of their capacity to float boats used as instruments of commerce, in the interchange of commodities, and large enough for the purpose. Such waters lose not their navigibility, because intercepted by falls, when above and below them, the waters can be thus used for the purpose of commerce for long distances. Under such circumstances, they remain highways for common use. Such is the condition of many of our large rivers, and was of the Ohio itself, near the city of Louisville, until the impediment was overcome by works erected there.

The defendants' boats, with capacity to transport twenty bales of cotton, or 9,000 pounds of freight each, ascend and descend the river for more than forty miles, passing the State boundary, and as a common carrier, receiving and delivering goods at places along the route, and thus transferring the products of the farm to the railroad, and meanwhile, bringing supplies to the farmers, touching at a single point

in the prescribed distance, and this point two miles further up the river.

Can the maintenance of such a line of transportation, be deemed an exercise of rights, intended to be inhibited by the restraining statute? Is it in any proper sense, an invasion of the plaintiffs' franchise? Does the statute mean to deny the facilities possessed by those who find Mason's landing a convenient point of shipment, and compel them to carry, by wheels, what they may raise, over the needless space of two or more miles to the plaintiffs' ferry, in order that they may have the tolls for ferrying it over? We do not so interpret the prohibitory legislation. The essential element in a ferry, is the transportation over interrupting water—a crossing
(682) from shore to shore, at points conveniently opposite, and forming connection with thoroughfares at each terminus. A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be, "a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll," adding, "It is usually to cross a large river." Tomlin's Law Dict.

It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water, the essential idea of passing from *one shore to an opposite shore* being retained.

We are not disposed to hold, upon the evidence, and with the defendant's denial that they carry any person in their boats for fee or reward, that they are invading the franchise possessed by the plaintiffs, or any just right derived under it.

The action, moreover, is not alone for remuneration for loss, in damages, but for the recovery of penalties for multiplied alleged offences, and the aid of the Court is sought as an ancillary remedy. But a court of equity leaves one pursuing this course, to his strict legal rights, and withholds its aid. One seeking equity, must do equity, and be content with full indemnity for actual loss sustained. Thus, a debtor charged with usurious interest, will be, as a condition of relief, required to pay the debt he owes, with legal interest, or if the bill be filed by the creditor, he must forego his demand for the penalty, and be satisfied with such compensation as measures his loss, or is the just amount of his claim.

"It is against the general principles of equity," remarks Story, "to aid in the enforcement of penalties or forfeitures." 2 Story Eq. Jur., Secs. 1319 and 1494.

This rule of action is not abrogated by the union in one tribunal of the functions formerly divided between two, while each exercise those peculiar to itself, but the underlying principles of action are the same and unchanged.

There is error in the ruling, and this will be certified to the Court below.

Error. Reversed.

Cited: Hodges v. Williams, 95 N.C. 335; *S. v. Narrows Island Club,* 100 N.C. 481; *Bond v. Wool,* 107 N.C. 148; *Bridge Co. v. Flowers,* 110 N.C. 385; *Gwaltney v. Timber Co.,* 111 N.C. 560; *S. v. Eason,* 114 N.C. 790; *Comrs. v. Lumber Co.,* 116 N.C. 732; *S. v. Baum,* 128 N.C. 605; *S. v. Twiford,* 136 N.C. 607; *In re Spease Ferry,* 138 N.C. 223.

(683)

THOS. LYTLE v. LITTLETON LYTLE.

Judgment—Dormant—Execution—Scire Facias.

1. An execution issued on a dormant judgment is irregular, but not void, and a stranger, without notice, at a sale under such execution, gets a good title, but if the judgment creditor, or a stranger with notice purchases, he gets no title.
2. Under the former practice, the only defence to a *scire facias*, issued to revive a dormant judgment, was payment or satisfaction.
3. Where an execution issues on a judgment which has been docketed more than ten years, or when the ten years expires after the issuing, but before the sale under the execution, it conveys no authority to make a sale of the land so as to preserve the judgment lien which had attached.
4. If an execution issues on a judgment more than ten years after the docketing, but which is not dormant, or to a county in which the judgment has never been docketed, a sale of both real and personal property under it is valid, but the lien only relates to the levy.
5. Where a judgment has become dormant, and is more than ten years old, no execution can issue on it, unless the creditor gives to the debtor an opportunity to set up the statutory bar.
6. So, where a judgment was more than ten years old, and no execution had issued within three years, and the creditor issued a notice of a motion to issue execution, and the clerk made no order to that effect, but issued the execution; *It was held* that a sale thereunder was void.

CIVIL ACTION for the recovery of land, tried before *Gudger, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of BUNCOMBE County.

The plaintiff, in support of his title to the land described in the complaint, and of which the defendant was in possession, upon the trial, introduced evidence to establish the following facts:

Thomas Lytle, as administrator of John Lytle, in an action prosecuted against the defendant Littleton Lytle and others, in the
(684) Superior Court of McDowell County, recovered judgment at Fall Term, 1869, for the sum of two hundred and fourteen dollars and twenty-five cents, which was never docketed in Buncombe County, wherein the disputed land lies. The plaintiff administrator, in January, 1879, the judgment having become dormant, applied to the Clerk of the Court to issue execution, which he declined to do, unless upon notice and proof of subsisting indebtedness, he should so adjudge, and give leave for its issue. The plaintiff thereupon made the affidavit, caused the notice to show cause to be served on the defendant, and on being advised by the Clerk that all that was necessary had been done in the premises, proceeded no further, and without positive action on the part of the Clerk in making an order for its issue, sued out execution on the judgment, which, in the form of the former writ of *fieri facias*, was directed and delivered to the Sheriff of Buncombe County. Under the authority thus conferred, he advertised, and on March 8th, 1880, sold and conveyed to the present plaintiff, the estate and interest of the said Littleton Lytle in the land in controversy.

Upon the trial of the issues before the jury, whose verdict, under the instructions of the Court, was in favor of the plaintiff, the question of the validity of the sale was reserved. Upon consideration, the Court being of opinion that by reason of the failure to docket the judgment in Buncombe County, the sale of the land therein was unauthorized and void, set aside the verdict and rendered judgment for the defendant, from which the plaintiff appealed.

Mr. J. H. Merrimon, filed a brief for the plaintiff.
Messrs. M. E. Carter and C. A. Moore, for the defendant.

SMITH, C. J., (after stating the facts). The vitality of the judgment not having been preserved by a successive issue of executions, at intervals prescribed by law for that purpose, it had become dormant,
and an execution sued out without a renewing order made by
(685) the Clerk, was irregular, while not void, and liable to be set aside on application of the debtor. Until this is done, however, the execution remains in force, as if no dormancy had supervened; and when set aside, the title to property sold under its authority, to a stranger to the proceeding, who buys in good faith, and without knowledge or notice of the irregularity, or other defect in the issue of the process, will not be impaired thereby. *Barnes v. Hyatt,*

87 N. C., 315. It will be otherwise when the purchaser has full notice. *Sheppard v. Bland,* Id., 163.

This was the well established rule in the former practice, when no statutory bar obstructed the prosecution of a new action on the judgment, or the *scire facias,* in more general use to revive its dormancy, the defence to which could only be payment or satisfaction, and this was presumed after ten years, in the absence of any rebutting evidence.

The execution in the present case, was issued not only upon a dormant judgment, but after more than ten years had elapsed from its rendition, when the bar of the statute, prescribed by the existing law, would have interposed if set up by the debtor, to defeat a revival or the recovery of a new judgment upon the former, as a cause of action; and when if it had been docketed, the lien thus created upon the debtor's land would have become extinct. *McDonald v. Dickson,* 85 N. C., 248.

If the execution issued after the period during which the lien continues, or if the time expires before the sale under which it is made, it being in the nature of a writ of *venditioni exponas,* as to real estate, to enforce an expired lien, it becomes inoperative for such purpose, and conveys no authority to make a sale preserving the lien that had attached, while under it, the officer may seize and sell the personal estate; and this results from the fact, that there is then no lien to be enforced and made available. *Lyon v. Russ,* 84 N. C., 588; *Fox v. Kline,* 85 N. C., 173; *Spicer v. Gambill,* 93 N. C., 378.

The failure to acquire a lien for want of a docketing of the judgment, or when having been acquired, it has been lost by the efflux of time, the judgment does not thereby become invalid *ipso* (686) *facto,* nor is the creditor deprived of his right to resort to such remedies as the law provides, irrespective of the lien, and he may pursue them, when by means of successive executions, separated by intervals not exceeding three years, the life of the judgment has been preserved, and the necessity avoided of making application to the Clerk for leave. The Code Sec. 440. The lien is a better and further security for the debt than the creditor formerly possessed, but the act that gives it, does not profess nor undertake to displace or recall the remedies furnished by the law and practice previously in force. This has been declared when personal goods have been seized, after the lien on the real estate was gone, in *Williams v. Mullis,* 87 N. C., 159, and is extended to land in *Spicer v. Gambill, supra.* The docketing of a judgment is not an essential condition of its efficacy, nor a precedent requisite to an enforcement by final process. This is only necessary to create and prolong the lien thus acquired, for the benefit

of the creditor against subsequent liens, encumbrances and conveyances of the same property.

The writ which issued to the sheriff in this case and held at the sale pursuant to which the plaintiff bought, is neither in form or effect a mere order for the enforcement of a lien by sale under it, which was the office of the *venditioni exponas,* being but a mode of consummation of an action before begun, but is simply an *alias* mandate, addressed to the officer, requiring him "of the goods and chattels, lands and tenements of the several defendants named, to make the moneys adjudged to the plaintiff," pursuing the form of a *fieri facias,* recognized and in use before the introduction of the new procedure.

The former rulings, by which an execution, issuing upon a dormant judgment, was upheld as sufficient to pass title to an innocent purchaser, not a party to the proceeding, were made when the only informality in the judgment is its *dormancy,* but it would extend the principal much further, if the same effect is given to final process,

issuing upon a judgment not only dormant, but when an attempt
(687) to revive or give it legal force, must encounter at the defendant's election, the bar of the statute of limitation. To allow final process to be sued out, and have the assumed efficacy, is to deny to the debtor the opportunity to set up a full and sufficient defence, which the law gives him, and thus would the creditor be enabled to do by his own act, that which the law would have refused, if he had sought a remedy through its forms. The essential distinction between the former and the present rule, lies in the fact, that in the one case, there is not, while in the other there is, a bar interposed by the statute, against any mode of legal action, open to the creditor. The law prescribes how the dormancy may be removed, and we do not depart from the adjudications, when we allow the same results to an execution upon a judgment not barred, but with suspended activity only. We shall go beyond the authorities in upholding it, when all remedy to revive or renew it is taken away by the statute. We do not propose to do so, and we think, when the judgment cannot be enforced by asking leave of the Court, nor by a new action founded upon the judgment, as itself a cause of action, the defendant ought to have a day in Court, to show any legal objection he may have for opposing the grant of leave by the Court, or against a second recovery, in displacement of the former, as a new statutory point of time.

For these reasons, we are of opinion the judgment below is correct, and the same is affirmed.

No error. Affirmed.

Cited: Lilly v. West, 97 N.C. 279; *Coward v. Chastain,* 99 N.C. 444; *Jones v. Britton,* 102 N.C. 178; *Adams v. Guy,* 106 N.C. 277; *McIlhenny v. Savings Co.,* 108 N.C. 312; *Pipkin v. Adams,* 114 N.C. 202; *Cowen v. Withrow,* 114 N.C. 559, 560; *McCaskill v. McKinnon,* 121 N.C. 195; *McLeod v. Williams,* 122 N.C. 453; *Bernhardt v. Brown,* 122 N.C. 594; *Heyer v. Rivenbark,* 128 N.C. 272; *Evans v. Alredge,* 133 N.C. 379; *McKeithen v. Blue,* 149 N.C. 98; *Cox v. Boyden,* 153 N.C. 525; *Barnes v. Fort,* 169 N.C. 434; *Trust Co. v. Currie,* 190 N.C. 263; *Barnes v. Cherry,* 190 N.C. 774; *Hyman v. Jones,* 205 N.C. 267; *Sansom v. Johnson,* 212 N.C. 383.

ROSA J. BRYAN ET AL. v. EMMA V. MORING ET ALS.

Wills—Devisavit vel non—Evidence.

1. Where, upon an issue of *devisavit vel non,* the jury found a certain script to be the will, and the Judge ordered that the finding of the jury, together with a copy of the judgment, should be certified to the Clerk of the Superior Court, in order that he might proceed, etc.; *It was held,* to be informal. In such case, the probate is in the verdict, and the judgment so declaring, should direct the remission of the transcript in which the script is contained, with the original script, if among the papers, to the end that they may be recorded and filed, and other necessary proceedings had.
2. Where, in an issue of *devisavit vel non,* the caveators offered a witness who had been examined when the will was offered for probate before the Clerk, and to impeach him, and contradict his testimony, the propounders examined a witness who had made *memoranda* of the evidence taken before the Clerk, at the request of the Clerk, and who swore that his *memoranda* were accurate; *It was held,* to be error to exclude such *memoranda,* and the propounders had a right to read it to the jury to contradict the caveator's witness.
3. In such case, it does not remove the error to allow the caveator's witness to testify from memory what his evidence was before the Clerk. The propounders had a right to have that evidence, as preserved, read to the jury rather than to have the result of the witnesses recollection.

ISSUE OF *devisavit vel non,* tried before *Gilmer, Judge,* and (688) a jury, at Fall Term, 1885, of the Superior Court of CHATHAM County.

The propounders, the plaintiffs of record, appealed.

The facts appear in the opinion.

Messrs. F. H. Busbee and R. H. Battle, (Messrs. Samuel F. Mordecai and C. M. Busbee, were with them on the brief), for the plaintiffs.

Messrs. John W. Graham and John Manning (Messrs. T. C. Fuller, Geo. H. Snow and Thos. Ruffin, were with them on the brief), for the defendants.

SMITH, C. J. A paper writing, purporting to be the will of William C. Faucette, who died in June, 1883, was shortly thereafter produced before the Clerk of the Superior Court of Chatham County, at his office, by Elias H. Bryan, and Rosa J., his wife, and upon the written examination of witnesses, admitted to probate in common form, as his holographic will, and letters of administration *cum testamento annexo*, issued to the propounder. It was in form as follows:

NORTH CAROLINA,
CHATHAM COUNTY.

"I, William C. Faucette, of said county and State, being (689) sound in body and mind, do make and declare this my last will and testament, in manner and form following—that is to say, I will that my executors first pay all necessary funeral expenses, and all just debts that I may owe at my death; if I should leave a wife and child or children surviving me, then I wish my widow to have one-third of all my estate, real and personal, and the other two-thirds to such child or children as may survive me.

"If I should leave a child or children and no wife, then I give all my estate to such child or children.

"If I should leave a widow and no child, then I will that my estate be equally divided between such widow, my sister Sally A. Faucette and my brother Henry C. Faucette, one-third to each. If I should leave no child or widow surviving, then I give all my estate to my sister Sally A. Faucette and my said brother Henry C. Faucette, one-half to each; and if either my sister Sally A., or brother Henry C., should die without children, then I wish his or her part to go to the survivor.

"Witness my hand and seal this 21st July, 1879.

WILLIAM C. FAUCETTE. (Seal)."

To the probate, a caveat was entered by Emma V. Moring, her husband, John M. Moring, uniting with her, early in December thereafter, and in May of the next year, she, the said Emma, and her children, by their said father and next friend, propounded for probate, and proposed to establish, a later holographic will of the said William C. Faucette, alleged to have been lost, and the substance of

which is set out in their complaint. The said John M. was subsequently appointed guardian to said infants, to defend their interests in the action. To prevent the double controversy, an issue in the alternative was framed and submitted to the jury, as follows:

"Is the paper writing, dated July 21st, 1879, or any part (690) thereof, the last will and testament of W. C. Faucette; or does the paper marked A, contain the substance of a holograph will, duly executed by W. C. Faucette and dated July 12th, 1880?"

Upon the rendition of the verdict, judgment was entered as follows:

"The jury having found the following paper writing, marked A, to-wit:

"STATE OF NORTH CAROLINA,
CHATHAM COUNTY.

I, William C. Faucette, of said county and State, being sound in mind and body, do make and declare this my last will and testament, in manner and form following: That is to say, first pay all my funeral expenses and claims, and other claims. At my death, should I leave wife, child or children, then I wish my widow to have one-third of my estate, both real and personal, and the other to my child or children; but should I leave no wife, child or children, then I will all my estate, both real and personal, to cousin Emma Moring and children.

This the 12th day of July, 1880.

W. C. FAUCETTE, [Seal.]"

contained in substance the last will and testament of W. C. Faucette, deceased.

"It is now on motion of, etc., (omitting names of attorneys), adjudged, that the finding of the jury, together with a copy of this judgment, be certified to the Clerk of the Superior Court of Chatham County, with instructions that he proceed as the law directs, and in accordance with the finding of the jury and this judgment, to admit to probate the paper writing, found by the jury and hereinbefore set forth, as and for the last will and testament of W. C. Faucette, deceased, and that he proceed in other respects as the law directs.

Ordered, that the defendants Emma V. Moring and others (691) named, E. H. Bryan and wife, Rosa J., pay costs of this proceeding.

JOHN A. GILMER,
Judge presiding."

In this connection, it may not be amiss to observe, in order to prevent the adoption of the foregoing form of judgment as an approved

precedent, that in such case, the *probate is in the verdict,* and the judgment so declaring, should direct the remission of the transcript, in which the last script is contained, (with the original script, if there be one among the papers,) to the Probate Court, to the end that they be recorded and filed, and other necessary proceedings had therein. A precedent is found in Eaton's Forms, 444, 448; *McNeill v. McNeill,* 13 N. C., 393.

During the trial, one James E. Bryan, a witness for the caveators, a term used to designate those who, as parties, resist the probate of the first, and offer for probate the copy of the later lost script, testified to matters material to the issue, such as the search for and finding the place of deposit of both scripts; their being both in the handwriting of the deceased, and other facts in detail relating thereto, which will be found in his evidence, but are not necessary to be specifically recited in order to an understanding of the exception of the appellants which we propose to consider.

The propounders, (those who offer the first script being intended in using the word), then introduced T. B. Womack, of counsel for the caveators, to whom was handed the testimony taken for the caveators in the *ex parte probate* before the Clerk, among which was that of the said James E. Bryan, and the witness stated:

"I was not of counsel for Moring when the effort was made to propound the will of 1880, before the Clerk, May 18th, 1885. I was requested by the Clerk to take down the testimony, and did so by consent of counsel. I took down the substance of the evidence
(692) of J. E. Bryan, and this paper contains everything of importance testified to by him, omitting repetition merely, and it is in the main correct. It contains the substance of his evidence accurately. The evidence as taken was not signed by the witness, nor am I sure that it was read to him."

The propounders then proposed to read this evidence to the jury, to impeach the testimony now delivered by Bryan, as we must understand the record, and especially as the testimony was allowed when recalled to the memory of the witness, without opposition, and it was only competent for such purpose. The caveators objected to the reading, and it was disallowed by the Court, and to this ruling the propounders except.

The witness having stated that he could recollect the substance of Bryan's testimony as to what occurred at the store, proceeded to say that the latter testified that neither Mrs. Everett Bryan nor Wilkie, read or saw the contents of the paper handed to Elias Bryan, (the alleged will of 1880).

Upon cross-examination the witness said further, that he could give a synopsis of the testimony of J. E. Bryan from his recollection, but not the substance of all he said, as there were a good many pages of his testimony; that Bryan testified to the search; that he found the will of 1880, with the will of 1879, in the lower room, with the bank stock; that the handwriting was W. C. Faucette's, and that the substance of the contents of the will was the same as testified to upon the present trial; and also that the will was upon note paper, on the first page, and half of the second; and gave similar testimony as to the indictment for counterfeiting.

It will thus be seen, that while the carefully-written memorandum of the words as they came from the lips of the examined witness, J. E. Bryan, or Everett Bryan, as he was sometimes called, by an impartial and intelligent person, who swears that "it contains the substance of his evidence accurately," is excluded, the witness is permitted to reproduce it from memory, so that the opposition was not to the competency, but the means of obtaining the former evidence; in other words, though the correctness of what was committed to writing at the time is not questioned, it is refused, and the (693) witness allowed to speak from a refreshed memory. In this ruling we think there is error, and that the writing thus verified was impeaching evidence, which ought to have been heard. It is not offered as independent and original evidence, but in aid of other proof of bad character, and affecting the credibility of the witness. The *memorandum* thus identified and supported, *becomes part of the testimony of the witness,* just as if without it, the witness had orally repeated the words from memory. The present case falls within the ruling in *State v. Pierce,* 91 N. C., 606, when the Court says: "The purpose here is not to prove any facts sworn to, but what were the declarations made by the witness; what did she then say—what was her version of the matter. *What higher proof could be had, than her very words, written down as they were uttered, with care, and under a sense of official obligation?*" We shall not reëxamine the proposition, but simply refer to the opinion in that case.

It does not remove the error, to say, that the witness did, from memory, recall and repeat the testimony. The propounders had a right to have that evidence, as preserved, read to the jury, rather than have the result of an awakened, and perhaps imperfect memory, in which there might be omissions of importance bearing upon the case. The witness himself says, he could from memory give a synopsis, "but *not the substance* of all he said, as there were a good many pages of his testimony." Why, then, was excluded a memorandum which was full and complete, written down at the time, and the exer-

cise of an imperfect memory of what was said resorted to instead?

We refer again to what was said in the opinion in *Davenport v. McKee, ante,* 325, upon a similar exception.

Without noting other exceptions, that taken to the ruling under consideration must be sustained, and this results in the right to another trial.

There is error. Let this be certified.

Error. Reversed.

Cited: S. v. Jordan, 110 N.C. 495; *Bank v. Fidelity Co.,* 128 N.C. 370; *Trust Co. v. Benbow,* 135 N.C. 307.

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(694)

ROSA J. BRYAN ET AL. V. E. V. MORING ET ALS.

Devisavit vel non—Heir—Receiver.

1. An essential element in the exercise of the extraordinary jurisdiction of appointing a receiver, is the danger of the entire loss of the property. So, a receiver will not be appointed to take possession of land and receive the rents and profits, unless the plaintiff has established an apparent right to the property and the insolvency of the defendant is alleged and proved.
2. A receiver cannot be appointed in a proceeding to establish a will.
3. Where, on an issue of *devisavit vel non,* the jury found that a certain paper writing was the will, and certain persons, parties to the action, were in possession of the land of the testator, claiming under a prior script, *it was held,* error to appoint a receiver of the rents and profits, especially when there was no allegation of insolvency against the party in possession.

This was a motion to appoint a receiver of the personal and real estate of William C. Faucette, deceased, heard before *Gilmer, Judge,* at Fall Term, 1885, of Chatham Superior Court.

The motion was made in a cause pending in said Court, concerning the probate of the last will and testament of William C. Faucette, in which the plaintiffs were the propounders and the defendants the caveators, and also the propounders of a will alleged to have been published subsequent to the former.

The first will bore date the 21st day of July, 1879, under which the propounder Rosa J. Bryan claimed the land as sole heir and devisee. This will was admitted to probate in common form in the Probate Court for the county of Chatham, on the 18th day of July,

1883, and there being no executor appointed in said will, Elias H. Bryan was appointed administrator of William C. Faucette, with the will annexed.

E. V. Mooring and her children, claiming to be the legatees and devisees under a will made by the said W. C. Faucette, of date the 12th of July, 1880, entered their *caveat* to said will of July, 1879, and propounded at the same time the last alleged will for probate. Issues were made up and submitted to the jury, to (695) determine which of the two paper writings was the last will and testament of the deceased William C. Faucette. The jury found the paper writing, of date the 12th of July, 1880, to be the last will and testament of the said W. C. Faucette, and thereupon the Court adjudged that the paper writing of 12th of July, 1880, was the last will and testament of William C. Faucette, deceased, and adjudged that the finding of the jury, with a copy of the judgment, be certified to the Clerk of the Superior Court of Chatham County, that he might proceed as the law directs.

From this judgment the propounders of the first will appealed to the Supreme Court. See the preceding case.

Thereupon, John M. Mooring, who was one of the caveators, as next friend of the infant children of E. V. Moring, moved for the appointment of a receiver, based upon the following affidavit filed by him:

"1. That he is one of the *caveators* of the will of 1879, and a party to this action, which is an action to set up an alleged lost will of the late Wm. C. Faucette, dated 12th July, 1880, in which all of his property, both real and personal, is devised to the *executors*, Emma V. Moring and her children; a prior will, dated 21st July, 1879, having been offered for probate in common form by the propounders, at which time Elias H. Bryan was appointed administrator of the late W. C. Faucette, with the will of 1879 annexed, and entered into bond in the sum of six thousand dollars; that as such administrator, as affiant is informed and believes, he has come, or should have come, into possession of personal property to the amount of some twelve thousand dollars in value.

2. That a large portion of the estate of the late Wm. C. Faucette, consists of valuable real property in this county, which is now in possession of Rosa J. Bryan, one of the propounders, and the sole heir and devisee under said will of 1879, and that the rents accruing upon said land, should be about one thousand dollars per annum.

3. That Wm. C. Faucette died on the 26th day of June, 1883. (696)

4. That Elias H. Bryan, so this affiant is informed and believes, and so Rosa J. Bryan testified on the trial of this cause, is

suffering from a disease called softening of the brain, and has been for some time becoming more and more weak mentally, until now he is unable and incapable of attending to his business affairs, and that by reason of said dementia, the *caveators* are in great danger of loss by improper management of said estate.

5. That the jury found that the will of 1880 was the will of the late Wm. C. Faucette; judgment was rendered in favor of the *caveators,* from which the propounders appealed.

6. That by reason of the pendency of the appeal in this cause, and the other facts stated, that it is necessary to have a receiver appointed to preserve the said property from loss and waste, until this issue as to the will is decided."

His Honor made the following order:

"Upon a motion submitted for a receiver in this matter, upon the affidavit filed, it is ordered that William E. Anderson be appointed receiver of all the personal property of William C. Faucette, and also of the rents and profits of the lands possessed by said William C. Faucette, at his death, during the pendency of the appeal. The receiver will give bond in the sum of fifteen thousand dollars, and make report to each Term of the court, of his receipts and disbursements.

"R. J. Bryan and E. H. Bryan and their agents, are enjoined from receiving or interfering in any way with the property herein described, except that the said Receiver may rent, upon proper security, any of the said land to the said Rosa J. Bryan."

From so much of the above order as appoints a receiver for the real estate, and enjoins Rosa J. Bryan, and E. H. Bryan and their agents from receiving or interfering in any way with the said real estate, Rosa J. Bryan and E. H. Bryan appeal to the Supreme Court.

(697) *Mr. F. H. Busbee,* for plaintiffs.
Messrs. John W. Graham and Thos. Ruffin, for the defendants.

ASHE, J. (after stating the facts). The facts of the case are so imperfectly stated, that we are not certain that we can come to a correct conclusion upon the point presented by the appeal from the ruling of the Judge, in appointing a receiver to take charge of the real estate of W. C. Faucette.

The will of 1879, which was admitted to probate in 1883, gives all the property of the testator, to his sister Sally A. Faucette, and his brother Henry C. Faucette, one-half to each; and if either should die without children, then his or her part to go to the survivor. The case shows that Henry C. Faucette died before the testator, and we take

it, unmarried and without children. But whether Sally still lives, does not appear, and there is nothing in the case to show how Rosa J. Bryan is entitled to the land that belonged to the testator, except in the affidavit filed by Jno. M. Mooring, as the basis of his application for a receiver, where it is stated that Rosa J. Bryan is sole heir and devisee under the will of 1879. We must assume that this statement would not have been made, if she did not claim title to the land in some way under the will, possibly as heir to Sally A. Faucette, who may be dead. But in any way, it seems to be conceded by the propounders of the last will, that she claims as heir, and is in possession of the land, and in receipt of the rents and profits. That being so, ought she to be deprived of the enjoyment of the rents and profits, before the caveators shall establish their right to the land, which can only be done by establishing the will of 1880, as the last will and testament of W. C. Faucette.

They assert that by the verdict of the jury, they have at least shown an apparent right to the land, and that is sufficient, although there has been an appeal in the case, to give them a receiver to take charge of the land, to secure the rents and profits, and hold them subject to the final determination of the case, leaving open the issue (698) of *devisavit vel non*. But admitting that the verdict of the jury has established an apparent right, that of itself was no sufficient ground for the interposition of the Court, to take the land into the custody of the law, and deprive the owner of the pernancy of the profits. One essential element in the exercise of this extraordinary jurisdiction of the Court, is the danger of the property being lost, or its value greatly impaired—as in the case of rents and profits of land, that they will be squandered and lost by the insolvency of the party in possession. Hence, in such a case, it is necessary that the insolvency of the party in possession should be alleged and shown. This rule is expressly laid down in the case of *Twitty v. Logan*, 80 N. C., 69, where it is held, "an order appointing a receiver will not be made, when the party applying for the same has not established an apparent right to the property in litigation, and when it is neither alleged nor shown, that there is a waste or injury to the property, or *loss of the rents and profits*, by reason of the insolvency of the adverse party in possession."

In *Rollins v. Henry*, 77 N. C., 467, it was held by the Court, that "whenever the contest is simply a question of disputed title to property, the plaintiff asserting a legal title in himself, against a defendant in possession, receiving the rents, etc., under a claim of legal title, even if the defendant is insolvent, a receiver will be appointed, only when

plaintiff sets forth an apparently good title, not sufficiently controverted in the answer, and shows *imminent danger of loss by defendant's insolvency.*"

The rule laid down in the first cited case, and the case of *Rollins v. Henry, supra,* is fully and directly supported by *Vane v. Woods,* 46 Miss., 120, where it is held "the defendant will not be deprived of his possession by a receiver, unless it is made to appear that there is a great risk of ultimate loss of the property, and insolvency on the part of the defendant, so that he will be unable to respond to a final decision," and High on Receivers, thus lays down the doctrine:
(699) "There are two conditions, both of which must combine to warrant a Court of Equity in granting a receiver as against a defendant in possession. These conditions are, first, that plaintiff must show a strong ground of title, with a reasonable probability that he will ultimately prevail; and second, that there is imminent danger to the property or its rents and profits, unless the Court shall interpose."

But in this case, there is no allegation of the insolvency of Rosa J. Bryan. There is no statement in the affidavit of John M. Moring that she is insolvent, and that she will be unable to respond to the final judgment in the case, in consequence of her insolvency, and this, as shown from the authorities cited, is an essential condition to be alleged and shown, in a proper case for the appointment of a receiver to take into possession lands, or the rents and profits thereof, that may be the subject of the litigation.

But, moreover, we do not think this a proper case for a receiver of the lands and rents, etc. It is not an action to recover land, and to secure the rents and profits, as incidental to the final recovery; but a proceeding to establish a paper writing as a last will and testament, and we are not aware of any authority for the appointment of a receiver in such a case.

Our conclusion, therefore, is, that there was error in so much of the order made in the Court below, as gave to the receiver authority to take charge of the rents and profits of the land possessed by W. C. Faucette at his death, and enjoining R. J. Bryan and E. H. Bryan, and their agents, from receiving or interfering with the said land and the rents and profits thereof, and so much of the said order is reversed.

Let this be certified to the Superior Court of Chatham County.

Error. Reversed.

Cited: Lovett v. Slocumb, 109 N.C. 113.

(700)

THOMAS J. JONES v. VIRGINIA B. SWEPSON, EXECUTRIX OF GEO. W. SWEPSON, ET AL.

New Trial—Excusable Negligence—Issues—Affidavits.

1. A new trial awarded by the Supreme Court, re-opens the controversy for the admission of any evidence that is itself competent, and which, if offered at the first trial, should have been received, and this equally applies to cases when the facts are to be passed on by the Judge instead of a jury.
2. This rule does not apply to those cases, where of several issues, severable in their relations to each other, an error enters into one, which in no wise affects the others, when a new trial may be granted on that issue alone, nor does it apply where some essential issue in controversy, necessary to be determined before final judgment, has not been passed upon, when such issue may be eliminated and sent down for trial.
3. In hearing motions to set aside judgments for surprise, etc., there is no rule requiring the affidavits to be filed before the hearing of the motion is entered on.
4. In an application to set aside a judgment for surprise, etc., there was an appeal to this Court, where the judgment was reversed and further proceedings ordered. On the trial in the Court below, on the hearing, the defendant offered an additional affidavit, which was rejected by the Court; *It was held*, to be error, as the trial was *de novo*, and the parties had the right in law to offer any competent evidence, whether offered on the previous trial or not.

MOTION to set aside a judgment for surprise, etc., heard before *MacRae, Judge,* at November Civil Term, 1885, of the Superior Court of CUMBERLAND County.

The plaintiff recovered judgment against the testator of the defendant Virginia B. Swepson, for want of an answer, at May Term, 1877, of Cumberland Superior Court. The defendant thereafter caused to be served on the plaintiff, a notice in writing, in form as follows:

THOMAS J. JONES, *against* GEORGE W. SWEPSON and MILTON S. LITTLEFIELD. } Motion to set aside judgment.

Thomas J. Jones, the plaintiff in the above entitled action, is hereby notified, that on the 27th day of November, A. D. 1877, or as soon thereafter as counsel can be heard, I shall move the Su- (701) perior Court of Cumberland County, *Judge Seymour* presiding, to vacate and set aside the judgment rendered against me by said Court, at May Term, 1877, in said case.

GEORGE W. SWEPSON.

The motion was heard and allowed, and the plaintiff appealed. Conflicting affidavits were sent up with the transcript, and without an ascertainment of the facts by the Judge who rendered the judgment. In considering the case and reversing the judgment, this language is used in the opinion: "It was the duty of the Judge to find and set forth upon the record the facts upon which he grounded his judgment. Whether a given state of facts constitutes excusable neglect, is a question of fact." And again, "This is as well settled as any proposition can be, by many concurring decisions of this Court," citing several cases. See the same case, 79 N. C., 510.

The motion was again heard, at November Civil Term, 1885, upon the affidavits filed, when the plaintiff's counsel asked that a supplemental affidavit from the defendant, George W. Swepson, filed in 1879, before his death, be stricken from the file, on the ground that it "had been filed, without leave of the Court, and since the former hearing of the motion." This was denied, because, in the words of the Judge, "it appeared that this supplemental affidavit had been on file since 1879, and no motion had been made to strike it out, until the present hearing." The defendant's counsel then proposed to read in evidence an additional affidavit of T. C. Fuller, counsel for the defendant when the impeached judgment was recovered, made on the same day, and of which, and an intention to use it, information was given to the plaintiff's counsel before the trial was entered upon, with consent to a continuance, if denied, for the purpose of answering it. It was offered after the reading of the other affidavits, and objected to by the plaintiff, for "that he had no notice of it, nor opportunity to answer it before the hearing."

(702) The objection was sustained and evidence excluded. To this ruling the present defendant excepts. We reproduce the affidavit only to show its materiality and pertinency to the inquiry then before the Court.

"Thomas C. Fuller, being duly sworn, says that it is not true that the plaintiff ever notified him of the purpose to repudiate his covenant, nor to sue the defendant Swepson, nor to press his suit as to him, nor does affiant believe, and for the following reasons, that he gave such notice to said Swepson. After the execution and the delivering of the said covenant, affiant continued for several years to act as the plaintiff's counsel in the action, it being their purpose to prosecute it as to the defendant Littlefield.

"That for this purpose, and for this alone, the case was kept upon the docket, and the only reason why it was not dismissed of record as to the said Swepson, was that it was believed by the plaintiff and

his attorney, that to have the cause regularly constituted in Court, by actual personal service of the summons upon one of the defendants, would more certainly give the Court jurisdiction as to defendant Littlefield, whom it was proposed to make a party by mere publication, as he resided out of the State. That during these years while affiant was still acting as his attorney, he had divers interviews with the plaintiff with reference to the matter, and never did he at any time, express the least dissatisfaction with his settlement with the defendant Swepson. On the contrary, he frequently inquired of this affiant, as to the chances of his getting money from Florida, or from Littlefield, in pursuance of said settlement, mentioning the same as still subsisting, and at all times declaring that he sought no redress against the said Swepson, but regarded this cause, as to him, terminated. That affiant was present at a term of this Court, in the early part of the year 1876, when the propriety of proceeding to make Littlefield a party by publication was again discussed between the plaintiff, and his other attorney, the late B. Fuller, and this affiant. That it was then deemed best, that Littlefield should not know of the settlement made with Swepson or of the purpose not to (703) sue him further, and in order that he might not be apprised thereof, it was agreed that affiant should mark his name as the attorney of the defendant Swepson. That this was done at that term, in the absence of said Swepson, and without his knowledge, and only for what was supposed to be the plaintiff's advantage, he at this time recognizing his covenant with Swepson as still binding on him. That affiant, as attorney of the plaintiff, always assured the said Swepson, that he would see that no harm should come to him by reason of the continuance of the cause on the docket, and told him that it was not necessary for him to retain counsel in this cause, and that after affiant had marked his name upon the docket as his counsel, whereby he, in effect, became the mutual counsel of the parties, he repeated his assurance to him, and affiant has no doubt that it was in consequence of this repeated assurance, that the said Swepson failed and neglected to retain counsel to represent him in this action.

T. C. FULLER."

Upon the evidence, the Judge found the facts to be as follows:

"1. This action was brought to Spring Term, 1873 of Cumberland Superior Court, the summons being issued at the instance of B. & T. C. Fuller, as plaintiff's attorneys, upon a draft for $25,000.00, drawn by G. W. Swepson on M. S. Littlefield, in favor of A. J. Jones, dated November 8th, 1869, and payable ninety days after date, accepted by M. S. Littlefield, and endorsed by A. J. Jones.

"II. On the 10th of June, 1873, the plaintiff and G. W. Swepson compromised the suit, and plaintiff gave to said G. W. Swepson a receipt as follows:

"Received of G. W. Swepson, one thousand dollars, in full of cash payment of the sum agreed upon, in the compromise of a
(704) certain draft of said Swepson on M. S. Littlefield, payable to A. J. Jones and by him transferred to me, and on which I have commenced a suit. The agreement for compromise is placed in the hands of Hon. Thomas C. Fuller, and is now held by him.

(Signed) THOMAS J. JONES."

Raleigh, N. C., this June 10th, 1873.

The agreement for compromise referred to in the above receipt, was as follows:

"Thomas J. Jones and George W. Swepson have this day agreed together as follows: Thomas J. Jones does hereby agree to forbear and not to prosecute or sue any further, so far as George W. Swepson is liable or concerned, on a draft now in the hands of B. & T. C. Fuller, attorneys, in suit in Cumberland Superior Court as follows: Draft for $25,000.00, drawn by George W. Swepson on M. S. Littlefield, and by said Littlefield accepted, payable to the order of A. J. Jones, and by him assigned to Thomas J. Jones.

"The condition of the above covenant and agreement is, that George W. Swepson pay to Thomas J. Jones, one thousand dollars ($1,000.00), and George W. Swepson further agrees to pay Thomas J. Jones, through Thomas C. Fuller as soon as received by said Fuller, two thousand dollars, out of any money realized from railroad bonds in Florida, or from M. S. Littlefield, and if nothing is collected out of railroad bonds or M. S. Littlefield, then the one thousand dollars is in full satisfaction and payment for said covenant.

THOMAS J. JONES, [Seal.]
G. W. SWEPSON, [Seal.]"

Witness T. C. FULLER.

"The $1,000 is all the plaintiff has received on the draft or on the compromise. Neither said Swepson nor Thomas C. Fuller have, since said agreement, realized any money from railroad bonds in Florida, nor from M. S. Littlefield, and said Swepson was diligent in his efforts to collect and realize money from said sources.

(705) "The complaint was filed at Spring Term, 1873, and signed 'Fuller, attorney for plaintiff,' in the handwriting of B. Fuller,

Esq. Thomas C. Fuller, Esq., became the general attorney for G. W. Swepson, and was released from further professional obligations to plaintiff and at January Term, 1876, of said Court, entered an appearance for G. W. Swepson, by writing T. C. Fuller for——opposite the name of said Swepson in said suit upon the docket, and B. Fuller and J. W. Hinsdale, Esqs., thereafter represented the plaintiff, and at May Term, 1877, of said Court, judgment was rendered against G. W. Swepson for want of an answer or demurrer, in the absence of said Swepson and of his attorney.

"Notice of motion to set aside the judgment was served on the plaintiff, October 9th, 1877. The appearance being entered for said Swepson, at January Term, 1876, and not before, and it being alleged by plaintiff that he gave notice to said Swepson, that he intended to press his said action. Service of said notice being denied by said Swepson, it is found as a fact, that notice was given by plaintiff to defendant, G. W. Swepson of plaintiff's intention to press for judgment, prior to January Term, 1876, and that up to the time of said notice, the said Swepson, relying upon the compromise and covenant, took no steps to defend the action. No defence to the action is set forth in the defendant's notice or affidavits, other than that which is based upon the terms of the compromise and covenant.

"It does not appear that said Swepson ever communicated to his attorney any other defence to the action.

"Upon the foregoing facts found, it is considered by the Court, that the defendant is not entitled to relief under Sec. 274 of the Code.

"The plaintiff offering now to credit said judgment with the one thousand dollars, paid to him by said Swepson, on June 10, 1873, the said judgment must be credited with said sum, at said date. And the motion to vacate is denied, at defendant's cost, and the stay of proceedings heretofore granted is dissolved."

From which order the defendant Swepson, as executrix, ap- (706) peals to the Supreme Court.

Mr. John Devereux Jr., (Mr. Geo. V. Strong was with him), for the plaintiff.

Messrs. Thos. Ruffin, W. P. Bynum and Edward C. Smith, (Messrs. T. C. Fuller, Geo. H. Snow and Jno. W. Graham were with them on the brief), for the defendants.

SMITH, C. J. (after stating the facts). We think it clear, that a new trial awarded for some vitiating illegal ruling, which may be reasonably supposed to have influenced the verdict, re-opens the controversy for the admission of any evidence that is itself competent,

and ought to have been received, if offered, at the first trial. This is equally true when the Judge assumes the function of passing upon the evidence, and determining the facts upon which the judgment is grounded. We do not of course refer to those exceptional cases, where of several issues, severable in their relations, an infecting error enters into the finding of one, and the new trial is confined to that issue, as in *Burton v. Railroad,* 84 N. C., 193; *Lindley v. Railroad,* 88 N. C., 547; *Roberts v. Railroad, Ibid.,* 560; nor to cases wherein some of the essential matters in controversy, necessary to be determined before final judgment, have not been passed on, and the verdict is insufficient, as in *Allen v. Baker,* 86 N. C., 91.

There were no facts found in the former appeal, upon which the order vacating the judgment could be seen to have been founded, and the appellate Court, could not consequently decide upon the correctness of that ruling. The motion when re-heard, stood upon the same ground as if an entire verdict had been set aside, and the trial is of necessity *de novo.* There had been no fact determined, and the issue before the Judge included all such facts as were required in deciding upon the merits of the application, and was open to any evidence, legally admissible, which either party might be able to adduce,
(707) in conformity with the practice. In jury trials, the litigants introduce any proofs they may have, in proper order, until all are heard, and may, with leave of the Court, offer further proofs after the testimony has been closed.

Neither is required in advance, to communicate to the other that which he expects to introduce. Why should a different rule prevail when the Court is called on to perform a similar service? As affidavits are *ex parte* and no opportunity is offered for cross examination, there is a propriety in affording counsel an opportunity for examining such as may be offered against him, before trial, so that he may controvert the new matter, by adversary evidence, and when this is not done, it may present a case of surprise, authorizing the arrest of further proceedings, until the new evidence can be met. We know of no rule regulating the hearing of motions such as the present, which requires the filing of affidavits before the trial is entered upon, and their rejection when they are not. There is, of course, a discretion reposed in the Judge, which may warrant his rejection of testimony in this *ex parte* form, when inopportunely offered out of the regular course of proceeding, just as he may, under such circumstances permit it. We do not abridge his exercise of discretion in these cases. The present case is not of this kind. Notice of the affidavit was given in advance, and it does not appear that the plaintiff or his counsel were refused an opportunity of seeing it, or even that they wished to know what

it contained. No unfair advantage was taken, and the plaintiff assented to the hearing, with the knowledge that the affidavit would be offered.

It is true, the opposition to its admission is put by the plaintiff's counsel, upon the general ground "that he had no notice of it, nor opportunity to answer it before the hearing," and the record says the objections were sustained. If by this is meant that sufficient time had not been given to prepare the answering evidence, as we have already said, the objection is untenable in law, and could have been removed by a postponement.

Another portion of the record seems to imply the ruling out (708) of the affidavit for a different reason. The plaintiff's counsel seemed to have entertained the erroneous idea, that no testimony could be heard, but such as was before the Judge when the motion was first heard and allowed. This is indicated in the application for striking out the second, or, as it is called, *supplemental* affidavit of the deceased, though on file for six years, because the leave of the Court was not first obtained, as necessary to its admission. And the ruling seems, in some degree, to countenance the suggestion, since the objection is overruled, not for its intrinsic invalidity, but because the affidavit had so long remained on file, and no motion of such nature had before been made to this effect. Then immediately appears the objection to the reading of the refused affidavit, and the ruling sustaining it. It would seem that the implication found in the previous ruling, was acted on as a sufficient reason for rejecting the other. If this be the interpretation of the record or case, the action of the Court proceeds upon an underlying misconception of the law and practice in disallowing the evidence. And in the other view of the case, there was error in the ruling, which entitles the appellant to another hearing. It is not an authorized act of discretion, but a denial to the defendant of a legal right.

We are not prepared to say, even upon the findings, that the case is not within the purview of Sec. 274 of The Code, and that the ruling of the Judge in this regard is correct. But we express no opinion upon the point, as the facts developed upon the evidence, and found at the next trial, may be entirely different.

There is error in the ruling out of the affidavit, as a matter of law, and there must be another trial. It is so adjudged.

Error. Reversed.

Cited: Ashby v. Page, 108 N.C. 8; *Beville v. Cox,* 109 N.C. 267; *Strother v. R. R.,* 123 N.C. 200; *Benton v. Collins,* 125 N.C. 90; *Hun-*

ter v. R. R., 163 N.C. 283; *McGehee v. McGehee*, 190 N.C. 477; *Woody v. Privett*, 199 N.C. 379.

(709)

*J. C. PUITT, ELI PASOUR AND OTHERS v. COMMISSIONERS OF GASTON COUNTY.

Constitutional Law—Local Taxation for School Purposes—Discrimination Between Races.

1. The Constitution requires that all taxes, whether levied for State, county, town or township purposes, shall be uniform, and allows no discrimination in favor of any class, person or interest, but requires that all things possessing value and subject of ownership, shall be taxed equally, and by uniform rule.
2. Therefore, a law which allows a tax on the polls of one color and on property owned by persons of the same color, to be applied exclusively to the education of children of that color, is unconstitutional.
3. This law also discriminates between the races, by allowing the taxes paid by one, to be applied exclusively to the education of that color, and is therefore in conflict with the last clause of Art. 9, Sec. 2 of the Constitution, which is—"there shall be no discrimination in favor of or to the prejudice of either race."
4. This does not extend, however, to the law requiring the children of the two races to be educated in separate schools when the advantages are equal—nor to laws prohibiting marriage between the races, nor are such laws opposed to recent amendments of the Constitution of the United States.

CIVIL ACTION, heard by *MacRae, Judge,* at Chambers, on April 24th, 1884.

The action was instituted to perpetually enjoin the defendants, commissioners, from levying certain taxes for the support of schools.

His Honor refused to continue the restraining order to the hearing, and the plaintiffs appealed.

The facts fully appear in the opinion.

(710) *Messrs. W. P. Bynum and R. W. Sandifer, for the plaintiffs.*

Messrs. Geo. F. Bason and John Devereux, Jr., for the defendants.

*The decision in this case was rendered at the last Term, but the opinion was not filed in time for publication in the last volume of the Reports.

SMITH, C. J. While in this action for a perpetual injunction against the collection of a certain tax, levied by the commissioners in further support of free education of children of the white race alone, which, under our former system of judicial administration, would be exclusively cognizable in a court of equity, we would be required to look into the evidence, if properly taken and sent up, and ascertain what facts are proved, the parties are content to abide by the findings of the Court, as the facts upon which we are to declare the law. They are as follows:

The defendants, the board of commissioners of Gaston County, under the provisions of the act of March 8, 1883, The Code, Secs. 2594, 2595, caused an election to be held in school district No. 21 for white children, and to be submitted to the white electors therein for approval or rejection, a proposition for an additional tax of twenty cents on the one hundred dollars worth of property therein, belonging to white owners, and sixty cents upon each taxable white poll, for furnishing increased free educational advantages to the white children of the district. At the election held accordingly on December 6, following, at which, while there were colored electors, none but white electors were allowed to vote, twenty-five votes were cast for, and twenty against the proposition, whereupon the commissioners declared it to have been carried by a majority of five votes, and directed their clerk to make out a tax list, and place the same in the hands of the sheriff, which has been done, and the sheriff is proceeding to collect said assessment.

By the act to incorporate the town of Dallas, (Private Laws, 1871-'72, ch. 46), it is provided that the town of Dallas shall constitute a school district.

The boundaries of school district No. 21 were established in 1868, and embrace a larger territory, including more persons, voters and property, than are comprised in the corporate limits of the (711) town of Dallas, and the boundaries of said school district have been retained as in 1868, up to the present time, and no action has ever been taken under the charter of the town of Dallas to conform the limits of the school district to the limits of said town.

If the colored voters had been allowed to vote, twenty-five would not have been a majority of the qualified voters therein, either as the district is recognized, or as it would be if confined to the limits of Dallas.

That there were sixty-three qualified white voters residing within the limits of school district No. 21 at the time of said election.

The said tax list contains a tax or assessment of twenty cents on the $100 worth of property in said district belonging to white persons, and

sixty cents on the polls of the white persons residing therein, and none on the property or polls of colored persons resident therein, though there are several who reside and own property, subject to taxation therein.

A large amount of said tax or assessment is upon property and polls of persons, situate and resident outside of the corporate limits of the town of Dallas.

That the collection of said assessment will not have the effect to produce a depreciation in the value of the property subject to such assessment. As a matter of law, that the levy and collection of said assessment, is not in violation of the Constitution or the laws of the State.

It is therefore ordered, that the restraining order heretofore granted be dissolved, and that the plaintiffs pay the costs of this application, to be taxed by the clerk.

From which order the plaintiffs appeal to the Supreme Court.

The first section of the Act, prescribes the manner, such as was pursued in the present case, of ascertaining the will of the white voters on the proposed assessment in aid of schools in the district, and upon an approval, directs the further action mentioned in the next three sections, which are as follows:

(712) SEC. 2. In case a majority of the votes cast at said election shall be in favor of such assessment, the board of commissioners shall direct their clerk to make out from the tax list of the township in which such district is situate, a list of all the taxable property and polls of the white or colored tax-payers, as the case may be, in such district, and it shall be the duty of the school committee of such district, to aid the clerk in making out said list; and said clerk shall deliver said list to the sheriff of the county, with an order signed by him, commanding the sheriff to collect said assessment in like manner as provided for the collection of State and county taxes; and said sheriff shall collect and pay over the same to the county treasurer. And said sheriff's bond shall be liable therefor, as provided in case of the county school tax.

SEC. 3. No election, under the two preceding sections, shall be held more than once in any one year.

SEC. 4. The assessment thus levied and collected from the taxable property and polls of white persons, shall be expended in aiding to keep up the public school in said district for white children of both sexes, between the ages of six and twenty-one years; and the assessment thus levied and collected from the taxable property and polls of colored persons, shall be expended in aiding to keep up the public

school in said district for colored children of both sexes, between the ages of six and twenty-one years.

The act granting a charter to the town of Dallas, ratified and taking effect on January 23d, 1872, contains the following section:

That the corporate limits of the town of Dallas, shall constitute a school district, and that all taxes levied upon the same by the State for school purposes, shall be expended in conformity with the State regulations in establishing graded schools within the town; and for the advancement of this purpose, the commissioners may appropriate a sufficient sum belonging to the corporation, to supply the deficiency, and the board of commissioners shall select a school committee for the purpose of supervising said schools, and to per- (713) form the duties now prescribed by law. Private Acts 1871-'72, chapter 46, Sec. 45.

The appellants' claim to be relieved of the tax by a restraining order, to be made permanent on the final hearing, rests upon several grounds, and these are:

I. The school district, as comprised within the corporate limits of the town of Dallas, under the Act, is that wherein the will of the electors, regarding the proposed tax, should have been collected by a vote; and none of the electors outside, though within the boundaries of school district No. 21, should have been permitted to vote. If this be the result of the legislation, and the area covered by the town be withdrawn from the territory originally formed into a school district, the election was not held in conformity with the law, and is void, under the rulings in *McCormac v. Commissioners,* 90 N. C., 441, and *Caldwell v. Commissioners, Ibid.,* 453.

But we do not dispose of the case upon this point, since the statute creates this district to bring it under the operation of the law in reference to graded schools, removing the disability of a want of sufficient population to come under the general law, and may admit of a construction that leaves the former district, undiminished in territory, for ordinary purposes.

II. The appellants' principal objection, and this is the essential point decided in the Court below and brought up for review, is based upon an alleged repugnancy of this legislation to the Constitutions of both the State and Federal governments.

They insist that it is not uniform in its operation upon taxable property and persons, as is required by the State Constitution, Art. 5, Secs. 3 and 6, and Art. 7, Sec. 9.

The counties are directed to be divided into school districts by the Constitution, and each becomes, with the consent of the General

Assembly, a taxing territory, and, remarks BYNUM, J., delivering the opinion in *Kyle v. Fayetteville*, 75 N. C., 445, "whenever the power (of imposing taxes) is exercised, all taxes, whether State, county or town,
by force of the Constitution, must be imposed upon all the
(714) real and personal property, money, credits, investments in bonds,
stocks, joint stock companies, or otherwise, situate in the State, county, or town, except property exempted by the Constitution."

And again: "It is the provision, and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person or interest, and that everything, real and personal, possessing value as property and the subject of ownership, should be taxed equally and by a uniform rule."

The principle of uniformity pervades the fundamental law, and while not in the Constitution applied in express terms to the tax on trades, professions, etc., necessarily underlies the power of imposing such tax, and a tax not uniform, says RODMAN, J., "would be so inconsistent with natural justice, etc., that it may be admitted that the collection of such a tax would be restricted (restrained) as unconstitutional." *Gatling v. Tarboro,* 78 N. C., 119.

So, Mr. Justice MILLER, defining the term as used in the Constitution of Illinois, says that while one tax may be imposed upon innkeepers, another upon ferries, and a still different tax on railroads, the taxation must be the same on each class: that is, the same tax upon all inn-keepers, upon all ferries, and upon all railroads, in their respective classes as taxable subjects. *Railroad Tax Cases,* 92 U. S., 575.

To the same effect is *Worth v. Railroad,* 89 N. C., 301, wherein is quoted with approval this language, used by the Supreme Court of Ohio: "Taxing by a uniform rule, requires uniformity, not only in the rules of taxation, but also uniformity in the mode of assessment upon the taxable valuation."

The proceeding conducted under the statute in the present case, widely departs from uniformity, the fundamental condition of all just authorized taxation under the Constitution. It marks a color line among the qualified voters of the same territorial district, admitting
only of the votes of white men in the white district, and colored
(715) men in the colored district, in determining in their respective
districts, the question of an increased assessment for the schools. The discrimination rests wholly upon race, in this, as in the other provision, which confines the taxation to the property and persons of the one or other of the classes thus divided, as the case may be. The same difference runs into the application of the funds. Those derived from one class, are devoted to the education of the children of that

class only, and denied to the children of the other, a distinction which finds no countenance in the Constitution, but is alike opposed to it in its general structure and in its details.

Suppose the principle was carried out, and made applicable to the entire county—and the school districts are but divisional parts of the county—is it not obvious it would be subversive of the equality and uniformity recognized in the system of public schools, which looks to a fair participation of all its citizens in the advantages of free education?

If the separating line can be thus run, why may it not be between children of different sexes, or between natives and naturalized persons of foreign birth, or even between the former and citizens of other States, removing and settling in this State?

These considerations clearly indicate the incompatibility of such legislation, partial in its operation, with the equality established in the Constitution, and to which all legislative action must conform, in order to its being valid.

The special race distinction, moreover, is in conflict with the concluding clause of Article IX, Sec. 2, which, after directing that instruction shall be given to children of the two races in separate public school, declares that "there shall be no discrimination in favor of or to the prejudice of either race."

Now it is obvious there would be no occasion for such a discriminating enactment, if the results would be the same as to a tax imposed upon all taxable subjects within the district, and fairly distributed, so as to secure similar advantages in obtaining an education to all the school children of either race.

Nor can we shut our eyes to the fact, that the vast bulk of (716) property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race; and yet the needs of the latter for free tuition, in proportion to its numbers, are as great or greater than the needs of the former. The act, then, in directing an appropriation of what taxes are collected from each class, to the improved education of the children of that class, does necessarily discriminate "in favor of the one and to the prejudice" of the other race.

It can make no difference that the property of the white people raises the means which are expended in the education of white children, since the fund is raised by the exercise of legislative coercion, and becomes common to all, and to be used for the general benefit. It is in no sense a voluntary contribution, for with such the law does not interfere, but the results are reached by legislative action, contingent upon an approval by partial voting, but not the less legislative

action for that reason, and, therefore this suit is instituted by unwilling tax-payers to arrest the collection.

The general views we have expressed, have not been seriously controverted in the argument here in support of the ruling below, but it is sought to defend the legislation, as belonging to the class of local assessments, such as have been upheld in cases where a large boundary fence, dispensing with a necessity for interior individual fences, is built and to be maintained at the expense of the lands thus enclosed and benefited. It is unnecessary to refer to these adjudications, as they have been considered and the principle governing them declared in *Busbee v. Commissioners*, 93 N. C., 143.

These local assessments are not made under the restraints applicable to the exercise of the general taxing power for the public good. They are put alone upon the property assumed to be benefited by the proposed improvement, and not upon other, which derives no special advantage from the expenditure. "The principle underlying local assessments conferring special advantages upon land," in the (717) words used in the opinion in this case, "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.*"

The doctrine finds legislative recognition and support in The Code, Sec. 2824, which imposes upon the lands enclosed by a common fence, the expense of its construction and maintenance.

The statute does not provide for cases of a local assessment, but is general in its terms, and applicable to every school district in the State, and thus partaking of the character of general legislation, the tax is put upon every species of taxable property therein, except in the distinction of race ownership.

Nor do we question the right of local taxation for special local interests, not dependent upon the benefits thence accruing to property. The difference in these cases is pointed out in the work of Mr. Burroughs on taxation, 406, whose words, referring to the establishment of a school as a source of advantage to local residents, we have quoted in *Busbee v. Commissioners, supra.*

"Whenever a system of public instruction is established by law" (we quote from Judge Cooley's works on Taxation, page 478), "to be administered by local boards, who levy taxes, build school-houses and employ teachers for the purpose, it can hardly be questioned that the State, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the State, even though a majority of the people in such township or district, in a want of proper appreciation of its advantages, should

refuse to take upon themselves the expense necessary to give them a participation in its benefits."

"The Legislature may authorize or make local public improvements by local taxation." 2 Desty on Taxation, 1,119.

"The imposition of taxes for educational purposes, or for maintaining the common school system, is for a public purpose." *Ibid.*, 1,118.

The principles of equality and uniformity are indispensable (718) to taxation, whether general or local. Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and must be assessed upon all the property according to its just valuation.

"Whatever may be the basis of the taxation," are the words of Judge Cooley in his other work on Constitutional Law, 499, 622, "the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes."

These references suffice to show, that in authorized local taxation for the general good of the residents within the tax district, as distinguished from those within the principle which includes large territorial boundary enclosures, it must be levied in accordance with constitutional requirements, and the property of a class, cannot be singled out to bear the burden, of which the property of another class is relieved. These universal conditions are disregarded in the present enactment, and the distinction can no more be drawn between different owners, than it can be between different kinds of taxable property of the same owner, alike subject to an *ad valorem* tax.

In the opinion we have expressed of the operation of our own Constitution upon such discriminating legislation, it is unnecessary to inquire into its consistency with the recent amendments made to the Constitution of the United States. The essence of these provisions, is to secure equal civil rights to all the citizens of a State, and especially to protect the newly enfranchised colored people, added to the body politic, in their possession and use. But they did not annul the statute long in force, which, from considerations of a public policy, forbids a marriage between a white person and a negro, as expressly held in *State v. Hairston,* 63 N. C., 451, and recognized in *State v. Kennedy,* 76 N. C., 251. Nor are they repugnant to the clause in the State Constitution, which provides for the instruction of the different races in separate schools. This is so decided in *State v. McCann,* 21 Ohio, 208; opinion of BAXTER, C. J., in *United* (719) *States v. Buntin,* 7 Fed. Rep., page 730, April 4, 1882, and in the concurring opinion of CLIFFORD, J., in *Hall v. DeCuir,* 95 U. S., 485-504.

In the latter opinion is reproduced the ruling in the case in Ohio, in these general terms: "That Court held, that it worked no substantial inequality of school privileges between the children of the two classes, in the locality of the parties; that equality of right, does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school advantages, is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

To the same effect are *Roberts v. Boston,* 5 Cush., 198; *State v. Duffy,* 7 Nev., 342; *Clerk v. Board of Directors,* 24 Iowa, 266; *Dallas v. Fosdick,* 40 How. Pr. 249; *People v. Gaston,* 13 Abb. Pr. N. S., 100.

It is not, therefore, every distinction dependent upon race or color, that comes in conflict with the Federal Constitution, but only when it produces inequality in rights or interests; and when this is the result, the State legislation from which it flows, is rendered inoperative. When the same essential privileges are secured to all, such legislation is valid, and rests in the sound discretion and views of public policy of those who make the law.

We think there is error in the ruling of the Court, and that the restraining order should have been continued. Let this be certified to the Superior Court of Cleveland, that further proceedings be therein had according to law.

MERRIMON, J., concurring. I concur in the judgment of the Court, upon the ground that the defendants failed to observe the requirements of the statute, (Acts 1871-72, ch. 46); but I do not concur in so much of the opinion of the Court; as declares the statute, (Acts 1883, ch. 148, Secs. 1, 2; The Code, Secs. 2594, 2595), imperative and void. I am of opinion, that the latter statute authorizes in
(720) effect a *local assessment,* and does not prescribe a public tax, in the sense of the Constitution, and that local assessments are not necessarily confined to particular real property to be affected by them favorably, in contemplation of law.

Error. Reversed.

Cited: Riggsbee v. Durham, 94 N.C. 804; *Skinner v. Bateman,* 96 N.C. 7; *Duke v. Brown,* 96 N.C. 129; *Markham v. Manning,* 96 N.C. 133; *S. v. Powell,* 100 N.C. 527; *Redmond v. Comrs.,* 106 N.C. 129; *McMillan v. School Committee,* 107 N.C. 614; *S. v. Moore,* 113 N.C. 700; *Hooker v. Greenville,* 130 N.C. 474; *Lowery v. School Trustees,*

140 N.C. 39; *Cox v. Comrs.*, 146 N.C. 585; *Bonitz v. School Trustees*, 154 N.C. 379; *Williams v. Bradford*, 158 N.C. 40; *Guano Co. v. Biddle*, 158 N.C. 214; *Dalton v. Brown*, 159 N.C. 178; *Keith v. Lockhart*, 171 N.C. 457; *Galloway v. Board of Education*, 184 N.C. 247; *Story v. Comrs.*, 184 N.C. 340; *Berry v. Durham*, 186 N.C. 426; *Corp. Com. v. Interracial Com.*, 198 N.C. 323; *Grimes v. Holmes*, 207 N.C. 300.

J. W. GRANT, ADMINISTRATOR, v. W. A. REESE, ET ALS.

Findings of Fact—Jurisdiction of the Supreme Court—Reference—Evidence—Executors and Administrators—Inventory—Assets in Another State—Negligence—Confederate Money—Commissions.

1. This Court has no power to review the findings of fact made by a referee in an action at law, but can only review errors of law in the admission of evidence, and erroneous conclusions of law from the facts as found.
2. The inventory returned by an executor or administrator into the Clerk's office, is *prima facie* evidence of the solvency of the persons owing debts to the estate and described in such inventory, if nothing be said in said inventory to the contrary, against the executor or administrator returning it, and the sureties on his bond, but *it seems* such inventory is not evidence against an administrator *de bonis non*, and the sureties to his bond.
3. Such inventory is not conclusive, and the defendants may show that the personal representative made errors and mistakes in describing and noting the debts in the inventory.
4. When an administrator dies, his administrator holds the funds of the first intestate for the administrator *de bonis non*, and it is his duty to account with such administrator *de bonis non*. When he does so, in the absence of evidence of mistake, or fraud and collusion, the presumption is, that the settlement was in full, and embraced all matters that ought to have been accounted for, and it shifts the burden of proof to the party attacking it, to show that debts due the estate of the first intestate, and returned by the deceased administrator as solvent, but which have not been collected, were collectible.
5. Apart from positive fraud, an administrator *de bonis non* is liable, if he fails to use due care and diligence in collecting from the administrator of the deceased administrator, all of the assets of the first estate unadministered by him, and it is his duty to do this, without any demand or request from the creditors or distributees of the first estate.
6. Where an administrator received into his possession certain slaves belonging to the estate of his intestate, he, and the sureties on his bond, are liable for their hire received by him, in the same manner as for the hire or price of other chattels so received.

7. In such case, where the slaves were hired in 1863 and 1864, and the administrator used reasonable diligence in hiring them and collecting the hire, if the same was paid in Confederate money, and the administrator kept it apart and separate as part of asset of the estate, and it was lost by the results of the war, the administrator is not liable.

8. In such case, in the absence of evidence of the amount of hire which the administrator actually received, he should be charged with the reasonable hire of the slaves in Confederate money, and this amount should be scaled, in the same manner as if he had converted the Confederate money received from such hiring.

9. It is a public fact, of which the Courts take judicial notice, that there was no currency in this State during the years 1863 and 1864, except Confederate money, and that ordinary business transactions were almost uniformly discharged by that currency.

10. Where one used Confederate money, not his own, he must account to him whose money he used, for its value in gold, with interest thereon.

11. Where an administrator sold and assigned a judgment due the estate of his intestate, for fifty *per centum* of its face value, and on the same day, the judgment debtor paid the assignee the entire amount due on the judgment, and it appeared that at the time of the assignment, the judgment debtor was solvent, and the judgment collectible; *It was held,* gross negligence, and the administrator and the sureties on his bond were liable for the full amount of the judgment.

12. In such case, it is no justification to the administrator that the counsel for the next of kin authorized such sale, unless the counsel has express authority from his client to do so.

13. An administrator is, in an important sense, a trustee for those who will take benefits under his intestate.

14. Where a person dies domiciled in this State, having personal property in other States, the personal estate, wherever situated, must be distributed according to the laws of this State, but each State has the power to administer so much of the estate as may be within its jurisdiction, for the security of domestic creditors, and when they are provided for, to distribute the remainder to the persons entitled, without regard to the place of their domicile.

15. Where a person dies in North Carolina, having personal property in Virginia, the Virginia administrator is not bound to account to the administrator here, for the surplus after paying debts, nor is the administrator in this State required to collect such surplus from the foreign administrator.

16. The grant of letters of administration, although general in its terms, is limited to the administration of property in this State, and gives no authority to the administrator to administer the property in another government, and a failure to return such property on his inventory, is no breach of his bond.

17. In such case, if the administrator received such foreign assets, he may, in equity, be held personally to account, on the ground of a personal trust in the administrator, without regard to where it was assumed.

18. An executor stands upon a different footing, as he derives his authority from the will, and not simply from the law, and when he proves the will as required by the law of the domicile of the testator, it passes the property to him, wherever it may be situated, according to its legal effect.

19. An administrator *de bonis non, cum testamento annexo*, although required to execute the will, does not stand on the same footing in all respects as an executor, as his authority is derived from the law, and not from the will, and he cannot sue in another jurisdiction, to recover the assets of the estate.

20. So, where a testator died domiciled in this State, leaving debts due by parties in Virginia, the administrator *de bonis non, cum testamento annexo*, and the sureties on his bond, are not liable for a failure to return such notes on the inventory in this State and collect the same, when there is administration on the estate in Virginia.

21. In such case, if there is no administration in Virginia, the administrator would be personally liable, if he had received such notes, and failed to make diligent effort to collect them; but whether his bond would be liable or not, *quære*.

22. An administrator or executor is not entitled to commissions under all circumstances, but he must have earned them by an honest and just discharge of his duty, and it must appear that the receipts and expenditures have been fairly made, in the course of the administration.

23. Where an administrator failed to file any inventory or annual accounts of his administration, and it appeared that he had been guilty of gross negligence and want of care in his management of the estate, he is not entitled to commissions.

CIVIL ACTION, heard on exceptions to the report of a referee, before *Graves, Judge*, at January Special Term, 1885, of the Superior Court of NORTHAMPTON County.

The defendants appealed.

The facts are fully stated in the opinion.

Mr. T. N. Hill, (Mr. R. B. Peebles was with him on the brief) (723) *for the plaintiff.*

Messrs. W. C. Bowen, Willis Bagley, and W. H. Day, for the defendants.

MERRIMON, J. The alleged errors are imperfectly assigned, and we find it difficult to determine the meaning and application of some of them. Such as apply to alleged erroneous findings of fact, we cannot correct, if, indeed, they exist, because this is simply an action at law, and we have not jurisdiction to review the findings of fact. We can only correct errors of law, in the admission of evidence, and in other respects, properly assigned. If we fail to reach the whole merits of

the case, such failure must be attributed to the loose, imperfect and confused manner in which the alleged errors are assigned.

I. The plaintiff, as administrator *de bonis non,* of Sterling Smith, deceased, who was, in his life-time, the sole devisee and legatee named in the will of Martha Parker, deceased, seeks to charge the defendant Reese, as administrator *de bonis non, cum testamento annexo,* of the said Martha, and the other defendants, sureties to his bond as such administrator, with having failed to collect and account for certain notes, and other evidences of debt of his testatrix, as he should have done, and was bound to do.

The referee, in taking the account in the course of the action, charged the defendants with the face value of several of such notes, and other evidences of debt, and the interest due thereon, the only evidence of the solvency of the persons owing them respectively, being the *inventory,* in which they were named and described, of the property and effects returned into the late Court of Pleas and Quarter Sessions of the county of Northampton, by the former and first administrator *de bonis non, cum testamento annexo,* of the said Martha. The referee received that inventory as *prima facie* evidence of the solvency of the persons owing such notes, and other evidences of debt named, and, upon exception by the defendants, the Court sustained the action of the referee in this respect.

(724) The defendants insist that this ruling of the Court is erroneous, and we are of that opinion.

The inventory of property, returned by an executor or administrator into the proper office as required by the statute, is *prima facie* evidence of the solvency of the persons owing debts mentioned and described therein, if nothing there be said to the contrary, as against the executor or the administrator and his sureties. The law requires such inventory to be made under oath, and it is the duty of an executor or administrator, incident to his office as such, to make proper inquiry as to the property—its nature and condition—with which he ought to be charged, and it is presumed when he notes it in the inventory, that he describes it correctly, as the property of his testator or intestate, as the case may be, and as to debts due the estate, that the parties owing them are solvent, if nothing explanatory in that respect be said. And the inventory, as evidence of such facts, is admissible against the sureties to the bond of the administrator, because they stipulated that their principal would make the inventory, as required by the statute. In this respect, they stand upon the same footing as the administrator. *Armistead v. Harramond,* 11 N. C., 349; *Hoover v. Miller,* 51 N. C., 79. The executor or adminis-

trator may show, however, that the debtor was insolvent, and generally, that he had made mistakes in noting the property properly, and its condition. The inventory is not conclusive against him or his sureties. *Yarborough v. Harris,* 14 N. C., 40; *Huntington v. Spears,* 25 N. C., 450.

But it may be questioned, whether such inventory of the first administrator, could be *prima facie* evidence of such solvency of the debtor, as against the administrator *de bonis non.* The persons owing the debts may have become insolvent before they came to the hands of the latter, and besides, he had no part in making that inventory, or opportunity to ascertain the condition of the property described in it. While for some purposes, there is a privity between the administrator and the administrator *de bonis non,* as was decided in *Thompson v. Badham,* 70 N. C., 141; it is not at all clear, that this prevails to the extent of making the inventory of the first (725) administrator, *prima facie* evidence against the second and his sureties.

But we do not find it necessary to decide whether or not this is so. It appears that the defendant administrator, and the administrator of the first administrator *de bonis non,* etc., of the testatrix, had a settlement long prior to this action, in which it was ascertained that the first administrator *de bonis non,* owed the estate of his testatrix but the sum of fifty dollars, and this sum was paid to the defendant administrator. The latter had the right to make such settlement. The former held the assets of the testatrix, in the hands of his intestate, for the defendant administrator, and it was his duty to account faithfully for the same. As such settlement might be made, and was made, the presumption is that it was a proper one in all respects, and embraced all matters that ought to have been accounted for, as it purported to do. It was not, however, conclusive. The plaintiff might show that it was carelessly and improvidently, or fraudulently made, to his prejudice and injury. The presumption is, that this settlement embraced the notes and other evidences of debt in question, and hence the burden of showing that they were not, and that the persons owing them were solvent, was on the plaintiff. One effect of the settlement, was to shift the burden of proof to the plaintiff, in the respects mentioned.

II. It is insisted further by the defendants, that the settlement just mentioned, was conclusive, in the absence of fraud; and moreover, that no demand was made by the plaintiff on the defendant administrator, that he compel the former administrator *de bonis non* to account for the notes in question, and in all other respects.

This is a mistaken view of the effect of that settlement. While, as we have seen, there was a presumption in favor of its regularity and propriety, it was clearly not conclusive. It was the duty of the defendant administrator, to require—if need be, to compel—the administrator of the former administrator *de bonis non,* to account
(726) faithfully to him for all the property of every description, that he was properly chargeable with, of his testatrix. This he ought to have done with reasonable promptness, and he ought to have exercised like reasonable care and caution in making the settlement mentioned. He would be justly liable, if he negligently failed to exercise due care in obtaining all that was properly due, and this is so, apart from positive fraud. It was competent for the plaintiff, by any proper evidence, to show such lack of diligence and care. For example, he had the right to show if he could, that the persons indebted to the testatrix were negligently treated in the settlement, as insolvent, when in fact, they were abundantly solvent. And it was the duty of the defendant administrator, to compel an account of the property of the testatrix, as indicated above, without a demand that he do so on the part of the plaintiff. The law charged and required him to be diligent and faithful in the discharge of his duties. *Ferebee v. Baxter,* 34 N. C., 64; *Badger v. Jones,* 66 N. C., 305; *University v. Hughes,* 90 N. C., 537, and cases there cited.

III. The defendants are charged with the hire of four negro slaves for the years 1863 and 1864, at $80 each, per annum. This charge is based upon the evidence of witnesses, who testified before the referee, that such hire would be reasonable, if paid in the present currency of the country. The defendants contend that it was not the duty of the first, administrator *de bonis non,* to have charge of and hire out the slaves of his testatrix, and if it were, then the value of the hire in "confederate currency," should have been ascertained, and the scale of depreciation of that currency should have been applied.

The last mentioned administrator was charged by the law with the slaves, as he was with other personal property of his testatrix, to be disposed of as was directed by the will, and if he realized hire for their labor, while he had control of them in the course of the administration of the estate by him, such hires were embraced by the condition of his bond as such administrator.
(727) But he ought to have been held to account for such hire as he received, if he exercised reasonable diligence and care in hiring the slaves, and collecting the hire when due. If he received "Confederate money" in payment for the hire, and kept it set apart as a part of the assets of the testatrix, then he ought not to be chargeable

with it at all, as that currency, without his default, became utterly worthless as a result of the late civil war.

But in the absence of evidence as to what he really received as hire, he should be charged with the reasonable hire of the slaves, paid in Confederate currency, and the scale of depreciation prescribed by the statute, should have been applied, as if he had used the money he had received for the hire. It is a public fact, of which the Court takes notice, that there was no *currency* in this State in the years 1863 and 1864, other than "Confederate currency," and that ordinary business transactions, were generally, almost uniformly, discharged by that currency. It is just and reasonable to require the administrator *de bonis non*, who received the hires, to account for the same, as if he had received and used them. It would be unconscionable to require him to account for what he did not get! The rule is, that where one used Confederate money, not his own, that he must account to him whose money he used, for its value in gold or silver, with interest thereon.

IV. The defendant administrator received a note of his testatrix, for $746.59 due September 24th, 1858, against P. B. Sykes, payable to H. W. Ivey, and endorsed by him to the testatrix in her lifetime. The said Ivey died in 1860 or 1861, intestate, and administrators of his estate were duly appointed, and the defendant administrator obtained judgment *quando* against them, for $1,313.17, with interest on $746.59, thereof, from May 22nd, 1871, and for $10.35 costs. Ivey was solvent at the time of his death, and his estate was sufficient to pay all his indebtedness, from that time, until the taking of the account.

On the 19th day of November, 1872, the defendant administrator "compromised," (what this means we cannot tell,) the judgment mentioned, by selling and assigning it to a third party, for (728) $678.14. On the same day, the administrators of Ivey, paid the purchaser thereof the whole amount of money due upon it, and thus discharged it. The Court, sustaining the action of the referee, held that the defendants were properly charged with the whole amount of that judgment, and the defendants excepted.

Accepting the facts as found by the Court, there was no substantial reason for selling the judgment at all, much less selling it for fifty *per centum* of its face value. The estate of Ivey was sufficient to pay it, and all the debts chargeable upon that estate. And yet the defendant administrator sold the judgment for fifty *per centum* of the sum of money due upon it! And the administrator of Ivey, on the same day, paid the purchaser the full amount due upon it, and discharged it! It seems to us manifest, that the defendant was grossly

negligent in making such disposition of the judgment, and that the defendants were properly charged with the face value of it. So far as appears, no reasonable cause existed, prompting such sale.

It seems that the defendants contended, that the counsel of a former administrator and of the next-of-kin of the intestate of the plaintiff, authorized the sale. But the Court finds as a fact, that the counsel did not authorize it; that another counsel, (it is not found as a fact that he was counsel for the administrator or the next-of-kin,) did authorize it, "upon condition that the amount be paid over immediately to his clients," which was not done, and has not been done. This questionable permission of counsel, cannot be treated as authorizing and justifying the sale in question. Indeed, even if the counsel had expressly given his permission to make it, he having no special authority from his clients to do so, this would not be a sufficient justification. The administrator was bound to exercise reasonable diligence, care, and caution, in collecting the debts of his testatrix. He was, in an important sense, a trustee for those who might be entitled to take through the deceased legatee. When he made such a sale, he knew, or ought to have known, that he was making an un-
(729) necessary and unwarranted sacrifice of half of a large judgment which could be collected, to the manifest prejudice of the estate of the deceased legatee. The counsel referred to, simply as such, had no authority to authorize such a sacrifice, and if he gave the defendant administrator permission to make it, and he acted upon such permission, he did so at his peril. The defendants were properly charged with the whole amount of the judgment.

V. A note belonging to the estate of the testatrix, against a person residing in the State of Virginia, not far distant from the county of Northampton, in this State, for $286.00, due May 7th, 1860, was noted and described in the inventory mentioned above, and it passed into the hands of the defendant administrator. The latter deemed it necessary that he should become administrator *cum testamento annexo* of his testatrix, in the State of Virginia; he did so, and there collected the debt above described. It does not appear that the testatrix had property, other than the note mentioned, nor does it appear that she owed any debts there, nor that the administration there has been completed. The defendants sureties, insist that they ought not to be charged with this debt, because it properly belonged to the administration in Virginia. The Court, sustaining the action of the referee, held that they were properly charged with it, and they excepted.

The administration of the estate of the testatrix in the State of Virginia, is distinct from, and has no connection with that in this State. This State being the domicile of the testatrix, her estate, wherever

situate, must be distributed according to its law—that is, among the persons, and in the proportions prescribed by that law. But each State has the power to administer so much, and such parts of the estate, as may be within its jurisdiction, for the security of domestic creditors, and to distribute the surplus, if any, to the persons so entitled, without regard to the place of their domicile. The administrator in the former State, is not obliged to account to the administrator here, for such surplus—the latter has no interest (730) in it, because the laws of this State have no extra territorial operation—they cannot, and do not undertake, to force the administrator here, to demand and collect from the administrator abroad, any surplus that may remain in his hands, after the payment of the debts and costs there, any more than to sue for, and recover a debt due the intestate beyond the limits of this State. And hence it was held in *Governor v. Williams*, 25 N. C., 152, that administration of an estate granted here, although general in its terms, is necessarily limited to the property in this State, and gives no authority to the administrator to administer the property in another government—that the administrator cannot be required to return an inventory of such property, and that a failure to do so, would be no breach of his administration bond, although the administrator might, in equity, be required to account personally, wherever he might be found, to those entitled to the estate in his hands. This rests on the ground of a personal trust in the administrator, without regard to where it was assumed. The administration in this State, does not authorize the administrator to sue abroad, nor is he held responsible for property within a foreign jurisdiction, certainly, when there is administration of the property of the intestate there. *Plummer v. Brandon*, 40 N. C., 190; *Carmichael v. Ray, Ibid.*, 364; *Sanders v. Jones*, 43 N. C., 246; *Medley v. Dunlap*, 90 N. C., 527, and cases there cited.

An executor, however, stands upon a different footing, in some material respects. When he proves the will as required by the laws of the domicile of the testator, it passes the property, wherever it may be situate, to him, according to the legal effect of the will. He derives his authority from the will, and not simply from the act of the law. *Helme v. Sanders*, 10 N. C., 563; *Governor v. Williams, supra.*

The administrator *de bonis non, cum testamento annexo*, as in this case, although clothed with the power, and he is required to execute the will, according to its legal effect as if he were executor, does not stand upon the same footing in all respects with an executor. He derives his authority, not from the will simply, but from (731) the statute, (The Code, Sec. 2168,) and he would not be treated as an executor in another State, nor would he have power to sue

there as administrator, because his authority is conferred by the law, and not by the will.

Inasmuch as there was administration of the estate of the testatrix in the State of Virginia, and the person owing the note in question lived in that State, the defendant administrator was not required to return an inventory of it in this State, nor was there any breach of his administration bond, by reason of his failure to account for it, or the proceeds thereof, in this State. He was bound to account for it in Virginia, and only there, as administrator. His sureties ought not, therefore, to be charged on that account in this action. *Governor v. Williams, supra.*

It might possibly have been otherwise, if there had been no administration in Virginia. In that case, the defendant administrator, having the note in his possession, it would have been his duty to make reasonable and diligent effort to collect it without suit, and his negligent failure to do so, would have made him personally liable, upon the ground that he was a trustee, as was decided in *Williams v. Williams,* 79 N. C., 417; but whether his failure to do so would have been a breach of his administration bond, is a question not yet decided, nor is it entirely free from doubt.

VI. The Court, sustaining the action of the referee, decided that the defendant administrator was not entitled to commissions for "receipts and expenditures," and the defendants excepted.

This exception cannot be sustained. An executor or administrator is not entitled to commission at all events. He must have earned them, by a just and reasonable discharge of the duty of his office. It must appear, that the receipts and expenditures, on account of which the same are claimed to be due, "have been fairly made in the course of administration." The Code, Sec. 1524; *Finch v. Ragland,* 17 N. C., 137; *Burke v. Turner,* 85 N. C., 500; *Carr v. Askew, ante,* 194.

(732) It appears that the defendant administrator failed to return any inventory of property of the testatrix, or any annual account of his administration, and to pay the money in his hands to the persons entitled to have the same, as he was required by law to do. Moreover, the principal part of the money in his hands, was the fruit of the sale of the judgment already mentioned above, which was sold for half its value. There was, as we have seen, gross negligence. The receipts and expenditures were not "fairly made in the course of administration," in the sense of the statute, and the law will not allow compensation to him who thus disregards its commands, and neglects to observe its requirements.

We believe that what we have said, in effect disposes of the errors assigned in the record.

There is error. The report of the account stated must be recommitted to the referee, Mr. Mason, with instructions to retake and state the account, in accordance with this opinion, and to make report thereof to the next term of the Court.

Let a proper order to this effect be entered. The case will be retained for further action. *It is so ordered.*

Error. Reversed and retained.

Cited: Topping v. Windley, 99 N.C. 10; *Gay v. Grant,* 101 N.C. 210; *Allen v. Royster,* 107 N.C. 282; *Roper v. Burton,* 107 N.C. 540; *Tayloe v. Tayloe,* 108 N.C. 74; *Morefield v. Harris,* 126 N.C. 627; *Kelly v. Odum,* 139 N.C. 281; *Phillips v. Phillips,* 227 N.C. 440; *Trust Co. v. Waddell,* 237 N.C. 345.

O. G. WILLIAMS ET ALS. v. JNO. WILLIAMS ET ALS.

Infants—Guardian ad litem—Possession.

1. Where the record showed that a guardian *ad litem* was appointed in 1866, but no answer was filed for the infants, and no effort made to assert their rights, but the infants delayed action until the youngest of them was 24 years old; *It was held,* that the cause would not be opened to allow them to assert their rights, when it had proceeded to an end, and all that was necessary was a final decree.
2. Where the plaintiff was in possession, and a suit for partition was progressing, and certain infant defendants, for a number of years after reaching majority, raised no objection to the possession, and made no defence to the proceeding; *It was held,* that they would not be allowed to come in when nothing was wanting but a final decree, and open the case so as to set up defences attacking the plaintiff's right of possession.

MOTION heard in a cause pending in the Supreme Court, at (733) February Term, 1886.

The facts appear in the opinion.

Mr. D. M. Furches for the plaintiffs.

Messrs. Theo. F. Davidson and John Devereux, Jr., for the defendants.

SMITH, C. J. This suit was begun in the former Court of Equity of Iredell County, and the original bill was filed at Spring Term, 1886. At the last Term, in pursuance of an order previously made for par-

tition, the land was divided, and report made by the commissioners, allotting to the tenants their shares in severalty. To the confirmation of the report, several of the defendants unite in filing objections, in support of which they allege that they were infants, without guardian, at the institution of the suit, and during its progress have had no one to defend their interests, which are not identical with the other contesting defendants, and which will be sacrificed by a decree of confirmation. They therefore ask that the matter be re-opened, and the further progress of the cause arrested, to enable them to assert their rights in the premises.

It appears from an inspection of the bill, that it prayed for the appointment of a guardian *ad litem* to the infant defendants.

The cause was docketed, and at Fall Term, 1866, an entry appears, shown to be in the handwriting of the clerk and master then acting and since deceased, in these words, "In this case, upon motion, the clerk and master was appointed guardian, *pendente lite* for the minor defendants."

It does not appear that any effort was made on their behalf, to set up the claim now asserted by them. The affidavits offered in resistance to the motion, prove that the oldest of those then under age, is now about thirty-six years of age, and the youngest about twenty-four, the ages of the others being intermediate between them.

(734) There is also evidence furnished, tending to show that the intestate father, under whom they claim, knew of the possession and claim of Theophelus Williams, under a deed from J. W. Williams, made to him in 1854, and the occupation of the land for several years, and the intestate was heard to say, that he got a certain gray horse from the defendant J. W. Williams for the land, or in the way of it.

We shall not repeat all the testimony offered in the affidavits to sustain the claim of right from long possession and general family acquiescence in it, and refer to what has been extracted, only to say, that the acquiescence of the present complaining parties, for the series of years since they attained their full ages, the youngest for three years, in which no resistance was offered to the prosecution of the proceeding, when we must infer it was known to them, would render it inequitable for them now to intervene and disturb what has been done, for any of the reasons suggested. If the guardian *ad litem* did not assert any claim for the infants, or even put in an answer, we must suppose it was because he thought they had none, for we cannot assume that he was wholly heedless of the trust imposed. The

application must be denied, and there being no other exception, the report must be confirmed. A decree may be drawn accordingly.

Report confirmed.

Cited: Cates v. Pickett, 97 N.C. 26; *Yarborough v. Moore,* 151 N.C. 122.

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*THE RALEIGH NATIONAL BANK v. VAN B. MOORE ET ALS.

Mortgage—Priority.

1. Three mortgages were executed on the same property, and the money obtained from the third, was used to discharge the first *pro tanto.* When the third mortgage was executed, the first mortgagee covenanted with the third mortgagee, that the third mortgage should have preference over the unpaid balance on the first; *It was held,* that such covenant did not have the effect of subrogating the third mortgagee to the rights and priorities of the first, except as to the amount still due to the first mortgagee.
2. On a sale of the land, in such case, the proceeds must be applied—1st. To the payment of the amount remaining due on the first mortgage, the third mortgagee being subrogated to his rights; 2nd. To the payment of the second mortgage; and 3rd. To the payment of the balance due on the third mortgage.

CIVIL ACTION, tried before *Clark, Judge,* at August Civil Term, (735) 1885, of WAKE Superior Court.

A jury trial was waived, and it was agreed between the parties that his Honor should find the facts; and upon the evidence offered and the admission of the parties, his Honor found the following facts, viz:

"1. That the plaintiff is, and at the dates hereinafter mentioned was, a corporation duly created and existing according to law.

"2. That the defendant, Manteo Lodge, No. 8, Independent Order of Odd Fellows, is, and at the dates hereinafter mentioned was, a corporation duly created and existing according to law.

"3. That on June 5th, 1877, J. N. Bunting and wife, by their deed, duly executed, conveyed to the defendant Frances J. Ballard, the lot of land described in the pleadings, in fee.

"4. That on October 1st, 1877, the defendants V. Ballard and wife, Frances J., executed to the defendant John E. Bledsoe, trustee, a certain deed of trust, whereby they conveyed to the said trustee, the

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

said lot of land, for the purpose of securing six several notes, executed by said V. Ballard and wife, to M. A. Bledsoe, each for the sum of $204.23, dated October 1st, 1877, and payable respectively, on the 1st days of October, 1878, 1879, 1880, 1881, 1882 and 1883, and bearing interest from date at eight *per cent. per annum;* that said deed of trust was duly registered, on October 5th, 1877.

"5. That under said deed of trust, the said trustee is required to sell said land, upon default in the payment of said notes, or any
(736) of them, upon the request of M. A. Bledsoe or any assignee of said notes.

"6. That on February 14th, 1878, the said V. Ballard and wife executed to Wm. Simpson, their mortgage deed, which was duly registered on February 26th, 1878, whereby they conveyed to said Simpson the said lot of land, for the purpose of securing three several notes, executed by the said V. Ballard and wife to said Wm. Simpson, each for the sum of $100, dated February 14th, 1878, and payable respectively, at one, two and three years after date, and bearing interest from date at eight *per cent. per annum.*

"7. That the consideration of said notes was as follows, viz.: The said V. Ballard and wife, were indebted to the Mechanics' Building and Loan Association, in the sum of three hundred dollars; the said Wm. Simpson, at their request, discharged the indebtedness, by surrendering certain stock in said Association, owned by him, and thereupon the notes and mortgages were executed; that thereafter the said Wm. Simpson assigned the said mortgage and notes to John C. Blake, in payment of a debt theretofore owing by him to said Blake; that thereafter said John C. Blake, for value, assigned said mortgages and notes to the plaintiff, in satisfaction of an indebtedness theretofore existing.

"8. That prior to October 11th, 1879, said M. A. Bledsoe, for value, transferred and endorsed to J. J. Litchford, the note secured by said deed of trust to John E. Bledsoe, which fell due on October 1st, 1880; that on January 6th, 1880, said J. J. Litchford, for value, transferred and endorsed said note to the defendant Manteo Lodge.

"9. That on October 20th, 1879, the said V. Ballard and wife, executed to the defendant Van B. Moore, agent, their mortgage deed, which was duly registered October 22nd, 1879, whereby they conveyed to said Moore, the said lot of land, for the purpose of securing their note executed to said Van B. Moore, agent, for the sum of $800, dated October 20th, 1879, and payable October 20th, 1880,
(737) and bearing interest from date at 8 *per cent. per annum,* payable semi-annually; that said eight hundred dollars was bor-

rowed by said V. Ballard and wife (W. H. Bledsoe negotiating the loan at the instance of M. A. Bledsoe), for the purpose of paying off and discharging certain of the notes secured by the deed of trust to John E. Bledsoe, as aforesaid, and with said sum the said V. Ballard and wife, paid off and discharged the three notes secured by said deed of trust, which fell due on the 1st day of October, 1878, 1879, and 1881, and also made a payment on the note secured by said deed of trust, which fell due on October 1st, 1882, of $100.86, which was duly credited on the same; that upon payment of said three notes falling due on October 1st, 1878, 1879, and 1881, as aforesaid, the same were taken up by said Ballard and wife and destroyed. Said Van B. Moore had no notice of the mortgage executed to Simpson, as aforesaid, other than that fixed upon him by its registration.

"10. That on October 20th, 1879, the said John E. Bledsoe and M. A. Bledsoe, executed to the said Van B. Moore, the instrument of writing hereinafter set out. That said V. Ballard and wife had no knowledge of its execution.

"11. That the note falling due October 1st, 1883, and the note falling due October 1st, 1882, with the credit of $100.86 as aforesaid, are both in possession of said M. A. Bledsoe.

"12. That by agreement of the parties, Van B. Moore was to collect the rent for said lot of land, and hold the same, subject to the order and judgment of this Court. That he has now in his hands, after deducting taxes and other expenses paid by him, the sum of $188.02, being rent up to the .....day of....., 1885.

"13. That there is due and payable on the note held by Manteo Lodge, the sum of $275.65, with interest on $204.23, from August 31st, 1885, at eight *per cent.* interest, payable annually; on the notes held by M. A. Bledsoe, the sum of $479.64, with interest on $307.60 from August 31st, 1885, at eight *per cent.;* on the mortgage notes held by the plaintiff, the sum of $481.13, with interest on $300 from (738) August 31st, 1885, at eight *per cent.;* on the mortgage note held by said Van B. Moore, agent, the sum of $1,000.73, with interest on $800 from August 31st, 1885, at eight *per cent.*, interest, payable semi-annually on 1st of April and October in each year, with interest at the same rate on instalments of interest."

The following is a copy of the agreement from Moses A. Bledsoe to Van B. Moore, above referred to:

"Whereas, V. Ballard and F. J. Ballard, his wife, did, on.....day of ....., 1877, execute to John E. Bledsoe, their deed, whereby they conveyed to him in fee-simple, a tract of land in the city of Raleigh, adjoining the lands of H. Mahler, N. S. Harp and others, and more

particularly described in their said deed, which is duly recorded in the office of the Register of Deeds for the said county of Wake, in Book 48, at page 329, in trust, however, to secure to Moses A. Bledsoe, the payment of twelve hundred dollars; and whereas, at the instance of the said Moses A. Bledsoe and John E. Bledsoe, Van B. Moore, as agent of Mrs. Lucy W. Moore, has this day lent to the said V. Ballard and wife, the sum of eight hundred dollars, to be paid to the Moses A. on account of his said debt; and the said V. Ballard and wife, have executed to the said Van B. Moore, their deed of mortgage, whereby they have conveyed to him the land aforesaid, to secure the payment of the sum lent by him as aforesaid:

"Now, therefore, in consideration of the premises, and of one dollar to them paid, the said Moses A. Bledsoe and John E. Bledsoe, do hereby agree with the said Van B. Moore, that the mortgage executed to him as aforesaid, shall, with respect to the deed of trust executed to the said John E. as aforesaid, be a first mortgage, and have priority of payment out of the proceeds of sale of said land, whenever sold, over and before the debt secured in said deed of trust and any part thereof; and further, that they, and neither of them, will
(739) not undertake to collect the debt secured in said deed of trust by a sale of said land, until the sum secured in the said mortgage, and every part thereof shall be paid.

In testimony whereof, the said Moses A. Bledsoe and John E. Bledsoe have hereunto fixed their hands and seals this 20th day of October, 1879.

(Signed) JOHN E. BLEDSOE. [Seal.]
(Signed) M. A. BLEDSOE. [Seal.]"

Upon the foregoing finding of fact, the Court rendered the following judgment:

"1. That the plaintiff, the Raleigh National Bank, recover of the defendants V. Ballard and Frances J. Ballard, the sum of four hundred and eighty-one dollars and thirteen cents, with interest on $300 thereof, at eight *per cent.* from August 31st, 1885, until paid.

"2. That the defendant Manteo Lodge, No. 8, I. O. O. F., recover of the defendants V. Ballard and Frances J. Ballard and M. A. Bledsoe, the sum of two hundred and seventy-five dollars and sixty-five cents, with interest on $204.23 thereof, at eight *per cent.* from August 31st, 1885, until paid, interest payable annually.

"3. That the defendant M. A. Bledsoe recover of the defendants V. Ballard and Frances J. Ballard, the sum of four hundred and seventy-nine dollars and sixty-four cents, with interest on $307.60 thereof, at eight *per cent.* from August, 1885, until paid, payable annually.

"4. That the defendant Van B. Moore, agent, recover of the defendants V. Ballard and Frances J. Ballard, the sum of one thousand dollars and seventy-three cents, with interest on $800 thereof, at eight *per cent.* from August 31st, 1885, until paid, interest payable semi-annually on 1st of April and October in each year.

"5. That the mortgage note executed by the defendants V. Ballard and Frances J. Ballard to the defendant Van B. Moore, agent, be subrogated to the prior lien of the notes held by said M. A. Bledsoe, as aforesaid, upon the lot of land described in the (740) pleadings, to the extent of the amount due upon the said notes, being four hundred and seventy-nine dollars and sixty-four cents, with interest on $307.60 thereof, at eight *per cent.* from August 31st, 1885, until paid, as aforesaid, interest payable annually.

"6. That the amount in the hands of Van B. Moore, being one hundred and eighty-eight dollars and two cents, as aforesaid, be applied as a credit *pro rata* upon the notes held by Manteo Lodge and M. A. Bledsoe, as aforesaid, to-wit: sixty-eight dollars and sixty-two cents upon the note held by Manteo Lodge, and one hundred and nineteen dollars and forty cents, upon the notes of M. A. Bledsoe, the latter sum to be paid upon the mortgage note held by Van B. Moore, agent, by virtue of its subrogated rights and priority, as aforesaid.

"That the said lot of land described in the pleadings, be sold as hereinafter provided, and the proceeds of sale, after payment of the expenses of sale, be applied as follows, viz.: First, to the payment and satisfaction of the amounts remaining due, (after the aforesaid credits), upon the note held by the defendant Manteo Lodge, aforesaid, and upon the notes held by said M. A. Bledsoe, as aforesaid, the latter sum to be paid upon the mortgage note held by Van B. Moore, agent, by virtue of its subrogated rights and priority, as aforesaid; second, to the payment and satisfaction of the amount due upon the note held by the plaintiff, as aforesaid; third, to the payment of the balance remaining due upon the note held by Van B. Moore, agent, after the credits aforesaid; fourth, to the payment of the notes held by M. A. Bledsoe, as aforesaid.

"8. That said sale be made by Charles M. Busbee and Van B. Moore, Esqrs., who are hereby appointed commissioners for that purpose, at the court house door in the city of Raleigh, for cash, after thirty days advertisement of the time, place, and terms of sale, in the *Evening Visitor,* a newspaper published in said city, and that they report said sale, when and how made, to the next term of this Court.

"9. That at said sale, any party to this action is authorized (741) to become a purchaser.

"10. That the plaintiff, the Raleigh National Bank, recover of the defendants, its costs and disbursements incurred, up to and including the present term of this Court.

"11. That the defendants, and all persons claiming under them, or any or all of them, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said lot of land and premises or any part thereof;"

From this judgment, the defendant Moore appealed.

Mr. C. M. Busbee, for plaintiff.
Mr. John Gatling, for defendant.

ASHE, J., (after stating the facts). The questions presented by the record, are in regard to the priorities of the mortgages, executed at different times, and to different parties, by V. Ballard and wife Frances. The facts found by his Honor, among others, were, that the first mortgage was to John E. Bledsoe, trustee, to secure six several notes, for the sum of $204.23 each, dated October 1st, 1877, and payable respectively on the 1st of October, 1878, 1879, 1880, 1881, 1882 and 1883, with interest at 8 *per cent.*

Prior to October 1st, 1879, M. A. Bledsoe, for value, endorsed to J. J. Litchford the note secured by the deed of trust to John E. Bledsoe, which fell due on October 1st, 1880, and the same was endorsed for value by said Litchford, on the 6th of January, 1880, to the defendant Manteo Lodge.

The second mortgage was executed to William Simpson, dated February 18th, 1879, to secure three several notes, bearing even date with the mortgage, payable respectively in one, two and three years. These notes and the mortgage, for a valuable consideration, were assigned by Simpson to Jno. C. Blake, and by him, for like consideration, to the plaintiff.

(742) The third mortgage was executed to Van B. Moore, dated October 20th, 1879, to secure a note of even date, for the sum of $800, given to him by the said Ballard and wife, bearing interest from date at 8 *per cent. per annum*, payable semi-annually.

This money was borrowed by V. Ballard and wife, at the instance of M. A. Bledsoe, for the express purpose of paying off and discharging certain notes secured by the deed of trust to John E. Bledsoe, and, accordingly, was applied to the discharge of the notes severally due on the 1st of October, 1878, 1879, and 1881, and also in part payment, to-wit: $100.86, on the note falling due on the 1st of October, 1882, which was duly credited thereon, and, contemporaneously with the execution of the last mortgage, the agreement, of which V.

Ballard and wife had no knowledge, was entered into between John E. and M. A. Bledsoe, on the one part, and Van B. Moore on the other, that the mortgage executed to Moore, should have priority over the deed of trust, and the debt secured therein should have preference to the debts secured in the trust, and the further stipulation, that they would not undertake to collect the debts secured in said deed of trust, by a sale of said land, until the sum secured in the mortgage should be paid.

All of the notes, secured in the trust, were paid off with the money loaned to them by Moore, except that transferred to the Manteo Lodge, and that falling due October 1st, 1883, and that falling due October 1st, 1882, with the credit of $100.86, which still remained in the hands of M. A. Bledsoe.

The defendant contended, that as Bledsoe proposed to Moore to loan Ballard and wife the money, wherewith to pay off and discharge the notes secured in the trust, and it was used by them for that purpose, that he should be subrogated to all the equity of Bledsoe, and thereby acquire a lien prior to that of the Simpson mortgage, and there was error in the judgment of the Court, because it was not rendered upon that principle.

But, in our opinion, the main question in the case, does not (743) arise so much out of the conflicting equities involved in the case, as upon the construction and effect of the agreement entered into between the two Bledsoes and Moore. The transaction seems to have been nothing more or less, than that M. A. Bledsoe, who had a large debt secured in the deed of trust, wanted his money, and he proposed to Moore, to loan to Ballard and wife the money to pay off and discharge the notes, or a part thereof, which he held against them, and as an inducement to Moore to make the loan, he agreed that the mortgage taken by Moore from Ballard and wife, to secure the $800 loaned them, should "be a first mortgage, and have priority of payment out of the proceeds of the sale of said land, whenever sold, over and before the debt secured in said deed of trust, and any part thereof, and further, that they, and neither of them, will undertake to collect the debt secured in said deed of trust, by a sale of said land, until the sum secured in the said mortgage, and every part thereof, shall be paid."

The money was not loaned to Bledsoe, but to Ballard and wife, and a mortgage taken from them to secure its payment. Moore looked to them alone for payment, and after receiving the money, they had a right to apply it or not, as they might see proper, to the discharge of Bledsoe's notes. But they did so apply it, and it extinguished the

debts secured by the deed of trust *pro tanto,* and put that much of those debts out of the way of Moore's mortgage, and left only the debt due the Manteo Lodge, to the payment of which there is no objection, and the two notes left in the hands of Bledsoe.

The entire scope and meaning of the "agreement" was, that the notes secured in the trust, should not be in the way of, or oppose any obstacle to, the payment of the Moore debt, and when the three notes were discharged, they were put out of the way, leaving only the two notes in the hands of Bledsoe, the one due October 1st, 1883, and the other due October 1st, 1882, with the credit indorsed; and as
(744) to these notes, his Honor held that the mortgage note held by Moore, should be subrogated—and this we think was the only equity acquired by Moore, by the agreement with Bledsoe, and was fully satisfied and met by the judgment of the Court in that respect.

When Moore secured his mortgage, that in favor of Simpson and transferred to the plaintiff, was registered. Its registration was notice to him. Then when he received his mortgage, he took it subject to that mortgage. But while he was willing to take a mortgage, subject to a prior mortgage of only three hundred dollars, he was unwilling to take it, subject also to the lien of the deed of trust for $1,225.38, and therefore it was, that he required the covenant from Bledsoe, that his mortgage should have preference to the deed of trust, so that instead of there being $1,525.38 ahead of his mortgage, there should be only the $300 secured by the mortgage to Simpson.

If Ballard and wife had paid the whole debt due to M. A. Bledsoe, it would have extinguished the lien of the deed of trust, the effect of which would have been to let the Simpson mortgage into the position of priority, 1 Jones on Mortgages, Sec. 605; and the same principle must apply, when the first lien is satisfied *in part,* so as to let into priority the subsequent incumbrance *pro tanto.*

The view we have taken of the case, sustains the judgment of the Court below, and is supported by authority. The case of *Taylor v. Wing,* 84 New York, is a case almost directly in point. In that case, there were four mortgages, and, as in this case, the beneficiary in the first mortgage, executed an instrument under seal, referring to the first mortgage as annexed, in which he covenanted and agreed that the fourth mortgage should have priority of lien, before and above the first mortgage, as fully and to the same effect, as if it had been previously executed. The action was brought by the plaintiff, who was the holder, to foreclose the two intermediate mortgages, and the Court says: "In an action to foreclose two mortgages, it appeared there was a prior mortgage upon the premises, the beneficiaries where-

of, in pursuance of an agreement, under which a fourth mort- (745) gage was executed and accepted, covenanted that said mortgage should have priority of lien over his first mortgage, as if it had been previously executed and recorded. The lien of the first mortgage was subsequently discharged. *Held,* that the covenant did not give the fourth mortgage a priority of lien over plaintiff's two mortgages; that the intent of the parties to the agreement under which the fourth mortgage was taken, was not to place that mortgage ahead of plaintiff's mortgages, or to give to its owner an interest in the first mortgage, but simply that the liens prior to the fourth mortgage should only *be the amount of the plaintiff's mortgages,* and that the agreement was fully satisfied by a discharge of the first mortgage."

The only difference between that case and this is, that there the first mortgage was entirely discharged; here only in part, but by substituting the lien of Moore, to that of M. A. Bledsoe, to the extent of the two notes held by him, the agreement was as fully satisfied, as if all the debts secured in the deed of trust had been paid off and discharged by Ballard and wife. The judgment of the Court below was to that effect, and we think it was correctly decided.

Upon a careful examination of his Honor's conclusions of law, upon the facts found by him, we find no error. His judgment is affirmed in every particular, and the case is remanded to the Superior Court of Wake County, that it may be proceeded with in conformity to this opinion.

No error. Affirmed.

Cited: Davison v. Gregory, 132 N.C. 395.

(746)

THE CAROLINA CENTRAL RAILROAD COMPANY v. JOHN C. McCASKILL.

Eminent Domain—Railroad Companies—Right of Way—Statute of Limitations—Charters—Estoppel.

1. A Railroad Company has the right to enter upon and take possession of land before payment to the owner, which is needed in the building of its road, when it is authorized by its charter to do so.
2. Where a remedy is given to the land owner in the charter of the company, for getting compensation for land taken for the use of the corporation under its charter, the landowner must pursue this remedy, as the statutory remedy, by implication, takes away that at common law.

3. A stipulation in the charter of a railroad corporation, that all claims for damages for land taken by the corporation, must be made within two years, is a positive statute of limitations, and bars all claims not made within that time, when the parties are *sui juris*.
4. Where the charter of a railroad corporation provided, that if the owner did not apply within two years to have the damage assessed, caused by the use and occupancy of land taken by the corporation, they should forever be barred from recovering said land; *It was held*, that the presumption of a conveyance arose from the act of taking possession and building the road and the owner's failure within the two years to take steps to have his damages ascertained.
5. No presumption of abandonment or of a grant, and no statute of limitation, runs against a railroad company by the adverse occupation of any of the land condemned or otherwise obtained by them for the purposes of the road.
6. Mere silence while a trespasser is improving real estate as if it was his own, while it may sustain a claim for the value of such improvements when made in good faith, cannot be allowed to transfer the property itself to such trespasser.
7. Where the charter provided that the title to condemned land should remain in the corporation as long as it was used by such corporation, but when it ceased to be so used, it should revert; *It was held*, that under the charter, the corporation was not required to use every part and parcel of the condemned land at once, and a permissive use of a portion of such land, does not deprive the corporation of the right to take possession of the land, when needed for purposes of the corporation.
8. A railroad corporation, having the right to use land, or a right of way over land, may maintain an action for its possession.

(747) CIVIL ACTION for the recovery of land, tried before *MacRae, Judge*, and a jury, at Fall Term, 1885, of the Superior Court of ROBESON County.

The Wilmington and Charlotte Railroad Company, whose corporate name was changed by an amendatory enactment, ratified immediately thereafter, into that of the Wilmington, Charlotte and Rutherford Railroad Company, was formed and organized under an act of the General Assembly, passed at the session of 1854-'55, ch. 225, for the construction of a railroad communication between Wilmington and Rutherfordton, its terminal points, passing by Charlotte.

Section 24 provides, that said company may purchase, have, and hold in fee or for a term of years, any land, tenements, or hereditaments, which may be necessary for said road, or the appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants or agents of the company, or for workshops or foundaries to be used for said company, or for procuring stone, or other materials, necessary to the construction of said road, or for effecting transportation thereon, and for no other purpose whatever.

Section 26 prescribes the mode of condemning and valuing any lands or right of way demanded by the company for the purpose of construction, in the absence of any agreement as to the value, by the appointment of commissioners, from whose action the owner may appeal to the Superior Court.

Section 27 extends the company's right of condemnation, to one hundred feet on each side of the main track, measuring from the centre of the same, unless in case of deep cuts and fillings, when more may be taken, and for additional land, not exceeding two acres, for the construction and building of depots, shops, etc.

Section 28 is in these words:

"That in the absence of any contract or contracts in relation to the land through which said road, or any of its branches, may pass, signed by the owner thereof, or his agent, or any claimant, or person in possession thereof, it shall be presumed that the land over which the said road, or any of its branches, may be constructed, (748) together with a space of one hundred feet on each side of the said road, has been granted to said company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same, so long as the same shall be used for the purpose of said road, and no longer, unless the person or persons owning the land at the time that part of the said road was finished, or those claiming under him, her or them, shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road, which may be on said land, was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she, or they, shall forever be barred from recovering said land, or having any assessment or compensation therefor; *provided*, that nothing herein contained, shall affect the rights of *feme coverts* or infants, until two years after the removal of their respective disabilities."

Under this charter, the work of building the road progressed, and in April, 1861, the track of the road was completed at the place known as Shoe Heel, whereof the present controversy has arisen. There does not appear to have been any contract for the purchase of this part of the territory traversed by the railway, nor any proceeding instituted for its condemnation and assessment of value.

The road continued to be operated, and being under mortgage, proceedings for foreclosure and sale were instituted in the Superior Court of New Hanover County, resulting in a decree and sale.

The General Assembly, at the session in 1872-'73, incorporated the Carolina Central Railway Company, conferring very similar fran-

chises and privileges, and in express terms authorized it to purchase the franchise and property of the former corporation, at the foreclosure, or any other sale that might be made, and that upon (749) such foreclosure, it should thenceforth "have, hold, possess, and be entitled to, the said railroad, extending from Wilmington to Rutherfordton, and all its contracts, franchises, rights, privileges and immunities; and all the estate of every description, real and personal, belonging to the said Wilmington, Charlotte and Rutherford Railroad, and by such purchase, the company hereby incorporated, shall acquire all the rights, privileges and immunities conferred on the Wilmington, Charlotte and Rutherford Railroad Company, by its charter, and amendments made thereto." Acts 1872-'73, ch. 75, Sec. 15.

At the same session, a general act was passed, regulating "mortgages by corporations, and sale under the same," which conferred upon purchasers at such sales, corporate powers, and when the mortgage deed was sufficiently comprehensive, "not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due it." Acts. 1872-'73, ch. 131, Sec. 1.

It is further provided, that "the corporation created by, or in consequence of such sale and conveyance, shall succeed to all such franchises, rights and privileges, and perform all such duties, as would have been, or should have been, performed by the first Company, but for such sale and conveyance, except debts due it." Sec. 2.

On January 18th, 1881, was passed an act, "to perfect the organization of the Carolina Central Railway Company," the first section of which is as follows: "That the Carolina Central Railway Company, a corporation created under and by virtue of an act, ratified the 1st day of March, 1873, entitled, 'An act to regulate mortgages by corporations and sales under the same, and the grantee in a deed executed the 25th day of June, 1880, by Nathan A. Steadman, Jr., and Junius Davis, commissioners appointed by a decree of the (750) Superior Court of New Hanover County, to sell the property, rights and franchises, of the Carolina Central Railway Company, and to make title to the same, is hereby declared to be a lawfully organized corporation, succeeding to, and legally possessed of, all the rights, powers, privileges and franchises, which were owned and possessed by the former corporation, the Carolina Central Railway Company, on and prior to the day of said sale, to-wit, the 31st day of May, 1880.' " Acts 1881, ch. 5.

This brief history of legislative action, is sufficient to show the transmission to the plaintiff, the third corporate organization in the series, of all the estate, interest, rights, property and franchises, except debts due it, bestowed upon, or acquired by, the first, the Wilmington, Charlotte and Rutherford Railroad Company, through the second corporation, whose name differs from the present, only by a change of the word "Railway," to "Railroad," in the corporate name.

It is conceded that the premises described and claimed in the complaint, and for the recovery of the possession of which the present action is prosecuted, are within 100 feet of the track of the road, and that the defendant occupies the same, or a part thereof.

This was part of a large tract, whereon one Robert Hughes resided when the road was located, and up to 1861, or later. It is part of a grant of 90,000 acres issued in 1795, to David Allison.

Robert Hughes has not been heard from since the close of the civil war.

The disputed territory was sold under execution against one John Patterson, to Giles Leitch, who, dying intestate, the defendant acquired his title from Archy Leitch, and Mary Robinson, his heirs-at-law, by deeds executed in May and June, 1883.

There was a judgment for the plaintiff, and the defendant appealed.

Messrs. Platt D. Walker and John D. Shaw, (Mr. A. Burweil (751) *was with them on the brief), for the plaintiff.*

Messrs. Frank McNeil, William Black and W. P. Bynum, for the defendant.

SMITH, C. J. (after stating the facts). It is not material to inquire into the source from which the defendant derives his title, beyond his mere occupancy, since the plaintiff must establish its right to the possession of the premises, in order to a judgment of ejection. In whomsoever the estate was vested, there being no suggestion that they were under disabilities, it was, under the statute, as soon as the road was constructed and *toties quoties* as it progressed towards conclusion, transferred to the corporation, of the required width of 100 feet on either side, to be paid for as directed, when no written contract has been entered into for the purchase. In such case, the inaction of the owner in enforcing his demand for compensation for land taken and appropriated after the finishing of the construction of the road thereon, for the space of two years thereafter, raises, under the statute, a presumption of a conveyance and of satisfaction, and hence becomes a bar to an assertion by legal process, of such claim.

These conditions unite in this case, and not only does the title vest in the corporation, but the remedy given the owner, under no disability, has been lost by lapse of time.

The right of a railroad corporation to enter upon and take possession of land, needed in the building of the road, before payment to the owner, when authorized by the power which exercises the right of eminent domain, is sanctioned by the ruling in *Raleigh & Gaston R. R. Co. v. Davis,* 19 N. C., 451, as necessary to the efficient prosecution of these great works of internal improvement, and, whatever may be the adjudications elsewhere, has been accepted law in this State. And so the remedy of attaining compensation, which the statute provides, must alone be pursued for that purpose. *McIntire* (752) *v. Western N. C. R. R. Co.,* 67 N. C., 278; *Johnson v. Rankin,* 70 N. C., 550; *Phifer v. Railroad,* 72 N. C., 433; *State v. McIver,* 88 N. C., 686; Pierce on Railroads, 163.

"If the actual payment of the compensation were required," says the author last quoted, "to precede an entry for construction, the entry would be delayed until the amount, when not agreed upon, had been finally determined by legal proceedings, and such delay would often result in serious detriment to public interests."

And so Mr. Justice RODMAN indicates the rule, in *McIntire v. W. N. C. Railroad Co., supra,* thus: "If the officers of the corporation cannot enter on lands and make surveys without a trespass, they would never locate the road. And if the road were located, and its construction delayed until the damages to all the land owners on the route were ascertained under the act, the delay would be indefinite, and of no benefit to any one. * * * The act intended to allow the company to enter and construct its road at once, leaving the question of damages, if the parties could not agree on them, to be settled afterwards. The company was not obliged to initiate proceedings. It is not obliged to know *that the owner claims damages,* until he claims them in the mode provided."

The provision in the charter granted to the predecessor, in February, 1881, is a transcript of a similar section, (29), contained in the act of 1848-'49, ch. 82, incorporating the North Carolina Railroad Company, and this latter has been recognized and enforced as valid, by express adjudication in *Vinson v. N. C. R. R. Co.,* 74 N. C., 510. In this case, proceedings were instituted by the company against the owner in 1865, a year after the road had been finished. It depended in the Superior Court of Johnston, until Spring Term, 1875, when the counsel for the company entered a dismissal, without prejudice, and without the knowledge of the defendant's counsel. A petition was filed by the plaintiff Vinson, to recover damages on account of the

construction of the road over his land. The Court held, and so declared, in reference to the recited section of the incorporating act: "It is a positive statute of limitations, and it clearly bars (753) the plaintiff's action, unless it be saved by the special circumstances relied upon," etc., and, adjudging that they could be allowed no such effect, the petition was dismissed at petitioner's cost. We refer to the case, only as showing a judicial determination of the efficacy and operation of the clause under which the plaintiff claims its proprietary right to the land in dispute, without reference to some of its other features.

We proceed now to consider the grounds as contained in the series of instructions asked, on which the recovery is resisted by the defendant, and these are:

I. The presumption is not raised under the Act, when there is an adverse holding by another, and if it is, it is rebuttable and has been rebutted.

The presumption of the conveyance arises from the company's act in taking possession and building the railway, when in the absence of a contract, the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated, of the specified breadth, unaffected by the ordinary rules in reference to repelling presumptions, by virtue of Sec. 23, chapter 65, of the Revised Code, brought forward in The Code, Sec. 150. This declares, that "no railroad, plank-road, turnpike or canal company, shall be *barred of, or presumed to have conveyed,* any real estate, right of way, easement, leasehold, or other interest in the soil, which may have been condemned *or otherwise obtained for its use, as a right of way, depot station-house, or place of landing, by any statute of limitation, or by occupation of the same by any person whatever.*"

This is the substance of the first, fourth and sixth instruction demanded, to which the statute furnishes a sufficient answer.

II. The fifth instruction asserts an estoppel upon the com- (754) pany, growing out of the knowledge by its officers, of the erection of the house by the defendant, while it was being built, and assent implied by that silence and acquiesence. This objection is met by the cases of *Holmes v. Crowell,* 73 N. C., 613; *Exum v. Cogdell,* 74 N. C., 139; *Mason v. Williams,* 66 N. C., 564; *Melvin v. Bullard,* 82 N. C., 33; Big. Est., 480. Mere silence while a trespasser is improving real estate as if it were his own, while it may sustain a claim for the

value of such improvements made in good faith, cannot be allowed to transfer the property itself to the usurping occupant.

III. What has already been said, disposes of the matter of the instructions numbered 8 and 9.

IV. The 7th, 10th and 11th instructions involve the proposition, that the land sued for, is no longer needed by the company, and reverts under the charter.

We concur in the answer given in the charge, that the statute does not require the occupation and direct use of every foot of the condemned area, for building, embankments and the like, but preserves the property in the company, so long as the road runs over the land and is operated by the company. A permissive use of part of it by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances, would be a needless and uncalled for injury. This may suspend, but does not abridge the right of the company to demand restoration, when the interests of the road may require its use.

V. The constitutionality of the act has been considered, and it rests upon well considered adjudications that we do not feel at liberty to disturb.

We do not find error in the refusal of the Court to give the instructions proposed by the defendant, nor in those given to the jury.

It is manifest, that whether the company has the estate in the land, or the right of way over the land, to which possession is indis-
(755) pensible, it is entitled to recover the possession, and for this the action can be maintained. The right of possession is, and must be exclusive. Pierce on Railroads, 159-402, except at lawful crossings.

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

No error. Affirmed.

Cited: McAdoo v. R. R., 105 N.C. 152; *Gudger v. R. R.*, 106 N.C. 485; *Beattie v. R. R.*, 108 N.C. 431; *Bass v. Navigation Co.*, 111 N.C. 455; *R. R. v. Sturgeon*, 120 N.C. 227; *Shields v. R. R.*, 129 N.C. 6; *Smith v. Ingram*, 132 N.C. 965; *Spencer v. R. R.*, 137 N.C. 126; *Barker v. R. R.*, 137 N.C. 219, 223; *S. v. Jones*, 139 N.C. 620, 625; *R. R. v. Olive*, 142 N.C. 271; *Parks v. R. R.*, 143 N.C. 293; *R. R. v. New Bern*, 147 N.C. 168; *Muse v. R. R.*, 149 N.C. 446; *Jeffress v. Greenville*, 154 N.C. 496; *Earnhardt v. R. R.*, 157 N.C. 363, 365; *Abernathy v. R. R.*, 159 N.C. 343; *R. R. v. Bunting*, 168 N.C. 580; *R. R. v. McGuire*, 171 N.C. 282; *Tighe v. R. R.*, 176 N.C. 244; *Parks v. Comrs.*, 186 N.C. 498, 500; *Rouse v. Kinston*, 188 N.C. 10; *Griffith v. R. R.*, 191 N.C. 87; *In re Assessment v. R. R.*, 196 N.C. 759, 762; *Highway Com. v.*

Young, 200 N.C. 608; *R. R. v. Lissenbee,* 219 N.C. 322; *Ramsey v. Nebel,* 226 N.C. 593; *R. R. v. Mfg. Co.,* 229 N.C. 699, 700.

J. W. GRANT, ADMINISTRATOR, v. W. J. ROGERS, ADMINISTRATOR.

Parties—Amendment—Statute of Limitation—Bona Notabilia—Account.

1. Where an action on an administration bond was brought in the name of the administrator *de bonis non,* and not in that of the State on his relation, an amendment making the proper plaintiff will be allowed in the Supreme Court, without terms, where the objection was not taken below, and was not made for the first time in this Court.
2. Such amendments will not be allowed when they would destroy a just legal ground for the appeal, which existed when it was taken, such as the introduction of a party plaintiff who could maintain the action, while the party to the record when the appeal was taken could not do so, and objection was made for that cause.
3. Where administration was granted in 1859, and the administrator died in 1877, and suit on his bond was brought by the administrator, *de bonis non,* in 1879 directly after his qualification, *It was held,* that the action was not barred by the statute of limitation.
4. *Quare,* whether in such case, the present statute of limitation applies, or that in force prior to 1868.
5. *Bona notabilia,* consists of any obligations due to the intestate's estate, which are recoverable by action.
6. Where a party died domiciled in Virginia, but administration was granted in this State, and an administration bond given, such administration bond is sufficient *bona notabilia* to warrant the issue of letters of administration in this State.
7. Where a defendant is shown to be liable to account, a reference follows as a matter of course, unless some plea in bar is set up, such as a release, etc.
8. Where a person dies domiciled in another State, and has property in this State, the administrator here, should file his account with the Clerk, and have it audited and passed on, before transferring the fund to the State of the domicile.
9. Where in bar to an action for an account, in a suit upon an administration bond, it was alleged that the decedent was domiciled in Virginia at the time of his death, and that the estate had been fully settled there, but the administrator in this State had made no settlement with the Clerk, *It was held,* that such plea did not bar the account, although the administrator may show upon taking the account that the assets in this State have in fact been properly applied.

(756) CIVIL ACTION, tried before *Avery, Judge,* at Spring Term, 1884, of the Superior Court of NORTHAMPTON County.

The defendant appealed.

The facts are fully stated in the opinion.

Mr. T. N. Hill, for the plaintiff.

Mr. W. C. Bowen, for the defendant.

SMITH, C. J. The case made in the complaint, and constituting the plaintiff's cause of action, is this:

Edward J. Turner, alleged to be a resident of Northampton County, in this State, died intestate in the year 1858, possessing both real and personal estate therein, and at March Term, 1859, following, the County Court of said county, granted administration on his estate to Thomas B. Powell, who thereupon entered into bond, in the penal sum of thirty thousand dollars, in the form and with the conditions prescribed by law, to which Joseph M. S. Rogers and J. M. Rogers became and were accepted as sureties. By virtue of these letters, the said Thomas B. Powell acquired possession of assets of large amount, and also received rents of land, and the proceeds of the sale of land, made under an order of Court, and paid over to him, to be applied by him in a due course of administration, for none of which has he ever accounted, nor made any return. Thomas B. Powell died in 1877, and letters of administration *de bonis non,* on the estate of the intestate, Edward J. Turner, were, on April 1st, 1879, issued from the Probate Court of said county, to the plaintiff.

(757) The surety, Joseph M. S. Rogers, having also died intestate, administration on his estate was committed to the defendant W. J. Rogers.

The present action was commenced on April 1st, 1879, by the issue of a summons against the living, and the administrator of the deceased surety to the bond, for the recovery of the assets of the intestate, which were, or ought to have been, in the hands of his deceased representative, and with which he is chargeable in this State. The Sheriff's return on the process, "served April 3rd, 1879, by making known to the defendant," (using the singular number,) "the contents of this summons," leaves it uncertain whether the service was on both, or if on one only, which of the defendants, but as an answer is filed by the administrator of the deceased surety only, and no notice is taken of the failure of the other defendant to answer, in the progress of the cause, we must deem the action to be prosecuted only against the former.

The answer of W. J. Rogers, administrator, while controverting most of the material allegations of the complaint, denies that the intestate Turner was a resident in this State, and declares that before, and at his death, his domicile had been, and was, in the adjoining county of Southampton, in Virginia, where were his large real and personal estate possessions, and soon after his death, letters of administration were granted by the proper court in that county to the said Thomas B. Powell; that as a means of perfecting this primary administration of domicile, he also took out administration in Northampton, but what amount of assets may have been received under the latter grant, is unknown to the defendant. As a further defence, and in bar of a right to an account, the defendant alleges, that in a suit in the court of chancery in Southampton county, in which the said Thomas B. Powell, and the creditors and next-of-kin of the intestate Turner, were made parties, there was a decree for an account against the administrator, and an order of reference executed, ascertaining the value of the assets, as well personal as derived from the sale of land, and the extent of the intestates indebted- (758) ness.

That in this proceeding, a final decree was made, directing the payment of the debts reported to be due, and the distribution of the surplus among the parties entitled thereto, which has been fully performed by the said administrator.

The answer also sets up the bar of the statute of limitations, and insists further, that the grant of administration to the plaintiff, is void, for want of *bona notabilia* in Northampton County to confer jurisdiction upon the Court, to order the issue of letters.

Without adverting to the pleadings, further than to note the misdescription in the answer of the proceeding in equity, drawn from memory, in that the record shows it to have been a creditor's suit, prosecuted against the administrator, the widow, and the infant child of the deceased, as his next of kin, with the result, however, properly set out in the answer, we proceed to consider the controversies raised.

At Spring Term, 1884, issues were prepared, and by agreement, submitted to the Judge in place of a jury, which, with his findings in response, are as follows:

I. Was Edward J. Turner a resident of Northampton County, as is alleged, or was he a resident of Virginia?

Answer—He was a resident of Southampton County, Virginia, where he died.

II. Was Thomas B. Powell duly appointed in the county of Southampton, administrator of Edward J. Turner?

Answer—He was.

III. Did Edward J. Turner, at his death, leave real and personal property in said Southampton County?

Answer—He did.

IV. Did said Powell, after his qualification in Virginia, in order to administer the personal property of the intestate in Northampton, qualify also as such, in this county?

Answer—He did.

(759) V. Were there, on April 1st, 1879, any assets of said intestate in Northampton County?

VI. Were any debts outstanding, at the date last mentioned, against the intestate's estate?

VII. Are the heirs and distributees of the intestate, residents of Virginia?

VIII. Did said Thomas B. Powell, as administrator of the intestate, in or about the year 1860, bring suit in the Court of Equity in Southampton County and file a petition against the next of kin and creditors of the deceased, for an account and final settlement of his estate, wherein said creditors and next of kin were made parties and duly served with process; and was said suit conducted to a final hearing, according to the laws of Virginia?

The Court being of opinion that the 5th and 6th issues contained no matters, however answered, barring an account, declined to pass on them. To this the defendant excepted.

In reference to the remaining issues, without any response thereto, the Judge directed the following entry to be made: "The counsel for the defendant proposed another issue, numbered 8, which was entered on the record, and stated that they had no evidence bearing upon that issue, except a transcript of the record of the Court of Equity of Southampton County."

The evidence was received, and it was adjudged that the 8th issue presented matter for the Court, and the question arising thereon was reserved by the Court.

The foregoing case, prepared by the appellant, was objected to on the part of counsel for the appellee, for certain insufficiencies of statement, which but for the fact, that if supplied as proposed, the result would not be changed, in the view we take of the appeal, would compel us to remand the cause, in order that the differences be considered and adjusted by the Court.

The Court ruled, that as the first administrator died in 1877, and the present plaintiff obtained letters *de bonis non*, on April 1st, 1879,

(760) and at once began the action, there was no statutory bar to its prosecution, and proceeded at the plaintiff's instance, and against the defendant's objection, to make an order of reference

for the taking an account of the administration by the said Thomas B. Powell, of the assets received, and that ought to have been received, in this State.

From these rulings the defendant appeals.

I. His counsel here, move to dismiss the action, for that the State is not, and should be, a party plaintiff in the action, and in answer thereto, the plaintiff asks leave to amend.

This objection, assuming its sufficiency, was not taken until the hearing in this Court, but the cause has proceeded as if no such defect in the pleadings existed, and the case is a proper one, under the circumstances, for the exercise of the power of amendment, conferred in express term by The Code, Sec. 965, "to amend by making proper parties to any case, when the Court may deem it necessary and proper for the purposes of justice, and on such terms as the Court may prescribe."

A precedent, if any was needed, may be found in the action of the Supreme Court of the United States in the *Tremolo Patent,* 23 Wall., 518, where Mr. Justice STRONG uses these words: "The amendment, (inserting in the bill an averment of a second re-issue of the patent,) deprived the defendant of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment in form, because it introduced no other cause of action than that which had been tried."

We should not allow such a change, if the effect were to destroy a just legal ground for the appeal, which existed when it was taken, as an application for an amendment introducing a new plaintiff, who might, while the displaced plaintiffs appellants could not, maintain the action, as was refused in *Justices v. Simmons,* 48 N. C., 187, approved in *Allen v. Jackson,* 86 N. C., 321; nor do we impose any terms.

II. We concur in the opinion that no impediment is interposed by the lapse of time, as decided in *Lawrence v. Norfleet,* 90 N. C., 533, if the case be governed by the present statute, and if not, (761) the remedy on the bond remained in force, until lost under the presumption of satisfaction.

III. The appellant's next exception relates to the validity of the issue of letters to the plaintiff.

It is a sufficient answer to this, to say, that the official bond, and the liability under it to the administrator *de bonis non,* constitute assets, sufficient to confer jurisdiction upon the Probate Court. *"Bona notabilia"* embrace this, as well as other obligations to the intestates estate, the fruits whereof are recoverable by action. If it were other-

wise, a note for the payment of money, sued on by the personal representative, and found at the trial to have been paid, or perhaps, if owing, barred by the statute of limitations, would have the effect of divesting the plaintiff of his representative right to bring the action, and practically annul and avoid the proceeding.

Besides, the existence of a recoverable demand would have to be proved before administration could be granted, so as legally to raise and have the question of debt determined. The very purpose of the appointment is to have the debtor's liability tested, and the result cannot invalidate the appointment, properly made at the time.

Further, the complaint avers a breach of the administration bond, in the failure to make any returns, and these damages are recoverable as assets, even if it were true that the funds had been transferred and accounted for in the chancery suit in Virginia.

IV. The remaining ground of complaint is the adjudication that the suit in Virginia is not a bar to the action.

In this, too, we think there is no error, and the defence, if well founded, is available on the taking of the account, and is not prejudiced by the order of reference. Undoubtedly, if all the assets collected in this State, and such uncollected assets as the administrator Powell is responsible for, have been transferred to the account taken in the Court in Virginia, and the account settled in full with
(762) those to whom the fund belongs, which is the subject of this action, it ought not to be allowed to proceed. But this is not an accepted fact, and that account does not show an item professing to be the balance of an account taken or stated of the assets received under the grant of administration in this State. It consists of a series of reports, debits and credits, in which, perhaps, may be included such of the former, as should have been accounted for in this State. This is, however, an inquiry to be made in executing the present reference.

The rule is well settled, upon numerous adjudications, that when a person sued, is shown to be an accounting party, a reference follows, as a matter of course, unless some defence is set up to bar the action, such as a release, settlement or the like. *Railroad v. Morrison,* 82 N. C., 141; *Neal v. Becknell,* 85 N. C., 299, and cases cited.

An administrator is required to render an inventory of the real and personal estate of the deceased, soon after his appointment, The Code, Sec. 1396; and within twelve months, as well as annually thereafter while any of the estate remains under his control, to file an inventory and account, with his vouchers for payments, to be examined by the clerk. Sec. 1399.

This ought to be done, for revision by the clerk, acting as Probate Judge, before the transfer of the moneys to another jurisdiction, and hence the propriety of taking the account now. The administrators in the different jurisdictions, are independent, and should be under the supervision of the proper officers in each, as far as assets are acquired by the respective grants of letters. This has not been done as to the assets collected in this State, although, as we have said, if the proper distributees have received payment in full of what has been collected in both jurisdictions, and there are no creditors, the present plaintiff, who is but a trustee, ought to be restrained from collecting from a discharged surety, for an unnecessary purpose. *Baker v. Railroad,* 91 N. C., 308, and cases referred to.

We assume that the Court ruled against the record as a bar, (763) since otherwise there would have been no order of reference, yet the statement leaves it in the form of a reserved and undecided question. Its insufficiency as a full defence at this stage of the proceeding, is necessarily determined by the further action in directing an account to be taken. We have not overlooked the misdescription of the suit, shown in the record, to the issue it was produced to support. The proof does not correspond with the recitals contained in the 8th issue, and an affirmative response could not have been given. But as the essence of this defence lies in the final decree and its performance, we do not notice the variance, but consider the matter of the defence, as if the case had been correctly represented in the answer, and the issue formed upon it.

There is no error. This will be certified for further proceedings in the Court below.

No error. Affirmed.

Cited: Wilson v. Pearson, 102 N.C. 319; *Hodge v. R. R.,* 108 N.C. 26, 34; *Allen v. Sallinger,* 108 N.C. 160; *Forte v. Boone,* 114 N.C. 178; *Monger v. Kelly,* 115 N.C. 295; *Harcum v. Marsh,* 130 N.C. 154; *West v. R. R.,* 140 N.C. 621; *Robertson v. R. R.,* 148 N.C. 326; *S. v. Scott,* 182 N.C. 868.

LONG & REID v. G. W. CLEGG, ADMINISTRATOR.

Presumption of Payment—How Rebutted.

1. Under the law as it was prior to 1868, the presumption of payment of a bond, raised by the lapse of ten years after its maturity, was an artificial presumption of fact, raised by the law, to be acted on by the jury, and was not created by any statute.
2. This presumption is not one of law, but of fact, and may be rebutted by showing that no payment was in fact made, or such other circumstances as are sufficient in law to remove the presumption.
3. The presumption is founded on the remissness of the creditor in suing, and the inference that his reason for not suing is, that the debt has been paid, and where there is a positive inability to sue for a part of the ten years, such part should not be counted.
4. So, where a debtor died after the bond was due and the presumption had begun to run, and no administration was had on his estate for some years; *It was held*, that the time during which there was no administration must be eliminated, and only the time during which there was a person *in esse* to sue could be counted in computing the ten years.

ASHE, J., dissented from the judgment of the Court.

(764) CIVIL ACTION, tried on appeal from a Justice of the Peace, before *Montgomery, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of IREDELL County.

This action, begun in a Justice's Court, and upon an adverse judgment, removed by defendant's appeal to the Superior Court of Iredell County, is for the recovery of the money due on a note under seal, executed by the defendant's intestate, William Maxwell, to the plaintiff, on the 30th day of January, 1868, and due one day after date.

William Maxwell, the debtor, died in December, 1869, and no administration was granted on his estate until September 6, 1882, when letters issued to J. A. Watts, and the present suit was instituted in the next month. The latter died pending the action, and letters *de bonis non,* on the intestate estate, were granted to the present defendant.

The defence relied on, is the payment presumed from the lapse of time since the maturity of the obligation, and this, the plaintiff insists, is rebutted by the long interval, more than twelve years, after the intestate's death, during which there was no administration, and no one to sue for non-payment of the note. The Court on these facts was of opinion, that the statutory presumption had not been repelled, and so instructed the jury, who find for the defendant, and from the judgment rendered on the verdict the plaintiffs appeal.

Mr. M. L. McCorkle, for the plaintiffs.
Mr. D. M. Furches, for the defendant.

SMITH, C. J., (after stating the facts). Strictly speaking, (765) there was, when this cause of action accrued, no statute limiting the time in which suit must be brought on a bond, but after the lapse of ten years, in the absence of rebutting evidence, an artificial presumption of payment, as a fact, was raised, to be acted on by the jury. It was not a presumption of law, such as arises from an adverse occupancy of land for thirty years, of the issue of a grant from the State, which was not allowed to be controverted; but of fact, open to disproof, in showing that no payment had been made, or such facts, as in law, were held to be sufficient to remove the presumption, as in case of the debtors continued insolvency during the entire period, which explained the inaction of the creditor. His remissness furnished the source of the inference that the debt had been paid, for why does he wait, unless this is so? The inquiry is not whether the time in which there was no administration should be counted, or left out in computing the ten years, but whether the absolute inability of the creditor to bring suit, except for a period less than ten years of the entire intervening space, does not fully and adequately account for the delay, and repel the presumption resting solely on the creditor's inactivity.

"It is clear," remarks GASTON, J., "that a *forbearance* to require payment of the principal or interest of a bond for twenty years," (the time at common law, reduced to ten by the Act of 1826,) "after it becomes due, raises a presumption that it has been paid. But this presumption may be raised by forbearance for less than twenty years, combined with other circumstances rendering the inference of payment probable." *Matthews v. Smith*, 19 N. C., 287.

The same eminent Judge, in a later case, uses this language: "The presumption against a bond, raised from the lapse of twenty years, without demand by the obligee, or acknowledgement of the obligor, is, in one sense, a presumption of law. The law attributes to such lapse of time, a technical operation, so that it is the duty of the court, if no opposing testimony be offered, to advise the jury to find (766) the fact of payment. But the inference to be raised, is an inference of fact, liable to be attacked, repelled or confirmed by other testimony. And it is the duty of the triers of the fact, allowing to this technical presumption its *prima facie force*, to find the facts as it may appear upon the proofs." *McKinder v. Littlejohn*, 23 N. C., 66.

When the case was again before the Court, DANIEL, J., in the opinion, thus speaks: "The law makes it the duty of the debtor to

seek his creditor and pay him. Take the fact to be then, that for the space of eighteen months, during the latter part of seven or eight years, in the twenty years from the time the bond became payable, Vaughn did have at Woodville" (in Mississippi, to which place he had removed,) "the *means of payment,* then the circumstances of distance between the debtor and the creditor, might, we think, be left to the jury, with the fact of a *continuous insolvency* during the residue of the twenty years, as some evidence that the debtor did not pay the debt during that small space of time." *McKinder v. Littlejohn,* 26 N. C., 198. With the attention of the Court thus called to the kind and nature of the rebutting evidence required in neutralizing the statutory presumption, the very point now presented came up for consideration, and was determined in *Buie v. Buie,* 24 N. C., 87. The late Chief Justice, then presiding in the Superior Court, thus charged the jury: "Upon the plea of payment, under the Act of 1826, (Rev. Stat., ch. 65, Sec. 13), a note, situated as this was, was presumed to have been paid after thirteen years," (the period elapsing when the Act of 1826 was passed,) "unless that presumption was rebutted. That here, as to Neil Buie's estate, it was admitted that the thirteen years had run; but there was no administration upon his estate, until the year before the suit was brought, and this was *sufficient to repel the presumption,* for during all that time, there was no person to pay." Reversing the ruling on appeal, the Court, GASTON, J., delivering the opinion of himself and his very able associates on the bench, says: "It cannot be doubted, we think, that the want of a person against whom to
(767) bring suit, *rebuts the presumption of payment, arising from forbearance to sue.*" *Ingram v. Smith,* 41 N. C., 97; *Woodhouse v. Simmons,* 73 N. C., 30; *Quince v. Ross,* 3 N. C., 180; *Grubbs v. Clayton,* 3 N. C., 378 (575); *Ridley v. Thorpe,* 3 N. C., 343; *Glenn v. Kimborough,* 58 N. C., 173. We are not aware of any adjudication since, that calls in question the rule thus sanctioned by these eminent jurist, and, as far as we know, accepted and acted on as correct, and the reasonableness of which finds its own self-vindication in the general acquiescence.

In a case decided in Pennsylvania in 1882, *Bentley's Appeal,* 99 Penn. St., 500, these modes of repelling the presumption are mentioned:

The evidence must consist of;

I. An unconditional and unqualified admission, either expressed or implied, on the part of the defendant, within twenty years, of the justness of the claim, and that it is still due.

II. A payment on account of either the principal or interest, either of which is an implied recognition of the debt.

III. The situation, condition, or circumstances of the parties, such as the absence of the plaintiff or defendant in a foreign country, the insolvency or embarrassment of the plaintiff or of the defendant."

At first view, it may not seem to be in harmony with *Hall v. Gibbs*, 87 N. C., 5, where it is held that the death of the obligee, and the want of administration for more than four years thereafter, which must be counted to make up the statutory period, were insufficient to repel the presumption. The same remissness in not suing out letters of administration by those entitled to the personal estate, may stand, as rebutting evidence, upon somewhat the same ground as the remissness of the creditor in asserting his demand by action, and hence the explanatory inference is drawn, that the debt has been discharged. But the case is different when the debtor remains the whole time accessible to process, and none is sued out to enforce his liability. The distinction in the cases may be maintained, (768) upon the principle that there can be no forbearance, the admitted foundation of the presumption, when there is no one to forbear or to indulge the debtor, and no inference from remissness can be drawn.

We are unwilling, therefore, to repudiate the ruling in *Buie v. Buie, supra,* so long recognized as law, and unsettling an adjudication not only resting upon authority, but commending itself to our approving judgment. There is error, and there must be a *venire de novo,* to which end this will be certified to the Court below for further proceedings therein.

MERRIMON, J., (concurring). I concur fully in the opinion of the Court in this case, as delivered by the Chief Justice, and will say for myself, that it seems to me clear, that the rule as stated and applied by him, must, in the nature of the matter, be the true one.

The purpose of the statute is to raise the presumption of fact, that a bond, not paid within ten years next after the right of action upon it accrues, has been paid. But this presumption is not conclusive—on the contrary, it may be rebutted by any fact or facts that tend reasonably to show that it has not been paid. The statute is, indeed, one of repose, but its purpose is not to conclude the creditor, and prevent him from showing the truth—it simply puts upon him the burden of proving that the bond has not been paid, and this he may do by any proper evidence of facts, that are in their nature sufficient to destroy the presumption raised by the statute. These facts must be such as show that the creditor, or party in interest in the bond, had reasonable ground for failing to sue before the lapse of ten years. He

must show that he had substantial reason for failing to sue within that time. In *Dunlap v. Ball,* 2 Cr., 80, Chief Justice MARSHALL said: "The principle upon which the presumption of payment arises from lapse of time, is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule. In that case it was held,

(769) in order to create the presumption of payment of a bond, twenty years must have elapsed, exclusive of the period of the plaintiffs disability to sue. They were during the war of the Revolution alien enemies, and the time during the war, was not treated as part of the twenty years necessary to raise the presumption.

In this case, the right of action on the bond, accrued on the first day of July, 1868. The debtor obligor died in December, 1869. There was no administration of his estate until September 6th, 1882. This action was begun in about a month after that time.

Now is it not manifest, that the plaintiff could not sue, or collect his bond at all during the time there was no administrator of the deceased obligor? Did not the reason of the rule of presumption of payment cease, when the creditor could not collect his bond? Was not such inability to sue, quite as strong, and as good a cause to destroy the presumption of payment, as that of the continued insolvency of a debtor, from the time the right of action accrued, until the end of ten years? The latter cause has always been held to be sufficient to repel the presumption.

It is said that the plaintiff might have sued the intestate of the defendant before his death, and so he might, but he was not bound to do so—no presumption of payment had arisen then, and as he did not sue, surely he ought not to loose his debt, because he *could not* for ten years afterwards! Such injustice is not the spirit of the rule of presumption in question.

It is said also, that in such cases, when the time *begins to run,* nothing can interpose to prevent the continuance of such lapse. I cannot accept this view as correct. The very nature of the principle of such presumption of payment contravenes it. The presumption itself implies, that it may be rebutted by any interposing fact, that destroys its reasonableness, and shows that it is unfounded in truth.

The presumption of payment arising from lapse of time, is in the respect mentioned, different from a statute of limitation. The

(770) latter is inflexible and unyielding—it ceases to operate only in the way and for the cause prescribed by the statute.

Error. Reversed.

ASHE, J., dissenting. I cannot concur in the opinion of the majority of the Court in this case. The note in question was due on the

31st day of January, 1868. The obligor died in the month of December, 1869, and there was no administration on his estate, until the 6th day of September, 1882. His Honor's instruction to the jury, on the trial below was, that these facts raised a presumption that the bond had been paid, and the statute of presumption had not been rebutted.

The plaintiffs contended that inasmuch as there was no one who could have been sued, from December, 1869, until September, 1882, when the administration was first granted on the estate of the obligor, that fact was sufficient to rebut the presumption of payment, and for the position he relied upon the case of *Buie v. Buie*, 24 N. C., 87. In that case, the defendant pleaded the act of 1715, and the presumption of payment. The note in that case was given in 1818, and due twelve months after date. Neil Buie, one of the obligors, died in 1823, and there was no administration on his estate until 1837, and the Court below held, that as there was no person to be sued, the presumption of payment was rebutted, and the decision was sustained by this Court. The question of a presumption of payment does not seem to have been discussed in this Court, but the entire stress of the argument of plaintiff's counsel, was upon the effect of the act of 1715. All of the authorities cited by Mr. Strange, who argued that case for the defendant in this Court, had reference only to that statute.

There can be no doubt that the action in that case was barred by the act of 1715, for the debt was due when the debtor died, and at the time of his death there was a creditor who might have sued, and that was all that was necessary to put that statute in operation—*Jones v. Brodie*, 7 N. C., 594—so that there was no necessity for deciding the other question of the presumption of payment. (771) There is a marked distinction between the act of 1826, the statute of presumption, and the act of 1715. The former begins to run when the action accrues; the latter from the death of the debtor. The Court, in *Buie v. Buie, supra,* does not seem to have given particular consideration to the fact that there were five years intervening between the maturity of the note and the death of the debtor, in all of which time the debtor might have been sued. In fact, the opinion of the Court was almost entirely directed to the operation of the act of 1715, and only a passing reference was made to the statute of presumption. If the debtor had died before the note fell due, and ten years had elapsed before administration on his estate, there can be no question, upon the authorities and the reason of the thing, that the statute would not bar, nor would any presumption arise from the

forbearance to sue, because there would have been no one who could be sued. This, we think, is the true distinction.

If *Buie v. Buie, supra,* be law, we do not see how it is to be reconciled with the subsequent decisions of this Court. In the case of *Powell v. Brinkley,* 44 N. C., 154, *Pearson, Judge,* who decided the case of *Buie v. Buie,* in the Court below, speaking for the Court, used this language: "When one is absent and unheard of for more than seven years, there is a presumption of his death; but there is no presumption as *to the time* of his death, for there is nothing to refer it to one time more than another. But when there is a presumption of payment, from lapse of time, it is otherwise, for there is a day fixed when the payment ought to have been made," and in support of the position, he cited, *Best on Presumption,* Secs. 137-140; and in the more recent case of *Grant v. Burgwyn,* 84 N. C., 560, when the question under consideration was, whether the presumption of payment was rebutted by the insolvency of the debtor, Judge RUFFIN, in delivering the opinion of the Court, said: "The only true rule in such a case is,

(772) to require such a state of insolvency to be shown to have existed *during the entire ten years next after the maturity of the debt, as will prove that the debtor did not pay, because he could not,* and nothing short of this will the law permit to destroy its own inference arising from the lapse of time. Besides this, in a case like the present, the presumption of payment, unlike that which is raised of the death of a party, from his being continually absent and unheard of for seven years, is by law referred to a period of time, and has relation to the day on which the debt became due." According to the rule laid down in this case, supported by the decision in *Powell v. Brinkley, supra,* if the debtor had been solvent for nearly two years after the maturity of the debt, his subsequent insolvency for ten years would not have been allowed to rebut the presumption of payment.

Upon what principle then, can a distinction be made between the case where insolvency is relied upon to rebut the presumption of payment, and that, as in this case, where the absence of a person to be sued is relied on for the same purpose? If in the former case, the entire period of ten years, commencing from the maturity of the debt, must be shown to rebut the presumption, why, by anology, must it not be requisite to be shown, in order to rebut the presumption, that for ten entire years, beginning from the maturity of the debt, there was no one in existence against whom an action could be brought? The cases are so analogous, that if the rule will hold good in the one case, it must in the other.

In our case, the debtor was alive and could have been sued at any time before his death, which occurred about twenty months after the maturity of the note. The presumption of payment arises within ten years after the *right of action accrues.* Rev. Code, ch. 65, Sec. 18. The action accrues when the note becomes due, provided there is a person to sue and one to be sued. When that is so, this statute of presumption begins to run, like the statute of limitation, from the maturity of the note, and like that statute, no disability subsequently arising, will arrest its progress. It was so held in this Court in *Hall v. Gibbs,* 87 N. C., 4. There the creditor had died after (773) the maturity of the note sued on, and it was held, that as the statute of presumption had begun to run against him when alive, his subsequent death did not obstruct the running of the statute. The principle there decided is applicable to this case, *mutatis mutandis,* and see also *Tucker v. Baker, ante,* 162.

I am not inadvertent to the fact of the very eminent abilities of the distinguished jurists who made the decision in the case of *Buie v. Buie,* and I would confess the imputation of presumption in setting up my unsupported individual opinion against that of a Court so constituted, but what I contend is, that subsequent decisions of the Court are inconsistent with it, and I rely upon the fact, as heretofore stated, that the case was made to turn mainly upon the act of 1715, and that the effect of the act of 1826, was but slightly considered, and upon the more recent opinion of PEARSON, C. J., in the case of *Powell v. Brinkley, supra,* and Judge RUFFIN'S opinion in *Grant v. Burgwyn, supra,* and the still more recent decision of this Court in the case of *Hall v. Gibbs, supra,* concurred in by all the Judges then constituting this Court.

Cited: Baird v. Reynolds, 99 N.C. 473; *Coppersmith v. Wilson,* 107 N.C. 35; *Brawley v. Brawley,* 109 N.C. 527; *Dickson v. Crawley,* 112 N.C. 633; *Copeland v. Collins,* 122 N.C. 626; *Menzel v. Hinton,* 132 N.C. 662; *Brown v. Harding,* 171 N.C. 689.

*W. T. JOHNSON ET ALS v. JOSEPH P. PRAIRIE.

Conveyance of Land—Held Adversely—Statute of Limitations.

1. It was a rule of the common law, which is in force in this State, that a conveyance of land, held adversely to the grantor, was void, as to the person so holding adverse possession and those claiming under him, but was valid and passes the title as to all the rest of the world.
2. This is altered by The Code, Sec. 177, to the extent of allowing the grantee to sue in his own name, provided he, or any grantor or any other person through whom he may derive title, might maintain such action, notwithstanding such conveyance was void, by reason of such actual adverse possession, when it was made.
3. A person, holding possession of land for himself, in 1858, executed a mortgage, and, in 1859, assigned his equity of redemption to the mortgagee, but continued in possession; and the mortgagee sold and conveyed the land, in 1872, to a third party, who entered and held possession until 1878, when this suit was commenced; *Held*, 1st, That the mortgagor became tenant at sufferance of the mortgagee, and his possession was the possession of the mortgagor and his grantee; 2nd, That, the defendant and those under whom he claims having had actual adverse possession, under known and visible metes and bounds of the land in controversy, with color of title, the action would have been barred, if it had been brought by the plaintiff's grantor, or his heirs, and therefore this action, which was brought by the heirs of the grantee, was barred.

(774) CIVIL ACTION for the recovery of land, in nature of ejectment, tried before *Clark, Judge*, and a jury, at August Civil Term, 1885, of WAKE Superior Court.

The plaintiffs alleged that they were the owners in fee of the tract of land described in the complaint, as the heirs of Sarah Johnson, who died seized in fee of the same, and that the defendant is in possession thereof, and wrongfully withholds the same.

The defendant denied the title of Sarah Johnson and the plaintiffs, and that he wrongfully withheld the possession from the plaintiffs, and as to the plaintiffs being the heirs of Sarah Johnson, he had not sufficient knowledge or information upon which to form a belief.

The following issues were submitted to the jury:

"I. Are the plaintiffs the owners in fee of the land mentioned in the complaint?

"II. What damages have the plaintiffs sustained by reason of the defendant's occupation and use of said land?"

Plaintiffs introduced a deed for a large tract of land, of which the land in controversy forms a part, from Alfred Lane to Moses Mor-

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

decai, of date of March 30th, 1822, and followed this by the will of Moses Mordecai, (probated November, 1824), in which the Lane lands were devised to Henry Mordecai.

Plaintiffs then offered in evidence, a deed from Henry Mordecai to Henry W. Miller, trustee for Mrs. Sarah A. Johnson, dated December 23rd, 1855. This deed conveyed the whole of the (775) Lane land, including the land in controversy. Said deed is as follows:

"This indenture, made and entered into this 23d day of December, A. D. 1855, by and between Henry Mordecai, of the county of Wake, State of North Carolina, of the one part, and Henry W. Miller, as trustee of Mrs. Sarah Johnson, wife of Wiley W. Johnson, of the same county and State, of the other part, witnesseth: That the said Henry Mordecai, for and in consideration of $2,990, to him in hand paid by the said Henry W. Miller, as trustee aforesaid, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, conveyed and confirmed, unto the said Henry W. Miller, trustee as aforesaid, his heirs and assigns, the following tract or parcel of land, situate in the county and State aforesaid, on the south side of Crabtree Creek, adjoining the lands of William Boylan, and others, bounded as follows:

"Beginning at a stake, near a hickory, on the Tarboro road, J. J. Rial's corner, thence North 7 degrees West, 111 poles, to pointers on a branch, thence down the various courses of said branch to Crabtree Creek, thence down the various courses of said creek, to a hickory and ash, William Boylan's corner, thence with his line, South 66 degrees West, 189½ poles to a stake, his corner, thence South 29 degrees, East 108½ poles to the said Tarboro road, thence Northwest along the said road to the beginning, said to contain 409½ acres. To have and to hold, the aforesaid tract or parcel of land, with all and singular its appurtenances, to the said Henry W. Miller, his heirs and assigns forever, in trust to hold the same, for the sole and separate use of the said Sarah Johnson, wife of the said Wiley Johnson, her heirs and assigns, free and clear from the claims, debts or demands of the said Wiley W. Johnson, or his heirs, and in further trust to convey the same, or any part thereof, to such person or persons, and at such times as she, the said Sarah A. Johnson, may, by writing, under her hand and seal, and attested by two witnesses, direct, either with or without the consent of her said husband. And the said Henry Mordecai, doth for himself and his heirs, covenant and (776) agree to warrant and defend the title of the said tract of land to the said Henry W. Miller, trustee as aforesaid, his heirs and

assigns, to and for the trusts, uses and purposes hereinbefore set forth, and no other. In witness whereof, the said Henry Mordecai doth hereto set his hand and seal, the day and year above written.

HENRY MORDECAI, [Seal.]

Signed, sealed and delivered in presence of William T. Shaw."

This execution of this deed was duly proved, and it was registered on the 3d day of April, 1878.

The defendant put in evidence:

1. Request of Wiley and Sarah A. Johnson, in writing, to Henry W. Miller, trustee, to convey to George Taylor a portion of the land, 325 acres, dated December 25th, 1865, duly witnessed and registered.

2. A deed from H. W. Miller, trustee, to George Taylor, for the 325 acres, dated December 24, 1855.

Plaintiff objected to said deed, because it was executed without Sarah A. Johnson having requested the same to be done. Objection overruled, and exception.

Defendant offered a deed from H. W. Miller, trustee, and Sarah A. Johnson, to George Taylor, dated 11th May, 1857, for 73 acres. This deed contained the following description, to-wit:

"To John Taylor's corner, thence along John Taylor's line to the Tarboro road."

This deed was made at the written request of Wiley and Sarah A. Johnson. It did not embrace any part of the land in controversy, but embraced a part of the land conveyed to H. W. Miller, trustee, by deed dated December 23, 1855. Objection of plaintiff overruled. Exception.

The defendant then proved by H. C. Johnson, the plaintiff, that "John Taylor's line" called for in said deed, was the line of the tract in controversy, which was then held by John R. Taylor under
(777) a claim that it had been purchased by him from Wiley Johnson by verbal contract.

Deed of mortgage from John R. Taylor to Henry B. Jordan, dated 22d of May, 1858, for the land in controversy was then offered. Plaintiff objected. Objection overruled. Exception.

The defendant then offered an assignment by John R. Taylor, dated 29th July, 1859, of his equity of redemption in said land, to H. B. Jordan. Plaintiff objected. Objection overruled. Exception.

The defendant then offered in evidence, a deed from Henry B. Jordan to Joseph P. Prairie, dated the 19th day of December, 1872.

H. C. Johnson, one of the plaintiffs, testified in their behalf as to the kinship of the plaintiffs to Sarah Johnson, and further testified, that Sarah Johnson died in 1863, and Wiley Johnson in 1864, and that

John R. Taylor had the land in controversy in possession from October, 1852, to December, 1872; that he obtained his possession from Wiley Johnson, husband of Sarah Johnson; that Wiley and Sarah Johnson were living on the land when Taylor went into possession; that the defendant went into possession after John R. Taylor left the land, and has held it ever since.

The defendant introduced John R. Taylor as a witness, who testified that he made an agreement with Wiley Johnson to buy the land in controversy, by a verbal contract; that he was to give him three hundred dollars for it; that he paid him one hundred and fifty dollars in cash, and gave him his note for the balance. That Wiley Johnson and his wife were living on the land at the time he made the contract with him for it; that Wiley Johnson did not tell him the land was held by his wife under a contract of purchase, and he never heard of any such contract with Mrs. Johnson; that his possession was held under his contract, and he held the possession for himself; that he cleared the land, fenced and cultivated it, and built a house on it.

The Court instructed the jury, that in no view of the evi- (778) dence in this case could the plaintiffs or any of them recover in this action.

The jury found the first issue in favor of the defendant. There was judgment in his favor, from which plaintiffs appeal to the Supreme Court.

Mr. E. C. Smith, for the plaintiffs.
Mr. D. G. Fowle, for the defendant.

ASHE, J. (after stating the facts). There was no question raised in the case, as to the title being out of the State, and we must therefore consider that as conceded.

The defendant based his defence mainly upon two grounds: 1st. That neither Sarah Johnson, under whom the plaintiffs claim, nor Henry W. Miller, acquired any title to the land purported to be conveyed to the latter, by the deed of Henry Mordecai, of date December 23rd, 1855, and the plaintiffs have no right to maintain this action; and, 2nd. That if said deed did pass the title, the plaintiff's right of action is barred by the statute of limitations.

We are of the opinion that the grounds of defendant's defence are well taken, and are fatal to the plaintiff's right to recover.

The land in controversy was a small portion of a large tract of 409½ acres, conveyed by Henry Mordecai to Henry W. Miller, to the separate use of Sarah Johnson and her heirs. All that tract was conveyed to one George Taylor, by said Miller, with the written con-

sent of Sarah Johnson: 1st. 325 acres on the 25th of December, 1855, and 2nd. 73 acres on the 11th of May, 1857, leaving the residue, consisting of ten or eleven acres, which is the land in controversy, and was claimed by John R. Taylor, by a verbal contract made with Wiley Johnson, some three years before the date of the deed of Mordecai to Miller. And to show that Sarah Johnson, after the execution of that deed, recognized and acquiesced in the contract made between
(779) her husband and John R. Taylor, in the deed executed by H. W. Miller to George Taylor, with her written consent for the 73 acres, in describing the boundaries of that tract, there is a call "to John Taylor's corner, thence along John Taylor's line to the Tarboro road." She no doubt knew that the land had been paid for by Taylor, and she had probably received the benefit of the price, and therefore did not wish to disturb his possession, and then her heirs, the plaintiffs, have acquiesced in his title for twenty years after her death, before bringing this action. The claim is inequitable, and it subserves the justice of the case, that the defendant is able to establish a defence that is sufficient to defeat the plaintiff's action.

It is in evidence, that at the time of the execution of the deed from Henry Mordecai to Henry W. Miller, John R. Taylor was, and had been for more than two years, in the actual adverse possession of the land, claiming it as his own.

The common law is in force in this State, and it is a general rule of that law, that a conveyance of land by a person against whom it was adversely held at the time of making it, is void, and the reason of the rule, according to Lord Coke, is for avoiding maintenance, suppression of right and stirring up of suits. Coke on Littleton, 214, and Tyler on Ejectment, 925.

The general rule of the common law, however, is to be taken with the qualification, that a deed taken for land, while another is in the adverse possession, is void only in relation to the person so in possession and those claiming under him. As to all the rest of the world, the deed is valid and passes the title. Tyler on Ejectment, 937. But this qualification does not affect the title of the defendant, for he claims under Taylor, the person in the adverse possession when the deed was executed.

It was to avoid this consequence of a deed executed while another was in adverse possession, that in the practice under the old system, it was common for the plaintiff to lay two demises in his declaration, the one in his own name, and another in that of the grantor.
(780) But the plaintiffs contend that the rigid rule of the common law has been relaxed by the act of 1875, ch. 256. The Code, Sec. 177, which provides, "that an action may be maintained by a

grantee of real estate in his own name, whenever he, or any grantor, or other person through whom he may claim title, notwithstanding the grant of such grantor or other conveyance be void by reason of the actual possession of a person claiming under a title adverse to that of such grantor or other person, at the time of the delivery of such grant or other conveyance."

But it is a general rule, in reference to statutes, that they are to be so construed as to have a prospective effect, and will not be permitted to affect past transactions, unless the Legislature has clearly and unequivocally expressed its intention to the contrary. Wood on Limitations, 29, and note 1. Whether this intention is so unequivocally expressed by the wording of this statute, it is unnecessary to decide. For conceding that the act does have a retrospective operation, it only gives the right to the grantee to sue in his own name, if the original grantor might have done so, and this raises the question, could the grantor, Henry Mordecai, or his heirs, have maintained this action?

They certainly could not, for prior to the commencement of the action, Prairie had been in the actual possession of the land for more than seven years with color of title. On the 22nd day of May, 1858, John R. Taylor, who had been for several years in the actual adverse possession of the land, executed a deed of mortgage to Henry B. Jordan. Taylor then, as mortgagor, was concluded by his deed, and after its execution, his possession is by consent of the mortgagee, and in law, the possession of the mortgagee; *Williams v. Bennett,* 26 N. C., 122; Adams' Equity, p. 114. He is the tenant at sufferance of the mortgagee, and when in 1859 Taylor assigned his equity of redemption to H. B. Jordan, who entered thereafter in possession, his conveyance of the equity of redemption could not have the effect of changing their nature. And so when Jordan conveyed to Prairie the same land, by deed bearing date 19th of December, 1872, the same relation between him and Prairie still subsisted. His possession having (781) been once the possession of Jordan, it must continue, so long as he remains in possession, to be the possession of his alienee.

The defendant Prairie, then, and Jordan, under whom he claimed, had color of title and possession, more than seven years, prior to the commencement of the action, claiming it up to known and visible boundaries; for all the other portions of the land had been conveyed to George Taylor by two deeds, one of which called for a corner and line of the John Taylor tract, the land in controversy, and it would seem to follow as matter of course, that its boundaries must be circumscribed by the lines of one or both of those tracts, and the outside line of the whole tract conveyed by Henry Mordecai to Henry W. Miller.

The possession, under the color of title held by the defendant would have barred the action if brought by the heirs of Henry Mordecai, and if they could not have maintained the action, it follows that neither Henry Miller's heirs, nor the heirs of Sarah Johnson could have maintained it, for the statute only gives them the action in their own names, provided the grantor could have brought it.

Our opinion is, the plaintiff had no right to recover, and there is no error in the judgment of the Superior Court, which is therefore affirmed.

No error. Affirmed.

Cited: Brewer v. Chappell, 101 N.C. 253; *Killebrew v. Hines,* 104 N.C. 196; *Bland v. Beasley,* 145 N.C. 169.

GEO. W. BRITTAIN v. JOHN DANIELS.

Pleadings and Proof.

1. The evidence introduced by the plaintiff must conform to his proofs. So where in his complaint, the plaintiff alleged that he was seized of certain lands in fee, and the evidence showed that he was only entitled to a life estate, he is not entitled to recover, in this state of the pleadings.
2. Where one is in possession of land by virtue of a deed conveying a life estate, he is not estopped by such deed from setting up a title in fee by reason of twenty years possession, against one who is a stranger, and neither party nor privy to the grantor in the deed conveying the life estate.
3. Where it appeared that the *locus in quo* had been in the actual possession of parties under whom the plaintiff claimed, for sixty years prior to 1870, but it did not appear that the possession was continued after that time up to the time when the action was brought, *It was held* to be erroneous for his Honor to charge the jury that the law presumed a grant from twenty years adverse possession, and that they would be at liberty to presume the necessary conveyances to the plaintiff.
4. Where the defendant used a spring on the *locus in quo,* and built a spring house thereon, which he used as his own, *It was held,* a sufficient possession to satisfy the allegation of wrongful possession by the defendant.
5. Where the plaintiff's deed was for a life estate only in the *locus in quo,* with his brothers and sisters, some of whom died without issue, *It was held,* that he could recover the entire tract, under an allegation in the complaint that he was seized in fee; the interest which descended to him from his deceased brothers and sisters being sufficient to support the action.

BRITTAIN *v.* DANIELS.

CIVIL ACTION, for the recovery of land, tried before *Gudger,* (782) *Judge,* and a jury, at August Term, 1885, of the Superior Court of BUNCOMBE County.

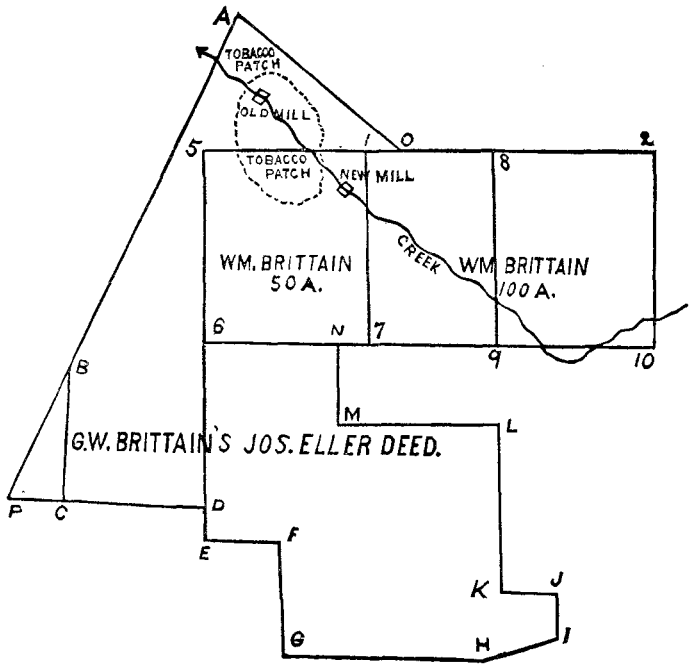
The facts appear in the opinion.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. M. E. Carter and C. A. Moore, (Messrs. F. A. Sondley and C. M. McLeod were with them on the brief,) for the plaintiff.

Mr. J. H. Merrimon, filed a brief for the defendant.

ASHE, J. This action was constituted by the consolidation of two actions into one. The first was begun on the 21st day of October, 1881, and claimed the land represented on the plat, by the lines A, B, P, C, D, 6, 5, 1, 0, A, in the first paragraph of the complaint, and by the lines A, B, C, D, E, F, G, H, I, J, K, L, M, N, I, 5, 1, 0, A, in the second paragraph.



The second action, commenced on the 27th of February, (783) 1883, was brought to recover the land embraced within the lines, 1, 5, 7, 1.

It was admitted by both parties, that the title to the land in controversy was out of the State. The following plat will show the several tracts of land that were respectively claimed by the parties:

The plaintiff, in his complaint, alleged that he was the owner in fee simple of the lands described therein, and that the defendant wrongfully withheld from him the possession of said land. The defendant denied that the plaintiff was the owner in fee simple, and also that he wrongfully held the possession of the same.

(784) The plaintiff introduced a deed from Joseph Eller to himself, dated the 10th of March, 1838, for all the land described in the first complaint, represented on the plat as "G. W. Brittain's, Joseph Eller deed." But this deed conveyed the plaintiff only a life estate, and as his Honor correctly held, under the pleadings in the case, the plaintiff was not entitled to recover any less estate than an estate in fee simple. The plaintiff must make out his case *secundum allegata. Harkey v. Houston*, 65 N. C., 137; *Falls v. Gamble*, 66 N. C., 455, and Malone on Real Property Trials, p. 54. We are of opinion, therefore, that he is not entitled to recover the land claimed under the Joseph Eller deed, by virtue of that deed, in this action. But his Honor charged the jury, that if the plaintiff had claimed the land up to known and visible boundaries, and had actual, adverse, and continuous possession of the same, for twenty years, excluding the time elapsing between the 20th of May, 1866, and the 1st of January, 1870, title having been admitted to be out of the State, such possession as was consistent with the uses of agriculture, the jury would be at liberty to presume the necessary conveyances for the same to the plaintiff, and if the plaintiff had such possession, he would be entitled to recover. That such possession must be by actual occupation, and continuous, and accompanied by all such acts of ownership, as persons usually exercise over their own lands. To this instruction the defendant excepted.

We find no error in this instruction as an abstract proposition, as against the defendant who is a stranger; and as he is neither a party or privy to the deed from Joseph Eller to plaintiff, there is no estoppel upon the plaintiff. There is then, no reason why the plaintiff, notwithstanding the deed from Joseph Eller conveyed to him only a life-estate, may not, as against the defendant in this case, show that he has, independent of the Eller deed, a good fee simple title to the land. This principle was decided in *Hurley v. Morgan*, 18 N. C., 425.

RUFFIN, C. J., there laid down the proposition as follows: "We (785) deem it entirely incorrect to hold that a party, who, upon the trial of a cause in which he asserts a title to the thing in dis-

pute, offers an *argument,* that a particular deed vested the title in him, is precluded, either by way of estoppel or presumption, from insisting that another deed shown in evidence or *presumed,* did vest it. It is indeed a presumption of fact, to be decided by the jury, but it is deduced upon legal principles, and may properly be found, and in many cases ought to be found, although the Court and jury may be satisfied that it never was in fact made." Bearing on the same point is the case of *Osborne v. Anderson,* 89 N. C., 261.

But his Honor, we think, failed to make a proper application of the principle, to the facts of the case. For there was evidence here, on the part of the plaintiff, that he had been in possession of that part of the land in controversy, near the angle at A, for forty years or more, and the defendant offered evidence that Adam Eller, under whom he claimed, had been in possession of the same land, near the same point, since sixty years ago, and he died in the year 1868, 1869 or 1870, claiming the land, represented in the plat by the lines A, B, C, D, 5, 0, A, under a grant to John Dillion, and from him to William Pickens, and from Pickens to Adam Eller. But the case does not state whether the possession of this field was continued after the death of Adam Eller, by any one claiming under him, and in this respect, the statement of the case is imperfect, and that makes the difficulty as to this tract of land. If the possession was continuous, it might probably present the question of the oldest title, and if it was not, then the plaintiff might have asserted a title against the heirs of Adam Eller, if he labored under no disability, by an adverse possession of seven years with color of title. But the plaintiff sets up no claim of adverse possession with color of title, and his Honor, while laying down a correct proposition of law to the jury, omitted to call their attention to these facts, which were important in settling the rights of the parties, and we are therefore of the opinion, there should be another trial in respect to so much of the land described in the (786) complaint, as is embraced within the lines A, B, C, D, 6, 5, 0, A.

Our opinion is, that the plaintiff, from all that appears, is entitled to recover all the residue of the land conveyed to him by the deed of Joseph Eller, represented by the lines 6, D, E, F, G, H, I, J, K, L, M, N, O, to which the defendant sets up no title.

The next inquiry is, whether the plaintiff is entitled to recover the fifty acre tract. He introduced evidence to show that the defendant, at and before the time of commencing this action, used a spring in the fifty acre tract, and had a spring-house, at or near the spring, which he used as his own. This, we think, was sufficient proof of possession, as held by the Court below.

The plaintiff then offered in evidence a grant from the State to his father, William Brittain, dated 2d December, 1792, for the fifty acre tract. Then a deed from William Brittain to plaintiff and Jane Swain, a daughter of the said William Brittain, for the same land, but this deed contained no words of inheritance, and conveyed only a life estate, and then a deed from Jane Swain to plaintiff for the said land.

The defendant offered evidence tending to locate the fifty acre tract, as described in the plat by the lines 1, 5, 6, 7, as the land granted to William Brittain, and that plaintiff had been in the actual possession of the same, and in cultivation of a part thereof for a great number of years.

He also offered evidence to show that William Brittain left four sons and three daughters. Two of the daughters are still living, and one dead, leaving no children. The sons are all dead, except the plaintiff; the sons who died left children, unless William, one of them, died without issue.

The defendant set up no title to the fifty acre tract, but contended that as the deed from William Brittain to the plaintiff and Jane Swain, conveyed to them only a life estate, the plaintiff could not recover under pleadings in the case, because he alleged in the complaint, that he was the owner in fee simple of the land described
(787) therein. But the doctrine laid down in *Hurley v. Morgan, supra,* applies equally to this branch of the case. But even if it did not, although the deed from William Brittain to the plaintiff and Jane Swain, conveyed only a life estate, yet when William Brittain died, the reversion in the land descended to his seven children, who then became seized of the land in fee simple, as tenants in common of the reversion, after the plaintiff's life estate, and the plaintiff is entitled to a life estate in the land and an undivided interest in the reversion of two-sevenths by his purchase of the interest of his sister Jane Swain, and at least of an additional one-sixth of a seventh, by the death of one of his sisters, and is the owner in fee to this extent, and as the defendant claims no title to this tract, the plaintiff has the right to recover the entire tract for his life, and for his cotenants. *Overcash v. Kitchie,* 89 N. C., 384; *Yancey v. Greenlee,* 90 N. C., 317.

Our opinion is, the plaintiff has shown title to the fifty acre tract, and all the land conveyed in the deed from Joseph Eller to the plaintiff, except so much as is embraced within the lines A, B, C, D, 6, 5, 0, A, and therefore there must be new trial, and at the same time, the jury should be directed to inquire into and determine what damages the plaintiff may have sustained by trespasses upon each tract, as claimed by him.

Error. Reversed and *venire de novo.*

Cited: McAlpine v. Daniel, 101 N.C. 550, 558; *Allen v. Sallinger,* 105 N.C. 342; *Faulk v. Thornton,* 108 N.C. 320; *Hunt v. Vanderbilt,* 115 N.C. 563; *Brown v. House,* 118 N.C. 881; *Allred v. Smith,* 135 N.C. 450; *Talley v. Granite Quarries Co.,* 174 N.C. 447; *Alexander v. Cedar Works,* 177 N.C. 145; *Whichard v. Lipe,* 221 N.C. 54.

EMMA J. EMERY ET AL. v. G. V. HARDEE.

Removal of Action.

1. When there is an order for the removal of an action which is sufficient on its face, it will be conclusively presumed that the Court making the order, had before it in a legal way, facts sufficient to warrant the order.
2. The Court to which the action is removed, can consider only the sufficiency of the order, and not of the facts on which it is based.
3. When it is stated in the order, that the motion is heard *"as an affidavit,"* the implication is, nothing else appearing, that all the parties consented to accept the facts as if stated under oath.
4. It is within the power of counsel to consent that the Court might hear and consider the facts as if stated in an affidavit.
5. The leading purpose of The Code, Secs. 196-197, is to secure a fair and impartial trial; the affidavit is required to make the facts appear to the Court. But if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal.

CIVIL ACTION, heard on motion before *Avery, Judge,* at Spring (788) Term, 1884, of the Superior Court of NORTHAMPTON County.

This action was brought to the Spring Term, 1881, of the Superior Court of Halifax County. At the Fall Term thereof of the same year, the Court made an order removing the action to the Superior Court of Northampton County for trial, whereof the following is a copy:

"This cause coming on to be heard, on motion and as on affidavit of plaintiffs, it is ordered that it be removed to Northampton County for trial."

This order is subscribed by the Judge granting it, on the right hand side, and by the counsel for the plaintiffs and for the defendant, on the left hand side thereof.

Afterwards, at the Spring Term, 1884, of the latter Court, "the defendant moved to remand this case for trial to the Superior Court of Halifax County, upon the following grounds:

I. That the defendant had never assented to the removal to the county of Northampton.

II. That the order of removal was made by the Judge without hearing affidavits or other evidence as required in Sections 196 and 197 of The Code of Civil Procedure. Acts of 1879, ch. 45."

The Court denied the motion, and the defendant having excepted, appealed to this Court.

(789) *Messrs. John A. Moore and R. B. Peebles, for the plaintiffs.*
Messrs. T. N. Hill and W. C. Bowen, for the defendant.

MERRIMON, J., (after stating the facts). It is very clear, that if the order of the Court directing the removal of the action had omitted the words "as on affidavit," it would have been sufficient. In that case, the conclusive presumption would have been, that the Court had before it, and considered, facts duly appearing, that warranted the order. The Court to which the action is removed, ought only to see that there is an order of removal, sufficient on its face. This is sufficient to give it jurisdiction—indeed, it gives the jurisdiction. It is not the province of the latter Court to consider and determine the sufficiency of the facts upon which the order is founded—that is the province of the Court making it. If this were not so, the Court to which the action is removed, might always review, and in its discretion, reverse the action of the Court making the order, and thus put and keep in question in what Court the action is really pending. The law does not tolerate, much less authorize, such unseemingly practical absurdity. *State v. Seaborn,* 26 N.C., 305; *State v. Barfield,* 30 N. C., 344; *Boyden v. Williams,* 84 N. C., 608.

But it is insisted, that it appears upon the face of the order of removal in this case, that it was not founded upon proper facts appearing *by affidavit,* and therefore it is null and void.

The fair inference from the order, as it appears in the record, is, that the parties plaintiffs and defendant, agreed upon the facts, to be taken as if they had been embodied in an affidavit, upon which the motion to remove the action was based, and that the Court should determine their sufficiency to entitle the plaintiffs to the order. The latter recites that, "This cause coming on to be heard, on motion, and as on affidavit of plaintiffs," etc. Obviously, according to the course of practice, familiar to every intelligent practicing lawyer, this means that the cause came on in order for the hearing of the motion, and

the facts stated to support it, not appearing by affidavit, but taken as if so appearing. It is the common practice to do this (790) in plain cases, when the facts are not disputed, with a view to convenience and to save time. And when the Court declares that the case is heard "as on affidavit," the implication is, nothing to the contrary appearing, that all the parties consented to accept the facts as if stated under oath. This is so, generally. In this case, that implication is strengthened by the fact, that the counsel for the plaintiffs and defendant subscribed their names immediately under the order, at the left side of it, thus signifying directly their actual knowledge of and assent to the manner of hearing the motion, if not to the order itself.

It is true, the defendant swears that he did not authorize his counsel to assent to the removal. It does not appear that his counsel did so assent; he only consented that the Court might hear and consider the facts as if they were embodied in an affidavit, and it was within the scope of his authority as counsel to so consent. Counsel are not required to have special instructions from their clients as to the conduct of the action by them, after they are retained. It would be practically impossible for them to do so. The law contemplates that they shall be capable and honest men, and they are presumed to be so, nothing to the contrary appearing, and the nature of their duties in conducting actions before courts, requires that they shall be entrusted with important powers. Necessarily, they must be treated as representing and acting by and under the instructions of their clients.

The complaint of the defendant of one of his counsel, seems to be ungracious, to say the least, and, indeed, an after-thought, because, after the removal of the action, he ratified what had been done, by allowing the action to remain and proceed in the court to which it was removed, for several years before making any complaint, having in the meantime had subpœnas issued by the clerk for witnesses, offered an affidavit for a continuance of the action at one term, and consented to set it for trial at a term and on a day designated at another.

It is only essential, that facts sufficient shall exist and appear (791) to the Court to justify the removal of an action in a case like the present one. If they are admitted or if the parties agree upon them as if stated in an affidavit, this is sufficient, because it is the sufficiency of the facts appearing, that entitles the party applying to the order of removal.

The statute, (The Code, Secs. 196, 197), authorizes the removal of civil and criminal actions in the Superior and Criminal Courts to

adjacent counties for trial, when facts sufficient for such purpose appear by *affidavit*. But this statute must receive a reasonable interpretation, in the light of its purpose as well as of its terms. The leading purpose is, that there shall be a fair and impartial trial. The parties to the action are the parties in interest and to be affected. The statute, as to the affidavit required, refers to cases where the facts are not admitted by the opposing party, or are not agreed upon by the parties to the action. The essential purpose of the affidavit required, is to make the facts appear in a way designated by law, notwithstanding the contention and opposition of the opposing party. If, however, the latter party admits them—agrees that they do exist, then wherefore an affidavit also? Can it, in the nature of the matter, impart to them an essential legal quality they could not have, if admitted by the party interested to deny them. We do not think so. An admission of the facts is sufficient, and it is not necessary that they should be recited in the record or order of removal.

It is said the affidavit gives the jurisdiction to the Court to which the action is removed. This is a misapprehension of the law applicable. It is the order of removal that gives the jurisdiction to that court, and as we have seen, that order appearing upon its face to be sufficient, is conclusive. Any contest as to the facts upon which the order is based, must be had in the court where it is made.

We are therefore of opinion, that the Court properly refused to grant the order prayed for by the defendant.

(792) Speaking for myself and not for the Court, I am of opinion that this appeal ought to be dismissed, upon the ground that it does not lie at the present stage of the action.

It is obvious that the order appealed from, is not final in its nature and effect—it is only interlocutory, and it does not have the effect to destroy or seriously impair a substantial right of the defendant, if the ground of error assigned 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. He may be able to defend the action successfully in the Court where it is now. If so, he will be content; if otherwise, and his exception be well founded, he can have the error corrected after final judgment, when an appeal would bring up all errors assigned by the appellant in the course of the action for correction. This is the settled rule in criminal actions, and I can see no good reason why it should not prevail as well in civil actions.

It has often been decided that an appeal does not lie from an interlocutory order or judgment, except in cases where a substantial right

of the appellant might be lost or seriously impaired, if the appeal shall be delayed until final judgment. I am wholly unable to see why this wholesome and necessary rule shall not apply to such orders and judgments entered at any stage of the action. Of course, appeals lie from all judgments and orders that put an end to the action, no matter when made. *Lutz v. Cline,* 89 N. C., 186; *Jones v. Call, Ibid.,* 188; *Arrington v. Arrington,* 91 N. C., 301; *Torrence v. Davidson,* 90 N. C., 2; *Grant v. Reese, Ibid.,* 3; *Hicks v. Gooch,* 93 N. C., 111; *Welch v. Kinsland, Ibid.,* 281.

There is no error. To the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court. *It is so ordered.*

No error. Affirmed.

Cited: Clement v. Foster, 99 N.C. 258; *Ladd v. Teague,* 126 N.C. 547.

(793)

W. T. JUSTICE v. R. S. LUTHER.

Evidence—Estoppel.

1. An *ex parte* survey of the line in dispute, in the absence of the parties, and not ordered by the Court, is admissible in evidence, as tending to show where the line is.
2. When a line from "the Alder Springs to a post oak" has been fixed by the verdict of a jury, rendered in 1874, as the true line between the parties, and the location of the post oak being known, the only question on this trial was the location of the Alder Spring, as fixed by the verdict of 1874: *Held,* that the location of a white oak called for in a grant, issued in 1803, was inadmissible, the Alder Spring not being called for in this grant nor in any other grant or deed which was used in the trial in 1874, when the verdict was rendered.
3. The defendant offered to prove, by his own testimony, the contents of a paper writing executed in 1859, whereby plaintiff and one Logan (whose estate defendant owned) agreed to submit the controversy, in reference to this line, to arbitration, and to show the loss of this paper, proved that it was deposited with one Penly for safe keeping, who, upon being applied to for it, said it was lost; that said Penly was summoned as a witness, but had changed his residence to another State: *Held,* that this evidence was incompetent, because; 1st, the submission to referees was prior to the verdict of 1874, and, if it had any effect, it would be to control or affect the verdict as an estoppel; 2nd, before secondary evidence is admissible to prove the contents of a writing, its absence must be legally accounted for, and this is not done by showing the declaration of the party with whom

it was deposited, that it was lost, or that he had removed his residence from this into another State.

4. The report of the action of such referees is also inadmissible.

CIVIL ACTION, for the recovery of land, tried at Spring Term, 1883, of the Superior Court of BUNCOMBE County, before *Avery, Judge,* and a jury.

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

The case is sufficiently stated in the opinion of the Court.

Mr. Chas. A. Moore, for the plaintiff.

Messrs. T. F. Davidson and S. F. Mordecai, for the defendant.

(794) SMITH, C. J. This action, begun on August 26th, 1874, is prosecuted for the recovery of the possession of a small portion of land, alleged to be wrongfully withheld by the defendant, parcel of a tract specifically described in the complaint, and consisting of one hundred and ninety-one acres. No answer seems to have been made, or if made, it is lost, and not found in the record. After numerous continuances, the cause came on for trial before a jury, at Spring Term, 1883, of Buncombe Superior Court, when a verdict was rendered, in which they "find all the issues in favor of the plaintiff, and assess his damages at," etc.

The plaintiff, in support of his title, introduced in evidence:—

I. A grant issued November 24th, 1803, to Samuel Harris.

II. A second grant issued December 4, 1804, to the same.

III. A deed made July 20th, 1805, by Samuel Harris to James Patton and Andrew Erwin, for 120 acres, calling for the first grant, and purporting to convey part of the land contained in it.

IV. A deed dated December 14th, 1838, from James Patton to Wilson Green, for the land described in that next preceding deed.

V. A deed from Daniel Green, shown to be the heir-at-law of Wilson Green, who had died intestate, to the plaintiff, bearing date August 25th, 1870. Upon this state of the proofs it was admitted that the plaintiff showed a *prima facie* title to the land described in the last mentioned deed to himself.

To rebut this, the defendant relied on an estoppel, and in its support produced the record of a former action between the plaintiff and himself, with reversed relations, wherein he, the defendant, was plaintiff, and the present plaintiff was defendant, in a controversy about the title and boundary of the same land, and which action terminated in a verdict of the jury in these words: "That they find the issues in

favor of the plaintiff, and find the true line of Harris's tract, No. 1, to be from the Alder spring to the post oak, the beginning corner of No. 2."

Upon this verdict, judgment was rendered, and the plaintiff, (the present defendant,) put in possession under a writ issued for that purpose. In executing the writ, the deputy sheriff, one (795) Jones, caused the line to be run by one S. B. Gudger, a surveyor, from the post oak to the Alder spring, as understood to have been intended in the verdict, at which running the present plaintiff, being there part of the time, made no protest. There was no dispute as to the position of the post oak, as fixing the northeast corner of the second grant issued to Harris, but the controversy was as to the location of the Alder spring, between which terminal objects, a direct line formed the divisional boundary between the parties. The Court ruled, that the only inquiry for the jury to make, was as to the location of this line, and whether the defendant's possession extended over and south of it.

The testimony and exceptions taken to the rulings of the Court during the progress of the trial, which are before us on the appeal, are in substance as follows:

I. B. F. Patton, a witness for the plaintiff, testified, that he ran the line from the post oak to the spring known as the Adler spring, and that it passed through the defendant's enclosure, leaving about two acres south of it. The line so run since this action was brought, is north of that located by Gudger.

II. W. G. Candler, examined by the plaintiff, also stated that he went on the premises with one Culberson, in the absence of both parties, and after the suit was instituted, and ran the line from the post oak, to what is known as the Alder spring, the only spring whose water was used, and the locality of which is known as the Alder spring, and a part of the defendant's possession south of the line.

This testimony was received, after objection that the witness was not appointed by the Court to make the survey. It was competent to be heard, as is any other pertinent testimony tending to ascertain where the line is, while surveys made under an order of the Court, have of course greater weight, and as showing the precise contentions of parties, calculated and intended more to elucidate, than can be a mere *ex-parte* survey. But the latter is not for this reason to be excluded.

Andrew McAfee, for the plaintiff, testified that he was present (796) at the surveys of both the preceding witnesses, and that the defendant had about four acres south of the lines run, enclosed and

in cultivation in wheat; that he "uses water out of the spring that Patton and Candler ran to," and has done so "for thirty years;" that there is no other spring in that vicinity, and it "is known as the Alder Spring," and that he, the witness, conveys the water a short distance from the spring to a spout.

One Meredith Williams, and the plaintiff, gave similar evidence about the line run, and the defendant's possession South of it.

For the defendant, several witnesses were examined, the material import of whose testimony is this:

I. Jones, the deputy who executed the writ of possession, caused the line to be surveyed by Gudger, who was assisted by two chain-bearers, and put the plaintiff in that action in possession up to it. Justice was present some of the time and objected. Defendant's fence is on or near the line.

II. Samuel Gudger, in making his survey for the deputy, "began at the spout, and ran half-way towards the end, then he began at the post-oak, and ran west to about the centre, or half-distance of the entire line. The two lines were about thirty-five feet apart. He then ran from the post-oak, allowing one degree first, and struck the spout. The spout was selected, "because the waters from two sources converge there." Defendant's fence, run sometime afterwards, was north of the line. When witness first knew the place, no one used the water. There were then two springs or sources of branches. McAfee had not then moved to the locality. The spring, bearing his name, is about four rods north of the other, and between them, about equally distant from each, is the spout. There formerly was more marshy ground about McAfee's spring—there was no spring cleaned out. Alders grew around the other spring.

Upon cross-examination, witness stated that he ran neither to nor from any spring—has never known water used from any other
(797) spring but McAfee's, and these during late years have been known as the Alder Springs.

Culberson, seventy years of age and owning land in two miles of the place, has known the Alder Springs since he was a boy—it went by that name. When first known, there was no certain spot to get water—a marsh extending twenty or twenty-five steps. There are two streams. The spout is north of the centre of the marsh. The defendant then proposed to show where a white-oak tree was called for in the grant of 1803, and that it was 74 poles east of the Alder Springs, with a view of thus fixing the location of the latter. Neither this grant, nor any other grant or deed exhibited in evidence on the

trial of the first suit, called for the Alder Springs, nor did the grant of 1803 call for the post-oak, or, as alleged, reach it.

The plaintiff objected, on the ground that it was an effort to use the same testimony as that before the jury that rendered the former verdict, and to re-open matters there settled, and of which that verdict was conclusive. The evidence was ruled out, and for reasons entirely satisfactory. The sole question was, where was the Alder Springs, as intended in the verdict *when delivered* at Spring Term, 1874. To this issue the minds of the jury had been directed, by an early ruling in the cause. The verdict and corresponding judgment, spoke words applicable to the state of things then existing, and to the names which natural objects *then bore*. Where was the point designated as the "Alder Springs," from which the line was to run to the post oak, intended by the jury by their finding, was the sole question now to be determined in giving effect to the verdict.

The defendant then offered to prove by his own testimony, that a paper writing, made in 1869, by the plaintiff and Charles Logan, to whose estate he claims to have since succeeded, was entered into, to submit the matter now in controversy to R. L. Jones, J. T. Morgan and J. R. Jones; that it had been placed in the hands of one Penley for safe keeping, to whom defendant had applied for it, and who in answer said it was lost. That Penley had been summoned (798) as a witness, but he had removed from the State to Virginia afterwards; and that Logan had also removed, and his place of residence was not known. Notice had also been served on the plaintiff to produce the paper, but it had not been done.

Upon this preliminary showing, the defendant proposed to prove the contents of the writing from memory. The proposed evidence was rejected on objection, for the two-fold reason, that the paper was not shown to be lost, so as to let in secondary proof of its contents, and it would be irrelevant if the original were present. This ruling also meets our approval.

I. It will be observed that this suggested agreement for submission to referees, was before the institution of the first action, and its introduction would be to go behind the former verdict, and, if not to control, to affect it as an estoppel.

II. The loss of a paper, traced to the hands of a depositary, cannot be proved by his unsworn declaration of the fact. The evidence addressed to the Court, must be reasonably sufficient to account for the absence of the original, and this must be on oath, not mere hearsay.

III. Proof of the residence of the person in whose custody the writing is, or ought to be, in another State, does not warrant a relaxa-

tion of the rule, which requires the production of the original as the best evidence of its own contents. *Harper v. Hancock*, 28 N. C., 124; *Threadgill v. White*, 33 N. C., 591; *McCracken v. McCrary*, 50 N. C., 399.

Proof had been received from one of the referees, Joshua R. Jones, without objection, that himself and two other associates, did run a line between the plaintiff and Logan, when both of them and Penley were present. The defendants then offered their report, which, on objection, was ruled out.

The result is thus expressed.

"After two days' labor surveying and running lines, we agreed as follows: Beginning on a black oak sapling, in Peebles' line, and
(799) runs due East, passing thence between the said Charles Logan and said Justice's fields and premises, in a few rods of Logan's fence, to the terminus of said Logan's land, the line well marked by one of the referees, this to the best of our recollection.

J. R. JONES.
RUSSELL L. JONES.
J. T. MORGAN."

March 22, 1872.

"I certify, that on or about the time specified, I was engaged and did survey for the above referees, and did run the said division line between Dr. C. Logan and W. T. Justice.

DAVID M. GUDGER."

The evidence of the fact that this survey and running of lines was made, was received, and as far as the plaintiff's assent may be inferred from his presence, and the value of the evidence upon the point in controversy was before the jury for them to consider and weigh. But as the carrying into effect of a previous agreement to refer, the report was properly ruled out, and for reasons already suggested.

But we do not perceive what harm could come from the refusal to admit the award, or what relevancy it has to the question of the proper position of the springs. The jury locate them, and as no exceptions are taken to the want of evidence to determine their position, nor to any instructions from the Judge, there is no ground for disturbing the verdict, and the judgment must be affirmed.

No error. Affirmed.

Cited: Hampton v. R. R., 120 N.C. 539; *Andrews v. Jones*, 122 N.C. 667; *Peebles v. Graham*, 130 N.C. 262; *Avery v. Stewart*, 134 N.C.

297; *Green v. Grocery Co.*, 159 N.C. 121; *Mahoney v. Osborne*, 189 N.C. 450; *Teague v. Wilson*, 220 N.C. 242.

(800)

A. M. RIGGSBEE v. THE TOWN OF DURHAM.

Constitutional Law—Public Schools—Taxation—Discrimination Between the Races.

1. A law which directs the tax raised from the polls and property of white persons to be devoted to sustaining schools for white persons, and that raised from the polls and property of negroes to be used for the support of their schools, is unconstitutional and void.
2. The collection of a tax will be restrained, when the purpose for which it is to be expended is unconstitutional.
3. While some provisions in a statute may be unconstitutional and void, others may remain and be enforced, but the rule does not apply, when the constitutional and unconstitutional parts of the statute are conducive to the same object, and the dislocation of the unconstitutional part would so affect its operation, that the act would fail in an essential part.

MOTION to continue a restraining order to the hearing, in a case pending in the Superior Court of DURHAM County, heard before *Clark, Judge*, at Chambers in Greensboro, on February 19, 1886.

At the session of 1881, the General Assembly passed an act "to establish a graded school in the town of Durham," chapter 231, the provisions of which, so far as they relate to the present controversy, are in substance these:

The first section directs the submission to the voters of the town, of the question whether an annual tax shall be levied for the support of a graded school in the town, and prescribes the mode in which the popular will shall be ascertained.

The second section, in case of an affirmative vote, authorizes the imposition and collection by the town authorities, of a tax upon property and polls, not exceeding one-fifth of one per cent. upon the value of the former, and seventy-five cents upon the latter, within the town and subject to taxation, the proceeds of which, it is declared, "shall be applied exclusively for the support of a 'graded public school' and shall not be expended for any other purpose." (801)

Section three is in these words: "The special taxes thus levied and collected from the taxable property and polls of white persons, shall be expended in keeping up a graded public school for

persons of both sexes, between the ages of six and twenty-one years; and the special taxes thus levied and collected from the taxable property and polls of colored persons, shall be expended for the benefit of the colored schools for the colored children between the ages of six and twenty-one years."

The other sections of the Act, regulate the management of the school and the administration of the funds, and are not important in the present exigency. Nor is the principle involved, affected by the subsequent amendments. Acts 1883, chapter 377; Acts 1883, Private, chapter 106; Acts 1885, chapter 87, Private. An election was held, and a favorable vote taken, pursuant to which a graded school was set up for the education of white children only, to support which the taxes derived from white tax-payers were appropriated, while those from colored persons were distributed among the colored districts, which entered within the corporate limits of the town, in the general division of the county into separate school districts for the education of both classes of children. The county authorities accordingly fixed upon the maximum tax allowed by the enactment upon property, and upon sixty cents on the poll, preserving the constitutional equation between the two, which the act disregarded in imposing the limitations, and a tax list was made out and delivered to the town tax-collector, who was proceeding to levy and collect, when the present action was instituted by the issue of a summons against him and the other defendants, on the 13th day of February of the present year. The purpose of the suit, is to have a perpetual injunction against the enforcement of the tax, preliminary to the final hearing of which, the plaintiffs, upon notice, applied to Clark, Judge, on the 18th day of the same month, for an intermediate restraining order to prevent the collection.

(802) It was in evidence, in support of the plaintiff's motion, that there had been no graded school established in the town for colored children; that the town contains over two thousand inhabitants; that the territory embraced in the corporate limits of Durham, constitutes parts of three colored districts, into which the county is divided, and the school-houses in each are outside the town limits; that there are no school-houses therein for educating colored children, or into which they are allowed to enter; and that the taxes collected from that race, are distributed among the county colored districts, enuring as well to the benefit of colored children therein, who reside without, as to those who reside within the town. It was insisted for the plaintiff, that the Act, in its essential provisions and purposes, is in violation of the Constitutions of the United States and of this State,

in making unwarranted distinctions between the white and colored races, and that it is inoperative and void.

The Court rendered judgment as follows:

"This cause coming on to be heard, upon a motion by the plaintiff for an injunction, notice of motion having been duly served upon the defendants, and both parties being present, the complaint, (which is read as an affidavit,) and affidavit of plaintiff, and also affidavit of defendant being read, and it being agreed by both parties, that the statements in said complaint and affidavits shall be taken as facts admitted, (and they are found as facts by this Court,) and upon argument of counsel, the Court being of opinion:

1. That there is no irregularity or illegality in the mode of levying or collecting the tax complained of.

2. That clause 3 of the Act, (chapter 321, Acts of 1881), is unconstitutional and void, so far as it directs a discrimination between the races in the apportionment or appropriation of the fund raised by said tax.

3. That nothing in said Act, permits or authorizes the appropriation of the money raised by said tax, to the benefit of the public schools, or to any other purpose than for graded schools for the town of Durham.

It was ordered by the Court: (803)

1. That upon the plaintiff's executing a bond in the sum of $100, conditioned as required by law, a notice shall be issued to the defendant, by the Clerk of the Superior Court of Durham, that they, their agents and attorneys, are enjoined and forbidden, till the further order of the Court, from appropriating any of the proceeds of said tax, for the use and benefit of any object, other than the graded school of the town of Durham. And they are further enjoined and forbidden in apportioning said fund, to make any discrimination on account of race, or to apportion it in any other manner than as provided by Sec. 2655 of The Code.

2. The motion for injunction against the levying and collecting of said tax is denied."

Messrs. W. W. Fuller, John W. Graham and Thos. Ruffin, for the plaintiff.

Messrs. John Manning, James S. Manning, J. A. Long and R. C. Strudwick, for the defendant.

SMITH, C. J. (after stating the facts). We do not lay any stress upon the omission to designate the schools to which the money collected from colored tax-payers as "graded," as is done in directing the

application of the money derived from white tax-payers, but it is quite manifest that the statute means to furnish the increased educational facilities, resulting from the local assessment to the children of both classes resident in that town, and to confine the benefits to them. The departure from this requirement in the distribution of the taxes drawn from colored persons, is, in our opinion, at variance with the language and intent of the enactment. Moreover, the sanction of the voters, on which its efficacy depended, was given to the Act in the form in which it came from the hands of the law-making power, and not as it was interpreted and acted on by those who are charged with the disbursement of the fund.

(804) The Judge ruled that the third section of the Act, so far as it discriminates between the races in the apportionment of the fund, was repugnant to the constitution, and that it was not allowable to use it for any other than graded schools in Durham. But he declared that there was no irregularity or illegality in the mode of levying and collecting the tax, and refused to issue a restraining order to this effect. The ruling as to the discriminative features of the Act, is fully sustained by the decision of this Court in *Puett v. Commissioners, ante,* 709, and we do not propose to re-enter upon the discussion of the same matter in the present opinion. If the only purposes for which the taxes are to be levied and used, are condemned by the paramount law of the Constitution, and they cannot, when collected, be expended as the statute directs, why should they be raised at all? The moneys thus obtained, are but the means by which some supposed or real useful end is to be obtained; and if the proposed expenditure is forbidden, so must be the provision for raising the money to be thus used. The one is an inseparable incident of the other, and an essential and controlling element in the enactment. It matters not however regular and free from objection may be the prescribed method of levying the taxes, if, when collected, those paid by one race are to be separated and applied exclusively to the schools in which the children of that race are taught, the same discrimination in the disposition of the fund is made, as if the taxes had been raised by separate and distinct assessments upon the races. It is true, as was ruled by the Judge, the present assessment is uniform, and not obnoxious to one of the objections considered in the case referred to, but the essential objection remains, that there is "a discrimination in favor of, or to the prejudice of" one of the races. Const. Art. 9, Sec. 2, which renders the enforcement of the tax for such purposes illegal.

The Judge held, that while the moneys could not be used in the manner pointed out and commanded in the statute, they could never-

theless be collected, acting upon the proposition, that while some provisions of an enactment might be void, others might (805) remain and be enforced. The proposition is correct to a limited extent, as decided in numerous cases: *Berry v. Haines,* 4 N. C., 311; *McCubbins v. Barringer,* 61 N. C., 554; *Johnson v. Winslow,* 63 N. C., 552.

But it is otherwise when the parts of the statute are so interlaced and dependent one on the other, as uniting and constituting the whole, necessarily conducive to one and the same object, so that the dislocation of the illegal part would so affect its operation, as that the act would fail of its essential object, and could not be supposed, in its mutilated form, to effect the end intended by the enacting power. When such relations exist among the parts, as that they make one consistent whole, and each material to the efficacy of the statute in subserving its general object, it must stand as a unity, or fail altogether.

Judge Cooley states the proposition to be, that the unconstitutional do not affect the constitutional parts of a statute, "unless all the provisions are connected in the subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed that the Legislature would have passed the one without the other." Const. Lim., 178, 215, with cases cited in notes 2 and 3.

Such is clearly the relation to each other of the several sections which constitute this enactment. The money is raised for a specific object—the maintenance of one or more graded schools within the limits of the town—and it comes, in addition to other public burdens, from the resident tax-payers and taxable property therein. The great bulk of it is appropriated to a graded school for white children, the residue to such a school for colored children. The fund is divided by race distinctions, depending on the source from which the moneys are derived. This, as the Judge decides, is forbidden by the constitution, and as the object in view cannot be accomplished by using the funds as directed, or for any other purpose under the statutory requirements, it clearly ought not to be taken from the tax- (806) payers at all, because this is but a means of effecting an illegal end. We do not advert to the actual misappropriation of the tax from the colored persons to county school districts, since this is the wrongful act of agents employed in disbursing it, and may be corrected without impairing the force of the enactment. But the statute itself directs an illegal and unauthorized disposition of the fund, and this the popular vote approves, and therefore the restraining order ought to have

issued upon the facts shown. In this refusal there is error. Let this be certified to the Court below.

Error. Reversed.

Cited: Duke v. Brown, 96 N.C. 128; *Markham v. Manning,* 96 N.C. 133; *Greene v. Owen,* 125 N.C. 222; *Glenn v. Wray,* 126 N.C. 734; *Hooker v. Greenville,* 130 N.C. 474; *Lowery v. School Trustees,* 140 N.C. 39; *Bonitz v. School Trustees,* 154 N.C. 379; *Williams v. Bradford,* 158 N.C. 40; *Smith v. Wilkins,* 164 N.C. 145; *Keith v. Lockhart,* 171 N.C. 458; *Claywell v. Comrs.,* 173 N.C. 660; *Comrs. v. Boring,* 175 N.C. 111; *Minton v. Early,* 183 N.C. 202; *Galloway v. Board of Education,* 184 N.C. 247; *Story v. Comrs.,* 184 N.C. 340; *Leonard v. Maxwell, Comr. of Revenue,* 216 N.C. 98; *Lance v. Cogdill,* 238 N.C. 504.

STATE v. WILLIAM SNEED.

Convicts—Power to Farm Out—Escape.

1. The provisions of The Code, Sec. 3448, forbidding the hiring out of convicts, unless the Court before which such prisoner was convicted shall so authorize in its judgment, only applies to farming out convict labor to individuals and corporations, and does not extend to cases of convicts employed on public works, and under the supervision and control of public agents.
2. So where a prisoner confined in the public jail was used by the county authorities to work on the public roads, the person in charge of him was guilty of an escape for negligently allowing such person to make his escape.

INDICTMENT for an escape, tried before *Meares, Judge,* and a jury, at August Term, 1885, of the Criminal Court of MECKLENBURG County.

The defendant is charged with negligently permitting the escape of a prisoner, sentenced to imprisonment in the county jail, and under his care and control as guard. The jury rendered a special verdict, and find as follows:

(807) At August Term, 1883, of the Inferior Court of Mecklenburg County, Samuel Hutcheson was tried and convicted of larceny, and was sentenced to be imprisoned in the county jail, for the term of three years, at hard labor. He was thereupon committed by the sheriff to the jail, and before his sentence was terminated, he was removed by the county commissioners to a stockade, for the security of prisoners employed in working the public roads, provided for that

purpose by the commissioners. The convict was placed in custody of the superintendent of the stockade, who was hired to oversee prisoners there confined, and to supervise the work on the public roads, as directed by the commissioners, but was not under bond, nor a deputy of the sheriff, or a constable. The defendant was employed by the superintendent, with the commissioners' consent, as one of the guards at the stockade, to guard prisoners placed in charge of the superintendent, at a monthly salary. The convict had become what is known as a "trusty," and had been allowed to pass in and out of the stockade at all times, without hinderance.

In June, 1885, the then acting superintendent, who had succeeded the former appointee, on leaving the stockade in the evening, with defendant in charge, specially directed the defendant, to let no one pass in or out of the enclosure, without his own permission. On the defendant's saying such a course would be hard on the prisoners, the superintendent replied, that he must obey the order. During the night, the convict was allowed by the defendant to pass out at his request, and on his saying he would be back in a minute, but did not return, and thus made his escape.

Upon the foregoing, the substantial facts found by the jury, the Court was of opinion that the defendant was guilty, and so adjudged, imposing a fine of fifty dollars. From this ruling the defendant appealed.

Attorney General, for the State.
Mr. W. P. Bynum, for the defendant.

SMITH, C. J., (after stating the facts). The Act of March (808) 6th, 1867, ch. 196, without the concluding *proviso* as found in The Code, Sec. 3448, was in force when the case of the *State v. Shaft,* 78 N. C., 464, was decided, at February Term, 1878, and in which it is held, that a prisoner, undergoing a sentence of imprisonment in the county jail for six months, for the offence of fornication and adultery, could be lawfully farmed out, and hired to his wife. In the opinion, *Rodman, J.,* makes the suggestion, in view of the possible mischief of a provision, unrestrained in its terms, and which authorized the employment of convict labor "for *individuals* or corporations;" that the Legislature might see fit to amend the law, by leaving it to the Judge to say, in his sentence, whether the prisoner may be hired out or not; or by allowing the hiring, only when the prisoner shall be in prison for non-payment of a fine.

The suggestion seems to have attracted the attention of the General Assembly, and in the amendatory Act of March 13, 1879, ch. 218, this

clause was added, as a third *proviso:* "It shall not be lawful to farm out any such convicted person, who may be imprisoned for the non-payment 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." The Code, Sec. 2448.

This proviso must therefore, have been intended, as argued by the Attorney General, to apply and be confined to the farming out of convict labor to "individuals or corporations," the danger of abuse of which power, conferred without restraint, was made manifest in the case referred to. It does not extend to labor employed upon public works, and under the supervision and control of public agents.

The next two sections look to a similar employment of convicts in the penitentiary, under a written contract with the county and municipal authorities, and while they are to "be fed, clothed and quartered while in such service," by the board of directors or managers of the penitentiary, as in the case of the hiring of convicts to rail-
(809) road companies, it is expressly provided, that if any person, charged in any way with the control or management of such convicts, shall negligently permit to escape, or shall maltreat them, every person so offending shall be guilty of a misdemeanor," etc., Sec. 3450.

While this provision primarily applies to escapes of convicts committed to the penitentiary, and employed by the county or municipal authorities in public works, it is in our opinion, but declaratory of a principle equally pertinent to convicts taken from the county prison, and placed in charge of guards or other superintending county or municipal officers. It is in each, a breach of public duty, and as much so in reference to the one as to the other class of convicts, allowed negligently to make their escape. The prisoner was in the lawful and immediate custody of the defendant, whose duty was to maintain that custody, and he is amenable to a criminal prosecution for wilfully allowing his escape. 2 Whar. Cr. Law, Sec. 2609.

We shall not repeat what has been said in *State v. Garrett Johnson, post,* 924, in considering a similar accusation against a guard for permitting an escape of a prisoner, whose good conduct had raised him to the dignity of being a "trusty," as in the present case, and who had in like manner betrayed the confidence reposed in him, and forfeited his newly-acquired good name. The escape here, was the result of the direct voluntary act of the defendant, and in disregard of the command of his superior.

There is no error. Let this be certified.

No error. Affirmed.

Cited: *S. v. Yandle,* 119 N.C. 880.

STATE v. SAMUEL BLACK.

Indictment—Keeping Gaming-house—Appeal.

1. The statute allows the defendant to appeal from any final judgment that may be rendered against him. This right is not forfeited by failing to appear at the trial term after verdict was rendered against him.
2. A *gaming-house* is a house or room, kept by the owner or occupier for the purpose of inducing, or permitting persons to resort thither, and play therein at games of cards or other games for money or thing of value.
3. It is not necessary to charge in express terms or to prove that the games played were games of chance.
4. Nor is it any defence that it is the defendant's dwelling-house or sleeping chamber, if the facts are proved which constitute a *gaming-house.*

INDICTMENT for keeping a gaming-house, tried before *Meares,* (810) *Judge,* at June Term, 1885, of the Criminal Court of MECKLENBURG County.

The proof was, that the defendant leased, occupied and controlled two adjoining rooms in the second story of a building, situated in the city of Charlotte, for some months. That one of the rooms contained two beds, and the other, bed-room furniture. While these rooms were occupied and controlled by defendant, many persons, numbering from five or six up to as many as forty, frequently assembled therein, both by night and by day, for the purpose of betting money on games of cards played therein. The defendant was usually, but not always, present when these games were played, and, when present, controlled the games and the rooms. Money was staked and bet on several kinds of games of cards on frequent occasions by the persons so assembled, but the game most frequently played was called *poker.* The defendant, when present, acted as banker in these games of poker, selling chips at a certain price, which the purchasers would bet at the games of poker, and after the game was finished, the holders of these chips would have them cashed (in money) by defendant.

The counsel for defendant asked the Court to instruct the jury as follows:

1. That there is no evidence that the games played were games of chance, and that therefore the jury cannot convict under this bill of indictment.

2. That if the jury were satisfied that the rooms were rented and used for a sleeping apartment and dwelling, then, notwithstanding money was allowed to be bet at cards therein frequently, the defendant would not be guilty.

(811) The Court refused the instructions prayed, and counsel for defendant excepted.

The Court charged the jury, that a gaming house was a public nuisance at common law, and that a gaming house was a house in which persons are induced or allowed by the owner, or occupant thereof, to assemble frequently in large or small numbers, and to bet money on the result of games played therein. That is was a question of fact to be decided by the jury, whether the defendant kept such a house. That if the jury were satisfied, beyond a reasonable doubt, that the defendant hired and controlled the rooms mentioned, and did induce or allow persons to assemble in numbers from five or six to forty, and to bet money on games of cards in these rooms, or to buy chips from him, and to bet these chips frequently on games of cards, and to cash the chips with money after the games were finished, in the manner described by the witnesses, that these facts would constitute a gaming house, although one of the rooms was also used for the purpose of a bed-room, and the defendant would be guilty.

The jury returned a verdict of guilty. The defendant was afterwards called, in order that the Solicitor might pray judgment of the Court against him, but did not appear, and the case was continued until the August Term of the Court, and no motion was made in it. At the August Term, 1885, of the Court, the defendant appeared, and his counsel moved for a new trial, on the ground that the Court had refused to give the instructions asked for by defendant. Motion refused, and defendant's counsel excepted.

The Court pronounced judgment on the verdict, from which the defendant appealed.

Attorney-General, for the State.
No counsel for the defendant.

MERRIMON, J. The objection, taken in this Court for the State, that the appealed did not lie, is groundless. The statute, giving

(812) the right to appeal, is broad and comprehensive, and gave the defendant the right to appeal from any final judgment, given against him, whenever the same was entered in the course of the prosecution. He did not forfeit his right of appeal by failing to appear at the trial Term, after the verdict of guilty. There is no statute, nor

is there any principle of law, under which such supposed forfeiture could be incurred. Indeed, the right of appeal did not arise until the judgment was entered. The law permits the errors assigned by the defendant, if well founded, to be corrected by this Court, notwithstanding his default.

The defendant is indicted for the common law offence of *keeping a common gaming house.* A house so kept, is a public nuisance. The natural tendency of it is to corrupt and debauch those who frequent it. It gives rise to cheating, and other corrupt practices; it incites to idleness, encourages dishonest ways of gaining property, and brings together, for unlawful and vicious purposes, numbers, greater or smaller, of idle and evil disposed persons, who corrupt others, especially younger persons, who might otherwise be honest, industrious, and useful people. The essential effect of a house kept for such a purpose, is detrimental to sound morality, and contravenes the well being of society.

Such a house is one kept for the purpose of permitting persons to resort to it, and gamble therein, for money or other valuable thing. Hence, if a person shall keep a house, a room, or other like place, for the purpose of inducing or allowing other persons to frequent the same, in small or large numbers, to bet on the result of games played and engaged in, at cards or other like devices, for money or other thing of value, such person will be guilty of keeping a gaming house. It is the keeping—using—the house, or like place, for gaming purposes, that determines its character. The manner of fitting it up, does not constitute a house such a house; but this might be evidence of the purpose and use to which it is devoted. The fact that the keeper has his bed, or takes his meals in the room where the gaming is done, does not necessarily change the character of the house. One might turn his dwelling house, his sleeping chamber, his office building, or (813) business house, into a gaming house, by inducing or allowing persons to resort thither, from time to time, for gaming purposes. It is not gambling, *per se,* that constitutes the offence; it is the keeping of the house, or other like place, for the purpose of gaming, and inciting or allowing persons, few or many, to resort there, from time to time, for that purpose; this makes it such a house, and constitutes it a public nuisance.

It is not necessary to charge in terms in the indictment, that the games played were games of chance. This is sufficiently implied, in charging that the defendant kept "a certain common gaming house," etc., "and then and there, unlawfully and injuriously, did cause and procure, divers idle and ill-disposed persons, to frequent and come together, to game, and play at cards for divers large and excessive

sums of money, etc., etc. Nor is it essential that the games should be played by using ordinary gaming cards. This may be done by other means and devices as well.

The instructions given by the Court to the jury, were fully warranted by the evidence. Manifestly, there was evidence going to show that games of chance were played in the house as charged.

As to the second instruction prayed for, there was no positive evidence that the chambers were used as sleeping apartments, or a dwelling place. The facts, tending to show this by implication, were the presence of beds and chamber furniture. But this did not, as we have seen, change the character of the rooms, if they were kept for gaming purposes. The Court plainly told the jury, that in order to find the defendant guilty, they must find that the chambers were kept for such purposes. 1 Russ. on Crimes 326; 1 Bish. Cr. L., Secs. 1070, 1072; Whar. Cr. Prec, 736, *et seq.*

There is no error. To the end that the judgment may be affirmed, let this opinion be certified to the Criminal Court, according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Morgan, 133 N.C. 745; *S. v. Everhardt,* 203 N.C. 615, 616.

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(814)

STATE v. LAFAYETTE GAY.

Evidence—Handwriting—Witness—Degrading Questions.

1. Where a witness to prove that a certain letter was in the handwriting of the defendant, testified that he had often seen the defendant write, and knew his handwriting, he is competent to express an opinion as to whether the letter in controversy was written by the defendant.
2. In all cases, questions tending to disparage or disgrace a witness may be asked, provided they are limited to particular acts, but even then, when it is apparent to the Court, that they are put merely for the purpose of annoying or harassing the witness, the trial Judge may in his discretion, refuse to compel him to answer, but such refusal is a legitimate subject of comment before the jury.
3. Where a witness was asked, with a view to discredit him, whether he had ever had sexual intercourse with any woman except his wife, since his marriage; *It was held,* that the question was too general and was not allowable in this form, and that it was not error to refuse to compel the witness to answer.

4. Where the Judge admits evidence to which exception is made, and afterwards excludes it, and instructs the jury not to consider it, the exception to such evidence will not be considered in this Court.

5. Where his Honor charged the jury, that evidence had been offered to show that a witness had been for many years a man of unblemished life, (as had been offered as to a witness in the case), those years, if the jury believed the evidence, in which he had trod the paths of truth and probity, should speak for him, but he further charged, that the jury were the sole judges of the facts, and they could believe or disbelieve any or all of the testimony: *It was held*, not to be any expression of opinion, and free from error.

6. It is not error for the Judge to state to the jury a proposition which is universally admitted, and so it is not error for him to say to them, that the testimony of a witness who proved a good character, is entitled to more weight than the testimony of one who has been shown to be of bad character.

INDICTMENT, tried before *Clark, Judge,* and a jury, at November Special Criminal Term, 1885, of WAKE Superior Court.

The defendant Lafayette Gay, and one Mary Patterson, were jointly indicted and tried for the offence of fornication and adultery.

One Strickland, a State's witness, testified that he had on several occasions seen the two defendants lying together on the same bed.

Other witnesses for the State, testified to circumstances tend- (815) ing to show adulterous intercourse between the two defendants.

For the defence, the female defendant was introduced as a witness, and swore that the State's witness (Strickland) was the father of her child, then aged about twelve months; that he, (Strickland,) was the only person that had ever had sexual intercourse with her; that she had allowed his sexual embrace five times, and that she refused to permit them any further, although no quarrel or unkind feeling had arisen between her and him.

The State introduced as a witness, one Hunter, who testified that said female defendant had admitted to him, that the defendant Gay was the father of her said child. The State then proposed to produce in evidence, a certain letter addressed to the witness Hunter, and received by him from the post office, which letter was dated at Atlanta, Georgia, and signed "Lassiter." In this letter, the writer expressed a desire to see the said female defendant and her baby, and a request to Hunter to have them sent to him at Atlanta. Preliminary to putting the letter in evidence, the witness was asked if he had often seen Gay write, and if he was therefore acquainted with his handwriting. To this, the witness answered, that he had often seen the defendant Gay writing at the counter in Gay's store—Gay standing on one side of the counter, and witness on the other—and that he

thought from his having seen him writing on such occasions, that he knew his handwriting; that he could see the writing plainly, although he had not given the writing on such occasions a very close examination. The evidence was objected to by the defendant Gay, but the objection was overruled, and the evidence was admitted. The witness then testified that he knew no such person as the Lassiter named, and that the handwriting of the letter, and the signature, were in his opinion, the defendant Gay's, and the letter was allowed to be read, and the defendant Gay excepted.

Preliminary to the admission of said letter, J. G. Brown testified,
as an expert, without objection, on comparison of the writing
(816) with the writing of said Gay, admitted to be genuine, that in
his opinion the letter was in the same handwriting.

George H. Snow, a witness for the State, testified that the character of the witness Strickland was excellent. On cross-examination, he was asked by the defendant's counsel, if he had seen an article in a Charlotte newspaper, stating that the witness Strickland had gone to Atlanta, Georgia, with a requisition for the arrest of the defendant Gay, and that having arrested Gay, he allowed him to escape at Charlotte; and that he, the witness Strickland, was the seducer of a young girl named Hicks, whom he brought back home from Atlanta with him. To this, the witness answered, that he had seen the article, but did not believe a word of it.

Then the witness Strickland was recalled, and testified that he was not the father of the child, and never had had any sexual intercourse with the female defendant. He was asked, on cross-examination, if he had never had sexual connection with any woman, except his wife, since he was married, which he declined to answer, upon the ground that it tended to criminate and degrade him; and the Solicitor for the State objected to the question. The counsel for the defendant, asked the Court to compel the witness to answer, stating that the question was asked to discredit the witness. This was refused by the Court, and the defendant excepted. The witness Strickland, was then asked by the counsel for the defendant, if he had not seduced the young girl Hicks, and run her off to Georgia. To this he answered he had not, but that she had been abducted from his house and carried there. On further cross-examination, he was asked if he had not gone to Atlanta, with a requisition for defendant Gay, from the Governor of this State, and after capturing Gay, allowed him to escape at Charlotte, and to this he answered, that he had arrested Gay on the requisition, and that Gay had escaped from him at Charlotte, but without his knowledge or consent. On the re-direct examination, he

was asked to explain all about the capture of Gay, and the manner of his arrest and escape, which was objected to by the (817) defendant, objection overruled and defendant excepted. The witness then testified, that he proceeded to Atlanta with the requisition for the defendant Gay; that he captured him there, and also found the girl Hicks there; that the defendant Gay employed counsel on his being arrested, and that the girl Hicks informed him, (witness), in Gay's presence, that he, Gay, had influenced her to say to Gay's lawyer, and agree to testify, that the witness had seduced her, and to say further, that the witness had made a conspiracy with her to have Gay arrested under a false charge; that as soon as the girl made this confession to witness, the defendant Gay demanded of her certain money, which she then said to witness, in Gay's presence, that Gad had given her to swear falsely against witness. Exception by defendant.

The Court ruled out all the evidence elicited by the defendant regarding the newspaper report, and all the testimony of Strickland called out by the State in reply, regarding the arrest and escape of Gay and the declarations of the girl Hicks, and instructed the jury not to consider the testimony so ruled out.

Among other things in regard to the character of a witness, the Court charged the jury, that it was a rule of law, based upon ordinary observation in life, that in passing upon contradictory statements, men could take into consideration the character of the parties making such statements; that when testimony had been offered to show that a witness had been for many years a man of unblemished life, as had been offered as to the witness Strickland, those years, (if the jury believed the evidence), in which he had trod the paths of truth and probity, should speak for him; and if the jury believed that the character of the witness was bad, they were entitled also, to consider that; but notwithstanding that, the jury are the sole judges of the facts, and could believe the whole, or a part of any witness' evidence, or reject it altogether, according to the convictions made upon their minds of the truth of his statements. The defendant excepted to this part of the charge, upon the ground that it was an intimation by the Court upon the weight of the evidence of the witness Strick- (818) land.

There was a verdict of guilty, and judgment, from which the defendant Gay alone appealed.

Attorney-General for the State.

Mr. Thos. M. Argo for the defendant.

ASHE, J., (after stating the facts). The first exception taken by the defendant, was to the admission by the Court of the testimony of Hunter, as to the genuineness of the handwriting of the defendant Gay.

We think the testimony of the witness Hunter, came up to the requirements of the law in such cases. He testified that he had frequently seen him writing, and that he knew his handwriting, and it was his opinion that the letter offered in evidence was in the handwriting of the defendant Gay.

The next exception, was to the refusal of the Court to compel the witness Strickland to answer the question propounded to him on cross-examination by the defendant, "if he had never had sexual intercourse with any woman, except his wife, since he was married." The character of the witness had been proved to be excellent, and when this question was propounded, he refused to answer, on the ground that it tended to criminate and disgrace him. The question was put, as stated by defendant's counsel, to discredit the witness. The Court refused to compel the witness to answer.

On this question, there has been a very great diversity of opinion, both in the Courts and among text writers. In this State, while it has been held that a question may be asked a witness which tends to degrade him or bring him into disgrace, it has not been directly decided that he shall be compelled to answer such questions. The case of *State v. Patterson,* 24 N. C., 346, and *State v. Garrett,* 44 N. C.,
357, were cited by the defendant's counsel, as sustaining the
(819) doctrine. In the former case, the question was referred to as doubtful, and was not directly presented, and the Court on that point only say, that "questions to a witness, tending to disparage or disgrace him, may be asked, and cannot be objected to by the opposite party. Whether the witness is bound to answer them, is doubtful." In the latter case, the Court, referring to the case of *State v. Patterson, supra,* says, "it is settled by that case, that such a question may be asked, and the Court in that case were inclined to the opinion, though they did not so expressly decide, that when the question tended only to the disparagement or disgrace of the witness, but not to expose him to a criminal prosecution, he was bound to answer," and in *Garrett's case,* the Court goes no further than to say: "We are inclined to think with the very eminent Judges who decided the case of *State v. Patterson,* that it follows as a necessary consequence, that the witness is bound to answer. But if that be not so, and it is admitted that the witness may refuse to answer, yet we hold that such refusal is the proper subject of comment to the jury." Yet, notwithstanding these observations by the Court in that case, the witness was not

compelled to answer in the Court below, and its ruling was sustained by this Court. So that, without any decision on the question, we have only the intimations of the Court, and with that exception, it is an open question in this State.

Mr. Wharton, in his work on *Criminal Law*, says: "The weight of authority seems to tend to the opinion, that when the transaction to which the witness is interrogated, forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character." On the other hand, it has been held, that "when a witness is asked a question, the answer to which would disgrace him, but could have no bearing on the issue, except so far as it might impeach his credibility, he is privileged from answering," and he is supported in this view of the law by Mr. Greenleaf and Mr. Taylor, see 1 *Greenleaf on Evidence*, Sec. 1313, and in Sec. 1314, the author gives expression to his own opinion as follows: "No doubt, cases may arise, when the Judge may, in the exercise (820) of his discretion, very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discredible transactions of a remote date, might, in general, be rightly suppressed, for the interests of justice can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions of alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them, would not be a man of veracity, might very fairly be checked."

This we think is a reasonable solution of the difficulty in coming to a correct conclusion from the conflicting opinions on this question, and the rule to be deduced is, that in all cases, questions tending only to disparage or disgrace a witness, may be propounded, provided they are limited to particular acts, but even then, when it is apparent to the Court that they are put for the purpose merely of annoying or harassing the witness, the Court may, in its discretion, refuse to compel him to answer them—though should the witness decline to answer, his refusal may be a legitimate subject of comment before the jury. But in no case do we think it is allowable to put such a question in the general form in which it was propounded in this case.

The third and fourth exceptions are not to be considered, as the Court ruled out all the evidence upon which they are founded.

The last exception of the defendant, was to that part of his Honor's charge, in which he alluded to the testimony of Strickland, upon the

ground as alleged, that it was in violation of the Act of 1796. We do not think the charge is obnoxious to the objection.

The witness Mary Patterson, had sworn that Strickland had had connection with her, and was the father of her child. The witness Strickland swore that he was not the father of her child, and had never had sexual intercourse with her, and his general character
(821) was proved to be excellent, and after the witness Mary Patterson had sworn that Strickland was the father of her child, it was testified by the witness Hunter, that she had admitted to him that Gay was the father.

In charging the jury, his Honor, in substance, told them in the outset, that he had no right to express an opinion upon the weight of the testimony. That when a witness had proved a good character, as Strickland had done, it was a matter for the jury to take into consideration, and so when a witness' character was shown to be bad, that was a matter also to be taken into consideration, but, notwithstanding that, they were the sole judges of the facts, and could believe the whole or a part of the evidence of any witness, or reject it altogether, according to the conviction made upon their minds of the truth of the witnesses.

He refrained from expressing an opinion upon the weight of the testimony. But even if his charge could be held to mean, that the testimony of a witness who had proved a good character, was entitled to more consideration than that of a witness who is shown to be of bad character, it is a proposition in accordance with the experience of all men.

It cannot be error to state a proposition to the jury, which is universally admitted.

There is no error. Let this be certified to the Superior Court of Wake County, that further proceedings may be had according to law.

No error. Affirmed.

Cited: S. v. Sidden, 104 N.C. 846; *Byrd v. Hudson,* 113 N.C. 212; *Davis v. Blevins,* 125 N.C. 435; *Meadows v. Telegraph Co.,* 131 N.C. 77; *S. v. Little,* 174 N.C. 802.

STATE v. LAFAYETTE GAY.

Certiorari.

1. When it is suggested that the case on appeal is inaccurately made out, the most that the Supreme Court will do, is to remand the case, or award a *certiorari*, in order that the Judge, if he sees proper, may make the correction.
2. The case on appeal must be accepted as conclusively true, when made out by the Judge upon disagreement of counsel, and the Supreme Court will not grant a *certiorari* to force the Judge to make up a new case and insert matters therein, alleged by counsel to have been omitted.

PETITION for a *certiorari*, heard at February Term, 1886, of the (822) Supreme Court.

The cause was tried before *Clark, Judge,* and a jury, at November Special Criminal Term, 1885, of the Superior Court of WAKE County.

To sustain his application, the petitioner states, that on his appeal, his counsel prepared the case containing his exceptions to the rulings of the Court, and submitted it to the Solicitor, upon whose objections it was laid before, and settled by the presiding Judge. That among his exceptions, taken at the trial, was an exception to certain evidence offered for the State, and received as competent; that it became the subject of comment by counsel before the jury, and was considered by them in making up their verdict; that the case prepared by the Judge, and filed with the record, erroneously represents that the objectionable evidence was withdrawn, and the jury instructed not to consider it, whereas, it was not so withdrawn, and the Judge is mistaken as to his own action in the premises: that while he did intimate to the counsel an opinion that it was incompetent, and ought to be stricken out, yet it was not done.

Attorney-General, for the State.
Mr. T. M. Argo, for the defendant.

SMITH, C. J. (after stating the facts). We do not propose to consider the manner in which the case on appeal was made up, as the subject matter has been examined in another similar application presented at this Term.

Divested of this feature, the case made in support of the application for the writ of *certiorari* is simply this: The Judge says that the testimony objected to when admitted, not alleged to be material, not set out so that we can see that it is so in the petition, (823) was recalled, and the jury directed not to consider it. The

defendant says it was not recalled, but passed on. This issue of fact as to what transpired at the trial, we are asked to determine adversely to the Judge, and to award a mandate to the Judge, the Solicitor and the Clerk, requiring them "to prepare and transmit to this Court, a true and perfect copy of the record," and also with it "a full statement of the case on appeal, setting forth what was said and done in the premises."

The absurdity of such a demand, and the inevitable consequences of yielding to it, in subverting the relations of this, as an Appellate Court to review and correct errors of law, to the Court below, is the only answer required to it. Facts are finally and conclusively determined in the Court, whose rulings of law are to be revised, not more when found by the Judge acting within the sphere of his jurisdiction, than when ascertained by a jury, upon an issue submitted to them. Especially is and must this be so, in reference to incidents attending the trial and the action of the Court. The case when made up by the Judge, when the counsel of parties cannot agree and the duty of settling it devolves upon him, must be accepted as conclusively true, and the utmost which this Court can do, upon a suggestion that an *unintentional* omission or mistake has occurred, is to remand the cause, or award the *certiorari* to give the Judge an opportunity, *if he thinks proper,* to make a correction, as was suggested and pursued in *McDaniel v. King,* 89 N. C., 29.

The application is denied, and the petition dismissed.

Motion denied.

Cited: Mayo v. Leggett, 96 N.C. 241; *S. v. Sloan,* 97 N.C. 501; *Boyer v. Teague,* 106 N.C. 574; *S. v. Harris,* 181 N.C. 608; *S. v. Thomas,* 184 N.C. 667.

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(824)

STATE v. E. K. CUNNINGHAM.

Assault and Battery—Pleading—Practice—Jurisdiction.

1. When the defendant files no plea, no issue is joined, and the verdict of the jury is a nullity, and no judgment can be pronounced on it.
2. The Superior Court has original jurisdiction of assaults and batteries: 1st, when a deadly weapon is used; 2nd, when serious damage is done; 3rd, when the offence was committed six months before the indictment was found, and no justice of the peace has taken cognizance of the offence.
3. When the indictment is found in the Superior Court within less than six months after the offence is committed, and verdict is rendered for a simple

assault, the Court will proceed to judgment; but to give jurisdiction *in such cases*, the indictment must charge the offence to have been committed with a deadly weapon, and must also set forth the character of the weapon, or must charge that serious damage was done, and set forth the nature and extent of the injury sustained.

4. If these averments are not made, and defendant pleads not guilty, and the jury find that the offence was committed less than six months before the indictment was found, the indictment should be quashed; but if this fact is not so found, the Court would have jurisdiction of the simple assault and could pronounce judgment.

INDICTMENT for an assault and battery, tried before *Gilmer, Judge*, at Spring Term, 1885, of MACON Superior Court.

The indictment was as follows, to-wit:

"The jurors for the State, upon their oath present, that E. K. Cunningham, in Macon County, on the 22d day of September, 1884, in and upon one J. M. Davis, then and there with a certain deadly weapon, to-wit: a——, unlawfully and wilfully did make an assault, and him, the said J. M. Davis, there and then, unlawfully and wilfully, did beat, wound and seriously injure, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The jury returned the following verdict:

"The jury empaneled in this case, find that in the month of September, 1884, the defendant, by reason of insulting words used to him by the prosecutor, struck him with his fist; that at the (825) Superior Court held afterwards, in the same month, September, 1884, this indictment was found. Upon this state of facts, if the Court is of opinion that the defendant is guilty, the jury find him guilty; but if the Court is of the opinion that the defendant is not guilty, the jury find the defendant not guilty."

Upon this finding of the jury, the Court held that the defendant was not guilty, and the Solicitor for the State appealed from this ruling to the Supreme Court.

Attorney General for the State.

No counsel for the defendant.

ASHE, J., (after stating the facts). There is manifest error in the judgment of the Superior Court. First, for the reason that there was no plea filed by the defendant, and therefore no issue to be submitted to the jury, and consequently the verdict returned by them was a nullity; and it must follow as a necessary consequence, that no judgment could be pronounced upon such a verdict; and, secondly, because

the Superior Court had no jurisdiction of the case, unless the assault was committed more than six months prior to the finding of the bill of indictment, and no Justice of the Peace had, in the meantime, taken cognizance of the case. By Sec. 892 of The Code, exclusive original jurisdiction is given to the Justices of the Peace, of "all assaults, assaults and batteries, and affrays, where no deadly weapon is used, and no serious damage is done," but it is further provided, "that nothing in this section shall be construed to prevent the Superior Court from assuming jurisdiction of all offences, whereof exclusive original jurisdiction is given to Justices of the Peace, if some Justice of the Peace, within six months after the commission of the offence, shall not have proceeded to take official cognizance of the same." This section should be considered in connection with Sec. 922, which defines the jurisdiction of the Superior Court in criminal matters. The construction given to these sections is, that where an indictment
(826) in the Superior Court, charges an assault with a deadly weapon, and a verdict is rendered for a simple assault, the Court will proceed to judgment, although six months have not elapsed since the commission of the offence. *State v. Ray,* 89 N. C., 587; *State v. Reaves,* 85 N. C., 553. But to give jurisdiction in such a case to the Superior Court, the indictment should contain the proper averments, not merely that the assault was committed with a deadly weapon, or that serious damage was done, but it must set forth the character of the weapon used, or the nature and extent of the injury sustained. *State v. Moore,* 82 N. C., 659; *State v. Russell,* 91 N. C., 624.

The indictment in the case before us, is radically defective, in the absence of these essential averments. It charges that an assault was committed with a deadly weapon, and that serious damage was done, but it fails to state the *character of the weapon* used, or the *nature and extent* of the injury alleged to have been inflicted, and by reason of the omission of these averments in the indictment, which were necessary to give the Superior Court jurisdiction, we are of the opinion that it was error in that Court to render a judgment in the case, without submitting to the jury an issue raised by the plea of the defendant, so that the defendant might show, as matter of defence, that the offence was committed within six months before the indictment was found.

The Court should have required the defendant to plead "guilty" or "not guilty." In the former case, the Court might have rendered judgment at once, and in the latter, the issue raised by the plea should have been submitted to the jury, when the defendant might show that the offence was committed within six months before the finding of the

bill; and if the fact had been so found, the indictment should have been quashed; but if the fact should not have been so found, then the Court would have had jurisdiction of the simple assault, and might proceed to judgment.

We are of the opinion there was error, and the judgment of the Superior Court is reversed, and the case remanded, that it may be proceeded with according to the regular and orderly practice (827) of the Court.

Error. Reversed and remanded.

Cited: S. v. Shelly, 98 N.C. 679; *S. v. Earnest,* 98 N.C. 742; *S. v. Porter,* 101 N.C. 715; *S. v. Fesperman,* 108 N.C. 770; *S. v. Kerby,* 110 N.C. 559; *S. v. Wynne,* 116 N.C. 985; *S. v. McLamb,* 188 N.C. 804; *S. v. Beal,* 199 N.C. 304; *S. v. Rice,* 202 N.C. 413; *S. v. Myrick,* 202 N.C. 690; *S. v. McKinnon,* 223 N.C. 166; *S. v. Farrell,* 223 N.C. 806; *S. v. Jenkins,* 234 N.C. 114.

STATE v. BYTHA WALLACE.

Public Local Statutes—Sale of Liquor—Indictment.

1. An Act prohibiting the sale of liquor within a certain distance of a locality named in the Act, is a public local statute, and need not be specially averred in an indictment under the Act.
2. On the trial of an indictment for selling liquor under this Act (Laws of 1885, ch. 175, sec. 34), evidence is immaterial which goes to show that the defendant was the employé and general agent of the owner of the premises, and that the defendant distilled the liquor sold by him as such employé and agent, at a distillery on the premises, and from fruit grown thereon.
3. One part of a statute may be private, while another part may be public and general, or local, and *vice versa.*

INDICTMENT, tried before *Boykin, Judge,* at March Term, 1886, of the Superior Court of CUMBERLAND County.

The State introduced one McBryde, who swore that he purchased from the defendant, in the year 1885, one quart of apple brandy, at a distillery one and a half miles from Little River Academy.

The defendant then offered to prove that the distillery was owned by one Adams; that the brandy sold was made by himself, as employé of said Adams, from fruit grown on the premises, and that said distillery was situate therein.

Upon objection, the Court excluded this evidence as immaterial.

The defendant then offered to prove further, that he was the general agent of said Adams, in controlling the farm and distillery, and
(828) in selling the brandy so manufactured, being employed by the year by said Adams for that purpose.

Upon objection, the Court excluded this evidence as immaterial, to which ruling of the Court the defendant excepted.

The jury returned a verdict of guilty.

The defendant then moved an arrest of judgment, because the Act prohibiting the sale of spirituous liquor, within three and one half miles of Little River Academy, is a private statute, and should be specially pleaded in the indictment.

Motion overruled, and judgment pronounced, from which the defendant appealed to the Supreme Court.

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J. The motion in arrest of judgment was properly disallowed. The statute upon which the indictment is founded, although found in, and making a section of a private statute, is a local public statute, of which the Court takes notice, and it was not therefore, necessary to set it forth, or refer to it by averment in the indictment. It does not apply to, operate upon, and affect only individuals, or particular classes of individuals, in a way peculiar to themselves, but it has general application, and operates upon all classes of people alike, who may reside, be, or go, within the area of territory designated. It is local, but public. *State v. Chambers,* 93 N. C., 600; *State v. Cobb,* 18 N. C., 116.

The mere fact that the statute appears in, and as a section of, a private one, does not make it private. It is well settled, that one part of a statute may be private, while another part may be public and general, or local. It not infrequently happens that public statutes contain provisions of a private nature, and *vice versa. Humphries v. Baxter,* 28 N. C., 437; Pot. Dwar. on Stats., 53.

(829) Manifestly, the evidence offered by the defendant and excluded by the Court, was immaterial. The fact that the defendant was in the service of another person, and sold the spirituous liquor for his employer; and the further fact that the liquor was manufactured from his own products on his own farm, by the employé, could not alter the case. If, indeed, the employer had instructed him to sell it, though so manufactured, then both would be guilty of the like criminal offence under the statute. The employé had no right to sell it.

The statute (Acts of 1885, ch. 175, sec. 34), does not, as it seems was contended, authorize the owner of land, on which the spirituous liquor was manufactured, to sell it at the place of manufacture, or sell it, if of the products of his own farm, within the area of territory, within which the sale of spirituous liquor is prohibited by a local statute. That section simply regulates the subject of license to sell liquors, and in certain cases, allows sale of the same without license. It does not purport, nor was it intended to, nor does it, in effect, repeal or affect statutes prohibiting the sale of spirituous liquors in certain designated localities.

There is no error, and the judgment must be affirmed. To that end, let this opinion be certified to the Superior Court. *It is so ordered.*

No error. Affirmed.

Cited: S. v. Witter, 107 N.C. 795; *Durham v. R. R.,* 108 N.C. 401; *S. v. Best,* 108 N.C. 749; *S. v. Barringer,* 110 N.C. 529; *S. v. Kittelle,* 110 N.C. 565, 592; *S. v. Downs,* 116 N.C. 1066; *S. v. Snow,* 117 N.C. 779; *S. v. Jones,* 121 N.C. 619; *S. v. Patterson,* 134 N.C. 615; *S. v. Piner,* 141 N.C. 764; *Hatsfield v. New Bern,* 186 N.C. 141.

STATE v. R. S. HUNTER.

Indictment—Escape—Evidence—Practice.

1. When the original record is offered in evidence in the Court to which it belongs, it should be received. While in any other court, the proper mode of proving it, is by a duly authenticated copy, under the seal of the Court, yet the original, when present, is admissible, if competent.
2. While not entirely orderly to take a submission during a trial of another action, yet the Court may do so, taking care that no injustice or prejudice is caused thereby to the party on trial.
3. The Court is not required to give special instructions, unless there is evidence on which to base them.
4. The Court charged the jury that it was the duty of the officer to use all legal means to safely keep the prisoner; that failure to put hand-cuffs on him, was not *per se* negligence, but the jury must decide whether in this case the failure to do so contributed to his escape, and whether the defendant had used due diligence in guarding the prisoner without them; *Held* to be no error.
5. The Court further charged, that ordinarily, the burden of proof is on the State to the end of the case, but that in an indictment for an escape, this was changed, and when the escape was proved or admitted, the burden is shifted to the defendant, to prove that there was no negligence on his part,

and that he had used all legal means for his safe keeping; *Held*, to be no error.

(830) INDICTMENT for an escape, tried before *Clark, Judge,* and a jury, at November Special Criminal Term, 1885, of the Superior Court of WAKE County.

It was admitted that the defendant was the deputy sheriff of Alamance County. The State then offered in evidence the original bound volume of the records of Wayne Superior Court, produced in Court and proved by the Clerk of the Superior Court of Wayne County, for the purpose of showing that the escaped prisoner had been indicted in Wayne County for larceny, and also proved by the same officer, the original *capias* issued by the Clerk of said Court to the sheriff of Alamance County, with the original return thereon, signed "R. S. Hunter, deputy sheriff." This evidence being objected to, the objection was overruled and evidence admitted.

The State then offered the original bill of indictment, and the endorsement thereon, brought from the records of Wayne Superior Court. To this defendant objected; objection overruled, and evidence admitted.

After all the evidence was in, and one counsel had addressed the jury, there being a pause for a few minutes, a member of the bar,
(831) who appeared for one Evans, who was indicted in a separate bill for the same offence, rose and said, that he wished to enter a submission, without stating in what case. Defendant's counsel objected. The Court remarked that if he wished to enter a submission, he could do so while the Court was waiting. The counsel then said he wished to submit for Henderson Evans; that he had examined the evidence; that Henderson was certainly guilty, but Hunter was more guilty than he. The Court promptly interfered and stopped the counsel, and also told the jury to disregard and put out of their minds this statement; that it was not evidence, and they should not consider it, and that the Court would not have allowed the remark, if it could have prevented it. The counsel for defendant excepted.

The State introduced Evans, who was indicted in another bill for the same escape, who testified that the defendant was deputy sheriff of Alamance County; that, being summoned by defendant, he aided him in the arrest of the prisoner upon papers from Wayne County; that prisoner offered to pay expenses of defendant and witness to Goldsboro, if defendant would take him direct, instead of carrying him to Alamance jail; and further testified among other things, that after they left Raleigh, prisoner said he wanted to see a friend in the second class car; that defendant told him that he might go; that prisoner went, under

that permission, into said car, unaccompanied by any guard; that defendant did not go with prisoner, nor did he tell witness to go; that afterwards he, witness, went of his own accord, and prisoner was in the second class car, but defendant did not know that witness had gone into that car; that prisoner got up and started back, and must have stepped off the platform; that witness went back into the first class car, and found that prisoner was missing, and told the defendant, who was sitting in that car, with his head hung down, by the side of prisoner's wife; that defendant made no inquiries, and at Garner's station, they both took the back train to Raleigh; that before they reached Raleigh, going down, one Andrews told defendant that he knew prisoner, and that defendant had better hand-cuff him, but defendant refused to do so.

Captain Waitt, the conductor, testified that the prisoner paid (832) for tickets for the whole party; that defendant and wife of prisoner were in the first class car; that he heard Evans tell defendant that the prisoner had got away; that defendant expressed no surprise, and took back train at Garner's station; that he saw Evans in the second class car, who told him that he had an eye on the prisoner, and as far as he knew, the defendant was sober, and that he had some conversation with him.

One Andrews testified, that he told the defendant that he had better handcuff the prisoner, but he did not do it; that the prisoner said he would pay the way of the guard, rather than be handcuffed.

There was other evidence to the same effect; also, that prisoner and defendant were drinking together before they reached Raleigh, and while at Raleigh; of conversations between Evans and defendant while at Raleigh on their return, and that defendant was drunk when he returned.

Defendant asked the Court to instruct the jury, that if they believed that the defendant let the prisoner go into the forward car to speak to his friend, and ordered Evans to go with him as a guard, and that Evans was a sufficient guard, then the defendant is not guilty. The Court refused to give this instruction, on the ground, that there was no evidence that the defendant had ordered Evans to follow the prisoner into the other car. Defendant excepted.

The defendant further asked the Court to instruct the jury, that it was not the duty of the defendant to put handcuffs on the prisoner. On this point the Court charged the jury, that under the statute, it was the duty of the defendant to use "all legal means to keep the prisoner, and carry him to Goldsboro; that the failure to place handcuffs on him was not *'per se.'* negligence; that the jury were to judge from the evidence, whether or not the failure to do so in this case contributed to the

escape, and whether or not the defendant had used due diligence in guarding the prisoner without them. Defendant excepted.

(833) The Court further charged, that ordinarily the burden of proof is on the State, to the end of the case, but in indictments for escape, and this was an indictment for negligent escape, when the escape was proved or admitted, the burden is shifted to the defendant, to prove there was no negligence on his part, and that he had used, in the language of the statute, "all legal means" for his safe keeping; to which defendant excepted.

The jury returned a verdict of guilty, and the Court pronounced judgment accordingly, from which defendant appealed to the Supreme Court.

Attorney General, for the State.

Mr. John Devereux, Jr., for the defendant.

MERRIMON, J. Generally and regularly, the record itself of an action, ought not to be produced in evidence, except when it is offered in the same Court to which it belongs. That Court has the lawful possession and control of it, and can promptly give litigants such benefit of it as they may be entitled to have, without removing it from the immediate custody of the Court, and to a place more or less remote from the office where it is regularly kept. There is no reason, however, why the record should not itself be evidence, in a proper case, in any Court, and the best evidence. It is not generally so used, because it ought not to be removed from its proper depository, and from the Court to which it belongs. The law contemplates that it shall continuously remain there, under the keeping and strict care of the proper officer of the Court, to the end that it may be safely kept, and always be present there, to be seen and examined by those who may have the right to see and examine it. There are exceptional occasions on which it may be necessary to remove it for a short while to another Court, to be used as evidence, but such occasions are infrequent and extraordinary, and the power to remove it should be exercised sparingly and with care. But this by no means implies that the record is not evidence, whenever it is

(834) present, in a proper case, in any Court. Indeed, it is the best evidence of itself and what it contains.

Regularly, however, a duly authenticated copy of the record, under the seal of the Court, is the proper evidence of it and its contents.

On the argument, the defendant's counsel relied upon *Ward v. Saunders*, 28 N. C., 382, to support his objection to the record, itself offered is proper evidence. In that case, Chief Justice RUFFIN said: "When the proceedings are in one Court, and they are offered as evidence in

another, regularly the original documents, which may need evidence to identify them, are not evidence, but only the record made up, or a copy from it, authenticated by the Court." This is not inconsistent with what we have here said. *Regularly* the law is as he thus states it, but he did not say, nor mean to say, as we understand him, that the record itself is not evidence when present. *State v. Collins,* 14 N. C., 117; *Ward v. Saunders, supra; State v. Voight,* 90 N. C., 741. So, the first exception cannot be sustained.

For the like reason, the second exception cannot be sustained. The indictment was a part of the record—it was a formal presentation of the charge by the grand jury, and in contemplation of law, passed into, and became a part of the record, and the best evidence. The Court so recognized and accepted it. The original indictment in writing, was part of the minutes and documents that made up the record when drawn out in form, and such minutes and documents are treated, ordinarily, as the record itself.

During a pause in the trial, the Court received the submission of a defendant other than the present defendant, in an indictment for the same escape, and this is made the ground of a third exception.

It was not very orderly perhaps, to receive the submission, pending the trial. But there is no substantial legal reason why it might not be done. We are unable to see how the mere fact of the submission could prejudice the defendant—it did not in contemplation of law, and it does not appear that it did so in fact. The defendant simply (835) had the exception entered, seemingly for what it might be worth, without assigning any special ground for it; he did not ask for a mistrial at the time, nor did he afterwards move for a new trial, upon that or any other ground.

In practice, it is not uncommon to receive submissions from defendants, or to allow them to plead guilty, at any time while the Court is in session, with a view to convenience, and to expedite the business of the Court. And not infrequently, a party on trial with another, for the gravest offence, is allowed to change his plea to guilty, or to consent to a verdict of guilty for some grade of the offence of which he is charged. The Court, however, should be careful, to see that such practice works no undue prejudice to another party on trial. *State v. Martin,* 70 N. C., 628; *State v. Pratt,* 88 N. C., 639.

The Court properly declined to grant the first special instruction to the jury, asked for by the defendant, because, as the Court said, there was no evidence that warranted it. The mere fact that a witness testified that another witness said in his presence, that he had his eye on the prisoner who escaped, is too unimportant of itself and in the face of the other testimony, to make evidence to go to the jury, to establish a leading and important fact.

Nor was the defendant entitled to the second special instruction he asked the Court to give. Whether it was proper or not to put handcuffs on the prisoner whom he had in custody, depended upon his character and the attending circumstances. The instructions given by the Court in that respect, were unobjectionable.

Obviously, the sixth exception is without foundation. The Court substantially told the jury, that the burden of proof was upon the State, to show that the prisoner who escaped, was committed to the custody of the defendant, and escaped then the burden of proof shifted to the defendant, and he must prove that "such escape was not by his
(836) consent or negligence, but that he used all legal means to prevent the same, and acted with proper care and diligence." The charge was substantially in accordance with the statute. (The Code, Sec. 1022.)

We find no error in the record, and the judgment must be affirmed. To that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

Cited: Seay v. Yarborough, 94 N.C. 293; *Iron Co. v. Abernathy,* 94 N.C. 549; *S. v. McLean,* 104 N.C. 897; *S. v. DeGraffenreid,* 223 N.C. 462; *S. v. Bryant,* 236 N.C. 747.

STATE v. JOHN WEAVER.

Indictment—Forgery.

1. To constitute the offense of forgery at common law, the instrument forged must be executed with the fraudulent intent to injure or defraud another; and must be such as tends to injure or defraud another.
2. If this appears on the face of the instrument, it is sufficient to set it out in the indictment, with an allegation of the false and fraudulent intent. But if this does not appear on the face of the instrument, the extraneous facts which show the tendency to injure and defraud, must be averred.
3. An indictment which charged that *J. W.* did wilfully and falsely make, forge and counterfeit, and assent to the falsely making, forging and counterfeiting, a certain paper writing, commonly called a railroad pass (setting it out), with intent to defraud, does not charge the offense of forgery either under the statute of this State or at common law.
4. A railroad ticket or pass may be the subject of the offense of forgery at common law.

STATE *v.* WEAVER.

INDICTMENT, for forgery, tried before *Gilmer, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of ORANGE County.

The jury found the defendant guilty, and from an order of the Court arresting the judgment, the Solicitor, in behalf of the State, appealed.

The defendant was indicted for the alleged forgery of a paper (837) writing, commonly called a "railroad pass." The following is a copy of the material parts of the indictment: "The jurors for the State, upon their oath present, that John Weaver, late of the county of Orange, on the first day of January, 1885, with force and arms, at and in the county of Orange, aforesaid, of his own head and imagination, did wittingly and falsely, make, forge, and counterfeit, and did then and there wittingly assent to the falsely making, forging, and counterfeiting, a certain paper writing, commonly called a railroad pass, which forged writing is as follows, that is to say: 'Hillsboro, N. C., Oct. 17th, 1885—Conductor will please pass this man to Graham and return, J. B. Rosemond,' with intent to defraud, against the form of the statute, in such case made and provided, and against the peace and dignity of the State."

The defendant pleaded not guilty. Upon the trial, the jury rendered a verdict of guilty, and the Court arrested the judgment, upon the grounds that, "1st. The indictment did not charge an indictable offense; 2nd. The failure of the indictment to aver that J. B. Rosemond had authority from the railroad company to sign papers like the one set out in the indictment; and that the railroad company was under obligation to honor the same thus given." The Solicitor for the State excepted, and from the order arresting judgment, appealed to this Court.

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J., (after stating the facts). It is very obvious that the indictment charges no offence created by any statute of this State in respect to forgery, and we are of opinion that it cannot be sustained at common law.

The order, request, or "railroad pass," as it is called, is very indefinite and uncertain in every aspect of it. It does not purport, upon its face, to be given by a person who had any authority to grant it, or to create any possible obligation on his part, to make it good or (838) effective in any contingency, nor does it create, or express any purpose to create, any—the slightest—obligation upon the "conductor," whoever he was, or whatever his business, to accept it, and comply with the request contained in it, or to create any liability in any way, upon

any person. Nor does it appear to whom it was given, or that it was given for any consideration of value. So far as appears from the order itself, or any averment in the indictment, it had no binding effect, and could not operate so as to injure or defraud any person. It was a simple, naked request, in favor of any person who might hold it.

To constitute the offence of forgery at common law, the paper writing, or instrument forged, must be executed with a fraudulent intent, and be such as may prejudice, or as would, or might, if genuine, operate to create a liability of another person. The false instrument must be such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the Court, either from the face of the writing itself, or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment, alleging the false and fraudulent intent; but where such tendency does not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the Court to see in the record, that the indictment charges a complete offence. *State v. Greenlee,* 12 N. C., 523; *State v. Thorn,* 66 N. C., 644; *State v. Lamb,* 65 N. C., 419; *People v. Sholl,* 9 Cowen, 778; *People v. Harrison,* 8 Barb., 560.

As we have seen, the alleged forged writing in this case, did not, of itself and upon its face, tend to prejudice any person. It may be, however, that the person whose name is subscribed to it, was the agent of a railroad company, and had authority to issue such a "pass" for a consideration—that the paper was given to some particular person—

that the conductor was agent of the railroad company, and
(839) authorized and required to receive and act upon such a paper—

it may be that there were facts and circumstances that would have shown that the paper did constitute the offence of forgery. If so, such material facts should have been properly averred, in connection with the writing, in the indictment. It is not sufficient to simply designate the paper as a "railroad pass"—it must appear and purport in some way, and with reasonable certainty, to be such pass, to constitute forgery. A railroad ticket, or pass, may be the subject of the offence at common law. *Commonwealth v. Ray,* 3 Gray (Mass.), 441; *Regina v. Boult,* 3 Car. & Kir., 604, (61 Eng. C. L., 603). The Court properly arrested the judgment.

Let this opinion be certified to the Superior Court, to the end that further proceedings may be had according to law. *It is so ordered.*

No error. Affirmed.

STATE v. THOMAS J. WILSON.

Forcible Entry.

Although the entry be peaceable, yet if after getting on his premises, the defendant uses violent and abusive language, and threatens to strike, and does other acts, calculated to, and which do, intimidate the owner, it makes a case of forcible trespass.

INDICTMENT, tried before *Meares, Judge,* and a jury, at April Term, 1885, of the Criminal Court of MECKLENBURG County.

The defendant, along with another, was indicted for forcible entry on the lands of one J. C. Baker.

Said Baker, introduced as witness for the State, testified that he lived one mile and a half from Charlotte, and that he had a store in the corner of his yard, and that his residence was a few feet from the store; that on the evening of September 6th, 1884, about dark, while in his store, he was informed that some persons wished to see him. (840) Upon going to the door of his store, he found the prisoner, Wilson, and another person. Prisoner asked witness if he did not have a stray hog? Witness replied, "Yes," and told prisoner that he would show it to him, whereupon witness and prisoner left the store and went into the back lot of witness to his hog-pen, where he had impounded a stray hog, the pen being within a few feet of the residence of witness, and within his enclosure. When the parties reached the pen, the prisoner claimed the hog as his property, and asked witness his charges for impounding it, and paid him therefor. The prisoner then commenced to curse the witness, and was very abusive, threatening, and outrageous in his oaths. Witness then observed that the man who was with the prisoner, named Leedham, came near where the prisoner was standing, and joined in with him in cursing the witness. The witness ordered them to leave his premises, which they refused to do, but remained, and continued to use vile and abusive language to him, for fifteen minutes. That while prisoner and Leedham were cursing him and using abusive language towards him, prisoner drew back his right arm as if to strike him, but did not strike. After this, the prisoner put his hand in his pocket as if to draw a weapon, but witness saw no weapon, whereupon witness called and asked if there was any help in the store. The wife of the witness was standing in the porch, while prisoner and Leedham were cursing and abusing witness, and was badly frightened, and witness was intimidated by the conduct and language of prisoner and Leedham towards him. That after witness called for help, and was answered by a man in the store, when prisoner and Leedham took the hog and left the premises, cursing the witness.

On cross-examination witness stated, that during the cursing of witness by the prisoner, and before the witness had observed that Leedham was present, he began to let down the hog-pen, and the prisoner the fence. That during the quarrel, and after witness had ordered the prisoner and Leedham to leave, witness had used offensive language to them.

(841) The wife of the witness Baker, was also introduced as a witness, by the State, and confirmed the statement of the first witness. She also stated that she was greatly alarmed and intimidated by the conduct and language of the prisoner and Leedham.

The prisoner introduced no evidence, but asked the Court to charge the jury, that the prisoner having gone upon the premises of Baker peaceably and at his invitation, even though a quarrel and fight should afterwards ensue, the prisoner would not be guilty of a forcible trespass, and upon the whole testimony the State had failed to make out a case of forcible trespass.

The Court refused to instruct the jury as prayed by the prisoner, and instructed them, that the offence of forcible trespass occurred, when there was an invasion of a person's possession, he being present, accompanied with such violence as was necessary to intimidate him, or as was calculated to produce a breach of the peace; but that mere words, however abusive or threatening, unless accompanied by a display of overpowering numbers, or some outward acts, would not constitute the offence.

The Court, after stating the facts relied on by the State, as tending to intimidate or bring on a breach of the peace, and calling attention to two overt acts, proved by the witness, to-wit: the drawing back the right hand in the attitude of striking, and the act of running his hand in his pocket, as if to draw a weapon, continued: "Although the prisoner entered the premises peaceably in the first instance, yet if in a little while, he and Leedham used violent and abusive language towards Baker, and Baker then ordered them off his premises, and they refused to go, and remained and continued to use violent and abusive language to him for more than fifteen minutes, and Baker was intimidated by their language and display of numbers and overt acts, as he has stated, the defendant would be guilty, notwithstanding the peaceable manner of the entry in the first instance."

The jury returned a verdict of guilty, and judgment was pronounced by the Court, from which the defendant appealed.

Attorney-General, for the State.

Mr. W. W. Flemming filed a brief for defendant.

(842) MERRIMON, J. If the evidence be accepted as true, it is obvious what the defendant and the other party indicted with him, did on the premises of the prosecutor, in his presence and against his expressed will, amounted to more than a simple trespass. The evidence tended strongly to prove, that, without provocation and with concert between them, their manner and language directed towards and against the prosecutor grossly insulting and threatening, and accompanied by some demonstrations of violence, they intended to provoke a breach of the peace and to intimidate him. He testified that he was intimidated, and his wife, who was near by, witnessing what was done and said, was greatly alarmed. Such action and conduct constituted a forcible trespass.

The defendant cannot escape criminal responsibility upon the ground suggested on the argument here, that he went upon the premises of the prosecutor by his permission, for a peaceful and proper purpose. There was evidence to show that he intended insult, and perhaps violence, when he went there; but be that as it may, the prosecutor was there in the peaceful possession of his own premises. As soon, then, as the defendant and his companion began such display of force and threatened violence, and the prosecutor commanded them to get off his grounds, and they refused to do so, they then at once put themselves in violent opposition to him, and made forcible entry upon his premises, against his right, in such way as tended directly to produce a breach of the peace, or intimidate the prosecutor, and force him to desist from the just exercise of his rightful authority there. At first, the defendant did not get possession of the premises at all; he went upon them under the prosecutor, and by his express or implied permission—he got temporary violent possession, made forcible entry, and thus committed a forcible trespass. It may be, he was not at first a trespasser, but he became such as soon as he put himself in forcible opposition to the prosecutor.

The instructions given the jury by the Court, were warranted (843) by the facts.

There is no error. To the end that the judgment may be affirmed, let this opinion be certified to the Criminal Court. *It is so ordered.*

No error. Affirmed.

Cited: S. v. Lawson, 98 N.C. 762; *S. v. Gray,* 109 N.C. 792; *S. v. Woodward,* 119 N.C. 838; *S. v. Webster,* 121 N.C. 588; *S. v. Tyndall,* 192 N.C. 561; *S. v. Fleming,* 194 N.C. 43; *Freeman v. Acceptance Corp.,* 205 N.C. 258; *S. v. Goodson,* 235 N.C. 179.

STATE v. M. V. MIKLE.

Variance—False Pretences—Indictment.

1. Where the testimony of two witnesses for the State, tends to show a state of facts, in accordance with the charge in the bill of indictment, it is no variance because a witness for the defendant testifies to facts, which, if believed, would make a variance.
2. Where a bill of indictment for false pretences, charges that the defendant unlawfully, knowingly, and designedly, with intent to defraud and cheat certain persons (naming them), falsely represented that he had an order for the delivery of goods, and that by means of such false representations, the defendant obtained goods; *It was held*, that the bill sufficiently charged the offence, and was good.
3. In such case, it is immaterial whether the order which the defendant pretended to have, is verbal or written.

This was an INDICTMENT for obtaining goods by false pretence, tried before *Graves, Judge,* at Spring Term, 1886, of ASHE Superior Court.

The indictment was as follows, to-wit: "The jurors for the State, upon their oath present, that Martin V. Mikle, late of the county of Ashe, at and in the county of Ashe, unlawfully and knowingly, devising and intending to cheat and defraud J. F. Motny and M. L. Motny, (trading under the name and style of Motny Bros.,) of their goods, money, chattels and property, did then and there, unlawfully, knowingly and designedly, falsely pretend to J. F. Motny and M. L. (844) Motny, that Bob. B. Wilson had given to him, the said Martin V. Mikle, an order to get goods from J. F. Motny and M. L. Motny, trading under the name and style of Motny Bros., on the credit of him, the said Robert B. Wilson; by reason of said false pretence, J. F. Motny and M. L. Motny, trading under the name and style of Motny Bros., did deliver to him, the said Martin V. Mikle, a lot of goods, to-wit: a pair of boots and other merchandise, to the value of four dollars. Whereas, in truth and in fact, the said Robert B. Wilson had not given the said Martin V. Mikle any order, either written or verbal, for said goods, as he, the said Martin V. Mikle, then and there falsely pretended, which said false pretence, he, the said Martin V. Mikle, then and there well knew to be false, by color and means of which said false pretence and pretences, he, the said Martin V. Mikle, did then and there unlawfully, knowingly, and designedly, obtain from the said J. F. Motny and M. L. Motny, trading under the name and style of Motny Bros., being then and there the property of the said Motny Bros., the boots and other merchandise as aforesaid, with intent to cheat and defraud the said Motny Bros. to the great damage of the said Motny Bros., contrary to form of the statute, etc."

On the trial, * * * Motny, a witness for the State, testified that the defendant came to his store, and represented to him that he, defendant, had obtained an order from one Wilson, to get goods on his—Wilson's credit; that Wilson had told him—the defendant—to tell him—Motny —to let him—defendant—have some goods, and he—Wilson—would pay for them. That he did let him have the goods on said representation, and charged the goods to Wilson.

Wilson, examined by the State, testified that he did not give to defendant any order upon Motny Bros. for goods, as testified to by Motny. That he had entered into a contract with defendant, to have him make some shingles for him, and he had promised him to pay in goods, at the store of Motny Bros., when the shingles should have been made; that at the time the defendant obtained the goods, (845) the shingles had not been made, and he had not authorized the defendant to get the goods on his credit. That he understood that the defendant had begun to make the shingles, about three days after the goods were obtained, and made shingles enough to amount to seven dollars and fifty cents.

The defendant was examined in his own behalf, and admitted that he did not have an order, but said he told Motny Bros. that he had a contract with Wilson, to make shingles, and that he had an understanding with Wilson, that he was to be paid for the shingles in goods at Motny's store; that he obtained the goods from Motny Bros., but supposed he was getting them on his own credit, and that he afterwards made the shingles according to the contract.

The jury found the defendant guilty, and he moved for a new trial upon two grounds:

1st. That the facts set forth in the bill of indictment, does not constitute an offence under the statute.

2nd. That there was a variance between the allegations in the bill, and the proof.

The motion for a new trial was overruled, and the defendant then moved in arrest of judgment, which was overruled by the Court, and the sentence of the law was pronounced against the defendant, from which he appealed.

Attorney-General, for the State.

No Counsel for the defendant.

ASHE, J. (after stating the facts). The first ground assigned for a new trial, is more properly to be considered under the motion for the arrest of judgment.

The second ground is untenable, for the testimony of Motny and Wilson, considered together, fully sustains the averments in the bill. There was no variance, unless the jury should have discarded the (846) testimony of both of those witnesses, and accepted that of the defendant, as the correct statement of the transaction. If they had done so, then there was a variance, but the jury believed the testimony of the first two witnesses, as is shown by their verdict. The new trial was therefore properly denied on that ground.

The first ground is the same as that urged in arrest of the judgment, that the bill of indictment does not set forth such a state of facts, as constitutes the crime of "false pretence."

The bill, we think, is well drawn, and contains all the averments necessary to constitute the offence of "false pretence." It charges that the defendant unlawfully, knowingly, and designedly, with intent to cheat and defraud Motny Bros., did falsely represent to them that he had an order from Robert Wilson to obtain goods from them on the credit of said Wilson, and that by means of the false representation, he did obtain goods from them, and they were charged to Wilson.

It could make no difference, whether the order which the indictment charges the defendant falsely pretended to have from Wilson, was verbal or written. If A says to B, "tell C to let you have a pair of boots and charge to me," it is as much *an order*, as if A had written to B to let C have the boots and charge them to him. An order, according to Webster, is a "mandate;" "an authoritative direction." When then, the indictment charges that the defendant falsely represented that he had an *order* from Wilson to obtain goods from Motny Bros., it was a false representation of a "subsisting fact," and when it was made to obtain goods from Motny Bros., and goods were thereby obtained, with intent to cheat and defraud Motny Bros., the criminal offence is properly made out.

The rule is thus laid down by READE, Judge, in the case of *State v. Phifer*, 65 N. C., 321, "that a false representation of a *subsisting fact*, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in *writing* or in *words*, by which one man obtains value from another, without compensation, is a (847) false pretence, indictable under our statute." *State v. Eason*, 86 N. C., 674; *State v. Mathews*, 91 N. C., 635, and the decision in these cases is fully sustained by Mr. Bishop, in his work on criminal law.

There is no error. Let this be certified to the Superior Court of Ashe County, that the case may be proceeded with, according to this opinion and the law.

No error. Affirmed.

Cited: S. v. Burke, 108 N.C. 751; *S. v. Whedbee,* 152 N.C. 780, 782.

STATE v. DUNCAN C. HAYWOOD.

Juror—Disqualification—Motion to Quash—Apt Time—Insanity at the Time of the Trial—Issues.

1. The non-payment of taxes for the year preceding the first Monday in September, constitutes a disqualification to act as a juror.
2. The objection to a grand juror, who acted in passing upon the indictment, based on such incapacity, taken in apt time and in proper manner, is fatal to the bill.
3. The regular way of making the objection, when the facts do not appear in the record, is by plea in abatement, and if it appears on the face of the record, by a motion to quash, but in this State the distinction has not been held to be important, and a motion to quash in either case is permitted.
4. This objection must be taken in apt time, or it will be waived, and apt time is before the prisoner has pleaded. So, where on his arraignment, it was suggested that the prisoner was then insane, and an issue as to his sanity at the time was submitted to a jury, who found the defendant insane and incapable of making his defence, which verdict was set aside, and the cause continued, and, at the next Term, motions to remove the cause to another county, and for a continuance, were made and refused, and then the motion to quash was made, *It was held,* to be in apt time.
5. A motion to remove a cause to another county, cannot be made until the party has pleaded, and the case is at issue.
6. In such case, it is not necessary for the prisoner to offer evidence of the disqualification, if the Judge holds that the motion is too late, and refuses it on that ground alone.
7. Where, upon his arraignment, it is suggested that a prisoner is insane, and not capable of conducting his defence, the proper manner of procedure is to submit an issue to the jury, in order to ascertain this fact, and while there are precedents for submitting the issue as to guilt at the same time, the practice is disapproved.

INDICTMENT for forgery, tried before *Clark, Judge,* and a jury, (848) at September Criminal Term, 1885, of the Superior Court of WAKE County.

The indictment on which the defendant was tried and convicted, consists of one count, charging forgery, contained in a bill passed on by the grand jury, at June Term, 1884, of Wake Superior Court, and of two others, the first charging forgery, and the second the uttering of a forged order, passed on at July Term, 1885. These bills were consoli-

dated by order of the Court, as authorized by the rulings in *State v. Johnson*, 50 N. C., 221, and *State v. Watts*, 82 N. C., 656.

The trial came on at September Term, following, when the defendant being arraigned, and called on to answer the charge, the counsel appearing on his behalf, suggested to the Court his present insanity and inability to plead or make defence, and asked that a preliminary inquiry as to his mental condition be made before a jury. At a subsequent day during the Term, an issue was prepared and submitted to a jury, in this form: "Is the defendant, Duncan C. Haywood, sane, and capable of conducting his defence in the indictment?" The jury returned a verdict in the negative, and thereupon the defendant was ordered to be removed, and was conveyed, to the asylum for the insane near Raleigh, and committed to the custody and control of the authorities thereof. On the next day, and on motion of the Solicitor for the State, the verdict was set aside, as being against the weight of the evidence—the order of commitment to the asylum recalled—and the defendant brought back. The cause was then continued to the next term *"without*
(849) *prejudice,"* and a day certain fixed for the trial, the Judge giving notice to counsel, that the two issues, as to the defendant's mental capacity to manage his defence, and of his guilt, would be submitted to one and the same jury at the same time.

At the designated day of the next Term, the cause was again called, and the same counsel acting for the defendant, asked for an order for its removal to another county, upon an affidavit offered in its support, to which the Solicitor opposed a counter affidavit, upon the hearing of which, the Court found as a fact, that "the ends of justice did not require, and would not be promoted, by the removal," and denied the application. To this ruling counsel excepted. A motion was then made for a continuance, which was also refused, and exception entered.

Counsel then moved that the bill found at July Term, 1885, be quashed, on the alleged ground that a juror of the grand jury which passed upon it, was disqualified from acting as such, by reason of his not having paid his taxes for the preceding year—no affidavit accompanying the motion to sustain it. The Court ruled that the motion came too late, inasmuch as the defendant had been called on to answer the indictment at July Term, preceding—the preliminary issue of his present legal capacity tried—a verdict rendered and set aside—cause continued—and motions for removal and continuance made and refused at this Term. Counsel also excepted to this ruling.

The Court thereupon directed the trial to proceed, and the clerk to propound the usual inquiry to the defendant, who, in proper person, pleaded not guilty of the charge, and the jury were empanelled to try the two issues:

"Is the defendant guilty or not guilty?

"Is he now insane?"

Passing by the many rulings to which exceptions were taken during the progress of the trial, as not necessary to be considered in determining the appeal, it is sufficient to add that both issues were found against the defendant, and the sentence of the Court having been (850) pronounced, the defendant appealed.

Attorney-General, for the State.

Messrs. Jos. B. Batchelor, T. C. Fuller and John Devereux, Jr., for the defendant.

SMITH, C. J. (after stating the facts). The authorities in this State fully settle these two propositions of law:

1. The non-payment of taxes for the year preceding the first Monday in September, when the list is made of competent jurors, constitutes a disqualification to act. The Code, Secs. 1722 and 1723; *State v. Griffin,* 74 N. C., 316; *State v. Watson,* 86 N. C., 624.

2. The objection to a grand juror who acted in passing upon the indictment, based on such incapacity, taken in apt time and in a proper manner, is fatal to the prosecution.

The regular and appropriate method of making the objection under the general practice, when the fact upon which it depends does not appear in the record, but is outside, and to be established by proof, is by plea in abatement, and if it does so appear, by a motion to quash.

In our practice, the distinction has not been recognized as important, and the motion to quash has been held proper in either case. It has the sanction of the Court, in *State v. Liles,* 77 N. C., 496, where a grand juror was disqualified by reason of his having a suit pending and at issue in the same Court, and for this personal defect, the indictment, on motion, was quashed. *State v. Haywood,* 73 N. C., 437; *State v. Griffin,* 74 N. C., 316; *State v. Barbee,* 93 N. C., 498.

And a plea in abatement for the same incapacity in one of the grand jurors, was sustained in *State v. Smith,* 80 N. C., 410, and it was held not necessary to show that he participated in the action of the body in finding the bill.

The objection, to be available, must be made in apt time, and (851) if not made in apt time, is deemed to have been waived, and cannot be taken at a later stage in the progress of the cause. In the present case, it was interposed upon the arraignment, and before pleading to the charge, which the Court held, for the reasons stated in the ruling, too late to be entertained, and disallowed the motion. In this we think there is error.

The regular way of raising the question of the competency of the grand jury, in the words of BYNUM, J., "is not by a motion to quash, but by plea *on the arraignment for trial.*" *State v. Haywood,* 73 N. C., 437.

"The defendant is at liberty," says DILLARD, J., "to avail himself of any want of qualification in the grand jury, in whole or part, *when called* on to plead." *State v. Smith,* 80 N. C., 410.

"If there be a defect in the accusing body," is the language of the same learned Judge in another case, decided at the same Term, "it is the right of the party indicted, by plea in abatement, or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be *upon the arraignment, when the party is just called upon to answer.*" *State v. Baldwin, Ibid.,* 390.

The prisoner moved to quash the indictment, after he had pleaded not guilty, for an alleged defect in the organization of the grand jury, and it was declared by the Court, ASHE, J., delivering the opinion, that "the objection came too late. It was *not taken in apt time.*" *State v. Blackburn, Ibid.,* 474.

"The non-payment of taxes, is held to disqualify a grand juror, and a defendant may avail himself of such disqualification, by a plea in abatement, if filed in apt time. What is meant by *apt time* is the arraignment of the defendant." *State v. Watson,* 86 N. C., 624.

But whatever difference may be supposed to exist as to the two methods of raising the objection, they are removed and the practice settled by statute, which provides, that "all exceptions to grand juries, for and on account of their disqualification, shall be taken before
(852) the jury is sworn and impanelled to try the issue, *by motion to quash the indictment,* and if not so taken, the same shall be deemed to have been waived." The Code, Sec. 1741.

This law at once determines when the exception to a grand juror must be taken, and in what mode it must be done, or may be done.

The defendant, when first called upon, did not plead to the charge, but on the suggestion of counsel appearing on his behalf, an inquiry was instituted before a jury, as to the defendant's mental condition, and legal capacity to conduct his defence and protect his own rights, and this preceded the entering of any plea to the indictment. The rendition of the verdict, in answer to this inquiry, and the subsequent order setting it aside, left the cause in the same plight and condition as before, and it was then continued, *"without prejudice,"* that is, without impairing any of the legal rights of the accused as they then existed, and among them, must be included the right to make the motion to quash. *State v. Watson, supra.*

The motion to remove was prematurely made, since no issue had then been made as required by law. *State v. Reid*, 18 N. C., 377; *State v. Swepson*, 81 N. C., 571.

The overruled motion to continue, did not change the *status* of the prosecution, and hence, when again arraigned, the defendant had the manifest right to raise the objection to the grand juror, and he should have been afforded an opportunity to adduce proof of the alleged disqualifications, if such there was among the grand jury that found the last bill.

It was argued for the State, that no evidence was offered upon the point, and consequently none excluded to the defendant's injury. But when the Judge decided that the motion came too late, he necessarily decided that he would hear no evidence in its support, nor entertain the motion itself. The error consists in not giving an opportunity for the introduction of any proof on the subject, when the motion was made in proper time.

Again, it may be suggested, that as the two indictments were (853) found at different times, and by different grand juries, and the competency of one only is called in question, the only effect of sustaining the motion, would be to quash the two counts constituting the last indictment, leaving the first undisturbed, and as the verdict was general, the Court may proceed to judgment upon the unaffected count, not obnoxious to complaint, the others being regarded as stricken out, as if they had been quashed.

But this cannot be allowed. Evidence was introduced of another act of forgery, committed upon a different person by the defendant, and received as applicable to the charge of uttering, and tending to show a guilty knowledge of the false making of that uttered, and was confined to that part of the charge. It would have been incompetent to prove one forgery, by showing that the accused had committed another, and this would have vitiated the trial of the single count contained in the original bill. The trial was not such as it would have been, had the last indictment been quashed and eliminated from the record, and the proofs would have been restricted, when confined to the single interpretation of an act of forgery. How far the jury may have been influenced by the admission of evidence, that would not have been heard in the latter case, it is not our province nor in our power, to ascertain. It is sufficient to say, that evidence, incompetent to sustain the first charge, *was heard*, and should not have been heard, if the motion to quash had prevailed. It is of the highest importance, that the rules of law should be observed in the administration of penal justice, and that every person accused of crime has all the safeguards provided for the purpose of securing a fair and legal trial, to which those

whose sanction is found in the experience of ages, so largely contribute. A right to have a grand jury, competent under the law, to pass upon the accusation preferred, is guaranteed to all, and must be upheld.

While we do not mean to decide that there was error in law, which enters into and vitiates the verdict in submitting the double issue, as was done in this case, of present insanity and guilt, to the same jury, for this course has been pursued in other trials, *Rex v. Little,* (854) Russ. and R., 430; *Regina v. Southey*, 4 Foster & Fin., 864, cited in Buswell on Insanity, Sec. 461, and these furnish a precedent, it is most obviously fitting and proper that the inquiries should have been separated, and that the defendant's capacity to enter upon a trial, should be determined before he is put upon the trial; for the trial would amount to nothing if the defendant has not the required capacity to defend himself against the charge. The very requirement to answer, prejudges the case adversely to the prisoner, and must have an unfavorable influence upon the jury, in passing upon the issue. Besides, the blending of the inquiries, by allowing evidence pertinent to one, and incompetent to the other, notwithstanding the caution the Judge may give as to its consideration, may tend to confuse the minds of the jury, and to do injustice to the defendant. In *State v. Harris,* 30 N. C., 136, the preliminary inquisition was made by the jury as to the capacity of the prisoner, who from infancy had been a deaf mute, to understand and make defence to the charge, and this course was approved by the Court. In commenting on cases cited in the opinion, BATTLE, J., says: "We have stated these cases with more than usual particularity, because they set forth clearly, the true grounds upon which a deaf and dumb prisoner, whose faculties have not been improved by the arts of education, and who, in consequence thereof, cannot be made to understand the nature and incidents of a trial, ought not to be compelled to go through, what must be to him, the senseless forms of such a trial. Whether arising from physical defect or mental disorder, he must, under such circumstances, be deemed not sane, and of course, according to the great authority of Lord Hale, he *ought not to be tried.*"

There must be a new trial of the criminal charge contained in the indictment, while we see no sufficient reason for interfering with the finding upon the other, properly precedent in the regular order of proceeding. The verdict simply determines the defendant's sanity at the time of the trial, but does not preclude a similar inquiry hereafter, if any sufficient basis for it is laid before the Judge, to warrant (855) its being submitted to a jury, of an insanity since supervening, and still existing. *People v. Farrell*, 31 Cal., 576.

This will be certified, to the end that the verdict of guilty be set aside, with whatever was done since the erroneous ruling upon the motion to quash, and the cause proceed as upon the arraignment, in accordance with this opinion.

Error. Reversed.

Cited: Sellers v. Sellers, 98 N.C. 17; *S. v. Hapgrave,* 100 N.C. 485; *S. v. Gardner,* 104 N.C. 740; *S. v. Davis,* 109 N.C. 781; *S. v. Flowers,* 109 N.C. 845; *S. v. Fertilizer Co.,* 111 N.C. 659; *S. v. Ellsworth,* 131 N.C. 776; *S. v. Peoples,* 131 N.C. 790; *S. v. Spivey,* 132 N.C. 994; *Shepard v. Telegraph Co.,* 143 N.C. 246; *S. v. Khoury,* 149 N.C. 455; *S. v. Sandlin,* 156 N.C. 626; *S. v. Craig,* 176 N.C. 743; *S. v. Falkner,* 182 N.C. 797; *S. v. Levy,* 187 N.C. 585; *Speas v. Bank,* 188 N.C. 527; *S. v. Barkley,* 198 N.C. 351; *S. v. Bracy,* 215 N.C. 258; *S. v. Sullivan,* 229 N.C. 253, 255, 256, 257; *Miller v. State,* 237 N.C. 49.

STATE v. CATHERINE WOOD.

City Ordinances—Justice's Jurisdiction.

A justice of the peace has jurisdiction to try misdemeanors, arising from violations of the ordinances of cities and towns.

MOTION to quash a warrant issued by a justice of the peace, heard on appeal by *Clark, Judge,* at the November Special Criminal Term, 1885, of the Superior Court of WAKE County.

The charge against the defendant, as set out in the warrant, was, that on the 29th day of September, 1885, within the corporate limits of the city of Raleigh, she unlawfully and wilfully violated sec. 3, ch. 5, of the ordinance of the city of Raleigh, by saying to the prosecutrix in loud and boisterous language, "You are a nasty stinking scar-faced bitch."

When the case was called for trial before the justice, the defendant, through her counsel, moved to quash the warrant, because the justice had no jurisdiction to issue it, and try the defendant for the offence charged in the warrant; the jurisdiction being exclusively in the Mayor of the city of Raleigh, as was held in the case of *State v. Threadgill,* and *State v. White,* reported in 76 N. C. Reports.

The motion was sustained, and the State appealed to the (856) Superior Court, by the counsel representing the prosecution.

At the November Special Criminal Term, 1885, of the Superior Court for the county of Wake, before *Clark, Judge,* the defendant again moved to quash the warrant, upon the same ground as taken below, and the motion was sustained by the Court, from which judgment the State appealed to this Court.

Attorney General for the State.
Mr. Daniel G. Fowle, for the defendant.

ASHE, J. (after stating the facts). The case of *State v. Threadgill,* 76 N. C., 17, and *State v. White,* 76 N. C., 15, were decided by the Court under the Act of 1871, ch. 195, which is the same as the provision in Battle's Revisal, Ch. 111, secs. 30 and 31.

By the Act of 1871, Sec. 1, the chief officers of all cities and towns, were endowed with the same jurisdiction and powers as had therefore been given to justices of the peace, in criminal matters, except that such officer shall not take jurisdiction of any offence committed beyond the limits of the city or town, of which he was such chief officer.

And the second section provided, that "any person or persons violating any ordinance of any city or town of the State, shall be deemed guilty of a misdemeanor, *and be subject to the provisions of this chapter.*"

What were the provisions of this chapter? They are none other than that the mayor or other chief officer of the city or town, should have jurisdiction to try all criminal matters of which justices of the peace had jurisdiction, which might occur in the corporate limits of his city or town, and it was to this jurisdiction, that any person violating an ordinance of such city or town, was subjected by the second section of the act; and it was this provision in the second section of the act—"*shall be subjected to the provisions of this Act*"—that led this Court to decide in *Threadgill's* and *White's* cases, *supra,* (857) that the mayor or chief officer of a city or town had exclusive jurisdiction of violations of the ordinances of cities or towns, of which they were chief officers.

But when the act of 1871 was carried forward into the Code, the words, "and shall be subjected to the provisions of this chapter," were omitted, so that the section read: "Any person violating an ordinance of a city or town, shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned, not exceeding thirty days." There are no restrictive words. The very terms of the enactment, are such as to confer jurisdiction upon justices of the peace, and our opin-

ion is, under this section of the Code, the justice of the peace had jurisdiction, and it was error to quash the warrant on that ground.

Let this opinion be certified to the Superior Court of Wake County, to the end that a *procedendo* may be issued to the justice before whom the case was pending when the warrant was quashed, that the case may be proceeded with according to law.

Error. Reversed.

Cited: S. v. Smith, 103 N.C. 405; *Board of Education v. Henderson,* 126 N.C. 692; *S. v. Joyner,* 127 N.C. 542; *S. v. Baskerville,* 141 N.C. 816; *S. v. Wilkes,* 233 N.C. 647.

STATE v. POWELL WALKER.

Appeal—Peace Warrant.

1. No appeal lies from the order of a justice of the peace, requiring the defendant in a peace warrant to enter into a recognizance to keep the peace.
2. In such case, upon appeal to the Superior Court, that Court has no power to discharge the defendant, but should dismiss the appeal.

MOTION to dismiss an appeal from a justice, ordering the defendant to enter in recognizances to keep the peace, heard before *Graves, Judge,* at Spring Term, 1884, of the Superior Court of BUNCOMBE County.

In a peace warrant proceeding before a justice of the peace, the latter made an order requiring the defendant, with sureties, (858) to enter into a recognizance in the sum of $200, conditioned that he would keep the peace, be of good behavior, etc. From this order he appealed to the Superior Court. In that Court, the Solicitor for the State moved to dismiss the appeal, which motion was over-ruled. The solicitor then suggested that the prosecutor did not desire that the recognizance should be renewed or continued. Thereupon, the Court gave judgment, that the defendant be discharged upon the payment of costs, from which judgment he appealed to this Court.

*Mr. John Devereux, Jr., for the State.**

No counsel for the defendant.

*The Attorney General, before his election, having been of counsel for the defendant, the Court called on Mr. Devereux to argue the case for the State.

MERRIMON, J. (after stating the facts). This case is substantially like that of *State v. Lyon*, 93 N. C., 575. No appeal lay from the order of the justice of the peace, requiring the defendant with sureties to enter into recognizance to keep the peace. The Court ought, therefore, to have granted the motion to dismiss the supposed appeal. It ought not to have made the order discharging the defendant, because the proceeding was not in the Superior Court. It remained before the justice of the peace to be proceeded in accordance to law.

The order discharging the defendant must be reversed, and an order entered dismissing the supposed appeal.

To that end let this opinion be certified to the Superior Court. *It is so ordered.*

Error. Reversed.

Cited: S. v. Gregory, 118 N.C. 1199.

STATE v. MARCUS ROPER.

Undertaking on Appeal.

An appeal will be dismissed, when the surety on the undertaking only justifies in the amount, and not double the amount, thereof.

(859) INDICTMENT for retailing liquor, tried before *Gudger, Judge*, at Fall Term, 1885, of the Superior Court of MACON County.

The defendant was convicted, and there was judgment against him, from which he appealed to this Court. He was required to give a bond of fifty dollars on the appeal. He gave a bond in the sum of fifty dollars, with one John Ingram as surety, who made oath that he "was worth the sum of fifty dollars over and above all exemptions allowed by law, personal and real, and over all his debts and liabilities."

When the case was called for argument in this Court, the Attorney General moved to dismiss the appeal, upon the ground that the bond or undertaking was not justified by the surety in double the amount specified therein.

Attorney General for the State.
Mr. C. M. Busbee, for the defendant.

ASHE, J. This has been so repeatedly decided by this Court to be an essential requisite in every undertaking on appeal to this Court, that

it is hardly necessary to cite any authority. We therefore refer only to the cases of *Turner v. Quinn*, 92 N. C., 501, and *Anthony v. Carter*, 91 N. C., 229.

The appeal must be dismissed, and this certified to the Superior Court of Macon County, that the case may be proceeded with according to this opinion and the law.

Dismissed.

STATE v. JACOB ROGERS.

Abuse of Privilege—Evidence—Juror—Indictment—Setting Fire to Mills—New Trial.

1. It is the duty of the trial Judge to watch the course of the argument to the jury, and to see that no injustice arising from it is done to either the prisoner or the State, and nothing appearing to the contrary, he is presumed to have done so.
2. Abuse of privilege in the argument to the jury, is never ground for a new trial, except when it is gross, and probably injured the complaining party, and was not properly checked by the trial Judge.
3. Where a new trial was asked on the ground that one of the jurors who sat on the trial of the case became insane very shortly after the verdict was rendered, and so might be supposed to have been insane while acting as a juror, the matter is entirely in the discretion of the trial Judge, in the absence of any finding of fact that the juror was insane while on the jury.
4. An indictment for burning a mill, under The Code, sec. 985, as amended by the Laws of 1885, ch. 66, need not allege that the prisoner set fire to the mill with the intent to injure some particular person.

INDICTMENT for burning a mill, tried before *Gilmer, Judge,* (860) and a jury, at Fall Term, 1885, of the Superior Court of CHATHAM County.

On the cross-examination of one C. G. Howard, a material witness for the State, he was asked, in order to impeach him, if on one occasion, one Wiley Ellis' pocket book was not found in his boot leg. The witness answered that it was, and on being asked how it came there, said, "ask Mr. Ellis," and refused to answer further.

In the closing argument for the State, counsel asked, why did not the defendant produce Wiley Ellis, and show that the witness had stolen his pocket book, if such was the fact. Counsel for the prisoner interrupted the counsel addressing the jury, and asked him to state to the jury, that the defendant had no right to introduce this evidence, because it was incompetent. The counsel for the State refused to do

so, but proceeded to argue that the defendant had the right to
(861) introduce this evidence.

The counsel for the defendant then handed up to his Honor a written prayer for an instruction to the jury, that the defendant could not have introduced this evidence, to which his Honor said that he did not think it necessary to take notice of it, and that the prayer for instruction came too late, and did not notice it in his charge. After verdict, the defendant moved for a new trial, among other grounds, because one of the jurors who sat upon the trial, had become insane, and that from the development of the insanity so soon after the rendition of the verdict, the defendant believed that the juror was insane during the trial. When this juror was called into the box, he had been challenged for cause, and after examination, had been accepted by the defendant, but mental unsoundness was not then suggested.

His Honor refused the motion, and from the judgment on the verdict of guilty, the defendant appealed.

Attorney-General and Mr. John Manning, for the State.
No counsel for the defendant.

MERRIMON, J. The witness for the State sought to be impeached by cross-examination, might have declined to answer the questions asked in respect to the pocket-book, because they tended to expose him to a criminal prosecution. He, however, chose to answer them, and his admissions tended very strongly to prove that he had stolen the pocket-book, as implied by the questions put to him, and the prisoner got the benefit of that discrediting fact.

The question suggested to the jury, *arguendo*, by the counsel for the State in the course of his argument, of which complaint is made, was not strictly a proper one, but any possible undue weight it may have had upon the minds of the jury, was sufficiently counteracted by the interruption at the time, made by the prisoner's counsel. It seems the Court thought so, and hence it declined to comment to the jury on a matter, at most, of slight importance. It was the duty of the presiding Judge to watch the course of the argument to the
(862) jury, and see that no injustice arising from it was done to the prisoner or the State, and it must be presumed, nothing to the contrary appearing, that he did so. The abuse of privilege of counsel in the argument to the jury, is never ground for a new trial, except when such abuse was gross, and probably injured the party complaining, and was not properly checked and corrected by the Court. The supervision of the trial, including the argument to the jury, must be left largely to the sound discretion of the presiding Judge. *State v.*

Suggs, 89 N. C., 527; *State v. Bryan, Ibid.*, 531; *State v. Davis*, 92 N. C., 764.

The juror supposed to have been insane, was duly chosen and sworn. It is not found as a fact, nor does it appear in evidence before the Court, on the motion for a new trial, that he was insane while he sat as a juror on the trial. The prisoner simply inferred that he was, because he became so very shortly afterwards. If he became insane, as suggested, this was a matter properly addressed to the Court, upon a motion for a new trial, to be granted or refused in its sound discretion. It was not an error to refuse to grant it that can be corrected in this Court; certainly not, in the absence of the fact to be found by the Court, that the juror was insane while sitting on the trial.

On examination of the record, we at first thought the indictment defective, in that it fails to charge that the prisoner set fire to the mill, with intent "to injure or defraud" some person. But we find that the statute, (Acts 1885, ch. 66), repeals so much of the statute, (The Code, Sec. 985. sub-section 6), as made such allegation necessary.

There is no error. To the end that further proceeding may be taken in the action in the Superior Court according to law, let this opinion be certified to that Court. It is so ordered.

No error. Affirmed.

Cited: Goodman v. Sapp, 102 N.C. 483; *S. v. Massey*, 103 N.C. 361; *S. v. May*, 118 N.C. 1205; *Maney v. Greenwood*, 182 N.C. 584.

STATE v. CHARLES JOHNSON.

Jurisdiction—Punishment.

1. A simple assault, in which no deadly weapon is used, and no serious bodily harm done to the prosecutor, is within the jurisdiction of a justice of the peace.
2. Where an indictment charges an offence of which the Superior Court has jurisdiction, but the conviction is for a less offence, the Superior Court, having once obtained jurisdiction, can proceed to judgment for such less offence.
3. In convictions for simple assaults, where there is no intent to commit rape, and no deadly weapon used, and no serious bodily harm done, the punishment is limited to a fine of $50, or imprisonment for thirty days.
4. The Court has no power by its judgment, to direct that the defendant shall be hired out by the county authorities, but it can only authorize this to be

done, under such rules and regulations as may be prescribed by the commissioners.

5. So, where a defendant was indicted for an assault with an intent to commit rape, and agreed to a verdict for simple assault; *It was held*, that the Superior Court had jurisdiction to pass sentence, but that it could not imprison for twelve months, and order the county commissioners to hire the prisoner out.

6. In such case, the prisoner is not entitled to a new trial, but only that the case be remanded, in order that a proper judgment may be passed.

(863) INDICTMENT for an assault with intent to commit rape, tried before *Meares, Judge,* and a jury, at December Term, 1885, of the Criminal Court of MECKLENBURG County.

After the evidence for the State had closed, the defendant offered to submit to a verdict for a simple assault, which was agreed to by the State. Thereupon, the verdict was so entered, and the Court sentenced the defendant to imprisonment in the county jail for twelve months, and that he hired out by the county commissioners.

From this judgment the defendant appealed.

Attorney General, for the State.
Mr. W. P. Bynum, for the defendant.

(864) MERRIMON, J. The charge in the indictment, is that of assault with the intent to commit rape. The defendant, however, was only convicted of a simple assault. No deadly weapon was used, nor was any serious damage done to the prosecutrix. So that the offence committed, was one within the jurisdiction of a justice of the peace, and the offender might have been prosecuted in that jurisdiction.

As, however, the indictment charged an offence in its nature embracing an assault, within the jurisdiction of the Criminal Court, that Court obtained jurisdiction, and although the conviction was for the less offence, the Court being one having general jurisdiction of criminal offences, retained jurisdiction over the less offence, and had authority to proceed to judgment in that respect. The verdict of guilty of the less offence, did not have the effect to oust jurisdiction of the Court. *State v. Reaves,* 85 N. C., 553; *State v. Ray,* 89 N. C., 581; *State v. Speller,* 97 N. C., 526. The Court therefore had jurisdiction.

But we think there is error in the judgment, because, as the jury in effect found that there was no intent to commit rape, the offence was not aggravated by the existence of such fact, and because it appeared that no deadly weapon was used, and no serious damage was done, and further, that the defendant was a boy under fourteen years

of age. The statute, (The Code, Sec. 987,) expressly provides that in such cases the punishment should not exceed a fine of fifty dollars, or imprisonment for thirty days. It should be observed, that the defendant was only convicted of a simple assault, unattended by the distinguishing cause of aggravation mentioned. The statute just cited, is general, and applies in such cases, in all jurisdictions. This case is different in respect to the manner of punishment, from that of *State v. Watts,* 85 N. C., 517.

The judgment is, that the defendant shall be imprisoned for twelve months, "and that he be hired out by the county commissioners." This order seems to have been made inadvertently. It is not the province of the Court, to *direct* that the defendant be "hired out," but to *authorize* the commissioners to do so, under rules and regulations to be prescribed by them. The Code, Sec. 3484. *State v. Norwood,* (865) 93 N. C., 578.

There is therefore error. The defendant is not entitled to a new trial, but to have such judgment as the law allows, entered against him. To that end let this opinion be certified to the Criminal Court, according to law. It is so ordered.

Modified.

Cited: S. v. Sneed, 94 N.C. 809; *S. v. Pearson,* 100 N.C. 415; *S. v. Albertson,* 113 N.C. 634; *S. v. Stafford;* 113 N.C. 637; *S. v. Taylor,* 124 N.C. 803; *S. v. Hight,* 124 N.C. 846; *S. v. Battle,* 130 N.C. 656; *S. v. Young,* 138 N.C. 572; *S. v. Williams,* 185 N.C. 689; *S. v. Palmer,* 212 N.C. 13.

STATE v. ALLISON SPEAKS.

Jury—Challenge to the Array—Expert—Deadly Weapon—Judge's Charge—Abuse of Privilege.

1. A challenge to the array can only be taken, when there is partiality or misconduct in the sheriff, or some irregularity in making out the list.
2. Where the sheriff returned to a writ for a special *venire* that he had not summoned one of the jurors because he was dead, and that he had not summoned three others, because they could not be found: *It was held,* no ground for a challenge to the array.
3. A physician who qualifies himself in other respects, is not precluded from testifying as an expert, because he has not been examined by the State Board of Medical Examiners.

4. Where a witness is asked with a view to corroborate, whether he has not made the same statement before being examined, he may testify that he has made the same statement before going on the stand, but he cannot tell other things said in the same conversation, which were not brought out on the first examination.
5. What was the instrument used to occasion the death, is a question for the jury; whether or not it is a deadly weapon, is to be decided by the Court.
6. It is not error in the trial Judge, to refuse an instruction not warranted by any view of the case, nor should he give a charge which involves a mere abstract proposition of law, not raised by any evidence in the case on trial.
7. Where the bill charged that the killing was done with a rock, and the Judge charged the jury that if the killing was done with a rock, *or other missile*, etc.; *It was held*, not to be error, as it is immaterial whether the killing was done with the weapon charged in the bill, or with some other instrument of the same nature and character.
8. An exception that the prosecuting attorney used improper language and arguments in his address to the jury, will not be considered, when it is not made until after the verdict was rendered.

(866) INDICTMENT FOR MURDER, tried before *Montgomery, Judge*, at Fall Term, 1885, of IREDELL Superior Court.

The prisoner was charged with the murder of Noah Mason, in the county of Iredell, on the first day of February, 1885.

At the request of prisoner's counsel, one hundred names of jurors were drawn from the jury box of said county, in accordance with the provisions of Section 1739 of The Code. A writ of *venire* was issued to the sheriff of said county, who made due return thereof, that he had summoned all the persons named therein, except four, and as to them, he returned that one was dead, and the others were not to be found. All the jurors answered to the call except these four, and on the failure of these four to answer, the prisoner challenged the array, and assigned for cause, the failure of these four to answer, and the sheriff's return. The challenge was overruled, and the prisoner excepted. The jury was obtained before the prisoner exhausted his peremptory challenges.

On the trial, the following is the substance of the material parts of the testimony:

Thomas Redman, a witness for the State, testified that he knew deceased—lived a mile from him—he was dead—saw him when he was knocked down; it was between his, witness's house, and Allison Speak's; he and the prisoner had had a quarrel about seven and a half cents, which the witness owed him—prisoner cursed him—witness told him if he would go off, he would pay him; prisoner continued to curse him; he saw the prisoner no more until up in the road, he commenced cursing witness—they quarrelled awhile, and prisoner went up

the road. Lee Shoemaker came up, and he, witness, Jim Pratt, and the deceased, were standing together, not three steps apart, (867) when the rock was thrown; it was not more than half an hour after he had last seen the prisoner, before the rock was thrown; the rock knocked the deceased down; it hit him over the eye, and he got up and said, "Oh Lord!"—and as he was getting up more rocks were thrown; prisoner had said when he was cursing witness, that he would whip him or die. Witness had been threatening to whip Speaks; he went next morning to where the deceased had been knocked down, and got the deceased's hat, and found a rock beside it. "It was a sorter long flint rock, weighing one and a half or two pounds—it was burst in three pieces, and on putting the pieces together, they fitted. There were no more rocks there, except where he threw them."

James Pratt, a witness for the State, testified that the prisoner and Thos. Redman had had a fuss at the election ground that day, and he, the deceased, Thomas Redman, and Lee Shoemaker, were returning together from the election ground; the prisoner came up behind them cursing—said he could whip any man in the crowd. He swore "he would whip Redman that night or die." Redman said he wouldn't. About that time, Jasper Smith came up, and said, "Is there anybody that wants to fight?" Witness said, "No, or there would have been a fight before now." Smith jumped off his mule and made at prisoner, who ran, and it was only a few minutes after prisoner ran off, before the rock was thrown. There were four rocks thrown altogether, and he could have touched all the parties when the rock was thrown. He heard a noise, and went out in that direction, and saw the bulk of a man, about twenty steps off, running, but could not tell who it was. He saw the rock next morning; it was broken into two pieces, and would weigh two or three pounds. Mason died in five days after he was struck. He also testified that the prisoner was five feet five inches high, and Thomas Redman much higher and stouter. That he heard a pistol fire in the direction of the lane, before the difficulty, and heard the rock strike Mason.

Lee Shoemaker, examined by the State, testified that a little (868) after sun-down, he left the election ground; that he, Redman, Pratt, and deceased being together, saw a man sitting on a log; he went up to him, and found it was the prisoner. He said the crowd was against him. A quarrel commenced between him and Redman, and he saw the prisoner pick up a piece of rock. Witness and deceased went on, and were soon joined by Redman and Pratt, and Mason was knocked down by something, and said, "Oh, Lord." About that time he heard the second rock, or something, hit a limb over his head, and that neither he, Redman nor Pratt threw the rock.

Jasper Smith testified, that he did not throw the rock at deceased; that he heard the parties quarreling—went to them, saw deceased, Jim Pratt, and Thomas Redman. Redman had off his coat, was talking loud and abusing the prisoner. Witness said, "Boys, if you are going to fight, why don't you do it?" Prisoner was eight or ten steps up the road. Witness said, "Are three of you afraid of one man?" Redman said, "he won't fight, every time we go to him he runs." Witness went towards prisoner, and he ran, and witness left in a few minutes.

G. W. Holler, witness for the State, testified that he saw the prisoner the next morning after the difficulty, and he said if Mason was knocked down, he reckoned it was a mistake in throwing the rock. A day or two afterwards, he was at the house of witness, and said that he was accused of throwing the rock, but was innocent. Witness said to him, "If I was guilty, I would take one of those horses and leave," but he made light of it, and said, "he would come out of it for twenty dollars."

One Mayberry, another witness for the State, testified that he had prisoner in his custody, and he slipped off, and he never saw him again until here in Court. It was thick dusk when he got home from the election ground; saw the prisoner in the road; he appeared to be drinking, and was staggering about; that he heard the quarreling up the road, but heard a pistol fire as he was leaving the election ground.

When he put up his horse, he could distinguish the bulk of a
(869) horse twenty-five yards, but could not have told a man twenty-five yards. He went to the place where deceased was knocked down next day, and saw some scattering rocks.

Dr. White was then examined for the State, and testified that he was a practicing physician; had been practicing for twenty months; had attended one course of lectures, and had practiced in surgery, and had sufficient learning to form an opinion upon the branches of his profession, but that he had not been examined by the State Board of Medical Examiners. The prisoner objected to his testimony, on the ground he had never been examined by the Board. The objection was overruled, and the prisoner excepted. The witness then testified that he had been called to see the deceased on the Thursday after he was knocked down on the Tuesday previous. He examined the wound, which was over the left eye. It was a compound fracture of the frontal bone, and the wound caused the death of the deceased. The deceased was not rational from the time he saw him.

Mason, the father of the deceased, was next examined in behalf of the State, who stated that he saw the deceased the next morning after he was hurt, lying by the roadside on the mountain, about 11 o'clock.

He was unable to get up, but was in his right mind. He said he was going to die; that Allison Speaks had thrown a rock at Thomas Redman, and hit him; he saw Allison when he threw. Allison and he had never had a word; that he, Thomas Redman, Jim Pratt, and Lee Shoemaker, were standing together; he saw a man squatting in the fence corner; that he stooped down, and was looking at him through the "element" light when he was knocked down, and it was Allison Speaks.

Elihu Speaks testified, on the part of the State, that he heard the prisoner say, after the difficulty, that he had to leave the road, he could not fight the crowd. Witness asked him who threw the rock, and he said he did not know, but it did not hit the man it was thrown at. (870)

Adly Hardin was examined for the defense, and testified that the deceased came to his house after dark, on the night he was hurt. Witness asked him who did it, and he said he didn't know.

Several witnesses for the defence, testified that they saw the deceased two or three times after he was hurt, and thy didn't think he had any sense.

The prisoner was then examined in his own behalf; gave a long account of the quarreling between himself and Redman—said he had been drinking off and on all day, but recollected what occurred; he did not know anything about deceased being knocked down, and made a general denial of those parts of the conversation with him, as testified to by the State's witnesses, which were prejudicial to him.

Mrs. Mayberry, a witness for the prisoner, testified that after her husband came from the election, she heard the fuss, and went up to the stable where he was—heard the quarreling—"heard some one accuse another of stealing—reply—damned lie—some one said that won't do—heard two licks—went to the house—there was a crowd at the house, counting the votes." On cross-examination, she said she was not certain she heard any licks, but they sounded like licks. On redirect-examination, she was asked if she had made the same statement to anybody else, that she had testified to here? The Solicitor objected, and stated he had not, and did not intend to impeach her. The Court overruled the objection, and permitted the witness to answer the question, and she replied that immediately after the occurrence, she had told her husband the same thing, and she went on to state, that she had told her husband that *she thought some one was killed*, but this latter part of her statement was held to be unimportant and was excluded, but the Court admitted the rest. The prisoner's counsel excepted to this ruling.

The prisoner's counsel asked the following written instructions:

1st. The killing of the deceased not being admitted in this
(871) case, it is necessary for the jury to be satisfied from the evidence, beyond a reasonable doubt, that the deceased was killed by the prisoner, before they can convict him of any offence.

2nd. That from the size and shape of the rock, alleged by the State to have been thrown by the prisoner at the deceased, and the manner and distance from which it was thrown, the Court cannot say as a matter of law, that it was a deadly weapon, but must leave that with the jury as a matter of fact.

3rd. That if the jury believe that the deceased was slain in a sudden quarrel and hot blood, without previous malice, the prisoner would only be guilty of manslaughter, though they should believe that he killed the deceased.

4th. That if the jury believe that the prisoner killed the deceased, and that he intended to strike Redman, and not the deceased; if the assault upon Redman had been only manslaughter had he killed Redman, then it would be manslaughter as to the killing of the deceased.

5th. That if the jury believe that the prisoner threw the rock that killed the deceased, and only intended to frighten or punish Redman, and did not intend to kill him, or do him great bodily harm, and the missile thrown was not a deadly weapon, then the prisoner would only be guilty of manslaughter.

6th. That a weapon might be a deadly weapon, when used on a small or feeble man, that would not be a deadly weapon when used on a large or powerful man.

The Court declined to give these special instructions, except so far as they are contained in his charge to the jury. The charge of the Court was given at considerable length.

The first instruction asked by the prisoner, was substantially given by the Court as follows: "Has the State satisfied you beyond a reasonable doubt, that the deceased's death was caused by a wound received on the night of the 4th of November, 1884, as charged in the indictment, and that the prisoner at the bar threw a rock or other missile which inflicted the wound? If the State has failed to satisfy
you of either of these facts, then it is your duty to acquit the
(872) prisoner.

The Court declined to give the second instruction asked, and charged the jury upon that point, "that a rock weighing one and a half pounds, if thrown by the prisoner, is a deadly weapon."

The Court gave the third instruction asked, almost in the very language of the instruction as prayed for.

In lieu of the fourth instruction asked, the Court charged the jury: "If the State has fully satisfied you, that the prisoner got a rock weighing one pound, or a pound and a half, with the intention of throwing it at Thomas Redman, with the intent to kill him, or do him some great bodily harm; concealed himself and threw the rock at Redman, with the intent to kill him or do him some great bodily harm, and missed Redman and hit the deceased, and thereby killed him, it would be murder, and it would be your duty to convict."

The fifth instruction asked, was given by the Court in the very language of the instruction as prayed.

The sixth instruction was refused, and instead thereof the Court charged: "If the State has fully satisfied you, that the prisoner threw a flint rock, weighing a pound and a half, or two pounds, (which the Court charged you was a deadly weapon,) at Thomas Redman, or at deceased, or at any one standing in the crowd with the deceased, or at the crowd, at a distance of twenty steps or less, and thereby killed the deceased, it would be murder, unless there were circumstances of mitigation, extenuation or excuse, and if there were such circumstances, the burden would be on the defendant to establish them to the satisfaction of the jury.

The Court concluded its charge as follows: "The jury can render one of three verdicts in this case. If the State has failed to satisfy you beyond a reasonable doubt, either that the deceased died from the wound inflicted on the night of November 4th, 1884; or, if the State has failed to satisfy you beyond a reasonable doubt, that the prisoner threw the rock, or other missile, which inflicted the wound, it is your duty to acquit the prisoner; and if the State has satisfied you beyond (873) a reasonable doubt that the prisoner threw the rock, or other missile, which inflicted the wound of which the deceased died, it is your duty to convict him, either of murder or manslaughter, as you may find under the instructions already given."

The prisoner excepted to the refusal of the Court to give the special instructions asked, and to the charge as given. The jury rendered a verdict of guilty. There was a motion for a new trial, upon the ground of the exceptions heretofore taken, and upon the further ground, that the Solicitor had abused the privilege of an attorney, in his address to the jury—the objectionable portions of which are set out at great length in the statement of the case.

Attorney-General, for the State.

Mr. R. F. Armfield, for the defendant.

ASHE, J., (after stating the facts). The first exception taken by the prisoner, was to the ruling of the Court in disallowing his challenge to the array. But there was no error in that—for a challenge to the array can only be taken when there is partiality or misconduct in the Sheriff, or some irregularity in making out the list. Wharton's Am. Cr. L., Sec. 2946. There was here no default in the Sheriff. One of the persons named as jurors could not be summoned, because he was dead, and the other three could not be summoned, because they could not be found. The Sheriff returned these facts. What more could he do?

The second exception was to the Court's overruling the prisoner's exception to the admission of the testimony of Dr. White, as an expert, and this exception is put wholly on the ground that he had not been examined by the State Board of Examiners. This is a virtual admission of his competency, except for that.

On his preliminary examination, he clearly qualified himself (874) to testify as an expert, under the rules laid down by this Court

In several cases, notably in *State v. Sheets,* 89 N. C., 543; *State v. Cole,* at this Term: and we know of no rule of evidence or of law, that would exclude his testimony, because he had not been examined by the Examining Board, when he has shown himself to be otherwise qualified.

The third exception was to the ruling out of what Mrs. Mayberry said to her husband, about some one being killed. There was no error in that. In her examination in chief, she stated that she heard some quarreling, and something that sounded like two licks, but said nothing about any one being killed, and on re-direct examination, she was asked, after objection by the Solicitor, if she had made the same statement to anybody else, and she said she had told it to her husband, and told him that *she thought some one had been killed.* This was properly ruled out, because she had made no such statement on her examination in chief. It did not amount to anything in any view of the case. What she thought, could not possibly have affected the minds of the jury in the least, and it is always better to rule such immaterial questions in favor of the defendant in criminal actions. To do otherwise, only gives the defendant grounds of appeal, and often has no other effect than to delay and obstruct the course of justice.

The fourth exception was to the refusal of the Court to give the special instructions asked. We are unable to discover any error in the rulings of the Court upon the instructions prayed by the prisoner.

The first instruction was given. The second instruction was properly refused. What was the instrument used in inflicting the mortal

wound, was a question for the jury, and if they should find it was such a stone as that described by the witnesses, then it was a question of law to be decided by the Court, whether it is a deadly weapon or not. *State v. West*, 51 N. C., 505; *State v. Collins*, 30 N. C., 407.

The Court gave the third instruction as prayed for.

There was no error in refusing the fourth instruction. The ex- (875) ception is predicated upon the assumption, that if the prisoner in throwing the rock, had killed Redman instead of Mason, it would have been only manslaughter, and consequently, if in throwing it at Redman, he struck and killed the deceased, it would still be only manslaughter. But according to the evidence, if he had struck and killed Redman, under the circumstances of the case, it would have been murder; for there was no fact proved, that tended to excuse or mitigate the act, even if Redman had been the victim instead of the deceased. The instruction given by the Court in reference to that exception, was without error, and well warranted by the facts of the case.

The sixth instruction asked was, "That a weapon might be a deadly weapon, when used on a small or feeble man, that would not be a deadly weapon when used on a large and powerful man."

This instruction ought not to have been given, and was properly refused, for there was no evidence to which it applied. There was no evidence that the deceased was a small or feeble man; for aught that appears, he may have been a very stout and powerful one. The instruction involves a mere abstract proposition, which the Court is not bound to give, and in fact should not give. *State v. Martin*, 24 N. C., 101; *Walker v. Baxter*, 23 N. C., 203.

It was further contended by the prisoner's counsel, that there was error in that part of the charge of the Court, in which it was said: "If the State has fully satisfied you, that the prisoner at the bar threw a rock, weighing one pound, or one pound and a half, or *other missile*, intending to do great bodily harm to Thomas Redman or to the deceased, and the deceased was stricken with the rock or other missile, and thereby killed, he would be guilty of murder, though he did not intend to kill either." It was insisted that it should have been left to the jury to determine whether the wound given the deceased was inflicted with a rock or other missile, and if with some other missile, whether it was clearly calculated to do great bodily (876) harm, for the counsel contended, that if inflicted with a missile not calculated to kill, or do great bodily harm, it could not, upon the authorities cited by him, be murder, although there was no provocation. But we are of the opinion, that the facts of this case, do not warrant the application of the principal. Upon the authority of *State v. Gould*, 90 N. C., 658, and the authorities there cited, it could make

no difference whether the mortal wound was inflicted with a rock, as charged in the indictment, or with "some other instrument of the same nature and character, when the method of the operation is the same." Whatever was the instrument used in this case, it was one thrown at the deceased, and was of such a deadly character as to break his skull and cause his death. It must necessarily have been of such a nature as to be a deadly weapon, or one calculated to do great bodily harm. But there was no evidence in the case, tending to show that the missile thrown was one of a nature not calculated to produce death or great bodily harm. All the evidence in the case pointed directly to the rock, weighing from one pound, to a pound and a half, with which the deceased was stricken, and the jury were well warranted by the evidence, in finding that the deceased was stricken with the rock, which caused his death, and that being so, the Court committed no error in charging them, that under such circumstances, the prisoner was guilty of murder.

The last exception taken by the prisoner, to the *abuse of privilege* by the Solicitor in his argument to the jury, was only taken after verdict, and it has been repeatedly decided by this Court, that such an exception, taken after verdict, is too late, and cannot be sustained. *State v. Suggs*, 89 N. C., 531; *Horah v. Knox*, 87 N. C., 483.

There is no error. Let this be certified to the Superior Court of Iredell County, that the case may be proceeded with in conformity to this opinion, and the law of the land.

No error. Affirmed.

Cited: *S. v. Hensley*, 94 N.C. 1028; *S. v. McMahan*, 103 N.C. 382; *Moore v. Guano Co.*, 130 N.C. 231; *S. v. Parker*, 132 N.C. 1016; *S. v. Tyson*, 133 N.C. 696; *S. v. Mincher*, 172 N.C. 898; *S. v. Lewis*, 177 N.C. 558; *S. v. Levy*, 187 N.C. 584; *S. v. Stewart*, 189 N.C. 348; *S. v. Steele*, 190 N.C. 509; *Butler v. Ins. Co.*, 196 N.C. 205; *S. v. Dixon*, 215 N.C. 440.

STATE v. ALICE CRENSHAW.

Town Ordinance—Penalty.

1. An ordinance of a town, which provides, that for certain offences, the offender shall pay not more than fifty dollars, or suffer imprisonment not to exceed one month, is void for vagueness and uncertainty.

2. The charter of the town of Durham (Private Acts 1874, chap. 110), does not authorize the commissioners to prescribe imprisonment as a punishment

for a violation of a town ordinance. It only authorizes imprisonment, if the party offending fails to pay the penalty incurred, when judgment therefor is obtained against him.

3. Nor does the general statute in relation to "Towns and Cities," authorize imprisonment for violation of such ordinance. It provides that the commissioners of towns may enforce their by-laws and regulations, and compel the performance of duties imposed, by suitable penalties, by which is meant pecuniary penalties, to be paid because of some default or violation of law.

4. While it is made a misdemeanor to violate an ordinance of a town, these statutes imply a valid ordinance. It is no offence to violate or disregard a void ordinance.

This was a WARRANT issued by the mayor of the town of Dur- (877) ham, for violation of a town ordinance, and was carried by appeal to the Superior Court of DURHAM County, when it was tried at the Fall Term, 1885, before *Gilmer, Judge*, and a jury.

The defendant was found guilty, and from the judgment pronounced by the Court, appealed to the Supreme Court.

The case is sufficiently stated in the opinion of the Court.

Attorney General, for the State.

Mr. W. W. Fuller, for the defendant.

MERRIMON, J. The defendant was arrested by virtue of a warrant, granted by the mayor of the town of Durham, charging her criminally for an alleged violation of an *ordinance* of that town, whereof the following is a copy:

"Any person who shall assault, oppose, or resist, or in any manner abuse, or insult any officer of the town, or member of (878) the police, while in the discharge of any duty, shall *forfeit and pay not more than fifty dollars, or suffer imprisonment not to exceed one month.*"

Before the mayor, the defendant pleaded not guilty; upon the trial she was found guilty, and there was judgment against her, from which she appealed to the Superior Court, where she was again found guilty, and there was judgment there against her, from which she appealed to this Court.

The charge in the warrant cannot be sustained as a criminal offence. The ordinance, for an alleged violation of which it is preferred, is void for uncertainty. It prescribes a penalty for a violation of its provisions, of "not more than fifty dollars," that is, it may, in the discretion of the mayor, be any sum less than that designated. It is settled, that penalties such as those prescribed in town ordinances, must be for a definite, fixed sum of money. An ordinance in substance

like that before us, was expressly held to be void, in *Commissioners v. Harris*, 52 N. C., 281; *State v. Zigler*, 32 N. J. L., 269; 1 Dill on Mun. Corps., Sec. 337, et seq.

The ordinance further provides, that whoever violates its provisions, shall pay such penalty as that mentioned, "or suffer imprisonment, not to exceed one month." This provision is also void. The charter of the town, (Pr. Acts 1874-'75, ch. 110), does not authorize the commissioners thereof to prescribe imprisonment for a violation of an ordinance made by them. It only authorizes the imprisonment of a person so offending, if he fails to pay the penalty incurred, when judgment therefor shall be obtained against him.

Nor does the general statute law of the State, in relation to "towns and cities," (The Code, Vol. 2, ch. 62), authorize imprisonment for a violation of town ordinances. The Code, Sec. 1804, provides, that, "They, (the commissioners of towns), may enforce their by-laws and regulations, by imposing penalties on such as violate them, and compel the performance of the duties they impose upon others, by suit-
(879) able penalties."

By the term *penalty*, as here used, is meant a pecuniary punishment. Generally, that term implies a sum of money, specified to be paid, because of some default, or violation of law by the party to be charged.

Besides, other sections of the statute cited, show clearly that pecuniary penalties are intended. These provide for their collection.

So that, although the commissioners of the town of Durham, might exercise the powers conferred by the general statute cited above, in respects not effected by the provisions of the charter of that town, they would still not have authority to prescribe imprisonment for the violation of an ordinance they might make. They cannot exercise a power not conferred.

As the ordinance in question is void, the defendant committed no criminal offense as charged.

The effect of the Code, Sec. 3820, and as well Sec. 78 of its charter, makes it a misdemeanor to violate an ordinance of the town of Durham, but these statutes imply a valid ordinance—one that is operative and effective.

The penalty is an essential part of the supposed ordinance in question; without the latter, which we have seen is void, it is unmeaning and pointless. It may be, that the violation of a valid ordinance, without a penalty attached, would be indictable, but here there is none in law.

This Court held in *State v. Bean*, 91 N. C., 554, that it was not a criminal offence to violate or disregard a void ordinance of the town

of Salisbury. That case is directly in point, and must control this case. 1 Dill. Mun. Cor., Sec. 336.

There is error. The defendant was improperly convicted. To the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: S. v. Cainan, 94 N.C. 884; *S. v. Worth,* 95 N. C. 616; *S. v. Rice,* 97 N.C. 422; *S. v. Irvin,* 126 N.C. 995; *S. v. Maultsby,* 139 N.C. 585; *S. v. Addington,* 143 N.C. 686; *S. v. Abernethy,* 190 N.C. 771.

STATE v. JOHN CAINAN.

Nuisance—Jurisdiction—Indictment—City Ordinance.

1. To make an act a nuisance, it must be done in the presence and hearing, and to the annoyance of divers persons about the place where the act was done.
2. As Justice of the Peace has concurrent jurisdiction with the mayor of a city or town, of violations of town ordinances, which are made misdemeanors, and the punishment of which cannot exceed a fine of fifty dollars, or imprisonment for thirty days.
3. It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such *indicia*, as point it out with sufficient certainty.
4. A city ordinance punishing by a fine, loud and boisterous cursing and swearing in any street, house, or elsewhere in the city, is valid, and one which it is in the power of the municipal corporation to make.
5. In an indictment under this ordinance, it is not necessary to set out the words used by the defendant.

INDICTMENT, tried before *Clark, Judge,* and a jury, at Jan- (880) uary Criminal Term, 1886, of the Superior Court of WAKE County.

The defendant was arrested by virtue of a warrant, issued by the mayor of the city of Raleigh, in which it is alleged that he "engaged in disorderly conduct, by the use of loud and boisterous cursing and swearing in said city, and did violate the rules of decency by the use of obscene language in said city, in violation of the ordinance of the city of Raleigh, chapter 5, section 3, contrary to," etc.

The ordinance referred to is as follows: "Every person found guilty of loud and boisterous cursing and swearing in any street, house, or elsewhere in the city, and every person found drunk on the streets,

alleys, or any public place of the city, disturbing the peace of the city, or violating the rules of decency, shall be fined five dollars for every offence." On the trial, the mayor found the defendant guilty, and gave judgment against him, from which he appealed to the Superior Court.

In that Court, the jury found a special verdict, from which it
(881) appeared that the defendant, on and about the premises of witness, engaged in disorderly conduct, "by cursing and swearing in a loud and boisterous manner, using profane and indecent words, that the defendant's language was loud enough to be heard by the neighbors on adjoining lots, and that he, the defendant, was upon the lot and engaged in such disorderly conduct about twenty minutes."

The Court being of opinion, as matter of law, that the defendant was guilty, directed that verdict be entered, gave judgment against the defendant, and he appealed to this Court.

Attorney General, for the State.
Mr. J. C. L. Harris, for the defendant.

MERRIMON, J. (after stating the facts.) The ordinance mentioned in the warrant, has reference to and forbids such acts and conduct of persons, as are offensive and deleterious to society, particularly in dense populations, as in cities or towns, but do not *per se* constitute criminal offences, under the general law of the State. The suggestion that the acts and things forbidden constitute nuisances, is not well founded. They lack the element of having been done in the presence and hearing, and to the annoyance of divers persons, in, near to, and about the place where the offensive acts were done. The purpose of the ordinance is to promote good morals, the decencies and proprieties of society, and prevent nuisances and other criminal offences, that might result from the acts and conduct prohibited.

Obviously, the ordinance is adapted to the purpose for which it is intended. It tends reasonably to promote the peace, good order, and well-being of the city, and it was clearly within the power of the Aldermen to make it; certainly in so far as it does not prohibit a criminal offence under the general law of the State. They have such power conferred by the city charter, as well as by the general law of the State in respect to towns and cities.

(882) The action is not a civil one, brought to recover the penalty prescribed, but it is a criminal action, for the alleged violation of the ordinance referred to, which violation is made indictable by The Code, Sec. 3820, and of which, plainly, the mayor had jurisdiction. The Code, Sec. 3818, constitutes him an inferior Court within the municipality, makes him a conservator of the peace, and confers on

him the "jurisdiction of a justice of the peace, in *all criminal matters arising under the laws of the State;* or under the ordinance of said city or town." A justice of the peace, and as well the mayor, has jurisdiction of a violation of a town ordinance, because it is a misdemeanor, and the punishment therefor cannot exceed a fine of fifty dollars, or imprisonment for thirty days. The Code, Secs. 3820, 892.

It has been expressly decided, that it is not necessary to set forth in the warrant, the ordinance alleged to have been violated. It is sufficient to refer to it by such *indicia* as points it out with reasonable certainty. *State v. Merritt,* 83 N. C., 679.

The warrant does not charge more than one offence. The acts charged to have been done, constitute a single violation of the ordinance referred to, as they were all done on the same occasion and were of the same nature. Nor does the warrant charge, nor do the facts found in the special verdict constitute a nuisance, as insisted by the defendant's counsel. It is not alleged, nor does it appear, that the boisterous cursing and swearing were in a public place, in the presence and hearing, and to the annoyance of divers persons thereabout.

Nor was it necessary to set forth in the warrant, the exact words used by the defendant. If he boisterously cursed and swore, no matter what were the precise words used, he was guilty. The words "boisterous cursing and swearing", have such distinctive signification, as necessarily implied a violation of the ordinance, and gave the defendant to understand with sufficient certainty, how he had violated it. The charge was simple and easily understood, without nice precision in making it. The Court could see that an offence was charged, and the defendant had sufficient notice and information (883) to enable him to make his defence.

There is no error. To the end that the judgment may be affirmed, and further proceedings in the action had according to law, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: S. v. Debnam, 98 N.C. 717; *S. v. Smith,* 103 N.C. 405; *S. v. Warren,* 113 N.C. 684, 685; *S. v. Stevens,* 114 N.C. 879; *S. v. Horne,* 115 N.C. 740; *S. v. Sherrard,* 117 N.C. 719; *S. v. Taylor,* 133 N.C. 758; *Paul v. Washington,* 134 N.C. 386; *S. v. Faulk,* 154 N.C. 640; *S. v. Moore,* 166 N.C. 372; *S. v. Abernethy,* 190 N.C. 771.

STATE v. JOHN CAINAN.

Town Ordinances.

1. Where a town ordinance provided that for certain disorderly conduct, the offender might be fined by the mayor not more than five dollars; *It was held*, that the ordinance was void, because the amount of the fine was not fixed and definite.
2. In such case, if the ordinance had imposed a fine of a certain amount, with power in the mayor or other police justice, to remit a portion thereof in his discretion, it would have been valid.

INDICTMENT, tried before *Clark, Judge*, and a jury, at the January Criminal Term, 1885, of the Superior Court of WAKE County.

The defendant was convicted and appealed.

The facts appear in the opinion.

Attorney General, for the State,
Mr. J. C. L. Harris, for the defendant.

MERRIMON, J. The defendant is charged with a violation of an *Ordinance* of the City of Raleigh, whereof the following is a copy: "Any person attending the market intoxicated, or who shall behave (884) in a rude and improper manner, or use profane, indecent, or boisterous language, shall be subject to arrest, and to a fine *not exceeding five dollars.*"

It will be observed, that the fine to be imposed, may be any sum *less* than five dollars. It is thus uncertain, and renders the ordinance void. In this respect, it is substantially like those held to be void in *Commissioners v. Harris*, 52 N. C., 281, and *State v. Crenshaw*, ante, 877.

On the argument, the Attorney General directed our attention to several authorities from other States, upholding such ordinances as valid, and commended to us the force of the reasoning upon which they rest. It must be conceded that there is a diversity of decisions on this subject, but we are unable to conceive of any reason sufficiently urgent to warrant us in overruling our own decisions. That first cited was made by a very able court, and has stood unchallenged in any respect, for more than a quarter of a century. The reasoning in *Commissioners v. Harris, supra*, if not conclusive, has great force, and harmonizes with the methods of enforcing town ordinances in this State by civil action. Besides, there are high authorities both in England and America, in exact harmony with our view. *State v. Zeigler*, 3

Vroom (32 N. J. L.), 262; 1 Dill. Mun. Corp., Secs. 337, 341, 410, and notes.

It was insisted on the argument, that if the penalty were omitted—treated as void—this did not render the whole ordinance void—it simply left it without a penalty, and therefore to violate it, would be indictable under the statute. We cannot accept this view. It contravenes what we have decided. And besides, the ordinance would be meaningless, without supplying material words, which we certainly have no authority to add. Moreover, without the penalty, it is not what its authors intended it should be. We cannot suppose or infer that they would have made it without the penalty.

It might be well, and sometimes better, in order to meet the ends of justice, to give the mayor or other chief executive officer (885) of the town, discretion as to the measure of the penalty to be imposed for the violation of an ordinance. This may be easily done by making the penalty prescribed certain, and providing that the mayor, or other like officer, shall have power to remit such part of the judgment for the penalty incurred, as he may deem just.

There is error. The judgment must be reversed, and judgment entered that the defendant go without day. To that end, let this opinion be certified to the Superior Court. *It is so ordered.*

Error. Reversed.

Cited: S. v. Worth, 95 N.C. 616; *S. v. Rice,* 97 N.C. 422; *S. v. Earnhardt,* 107 N.C. 790; *S. v. Stevens,* 114 N.C. 879; *S. v. Irvin,* 126 N.C. 995; *S. v. Addington,* 143 N.C. 686; *S. v. Abernethy,* 190 N.C. 771.

STATE v. PHILO HARBISON.

Indictment—Affray—Evidence—Competency of Wife.

1. By The Code, Sec. 1353, the husband or wife of the defendant, is a competent witness *for the defendant,* in all criminal actions or proceedings.
2. By Sec. 1354, neither husband nor wife is competent or compellable to give evidence *against* the other in any criminal proceeding.
3. When two are indicted in the same bill for an affray and mutual assaults on each other, the wife of neither is a competent witness for the State or for the other defendant.

This was an indictment for an affray and mutual assaults and batteries, tried before *Graves, Judge,* at Spring Term, 1886, of BURKE Superior Court.

There was evidence offered on the part of the State, that Gaston Scott, who was also charged in the bill of indictment, and the defendant Harbison, were seen to come from behind the house where they both lived, the defendant Harbison running, with a pistol in his hand, and the defendant Scott pursuing him and firing at him. No (886) other evidence as to how the difficulty began, was offered by the State.

The defendant Scott testified in his own behalf, that he was first assaulted by the defendant Harbison, with a pistol.

The defendant Harbison testified in his own behalf, that he did not assault the defendant Scott in any manner. The defendant Harbison then called Hennie Scott, and offered her as a witness in his behalf. The defendant Scott objected to the competency of the witness to testify against him, and it being made to appear to the Court, that the offered witness, Hennie Scott, was the wife of the defendant Gaston Scott, he insisted that she, being his wife, was not competent to testify against him.

Harbison, on the other hand, insisted that she was competent to testify for him, and he expected to prove by her the whole transaction, and especially that he did not assault the defendant Scott.

The Court, being of opinion that the witness Hennie was not competent to testify against her husband, refused to allow her to testify, and the defendant excepted.

There was a verdict of guilty against both defendants; a motion for a new trial; motion overruled, and judgment against both defendants, from which Harbison alone appealed.

Attorney-General, for the State.
Mr. S. J. Erwin, filed a brief for the defendant.

ASHE, J. (after stating the facts). The sole question presented for our consideration is, was the wife of the defendant Scott a competent witness in this case?

The indictment charged that the defendants committed an affray, and mutually assaulted and beat each other.

Although the indictment charges an affray, it at the same time charges mutual assaults and batteries, and although the indictment might not be good for the affray, because, for instance, the fight did not take place in a public place, etc., the defendants still may be convicted of the assault and battery upon each other, or one may be con- (887) victed, and the other acquitted. *State v. Wilson,* 61 N. C., 337.

Each of the defendants introduced himself as a witness in his own behalf. Scott testified that Harbison first made an assault upon

him with a pistol, and Harbison swore that he did not assault Scott in any manner, and proposed to examine Hennie, the wife of Scott, to prove by her the whole transaction, and especially that he did not assault the defendant Scott.

By Sec. 1353 of The Code, the wife is made a competent witness for her husband, when charged with a criminal offence, and by Sec. 1354, it is provided, that the wife shall not be competent or compellable to give evidence against her husband.

The defendant proposed to prove by her, the whole transaction, and especially that he did not commit an assault upon her husband, Scott. She could not testify to the whole transaction, without giving testimony against her husband, for he was seen running after the defendant Harbison, firing at him as he ran. This would make him guilty, no matter if the assault was first made upon him by Harbison, and then, if she were to testify that Harbison did not commit the first assault upon her husband, it would necessarily prove that her husband committed the first assault, for unquestionably, there was an assault committed by one or the other, and if not by Harbison, it must follow, as a self evident truth, that it was committed by her husband. So, whichever way it may be taken, her testimony would have been against her husband, and was therefore incompetent. It could make no difference, whether the testimony of the wife tended directly or indirectly to convict the husband, it was equally incompetent.

We are of the opinion that she was an incompetent witness, and the judgment of the Superior Court is therefore affirmed. This opinion must therefore be certified to the Superior Court of Burke County, that further proceedings may be had there according to law.

No error. Affirmed.

Cited: S. v. Adams, 193 N.C. 582; *S. v. Brigman,* 201 N.C. 794; *S. v. Kluttz,* 206 N.C. 728; *S. v. Cotton,* 218 N.C. 579.

STATE v. THOMAS BRIGMAN.

Indictment—Injury to Stock—Stock Law.

1. An illegal act is *wanton*, when it is needless for any rightful purpose, without any adequate legal provocation, and manifests a reckless indifference to the rights and interests of another.
2. To constitute the offence of wantonly and wilfully injuring the personal property of another, the act done must be wanton and wilful.

3. When an unlawful act is the result of a preconceived purpose, and not the mere impulse of anger, it is wilful.
4. The fact that the stock law prevails in a territory, is no excuse for inflicting wilful and wanton injury on stock running at large.
5. Where the defence, in an indictment for injury to stock, was that the stock law prevailed where the offence was committed, and the prosecutor did not keep his stock up, which trespassed on the crops of the defendant; *It was held*, no defence, and on the defendant's own evidence he was guilty.

(888) INDICTMENT, tried before *MacRae, Judge*, and a jury, at Fall Term, 1885, of the Superior Court of RICHMOND County.

The defendant is charged with the wanton and wilful killing of a cow, belonging to one Seth Andrews, made an offence under the Act of December, 13, 1876, (The Code, Sec. 1082), as amended by the Act of February, 10, 1885, ch. 53. In its amended form, the statute declares, that "If any person shall, wantonly and wilfully, injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the Court."

The defendant was put on trial before the jury, upon his plea of not guilty, and being examined, as a witness on his own behalf, testified to the following facts: The stock law prevails in the territory wherein the offence is alleged to have been committed, and Andrews, mentioned in the indictment, undertook to confine the cow in a pasture, surrounded by a very low and insufficient fence, from which she had repeatedly broken out for a week previous, and entered his cultivated land, and greatly damaged the crop growing thereon, which the defendant had sold to one Diggs. Andrews had been notified of the depre-
(889) dations committed by his stock, and requested to keep his cattle out. Diggs had employed witness to take care of the crop, and directed him "to shoot them, if they could not otherwise be kept out of the field."

On Saturday morning, witness found a cow there, and shot her, as soon as he came up to her, and again a second time, in the field. The witness did so, because he was unable to keep her out, either in the day time or at night, and as a means of protecting the crop. It is unnecessary to set out other evidence, since the Court instructed the jury, that upon the defendant's own statements, if accepted as correct, he was guilty. The jury convicted the defendant, and judgment being pronounced, he appealed to this Court.

Attorney General and Mr. Platt D. Walker, for the State.
Mr. John D. Shaw, for the defendant.

SMITH, C. J., (after stating the facts). The sole question then is, whether the shooting and killing the cow under the circumstances detailed, and for the purposes mentioned, is *"wanton and wilful"* within the contemplation of the statute, and more especially, was it *"wanton?"* To be criminal, the act must possess both qualities. It was certainly wilful, for it was the development of a preconceived purpose, not an impulse of anger, excited by unexpectedly seeing a repetition of the annoying trespasses. But more is required to constitute the indictable offence. The act must not only be of purpose, but it must also be wanton. What does this qualifying adjective mean, when applied to the killing?

Wantonness is defined by Bonvier, to be "a licentious act of one man, towards the person of another, without regard to his rights," and licentiousness, to be "the doing what one pleases, without regard to the rights of others."

In *Welch v. Durand,* 36 Conn., 182; Butler, Judge, speaking for the Court, says, "wantonness is action without regard to the (890) rights of others."

Mr. Justice Willes declares that "wantonly, means not having a reasonable cause." *Clark v. Haggins,* 103, E. C. L., Rep., 543.

In *Cobb v. Bennett,* 75 Penn. St., 326; when the action was for an injury done to a fishing net, in the waters of the Delaware, in use by the plaintiff, Chief-Justice Agnew uses this language: "It is *wantonness* when a mariner, warned of the net, seeing the lights marking its position, and requested to avoid it, yet indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net. Wantonness is reckless sport;—wilfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so without inconvenience to himself, can he be said to be blameless?"

This is, in our opinion, a fair exposition of the sense in which the word is used in the statute. The illegal act is wanton, when it is needless for any rightful purpose,—without adequate legal provocation,—and manifests a reckless indifference to the interests and rights of others. It is such a wrong, which the law subjects to a criminal prosecution.

To obviate the necessity of a resort to violence as a means of personal redress, or to avenge an injury done by straying stock, the law has made ample provisions, and this is open to the injured party.

It is made a misdemeanor for the owner to allow his stock to go at large in territory covered by the stock law, and he may be punished. The Code, Sec. 2811.

Stock found at large, may be taken up and impounded, and if damage has been done to another, a summary mode of assessing its amount is given, and both the costs incurred and the damages ascertained, must be paid, before the owner can have possession of his property. Ibid. Sec. 2816.

With these means of remuneration for losses sustained from
(891) the incursions of stock upon land in cultivation, there can be no legal excuse for the defendant to destroy the unoffending and irresponsible animal, and it must be characterized as *wanton* as well as wilful. The instruction of the Court was correct in law, and there is no error.

Let this be certified, to the end that the Court proceed to judgment upon the verdict.

No error. Affirmed.

Cited: S. v. Morgan, 98 N.C. 643; *Hansley v. R. R.,* 117 N.C. 572; *S. v. Neal,* 120 N.C. 619; *Everett v. Receivers,* 121 N.C. 522; *S. v. Battle,* 126 N.C. 1044; *S. v. Martin,* 141 N.C. 839; *Bailey v. R. R.* 149 N.C. 174; *Turner v. Lipe,* 210 N.C. 629; *Kelly v. Willis,* 238 N.C 639.

STATE v. ISAAC WILLIAMS.

Practice and Pleading—Former Acquittal—Estoppel Against the State.

1. When the defendant relies on the plea of former acquittal, the jury must find that there was a judgment which remains in force, and not reversed.
2. To support the plea, it must appear that the offences are precisely the same in the two indictments, both in law and in *fact,* and that the former indictment and the acquittal were sufficient in law. An acquittal in an indictment charging a sale to A, will not sustain this plea to an indictment charging the selling to B.
3. The doctrine of *estoppel* does not apply to the State; therefore, when in one indictment for selling liquor within five miles of a church, it was found that the place where the liquor was sold, was more than five miles from the church, this does not estop the State from proving in another indictment, that the same place was less than five miles from the church.

INDICTMENT for selling spirituous liquors to one Calvin Bethune, within five miles of Bethel church, in Richmond County, contrary to the provisions of the Act of 1881, ch. 234, tried before *MacRae, Judge,* at Fall Term, 1885, of RICHMOND Superior Court.

The defendant pleaded "not guilty," and "former acquittal," and the jury, on the trial of the plea of former acquittal, ren- (892) dered the following special verdict: "The jury find, that on or about the fifth day of December, 1884, the defendant, at a certain place in the county of Richmond, known as the Jim Green place, did sell to Calvin Bethune, one quart of spirituous liquor, to-wit, "corn whiskey."

They further find, that at the present Term of this Court, the defendant was tried upon an indictment for selling spirituous liquor to one William Wade, within five miles of Bethel Church, Richmond County; that on said trial, it was admitted by the State and defendant, that the selling of whiskey by defendant to William Wade, was at the "Jim Green place," in said county, but defendant denied that the place of sale of said liquor was within five miles; that the presiding Judge instructed the jury on the trial of said bill of indictment, that the controlling question in the case was, whether the "Jim Green place" was within five miles of Bethel Church, in Richmond County, or not. If the jury find that the "Jim Green place" was within five miles of said Bethel Church, then the defendant, upon the testimony and admission, was guilty. If the State failed to prove this fact to the satisfaction of the jury, they must find a verdict of not guilty, and that thereupon the jury found the defendant not guilty. If, upon the foregoing facts, the Court is of the opinion that the defendant has been formerly acquitted, the jury find a verdict to that effect. If the Court is of opinion, upon these facts, that the defendant has not been formerly acquitted of the charge in this bill of indictment, they so find."

The Court, upon the foregoing special verdict, directed that judgment be entered sustaining the plea of former acquittal. From this judgment the Solicitor for the State appealed.

Attorney-General, for the State.

Messrs. Platt D. Walker and Frank McNeill, for the defendant.

ASHE, J., (after stating the facts). This is certainly a case of the first impression. We have been unable to find any case like (893) it in the books on criminal law, and the learned and undefatigable counsel for the defendant, admitted in the argument of the case, that they had been unable, in their researches, to find any case where such a practice had been adopted.

The mischief intended to be remedied by the Act of 1881, under which the defendant was indicted, was evidently to prevent the sale of intoxicating liquors, with their usual concomitants of drunkenness, broils and boisterous and riotous conduct, within five miles of Bethel

Church, by which the religious worship in said church might be disturbed.

If the position contended for by the defendant's counsel be correct, then if one person should be indicted for selling liquor at a particular place, mentioned in the indictment, and the place so designated is not more than three miles, or less, from the church, and the State, by the introduction of ignorant witnesses, fails to prove that the place is within five miles, or by the introduction of corrupt witnesses, it should be proved and found by the jury, that the place was beyond the distance of five miles, the person so indicted and acquitted, would be at liberty to sell liquor at the same place, *"ad libitum"*, though the State might be able to prove beyond all question, that the place was within the prohibited district.

Such is undoubtedly the effect of the adjudication in this case, if his Honor rendered his judgment upon the special verdict, upon the ground, as was argued before us, that the State was precluded in the latter indictment, from showing that the offence was committed within the distance of five miles, when on the former indictment, it had been found by the jury, that the place was not within five miles.

His Honor committed no error in not rendering judgment against the defendant upon the finding of the jury, but his error consisted in not ordering a *venire de novo,* for a defect in the special verdict. For the jury failed to find that there was any judgment in the former indictment, which, from all the precedents we have seen, is an es-
(894) sential ingredient in such verdicts. See Archbold's Criminal Pleading, 89; Bishop on Criminal Proceedings, Sec. 576, where the forms of indictment, in such cases, contain the allegation, "as by the record more fully and at large appears, which judgment still remains in full force and effect, and not in the least reversed or made void." See Hale's Pleas of the Crown, vol. 2, page 243; where it is laid down, that a judgment in the former indictment must be averred.

But conceding that the special verdict may be a proper mode of taking advantage of a "former acquittal", it certainly must find the same facts as would be necessary to be averred and proved, when that plea is pleaded, and it is well established, that to entitle the defendant to that plea, it is necessary that the crime charged be *precisely the same,* and that the former indictment, as well as the acquittal, was sufficient, Chit. Cr. L., 451, 452. On the latter page, he proceeds to say: "As to the first of these requisites, the identity of the offence, if the crime charged in the former, and present prosecution, are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offences are so far the same, that an acquittal of the one, will be a bar to the

prosecution of the other," and in Arch. Cr. Plea, pp. 87, 88, it is said: "When a man is indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such, that he could have been lawfully convicted on it." The true test, says he, by which the question may be tried, whether such a plea is a sufficient bar in any particular case, is, whether the evidence necessary to support the second indictment, would have been sufficient to procure a legal conviction upon the first, and to illustrate, he says: "If one of the indictments appear to be for larceny of the goods of a person unknown, and the other for the larceny of the goods of I. N., the plea should also aver, that the person, so described as the person unknown, and I. N., were the same person, and not different; and so if the one indictment be for the larceny of the goods of I. F., and the other for the goods of I. G., the two of- (895) fences may be identified, by an averment that the said I. G. was as well known by the name of I. N. as I. G." Why aver that the said I. G. was well known by the name of I. N. as I. G.? Because otherwise the indictment would not be *precisely* the same, and the defendant could not have been convicted under the former indictment, upon the evidence adduced in the latter. So in our case, the indictments are not *precisely the same*, and the defendant could not possibly have been convicted on the indictment for selling liquor to Bethune, by proving that he had sold liquor to Wade. Wharton's Precedents, Secs. 1151 and 1152.

The counsel for the defence, relied on the case of *State v. Nash*,, 86 N. C., 650; but the decision in that case, is in direct accordance with the authorities above cited. Judge RUFFIN, speaking for the majority of the Court, held that the indictment must be for the same offence, both in *law and in fact*.

The defendant, if we understand his position, contended that inasmuch as in the former indictment against him, the jury found that the "Jim Green Place" was not within five miles of Bethel Church, the State was estopped thereby from insisting in this indictment, against the same person, for selling liquor at the same place, although the charge in this indictment was for selling to a different person. There might possibly be some force in the position, if the State was subject to the law of estoppel. But unfortunately for the contention of the counsel, it has been held in this State, that the doctrine of estoppel does not apply to the sovereign. *Wallace v. Maxwell*, 32 N. C., 110; *Taylor v. Shuford*, 11 N. C., 132; *Candler v. Lunsford*, 20 N. C., 542.

We are of the opinion that there was error. Let this opinion be certified to the Superior Court of Richmond County, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. v. Marsh, 134 N.C. 206; *S. v. Hankins,* 136 N.C. 623; *S. v. White,* 146 N.C. 609; *S. v. Freeman,* 162 N.C. 597; *S. v. Malpass,* 189 N.C. 355; *Sharpe v. Carson,* 204 N.C. 516; *S. v. Barefoot,* 241 N.C. 655.

STATE v. A. M. LONG.

Indictment—Obstructing Highway—Presumption—Easement—Statute of Limitations.

1. A public square, for the general public's use, and as a means of access to the courthouse and other public buildings, is substantially a public highway, and is usually so described in an indictment charging its obstruction.
2. If not sufficiently described, in this indictment, as a highway, the objection is removed by the averment, that thereafter the citizens of the State "could not, nor can now, go, return, pass and repass *as they ought and were accustomed to do,* to the great damage and common nuisance."
3. An easement in land may be presumed from long, continuous, and uninterrupted enjoyment, and its abandonment and discontinuance may be presumed from *non-user* and obstructions acquiesced in and submitted to without resistance, for a period sufficient to raise such presumption. This applies to public, as well as private easements.
4. It was, therefore, error to refuse to charge the jury, that if the defendant and those under whom he claimed, had possession of the land covered by his store, adversely, continuously, and openly, for twenty years next prior to the finding of this bill, excluding the time between 21st May, 1861, and January 1870, the defendant is not guilty.
5. It was not error to charge the jury, that the two years' statute, barring prosecutions for misdemeanors, has no application to this case, because, if the putting up of the house was an offence, it was a continuous nuisance and a violation of law.

INDICTMENT, tried before *MacRae, Judge,* and a jury, at September Term, 1885, of the Superior Court of RICHMOND County.

(896) The indictment charges, that the defendant erected and maintained a house, for a long space of time, "upon a certain public square, in the town of Rockingham, in said (Richmond) County, known in the plan of said town as Washington square, and upon which the court house of said county is situated; so that the citizens of this State, in, upon and through said square, all that time, could not, nor can now, go, return, pass, and repass, as they ought and were accustomed to do, to the great damage and common nuisance," etc.

Upon his trial in the Superior Court of Richmond County, at Fall Term, 1885, he was found guilty, and from the judgment (897) rendered upon the verdict of the jury, he appealed.

Attorney General, for the State.
Messrs. John D. Shaw and Platt D. Walker, for the defendant.

SMITH, C. J., (after stating the facts). Three grounds are assigned in support of the application for a new trial, as follows:

I. The admission of incompetent evidence of boundary.

II. The refusal to give instructions asked; and

III. Error in those given to the jury.

Numerous witnesses were introduced by the State and by the defendant, whose testimony was conflicting as to the true location of the boundaries of the square, and whether the defendant's house was upon any part of it. It was in evidence, however, that those under whom the defendant claimed, had enclosed under fence, and for many years had cultivated, the land upon which the house alleged to be an encroachment was built, some few years before the trial, by the defendant. In reference to the effect of this evidence, if accepted by the jury as true, the Court was asked to charge:

"If the defendant and those under whom he claims, had possession of the land covered by the defendant's store, adversely, continuously, and openly, for twenty years, next prior to the finding of the bill, excluding the time of the suspension of the statute of limitations, (May 20th, 1861, to January 1st, 1870), the defendant is not guilty."

"If the public, at one time had the right to use and enjoy the square, as a public square, yet if the part alleged to be covered" (an evident omission in the transcript, requiring to be inserted to complete the sentence, "was in possession of the defendant", or words of equivalent force), "and those under whom he claims, adversely, openly, and continuously, for twenty years, under a fence, next before the finding of the bill, excluding the time as aforesaid, the defendant cannot be convicted." (898)

The Court, in the instructions delivered, does not notice this part of the defendant's prayer, but in answer to others asked, told the jury, if the defendant's building did, in fact, encroach upon the square, whether the defendant believed, in putting it up, that he was so encroaching or not, he would be guilty of the offence imputed, and the two years statute, barring prosecution for such misdemeanors, had no application to this case.

A public square, such as this is described and shown to be, for the general public use, and as a means of access to the courthouse and other

public buildings, is substantially a highway, and is usually so charged to be in the bill. In the present case, such an averment is not directly made in connection with that description of the place, and if a public square, used for public purposes, in connection with the court-house and public county buildings, does not, *ex vi termini*, sufficiently designate it as possessing the character and incidents of a highway, so as to subject one who obstructs and prevents its use as such, to indictment, the defect is removed by a subsequent averment, that thereafter the citizens of the State "could not, nor can now, go, return, pass and repass, *as they ought and were accustomed to do*", that is, as they before had a right to use the square as a highway, "to the great damage and common nuisance," etc.

Assuming then, that a criminal act has been sufficiently set out in the indictment, showing that the defendant, in erecting the house upon the square, exposed himself to prosecution for the offence, the question is presented, contained in the refused instructions, as to the effect of the alleged long previous and continuous possession of those under whom he claims, upon his, and the rights of the public, in reference to that portion of the square. Has it divested the estate of the county in the land, and put it in the occupant, or has it only extinguished the public easement or way over the land, or has it been ineffectual for either purpose?

In determining this appeal, it is only necessary to consider the
(899) consequences of the long adverse occupation upon the public easement or right of way over the withheld premises, since if this has ceased to exist, the prosecution must fail. In obstructing the exercise of this public right, not in wrongfully withholding property from the owner, the offense, if any, has been committed by the defendant.

The earlier decisions, as to the effect of long user in raising a presumption of the original legal creation of highways by the action of the public authorities, or an accepted dedication by the owner of the soil, *Woolard v. McCullough*, 23 N. C., 432; and *State v. Marble*, 26 N. C., 318; are not in harmony with the ruling, as to their formation and existence, in *Kennedy v. Williams*, 87 N. C., 6; which must be deemed the settled law on the subject. It is there held, that the assent of the public authorities, or a recognition and assumption of control by them over a road, as well as long adversary uninterrupted use of it, are necessary to its becoming a public highway, and this because without the consent of the proper authorities, manifested in some form, the burden of its reparation and maintenance cannot be imposed upon the public.

These considerations do not enter into the present controversy, for all essential conditions unite in establishing the present easement, and the only question is, as to its loss from non-user, by reason of defendant's occupation and exclusion of the public.

We are of opinion, that there was error in refusing to charge the jury, that if upon the evidence, they found the predecessors of the defendant, and himself, to have held continuous adversary possession of the place whereon his house now stands, for the prescribed period of time, thus forcibly depriving the public of all use of it, the public easement was lost, and the verdict should be for the defendant. In *Crump v. Mims,* 64 N. C., 767, RODMAN, J., on behalf of the Court, in reference to the effect of a long continuous obstruction, such as that before us, says, "The burden is on the plaintiff to make good his claim, in derogation of the public right. No doubt, on a non-user of a public road for twenty years, an abandonment by the lawful authority (900) would be presumed; and so, *after an acquiescence in an obstruction for that time, of a right to continue it.*"

Perhaps, the mere non-user of a small portion of a public square, which people had no occasion to pass over, there being sufficient space left for that purpose, would not have the effect, and, in our opinion, does not have the effect, of impairing the public rights; but it is otherwise, when it is appropriated to one's sole use by surrounding fences, and this is acquiesced in and submitted to without resistance in any form, for a sufficient space to warrant the inference of an abandonment and surrender to the aggressor.

Thus says Mr. Washburn, in his treatise on Easements, 670: "And even a public easement in a high-way, may be lost by non-user. The law in such cases, presumes an extinguishment, by abandonment for a long time."

Nearly the same language is used by BIRCHARD, J., delivering the opinion in *Fox v. Hart,* 11 Ohio, 416. So, says BIGELOW, J., in *Holt v. Sargent,* 15 Gray, 102; assuming the legal existence of a high-way, which the plaintiff alleged to have been discontinued: "It was competent for the plaintiff to show in proof of this issue, that the alleged way had been shut up; the land enclosed by a permanent fence or wall and occupied or improved for purposes inconsistent with its use as a high-way, for a long series of years, and any other facts, sufficient to found a legal presumption upon, that the way had been discontinued by competent authority." The rule, and the reasoning in support of it, has application to an easement, as a servitude imposed upon land, the estate in which is vested in another, and as long use can establish, so may long continued disuse, forced upon the public by interposed obstructions, destroy the encountering easement, under the rule of pre-

sumption. In *Commonwealth v. Albright,* 1 Whar. (Penn.) Rep., 468, the use of the square for public purposes, was a trust, created in the original deed, and an incident inseparable from the legal estate, and could not be detached, so that the adverse occupation must (901) defeat the title to the land, to defeat the uses for which it is held, and this the Court declared it could not do. It is true, the Court seems to confine an adverse possession, as effecting the right to a way, to private, and not public ways, but this is at variance with the cases referred to to sustain our own ruling.

Returning to the facts of the present case, can there be a more distinct and defiant assertion of a right, and of an adversary occupation to sustain it, to the premises, than is shown by this appropriation of the premises to the use of the successive occupants? Could there be stronger inferential proof of an abandonment of the public claim to the easement, than is found in the silent acquiescence of the public authorities in this assumption and exercise of ownership? This view of the case ought to have been presented to the jury, and there is error in the refusal to do so.

The Judge correctly charged, that there was no statutory bar to the prosecution, because the house was put up more than two years before the finding of the indictment, for its maintenance was itself an offence, as the nuisance was continuous as a violation of law.

There must be a *venire de novo,* and this will be certified, to the end that the verdict be set aside, and a trial had before another jury.

Error. Reversed.

Cited: S. v. Eastman, 109 N.C. 788; *S. v. Wolfe,* 112 N.C. 894; *Wolfe v. Pearson,* 114 N.C. 634; *S. v. Godwin,* 145 N.C. 464, 465; *Threadgill v. Wadesboro,* 170 N.C. 642, 643; *Haggard v. Mitchell,* 180 N.C. 261, 262; *Lee v. Walker,* 234 N.C. 695; *Rowe v. Durham,* 235 N.C. 161.

STATE v. JAMES H. MILLER.

Certiorari.

1. The statement of facts, found by the Judge and sent up, must be accepted as true.
2. The measure of punishment for an offence is within the discretion of the Judge, within the limits of the law; and it must also be matter of discretion whether he will hear a petition and evidence for change or modification thereof.

Petition for a CERTIORARI, filed by the defendant at the Feb- (902) ruary Term, 1886, of the Supreme Court.

The petitioner, charged in the indictment, which consists of five counts, with keeping a gambling house in the city of Raleigh, on his arraignment, entered his plea of guilty to the fourth count, and the solicitor entered a *nolle prosequi* to the others.

Thereupon it was adjudged, that he be imprisoned in the common jail for thirty days, commencing on the 10th day of January, 1886, and pay a fine of two thousand dollars, and stand committed after the expiration of said term of imprisonment, until the fine and costs of the prosecution were paid. From this sentence he appealed to this Court. The present application is for a writ of *certiorari*, to correct certain statements of fact, alleged to be erroneous, contained in the case on appeal, that transpired after the rendition of the judgment, in an effort on the part of his counsel to obtain a modification of the sentence, which was unsuccessful.

The averments in the application for the interference of this Court are summarily these:

The admission of guilt was made on Monday; two witnesses were then examined by the Solicitor, and judgment deferred until Friday, when it was pronounced. On Saturday, the next day, and last day of the Term, the defendant's counsel made known their wish and intention to apply to the Court for a reduction of the fine, and show that it was imposed under a misapprehension of the defendant's financial condition and resources, and they requested the Court to designate an hour, not earlier than 3 p. m. for its presentation (903) and disposal. Thereupon, that hour was designated for the hearing, before the arrival of which, the Judge left the court, and did not return during the day, though counsel were there present with the petition to be offered.

Counsel then prepared the case on appeal, and under an agreement with the Solicitor, sent it to the Judge. He refused to approve and sign it, and made out one himself, which is on file among the papers in the cause.

All the matters contained in the application are not set out but so much only, as shows the grounds upon which the agency of this Court is invoked, for the correction of alleged error in the action of the Court below.

Attorney General, for the State.

Messrs. John Gatling and E. C. Smith, for the defendant.

SMITH, C. J. (after stating the facts). The sole grievance made the subject of complaint, is in the imposition of so heavy a fine, and the refusal or omission of the Judge to hear the evidence offered in support of the application for its reduction. As the measure of punishment, within the limits of the law, for the offence, is, and must be, within the discretion of the Judge, as he may estimate its criminality, so must be his hearing or refusing to hear a petition for its change or modification, and testimony in relation thereto. It might obstruct or paralyze the administration of criminal justice, if this Court were to undertake to revise that discretion, or listen to suggestions that it has been unwisely exercised in a particular case. The Judge who tried the cause and heard the testimony, is the best, as he is in law the sole Judge, of the merits, and if he acts within the boundaries prescribed by law, his decision is final and unreviewable in the appellate Court.

We have already said in a similar application, that the state-
(904) ment of facts sent up in the case, must be accepted as absolute verity, when so found by the Judge, and the subject does not require further comment.

The application must be refused and the petition dismissed.

Dismissed.

Cited: Mayo v. Leggett, 96 N.C. 241; *S. v. Sloan,* 97 N.C. 501; *S. v. Debnam,* 98 N.C. 719; *S. v. Roseman,* 108 N.C. 767; *S. v. Harris,* 181 N.C. 608; *S. v. Calcutt,* 219 N.C. 566.

STATE v. JAMES H. MILLER.

Excessive Fine—Power of Judge Discretionary.

1. When the limit of punishment is not fixed by the Legislature, it is left as a matter of discretion with the presiding Judge. This court cannot control such discretion, nor fix such limits.
2. Where the defendant kept a retail liquor shop, in which he suffered games of cards to be played for money and articles of value; *Held,* that a fine of two thousand dollars and imprisonment for thirty days, and thereafter until the fine and costs were paid, was not excessive punishment.

This was an INDICTMENT, tried before *Clark, Judge,* at January Criminal Term, 1886, of the Superior Court of WAKE County.

The indictment against the defendant consists of five counts, setting out the offence in different forms, to the fourth of which, when arraigned,

he pleaded guilty, and a *nol. pros.* was entered as to the others. That count is drawn under Sec. 1043 of The Code, which is as follows: "If any keeper of an ordinary, or house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game at which money, or property, or any thing of value is bet, whether the same be in stakes or not, to be played in any such house, or on any part of the premises occupied therewith; or shall furnish persons playing or betting with drink, or other thing, for their comfort and subsistence during the time of play, he shall be guilty of a misdemeanor, and fined not less than ten dollars, and be imprisoned not more than thirty days."

The specific charge in the fourth count is, that the defendant being the keeper of a house wherein spirituous liquors were re- (905) tailed by measure less than a quart, did knowingly suffer persons to play therein, games of cards, at which money and other things of value were bet.

When the Solicitor prayed judgment, he introduced and examined two witnesses, for the information of the Court, whose testimony was in substance as follows:

The house of the defendant, wherein the criminal act was committed, is situated on Fayetteville street, in the city of Raleigh, and next to the Yarboro House, and the defendant kept a bar and retailed spirituous liquors. In rooms above, at various times, persons were seen playing at games of cards, and betting for money, and chips representing money. The house belonged to him, and the lower story was painted red in front. The witnesses were not examined by the defendant.

Judgment was deferred until Friday, the trial having taken place earlier in the week, when, on being asked what he had to say, before passing of sentence, the defendant's counsel stated, that he was a person of character and means, and expressed a hope that the Court would not deal severely with him on that account. No expression of an intention to discontinue his illegal business came from him or his counsel. Thereupon, the Court inquired if the house of the defendant, opposite the court house, and in which the witnesses stated gambling was carried on, was his property, as well as the furniture and fixtures belonging to it, and if he had not paid $13,000 for the real estate alone. His counsel answered in the affirmative, adding that there was now a mortgage upon it.

The Court then read a paper, before prepared, and giving the reasons for the severity of the sentence about to be pronounced, and at its conclusion, adjudged that the defendant "be confined in the common jail of Wake County, for the term of thirty days, beginning on January 10th, 1886, and that he pay a fine of $2,000, and the costs

herein, and if he fails to pay said fine and costs as aforesaid, at
(906) the expiration of his sentence of thirty days, that he remain in said jail until the same are paid. And it was further ordered, that this judgment be docketed, and that on failure to pay the fine and costs, execution issue thereon.

From this judgment the defendant appeals, and assigns as error, the imposition of an excessive and unreasonable fine, not authorized by law.

Attorney-General, for the State.
Messrs. John Gatling and E. C. Smith, for defendant.

SMITH, C. J., (after stating the facts). We reproduce, as due to the presiding Judge, so much of what he said, as gives his reasons for fixing the fine at the sum mentioned. "It appears," he says, "that the defendant keeps, and has kept for years, a gambling-house in the city of Raleigh. In defiance, and with a profound contempt of the law, he has kept it open, next door to the principal hotel in the capital of the State, and immediately opposite to the United States Court House and Post Office, and under the very shadow of this Court House. That his contempt and defiance of law might be lacking in nothing, he has caused the front of his building to be painted a glaring red, to advertise his business by day, and an electric light is suspended to point the way by night. His illegal traffic has been profitable, for it seems that, in a short time, he has been able to accumulate enough to pay $13,000 for the building, besides the fixtures and his other property.

"In view of the open and notorious defiance of the law displayed by the defendant, and the profit he has made by it, the Court cannot do less for a law-abiding and law-respecting community, than to sentence him to pay a fine of $2,000 and be imprisoned thirty days."

We cite these remarks, not assuming a right to supervise the exercise of that discretion which the law reposes in the Judge who tries the cause, and who best understands all the surrounding circum-
(907) stances, but to set forth the consideration of public and official duty, under a sense of which he acted. There is no limit fixed as a maximum, in the statute, to the amount of the fine, and while we do not say, nor is it necessary, that it may not be so enormous and disproportionate to the crime proved by the evidence, indicating a disposition to oppress, rather than subserve the common good, as that this Appellate Court would be called on to interpose for the protection of the convict, against gross injustice and manifest wrong and oppression, and we certainly shall not undertake to assign limits to the exercise of judicial discretion, in anticipation of the possible occurrence of such cases. It is sufficient to say, the discretion reposed in the

Judge, under the statute, has not been abused in the present case, and there is no pretext for the revision of its exercise. The remedy may be only sought in impeachment and removal from office, when the conferred power has been oppressively or corruptly exerted, for selfish, and not public ends.

In Sec. 1047 of The Code, which punishes the carrying on of lotteries, the fine is limited to a maximum of $2,000, for an offence somewhat similar in its nature, and not exceeding in turpitude and injurious consequences to society, the conduct of the defendant as stated by the Judge, and why, when there has been no such restriction, should the imposition of a fine, authorized for that offence, be treated as excessive and unauthorized in the present, when then there is no such restraint? In our opinion, if the General Assembly had intended to limit the fine, that intention would have been expressed in the one Act, as is done in the other, and the absence of such restriction, shows that it was the purpose to leave this part of the penalty to be administered according to the demerit of the criminal act done and proved. What the Legislature refuses to do, in fixing limits to the pecuniary punishment allowed, this Court will not attempt to do, and still less in declaring a fine of $2,000, admeasured to the defendant according to the Judge's estimate of his guilt, as illegal and unwarranted.

We have passed only on the question of judicial power, but as the appeal vacates the judgment, and the accused must be (908) again sentenced, the alleged error, if it existed, would be corrected by the appeal, and prove harmless. We simply decide upon the possession of judicial power, leaving its exercise where the law places it, in the sound discretion of the Judge upon whom that duty devolves.

There is no error, and this will be certified that the Court may proceed to judgment.

No error. Affirmed.

Cited: S. v. Roseman, 108 N.C. 767; *S. v. Apple,* 121 N.C. 586; *S. v. Hamby,* 126 N.C. 1067; *S. v. Capps,* 134 N.C. 632; *S. v. Farrington,* 141 N.C. 845; *S. v. Dowdy,* 145 N.C. 439; *S. v. Woodlief,* 172 N.C. 890; *S. v. Spencer,* 185 N.C. 767; *S. v. Griffin,* 190 N.C. 138; *S. v. Parker,* 220 N.C. 419.

STATE v. JAMES H. MILLER.

Appeal—Judgment Vacated By.

The appeal by a defendant, in a criminal case from the judgment of the Superior Court, to the Supreme Court, vacates the judgment of the former, whether it be imprisonment or a pecuniary fine.

This was an appeal by the State in the foregoing case.

After the defendant's appeal from the judgment of the Court had been taken and perfected, the clerk after docketing it as directed, issued an execution to the sheriff, to enforce payment of the fine and costs adjudged against him.

Upon application to the succeeding Judge having jurisdiction in the District, it was ordered that the writ be recalled, and the sheriff proceed no further thereunder. From this order the State appeals.

Attorney General, for the State.

Messrs. John Gatling and E. C. Smith, for the defendant.

(909) SMITH, C. J. (after stating the facts). Upon the hearing, the counsel representing the State, admitted that there was no error in the ruling, and that the appeal could not be sustained. In this we concur, since the effect of the appeal was to vacate the entire judgment, which could not be docketed, nor authorize the issue of process for its enforcement. It is otherwise in civil cases, for then unless a *supersedeas* undertaking has been given, the judgment, for some purposes, remains, as was determined in *Bledsoe v. Nixon,* 69 N. C., 81; The Code, Sec. 435.

In *State v. Applewhite,* 75 N. C., 229, PEARSON, C. J., says, that "the effect of his, (the prisoner's,) appeal, was to vacate the sentence pronounced upon him in 1870. The effect of the decision of the Supreme Court, was not a judgment or sentence, but simply an order to the Court below, to *proceed to judgment* and sentence, agreeable to this decision, and the laws of the State."

This is the law informally recognized and acted on by the Court, for as is said by READE, J., in *State v. Jones,* 69 N. C., 16; "in criminal cases, we do not pass judgment. Such cases are sent up for our opinion only, which we certify to the Court below, and there our jurisdiction ends." When there is no error, the Court below is required to proceed to judgment again.

No authority can be needed to show that the fine is a part of the punishment, and, like the order of imprisonment, is annulled by an appeal, taken and perfected according to law.

There is no error and the judgment must be affirmed.

No error. Affirmed.

STATE v. C. M. BOWERS.

Jurisdiction—Affray—Former Acquittal.

1. The jurisdiction conferred upon the Superior and Criminal Courts to hear and determine indictments for affrays committed within one mile of the place where, and during the time, such Courts are being held (The Code, Sec. 892), is not exclusive, but concurrent with that of the Justices of the Peace.
2. Where a party is put on trial for an alleged offence, but the record does not disclose the result, it will be presumed that he was acquitted.
3. Where two Courts have concurrent jurisdiction of an offence, the judgment of that one which first passes judgment is a good defence against a prosecution in the other Court for the same offence.

This was an INDICTMENT for an affray, tried before *Montgomery, Judge,* at Fall Term, 1885, of the Superior Court of IREDELL County. (910)

The defendant being convicted, appealed from the judgment thereupon pronounced.

The facts appear in the opinion.

Attorney General, for the State.

No counsel for the defendant.

MERRIMON, J. The defendant and another, were indicted in the Superior Court of the county of Iredell, for a simple affray, "committed within one mile of the place where, and during the time such Court was being held." He pleaded *autrefois acquit.*

On trial, it appeared that the mayor of the town of Statesville, in which the court-house of that county was situated, issued his warrant charging the defendant and some other persons, with a simple affray committed in that town, and within a mile of the court-house where the Superior Court was being held. The defendant produced in evidence, the docket of the mayor of the day in which the affray was committed, and from it, "it appeared that the parties had been put

(911) upon their trial before the mayor, and the defendant Stockton was convicted and fined five dollars, and required to pay costs and the defendant Bowers was released." There was evidence going to show that the offence charged in the indictment, and that for which the parties were tried before the mayor, were the same.

The Court being of opinion that the Mayor, acting as a Justice of the Peace, had no jurisdiction of such offence committed within a mile of the place where, and during the time the Superior Court was being held, so instructed the jury, and the defendant was convicted.

We think the Court placed an erroneous construction upon the statute, (The Code, Sec. 892). So much of it as is material to be here considered, provides that "Justices of the Peace shall have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for thirty days: *Provided,* that Justices of the Peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: *Provided further,* that nothing in this section shall prevent the Superior, Inferior, or Criminal Courts, from finally hearing and determining such affrays as shall be committed within one mile of the place where, and during the time such Court is being held," etc.

It will be observed that this section, in that part of it that precedes the first *proviso,* confers upon Justices of the Peace "exclusive original jurisdiction" of affrays such as that charged in the indictment. The first *proviso, excludes* absolutely their jurisdiction of the offences mentioned in it. The second *proviso* does not in terms or effect exclude their jurisdiction of the class of affrays mentioned in it. If it had been the Legislative intent to do so, then the first *proviso* would have included this offense, as well as those specified in it, and there would have been no occasion for the second. The purpose was, as to
(912) such affrays, to limit the exclusive original jurisdiction confered upon Justices of the Peace in the first clause of the section, so as to give *concurrent* jurisdiction thereof to the Superior, Inferior and Criminal Courts. The words "finally hearing" employed in the second *proviso,* are not apt words to express the purpose intended, they are loose—indefinite—and seem to imply—to completely hear—that is, to hear and determine the affray from the beginning of it, in the way prescribed by law, but not to the exclusion of the jurisdiction of a Justice of the Peace to do the same thing.

We are unable to see any particular or controlling motive leading the Legislature to confer exclusive jurisdiction of such affrays upon the

Superior, Inferior, and Criminal Courts. The interpretation we have given the statute, it seems to us, is reasonable, consistent with its terms, phraseology and several parts, and gives it intelligent and effectual operation. It ought, therefore, to prevail.

The Court held that the Mayor, acting as a Justice of the Peace, had no jurisdiction. In this, as we have seen, there is error.

No question was made in the court below, so far as appears, as to the competency of the evidence introduced to prove the plea. It was insisted on the argument before us, that it did not appear from it, that the defendant had been acquitted by the Mayor; that it only appeared that he was "released".

It was in evidence that he was put upon his trial, with the other defendant, before the Mayor. It did not appear that there was any final judgment as to him, but it did appear that he was "released". This must be taken as implying, nothing appearing to the contrary, that he was acquitted. When a party is put on trial, in the absence of any verdict or judgment, the inference and legal effect is that he was acquitted. *State v. Taylor,* 84 N. C., 773; *State v. McNeil,* 93 N. C., 553.

It was likewise insisted, that the indictment must have preceded, in point of time, the warrant of the Mayor, and, therefore, (913) the jurisdiction of the Superior Court became exclusive. It certainly does not appear that the indictment preceded in time the warrant, nor is it material, because, if the Mayor had jurisdiction, as he had, and the case was tried before him and the defendant was acquitted, he might plead such acquittal in the Superior Court. *State v. Tisdale,* 19 N. C., 159; *State v. Williford,* 91 N. C., 529.

The defendant is entitled to a new trial. To that end, let this be certified to the Superior Court.

Error. Reversed.

Cited: S. v. Roberts, 98 N.C. 757; *S. v. Cross,* 101 N.C. 789; *S. v. Battle,* 130 N.C. 656; *S. v. Palmer,* 212 N.C. 13; *S. v. Gregory,* 223 N.C. 419; *S. v. Melton,* 232 N.C. 735; *S. v. Parker,* 234 N.C. 241.

STATE v. GEORGE COVINGTON.

Forgery—Indictment.

1. Where the instrument alleged to be forged, upon its face, has a tendency to deceive or prejudice the rights of persons, it is only necessary to set it forth in the indictment and aver its false and fraudulent character.
2. If the tendency and capacity to deceive, depend upon extrinsic facts, they must be set forth in the bill in connection with the instrument alleged to be forged, and the averments of its fraudulent character.
3. The forged instrument must resemble a genuine one, and be such as will ordinarily deceive, yet, if from its nature and the course of business it does deceive, or mislead, to the prejudice of another, the crime of forgery will be complete, no matter how informal it may be, or if by careful examination the forgery might have been detected.

This was an INDICTMENT for forgery, tried before *McRae, Judge,* at September Term, 1885, of the Superior Court of RICHMOND County.

The defendant was indicted for forgery of an order, of which the following is a copy:

Oct. 27th, 1884.

(914) Mr. R. T. Long, Please let Henry Carmone have 500 dollars and I will be in Monday and pay you oblige

yours J. M. HAWOOD.

The State introduced J. M. Haywood, who testified that he did not sign or authorize any one to sign the order for him; that he wrote his name "J. M. Haywood," and not "Hawood"; that he knew R. T. Long, but did not know whether Long knew him; that he never had any transactions with Long; that he was the son of James Haywood.

James Haywood, a witness for the State, testified that he signed his name James Haywood; that he did not sign the order, and that he spelled his name as J. M. Haywood did; that he did not think there was any other James M. Haywood in Richmond county.

R. T. Long, a witness for the State, testified that the order was presented to him by the defendant; that he told defendant he did not have the money, when defendant said he wanted goods; that he went and got another party to let him have the goods, among them a pair of boots; that he told defendant he was disposed to accommodate Mr. Haywood; that there had been some writings passed between him and James Haywood, father of J. M. Haywood; their names were spelled "Haywood"; that he did not notice the order particularly; he thought it was spelled "Haywood", but could not say; J. M. Haywood had never given any order on him before for goods or money, and he did

not know his given name; knew his father, but not the prosecutor; did not pay any attention to the spelling; the order was brought to him sometime last year, on or about its date—think a day or two afterwards; that he took it for five dollars; thought it was for that amount; there is nothing in the order that separates the 5 from the 00, but it is written 500; that he had never cashed any order for the defendant before; defendant said he wanted five dollars, and he took it for that.

Here the evidence closed.

The defendant asked for the following instructions: (915)

I. That in order to convict the defendant, there must be such a resemblance of the forged to the genuine order, as might deceive a person of ordinary caution or prudence, or of ordinary business capacity, and that if by exercise of ordinary care and caution, R. T. Long could not have been deceived or misled by the order, the defendant would not be guilty.

II. That if R. T. Long cashed the order, or delivered goods or other articles thereon, without having inquired as to its genuineness, and there was anything upon the face of the order to excite a reasonable suspicion or doubt as to its genuineness, then the defendant would not be guilty.

III. That if there was anything upon the face of the order to excite suspicion or inquiry as to its genuineness, and R. T. Long failed to exercise care, or to make inquiry as to its genuineness, defendant is not guilty.

IV. That if the name signed to the order, did not resemble the signature of the alleged drawer, and this was known to R. T. Long, or would have appeared to him by a careful inspection, it was enough to have put him on inquiry, and the law will presume that he knew what that inquiry would have disclosed.

V. That if by exercise of ordinary care, R. T. Long could have discovered that the order was not genuine, and he failed to exercise such care, the defendant is not guilty.

These instructions his Honor refused, and charged the jury: That if the defendant presented the paper offered in evidence to R. T. Long, for the purpose of obtaining money from him, and the paper was intended by the defendant to defraud; if it was intended to represent the name of J. M. Haywood, even though it was not spelled properly, and if it were not signed by Mr. Haywood or by his directions, and defendant knew it, he is guilty. If the State had not satisfied the jury of these facts, defendant would not be guilty.

The defendant excepted because of the refusal to give the
(916) instructions asked by him, and to the instructions given. Rule for a new trial discharged, judgment and appeal by defendant.

Attorney-General, for the State.
Mr. Platt D. Walker, for the defendant.

MERRIMON, J. The constituent elements of the crime of forgery at common law, are the false making or alteration of the writing or instrument forged, the fraudulent purpose, and the tendency and capacity of it to prejudice the right of another person.

If such tendency and sufficiency of the instrument appear upon its face, it will only be necessary to aver its false and fraudulent nature, setting forth an exact copy of it in the indictment. If, however, these do not appear, but there are extraneous facts that make the instrument have such tendency, and therefore, the subject of forgery, those facts must be averred in connection with it in such apt way, as will make the tendency appear. This is necessary, because the Court must see that the complete offence is charged.

In this case, the tendency of the writing forged to prejudice the right of another person plainly appears. Obviously, if the order had been genuine, the maker of it would certainly have been liable, if the person to whom it was addressed, has in compliance with it, supplied the money, or goods in lieu of it, notwithstanding the informality, and the misspelling of the name of the maker. It is true, as contended by the appellant's counsel, that the order must have resembled a genuine one, and been such as might have deceived or misled a reasonable person; but this does not imply that it must have been perfect and orderly in form, and correctly spelled the names of the persons mentioned in it. A genuine order might be informal, or slightly incomplete—some of the words misspelled—a firm addressed not precisely by its name—the maker might, in his haste, or by inadvertence, omit a letter from his name—some or all these imperfections
(917) might appear upon careful examination, and yet a reasonably cautious business man might—would—frequently accept such order, attributing the irregularities to haste and inadvertence, in some respects perhaps, to lack of accurate information. Orders for goods and the like, are often drawn hastily—carelessly. Many business men pay little attention to spelling or forms, and moreover, haste in the course of business will not allow of strict scrutiny of orders presented to be acted upon promptly. If, therefore, the false and fraudulent paper writing be such as that it might, from its nature, and the course

of business, deceive or mislead to the prejudice of another person, the offence of forgery would be complete.

The order in question was such a one. If genuine, a reasonably cautious man might, probably would, take and act upon it, if he knew the person making it, and had, or would like to have, business relations with him. It might be incautious, but not unreasonable to accept and act upon it, in the course of business. Indeed, the person to whom it was addressed did so. *State v. Thorn,* 66 N. C., 644; *State v. Leak,* 80 N. C., 403; *State v. Lane, Ibid.,* 407; *State v. Keeter, Ibid.,* 472; Archbold's Cr. Pl., 345; *State v. Weaver, ante,* 836.

The indictment does not charge an offence under the statute, but at common law. It was therefore unnecessary, indeed, not proper, to conclude against the statute. This, however, may be treated as surplusage. *State v. Lamb,* 65 N. C., 419; *State v. Leak, supra.*

There is no error. The judgment must be affirmed, and to that end, let this opinion be certified to the Superior Court.

No error. Affirmed.

Cited: S. v. Cross, 101 N.C. 785; *S. v. Hall,* 108 N.C. 779; *S. v. Utley,* 223 N.C. 48.

STATE v. WILLIAM BLOODWORTH.

Special Verdict—Statute—Punishment—Fences—Indictment.

1. An exception contained in the enacting clause of a statute creating an offence, constitutes a part of the description of the offence, and in every indictment thereunder it is necessary that it should be negatived.
2. In a special verdict, all the facts necessary to constitute the offence charged, must be especially ascertained, otherwise no judgment can be pronounced upon it, and it should be set aside and a new trial granted.
3. An indictment and a special verdict thereon for a violation of Sec. 2799 of The Code (requiring planters to keep fences around their fields during crop time), should contain an averment and finding that there was no "navigable stream or deep water course, that shall be sufficient instead of such fence," and that "the lands are not situate within the limits of a county, township, or district, where the stock law may be in force."
4. If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command, are misdemeanors, punishable by indictment—(if the statute prescribe no other method of proceeding)—notwithstanding no punishment is prescribed in the statute.

(918) This was an INDICTMENT against the defendant, for not keeping a fence five feet high around his cultivated field during crop season in the year 1885, tried before *Meares, Judge,* in the Criminal Court of NEW HANOVER County, at the September Term, 1885, of said court.

The jury returned the following special verdict, to-wit: "The jury find, that the defendant was the occupier and cultivator of a farm, and that he did not have and keep a fence five feet high around the same during the crop season of the year 1885. But whether the defendant is guilty or not guilty under this bill of indictment, the jury are not instructed, and pray the instruction of the Court. If the Court shall be of the opinion that the defendant, under this finding of fact, is guilty, then the jury find that he is guilty, but if not, then he is not guilty."

Whereupon, the Court being of opinion that the defendant is
(919) not guilty, gave judgment for the defendant, and he was discharged.

From this judgment of the Court, the Solicitor appealed to the Supreme Court.

Attorney-General, for the State.
No counsel for the defendant.

ASHE, J., (after stating the facts). The indictment was preferred under Sec. 2799 of The Code, which is as follows: "Every planter shall make sufficient fence about his cleared ground under cultivation, at least five feet high, unless there shall be some navigable stream or deep water course, that shall be sufficient instead of such fence, and unless his land shall be situated within the limits of a county, township or district, where the stock law may be in force."

The statute, it will be seen, contains two exceptions, the one that there is a *navigable stream or deep water course that shall be sufficient instead of the fence, and the other that the land is situated within the limits of a county, township, or district, where the stock law may be in force.*

The exceptions are contained in the enacting clause, and therefore constitute a part of the description of the offence, and in every indictment under the statute, it is necessary that they should be negotiatived, in order that the description of the crime may in all respect correspond with the statute. 1 Bishop Cr. Pro., Sec. 376; *State v. Heaton,* 81 N. C., 542; *State v. Lanier,* 88 N. C., 658.

It is equally essential in a special verdict, that all the facts necessary to constitute the offence charged, should be fully and explicitly stated, to warrant the Court in pronouncing a judgment upon the

verdict. *State v. Blue*, 84 N. C., 807; *State v. Bragg*, 89 N. C., 480. Thus, in this case, it was necessary that the jury should have found the facts, whether the defendant came within the exceptions in the statute, and their having failed to do so, their verdict imperfect, and when that is the case, no judgment can be pronounced upon it, and the verdict should be set aside and a new trial ordered. (920) *State v. Lowry*, 74 N. C., 121; *State v. Moore*, 29 N. C., 228.

It was contended, that in as much as the Legislature had not declared a violation of Sec. 2799 to be an indictable offence, it is not a criminal offence to violate its provisions. But this is a mistake. In *State v. Parker*, 91 N. C., 650, the Court held, "if a statute prohibited a matter of public grievance, or commanded a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specifies no other mode of proceeding," citing for the doctrine Arch. Cr. Law, 2; 2 Hawk., ch. 25, Sec. 4. But when the Statute mentions a particular mode of proceeding, as when it imposes a penalty for its violation, and says nothing more, that proceeding excludes that by indictment. *State v. Snuggs*, 85 N. C., 541.

There is error. Let this opinion be certified to the Criminal Court of New Hanover County, that a *venire de novo* may be awarded to the State.

Error. Reversed.

Cited: S. v. Addington, 121 N.C. 540; *S. v. Pierce*, 123 N.C. 747; *S. v. Rippy*, 127 N.C. 517; *S. v. Bradley*, 132 N.C. 1061; *S. v. Holloman*, 139 N.C. 648; *S. v. R.R.*, 145 N.C. 540; *S. v. Fisher*, 162 N.C. 565; *S. v. Brown*, 221 N.C. 304; *S. v. Bishop*, 228 N.C. 374; *S. v. Surles*, 230 N.C. 279.

STATE v. SLADE POWELL.

Case on Appeal—Judgment—Punishment—Removal of Crops—Notice—Indictment.

1. It is incumbent upon the appellant in all appeals, to send up a statement of the case, in which the errors of which he complains are set forth, and in the absence of such statement, the judgment below will be affirmed, as a matter of course, unless there be some error found in the record, which it is the duty of this Court to correct.

2. An averment in an indictment for removing a crop, "without having given *any* notice of such intended removal," is equivalent to the averment that the removal was made without giving "five days' notice."
3. Only felonies where no specific punishment is prescribed, and offences that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, can be punished by imprisonment in the Penitentiary.
4. The offence of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the Penitentiary. The Code, Sec. 1096, 1097.

(921) This was a CRIMINAL ACTION, commenced in the Inferior Court of BERTIE County, at August Term, 1885, of said Court, wherein the defendant was indicted for removing a crop, in violation of the provisions of Sec. 1759 of The Code.

The indictment is as follows, to-wit: "The jurors for the State, upon their oath present, that on the first day of January, in the year of our Lord, one thousand eight hundred and eighty-four, at and in the county of Bertie, by contract between them, one Solomon Pugh rented to Slade Powell, for agricultural purposes, a certain parcel of land there situated, to have and to hold the same, to the said Slade Powell, for and during the year 1884, yielding and paying therefor to the said Solomon Pugh, seven hundred and fifty pounds of lint cotton; and in and by said contract of lease, it was not agreed between the said parties thereto, that the crop which might be raised, grown and made on said parcel of land, during said term, by the said Slade Powell, should not be deemed and held to be vested in possession in the said Solomon Pugh, before and until said rent was satisfied and paid to him, and by virtue of said demise, the said Slade Powell, then and there entered into said parcel of land, and was possessed thereof, from then until January the 1st, 1885, in said county, and during the period of time last aforesaid, in the county aforesaid, raised, grew, and made on said parcel of land, a certain crop of cotton and corn, and held the same in his possession: and afterwards, and before satisfying the lien for his aforesaid rent, which the said Solomon Pugh had on the said
(922) crop of cotton and corn, on the 1st day of December, 1884, at and in said county, the said Slade Powell, did unlawfully and wilfully, remove from and off, and outside of said parcel of land, three hundred and fifty pounds of cotton, then and there being found, the same being then and there part of the crop aforesaid, which the said Slade Powell had raised, grown and made on said parcel of land during the aforesaid term, which said parcel of land was in his possession as aforesaid, without first having obtained the consent of the said Solomon Pugh to said removal, and without having given the said Solo-

mon Pugh, or any agent of his, notice of such intended removal of said cotton, contrary to the form of the statute," etc.

The defendant was convicted, and from the judgment of the Inferior Court that he be imprisoned in the penitentiary for two years, he appealed to the Superior Court.

It was charged in the bill of indictment, that the rent was due to Solomon Pugh, and there was evidence to that effect. There was also evidence that the crop had been removed in the night time. In the Superior Court, there was a motion by defendant's counsel to arrest the judgment, on account of defects in the bill of indictment, which motion was sustained by the Court.

The Attorney General, (Mr. W. L. Williams, also filed a brief,) for the State.

Mr. R. B. Peebles, for the defendant.

ASHE, J., (after stating the facts). This is the only question properly presented by the record for our consideration, but we think it proper to notice in this opinion, the judgment pronounced against the defendant in the Inferior Court.

The errors assigned by the Solicitor were: 1. The granting the motion in arrest. 2. For error or errors appearing on the record: "and it is agreed by counsel, that the record shall constitute the statement of the case, together with this assignment of error." This kind of practice cannot have the sanction of this Court. It is in- (923) cumbent upon the appellant, in all appeals, to send up a statement of the case, in which the errors to his prejudice complained of, are set forth. It is in effect the bill of exceptions, and when there is no bill of exceptions, nor statement in nature thereof, accompanying the record sent to this Court, the judgment below is affirmed as matter of course, unless there be found some error in the record, which it is the duty of the Court to look into. *State v. Orrell*, 44 N. C., 217; *State v. Ray*, 32 N. C., 29; *State v. Gallimore*, 52 N. C., 147.

Notwithstanding there is no *statement* of the case, we have looked into the record, and our opinion is, there was error committed by both the Superior and Inferior Courts. In the former by arresting the judgment, and in the latter by the sentence pronounced upon the defendant.

The indictment was well drawn, and in accordance with precedents approved by this Court—and it is now too late to inquire whether they were correct.

The indictment in this case is drawn in strict conformity to the form of the indictment in the case of *State v. Walker*, 87 N. C., 541, which

was approved and sustained by this Court, and also with that in the case of *State v. Pender*, 83 N. C., 651. The only difference between that case and this is, that there the crop was charged to have been removed, without giving five days notice, and in this without giving any notice, a distinction without a difference, for if the defendant gave no notice, of course he did not give five days notice.

In our opinion, there was error in arresting the judgment, and in the judgment of the Inferior Court in sentencing the defendant to two years imprisonment in the State's prison. Neither that, nor any other Court, had the power to impose such punishment in a case like this. It is a simple misdemeanor, and no specific punishment having been prescribed by the Legislature, it is punishable as misdemeanors at common law, that is by fine or imprisonment in the common jail, or both. It is only felonies—The Code, Secs. 1096 (924) and 1097—where no specific punishment is prescribed, and offenses that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, that may be punished with imprisonment in the penitentiary. But this is not one of those offenses, and because it may have been done secretly or at night, does not bring it within either class of those offenses.

There is error. Let this be certified to the Superior Court of Bertie, that the case may be remanded to the Inferior Court of that County, that that Court may proceed to judgment in conformity to this opinion, and the law of the land.

Error. Reversed.

Cited: S. v. Smith, 106 N.C. 655, 658; *S. v. Surles*, 230 N.C. 280, 284.

STATE v. GARRETT JOHNSON.

Convicts—Escape—Negligence—Penitentiary.

1. A person employed as a guard, in the management of convicts, is criminally responsible for the escape of prisoners confided to his care.
2. Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the Penitentiary, *actual* negligence being the test of guilt.
3. As a general rule, it is not necessary to prove negligence when one has lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or from irresistible adverse force.

STATE *v.* JOHNSON.

This was an INDICTMENT for an escape, tried before *Clark, Judge,* at January Criminal Term, 1886, of WAKE Superior Court.

The defendant, having the custody and control of a convict committed to the penitentiary for a felony, is charged in the indictment, with having unlawfully and negligently permitting him to escape and go at large. On a plea of not guilty, he was tried before a jury, who rendered a special verdict, in which they find as follows:

I. That one Peter Birdsong, a colored boy of the age of twelve or fourteen years, was sentenced by the Superior Court (925) of Warren County, at September Term, 1883, to the State's prison, for a term of three years, for larceny.

II. That the said Birdsong was a delicate boy, and in feeble health, and his behavior in the Penitentiary was good, and for this reason he was allowed, by and under the authority of the Directors and Wardens of the Penitentiary, privileges of a *"trusty."*

III. That a *"trusty"* is a convict, who, for reasons sufficient in the judgment of those in authority over the Penitentiary, when at work on railroads or farms worked by convicts, or when on other work outside of the Penitentiary grounds, is not required to be under the eye of the overseers or guards at all times, but is permitted to go on errands, or other special service in the furtherance of the work in which he and the other convicts are engaged, away from the presence of such overseer and guards.

IV. That the regulations under which this is done by the authorities of the Penitentiary, was made in the interest of economy, to save the expense of additional guards and overseers.

V. That at the time of the alleged escape of said Birdsong, the defendant was an overseer and guard, in charge of some of the convicts, engaged in work on a farm in Wake county, cultivated by convicts, and Birdsong was sent to him with other convicts, as a *"trusty"* as aforesaid.

VI. That he was sent without a guard, by the defendant, after a lot of bags which were necessary for use in picking cotton, and while on the errand, absented himself and did not return; and defendant was the only guard in charge of a squad of thirteen convicts, and the said bags were several hundred yards away from the place where the convicts were at work.

VII. That the *"trusties"*, while authorized by the Directors, were not designated by them, and in this case, Birdsong was made a *"trusty"* by the Warden of the Penitentiary.

If upon these facts, the Court is of opinion that the defendant is guilty, the jury find him guilty; if otherwise, they find him (926) not guilty.

The Court being of opinion that the facts found by the jury do constitute the offence charged in the indictment, directed an entry to this effect and pronounced judgment, from which the defendant appealed.

Attorney General, for the State.
Mr. R. H. Battle, for the defendant.

SMITH, C. J. (after stating the case). An escape has been effected, in the criminal sense of the law, in the language of an eminent author in a work on criminal law, "when one who is arrested, gains his liberty before he is delivered in due course of law." 1 Russell on Crimes, 467.

It is defined in brief words by another writer, as "the departure of a prisoner from custody." 2 Whar. Cr. Law, Sec. 2606.

It is not necessary to prove negligence in one who has the lawful custody of the prisoner, for it is implied, and is excusable only, when "occasioned by the act of God, or from irresistable adverse force," or, in the language of this Court, when it results "from the act of God or the public enemy." *Rainey v. Dumming,* 6 N. C., 386. This rigorous rule of the ancient common law, must, we think, find some relaxation in its application to those officers and agents, in whose custody, convicts sentenced to the State's prison, are placed when sent out from its walls to do public work, and when greater freedom in their movements is unavoidable, and increased facilities for making an escape are offered. In such case, to make such custodian criminally answerable, the means at his disposal to secure prisoners, and the service to which they are put, must be considered, in determining whether there has been actual negligence, or a failure to use the powers conferred, in preventing an escape. The defendant in the present case, had a squad of thirteen in charge, whose field labor he was to supervise, see that the convicts worked—and that they did not get away from any inattention
(927) of his. Their safe keeping was necessarily thus rendered more difficult, and the measure of official responsibility should be correspondingly reduced. The policy of our penal system, looks to the labor of its convicts, not only within the prison walls, but outside, on public works and in the service of the State, as alike securing their health, and diminishing the costs of their support, by making their own labor contribute to it. These considerations require a modification of the common law, and when an offence, such as is here charged against the defendant, is imputed to him as an overseer or guard, the guilt should be determined by an inquiry into the existence of actual negligence and inattention to duty, on the part of the accused.

Here the escape was caused by the direct act of the defendant, not only indicating a want of care, but in affording the convict an opportunity to escape. He was sent alone after bags for the picked cotton, to a place several hundred yards distant, and never returned. It was not alone a case of misplaced confidence in a *"trusty"*, but the errand enabled him to make his departure, and finds no extenuation in the fact that the bags were needed in prosecuting the farm work.

If such management of convicts employed in out-door work were tolerated in those who have them in keeping, their imprisonment and punishment would be rendered very precarious, and escapes frequent and unavoidable. They should at such times, remain in view and under control of the guard, so that any insubordination might be readily repressed, and any attempt at escape frustrated at once, or at least such means as were at hand, could be used for that purpose.

No objection is made to the form of the indictment, nor do we discover any.

There is no error, and the Court below will proceed to judgment. Let this be certified.

No error. Affirmed.

Cited: S. v. Ritchie, 107 N.C. 858; *S. v. Lewis*, 113 N.C. 624; *Brady v. Hughes*, 181 N.C. 235; *S. v. Carivey*, 190 N.C. 321; *Sutton v. Williams*, 199 N.C. 548, 549.

STATE v. WILLIAM FOX.

Larceny—Accessories—Variance.

1. There are no accessories before the fact in larceny, for not only those who aid and abet, but all who advise, counsel or procure the act to be done, are principals.
2. If an indictment charges that A committed the theft, and B was present aiding and abetting, and the proof should be that B committed the theft, and A was present aiding and abetting, it would be no variance, and a conviction would be sustained.

INDICTMENT for larceny and receiving stolen goods, knowing (928) them to have been stolen, tried before *Shipp, Judge*, and a jury, at July Term, 1885, of ALEXANDER Superior Court.

The indictment was preferred against the defendant Fox, and one Miller, and the defendant Fox was alone put on trial.

The indictment contained two counts, the one for the larceny of a quart of whiskey, the property of one Hedrick and the other receiving it, knowing it to have been stolen.

The evidence in the case showed, that Fox, on the day the larceny was committed, told Hedrick, the prosecutor, that he had no whiskey, but he knew where he could get some. The prosecutor gave him two bottles of a red color, and the money to buy the whiskey. The defendant brought the whiskey to the mill of the prosecutor, who, after giving the defendant a drink, put the bottles in a box of wheat in the mill, and the defendant saw him do it, there being no other person present at the time. The prosecutor then locked the door of the mill and went to supper, and when he returned after dark, he found the mill broken open and the whiskey gone. It was also in evidence, that shortly after dark, the defendant and Miller were seen sitting on a pile of saw dust and soon thereafter were seen returning from the place where the mill was broken open.

It was also in evidence, that on the night of the day when the mill was broken open, the defendant Fox rode up to the house of one Pope,
called him out of bed, and gave him a drink of whiskey out of
(929) a bottle; that he then had two bottles like those described by
the prosecutor Hedrick.

His Honor charged the jury, that if they believed from the evidence that Miller stole the whiskey, and that the defendant received the whiskey, knowing it to have been stolen, they would find him guilty on the second count in the bill of indictment.

He also charged, that if the jury believed from the evidence, that Miller stole the whiskey and the defendant aided and abetted, or advised and procured him to commit the theft, he would be guilty of larceny. There was a general verdict of guilty, and the defendant appealed.

Attorney General, for the State.

No counsel for the defendant.

ASHE, J. (after stating the facts). We do not understand why his Honor should have instructed the jury, that if Miller stole the whiskey, and that if they should believe that the defendant was an aider and abettor, or the receiver of the whiskey knowing it to have been stolen, he was guilty in the one aspect or the other, when all the evidence pointed directly to Fox, as the person who committed the theft, and that Miller was the aider and abettor. But there was no error in the charge, for the jury were satisfied, and we think there was evidence

sufficient to lead them to the conclusion, that Miller was present, aiding and abetting, or advising and counselling Fox in the commission of the theft, and it would be immaterial which took the whiskey. For in this offence there are no accessories before the fact—all are guilty, not only those who aid and abet, but all who advise, counsel or procure the act to be done, are principals. So that if it be alleged in the bill of indictment, that A committed the act, and B was present aiding and abetting him, and the proof should be, that B actually committed the act, and A was the abettor, the indictment would be sustained. Arch. Cr. Law, 6.

There is no error. Let this be certified to the Superior Court of Alexander County, that the case may be proceeded with ac- (930) cording to law.

No error. Affrmed.

Cited: S. v. Stroud, 95 N.C. 630; *S. v. Skeen,* 182 N.C. 846; *S. v. Overcash,* 182 N.C. 891; *S. v. Dail,* 191 N.C. 235; *S. v. Whitehurst,* 202 N.C. 633; *S. v. Johnson,* 226 N.C. 675; *S. v. Bennett,* 237 N.C. 752.

STATE v. FRED. ALSTON.

Case Stated on Appeal—Evidence.

1. The rule that only such parts of the evidence should be set forth, as will enable the Court to pass upon the exceptions made, reiterated by the Court.
2. As a general rule, it is not admissible, on a prosecution for one offense, to prove that the defendant had before committed another offense. To this there are exceptions, but the offense must be brought home to the defendant.
3. When two offenses are committed in two different years, it is erroneous for the Judge to permit the State, in a prosecution for the second offense, in order to show the *animus* of the defendant, to prove irrelevant facts which only tend to cast a suspicion on the defendant as to the first offence.

INDICTMENT, tried before *Phillips, Judge,* and a jury, at Fall Term, 1885, of Halifax Superior Court.

The defendant was indicted for burning a tobacco barn, the property of one T. R. Bowers, in September, 1885. There was a verdict of guilty, and judgment thereon, from which the defendant appealed.

Attorney General, for the State.
No counsel for the defendant.

ASHE, J. The statement of the case, in disregard of the repeated suggestions of this Court, that only such parts of the evidence should be set forth as will enable this Court to pass upon the rulings to which exception is taken below, contains a mass of superfluous and trivial facts, which should have been omitted, as not pertinent to the
(931) exceptions taken. *Strickland v. Draughan*, 88 N. C., 315; *Crawford v. Orr*, 84 N. C., 246.

But while the material facts disclosed by the evidence, raised, to say the least, a very strong suspicion that the defendant was guilty of the crime with which he was charged, we are of the opinion that there was such error in the admission of evidence, as entitles the defendant to a new trial.

The facts necessary to our decision, under the view of the case we have taken, are, that the barn of T. R. Bowers, was burned, about twilight on the .....of September, 1885. He had two barns, one old, the other new. The old barn was burned, and they stood about fifty yards apart. The old barn contained the tobacco of the prosecutor Bowers, and the other that of one Windsor, who was the father-in-law of the defendant. Some eight or ten minutes before the discovery of the fire, the defendant, with Bowers, Lee and Kemp Alston, was at the stables, about seventy yards distant from the old barn, where the defendant was feeding the steers. They left him there, and about the time they reached the dwelling, some hundred yards from the stables, the fire was seen to blaze up in the barn. About this time, some one, about the size of the defendant, was seen going from the burning barn to the new barn, and as the neighbors were hastening to the fire, Georgiana Alston, a witness for the State, saw the defendant standing by the new barn. He said, "you see three men have been watching the barn all day, and it is now burning. You see how good God is; last year it was brother Windsor's barn; this year it is the Boss', and Windsor ain't got a bit in it"—he told her this three times.

In the course of the trial, the witness Bowers was recalled by the State, and the Solicitor asked him this question: "Did you ever have a tobacco barn burned before, and what time was it burned." The State offered this evidence, to show the *animus* of the defendant, and to show whose tobacco was in the barn that was burned the year before, the witness, Georgiana, having stated that the defendant said, "last year it was Windsor's, this year it was the boss'," etc.
(932) The defendant objected to the question, but the Court admitted it, and he excepted.

The witness then said, that he had a barn burned last year, and Windsor's tobacco was in it, except a few ground leaves that he had in it. Last year Windsor's tobacco was burned, and Fred, (the defendant,) was living on the place then, in forty yards of that house.

We are of the opinion that there was error in the admission of this part of the testimony of the witness Bowers, not so much to that part of his testimony which stated that he had a barn burned the year before, and that Windsor's tobacco was in it, for, if the testimony had stopped there, it would have been harmless, as tending only to show that the defendant knew that Windsor's tobacco was in that barn; but when taken in connection with the further facts, that the defendant was living within forty yards of the barn when burned, and the declaration of the Solicitor, that he offered the evidence to show the *animus* of the defendant, it was an insinuation that the defendant had burned the barn the year before, and was calculated to produce the impression upon the minds of the jury, that the Court, by admitting this evidence to establish the *animus*, intended that they should take that circumstance into their consideration, in determining whether the defendant had burned the barn of which he was accused.

As a general rule, it is not admissible to adduce evidence that a defendant committed an offence, in order to prove that he committed another. 1st Wharton Cr. Law, Secs. 631-670. To this, however, there are exceptions, but the extraneous crime must be brought home to the defendant. *Ibid.* But there was no evidence fixing upon the defendant the crime of burning the barn in the previous year. It was nothing more than an intimation of the Solicitor, that the defendant had burned the barn, and the Court added to it the weight of its authority, by admitting the evidence, and thereby suffering the jury to be misled by such irrelevant testimony. His Honor, after admitting the evidence inadvertently, should have withdrawn it from the attention of the jury, and his failure to do so, was error. *State* (933) *v. Freeman*, 49 N. C., 5.

This opinion must be certified to the Superior Court of Halifax County, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. v. Graham, 121 N.C. 627; *S. v. McCall*, 131 N.C. 800; *S. v. Plyler*, 153 N.C. 633; *S. v. Griffith*, 185 N.C. 760; *S. v. Colson*, 194 N.C. 207; *S. v. Brady*, 238 N.C. 407.

STATE v. SAMUEL KEITH.

Jurisdiction—Town Ordinance—Resisting Town Officer.

An ordinance of a city or town, which makes an act which is punishable as a criminal offence under the general law of the State, an offence against the town, punishable by fine or imprisonment, is void.

INDICTMENT, commenced by a warrant returnable before the mayor of Raleigh, and carried by appeal to the Superior Court of WAKE County, where it was tried before *Clark, Judge,* and a jury, at November Criminal Term, 1885.

The defendant was arrested and held to answer criminally, under a warrant issued by the Mayor of the city of Raleigh, wherein it is alleged, that he did "unlawfully and wilfully assault, oppose, and resist, officer W. E. Hogue, a member of the police force of said city, while in the discharge of his duty, in violation of the Ordinance of the City of Raleigh, Sec. 9 chapter 11, contrary to", etc.

The following is a copy of the ordinance referred to:

"Any person who shall assault, oppose, or resist, or in any manner abuse or insult any officer of the city of Raleigh, or member of the police force, while in the discharge of any duty, shall be fined fifty dollars, or suffer imprisonment not to exceed thirty days."

On the trial, the Mayor found the defendant guilty, and gave
(934) judgment against him, from which he appealed to the Superior Court. In the latter Court, the jury rendered a special verdict, by which it appeared, that the defendant did resist and strike the officer mentioned in the warrant, while he was lawfully endeavoring to arrest him.

The Court being of opinion that the Mayor had no jurisdiction to try the defendant for the supposed offence, and that the ordinance was void, directed a verdict of not guilty to be entered, gave judgment for the defendant, and the Solicitor for the State appealed to this Court.

Attorney General, for the State.

Mr. J. C. L. Harris, for the defendant.

MERRIMON, J. (after stating the facts). The defendant is charged with a violation of the ordinance referred to in the warrant, and not for an assault. So much of that ordinance as is material here, undertakes to make an assault upon a public officer of the city of Raleigh, while in the discharge of his official duty, an offence against the city, punishable by fine or imprisonment.

It is indictable under the general law of the State, to so assault such officer, and it is settled that a town ordinance, that undertakes to make that which constitutes a criminal offence under the general law of the State, an offence against the town, punishable by fine or otherwise, is inoperative and void. So that so much of the ordinance in question, as declares an assault upon the officer of the city named, while in the discharge of his official duty, punishable by fine or imprisonment, is void. *Town of Washington v. Hammond,* 76 N. C., 33; *State v. Langston,* 88 N. C., 692; *State v. Brittain,* 89 N. C., 574.

There is no error, and to the end that the judgment may be affirmed, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: S. v. McCoy, 116 N.C. 1060; *S. v. Freshwater,* 183 N.C. 763.

STATE v. TOBE NORWOOD, ELI JONES AND GREEN POWELL.

Indictment—Gaming—Motion to Quash.

1. Playing and betting at cards, is not indictable, unless done in a house or on some part of the premises where spirituous liquors are retailed, or in some ordinary, tavern, or house of entertainment, or at a faro-table, or faro-bank, or at some other gaming table, used for playing games of chance.
2. A bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed.

INDICTMENT for playing and betting at cards, heard before (935) *Graves, Judge,* on a motion to quash, at Spring Term, 1886, of CALDWELL Superior Court.

The indictment was as follows, to-wit: "The jurors for the State, upon their oath present, that Tobe Norwood, Eli Jones and Green Powell, late of the county of Caldwell, on Sunday, the 7th day of March, 1886, with force and arms, at and in the county aforesaid, unlawfully did play at a certain game of cards, and then and there unlawfully and wilfully did bet money on said game, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State."

On hearing the indictment, the defendants' counsel, admitting the facts to be, that on one occasion they played cards for money and bet

on the game, in the woods some distance from any house or road, moved to quash the indictment.

His Honor quashed the indictment, from which judgment the Solicitor prosecuting for the State appealed.

Attorney General, for the State.
No counsel for the defendants.

ASHE, J. (after stating the facts). The indictment does not bring the offence charged within the prohibition of any statute in this State. It was evidently drawn under Sec. 1045 of The Code, but fails to make out a criminal offence under that section. It fails to charge that
(936) the game played was one of chance, and that it was played at a place or table where games of chance are played. In this State, persons playing or betting at cards or games of chance, are only amenable to the criminal law, when they play or bet at a faro bank, or faro table, under Sec. 1044 of The Code; or at some other gaming table, established, used, and kept as such, at which games of chance are played, under Sec. 1045; or in some ordinary, tavern, or house of entertainment; or in a house where spirituous liquors are retailed; or in some part of the premises occupied with such house, under Sec. 1042.

The bill of indictment in this case, fails to state facts that bring the offence charged within the inhibition of either of these sections of The Code, and we are not aware of any other law that makes the playing and betting at cards a violation of the criminal law.

There is no error. Let this be certified to the Superior Court of Caldwell County, to the end that the defendants may be discharged.

No error. Affirmed.

STATE v. ROBERT B. HARPER.

Indictment—Sending Threatening Letter—Motion to Quash.

1. The power to quash an indictment before defendant pleads, is not usually exercised unless the defect is gross and apparent, nor when the offence is of a heinous nature.
2. Certainty to a certain intent in general, is all that is required in indictments; but everything should be charged, or made to appear by necessary implication, which is necessary to constitute the offence charged.
3. Where the offence charged was the sending a letter under Sec. 989 of The Code, and the letter was set out in the indictment, from which it is deduci-

ble by necessary implication, that the defendant threatened to indict the prosecutor for an offence punishable by imprisonment in the penitentiary, with a view and intent to extort money; *Held*, that a criminal offence is sufficiently charged, and the indictment should not be quashed.

INDICTMENT, heard before *Clark, Judge,* on a motion to quash (937) at Spring Term, 1886, of DURHAM Superior Court.

The indictment was for sending a threatening letter, and was as follows: "The jurors for the State, upon their oath present, that Robert B. Harper, late of the county of Durham, in the State aforesaid, on the first day of January, in the year of Our Lord, one thousand eight hundred and eighty-five, in said county and State, did knowingly and wilfully, send to one C. M. Van Nappen, in which said letter, he, the said Robert B. Harper, threatened to accuse the said C. M. Van Nappen of a crime, punishable by the laws of said State with imprisonment in the penitentiary, to-wit: the crime of embezzlement, with a view and intent to extort and gain money, to-wit: the sum of ten dollars in money, from him, the said C. M. Nappen, which said letter is as follows, that is to say:

"DURHAM, N. C., September 14, '85.

"C. M. VAN NAPPEN: I want to say to you in regard to that case I had against you before Mr. C. B. Green, wherein I charged you with $10.00 received for house rent, I will make you this proposition: If you will pay me the $10.00 inside of ten days, I will drop it. If not, I am going to put the case before the Superior Court, in October, and I am going to have the postmaster and the express agent as witnesses, to show the amount of money you sent me through them, and I am also going to have Mr. C. A. W. Barham and Peter Green, and Robert Crabtree and E. H. Lyon and W. T. Speed, as witnesses, to show the amount of money paid you by them. I will also have my wife as a witness, to prove that the money was never paid to her, so if you like, you can look these things up, and you will not find, anywhere, where you paid or sent me the ten dollars. You may become clear in the Superior Court, but it seems to me, that the evidence will be very strong against you, when my wife and myself will both (938) swear that you have never paid it, and the postmaster's books, and the express agent's books, will show and correspond with all the money collected and sent to me by you, with exception of the $10.00. You can use your own pleasure about paying the money inside of ten days; but if you don't pay it, I am sure going to bring the suit in the next term of the Superior Court. R. B. HARPER.

"Contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State."

On motion of defendant, the court rendered judgment quashing the bill of indictment, from which judgment, the Solicitor, on behalf of the State, appealed.

Attorney General, for the State.
Mr. T. M. Argo, for the defendant.

ASHE, J. (after stating the facts). In every indictment, certainty to a certain extent, in general, is all that is required, and everything should be stated which is necessary to constitute the offence charged, or which, by necessary implication, is included in what is alleged, Arch. Cr. Pl., 44.

We infer from the statement in this indictment, that the prosecutor had been the agent of the defendant Harper, in collecting certain rents, and there had been an action before a Justice of the Peace by the defendant, to recover these rents from the prosecutor, and the defendant had failed to recover ten dollars which he alleges the prosecutor had received and refused to pay over.

The threatening letter set out in the indictment, was to force the prosecutor to pay this money. Whether the ten dollars was really due to the defendant, or whether the refusal to pay over the amount, was such an appropriation of the same as to constitute the offence of embezzlement, we are not called upon to decide. The only question for us to consider is, did the defendant, by the letter set out in the indict-
(939) ment, threaten to indict the prosecutor, if he did not pay over the ten dollars in ten days.

The defendant's counsel contended, that the letter did not make a threat of indictment, but had reference to a civil suit, and most probably an appeal from the Justice's judgment. If that was so, most clearly this indictment could not be sustained. The first part of the letter might lead to that conclusion, when he says: "If you do not pay, I am going to put the case before the Superior Court in October." But he subsequently says: "If you don't pay, *I am sure going to bring the suit in the next Term of the Superior Court.*" This evidently had reference to a suit to be originated in the Superior Court. He must have known, or at least he must be presumed to have known, that he could not bring a civil action in the Superior Court for a claim of such an amount. The only suit, then, he could have brought in the Superior Court, was a criminal action, and we think it is deducible, by a necessary implication from the whole tenor of the letter, that that was the action with which the prosecutor was threatened, and the action intended must have been a criminal action for embezzlement, under Sec. 1014 of The Code; for that is the only statute we have,

making it indictable for an agent fraudulently to convert to his own use, any money, etc., and is made punishable as larceny, which is a penitentiary offence.

Besides this, the Courts do not favor motions to quash. "It is not usually exercised, unless when the defect is gross and apparent, nor when the offence is of a heinous nature." *State v. Baldwin*, 18 N. C., 195.

Our conclusion is, there was error, and the judgment of the Superior Court is reversed. Let this be certified to the Superior Court of Durham, that further proceedings may be had according to law.

Error. Reversed.

Cited: S. v. Flowers, 109 N.C. 844.

STATE v. J. A. FANNING.

Affray—Evidence.

1. If a person, by such abusive language, or offensive conduct towards another, as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, although he did not return the blow.
2. Although the evidence be slight, yet if it is sufficient to reasonably warrant the finding of the jury, the Supreme Court cannot review their finding.

INDICTMENT for an affray, tried before *Avery, Judge*, and a (940) jury, at Fall Term, 1885, of the Superior Court of HENDERSON County.

The defendant and two others, Samuel P. Brittain and J. W. Brittain, of whom the latter died before trial, and a *nol pros* was entered as to the former, are charged with committing an affray, and mutually assaulting and beating each other.

The defendant, upon his plea of not guilty, was tried and convicted before the jury, at Fall Term, 1885, of Henderson Superior Court.

It was in evidence that one Few, the owner, had leased a store house in the town of Hendersonville to the said Samuel P., consisting of a front and rear room, and that himself and the defendant were interested as partners in a billiard table and bar, kept in the latter room.

A witness introduced for the State, W. D. Miller, testified as follows:

"I saw Samuel P. Brittain cross the street, and with his son J. W. Brittain, enter an adjacent drug store, come out, and go to the door of the store room, which he made an effort to break open. The de-

fendant, standing in front of the drug store, said to him, "Don't break the door open," to which Brittain replied with an oath, "I will do so." The defendant then passed into the drug store, and came out with his gun in his hand. Brittain forced the door open, and with his son, entered the room, the defendant closely following with his gun.
(941) I heard words, apparently angry, within the room where the parties were. In a few moments the defendant came out, walking backwards, closely followed by the two Brittains, the son behind the father, and the father with an uplifted board over the defendant's person, and the latter with his gun in both hands, and as they reached the sidewalk, the said Samuel P. struck the defendant with the board, and at the same moment the gun fired. A second blow was given the defendant with the same instrument, and again the gun exploded.

"The gun was in the defendant's hands, pointing upwards. I cannot say if it was pointed towards Brittain, or any one else. The latter advanced out into the street, the defendant giving way before him, and while the fight was going on, the said J. W. Brittain discharged his pistol several times at the defendant. I then interposed and made them desist."

The defendant, examined on his own behalf, testified thus:

"The store-house had been rented by Samuel P. Brittain, and he and myself had an arrangement, that in case the prohibition law should cease to be operative, we would together open a bar in the front or store room, and meanwhile he consented to my keeping and selling corn and flour in that room. We both had keys to the room.

"In the morning of the day when the difficulty took place, Brittain had the corn and flour removed to the back room, and I had it replaced in the store-room, and fastened the entrance in front, by nailing strips across the doorway. On returning from a bird hunt, with a double-barrel shot-gun, I deposited it in the drug-store, where it was usually kept, though sometimes it was left in the billiard-room, where I slept. Brittain, the father, said he would go into the store-room in three minutes, and thereupon passed over the street, and talked with his son, who came with him to the front door—passing by the drug-store, and taking a hatchet therefrom, which was used in forcing the door open. I went into the drug-store about the time that Brit-
(942) tain crossed the street, and got my gun and came out. I forbade the breaking open the door, but it was done, and as Brittain entered, I followed him, but was immediately ordered out. I started to back out through the door, when Brittain drew over my head a piece of plank or scantling about 6 feet long and 1¼ by 2½ inches thick, while his son drew a pistol, and both pursued me out of the door. I then turned round, hearing foot-steps hurrying behind, and

as I did so, received a blow on the head from the scantling, at the same time throwing up the gun to ward it off, but with no intention of firing it. The blow caused both barrels to explode, and the gun was broken. The son fired several times at me while this was going on. I went out of the drug-store with the gun, before Brittain entered it, and my sole purpose was to carry it to my room, and not to use it in any difficulty between us."

There was other evidence, but the foregoing versions of what transpired, are sufficient for a proper understanding of the instructions asked and given, in their application to the different aspects of the evidence, and to these the exceptions are confined.

The defendant's counsel requested the Court to charge the jury:

I. If the jury believe that the defendant, after being ordered out, did leave the store, and was followed by S. P. Brittain, then armed with a large piece of scantling held in a striking position, and the defendant attempted to ward off the blows given by Brittain, and in the attempt his gun went off, he would not be guilty.

II. That the fact that the defendant when ordered out, left the store and never fired his gun until stricken, when he had every opportunity to shoot before, should be conclusive to the minds of the jury, that he was acting with forbearance, and did not intend to use his gun, and that he would not be guilty.

The Court charged the jury substantially:

I. That if the testimony fully satisfied them that the defendant entered willingly into the fight, or wilfully provoked it, by language addressed to, or conduct towards Brittain, before being (943) followed out of the store, they would find him guilty, and proceed no further in their inquiry.

II. That in determining the precedent conduct and language of the defendant, in this view, they might consider the language and conduct of the defendant towards Brittain, when he forced open and entered the store door—his going after and getting his gun, and what then transpired, as the jury shall find the facts to be upon the evidence; and that if he did what is testified to, with no intention to engage in a fight when he followed Brittain into the store, he would not be guilty, if he used no more force afterwards, than was necessary in the progress of the difficulty.

III. If the defendant did not willingly engage in the fight, nor provoke it in the use of angry words in the store room, or by following Brittain as he entered, with his gun, after what he testified to as to his having forbidden the violent breaking into the door, he would not be guilty, although he fired his gun, voluntarily or otherwise, when his

assailant was pursuing him with the up-raised scantling, if he fired it under a reasonable apprehension of great bodily harm.

The statement of the evidence is protracted to an unusual extent, in order that the application of the propositions of law, on the basis of the appellant's exceptions, may be properly understood, in their application to the different aspects of the proofs.

There was a verdict of guilty, and the defendant appealed.

Attorney General, for the State.
No counsel for the defendant.

SMITH, C. J. (after stating the facts). It will be observed, that the instructions asked, differ from those delivered, in the very material fact, that while the latter are full, and embrace the whole case as developed by the witnesses, the former are partial, presenting only such facts as occurred after the parties emerged from the store-room, ignoring what preceded, and may have been the cause of the difficulty, culminating in the fight afterwards. Most obviously, the case
(944) was properly presented to the jury in the charge, and in as favorable a light for the defendant, as he could reasonably ask. The jury were directed to consider all the evidence, and ascertain from it, whether the defendant willingly entered into, or by his words and acts, provoked and brought about the violation of the public peace that ensued. If he did, he is criminally responsible for the consequences, notwithstanding his forbearing conduct when stricken and shot at. The test of guilt in such cases, is thus stated by BATTLE, J.: "If one person, by such abusive language towards another, as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow." *State v. Perry,* 50 N. C., 9.

And this tendency and intention may be indicated by conduct as well as by words.

While the later conduct of the Brittains flagrante bello, was extremely violent, and out of all apparent proportion to the provocation offered, and that of the defendant was forbearing and defensive, after the parties came out of the store, there was evidence, in the beginning, of an aggressive purpose in the defendant, when, with gun in hand, he followed the Brittains as they entered the store of the father, the sequel of which was seen soon after, in the retreating of one, with face towards the others, his pursuing antagonists. The inference from this, it was for the jury to infer, and they find in accordance with the charge, that the defendant was a wilful participant in the act of violence from which he was the sufferer.

The evidence may be slight, but it was such as authorized the jury, in passing upon it, to arrive at their own conclusion as to the defendant's guilt. This is their province, and when there is any reasonable evidence to warrant the verdict, it must be allowed to stand, so far as this question is involved.

There is no error, and this will be certified, to the end that the Court below proceed to judgment.

No error. Affirmed.

Cited: S. v. Lancaster, 169 N.C. 284; *S. v. Crisp*, 170 N.C. 791; *Supply Co. v. Windley*, 176 N.C. 22; *S. v. Baldwin*, 184 N.C. 792; *S. v. Robinson*, 213 N.C. 280.

STATE v. JOHN McMILLAN.

Escape—Motion to Dismiss Appeal.

1. Where a defendant, indicted for crime, escapes, this Court will suspend further proceedings until he is re-arrested and brought within its jurisdiction.
2. The prisoner, having escaped, after his conviction in the Superior Court and appeal to the Supreme Court, this Court will not dismiss the appeal, but will allow the case to remain on the docket until the prisoner is re-arrested: when it will be called for further action at the instance of the Attorney-General or of the prisoner.

Motion to dismiss the prisoner's appeal, made and heard at (945) the February Term, 1886, of the Supreme Court.

The case is sufficiently stated in the opinion of the Court.

Attorney-General, for the State.

Mr. John D. Shaw, for the defendant.

MERRIMON, J. The appellant was convicted in the Superior Court of the County of Moore, of the crime of murder.

There was judgment of death against him, and he appealed to this Court. His appeal was docketed here at October Term, 1884.

It appears to the satisfaction of the Court, that pending the appeal, the appellant escaped, and still continues at large, and fails to prosecute his appeal.

At the present Term, the Attorney-General moved to dismiss the appeal, "for that the same has been pending in this Court for more

than two Terms, and the appellant has failed to prosecute it as required by the Rule (5) of said Court."

It is the practice of this Court, to suspend proceedings in a criminal action, when it appears that the appellant has escaped, until he shall be re-arrested, brought within the jurisdiction of the Court, and held to answer according to law. So far as we know and can learn, this practice has been uniform in the past.

The Court will not proceed at the instance of a party charged
(946) with crime, after he has escaped, and thus defied the law and its Courts. He has no right to fly, and, at the same time, insist upon such relief and deliverance as the law might afford. His flight is itself a criminal offence, and by it he puts himself in opposition to the law, abandons his defence and his right to relief, while he persists in his flight. The law will not help or encourage an offender to resist and subvert its authority. It does not seek or tolerate revenge, but it demands and requires of every one, due submission to its organized authority, before it will grant relief. It would be false to itself, and absurd, to hear and determine the appellant's appeal, upon its merits, while he escapes—repudiates and resists its authority. Moreover, the Court will not do a vain and nugatory thing. The appellant may never be re-arrested. Then, why hear and determine the appeal? If it be said this should be done, to the end that the Court below may be ready to proceed further in the action there, when and if the appellant shall be re-arrested, it must be said in reply, that while the law does not encourage delay, it is never in a hurry—it contemplates orderly and proper proceeding at the right time, and when its jurisdiction is effectual. If this Court should decide the questions presented by the appeal, and certify its opinion to the Superior Court, that Court would not have actual jurisdiction of the appellant's person, so that it could proceed to judgment and enforce it. The decision would be empty and fruitless. The Court will not ordinarily hear and determine an appeal, when it sees that its orders and judgments cannot be enforced by itself, or through the Superior Court, as the law directs. In the course of just procedure, in a case like this, judicial action should be suspended, when and as soon as the appellant escapes, and so continue, until he shall be again personally brought within the jurisdiction of the Court, and be subject to its orders and judgments. *Lex nil facit frustra, nil jubit frustra.*

Besides, to dismiss the appeal, might raise embarrassing questions in the Superior Court, if the appellant should be re-arrested. Would the dismissal reinstate the judgment of death, vacated by the ap-
(947) peal, or operate to leave that judgment in force, as if no appeal

had been taken? Could such a result supervene in the absence of the prisoner, whether such absence be occasioned by his escape or otherwise?

These and like questions, more or less practical, might be raised. It is not at all necessary to raise them, and it is better to avoid them.

We have not found any decision of this Court bearing upon the subject before us, but we find numerous cases decided by other Courts, that substantially support what we have said. *An anonymous case,* 31 Maine, 592; *Commonwealth v. Andrews,* 97 Mass., 643; *People v. Genet,* 59 N. Y., 80; *Matter of Genet,* 3 Thompson & Cook, (N. Y.,) 734; *Sharking v. People,* Id. 739; *Regina v. Cardwell,* 79 Eng. Com. Law, 503; *Regina v. Chichester,* Id. 503.

We are, therefore, of opinion that the motion to dismiss the appeal should not be allowed. It is not, however, necessary to continue it on the current docket of the present Term. It may remain on the docket where it is now entered, to be brought forward to be heard and determined at the suggestion of the Attorney-General or the appellant's counsel, when the appellant shall be re-arrested. The motion must be denied.

Motion denied.

Cited: S. v. Pickett, 94 N.C. 972; *S. v. Jacobs,* 107 N.C. 776.

STATE v. ROSE BURTON.

Admissions—Evidence.

1. The rule that an admission of the truth of a statement, made by another in the presence of a party to an action, will be inferred from his silence, applies to the prosecutor in a criminal action.
2. To authorize such inference it must clearly appear, not only that the statement was fully understood, but also that it was of such a character, or made under such circumstances as would naturally call for some reply.

THIS was an indictment for an assault and battery with a (948) deadly weapon, and with intent to kill, tried before *Gilmer, Judge,* at Fall Term, 1885, of GRANVILLE Superior Court.

There were several exceptions taken on the trial, to the ruling of the Court upon the admission of evidence.

The main question involved, was as to the identity of the defendant. The prosecutrix, introduced as a witness for the State, testified, that in

August, 1884, the defendant, at night, came to her house disguised as a man, in men's clothing, with her face partially concealed with a white cloth, and beat her with a heavy stick, severely on her head and body, and ran her away from her house. On cross-examination, the witness was asked what was the state of feeling between her and the defendant, proposing to show that it was unfriendly. The defendant objected to the evidence, but it was allowed, and the defendant excepted. The witness answered, the defendant was very angry with her.

As bearing on the means of identification, the State was allowed, after objection by the defendant, to prove by this witness, that about a week before the assault, the defendant was at the witness' house, disguised as a man, and the witness then recognized her.

The defendant, testifying in her own behalf, denied being at the house of the prosecutrix at the time of the alleged assault, and also introduced evidence tending to prove an *alibi*.

One Home was introduced by the defendant, who proposed to show by him, that he met the prosecutrix and another woman, the night of, or the night after, the alleged assault, and that the other woman narrated to the witness, in the presence and hearing of the prosecutrix, what had happened, stating that the person who committed the assault was unknown. This was offered as tending to contradict the prosecutrix. The State objected to the evidence, and it was not allowed, and the defendant excepted.

The jury returned a verdict of guilty. There was judgment against the defendant, from which she appealed to this Court.

Attorney General, for the State.
Mr. Robert W. Winston, for the defendant.

(949) ASHE, J. (after stating the facts). We think there was error in excluding the testimony of the witness, Home, by whom it was proposed by the defendant to prove what was said by another woman, in the presence and hearing of the prosecutrix, in regard to the identity of the person who had committed the assault. The conversation occurred either on the night, or the night after, the assault, when the circumstances of the transaction were fresh in the memory of the prosecutrix, and before she had made a statement to any one, so far as appears, as to the person who committed the act, and while there was an inquiry as to the perpetrator.

The doctrine is thus laid down by Taylor on Evidence, Sec. 733: "Admissions may also be implied from the acquiescence of the party. But acquiescence of the party, to have the effect of an admission, must

exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party, and whether it be acquiescence in the conduct or language of others, it must plainly appear, that such conduct was fully known, or such language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances too, must not only be such as afford him an opportunity to act or to speak, but such also as would *properly and naturally call for some action or reply, from men similarly situated.*"

In *Guy v. Manuel,* 89 N. C., 83, this Court held, that "to make the statement of others evidence against a party, on the ground of his implied admission of its truth, it must be made on an occasion *when a reply from him might properly be expected. State v. Bowman,* 80 N. C., 432; *State v. Crockett,* 82 N. C., 599. Wharton on Evidence, 1136.

It is true, the principles announced by the authorities cited, are applied either to parties to an action, or to defendants charged with crime, but we can see no reason why, by analogy, they should not apply to the prosecutrix in a criminal action, as here, when a violent assault had just been committed, and the inquiry is made as to the person who had committed the act, and it was said in the (950) presence and hearing of the prosecutrix, who had been so recently assaulted, that the *person was unknown,* it was most natural, and therefore to be expected, that she would, at once say, "I know who did the act." But she was silent, and it is to be presumed that she did not know, or she would have spoken. It must be admitted, that is a very slight presumption, for she may have had some motive for being passive. But still, it was some evidence tending to impugn the credibility of the prosecutrix, and should have been submitted to the jury, to be weighed by them for what it was worth, and in the refusal to submit it to the jury, we think there was error.

There were some other exceptions taken in the course of the trial, which we think it unnecessary to consider, as the error on this point, secures to the defendant a new trial.

We have not overlooked an error in the judgment rendered below, which was in the alternative, but as a new trial is to be awarded, that is immaterial, as a proper judgment may be rendered, should the defendant be again convicted.

There is error. Let this be certified to the Superior Court of Granville County, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. v. Morton, 107 N.C. 894; *S. v. Record,* 151 N.C. 697; *S. v. Randall,* 170 N.C. 762; *S. v. McKinney,* 175 N.C. 786; *S. v. Martin,* 182 N.C. 851; *S. v. Evans,* 189 N.C. 235; *S. v. Portee,* 200

N.C. 142; *S. v. Wilson*, 205 N.C. 379; *S. v. Hawkins*, 214 N.C. 330; *S. v. Rich*, 231 N.C. 699; *S. v. Hendrick*, 232 N.C. 455; *S. v. Temple*, 240 N.C. 744.

STATE v. JERRY JACOBS.

Forcible Entry—Forcible Trespass.

1. The offences of forcible entry and forcible trespass are not the same at common law, although nearly allied, for strictly speaking, a forcible trespass applies to personal property, and a forcible entry to land.
2. To constitute either, there must be something more than a mere trespass, and the act must amount to a breach of the peace, although it need not amount to one of great public violence or terror.

(951) INDICTMENT, tried before *MacRae, Judge,* and a jury, at December Term, 1885, of RICHMOND Superior Court..

The charge in the indictment was, that the defendant, on the 30th day of November, A. D., 1885, with force and arms and with a strong hand, did enter the dwelling house of one Margaret Ives, against the will of the said Margaret Ives, she being then and there present and forbidding him to do so, against the peace and dignity of the State.

On trial, the prosecutrix was introduced as a witness on the part of the State, and she testified, that on the night of the 30th of November, 1885, about ten o'clock at night, the defendant came to her house in the county of Richmond, where she resided, "rearing and charging," cursing and swearing, and threatening to kill her. She did not forbid him, because she was afraid to stay. He came to the house calling for the witness, broke down the door, entered the house, and made a great noise, knocking over the furniture, etc.

At the time of his approaching the house, there were in it, Mr. Floyd and his wife, Mr. DeBerry, her two daughters and herself, but they all fled upon his approach.

Floyd, examined by the State, corroborated the testimony of Margaret Ives. He testified, that he and DeBerry, upon discovering that the defendant was coming to the house, put out the fire, fastened the door, and went out and sat behind the garden, about twenty-five yards from the house; that defendant went to the house, swearing, and declaring "that he was not afraid of no d—d man or woman; just as leave die to-night as not"; kicked the door down, went in, and fell over something and broke his leg.

There was some further testimony offered by the State, but it is not material. The defendant was found guilty. There was judgment against him, from which he appealed.

Attorney General, for the State.
Messrs. Platt D. Walker and John D. Shaw, for the defendant.

ASHE, J., (after stating the facts). On the night of the 30th (952) of November, 1885, a number of people, men and women, were quietly assembled at the house of a Mrs. Ives, and at the late hour of 10 o'clock, the peace and quiet of the household was disturbed, by the approach of this formidable defendant, with curses and threats of vengeance and death against the occupant of the house. Such was the terrible order of his coming, that all the inmates of the house fled panic-stricken therefrom, and betook themselves to places of concealment and safety. The door had been barred, but that formed no impediment to the furious onslaught of the redoubtable knight-errant. He kicked down the door, entered the house, and fell over something, by which his leg was unfortunately broken, instead of his neck, and yet it is seriously contended before us, that he is guilty of no offence.

In the Court below, his Honor treated the case as an indictment for a forcible trespass, and although forcible trespass and forcible entry, at common law, are distinct offences, yet nearly allied, and although we are not prepared to say that the indictment in this case may not be upheld as one for a forcible trespass, it is certainly a good indictment at common law for a forcible entry. A forcible trespass, strictly speaking, applies to personal property, and a forcible entry to lands and tenements. To constitute either an indictable offence, there must be something more than a mere trespass; there must be some act that amounts to a breach of the peace. But it is not necessary that the act should be one of great public violence or terror, for it is established, that an entry into a house or garden, though no one be therein, with such actual violence as amounts to a public breach of the peace, expressed in law to be "with force and arms and a strong hand;" for example, threatening violence, or breaking open a door, or bringing a multitude of attendants, with unusual weapons, is an offence indictable at common law, as a forcible entry. 1 Hawk. Pleas of the Crown, Sec. 26; *Langdon v. Potter,* 3 Mass., 215; *Harding case,* 1 Green, 22; *Burnett v. State,* 4 Rich, 340, and *State v. Pollock,* 26 N. C., 305, which, without relying upon any other authority, is decisive of this case. It was there held, where a party entering on land in possession

of another, either by his behavior or speech, gives those who are in possession, just cause to fear that he will do them some bodily harm, if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by carrying with him such an unusual number of attendants, or by arming himself in such a manner as plainly to intimate his design to back his pretensions by force, or by *actually threatening to kill, maim, or beat* those who continue in possession, or by making use of expression plainly implying a purpose of using force against those who make resistance.

Our opinion is there was no error. Let this be certified to the Superior Court of Richmond County, that the case may be proceeded with in conformity to this opinion and the law.

No error. Affirmed.

Cited: S. v. Bryant, 103 N.C. 438; *S. v. Davis,* 109 N.C. 810; *S. v. Leary,* 136 N.C. 578; *S. v. Gibson,* 226 N.C. 200.

STATE v. STEPHEN L. GARDNER.

Appeal—Assignment of Error—Judge's Charge.

1. It is the duty of the appellant to make up the case for the Supreme Court, so that the errors are distinctly pointed out, and if this is not done, they will not be considered.
2. So, where the defendant assigned as error, that the trial Judge laid down an abstract principle of law, which had no connection with the case, in a way to prejudice the prisoner, but the case on appeal did show to what the exception related, the Court refused to consider it.
3. The trial Judge has the right in his charge to the jury, to explain to them the difference between positive and negative evidence, and an illustration which he gives to explain the difference, is not prejudicial to the prisoner, when he tells the jury that it is merely given as an explanation, and that they must determine the fact, according to the weight they see fit to give to the evidence.

(954) INDICTMENT for an assault and battery, tried before *Jhillips, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of UNION County.

The prosecutrix, Sarah R. Smith, being examined on the part of the State, testified in substance as follows: The difficulty occurred at her house, about a stolen cow, belonging to her, that the defendant said some person had told him that she said he had stolen. He began to

curse her, and jerked her up by the left hand out of the rocking-chair in which she was sitting, and beat her with a seasoned stick, about three feet long, and one and a half inches thick, giving her three licks on the head, and leaving a scar. That she did not strike him with the chair, nor did she rise from the chair before he put his hands upon her. That her husband is dead; he left her some six or seven years before his death; and she had two children, and her husband was the father of one of them.

Dr. Caldwell, a witness for the State, testified that he was called to examine the wounds. One was on the top of the head, which cut through the skin, and was one or one and a half inches in length; he trimmed the hair and put a plaster on the wound. There were besides, some knots on her head, and she was in bed when he got there, about 10 o'clock at night.

The prosecutrix was further corroborated by the testimony of Rosa Baker, who swore she was present and heard the conversation about the cow. The defendant accused her sister of saying he had stolen her cow. She denied saying so, and the defendant caught hold of her arm, and lifting her up, struck her three licks with a stick. Her father went to the door about the time he stopped hitting her, and she was then carrying her sister, the prosecutrix, out of the room. She was married, and had one child.

James Baker, the father of the prosecutrix, testified, that he heard the defendant say to his daughter, "God d—n you, you are in your own room, but get up;" he heard three licks; he ran to the door, and the defendant was standing in front of her, and she was covered with blood from head to foot; he fired off his pistol, when he was caught hold of. He saw the stick; it was one and a half inches (955) thick at the big end, but was splintered at the small end, and he therefore thought he must have struck her with the little end. Taylor McCall and his daughter Rosa were there.

One Taylor was examined for the defence, who testified, that he was present when the difficulty occurred. There were present in the room, the defendant, McCall, and the prosecutrix. Rosa Baker had been in there, but had gone out. The defendant and the prosecutrix commenced grumbling about a cow, which she said defendant had stolen it, or had it done. She rose and struck him with a chair; he caught the chair and held it; he did not see the defendant strike with a stick; he had a small stick that could bend about any way. While they were scuffling, James Baker came to the door and fired a pistol; they had been drinking beer, James Baker included. Rosa Baker was not in the room at the time of the difficulty.

The character of the witness Taylor was proved to be good by several witnesses.

The prosecutrix being recalled by the State, testified that her sister, Rosa Baker, came into the room before Gardner struck her, and carried her out.

His Honor charged: "It is the duty of the jury to reconcile the evidence, if they can, and if there is a reasonable doubt in their minds as to his guilt, it is their duty to acquit the prisoner. There are two kinds of evidence for your consideration in this case—positive evidence and negative evidence. For instance, Sarah R. Smith testified, that the defendant struck her three licks. Rosa Baker testified that the defendant struck her sister three licks; that she was in the room and saw the defendant strike her. Now, this is what is called positive evidence.

"Taylor says that he saw the witness Sarah R. Smith strike Gardner, the defendant, but did not see the defendant strike her. This is both positive and negative evidence.

"What McCall says about not seeing Rosa Baker at the time
(956) of the difficulty, is negative evidence, and what Taylor says about not seeing Gardner strike Mrs. Smith, is negative evidence. To illustrate; if six men were to swear that they did not hear this court house bell ring this morning at the usual hour for the summoning of the Court, that would be negative evidence. If six other men were to swear that they heard the court house bell ring, and were present and saw the sheriff ring it at that time, this would be positive evidence. I use this comparison for the purpose of illustration merely. As triers of the fact, it is the province of the jury to determine the weight of the evidence. They see the witnesses, and the manner in which they give in their evidence, and hear the testimony as to their character. It is for the jury to say what they believe, and how much they believe. If they have a reasonable doubt as to the guilt of the defendant, as I said before, it is their duty to acquit.

"If the defendant sought a fight, or provoked the prosecutrix to strike at him with a chair, the defendant cannot justify a blow, on the ground of self-defence. If the defendant struck the prosecutrix to prevent her from striking him with a chair, he is justified in doing so, provided he used no more force than was necessary to prevent her from doing it.

"No mere words will justify a blow. If the defendant and prosecutrix got into a quarrel, and he struck her in consequence of words used by her, he would be guilty."

To this charge, the defendant excepted. There was no exception on the trial, to the admission or rejection of testimony. There was a

verdict of guilty, and judgment against the defendant, from which he appealed.

Attorney General, for the State.
Mr. D. A. Covington, for the defendant.

ASHE, J. (after stating the facts). The only exceptions to the charge of the Court were, that there was error in the instructions as to the distinction between positive and negative testimony, and that the instructions as to the difference between these kinds of (957) evidence, was calculated to make an impression upon the minds of the jury, prejudicial to the defendant, and that the Judge laid down an abstract proposition of law, without any specific reference to the case. To that part of the charge in which the abstract proposition was laid down by his Honor, we are unable to see from the record, to what the exception relates. The exception is too indefinite. It is the duty of an appellant to the Supreme Court, to see that the case is so made out, as distinctly to present the points upon which the judgment below is sought to be reviewed. *Flaniken v. Lee,* 23 N. C., 293; *State v. Cowan,* 29 N. C., 239.

As to the other exception, we do not concur with the counsel for the defendant, that the instructions given by his Honor, with regard to the distinction between positive and negative testimony, and the case put by him in illustration of the difference, was calculated to have a prejudicial effect upon the jury . For his Honor, after stating the distinction between the different sorts of evidence, refrained from telling the jury that more credit was to be given to positive than to negative testimony, which is the general rule applicable to such a case. *Henderson v. Crouse,* 52 N. C., 623. But he was careful to tell the jury, that the case put by him of the testimony in regard to the ringing of the bell, was an illustration merely, and he proceeded to qualify the illustration, by telling them that they were the triers of the fact, and it was their province to determine the weight of the evidence,—that they saw the witnesses, and the manner in which they gave in their evidence, and heard the testimony as to their character, and it was for them to say what they believed, and how much they believed. Even if the illustration in the abstract, had been calculated to have the prejudice ascribed to it by the defendant's counsel, this explanation would certainly have had the effect to remove from the minds of a jury of ordinary intelligence, any erroneous impression.

We do not think the defendant had any reason to complain of the charge. It was more favorable to him than he had any right (958) to expect.

His Honor might have told them, that there was but one witness, and he the defendant, who testified that he did not strike the prosecutrix, while there were three witnesses who contradicted him—the one who saw and felt the blows—a second who saw the blows—and a third who heard them, and although the defendant proved a good character, and the two female witnesses were of a sullied character, they were corroborated by their father, whose character was not impeached, and by the physician, who testified to the fact, that there was a gash and knots upon the head of the prosecutrix, which it is hardly probable to believe were inflicted otherwise than in the manner described by the State's witnesses; and then the witness McCall, who was examined by the defendant, and was present and saw it all, does not corroborate the testimony of Taylor. If he could have done so, he certainly would have been examined by the defendant with regard to the fight; but he was only examined as to the presence of Rosa Baker. The State was not called upon to examine him upon that point. The jury were well warranted in finding the defendant guilty.

There is no error. Let this be certified to the Superior Court of Union County, that the case may be proceeded with according to law.

No error. Affirmed.

Cited: S. v. Murray, 139 N.C. 542.

STATE v. BENJAMIN G. COLE.

Evidence—Witness—Expert—Opinion.

1. Where a prisoner was tried for murder by poisoning, and at the time of the death, stated that the deceased had had a similar attack some years before, for which a certain physician attended her; *It was held,* that such attending physician could be allowed to give an account of such previous illness.
2. Whether or not a witness is an expert, is a question of fact to be decided by the Court, and its finding is conclusive, and not subject to review.
3. Where a prisoner is accused of murder by poisoning with strychnia, it is competent to show that he bought some of this drug the previous year.
4. An expert may be asked his opinion, based upon evidence already offered, if the jury shall believe such evidence. Such opinion must not be the positive opinion of the expert, founded upon his own observation and the testimony of others, but must be wholly contingent upon the facts, as the jury shall find them to be.

STATE *v.* COLE.

INDICTMENT for murder, tried before *MacRae, Judge,* and a (959) jury, at August Term, 1885, of the Superior Court of MOORE County.

The prisoner is charged with the crime of murder, committed on the body of Mahala Cole, his wife, in administering, and inducing her to take, a deadly poison known as strychnia, in quantity sufficient to cause, and which did cause, her immediate death. Upon his trial before the jury, he was found guilty, and from the judgment thereon he appealed to this Court.

The testimony offered on the part of the State, (for none was offered by the prisoner,) so far as is necessary to an intelligent apprehension and disposition of the exceptions appearing in the record, is to this effect:

The deceased dined at the house of one Evander McGilvary, about a half mile distant from her own, in her apparent usual health and cheerful spirits, on Friday, December 5th, 1884, and died soon after returning home, between the hours of 3 and 4 o'clock p. m., no one but her husband being present. Several of the neighbors, hearing of her sudden death, went over, one of whom, Evander McGilvary, found the deceased covered up in the bed, her body drawn up, and her jaw fallen. The prisoner stated to him, that his wife's sister brought to the house, the night before, a bottle of Liver Regulator, and advised him to administer to her a double dose; that he gave it to her, and went out to the wood-pile, when hearing a noise, he went back to the house, found the deceased down, lifted her up in his arms, and with her aid, carried her to the bed; that her symptoms were very severe, (960) and that when he left the room, after her death, he noticed the time told by the clock, and it lacked fifteen minutes to four. The witness further testified, that a month or two before, he had a conversation with the prisoner, in which he mentioned getting strichnine for a dog that had broken a nest of eggs, and related the result, when the prisoner remarked, that he could have gotten some from him, as he had a plenty of it.

Another witness, A. M. Wicker, who had married a sister of the deceased, and arrived at the house about sunset of the same day, with his wife and son, remaining during the night, testified to the prisoner's making a similar narration of the circumstances attending his wife's death; that he said: "It seemed to come on her in spells—in nervous jerkings", reminding him of a similar attack some years before, and which he attempted to illustrate by jerking his own arms. This occurred in or about the year 1873, and witness told the prisoner that he remembered it. Dr. Arnold, his wife, and Mrs. Sylvia Cole, were also pres-

ent on that occasion. Prisoner said, she—the deceased—had just such a spell this evening. The body was buried some two days after death, and was disinterred, for exhibition before the coroner's jury, in March following, and it was identified, although the face was beyond recognition. Dr. William Arnold, after a preliminary statement, in which he said he had practiced medicine since 1857; had attended medical lectures for one course, but did not graduate, testified, that he was present when the deceased had the attack, about 1873, and had heard the previous witness' evidence in relation to it.

The witness was then asked, on behalf of the State, to give a description of what then occurred. This was objected to for the prisoner, but the question was allowed, and the witness testified thus:

"The prisoner came over in a great hurry for me, and I went.
(961) She was recovering from a hard spasm—twitching. I gave her an emetic, corded her arm for bleeding, and, while bleeding, she had another general cramping of the muscles—tetanic convulsions. I saw two of them. I can't say what causes these tetanic symptoms."

To the question and answer, counsel for the prisoner excepted, and this is his first exception.

The further question was then asked, objected to, and the objection overruled, as follows:

"What, in your professional opinion, was the cause of these convulsions". To which the answer allowed was, "My opinion was, that she had got some strychnia in some bitters she got that morning." To this ruling the Court, the prisoner's counsel also excepted, this being his second exception. The witness, also, after objection, was allowed to testify as follows: "I had let the prisoner have some strychnia the Spring of the year before that, to bait some crows."

To this ruling the third exception is taken.

The witness was not present at the last and fatal attack, and did not hear of it until the hour of eleven at night. But he testified that on Monday, after the funeral, the prisoner asked the amount of his bill for previous medical services; said he was going to sell out, and there might be something the witness would like to have. At another time, he said to witness, that he expected to leave, as soon as he could get clear of what plunder he had; that he had a bottle of strychnia he would give witness, as he did not care to give it to everybody. A few days later, the bottle was sent over to witness, and he had not opened it. It was subsequently examined by an expert, and found to contain strychnia.

The witness and Dr. Snipes saw the exhumation made before the jury of inquest, and took the stomach, with what it contained, from the body, and placed it in a clean glass jar, sealed it up, and, in the

same condition, afterwards placed the jar in the hands of S. J. Hinsdale, of Fayetteville, for examination, and said there was not much decomposition, though the features were sunken and changed.

Dr. E. B. Snipes, a graduate of Vanderbilt University, and a physician of six years practice, was also at the autopsy, and gave (962) the same substantial narrative of what there took place, as the preceding witness.

Samuel J. Hinsdale, a druggist, residing in Fayetteville, a graduate in pharmacy in 1838, and who had made chemistry a study and practice for over forty years, and toxicology a study to a greater or less extent, testified to receiving the glass jar and its contents, hermetically sealed, and, upon an analysis and the application of tests, ascertained the existence of strychnia in the stomach. He detailed his mode of proceeding, by which the result was arrived at, and the presence of the poison detected. No controversy seems to have been raised to his testimony.

Upon being recalled, the following question, reduced to writing, was put to the witness, Dr. Snipes:

"If the jury find the symptoms were as testified to by Dr. Arnold and A. M. Wicker, and the condition of the body after death, as described by Mrs. Annie McGilvary and Mr. Evander McGilvary", (both of whom had given evidence on the point,) "and if the jury should also find that strychnia was found in the stomach of deceased after death as testified to by the chemist, Dr. Hinsdale, can you say what produced the death?"

The response was, "I give it as my opinion, that strychnia produced death. Nothing would resemble it very much except *traumatic tetanus*, commonly called "lockjaw", caused by some wound. If it was lockjaw, caused by a wound, the jaw would remain rigid, and never drop. A body is warm, and very much relaxed, immediately after death from strychnia, afterwards becoming rigid."

This inquiry, and the answer, were objected to by prisoner's counsel, but admitted by the Court, and exception entered thereto.

There was a verdict of guilty, and from the judgment of death pronounced by the Court, the prisoner appealed.

Attorney General, for the State.

Mr. R. P. Buxton, for the defendant.

SMITH, C. J., (after stating the facts). Except a motion in (963) arrest of judgment, not pressed in this Court, and in our opinion not warranted by the form of the indictment, which pursues an

approved precedent, Arch. Cr. Pl. 186, these are the only errors pointed out and complained of, as having been committed on the trial of the prisoner, and these only are we required to consider in his application for a new trial.

1st Exception. Dr. Arnold was permitted to give an account of the illness of the deceased in the year 1873.

No ground is assigned, upon which the objection to the competency of the evidence rests, but, in the argument here, its remoteness in time, and tendency to mislead, are urged against its reception. It will be noticed, that the matter had come out in a conversation with the prisoner, in which he described the symptoms of the fatal attack, as similar to those on a former occasion, remarking that she had "just exactly such a spell", describing it. The witness to whom he said this, saw one of those spells, and Dr. Arnold was also called in and treated her at that time. No exception was taken to this evidence when delivered by the witness, Wicker, but was taken to it when Dr. Arnold testified to the same facts. It was referred to by the prisoner, as an expressive and clear way of making known to one, who had been present at the former attack, the physical manifestations that attended her death. The evidence was properly received.

2nd Ex. The second exception is to the allowing of the expression of his opinion by Dr. Arnold, as to the cause of this attack.

The argument here, is directed against the competency of the witness, as an expert, not ascertained to be such, to give a professional opinion in the case.

In *State v. Secrest,* 80 N. C., 450, objection was made to the
(964) competency of a witness to express an opinion, of whose opportunities, and the use made of them, for acquiring skill and experience in his profession, no proof was shown to have been offered and acted on by the Court, and it was sustained. The nature of the objection did not appear, but it was held that any just grounds could be assigned in this Court, when none had been assigned in the Court below, upon the authority of *State v. Parish,* 44 N. C., 239.

But in *Flynt v. Bodenhamer,* 80 N. C., 205, decided at the same term, in answer to a similar objection, the Court used this language:

"The Court *must decide* whether the witness has had the necessary experience to enable him to testify as an expert. But the value of his opinion, when admissible, must be determined by the jury alone, and it depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of those opportunities. If a regular and continuous practice in his profession for thirty years, does not entitle the witness to be regarded as an expert, or *experienced physician,* it is difficult to conceive what would do so." Whether a

witness, offered as an expert, is such, is an enquiry to be decided by the Judge, as a fact, and like many other preliminary facts, such as the operation of hope or fear inducing a confession, is conclusively determined by the Judge. *State v. Sanders*, 84 N. C., 728; *State v. Effler*, 85 N. C., 585; *State v. Burgwyn*, 87 N. C., 572.

3rd Ex. We see no ground of exception to the proof, that the year previous to the illness of the deceased, the prisoner procured strychnia, for the alleged purpose of killing crows. It is in confirmation of the physician's expressed opinion, that its use was indicated in the effect produced upon her physical condition, so closely resembling those developed at her last illness.

4th Ex. Dr. Snipes, being recalled, proceeded to explain in detail, the effects upon the human system, which this poisonous article, taken in larger or smaller quantities, produces, the time in which death ensues, and its resistant force against decomposition, and was then asked the question, and allowed to give the answer already (965) recited, over the prisoner's objection.

In this, also, we find no error. Both question and answer rest upon a hypothetical state of facts, of which there was evidence, should the jury so find the facts so to be. This mode of examination is warranted by the ruling in *State v. Bowman*, 78 N. C., 509, and the authorities there referred to. The opinion asked, was not a positive opinion, founded by the expert upon his own observation and the testimony of others, which would be an invasion of the province of the jury, but is wholly contingent upon the facts, as the jury may ascertain them. In this form, and to aid the jury in their deliberations, such scientific information is allowed to be given.

After a calm review of the case, we find no error in the record, and as the verdict declares that the unnatural crime of wife murder has been perpetrated by the prisoner, though the result is arrived at upon circumstantial evidence, the law must be vindicated, and the prisoner suffer the consequences of violating it.

This will be certified, to the end that the Court may proceed to judgment upon the verdict, and it is so ordered.

No error. Affirmed.

Cited: S. v. Speaks, 94 N.C. 874; *S. v. Potts*, 100 N.C. 461; *S. v. Keene*, 100 N.C. 511; *S. v. Hinson*, 103 N.C. 377; *S. v. Brady*, 107 N.C. 828; *Geer v. Water Co.*, 127 N.C. 355; *S. v. Wilcox*, 132 N.C. 1132; *Summerlin v. R.R.*, 133 N.C. 554; *Horne v. Power Co.*, 144 N.C. 377; *Pigford v. R.R.*, 160 N.C. 103; *Brewer v. Ring*, 177 N.C. 485; *White v. Hines*, 182 N.C. 281; *Hill v. R.R.*, 186 N.C. 477; *Martin v.*

Hanes Co., 189 N.C. 646; *Godfrey v. Power Co.*, 190 N.C. 32; *Hardy v. Dahl*, 210 N.C. 535.

STATE v. J. R. POWELL.

Burglary—Special Venire—Evidence—Abuse of Privilege.

1. A juror summoned on a special *venire* is qualified to serve, if he be a freeholder.
2. If a juror summoned on a special *venire* fails to answer, but his name is put in the hat and drawn therefrom, and being again called, he fails to answer a second time, this does not entitle the defendant to an additional challenge.
3. What is evidence, and whether there is any evidence, are questions of law for the Court; what weight the evidence is entitled to, is a question of fact for the jury.
4. If the evidence, considered as a whole, will not, in any just and reasonable view of it, warrant the verdict, then there is no evidence sufficient to be left to the jury, and the Court should so declare.
5. If the evidence only raises a conjecture or suspicion of a fact, such fact should not be left to the jury.
6. Counsel have a right to argue the law as well as the facts to the jury, and in doing so, they may read adjudged cases, but the facts contained in such cases cannot be commented on as the facts of the case on trial.
7. An exception that counsel abused his privilege in his address to the jury, will not be noticed in this Court, when not made in apt time.

(966) INDICTMENT for burglary, tried before *Philips, Judge,* and a jury, at November Term, 1885, of the Superior Court of EDGECOMBE County.

On calling the special *venire,* one Henry Weeks, who had been summoned, failed to answer. His name was, by consent, put into the hat with the names of the jurors who had answered, from which the jury was to be drawn. Before the jury was completed, the name of this juror was drawn, and upon being called again, failed to answer. Whereupon the prisoner claimed that this entitled him to an additional challenge. The Court ruled against the prisoner on this point, and he excepted.

After the prisoner had exhausted twenty-three peremptory challenges, a juror was drawn and tendered prisoner, who claimed the right to challenge him peremptorily, because Weeks, the defaulting juror, had not been presented for his acceptance. This was denied by the Court, and prisoner excepted.

One Howard being drawn, was challenged by the prisoner for cause; and on examination, testified that he was a free-holder, and had paid his taxes for the year 1883, but had not paid them for 1884. The Court held that this juror was competent to serve, and prisoner excepted.

The prisoner's counsel, in his argument to the jury, insisted that taking the evidence of the State as true, there was no evidence to go to the jury of the felonious intent charged in the bill of indictment, and requested the Court so to charge, and excepted to the (967) refusal of the Court to give this charge, and to the charge as given on this point.

In reply to the argument of counsel for the prisoner on this point, the counsel for the State argued the sufficiency of the evidence for this purpose, and by way of illustration, read and commented on the case of *State v. Mitchell.* This was excepted to by prisoner's counsel after the reading of the case was concluded.

The other facts necessary to an understanding of the decision, are sufficiently stated in the opinion of the Court.

There was a verdict of guilty, and judgment pronounced in pursuance thereof, from which prisoner appealed.

Attorney-General, for the State.
No counsel for prisoner.

MERRIMON, J. The first, second and third exceptions, in respect to the challenge of jurors, are manifestly untenable. *State v. Carland,* 90 N. C., 668.

The principle question presented by the record is, did the declarations of the prisoner, the circumstances, and all the facts in evidence on the trial, in their direct tendency, their natural relations to, and bearings upon each other, and the just inference to be drawn from them, constitute evidence to go to the jury, of the alleged intent of the prisoner to ravish the prosecutrix.

If there was such evidence, it was the province of the jury to determine its weight and sufficiency to warrant them in rendering a verdict of guilty. But if the evidence, so considered as a whole, could not, in any just and reasonable view of it, warrant such a verdict, then there was not legal evidence to go to the jury at all for the purpose mentioned, and the Court ought to have so decided. Because, what is evidence, and whether there be any, are questions of law to be decided by the Court, and there can be no conviction without legal evidence to support the charge in the indictment. Legal evidence is not such as merely raises suspicion, and leaves the matter in ques-

(968) tion to conjecture—as said above, it is such as in some just and reasonable view of it—taking all the facts, whether they be many or few, as will warrant a verdict of guilty. *Cobb v. Fogleman*, 23 N. C., 440; *State v. White*, 98 N. C., 462, and cases there cited; *State v. James*, 90 N. C., 702; 1 Greenleaf on Ev., Sec. 49; *State v. Atkinson*, 93 N. C., 519.

This being the well settled rule of law applicable here, we cannot doubt that there was evidence to go to the jury, to prove the intent of the prisoner to racish the prosecutrix as charged. That she, her infant, and an old colored servant woman made up her family; that the prisoner went into her house at the dead of night, when people were generally asleep, and so far as appears, without any lawful purpose, and at the back door, demanded admittance, and when questioned as to his identity, falsely gave the name of a white citizen of the neighborhood; that he went from that to another door, pushed at it, demanding admittance, threatening to force it open if not admitted; that he did violently force it open, was evidence, very strong evidence, that he was a desperate, devilish and dangerous man, capable of perpetrating the most heinous crimes. If these facts existed, they were leading and striking, and of themselves pointed to some criminal intent. Men do not, certainly in civilized life, prosecute their civil purposes, whatever they may be, under such circumstances, in such a way, and at such an hour. But uniform observation, in and out of criminal tribunals, serves to show, that desperate men do thus frequently prosecute their criminal purposes of the most serious nature.

There was then, evidence of a criminal purpose. What was it? There was no particular fact tending to show that he broke into the house to steal anything, or that he did so. Indeed, he declared the contrary. Nor was there any evidence that any one there sustained any relationship to him, or owed him any debt or obligation of any kind; nor was there the slightest evidence that he had a grudge at, or quarrel with any one there, and hence his purpose might be

(969) revenge. The prisoner broke open the door, and entered exclaiming: "There is a woman in here; where is she; after I get her, I have got no use for the house, nor anything in it." So far as appears, he had no right, or pretence of right, to see, have, or have anything to do, with any woman there. It seems the fact was just the contrary, as both the women fled the house to escape from him. On the trial, the prisoner offered no explanation of this important declaration; he left it unexplained—to speak for itself, in the light of the surrounding facts. He wanted a woman there! What did such a man, at such a place, at such an hour, in the absence of claim or right, or lawful purpose of any kind, want with a *woman* there? It is not a most

reasonable and just inference, in the absence of all explanation, that he wanted her for the purpose of sexual intercourse, and that he intended to have it by force? His alarming and violent persistency, indicated such a purpose. Asking for the woman, he at once ordered the infirm old man, who, it seems, without his knowledge, had gone there to aid the prosecutrix, to leave the house. Wherefore? Most probably that he might the more easily and privately accomplish his criminal purpose with the woman.

There was, then, evidence of the intent to ravish the woman. But which woman? In the absence of explanation, it is reasonable to infer, that he wanted the woman most likely—best suited—to gratify his lustful desires—the younger and possibly the more desirable woman in every respect. It is not probable, but on the contrary, very improbable, that he would have the purpose to ravish an old colored woman, when he could, just as easily, and with no greater hazard, force a much younger and a white woman. It is seldom that the most debased criminals ravish old women, and yet more seldom, when they can just as easily ravish young ones.

When the prisoner said, seeing the infirm old man unexpectedly, "There is a woman here; where is she?" the reasonable implication was, that he asked for the principal one—the younger one—
the mistress—the one who was most certainly there in her own (970)
house. If he had wanted the old woman—the servant—he
would probably have designated her as such; he would have shown some hesitation to disturb the mistress. But he showed no hesitation —no deference to any one; his manner and his course of conduct were desperate, violent, and right on towards the woman whom he sought. As we have said, every reasonable inference excluded the probability that he had any other purpose, than to gratify his lustful desire by force.

There are four counts in the indictment for burglary—one charging an intent to steal the goods of the prosecutrix; one the goods of the servant woman; one to ravish the prosecutrix, and one to ravish the servant woman. The jury rendered a verdict of guilty on the third count. We do not doubt that the evidence was such as might reasonably warrant such a verdict. It was not unreasonable. The evidence was much stronger than in the case of *State v. Neely*, 74 N. C., 425, or that in *State v. Massey*, 86 N. C., 658, and quite strong as that in *State v. Mitchell*, 89 N. C., 521.

The objection to the comments of the State's counsel in the argument to the jury, came too late. Besides, they were not in themselves unreasonable, and it was the province of the presiding Judge to in-

terfere, if he saw that injustice was likely to be done the prisoner. *State v. Suggs*, 89 N. C., 527; *State v. Bryan, Ibid*, 531.

If there was ground of objection to the reading of the case of *State v. Mitchell, supra*, and the comments of counsel on the same, it ought to have been interposed before it was read, or while counsel was reading it. It does not appear that it was read with a view to have the jury apply the facts of that case to this, or that it had any improper weight or application. The counsel had the right to apply the principle of that case to this, in his argument. It was the duty of the Court, to prevent any improper application of it, and we do not doubt that he did. Indeed, in the charge to the jury, he recited the evidence,

and expressly cautioned them that they were not to take
(971) evidence from the counsel, nor from the Court, but from the witnesses themselves. The subject of the right of counsel to cite and comment on reported cases, is discussed in *Horah v. Knox*, 87 N. C., 483; and the decision in that case, harmonizes with what we have here said.

We have given the case the earnest and cautious consideration its gravity merits, and we have found no error in the record.

Let this opinion be certified to the Superior Court, to the end that further action may be taken there according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Mitchener, 98 N.C. 693; *Covington v. Newberger*, 99 N.C. 531; *S. v. Goings*, 101 N.C. 709; *S. v. Christmas*, 101 N.C. 757; *S. v. Brackville*, 106 N.C. 708; *S. v. Telfair*, 109 N.C. 882; *S. v. Chancy*, 110 N.C. 508; *S. v. Rhodes*, 111 N.C. 651; *Spruill v. Ins. Co.*, 120 N.C. 147, 149; *Nash v. Southwick*, 120 N.C. 460; *Hodges v. R.R.*, 120 N.C. 556; *Epps v. Smith*, 121 N.C. 165; *S. v. Gragg*, 122 N.C. 1091; *S. v. Shines*, 125 N.C. 732; *Lewis v. Steamship Co.*, 132 N.C. 912; *S. v. Wilcox*, 132 N.C. 1139; *S. v. Staton*, 133 N.C. 644; *Crenshaw v. R. R.*, 144 N.C. 321; *S. v. Prince*, 182 N.C. 791; *S. v. Levy*, 187 N.C. 587; *Godfrey v. Power Co.*, 190 N.C. 29; *S. v. Steele*, 190 N.C. 509; *S. v. Harvey*, 228 N.C. 65; *Freeman v. Ponder*, 234 N.C. 302.

STATE v. OSCAR PICKETT.

Where a defendant, convicted of larceny, escaped pending the appeal, the appeal will not be dismissed, but will be continued, to be called up for argument either by the prisoner or the State, when he shall be re-taken.

MOTION by the Attorney General to dismiss the appeal, heard at February Term, 1886, of the Supreme Court.

The defendant was convicted at January Term, 1884, of the Superior Court of ROBESON County, before *MacRae, Judge*, of the crime of larceny, and pending his appeal, escaped from custody.

The appeal was continued from Term to Term in this Court, until Ferbruary Term, 1886, when the State moved to dismiss it.

Attorney General, for the State.

Mr. John D. Shaw, for the defendant.

MERRIMON, J. For the purpose of the motion to dismiss this (972) appeal, this case is in all material respects like that of *State v. McMillian, ante*, 945, except that the appellant here was convicted of the crime of larceny. We think what we said in that case, applies to, and embraces one like this. The motion to dismiss the appeal must therefore be denied.

Motion denied.

Cited: S. v. Jacobs, 107 N.C. 777.

STATE v. BROCKSVILLE.

See syllabus to the preceding case.

MOTION by the Attorney General to dismiss the appeal under the same circumstances as the foregoing case.

The defendant was convicted of murder, before *Shepherd, Judge*, at Fall Term, 1884, of the Superior Court of RICHMOND County, and escaped pending the appeal.

Attorney General, for the State.

Mr. W. H. Neal, for the defendant.

MERRIMON, J. This case is in all respects like that of *State v. McMillan*, decided at this term, and must be governed by it. The motion to dismiss the appeal must be denied.

Motion denied.

Cited: S. v. Jacobs, 107 N.C. 77.

STATE v. ALBERT STARNES.

Jurors—Evidence—Judge's Charge—Witness—Alibi—Assignment of Error.

1. It is no cause of challenge to a juror summoned on a special *venire*, that he has served as a juror within two years, and that he has a suit pending and at issue in the Court.
2. Where, in an indictment for rape, the prisoner proved that the prosecutrix had accused two other persons of the offence, and then proposed to show that he had caused *subpœnas* to be issued for these persons, but that the Sheriff had returned on the process that the parties were not to be found; *It was held*, that such evidence was incompetent.
3. A question is improper and should not be allowed to be asked, which calls for matter of opinion and argument, rather than of fact.
4. So, where a witness was impeached, and the impeaching witness testified that the impeached witness had been accused of larceny, and had run away, it is incompetent to ask whether it was not impossible for one in the station in life of the impeached witness, to give bail, with a view of showing that the witness ran away only to escape imprisonment.
5. Where the Judge's charge fully responds to all the prayers for instruction, so far as warranted by the evidence, it is free from error.
6. It is not error for the Court to charge the jury, that an *alibi* is a good defense, if proved to the satisfaction of the jury, and such a charge does not convey an intimation that the burden of proving it rests upon the prisoner.
7. Exception will not be heard in this Court, as to the manner in which the case on appeal was made up.
8. The Supreme Court has no jurisdiction to grant new trials in criminal cases for newly discovered evidence.

(973) INDICTMENT for rape, tried before *Phillips, Judge,* and a jury at Spring Term, 1885, of the Superior Court of UNION County.

The defendant was convicted, and from the judgment of death pronounced, appealed.

Attorney-General for the State.
Messrs. J. T. Strayhorn and D. A. Covington, for the defendant.

SMITH, C. J. The prisoner is charged with having committed (974) a felonious assault and rape, upon the body of Rosa Ann Hyatt, in an indictment which the record, after setting out the names of the grand jurors and the appointment of their foreman, says, was by them "returned into open Court, by the hands of J. M. Terrell, foreman," on Tuesday of the first week of Spring Term, of Union Superior Court, with endorsed thereon over the foreman's signature, "a true bill." Upon its being made to appear to the Court that the prisoner was without counsel and unable to employ any, the Court assigned, as such, four members of the bar, to conduct his defense, one of whom, on account of illness, was afterwards excused from serving.

Upon arraignment, he entered his plea of not guilty, and a day was fixed for his trial, and an order made for the issue of a special *venire*, returnable at that time. The trial after it began, continued for several days, and terminated in a verdict declaring the prisoner "guilty of the felony and rape wherewith he is charged." The prisoner's counsel moved for a new trial, and in its support assigns the following alleged errors:

I. In the admission of incompetent evidence;

II. In rejecting competent evidence offered for the defendant;

III. In declining to give instructions asked for him;

IV. In instructions given;

V. In other irregularities occurring during the progress of the trial.

The meaning of these vague and general terms, must be sought in the specific exceptions contained in the record of the proceedings at the trial before the jury. The motion for a *venire de novo* was denied, and sentence of death having been pronounced, the prisoner appealed to this Court, and was allowed to do so, without giving security for costs, as authorized under The Code, Secs. 1234 and 1235.

In getting a jury, five were taken from the original panel, and the others from those summoned upon the special *venire*. Of the latter, two were challenged by the prisoner, and cause assigned, in that they had within two years preceding, served as jurors in the Court, and had suits then pending and at issue. The challenges were (975) overruled, and to this ruling the prisoner excepted.

1. We deem it needful only to say, that a similar objection to such jurors was raised in *State v. Carland*, 90 N.C., 668, and decided to be untenable.

2. The prosecutrix was examined at great length as to the transaction, and her means of identifying the accused as the author of the

outrage, which was perpetrated at her house during the night of November 28th, 1884. Her testimony was explicit as to the commission of the crime and its attending circumstances, in many of which there was corroborating evidence from the others, and the cross-examination was mainly directed to the question of her ability to recognize and identify the person of the accused.

The prisoner, examined in his own behalf, testified that he did not commit the act of violence with which he is charged; was not at the house of the prosecutrix when it is said to have occurred; and was at another place; in which he was sustained by other witnesses produced.

It was in proof, that the prosecutrix had, on a previous occasion, sued out a warrant against two other persons, Bob Belk and Jim Belk, for the same offense, and the prisoner now proposed to show, that he had caused a subpœna to issue for them as witnesses, to which the sheriff had made return, that they were not to be found. This evidence, on objection from the solicitor, was ruled out, and to this the prisoner makes his second exception.

The proposition is to receive in evidence the prisoner's own act, or that of his counsel, in an unsuccessful effort to procure the attendance of certain witnesses in his own behalf, from whom favorable testimony was expected. How does this fact tend to disprove the charge, or to discredit the witness? It may be, that their testimony, if obtained, would be of service to the prisoner, but we cannot assume what they would swear, and the mere fact that they are not present, because they could not be summoned, authorizes no inference for the jury to
(976) make, as to what they would testify. We are unable to see the relevancy of the proposed evidence, and as impertinent to any issue, it was properly rejected.

III. The third exception is also to the rejection of evidence, and grows out of these facts:

A witness for the State testified, that the character of one Lila McMillan, who was examined for the prisoner to prove an *alibi*, was bad; and on his cross-examination, that he had heard some things about her honesty; that she had been charged with larceny—had given bail and "went to South Carolina; that on her return, she had not been prosecuted, so far as he knew." Thereupon the prisoner's counsel proposed to ask this further question: "It is not difficult for an insolvent colored person to give bond when charged with larceny?" The question, on objection, was not allowed to be put to the witness.

This exception must be summarily disposed of. The inquiry, as we understand its object, is to explain the act of the impeached witness in leaving the State, and avoiding an arrest and imprisonment, and her voluntary return, as indicating her conscious innocence.

The question was rightfully excluded, for the reasons assigned by the Solicitor. It was immaterial and irrelevant—a matter of opinion and argument, rather than of fact—and all the material facts for the inference were already before the jury.

The instructions asked for the prisoner, are drawn out at considerable length, and as those given are not responsive *seriatim*, as a whole, it becomes necessary, in passing upon the exceptions relating to them, to set out both in full. Those asked are as follows:

I. It devolves upon the State, before the defendant can be convicted, to prove beyond any reasonable doubt, that the crime charged in the indictment has been committed.

II. It devolves upon the State also, to prove beyond a reasonable doubt, that the prisoner is the guilty perpetrator of the (977) deed.

III. The State relies upon circumstances, and before the prisoner can be convicted upon evidence of this kind, the circumstances must all concur, in showing that the prisoner committed the crime, and exclude every reasonable hypothesis of his innocence.

IV. It is a rule of law to be acted on by the jury, that no conviction can be had upon circumstantial evidence, unless they are as thoroughly satisfied of his guilt, as if a reputable person of good character, and an eye witness, had sworn to the fact.

V. If the jury believe that the prosecutrix had an opportunity to disclose and make known the outrage alleged to have been committed on her person, the fact that she did not make such disclosure, and of the name of the party, until a considerable time thereafter, raises a strong presumption against the truth of her statements.

VI. In passing upon the question of guilt, the jury should consider the fact, that rape is a crime easy to be alleged, and hardest of all others to be disproved by one charged, though he be innocent.

VII. In all criminal prosecution, the defendant is entitled to a verdict, if there remain in the minds of the jury, a reasonable doubt of the prisoner's guilt; and while this is true in all trials for crime, it is much more so in cases of capital felony, where stronger and more cogent proof is required, than would be in simple misdemeanors.

VIII. Every person accused of crime, is presumed to be innocent, and while the evidence may not make the same impression on the mind of every juror, it is yet probable that consultation will lead all to the same conclusion; if not, that the whole jury upon the fair and honest doubt of part of them, will adopt a conclusion favorable to the prisoner, since in case of doubt, the law leans to the presumption of innocence.

Upon the prisoner's request through his counsel, the Court, in
(978) place of the foregoing, submitted the following instruction in writing to the jury:

After explaining the nature of the crime imputed to the prisoner, and what is necessary to be proved to sustain the charge, the Judge proceeds:

"An eminent legal writer, many years ago, said: 'It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be disproved by the party accused, though innocent.'

"Was a rape committed? If you are not fully satisfied that a rape was committed, then the State fails, and a verdict of acquittal will be entered. If the evidence should satisfy you beyond a reasonable doubt, that a rape was committed upon the person of Rosa Ann Hyatt, your next inquiry will be, did the prisoner do it? Every person is presumed to be innocent until the contrary is proved, and if there be reasonable doubt of the prisoner's guilt, the jury must give him the benefit of it. If the jury, from the evidence, believe that the prosecutrix did not disclose the fact that she was ravished, until some time afterwards, then the Court charges you, that the inference against the truth of the charge, arising from her long silence, is not an inference amounting to a rule of law, but is a matter of fact to be passed on by the jury. Consider the testimony on this point. The outcry on the night—the noise—the statement to Moser that some one was trying to kill her—that she told the men folks *that way* that night—that she told Moser the next morning that she had been outraged—the length of time before the warrant was taken out—the reason why it was not taken out earlier—the condition of the woman—and all the evidence brought out on the trial, in passing upon the truth of the charge.

"The evidence is mainly circumstantial. The proposition that before a conviction could be had on circumstantial evidence, the jury must
be as well satisfied of the guilt of the accused, as if one credible
(979) eye-witness had sworn to the fact, was not *a rule of law*, but an illustration, and all intended by it is, that the jury must be satisfied beyond a reasonable doubt. The rule is, that the circumstances must be such as to produce a moral certainty of guilt, and exclude any other reasonable hypothesis. But the Court cannot charge you, as requested, that the evidence in the case is wholly circumstantial. There is direct testimony, if believed, from the prosecutrix, who swears, that when he, the prisoner, 'got three or four steps from the door, he turned and answered me, and said if I told, he would kill

me. By his favor in the moonshine, and his voice, I knew it was Albert Starnes.' This is evidence tending to show recognition, for you to pass on and consider, with all the other evidence in the case. You pass on the weight of the evidence and the credibility of the witnesses. You hear their testimony—you see their manner on the stand—their bearing when they make their statements under oath; and you, as triers of fact, are to say how much and what you believe. To justify a jury in convicting, there should not be a rational doubt of guilt.

"In defence against the charge, the prisoner sets up an *alibi*, that is, that he was not at the place at the time the alleged crime is said to have been committed, and so he could not have committed it. You will consider the evidence of Nathaniel Gay, bearing upon the point, of Lila McMillan, and of the prisoner himself. In passing upon prisoner's testimony, and determining what credit should be given to it, it is proper to consider his interest in the result. An *alibi* is a good defence, if proved to the satisfaction of the jury. Whether it is so proved, is a fact for the jury. It is the duty of the jury to weigh the whole evidence, and if there be a reasonable doubt as to the prisoner's guilt, to acquit him. If upon the whole testimony, you have no reasonable doubt of his guilt, you will find him guilty as charged in the indictment."

It will thus be seen, that the charge fully responds to every just demand contained in the series of requested instructions, (980) and is as favorable to him as the evidence in its different aspects will admit. No specific portions of the charge are pointed out as falling short of the demands of the prisoner's counsel, and we observe none ourselves which are obnoxious to legal objection on the part of the prisoner.

In the argument here, objection is made to the language used in the charge, "An *alibi* is a good defence, if proved to the satisfaction of the jury," as conveying an intimation that the burden of proving it rested upon the prisoner, in opposition to what is said in *State v. Jaynes*, 78 N. C., 504.

We do not understand the Court to intimate that the failure of an effort to prove an *alibi*, was to be taken as affirmative evidence, tending to show guilt, or to relieve the State at all of its duty to fully prove the prisoner's guilt. On the contrary, the instruction in this form, is sanctioned by the ruling in *State v. Reitz*, 83 N. C., 634, where a charge was held to be unexceptionable, given in these words: "An *alibi*, if proved and established by testimony, was the most complete and satisfactory defence that could be made; when not complete, it could not avail the defendant. Whether an *alibi* is proved, is a question for the jury." This was followed by an instruction, that the

jury should weigh the whole testimony, and if there remained a reasonable doubt as to the prisoner's guilt, he should be acquitted. Reviewing the exception based upon this portion of the charge, ASHE, J., for the Court, says: "We see no error in this, for the evidence offered against the defendant, was circumstantial, and must have raised a strong presumption of his guilt, or he would not have been driven to the defence of an *alibi*. If the proof was of such a character as to amount to a violent presumption, it would behoove the defendant to make proof of his *alibi*, to the full satisfaction of the jury; and that is what we understand is meant by making complete proof the fact, and so, we think the jury must have understood it, in connection with what followed."

(981) In the present case, with direct and positive testimony to the crime and the identity of the accused, if credited, the remark of the Judge was the more clearly appropriate, if not necessary, in guiding the jury in their deliberation upon the evidence.

During the argument, and while the prisoner's counsel was discussing the matter embraced in his fifth special instruction asked, the Judge, interrupting and addressing the speaker, said: "Have you not missed the law? Have you not got it wrong? Consult the case of *State v. Peter*, 53 N. C., 19, and see if the Court has not decided exactly the contrary?" No exception was then taken to the remarks of the Court, though it has since been pressed.

The subject of the exception alluded to, was the inference to be deduced from the failure of the injured woman, to make a prompt disclosure of the outrage, as raising a presumption of her testimony being false or feigned. We are not informed of the tenor of the remarks of counsel thus interrupted, but we must assume them to be at variance with the ruling in that case, to which the charge to the jury conforms. There is no error apparent in the action of Judge in what occurred, nor in his charge upon the point.

We cannot entertain suggestions as to the manner in which the case on appeal was made up by the Judge. That prepared for the appellants was met by exceptions, embodied in one prepared by the Solicitor, and the Judge, giving notice to the counsel of the time and place when they could be heard, and none appearing, settled the case which comes up with the record. *State v. Gooch and Smith, post*, 982.

There was also a preliminary application made to the Court, for the awarding of a new trial, upon the ground of newly discovered evidence.

The jurisdiction conferred upon this Court, is under the Constitution, Art. 4, Sec. 8, "to review upon appeal any decision of the Courts below,

upon any matter of law or legal inference." In civil suits, rehearing may be had, and new trials granted upon evidence coming to light since the appellate jurisdiction of this Court attached, and that of the Court below upon the subject matter of the appeal is lost, (982) under the principles governing such applications, and pursuant to Rule 12 of this Court. *Bledsoe v. Nixon,* 69 N. C., 81; *Henry v. Smith,* 78 N. C., 27.

No such proposition in reference to criminal prosecutions has ever been made or entertained, so far as our investigations have gone, in this Court. The absence of a precedent, (for we cannot but suppose such applications would have been made on behalf of convicted offenders, if it had been supposed that a power to grant them resided in this appellate Court), is strong confirmatory evidence of what the law was understood to be by the profession.

We are clearly of the opinion, that no such discretionary power as that invoked, is conferred upon this Court. In appeals from judgments rendered in indictments, our jurisdiction is exercised in reviewing and correcting errors in law committed in the trial of the cause, and to this alone. *State v. Jones,* 69 N. C., 16.

It must be declared that there is no error in the record. This will be certified to the Court below, that it may proceed to judgment on the verdict.

No error. Affirmed.

Cited: S. v. Gooch, 94 N.C. 1006; *S. v. Starnes,* 97 N.C. 423; *Davenport v. McKee,* 98 N.C. 505; *S. v. Rowe,* 98 N.C. 630; *S. v. Edwards,* 126 N.C. 1055; *S. v. Council,* 129 N.C. 512; *S. v. Register,* 133 N.C. 754; *S. v. Lilliston,* 141 N.C. 864; *S. v. Arthur,* 151 N.C. 657; *S. v. Ice Co.,* 166 N.C. 404; *S. v. Bryant,* 178 N.C. 707; *S. v. Williams,* 185 N.C. 665; *S. v. Steen,* 185 N.C. 774, 781; *S. v. Levy,* 187 N.C. 587; *S. v. Griffin,* 190 N.C. 135; *S. v. Casey,* 201 N.C. 625, 626; *S. v. Sheffield,* 206 N.C. 386; *S. v. Bridgers,* 233 N.C. 580.

STATE v. WM. GOOCH AND JAS. A. SMITH.

Case on Appeal—Certiorari.

1. The action of the Judge in setting the case on appeal, when the parties cannot agree, is final, and cannot be reviewed by the Supreme Court.
2. When counsel can agree upon a statement of the case on appeal, both in criminal and civil actions, the Judge takes no part in its preparation, but

when they cannot agree, the Judge settles the case on appeal, and does not merely adjust the differences between the appellants' case and the specific objections filed by the appellee.

3. Where it is made to appear to this Court, by proper evidence, that the Judge has made an omission or mistake in the settlement of the case on appeal, this Court will give him an opportunity to correct it, or to modify an inaccurate statement; but where it appears that a full hearing has been accorded, and the action of the Court has been careful and considerate, no occasion for interference is presented.

4. It is no objection to the objections filed by the appellee to the appellants' case, that it is in the form of a counter-case, and not of specific objections.

(983) Petition for a writ of *Certiorari*, heard at February Term, 1886, of the Supreme Court. The facts appear in the opinion.

Attorney-General, for the State.

Messers. John Gatling, W. N. Jones, J. A. Williamson, T. M. Argo and Octavius Coke, for the defendants.

SMITH, C. J. The facts averred and set out in the petition, with the several accompanying affidavits to sustain the application for the remedial writ of *certiorari*, to be issued with a view to the reconsideration and correction of the case, embodying the prisoners exceptions, and transmitted with the transcript of the record of appeal, relate to the manner in which it was made up, and are substantially these: The prisoners counsel prepared their case on appeal, and caused a copy to be delivered to the Solicitor, who drew up and filed in the Clerk's office, a substitute, to cover his exceptions. Thereupon, the former requested the Judge to fix a time and place to settle the case before him, which was done, and counsel notified thereof. The prisoners counsel and the Solicitor, with whom had been associated in the prosecution another attorney, and the latter, were both present at the time and place appointed. When the subject was called up, prisoners counsel "objected to the Court's considering the paper writing drawn up by the Solicitor, upon the ground that it did not propose 'specific amendments', as the statute requires, The Code, Sec. 550, but a new case, ignoring that of the appellants." Thereupon, the cases, by direction of the Judge, were read, and the correspondent sections
(984) in each compared, and as they were proceeded with, the respective sections of the appellants case were accepted by the Solicitor, modified by consent, or settled by the Judge, and so marked on the margin. When the examination had progressed to the point at which the evidence is set out, prisoners counsel again objected to the manner and form in which the Solicitor had made his exceptions,

when the Judge remarked, that he regarded the insertion, in such manner, of the testimony, as not contemplated by law, and with consent of all parties, directed the associate attorney, employed in the prosecution, to take and examine the petitioners case, and report, with a specific statement of the State's objections, to him on the evening of the next day. The said attorney did not act under this direction, but from some disagreement with the prosecutor employing him, withdrew from the case, and took no further part in the proceedings.

The counsel, both of the prisoners and for the State, met again at the time designated, and proceeded with the settlement, by reading the prisoners' case, and marking such parts as the Solicitor made objection to, while other differences, as on the other sitting, were adjusted or settled by the Judge, and so marked on the margin.

The evening being far advanced, the Judge directed the prisoner's counsel to re-write the residue of the statement, having in view such objections as had been urged by the Solicitor, and then submit it to him for settlement. This was accordingly done, and the Judge thereafter returned to the Clerk's office the Solicitor's case, with his own approving signature, directing a copy to be transmitted to the Appellate Court, as part of the record.

We reproduce these allegations in a condensed form, to enable us to dispose of the subject matter of the complaint, and the manner in which redress is sought. The very recital of the various incidents connected with the effort to reconcile differences, and to prepare a satisfactory statement of the exceptions to be reviewed, is a vindication of the rule, which, when parties cannot agree, commits them for settlement to the Judge, whose action must be accepted as final.

When the respective counsel can come to an understanding as to the form of the case on appeal, now alike in criminal as in (985) civil actions, (The Code, Sec. 1234), the Judge takes no part in its preparation. When they cannot agree, the appellee annexes his specific proposed amendents, and the Judge, calling the disagreeing counsel before him, proceeds himself, not only to adjust their differences, but to *"settle" the case,* and authenticate it by his signature, as an entirety. When the matter thus passes under his jurisdiction, it is not to be exercised, as counsel seem to suppose, solely in determining the validity of the suggested amendments, but in correcting any errors in the statement, and making it truthful in all of its parts. This is just what the Judge undertook to do, as shown in his earnest effort to make it satisfactory to all, and giving counsel opportunity to be heard, when it was considered *seriatim* at the two hearings. The

final result is embodied in the case which comes up with the transcript of the record.

"An exception, or the case stated for an appeal to this Court," in the words of RUFFIN, C. J., "is here taken to be absolutely true as to all matters which occur on the trial, or purport to have been acted in the Court from which the appeal comes." *State v. Reid,* 18 N. C., 377.

Again he says: "A record imports absolute verity as to all matters which are stated in it as occurrences on the trial, because the law reposes entire confidence in the integrity of the Court." *State v. Ephraim,* 19 N. C., 162.

We must then assume, and especially after the careful and deliberate manner in which the case on this appeal was prepared, that its statements are correct and truthful, and the law entrusts this responsible discretion to the Judge who tries the case, and personally knows all that transpired on the occasion. Where an inadvertent omission may be, upon proper evidence, suggested to have been made, it would not be improper to give the Judge an opportunity to supply it, or even to modify an inaccurate statement. *McDaniel v. King,* 89 N. C., 29; *Currie v. Clark,* 90 N. C., 17; *Ware v. Nisbet,* 92 N. C., 202.

But where, as here, it appears that a full hearing has been
(986) accorded, and the action of the Court careful and considerate, no occasion for an interference is presented, and we cannot listen to averments that contradict the Judge's own statement of what occurred. "It would lead to endless contradiction and confusion," remarks the same Judge whose words have been quoted above, "if the *parties or counsel* could, independently of the Judge, form cases to suit themselves." *State v. Hart,* 28 N. C., 389.

This, of course, was said before the recent change in the law, which commits to the appellant the right and duty to prepare his exceptions, but it is not less applicable to the action of the Judge, when by reason of disagreement, that duty is transferred to him, and the accuracy of his statement is attempted to be impeached.

Nor do we concur in the argument, that the substituted case, not being strictly in the form of separate amendments, may be disregarded as a nullity. If this were so, there would be no need of going before the Judge, for there would be nothing to settle.

He might, and it seems he did, require the Solicitor to make his specific objections to the appellant's case, as it was read over, and such was the object of the reference to the retiring associate attorney. The defect was removed, if non-compliance with the strict directions of the act were a serious obstacle in the way of correction. While it is always

but to observe literally provisions of the statute, we do not regard them as mandatory, in the sense that any—the least—departure from them, prevents any consideration of the objections filed by the appellee. Indeed, the discrepances in the cases, show the specific amendments asked, and may be eliminated by their comparison.

The case was considered to the fullest extent, as if the terms of the law had been strictly observed, and every just right accorded to the prisoners.

It is sufficient to say, however, that there was a disagreement brought before the Judge by the prisoners' own counsel, and his (987) jurisdiction invoked, for an adjustment or correction.

It comes to us from his hands, and as the authority to decide the conflicting views of counsel must reside somewhere, it is wisely deposited with the Judge, who is personally cognizant of all that took place, and whose impartiality and integrity, are the surest guaranty that it will be justly exercised. His determination is, and must be, final. The course pursued here is, we believe, in accord with the general practice, when cases are made up by the Judge, and it is in substance a practical interpretation of The Code, and warranted by its terms.

The application must be denied, and the petition dismissed.

Denied.

Cited: S. v. Starnes, 94 N.C. 981; *Porter v. R.R.,* 97 N.C. 65; *S. v. Sloan,* 97 N.C. 501; *S. v. Debnam,* 98 N.C. 719; *S. v. Ellis,* 101 N.C. 769; *Rodman v. Harvey,* 102 N.C. 4; *Horne v. Smith,* 105 N.C. 327; *Lowe v. Elliott,* 107 N.C. 719; *S. v. Howard,* 112 N.C. 861; *Harris v. Carrington,* 115 N.C. 189; *Cameron v. Power Co.,* 137 N.C. 100; *Slocumb v. Construction Co.,* 142 N.C. 353; *Holloman v. Holloman,* 172 N.C. 837; *S. v. Harris,* 181 N.C. 608; *S. v. Pannil,* 182 N.C. 840; *S. v. Thomas,* 184 N.C. 667; *Lindsay v. Brawley,* 226 N.C. 471; *Hoke v. Greyhound Corp.,* 227 N.C. 376; *S. v. Johnson,* 230 N.C. 746.

STATE v. WM. GOOCH AND JAMES A. SMITH.

Newly Discovered Evidence—Severance—Jury—Special Venire—Evidence—Judge's Charge—Conspiracy—Manslaughter.

1. The Supreme Court has no power to grant a new trial in a criminal case, for newly discovered evidence.

2. Whether or not a severance will be allowed, and the prisoners allowed separate trials, is a matter of discretion in the trial Judge, and its refusal cannot be assigned as error.
3. The right to challenge jurors, is not a right to select such as the prisoner may desire, but it is only the right to take off objectionable jurors, and to have a fair jury to try the cause.
4. The rule is, that although the Court improperly refuse to allow a challenge for cause, yet if the jury is completed before the prisoner has exhausted his peremptory challenges, such refusal cannot be assigned as error.
5. Where an assault was made at the same time upon two persons, one of whom was killed, it is competent for the survivor to testify to the character and nature of the wounds inflicted on him.
6. When the defence offered evidence to show that one of the prisoners did not have a knife on the day of the homicide, it is competent for the State to show that both prisoners were seen together shortly before the homicide, and that one of them did have a knife; the homicide having been committed with such a weapon.
7. Evidence is competent to show that the prisoners had bad feeling against the deceased, on account of some disputed accounts.
8. Evidence is not competent on the part of the prisoners, to show that the deceased kept false accounts with other persons.
9. In cases of homicide, the question is, did the prisoner bear malice towards the deceased, and evidence is incompetent to show that the deceased bore malice towards the prisoner.
10. Evidence of the moral character of the deceased is irrelevant, unless it is to show that he was a violent man, and it is only competent then, when the evidence of the homicide is wholly circumstantial, and the character of the transaction is in doubt; or when there is evidence tending to show that the killing was done in self-defence.
11. Permission to recall and re-examine a witness, is entirely a matter of discretion, and cannot be assigned as error.
12. It is not error for the Court to refuse a prayer for instructions, not warranted by any view of the evidence.
13. It is not error for the Court to refuse to charge the jury, that when a prisoner, relies upon extenuating circumstances to reduce the grade of the offence from murder to manslaughter or excusable homicide, and circumstances come out from the State's witnesses which tend to establish the defence, then it is the duty of the jury to consider all the evidence, and if they are not satisfied of the guilt of the prisoner beyond a reasonable doubt, they should acquit.
14. Where two or more conspire to do an unlawful act, although the act be done by one, yet they are all equally principals. So when two persons were engaged in pursuit of an unlawful act, the two having the same objects in view, and in pursuit of that common purpose, one of them takes life, under such circumstances as makes it murder in him, it amounts to murder in the other, also.

15. If two persons seek another, and under the pretense of a fight, conspire to stab him, and in the fight he killed, it is murder, no matter what the provocation may be, after the fight has commenced.

16. If in a fight, one party uses an excess of violence, out of all proportion to the provocation, and kills the other, it is murder, although he had no intention to take life when the fight began.

17. If one enters into a contest, dangerously armed, and fights under an unfair advantage, although mutual blows pass, and he kills his antagonist, it is murder, and not manslaughter.

INDICTMENT for murder, tried before *Clark, Judge,* and a (989) jury, at September Criminal Term, 1885, of the Superior Court of WAKE County.

After the arraignment, the prisoners severally moved for a severance of the trial, upon the ground that the evidence to be offered by the State, which might be competent against the one, would not be against the other, and that the defence of the one, would be antagonistic to that of the other; and that each would insist that the other did the killing.

The motion was denied by the Court, and both the defendants excepted.

By consent, a special *venire* of two hundred men had been drawn from the jury box, under Sec. 1739 of The Code, in open Court, in the presence of the defendants and their counsel, and duly summoned to attend as jurors. The regular panel was duly perused, and one juror chosen therefrom.

Then the jurors of the special *venire* were called, and when the first special *venireman,* so drawn from the box, was passed by the State, he was challenged by the defendants, and on his *voir dire,* he was asked the following questions by the defendants: "Have you a suit pending and at issue in the Superior Court of Wake County?" Objection by the State, and the question was ruled out by the Court, his Honor holding the only qualification of a juror of the special *venire* was, that he should be a freeholder. Defendants excepted.

The same juror was then asked this question by the defendants: "Have you paid your taxes for the last preceding year?" Objected to by the State, question ruled out by the Court, and the defendants excepted.

Several other jurors, upon being tendered to the defendants, were asked the same questions on their *voir dire,* and each question on objection, was ruled out by the Court, and each ruling was excepted to by the defendants.

Neither of the defendants, when the jury was completed and empaneled, had availed himself of the twenty-three peremptory chal-

lenges; the defendant Gooch having challenged only thirteen jurors peremptorily, and the defendant Smith only six.

The deceased was one John A. Cheatham, and it was admitted (990) that the homicide occurred on the 10th day of June, 1885, about half past eight o'clock, p. m., in a store building in the city of Raleigh, which he occupied, and in which he did business at that time.

The store house was proved to be about seventy-five or eighty feet long, and forty or forty-five feet from the door to the stove. The front part of the house was used for groceries, and the back part for the sale of spirits, and was separated by a screen. The defendants were employés of the city government at the time of the homicide, and had been for some time.

James Cheatham, a witness for the State, testified that his brother, John A. Cheatham, was killed on the 10th of June, 1885; witness was his clerk; his brother was thirty-five years of age; and was killed at 8½ o'clock at night. John Hawkins and his brother were at the counter, just below the stove, and witness was near the front door, sitting in a tall arm chair. Smith came in smoking, and passing him, met Hawkins going out, and went into where his brother John was, and asked for his account, and while he was showing him his account, Gooch came in, in his shirt sleeves, and walked down below Smith and John, and stopped. Smith, after examining the account, said it was not correct, that he had paid it two or three times. The deceased told him he could not say that; that he had got every thing on there; that he, Smith, did like he had come there for a row, any way, and he had better go out. Deceased moved over to the opposite counter, and Smith repeated his remark, and made at him for a fight. Deceased got out of a chair he was sitting in, and pushed Smith against the counter, near the stove. Witness ran down to part them, and pulled deceased off. Gooch rushed on deceased while he, the witness, was holding Smith. Deceased called out, "he is cutting me," two or three times. He turned Smith loose, and made for Gooch to part them; and when he got to them, deceased was on the top of Gooch, who was flat of his back. Deceased had his hands on Gooch, with his head (991) turned off; as he stooped to pull deceased off, he felt a cut, Smith cut him on the shoulder, and he turned round on Smith, and Smith cut him in the side. He shoved Smith over some barrels, and made for the bar counter. The deceased had Gooch down, just inside the screen. Witness went to the front door to call some one to telephone for a doctor. The last he saw of Gooch, was when he stooped down and pulled deceased off of him. In returning into the store, he met deceased going towards the door, with his arms up, as if he wanted

to catch him, but he fell on some tubs and churns; he asked him if he was hurt bad, but he did not speak, and died in about ten minutes.

The witness also stated, that the deceased had his hands on Gooch, but was doing nothing else. He saw his hands plainly; saw no knife in his hands; saw Gooch's hand cutting up, about the heart of the deceased. The wounds were on the left side of the face, and two others on his breast, near his heart. The defendants were both working on the streets, and were generally paid by orders on the city. The deceased kept the accounts. Smith had overtraded $23.00, and Gooch had overtraded $32.00, and the deceased had stopped them from trading—Gooch about the last of February, and Smith about the last of March. Gooch said there were some articles in his account which he did get, and he would not pay it. Gooch was an athletic man; the deceased was not as strong a man as Gooch, but about the same size. Smith was not as strong as deceased, and was not quite as strong and heavy as Gooch. Something might have passed between Smith and his brother, which he did not hear. He did not hurt Smith, and was merely holding him. He pulled Smith down on the floor, but did not know whether his head struck the floor or not. He might have been hurt; did not see anything in his hand; did not know whether Gooch had a knife or not.

Scott Brown, a witness for the State, testified, that he examined the wounds of the deceased; one was a little below the left nipple; the other on the right of the nipple; pushed a pencil three inches into the wounds. The one to the right of the nipple went straight (992) in; the other ranged at an angle of forty-five degrees down. The wound on the face was three inches long, extending from the cheek-bone to the jaw-bone, and a great deal of blood was on his clothes.

Robert Saunders, a witness for the State, testified, without objection, that in the summer of 1884, he heard Smith and Gooch talking, near the railroad crossing, and overheard Gooch say to Smith, that if John Cheatham "messed" with him, like he did with some of the rest, he would kill "the G-d d—ned long, string-necked scoundrel;" that he had not thought of this since. He was walking along slowly when he heard the remark, and he was fourteen years of age August 5th, 1885.

Laura Lambert testified, that while in the field at work, last June, (1885), one Medlin hallowed that Gooch had killed Cheatham, but that he did not mention Smith, and thereupon Robert Saunders stated the remark, as testified to by him, which he had heard made by Gooch to Smith.

Abe Crabtree testified, after objection, that he saw the defendants together, about sunset, in front of Monie's store, about thirty-five steps

from Cheatham's store; Gooch had a knife, cutting at Smith, as if trying to cut him, and Smith was knocking at him with his fist; they seemed to be fooling. The knife was open, and the blade seemed to be about one and a half inches long.

Turner Evans testified, that defendants came to his restaurant for supper; could not get it, and left together; that Gooch was sober, and Smith a "little drinky". This was about one hour before the killing.

Wesley Hammil testified, that about a month or two before the homicide, he heard Gooch say that the account Cheatham had him charged with, was not right, and if Lambeth (city clerk) paid out any more of his money to Cheatham, he would know how much he was owing him. That he heard Smith say repeatedly, a night or two before the homicide, that Cheatham had not treated him right about his account. This evidence was objected to, and the objection overruled.

On cross-examination, this witness was asked, if there was not
(993) a good deal of grumbling among the city hands about the manner of the Cheathams in dealing with them. The Solicitor at first objected to this evidence, but withdrew his objection, and it was admitted. Witness said that he had heard some four or five of the hands complaining about their accounts with Cheatham.

L. P. Sorrell proved the wounds of the deceased, about as described by the witness Scott Brown.

Dr. P. E. Hines testified, that the wounds described would be mortal, and go directly into the heart. They would take a very few minutes to kill. He examined James Cheatham's wounds that night. One was on the left shoulder, penetrated to the hollow, and was a dangerous wound. It was a stab, and there was another wound on the left side.

John Walker, a blacksmith in Raleigh, testified that Gooch came to his shop between eleven and twelve o'clock, to have a horse shod; saw him at the grindstone, grinding, and then whetting something; thinks Gooch cut a string for a boy who came to the shop.

Ed. Jackson testified, that he saw the prisoner at Ellis' Store in Raleigh, just before the deceased was killed, about 8:30 o'clock, some 75 or 100 yards from Cheatham's store. He heard Gooch say to Smith, "Let us go where we are going," but he did not say where he was going. Had heard of Smith's having a little fight, but never heard of Gooch having a fuss.

John H. Alston testified, that he knew Gooch and Smith, and saw them together the night of the killing. They first went to Sorrell's bar room, and then went to Cheatham's store, one after the other. Heard some kind of noise at his store; saw a hand go up; and a coat tail also went up; and then Gooch and Smith came out, side by side. When they reached the middle of the street, the one said to the other, "We

have about finished the d—n scoundrel." Gooch went into the house first, Smith next, and they came out together.

C. W. Bevers, a police officer of the city, helped to arrest Smith at nine or ten o'clock on the night of the homicide. Wit- (994) ness found him in the street, and he went very stubbornly—they pulled him along.

C. D. Heartt, chief of police, testified that on the eleventh of June, he had a warrant for the arrest of Gooch, and searched for him, and directed all of the police force to search for him, but he could not be found. Gooch's time was not up when he left. He had always taken Gooch to be a quiet, peaceable man. Smith had been in several fusses.

F. D. Markham, Sheriff of Durham County, testified that he arrested Gooch on the 12th of June, on the plantation of one Jones, about three and a half miles from Durham. That he found him lying by a wagon belonging to one Huddleston, who worked on the plantation, between two public roads. He tied him and brought him to Raleigh.

The prisoner Gooch testified in his own behalf. He said that he and Smith were together at Ellis', and Smith went out, and told him to wait, he would be back in a few minutes. He came back, and they went to Cheatham's; Smith was sitting on the counter near the stove; Cheatham was sitting in a tall arm chair. Witness told deceased he wanted a half pint of whiskey, and went on down to the bar. He heard deceased say, "if you say that again, I will knock you out of my house with a chair." Deceased then rushed at Smith, and struck him in the face with his fist, and they clinched, just above the stove, towards the front door, about six inches from the stove. James Cheatham pulled them apart, and the deceased's foot caught against the tin or stove leg, and he fell against him and the screen. He fell backwards and tore his pants on a faucet, and the deceased fell on him, and as he tried to get up, James Smith ran up and grabbed deceased and stabbed him. James Cheatham came by their feet, going to the back door. Smith then stepped over them, and cut the deceased in the face. Deceased called out, "he has cut me." Smith then cut at James Cheatham, who ran, while Smith was cutting at him. (995) When he got up, the deceased was sitting on a box, and said to him, "Billy, I am cut." Witness said, "I see you are cut in the face," and the deceased asked him to get a doctor. He went out, and down the street, and he received information that John Cheatham was dead. Witness does not know whether he went there again or not.

W. H. Ellis, introduced by the prisoner Gooch, testified that Gooch and Smith were at his store, five doors north of Cheatham's, about seven or eight o'clock on the night of the homicide. They left about

8:30 o'clock. Smith paid $26.50 on his account, and he loaned each of them $1.00. Gooch had no account there. Smith got an order from him for five dollars to pay the deceased. He had a conversation that day with deceased about Smith's account. Deceased seemed to be angry, and said he would have his money, and "Smith had been 'monkeying' with him long enough." He communicated what deceased had said to Smith. The prisoners came into his store nearly every day. This evening while at his store, they were talking about some women; neither Smith nor Gooch seemed angry when they left his store; and when he communicated what the deceased said, to Smith, it did not seem to make him angry. After they left his store, Smith came back in about ten minutes, and his nose and mouth were bleeding freely, almost a stream. Blood was coming from both, and not from a scratch. He had a bloody handkerchief to his nose, and witness gave him a pan of water, and then ice water, to bathe his head. Just before Gooch left his store, he borrowed a knife, and returned it before he left the store, to cut a string.

John Morgan, a witness on behalf of Gooch, testified that he was passing the jail on the 12th of June, when Smith called to him, and asked him if they had caught Gooch, and said if they caught Gooch, it would ruin him; told him if he saw Gooch, to get him out of the way. Witness was afterwards put in jail for stealing, and had been in jail four times.

Caswell Smith testified, that he heard Smith tell John Mor-
(996) gan, if he saw Gooch, to get him out of the way, for if they caught Gooch, it would ruin him. He did not hear Smith say he did all cutting, but thinks he did say he would pay Morgan if he would tell Gooch. He had been in jail three months, and was convicted of having whipped his mother.

Another witness, one Williams, testified, that he heard Smith tell Morgan, that if he would go and tell Gooch to get out of the way, he would pay him well; that if they caught Gooch, he would be gone up. Smith, told him, witness, that he did all the cutting. Witness had been in jail since April 1st, for stealing about $1.00 worth of rations.

Lucius Griffith, a witness for Smith, testified that he was in jail, in the adjoining cell to Smith, and he never heard Smith have any talk about Gooch, and neither about having done the cutting; he has been in the penitentiary, and was then in the workhouse for larceny, but some nights he would sleep in jail.

York Lane, a witness for Smith, stated that Ellis told him to take Smith home, on the night of the homicide; he seemed to be drunk; said he wanted to go by Lou Box's and see Billy, (Gooch). They

stopped at Lou Box's, and Smith and Gooch talked about five minutes; they then went on to Askew's corner; heard nothing till after they got back, about Cheatham being killed, saw no blood about Smith's face, and he said nothing about having cut Cheatham.

Dr. Hines was introduced, and testified that he washed and dressed the wounds of James Cheatham, and that he gave substantially the same account of the transaction to him, that he gave in his testimony, only he did not say that he saw Gooch's hand moving up and down.

T. R. Purnell proved John Morgan's character to be bad. Several witnesses proved that Smith was very drunk the night of the homicide.

James Smith testified in his own behalf, in substance, that there was no agreement to go to Cheatham's that night; that he did not make the threats, as the boy Saunders had testified; that he went to Cheatham's to pay a $5.00 order. He was told that Cheat- (997) ham was mad with him; that Cheatham said if he could not get all, he would not have any; they disputed the correctness of the account; John Cheatham got him by the throat, and shoved him against the counter; James Cheatham ran up, and threw him on the floor, striking him in the mouth with a piece of plank, and pushed John Cheatham over to the right; he got out his knife, and cut James Cheatham, but did not cut John Cheatham; Gooch came out right behind him, and said, "he is cut, and cut bad"; he went to Ellis's to wash his face; he got a lick on the back of his head; his mouth and nose were bleeding; does not remember whether he told Ellis about the affair, he might have told him; went to the depot and saw Gooch; Gooch said, "I am gone, look out for yourself." He came back to the guard house and saw Blake, and told him he did not cut John Cheatham, but that he cut James Cheatham; he did not tell Gooch, as Alston testified, "we have finished the d—d scoundrel;" he had a conversation with Morgan, he asked him if they had caught Gooch, and he said, "I hope they won't catch him;" he never told Robert Williams that he had done the cutting; that James Cheatham testified before Meyor Dodd, that he, Smith, did not cut John Cheatham, but cut him, James; had a talk about going to see a girl; that he did not attempt to escape.

On cross-examination by Gooch's counsel, he stated that he got permission from Ellis to give Cheatham a $5.00 order, but he did not know whether or not he took the $5.00 order over. Ellis had told him that Cheatham was mad with him, and advised him not to go, and he replied, there was no more danger of a fuss, than between himself and Ellis. That he never knew of John Cheatham using a knife or weapon on any man.

Gooch then had Ellis recalled, and give an account of what Smith stated to him about the affair. He said, that the deceased threw a weight at him, and struck him in the back, and if it had not been for Gooch, he would have been killed. That Smith insisted he was cut, and witness examined him and found he was not. That he told
(998) Smith it was a lie about John Cheatham hitting him with a slab, for his face was only scratched. Smith said he "snagged Jim Cheatham twice, and he bleated and ran behind the counter." that Smith said he would go back to Cheatham's, and whip out the whole house. Smith said he was struck with a slab by John Cheatham, but that he saw no bruise on his nose or face, except a scratch. When Smith left his house, he said there was no more danger of a fight with Cheatham, than with him. A number of witnesses, introduced by the State, testified as to the good character of Robert Saunders and James Cheatham, and to the peaceable character of John Cheatham.

Lee King, a witness for Gooch, testified that he saw Gooch the night of the homicide, at Sid Solomon's. Witness told him he understood he had killed Cheatham. Gooch replied, "he had never struck him a lick—never touched him." He advised Gooch to give himself up, if he did not cut Cheatham, and that he heard no talk that night of lynching Gooch.

Ford Taylor was examined as a witness for the State, and testified that James Cheatham's character was good, and that John Cheatham was a quiet and peaceable man. On cross-examination, the witness, who was a former partner of John Cheatham, was asked some questions tending to impute a want of integrity and fair-dealing on the part of the deceased in their mercantile transactions. The Court ruled them out, on the ground that the character of the deceased for violence only, could be put in evidence. The witness further stated, that he never had any personal difficulty with deceased.

G. W. Taylor stated, that he saw Smith at Ellis' store, and he had a handkerchief to his face. Smith said John Cheatham had struck him with a slab, and threw a weight at him. That he was not sober, and there was no blood pouring out his nose and mouth, but he saw blood on his face and handkerchief. His nose and mouth were not dripping with blood.

To prove that the deceased was a dangerous character, the
(999) prisoner Gooch introduced W. H. Pace, who stated he once got into a fight with Cheatham. That he first struck Cheatham while sitting down, and no weapons were used, and not much damage done. James Cheatham jumped up and said "kill him", and struck him with a chair.

The defendants next offered B. F. Cheatham, who said he saw Pell come in one day, and get a drink. Pell stuck a knife in John Cheatham. John pushed him off, and Pell fell, and John told him he did not want to hurt him, but took the knife away from him.

James Cheatham described the affair between Pace and the deceased, the same as given by Pace, but stated he did not say "kill him".

The prisoners asked for a number of instructions, all of which were given, except the following, which were refused:

"If Smith was a friend to Gooch, and Gooch meant to assault John Cheatham, who was then engaged in a fight with his friend Smith, when he went towards John Cheatham with his hands raised and open, as testified by James Cheatham, and Gooch at that time had no knife in his hand, and was suddenly thrown upon the floor, as stated by James Cheatham, and was in danger of his life, or of serious bodily injury, or reasonably supposed that he was, and cut John Cheatham to relieve himself from that danger, he was excusable, and is therefore not guilty.

"If James Smith killed John Cheatham through malice, and went to Cheatham's store for that purpose, and Gooch did not know that Smith had such purpose, though Gooch may have joined in the fight to aid his friend Smith, he would not then be a participant in the malicious intent of Smith, and therefore would not be guilty.

"If Gooch went in at Cheatham's store, simply to get a half pint of whiskey, and became suddenly or unwillingly involved in a fight, in no view would he be guilty of murder.

"If Gooch willingly entered into a fight with John Cheatham, upon equal terms, and was suddenly and violently thrown (1000) upon the floor, and John Cheatham got upon him, and the surroundings were such as to justify William Gooch in apprehending serious injury to life, or limb, or body, he had the right to slay his assailant, and would not be guilty.

"In this case, there is no evidence of conspiracy or agreement between Gooch and Smith, the prisoners, to go to Cheatham's store for an unlawful purpose, or to attack the Cheathams, or either of them, or in anywise to injure them, or either of them.

"In trials for homicide, the killing by the prisoner being found or admitted, the law implies malice, and the burden lies upon the prisoner to show, to the satisfaction of the jury, that the killing was done under circumstances reducing the offence to manslaughter, or excusable or justifiable homicide, but when circumstances which come out from the examination of the State's witnesses, tend to establish such defence, then it is the duty of the jury to consider all the evidence, and if they

are not satisfied of the guilt of the accused beyond a reasonable doubt, they should acquit."

The defendant Smith asked the following instructions:

"If the jury shall believe, that there was no conspiracy between Gooch and Smith to kill John Cheatham, or to do him great bodily harm; that the meeting that night at said Cheatham's store was not in pursuance of any preconceived unlawful purpose; that said Smith did not kill John Cheatham, and did cut James F. Cheatham, not with a purpose of aiding Gooch in an unlawful act, but under the impulse of sudden passion, because of violent blows received, they would find Smith not guilty."

The Court, at the request of the Solicitor, gave the following instructions:

"Where two persons agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. *State v. Simmons*, 51 N. C., 21; *State v. Mathews*, 80 N. C., at p. 424.

"Therefore, whether it was the original intention and under-
(1001) standing of the prisoners to kill the deceased or not, if they agreed together to beat him, or to attack him, and in furtherance of this common design to do such unlawful act, they went to the store of the deceased and made the attack, and in doing so, one of them gave him a mortal stab, the other defendant is just as responsible for the killing, as if he had held in his own hand the knife which inflicted the fatal wound. And he would be equally guilty, if he had not raised a hand to strike, provided he was there present in pursuance of such common purpose, while the other gave the wound.

"It is a general principle of law, that if one man commit a felony, and another be present, aiding or encouraging him to commit it, they are both equally guilty, and the person so aiding and abetting, would be guilty, though his purpose to do so was not formed until the very moment when the act began; that is, if before the completion of the felony.

"It is true, as a general rule, that when two men meet and fight upon a sudden quarrel, on equal terms, *no advantage being taken*, and one kills the other with a deadly weapon, it will be but manslaughter, and in such case, it matters not which struck the first blow. *State v. Chavis*, 80 N. C., 358.

"The law presumes malice in every wilful killing of a human being. And where such killing was done on a sudden quarrel, in a mutual combat, the grade of the crime depends upon the character of the provocation. If the provocation be great, it will be but manslaughter;

but if the provocation was slight, and the killing be done out of all proportion to the provocation, it will be murder.

"Abusive words never amount to sufficient provocation to render a homicide manslaughter. If committed on any provocation less than an assaulting of the person, it is murder. *State v. Tackett*, 8 N. C., 210.

"He that first assaults, has done the first wrong, and if from his so assaulting another, he brings upon himself the necessity of slaying, to prevent being himself slain, he cannot be excused for the homicide, but would be guilty of murder or manslaughter, (1002) according to the circumstances of the case. *State v. Brittain*, 89 N. C., 481.

"If a man assault another with malice prepense, or a preconceived purpose to kill, or do great bodily harm, even though he should be driven to the wall, and kill the other there to save his own life, he is guilty of murder, for the malice of that assault communicates its character to all the subsequent acts. *State v. Hill*, 20 N. C., 629.

"Where there is a mutual combat without previous malice, but on a sudden provocation, if one of the parties takes an undue advantage, as by the use of a knife, on an unarmed antagonist, and thereby kills him, it is murder. *State v. Scott*, 26 N. C., 409. But where they fight on equal terms, it is manslaughter.

"The fact of killing with a deadly weapon having been proved, the burden of showing any matter of mitigation, excuse or justification, is thrown upon the prisoner. It is incumbent upon the prisoner to establish such matter, neither beyond a reasonable doubt, nor according to the preponderance of testimony, but to the satisfaction of the jury. *State v. Ellick*, 60 N. C., 450; *State v. Haywood*, 61 N. C., 376; *State v. Willis*, 63 N. C., 26. A *bare preponderance* of proof *will not do*. *State v. Carland*, 90 N. C., 668; *State v. Mazon, Ibid.*, 683. If the jury are left in doubt as to the extenuating circumstance, it is murder. *State v. Smith*, 77 N. C., 488.

"The evidence of defendants in trials for crimes, must be taken with some degree of allowance, and the jury should not give it the same weight as that of disinterested witnesses; but the rule which regards it with suspicion, does not reject it, or necessarily impeach it, and if from that testimony, or from it and other circumstances in the case, the jury believe that the defendants have sworn the truth, then they are entitled to as full credit as any other witness. *State v. Boon*, 82 N. C., 637. While the law regards such testimony with suspicion, it makes it the right and duty of the jury, to consider and decide on the weight which is due to it. *State v. Nash*, 30 N. C., 35.

"*Bare fear*, (however well grounded,) that another intends (1003) to kill one, when it is not accompanied by an overt act indica-

tive of such intention, will not warrant the latter in killing the other by way of prevention. There must be an *actual danger* at the time. *State v. Scott, supra.*"

The above "requests to charge" having been given, the Court resumed its charge and said:

"There are but three living witnesses of the killing, and each has given you his account of the homicide. You will remember their testimony, in what particulars they agreed, and wherein they differed. It is for you to consider all the testimony, and after weighing it, you are to say what really transpired. As the Court has told you, you can believe the whole, or a part of the testimony of any witness, or reject it entirely, according to the impression of its truth which is made upon your minds.

"If you should believe from the evidence, that Smith and John Cheatham were fighting, and that Gooch intervened and assaulted John Cheatham, without provocation; that John Cheatham got him down, but without having or using on Gooch any weapon, or putting him in reasonable apprehension of danger to his life, or serious bodily harm, (of the reasonableness of which apprehension you are to judge,) and Gooch then killed him with his knife; if you believe those to be the facts, you should find Gooch guilty of murder. There is no other evidence before you that Gooch acted in self-defence, beyond what may be deduced from the evidence tending to show that he and Cheatham were fighting, and Cheatham was upon him. Gooch's testimony is, that he did not cut Cheatham at all. Smith testified that he did not see how it was done. James Cheatham said that John Cheatham had his hands on Gooch, but he saw him have no weapon, and he was not striking Gooch, and there is no evidence before you, that John Cheatham had any knife, or any weapon, on that occasion. If you believe that Gooch made the first assault, and afterwards that Cheatham had him down, when he cut and killed Cheatham,
(1004) the law presumes malice, and the burden is on Gooch to satisfy you, that the killing was done to protect his own life, or to save himself from serious bodily harm. If you should be satisfied that he had reasonable apprehension of such, and cut in consequence thereof, you would find him guilty of manslaughter; if not so satisfied, or you are in doubt as to the mitigating circumstances, and you believe the facts to be as recited, you will find him guilty of murder. If under the circumstances named, you are fully satisfied that Gooch was there, under a preconcerted arrangement with Smith, to assault Cheatham, and in pursuance of such plan, a fight ensued in which Gooch killed Cheatham, he would be guilty of murder, even though he struck the

fatal blow under reasonable apprehension of danger to his person or life.

"If you are satisfied beyond a reasonable doubt, that Smith was there by a preconcert with Gooch to assualt John Cheatham, or to draw him into a fight, though they may not have intended to kill Cheatham, and Gooch did kill Cheatham in carrying out such preconceived unlawful purpose, both are guilty of murder. If you believe there was no such preconceived purpose, but are satisfied beyond a reasonable doubt, that Smith was there aiding and abetting Gooch before the fatal blow was given, and Gooch did the killing under the circumstances just mentioned, then Smith is guilty of the same grade of offence as Gooch, unless he shows on his own behalf, circumstances of mitigation or excuse. If Gooch is guilty of murder, so would Smith be guilty of murder, in the absence of such mitigating circumstances. If Gooch is guilty of manslaughter, so is Smith guilty of manslaughter, if present aiding and abetting Gooch before the fatal blow was given.

"If you are satisfied beyond a reasonable doubt, that Smith struck the fatal blow, he is guilty of murder, unless you are satisfied that he struck while still in the heat of passion raised by the fight between him and the deceased, in which event you should find him guilty of manslaughter, unless he used an excess of violence out of all proportion to the provocation, or in consequenc of a pre- (1005) conceived arrangement with Gooch to assault Cheatham, in either of which cases, Smith would be guilty of murder. If Smith did the killing, you should find Gooch not guilty, unless you are satisfied beyond a reasonable doubt, that he was there by a preconcert with Smith to assault Cheatham, or if there was no preconcert, that he was there, aiding and abetting Smith, at some time, however short, before the fatal blow was struck, in which case you should apply the principle above laid down, as to aiding and abetting.

"You are sworn men. You are to find your verdict by the law and the evidence alone. You are to allow neither sympathy nor prejudice to sway you, for you are to find the truth of the facts, and the facts cannot be changed by any feelings which may be entertained by you, if any, towards the prisoners. If mercy ought to be extended to either or both of the defendants, you have no right to exercise it. The prerogative of mercy, is, by our laws, vested elsewhere. With the effect of your verdict, you have nothing whatever to do. You impose no sentence and inflict no punishment. Your duty is a plain and straightforward one. You are to weigh the evidence and find the facts —and to apply to the facts as you find them to be, the laws as laid down by the Court, and respond as to each defendant, whether he is

guilty of murder, or guilty of manslaughter, or not guilty. There your duty and responsibility will end."

The defendants did not except to any particular charge, or part thereof, given by the Court, but generally to the charge as a whole.

There was a verdict of guilty. Judgment prayed and pronounced, the Court sentencing the defendants to be hanged on the 17th day of November, 1885.

Both defendants appealed.

Attorney General, for the State.

Messrs. T. M. Argo, W. N. Jones, John Gatling, J. A. Williamson and Octavius Coke, for the defendants.

(1006) ASHE, J., (after stating the facts). Prior to the argument in the case, the counsel of the prisoners moved the Court for a new trial, upon the ground of newly-discovered testimony. The motion is disallowed, for the reason this Court does not entertain such a motion. It was so expressly held at this term of the Court, in the case of *State v. Starnes,* upon a similar motion.

The prisoners are charged with the murder of John A. Cheatham, in the city of Raleigh, on the night of the 10th of June, 1885. After arraignment, each of the prisoners moved for a severance of the trial. The motion was denied by the Court, and the prisoners both excepted to the ruling. The exception cannot be sustained, for the severance of the trial was a matter of sound discretion, to be exercised by the Court. *State v. Smith,* 24 N. C., 402; and 1 Whar. Cr. Law, Sec. 433.

By consent, a special *venire* of two hundred men were drawn from the jury-box, under Sec. 1739 of The Code. When the first person's name was drawn from the box, he was challenged by the defendants, and on his *voir dire* was asked the following questions: "Have you a cause pending and at issue in the Superior Court of Wake county? Have you paid your taxes for the last preceding year? Have you served on a jury within the last two years?" To each of these questions, the Solicitor for the State objected, and the questions were ruled out by the Court, and the juror tendered. To this ruling the prisoners excepted. There were several others called on the list, who were passed by the Solicitor to the prisoners, and the same questions asked, with like results. Neither of the prisoners, when the jury was completed, had availed themselves of the twenty-three challenges to which, by law, they are entitled, the prisoner Gooch having challenged peremptorily only thirteen, and Smith only six.

The question of practice here raised by the exceptions of the prisoners, was decided at this term of the Court, in the case of *State v.*

Hensley, post, 1021. There the Court held, "that the right of challenge is intended to secure a fair and impartial trial, and to that end, to exclude from the jury, persons objectionable for one or another cause. It is no part of the purpose of the right of challenge, to afford the prisoner opportunity to select particular jurors, most likely (1007) to acquit, or give him undue advantage. He has no right to select and have his own choice of jurors, he has only the right to object to twenty-three, without assigning any cause, and indefinitely, for cause allowed by law to be good. He only had the right to except to objectionable jurors, and to have an unobjectionable jury. The conclusive presumption is, that such a jury was obtained, because the prisoner accepted jurors of the panel tendered, until the jury was completed, while he yet had the right to challenge four peremptorily." The rule to be deduced from this decision is, that although the proper challenges by the prisoner of the same panel may be denied him by the Court, it is no ground for a *venire de novo,* unless he has exhausted his peremptory challenges, for unless that contingency occurs, he is not prejudiced, for he is presumed, by not exhausting his peremptory challenges, to have what he considers an unobjectionable jury. There was, therefore, no error in the ruling of the Court in this particular.

We come now to consider the exceptions taken by the prisoner, upon the omission or rejection of evidence by the Court, and there were such a vast number of exceptions taken on the trial, many of which were too trivial for consideration, and many others, after being first taken, were afterwards avoided in the progress of the trial, by admitting the evidence to which they were taken, that we feel some distrust, lest in the confusion of the evidence and exceptions, we may overlook something that may be of importance.

In reviewing the evidence and the exceptions thereto, we shall only notice those that were taken to evidence that was not subsequently admitted, and consider only such of the instructions asked, as were refused by the Court.

On the examination of James F. Cheatham, the State proposed to prove by him, the nature and character of the wounds he had before stated he had received. The evidence was objected to by the prisoners, but received by the Court, as part of the *res gestæ,* and to show the violence of the transaction. The evidence, we think, (1008) was properly admitted upon both grounds.

Chamblee, a witness for the State, testified, that on the evening of the homicide, about sunset, he saw the prisoners together, about 35 yards from Cheatham's store, and upon the witness being asked what they were doing, the prisoners objected; but the Court admitted the

evidence, and the witness stated that Gooch had a knife, about two and one-half inches long, cutting at Smith, as if he were trying to cut him, and Smith was knocking at him with his fist; "they seemed to be fooling". He saw Gooch and Smith together nearly every evening about that time. The evidence was admissible. It was competent to show when and what the prisoners were doing that evening, and it was admissible to show that Gooch had a knife that evening, as evidence was offered by the defence, tending to show that he had none.

Wesley Hamilton, testimony on the part of the State, as to the declarations of the two prisoners regarding the deceased, and their accounts at his store, was objected to by both the prisoners. The testimony was competent, to show the dissatisfaction of the prisoners with their accounts, and as tending to support the contention of the State, that they bore a grudge against the deceased on that account.

They then asked the same witness the question: "Have not you known it to be frequently to be the case, that the Cheathams' have presented to the city hands, accounts double what was really due?" This question was objected to by the State, and ruled out by the Court. The defence insisted that the question was admissible, to rebut the testimony of Robert Sanders, who had testified that he heard Gooch, the summer before, say to Smith, that if Cheatham "messed" with him as he did with other hands, he would kill him. It was insisted that it was offered to explain what was meant by "messing", to rebut the disputing the account, by which the State claims to show malice, and to show that the condition named in the threat testified to by Sanders, never existed.

We do not see how the refusal to admit the answer to the
(1009) question could prejudice the prisoners, for evidence was offered by the prisoners tending to show deceased kept false accounts, and was a man who dealt hardly with his customers, and it could only have the effect of showing that the prisoners may have had just ground of complaining of their accounts, and was calculated to engender the ill feeling which the State alleged they entertained towards the deceased on that account. Such evidence, it seems to us, only tended to strengthen the allegation of the State in that particular, and was in fact prejudicial to the defence. The answer to the question, so far from showing that the condition contended for on the trial never existed, would tend to show that it did there exist. It was, if the deceased, "messed" with him, as he did with others, that is, make out a false account against him, he would kill him, for both the prisoners complained of their accounts, and alleged them to be unjust.

Questions were put by the prisoners to the witness Lambeth, the City Clerk, as to the temper of the deceased towards the prisoners, and whether he seemed to be mad with Smith, the day of the homicide, and did he know from anything he said that day, that he was mad with Smith. These questions were ruled out by the Court, and the prisoners excepted.

We are unable to see how the temper or anger of the deceased towards the prisoners, can be relevant to the question of their guilt or innocence. In a case of homicide, the question is, was the act of killing done by the prisoners with malice, and that question can in no way be affected by the fact that the deceased bore malice towards the prisoners. Besides, if the questions were material, they were fully answered by the witness Ellis, who stated that the deceased was angry with Smith, and he communicated what the deceased said on the same day to Smith, and that night advised him not to go to the Cheathams'.

Ford Taylor, a witness for the State, was asked several questions by the defence, for the purpose of attacking the character of the deceased, in relation to his mercantile transactions. They were ruled out, on objection by the Solicitor, and properly so, for the moral character of the deceased was in no way involved in the question of the guilt of the prisoners. The only inquiry that could be made about his character, was whether he was a violent and dangerous (1010) man, and only then, "when the evidence is wholly circumstantial, and the character of the transaction is in doubt," or when "there is evidence tending to show that the killing may have been done on the principle of self-preservation." *State v. Turpin*, 77 N. C., 473. But the facts of this case do not bring it within either exception.

The last exception taken by the prisoners, was by Gooch, to the ruling of the Court in permitting the Solicitor to re-call and re-examine a witness. This, as it has often been decided, is a matter entirely in the discretion of the Court.

The three first instructions asked by the prisoners, which were refused by the Court, are all predicated upon an assumed state of facts, not warranted by the record. They are based upon the idea that Gooch was driven by the necessity of the emergency in which he was placed, to take the life of the deceased, and therefore he was excusable, or at most not guilty of murder. But in no view of the case, are the prisoners excusable. This offence is either murder or manslaughter.

The prisoners then asked the Court to instruct the jury, "that when a prisoner, relying upon extenuating circumstances to reduce the offence from murder to manslaughter or excusable homicide, and the circumstances come out from the State's witnesses which tend to estab-

lish such defence, then it is the duty of the jury to consider all the evidence, and if they are not satisfied of the guilt of the accused beyond a reasonable doubt, they should acquit." Whatever apparent reasonableness there may be in the proposition here contended for, the rule in that respect has too often been recognized by this Court, to allow a departure from it at this time. See the cases of the *State v. Mazon*, 90 N. C., 676; *State v. Carland, Ibid.*, 668; *State v. Willis*, 63 N. C., 26; *State v. Ellick*, 60 N. C., 450; *State v. Brittain*, 89 N. C., 481.

The Court was next asked to instruct the jury, "that there
(1011) was no evidence of any conspiracy or agreement between Gooch and Smith, the prisoners, to go to Cheatham's store for an unlawful purpose, or to attack the Cheathams, or in anywise to injure them or either of them." The Court declined to give the instructions, and left that question to the jury.

The Court, in view of the facts of the case, could not give this instruction, and instead thereof charged, "If you are satisfied beyond a reasonable doubt, that Smith was there by preconcert with Gooch, to assault John Cheatham, or draw him into a fight, though they may not have intended to kill Cheatham, and Gooch did kill Cheatham in carrying out such preconcerted unlawful purpose, both are guilty of murder." This presents the main point in the case, upon which the question of murder depends, and raises the question, was there any evidence of a preconcert between the prisoners to assault the deceased, or draw him into a fight. If there was such evidence, it is unnecessary to consider the case in any other aspect. What then, is the evidence tending to show a preconcert between the prisoners for such an unlawful purpose? The prisoners were boon companions; they were co-laborers in the same employment; they were generally seen together, late in the evening, in that part of the city near the store of Cheatham; they both had accounts with Cheatham; twelve months before the homicide, while together, Gooch said to Smith, referring to the false accounts made by Cheatham against some of the street hands, "If Cheatham ever 'messes' with me as he does with some others, I'll kill him." They both had accounts in 1885, with Cheatham, and each complained that the account against him was unjust; and credit had been refused to both of them by Cheatham, in the spring preceding the homicide. Some short time before the homicide, they were together at Ellis' store; left together, and as they were leaving, the one said to the other, "let's go where we are going," and they went to Cheatham's store. Smith went down in the store, if James Cheatham is to be believed, to where the deceased was, and asked for his account, and while deceased was showing him his account, Gooch went into the

store in his shirt sleeves, and walked down and stopped be- (1012) tween deceased and Smith. Smith, after examining the account, said it was not correct, that he had paid it two or three times. Deceased replied, he could not say that, that he had got every thing on there; that he did like he had come in there for a row any way, and he had better go out. The deceased then moved over to the opposite counter, and sat in a chair. Smith repeated the remark, and made at him for a fight; the deceased got out of the chair, and pushed Smith against the counter. James Cheatham parted them by pulling deceased away, and holding Smith, and while holding Smith, Gooch rushed on deceased, who cried out two or three times, "he is cutting me." James Cheatham then turned Smith loose, and hastened to part them. Gooch was flat on his back, and deceased was on top of him, with his head turned off, and as James Cheatham stooped to pull deceased off, Smith cut him on the shoulder, and as he turned, he cut him again in the side.

The deceased was stabbed in three places, one wound on the left side of the face, from the cheek to the jaw-bone—one a little below the left nipple, and the other on the right of the nipple. The last went straight in, and the other ranged down, at an angle of 45 degrees. The prisoners left this scene of blood together, and when they reached the street, the one said to the other, "We have about finished the d—n scoundrel." Smith went to Ellis' bleeding from a scratch on his face, and telling with exultation, "that he had 'snagged' Jim Cheatham twice, who 'bleated' and ran behind the counter," and said "he would go back to Cheatham's and whip out the whole house." These facts, if believed by the jury, and they were testified to by James Cheatham, whose character was proved to be good, were surely some evidence of a preconcert between the prisoners to attack the deceased. Their conduct during the fight, offers some evidence of a common purpose, if not an express agreement, to stand by and assist each other, if either should get into a fight with the deceased. Gooch, armed with a deadly weapon, follows Smith into the store, and takes his stand near by, as if ready to join in the bloody drama, as soon as the (1013) play is opened. Smith uses offensive language, calculated to provoke the deceased to an assault, and failing in this, makes the assault himself; and as soon as he and the deceased are separated, Gooch rushes, without the slightest provocation, upon the deceased, and during their short contest, when the deceased is unarmed and using no violence upon his person, except that of being on him, which Gooch himself says was by accident, he gives him two or three stabs, one or two of which are mortal; and then when James Cheatham interferes, as a peacemaker, to separate the combatants, Smith inflicts two

severe stabs upon him, and then to show the *mala mens* by which they were actuated, on leaving the house, Gooch uses the language testified to by Alston, which indicated a remorseless and vindictive spirit, which had accomplished its purpose. Gooch testified that Smith did the cutting, and Smith admitted in his testimony that he had cut James Cheatham, but denied that he had cut John Cheatham. It is certain that he was cut by the one or the other, and we think from the nature of the wounds as described, they must have been inflicted by Gooch, as testified by James Cheatham. But be that as it may, there being some evidence produced before the jury that there was a common purpose on the part of the prisoners to assault or beat John Cheatham, and in pursuance of that common design he was assaulted and killed, both the prisoners would be guilty of murder, and the jury were warranted in so finding.

Lord Hale, in vol. 1, p. 440 of the Pleas of the Crown, thus lays down the doctrine on the subject: "If divers persons concur in an intent to do mischief, as to kill, rob, or beat another, and one did it, they are all principals, and if many be present, and only one gives the stroke whereof the party dies, they are all principals, if they came for that purpose."

And in *State v. Simmons,* 6 Jones, 21, this Court held: "When on a trial for murder, it appeared that two persons had formed the purpose of wrongfully assaulting the deceased, and one of them, in furtherance of such purpose, with a deadly weapon and without pro-
(1014) vocation, slew him, it was held both were guilty of murder."

In *Regina v. Cox,* 4 C. & P., 538, the rule is thus laid down: "If two persons are engaged in pursuit of an unlawful object, the two having the same object in view, and in pursuit of that common object, one of them does an act which is the cause of death, under such circumstances that it amounts to murder in him, it amounts to murder in the other also."

There is another view of the case, in which the jury might have been warranted in finding the prisoners guilty of murder, and it is this. If the jury believed from the evidence, that the prisoners went to the store of Cheatham, with the purpose, under the pretense of fighting, to stab Cheatham, and either the one or the other stabbed and killed the deceased, it was murder in the assailants, no matter what provocation was given, or how high the assailants passion was aroused during the fight, for the motive in such a case is express, *State v. Lane,* 26 N. C., 113; or if they believe from the evidence, that Gooch had prepared himself with a knife, with the intention of using it in case he or Smith got into a fight with the deceased, and went to Cheatham's store with the intention of having a conflict with him, and did kill him

with the knife, and Smith, having a knowledge of the purpose, went with him, and was present assisting in the conflict, the jury were well warranted in finding them both guilty of murder. *State v. Hogue*, 51 N. C., 381.

There is still another view of the case which sustains the verdict of the jury. Although they might believe there was no previous purpose on the part of the prisoners to assail the deceased, and they went to his store for a lawful purpose, and got into a sudden combat with the deceased, and they believed that the provocation given by the deceased was but slight, and in the progress of the fight, the prisoners used an excess of violence, out of all proportion to the provocation, the killing was murder. *State v. Chavis*, 80 N. C., 353; *State v. Curry*, 46 N. C., 280; *State v. Hildreth*, 31 N. C., 440. In this last case it was held, "if a party enters into a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, (1015) it is not manslaughter, but murder."

Our conclusion is that there is no error. This opinion must therefore be certified to the Superior Court of Wake County, that the sentence of the law may be pronounced.

No error. Affirmed.

Cited: *S. v. Jones*, 97 N.C. 472; *S. v. Potts*, 100 N.C. 462; *S. v. Ellis*, 101 N.C. 767; *S. v. Pankey*, 104 N.C. 844; *S. v. Oxendine*, 107 N.C. 784; *Jenkins v. R.R.*, 110 N.C. 441; *S. v. Whitson*, 111 N.C. 700; *S. v. Rollins*, 113 N.C. 733, 734; *S. v. Finley*, 118 N.C. 1164, 1171; *S. v. Jimmerson*, 118 N.C. 1175; *Hampton v. R.R.*, 120 N.C. 539; *S. v. Moore*, 120 N.C. 571; *S. v. Perry*, 121 N.C. 535; *S. v. Edwards*, 126 N.C. 1055; *S. v. Council*, 129 N.C. 513; *S. v. Bishop*, 131 N.C. 760; *S. v. Register*, 133 N.C. 754; *S. v. Exum*, 138 N.C. 607; *S. v. Worley*, 141 N.C. 768; *Ives v. R.R.*, 142 N.C. 137; *Medlin v. Simpson*, 144 N.C. 399; *S. v. Banner*, 149 N.C. 523; *S. v. Peterson*, 149 N.C. 534; *Blevins v. Cotton Mills*, 150 N.C. 497; *S. v. Holder*, 153 N.C. 607; *S. v. Cox*, 153 N.C. 642; *S. v. Blackwell*, 162 N.C. 682; *S. v. Robertson*, 166 N.C. 362; *S. v. Ice Co.*, 166 N.C. 404; *Long v. Byrd*, 169 N.C. 660; *S. v. Johnson*, 172 N.C. 924; *S. v. Little*, 174 N.C. 802; *S. v. Jones*, 175 N.C. 714; *S. v. Carroll*, 176 N.C. 731; *S. v. Southerland*, 178 N.C. 677, 678; *S. v. Rideout*, 189 N.C. 163; *S. v. McClain*, 240 N.C. 174.

STATE v. ADDISON E. WILSON.

Indictment—Defacing Tomb-stones.

1. In indictments for statutory misdemeanors, it is generally sufficient, if the indictment follows the words of the statute.
2. In an indictment under the statute (The Code, Sec. 1088), for defacing or destroying a tomb-stone, it is not necessary to designate the name of the person whose tomb has been defaced, nor is it necessary to charge in the indictment, in terms, that the dead body was that of a human being.
3. Where it appears that there was a burying ground, on land belonging to the defendant, and that he caused his employés to plough it up, and displace the grave-stones, *It was held*, some evidence to go to the jury that the defendant was guilty under the Act.
4. Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies, or to deface or pull down the grave-stones and monuments erected to perpetuate their memory.

INDICTMENT, tried before *Gilmer, Judge,* and a jury, at Fall Term, 1885, of the Superior Court of ORANGE County.

The defendant was indicted for a violation of the statute, (The Code, Sec. 1088), which provides as follows: "If any person shall, unlawfully and on purpose, remove from its place, any monument of marble, stone brass, wood, or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age,
(1016) or death, of any person, whether situated in or out of the common burying ground, or shall unlawfully or on purpose, break or deface such monument, or alter the letters, marks, or inscriptions thereof, he shall be guilty of a misdemeanor."

The indictment alleges, that the defendant, "at and in the county of Orange aforesaid, unlawfully, wilfully, and on purpose, did remove from its place, a certain monument of stone, erected for the purpose of designating the spot where a certain dead body was buried, contrary to the statute," etc.

The following is a copy of the material parts of the case settled upon appeal for this Court:

"George W. Tate, a witness for the State, testified, that he had known Willowdale Burial Ground all his life, and lived in a mile of it. He was proceeding to testify further as to the existence of monuments in said burial ground, when defendant, through his counsel, objected to any evidence of the existence or removal of any monuments, as there was no allegation in the bill of indictment, of any spot where

a dead body was buried, or place where a monument was erected, or the name of any person over whom a monument had been placed, or anything to inform the defendant, what charge he had to meet. The objection was overruled, and defendant excepted.

The witness then answered, that defendant owned land on which said burial place is located, in which a large number of stones were erected, to indicate the place of burial of dead bodies. Defendant cleared this place, and ploughed it up, the last of April or first of May, 1883. Witness' parents and grandparents were buried there, and hence witness went there, and noticed that stones had been thrown down, by felling trees and ploughing. The tombstones were torn off or scattered. Afterwards, witness obtained leave from defendant to inclose the graves of witness' parents and grandparents. This was in the Spring of 1883. Ploughing was going on when witness was building the pailing, and that at his last visit to the burial ground, the last of April or the first of May, he saw defendant's hands (1017) ploughing up and removing the stones or monuments.

On cross-examination, witness said that he could not say, without knowing when the presentment was made, whether any stone had been removed in two years prior thereto. Witness never saw defendant move any at any time—saw his hands and employés remove them; saw the stones crushed down by timber, the last of March or first of April, 1883.

Upon this testimony, the State closed, and there was no evidence offered by the defendant.

The Solicitor asked the following instructions, which were given:

1st. If the jury believe that the defendant, either by himself, or by others under his orders, removed any stone used to designate the resting place of a dead body, he would be guilty.

2nd. If the jury find such removal took place the latter part of April, or the first part of May, 1883, then this action is not barred by the statute of limitations, the presentment having been made at Spring Term, 1885, (the first week in April, 1885.)

The following instructions asked by the defendant, were refused:

1. That upon the evidence in this case, the defendant cannot be convicted, as there is no proof that the defendant removed or ordered the removal of any monument.

2. That there is no evidence that any monument was removed within two years prior to the presentment in this case.

3. That there is no proof that the monument of any person was removed.

At the request of the defendant, the following were given:

1. That the jury must be satisfied beyond a reasonable doubt, that the defendant removed a monument within two years prior to the presentment in this case.

2. That the jury must be satisfied that the monument of some person was actually removed, within two years prior to the presentment in this action.

There was a verdict of guilty, and defendant moved for a
(1018) new trial, upon the ground that there was no evidence sufficient to sustain the finding of the jury, that the defendant, through himself or others, removed any monument within two years prior to the presentment. This motion was denied.

The defendant then moved in arrest of judgment, on the ground that the indictment failed to allege any place where a monument was erected, whose monument it was, whose dead body was interred, or whose memory was preserved.

The defendant assigns as error, the admission of the testimony objected to, the refusal to give the instructions asked, and the giving of those asked on the part of the State, the denial of the motion for a new trial, and the refusal of the motion in arrest of judgment.

The Court gave judgment, and the defendant appealed to this Court.

Attorney General, for the State.
Mr. John W. Graham, for the defendant.

MERRIMON, J. (after stating the facts). It is true, that the offence is charged in the indictment in very general terms. But it must be conceded, that the offence is plain and simple in its nature, and that the constituent facts are few, and unattended by the slightest complication.

The charge is made substantially, indeed, almost in the very words of the statute, creating and defining the offence, and completely describes it. The Court could see, and the defendant could see and understand, exactly what was charged against him, and learn what was necessary for his defence, if he had any. In indictments for such plain statutory misdemeanors, it is sufficient to charge the offence in the words of the statute. *State v. Credle*, 91 N. C., 640, and the authorities there cited; *Commonwealth v. McMillan*, 101 Mass., 34; *State v. Brocken*, 32 Texas, 611; Bishop on Stat. Cr., Secs. 1098, 1099.

It was not necessary, as was insisted on the argument, to
(1019) charge that the monument was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. The statute is general and comprehensive in

its terms, and makes it indictable to remove the monument intended to designate the spot where *any* dead body, no matter whose it may have been, is interred.

Nor was it necessary to charge in terms, that the dead body was that of a dead person. This appears sufficiently from the purpose and language of the statute. Monuments such as are indicated, are usually erected to mark the spot where dead human bodies are interred, and to perpetuate "the memory, name, fame, birth, age or death of persons," and therefore, when the statute mentions dead bodies in such connection, it must be understood to apply to such dead bodies, unless it expressly, or by clear implication, intends a different sort of dead body.

It was contended on the argument, that if the defendant should be again indicted for the same offence, he could not successfully plead former conviction. This is a mistaken view. He could not do it so readily perhaps, as he could if the charge had been more specific, but he certainly could easily prove that he had been convicted in this case, and insist that his plea should be sustained, unless the State should prove that he had committed more than one such offence. The offence is so simple in its nature, the constituent facts are so few, that there could not be serious difficulty in making such defence.

It is clear, that there was evidence to go to the jury tending to prove the charge in the indictment. A witness testified, that there was in the county of Orange, a particular burying ground—that he lived near it —had known it a long while—that his father and grandfather were buried there—that he erected an enclosure around their graves, with the express permission of the defendant—that tombstones, erected to mark the place where dead bodies were buried, were torn off from their places, and scattered—that the defendant owned the land, and ploughed it within two years next before the presentment—that this was done by the defendant's employés, with his knowledge, and there were circumstances in evidence, that went directly to (1020) show, by reasonable inference, that it was done by his command. There was strong direct and circumstantial evidence, and such as warranted the jury in finding a verdict of guilty. The indictment having been held to be sufficient, the evidence was relevant and pertinent.

It was suggested on the argument, that the defendant, being the owner of the land, had the legal right to remove the monuments, however indecent, improper, and censurable it might be in a moral point of view, to do so. This view, it seems to us, is wholly untenable. It does not appear that the defendant was the owner of the land, but granting that he was, it was decent, orderly and proper to bury the

dead, they were buried, and the defendant, or those under whom he claimed title to the land, if he had title, must be presumed to have assented to and sanctioned the use of it for burial purposes, and having done so, he had not the right to remove the dead bodies interred there, or the memorial stones erected by the hand of affection and respect, and much less had he the right to desecrate the place, by felling the trees, ploughing the ground, and throwing down and scattering the grave stones. Such desecration shocks the moral sense of mankind, while it brings shameful reproach upon its authors. The law does not tolerate, but on the contrary forbids such acts, as criminal offences of serious moment.

Causes might arise that would require and justify the removal of dead bodies from one place of interment to another, but such removal should be made, with the sanction of kindred, in a proper way, or by legislative sanction.

It is not questioned that the Legislature has the authority to protect burial grounds, and monuments to the dead, from desecration and outrage of every kind, by declaring such acts criminal, and the imposition of adequate punishment by fine and imprisonment, one or both. The Court properly refused to arrest the judgment.

We discover no error in the record. Let this opinion be certi-
(1021) fied to the Superior Court according to law. It is so ordered.

No error. Affirmed.

Cited: *S. v. Foy,* 98 N.C. 746; *S. v. Watkins,* 101 N.C. 705; *S. v. Bryant,* 111 N.C. 694; *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N.C. 186; *King v. Smith,* 236 N.C. 171.

STATE v. J. P. HENSLEY.

Jurors—Challenge to the Array—Evidence—Homicide—Murder.

1. Where it appeared that the county commissioners had not revised the jury box at the last September meeting, and it also appeared that the jury boxes were not kept locked, and were kept in a place easily accessible to unauthorized persons: *It was held,* no ground of challenge to the array, it not appearing that they had been tampered with.
2. The fact that one person drawn on the special *venire* was dead, and that another had removed from the county, before the time when the commissioners should have revised the jury list, is no ground for a challenge to the array.

3. A challenge to the array, must be for some cause which affects the integrity and fairness of the entire panel, as partiality or unfairness to the person whose duty it was to select the panel.

4. *Quære*, whether a juror who has a bond to make title to him for a tract of land, on which he has made a payment, but a portion of the purchase money is still due, is a free-holder, so as to be competent to serve on the jury as a special *venire man.*

5. A reasonable number of jurors of any particular panel, may, in a capital felony, at the instance of the State, be required to stand aside, until all the other jurors of that panel shall have been called; but when all of the others have been called, the prisoner has the right to have the jurors so stood aside, tendered to him, or challenged by the State, before another *venire* is summoned.

6. The right to challenge jurors is for the purpose of obtaining a fair and impartial jury, and it was never intended by it to give either the prisoner or the State, the right to select certain men whom the party wishes to have as a juror.

7. So, where the Court allowed a challenge for cause to the State, to which the prisoner excepted, but a jury was obtained from the same panel, before the prisoner had exhausted his peremptory challenges; *It was held*, that the exception as to the cause of challenge, would not be passed on in this Court, as it would be presumed that a fair and impartial jury was obtained, for if it had not have been, the prisoner would have exercised his right to peremptorily challenge the objectionable juror.

8. If, in such case, the original panel had been exhausted, and the jury completed from another, the prisoner would have been entitled to have the juror challenged by the State, tendered, and if the cause of challenge by the State had been insufficient, it would have been error, entitling him to a new trial.

9. The prisoner, however, is not entitled at all events to have every juror on the panel, not challenged by the State, tendered, as this right is subject to proper exception, such as that a juror of the panel has died, or failed to appear, or has, for proper cause, been excused by the Court.

10. As a general rule, evidence is not admissible to show that the deceased was a man of violent temper, and a dangerous man, because the law protects the lives of violent men, as much so as those of a peaceable disposition, and evidence is also generally incompetent to show that the deceased had threatened the life of the prisoner.

11. The exceptions to these rules, are, 1st. When it appears that the killing was done in self-defence. 2nd. If the evidence of the killing be wholly circumstantial, and the character of the slaying is in doubt, and to make such evidence admissible in either case, it must appear that the prisoner knew of the violent character of the deceased, and of the fact that the threats had been made.

12. If the prisoner seek the deceased for the purpose of fighting with him, intending to kill him if he resists, and a fight ensues, and the prisoner slays the deceased, it is murder, although deceased puts the prisoner in danger of his life, during the fight.

13. So, if A assaults B first, and upon that assault, B assaulted A so fiercely as to put A, the aggressor, in great peril of his life, and A kills B, this is murder, and A cannot set up that he slew B in self-defence.

(1022) INDICTMENT for murder, tried before *Gudger, Judge,* and a jury, at the December Term, 1885, of the Superior Court of BUNCOMBE County.

The prisoner was indicted for the murder of one Wm. G. Haney.

On the calling of the special *venire,* which was drawn from the jury box in accordance with the provisions of Sec. 1739 of The Code, the prisoner challenged the array, and for cause of challenge showed, and the Court found the fact to be, that there was no revision of
(1023) the jury list at the September meeting, 1885, of the Board of Commissioners of Buncombe County. That the last revision was in September, 1884, and that the jury box was not locked when it was brought into Court; that the jury boxes were kept in the office of the commissioners, and that other persons had access to this office; that the jury boxes were sometimes kept locked, and sometimes unlocked, and that when the Clerk of the Board went after them, for the purposes of this trial, they were unlocked. It was not suggested that any names were taken from, or added to, the names in the boxes.

The office where the boxes were kept, had been used at the November Term, 1885, of the United States District Court, by the Marshall of such Court, as a place to assemble the witnesses in attendance, in order to pay them off.

The challenge to the array was not allowed, and the prisoner excepted.

As a further challenge to the array, the prisoner alleged, and the Court found as a fact, that one Peter Redmond, who was drawn on the *venire,* was dead, and had died before the first day of September, 1885, and also, that one M. W. Reeves, who was also drawn, had removed from the county before the said last mentioned date. The Court further found, that when these names were drawn from the box, the sheriff stated that the one was dead, and the other a non-resident, and the Court asked the prisoner's counsel, if they had any suggestion to make, the Solicitor asking the Court to determine upon the facts of the matter at once. Counsel for the prisoner said that they had nothing to suggest, and the names were then put on the list.

This cause of challenge to the array was likewise overruled, and the prisoner excepted.

One J. B. Whitesides, being drawn from the *venire,* was challenged by the State for cause, and stated on his *voir dire,* that he owned no land, nor did his wife. That he had a bond to make title to him, for a

lot of land, and had paid a portion of the purchase money, and was to have a title made to him when he paid the residue. That he lived on the land, and paid the taxes on it. The Court held the (1024) cause of challenge good, and the prisoner excepted.

The special *venire* being exhausted, the Court ordered the sheriff to summon a *venire* of fifteen from the by-standers, to which the prisoner excepted.

While the Sheriff was summoning this additional *venire*, it was ascertained that four names drawn on the first *venire*, had accidentally dropped from the box. By consent, they were put back into the box, and the jury was completed from them.

When the jury was completed, the prisoner had not exhausted his peremptory challenges.

The evidence was in substance as follows:

John Lawson, a witness for the State, testified that he knew both the deceased and the prisoner. That on Monday, the 3d day of November, 1885, between 6 and 7 o'clock a. m., he went to Lawson's store, and found Haney, the deceased, E. Recton, Tom Harkins, and Charles Harrison, standing in front of the store. That after he had been there for three or four minutes, he saw the prisoner come out of a store on the opposite side of the street. That he locked the store door, and put the key in his pocket, and then started down the street towards where the witness and the deceased were standing. That the prisoner walked nearly opposite to where the deceased and the witness were standing, and then turned suddenly and crossed the street. When he stepped on the sidewalk, a few feet from the deceased, he said, "Good-morning, gentlemen," to which the deceased replied, "Good-morning, Jim." That the prisoner then said to the deceased, "Gray, what did you hit me for with that stick?" The deceased answered, "What did you follow me, and catch me, and jerk me around the way you did for?" The prisoner then said: "You called me a d—ned rascal." The deceased answered, "You called me that first." The prisoner then said, "Gray, you ought not to have hit me." To this the deceased replied: "I know I ought not, Jim, and I am sorry that I did it, and I would not have done it for anything in the world;" and then added, "I haven't anything against you, Jim, and I (1025) don't want any fuss with you." That at this time, the deceased was standing on the sidewalk to the witness's right, and the prisoner to his left, and they were about six feet apart. After the deceased said, "I don't want any fuss with you, Jim," the prisoner stood about one minute, with both hands in his pockets, and then drew his right hand from his pocket and struck at the deceased, and said,

"Take that, d—n you." That the prisoner could not reach the deceased with his fist, and witness did not see anything in his hand, but as the prisoner made the stroke, he heard some missile pass him, in the direction of the deceased. That the prisoner immediately put his hand into his hip pocket, and drew a pistol. That the witness caught the prisoner to prevent him from shooting, and in the struggle they both fell to their knees, and about that time the prisoner began shooting. That he fired two shots while the witness held him, and then got loose from the witness, and jumped about three steps from him, and fired the third shot, which inflicted the mortal wound. That as soon as this shot was fired, the prisoner ran, but was soon arrested.

The witness further testified, that during the conversation between the prisoner and the deceased, the deceased, who was a cripple, seemed frightened, and his voice trembled, but that the prisoner seemed cool, and showed no sign of agitation.

Charles Harrison, a witness for the State, testified to substantially the same facts as the witness Lawson, except that he saw the rock, or other missile, which the prisoner threw at the deceased when he first struck at him. That when he threw the rock, he said: "D—n you, take that," and when he put his hand to his pocket to draw his pistol, he said: "D—n you, draw," or "D—n you, draw if you dare." That after the rock was thrown, the deceased took out his knife and attempted to open it, but it dropped to the ground, when he drew his pistol, which he held in both hands, and pointed at the ground. Witness noticed the prisoner while Lawson was attempting to hold him,

and saw him trying to present the pistol at the deceased,
(1026) around Lawson's body.

There was evidence introduced, tending to show that the deceased and the prisoner had had a fight on the Saturday evening previous to the homicide on Monday, and that the deceased had sticken the prisoner, and drawn blood. There was also evidence that the prisoner said, just after this difficulty, that no man could draw his blood and live, and that he would kill the deceased, and the fight was not over yet.

There was conflicting evidence as to whether the deceased fired or not at the prisoner, some of the witnesses saying that he did, and others that he did not. There was also evidence tending to show, that the pistol found in the hands of the deceased, after his death, was not discharged, every chamber being loaded.

The other material facts are set out in the opinion.

There was a verdict of guilty of manslaughter, and from the judgment thereon, the defendant appealed.

Attorney-General, for the State.
Mr. M. E. Carter, for the defendant.

MERRIMON, J. The causes of challenge to the array assigned, were not such as entitled the prisoner to have the whole panel of the special *venire* quashed. It is true that the county commissioners were very negligent in failing to revise and correct the jury lists, and to place the names of all persons in the county, eligible to be jurors, in the jury box; and the chairman of the Board of Commissioners, the Clerk, and the Sheriff, were equally negligent in respect to their respective duties as to the locking, custody, and safe-keeping of that box. Such neglect was highly culpable, and ought not to pass unnoticed by the proper authorities.

It is very important that the statutory regulations in respect to the selection of jurors, shall be faithfully observed. A due observance of them, greatly promotes the fair and intelligent administration of public justice, and besides, the plain commands of a statute should never be neglected or disregarded by those charged with (1027) special duties. But important as such regulations are, they are regarded as only *directory*— they have never been treated as *mandatory*—and it is only strictly necessary that the persons summoned to be jurors, shall be eligible as such in other material respects. It is only essential to obtain a fair and impartial jury, composed of eligible men.

It was not suggested, nor did it appear, that any name of a person found in the jury box, was improperly placed in it, or that any name was improperly taken from it, nor did it appear at the time the challenges were made, that the prisoner might probably be prejudiced, nor does it appear that he was in fact, in any material respect or degree, prejudiced by reason of the irregularities complained of.

Nor was the fact that one of the persons named in the *venire,* had died before his name was drawn, and that another had left the county before his name was drawn, and before the jury lists should have been revised and corrected, good cause for such challenge. That the names of these persons were in the jury box, was probably owing to the failure of the county commissioners to correct the jury lists, and they were inadvertently placed in the writ of *venire facias.* That the names of two persons had been improperly placed in the special *venire,* was surely no just reason why the whole panel should be quashed. These names ought simply to have been struck from it, as having been improvidently placed there, and if it turned out, that a jury could not be obtained from the panel, the Court ought then to have ordered a second special *venire,* or the necessary additional jurors might have

been obtained as allowed by law. The mere fact that the names of ineligible jurors, persons outside of the county, or persons dead, are named in the special *venire*, cannot destroy or impair the integrity of the whole panel, or in any way render it unlawful, and subject on that account, to challenge. Good cause of challenge to the array, must be such, as in contemplation of law, affects adversely, and renders ineligible the whole panel, as where the panel had been selected
(1028) and arrayed by one or more persons, charged to select the jury, who were moved, or probably were moved, by partiality in selecting them, and the like causes. *State v. Murphy*, 60 N. C., 129; *State v. Haywood*, 73 N. C., 437; *State v. Martin*, 82 N. C., 672; *State v. Speaks, ante*, 865.

The State challenged a juror for cause, and the latter, on his *voir dire*, stated that he owned no land—that, however, he lived on a lot of land and paid taxes for it—that he had a bond for title thereto, the title to be made to him upon the payment of the purchase money, and he had paid only a portion of it. It was insisted by the Solicitor for the State, that this juror was not a freeholder in contemplation of the statute, and he was not, therefore, eligible. The Court sustained the challenge, and the prisoner excepted.

Whether or not the cause of challenge thus assigned was good, may be questioned, but we need not decide that it was or was not, because the prisoner, having the right to challenge twenty-three jurors peremptorily, so challenged only nineteen, and the jury was obtained from the panel of the special *venire*. This case is in this respect, materially different from that of *State v. Shaw*, 25 N. C., 532. In that case, the juror challenged was of the original panel, and when this panel was exhausted, and before calling any of the jurors of the special *venire*, the prisoner did not have opportunity to accept or reject the juror challenged, or discharged. No such question arises here.

It was in effect held, in *State v. Arthur*, 13 N. C., 217, and it has been uniformly so held in many subsequent cases, that a reasonable number of jurors of a particular panel may, at the instance of the State, be required to stand aside, until all the other jurors of that panel shall be called and accepted or rejected, and then the State must challenge for cause, or challenge peremptorily, if it shall not before that time have exhausted its right in this respect, the jurors so required to stand aside.
State v. Benton, 19 N. C., 208; *State v. Lytle*, 27 N. C., 58;
(1029) *State v. Craton*, 28 N. C., 164; *State v. Cockman*, 60 N. C., 484; *State v. Jones*, 88 N. C., 671. These, and other like cases, rest upon the ground, that the right of challenge is intended to secure a fair and impartial trial, and to that end, to exclude from the jury, persons

objectionable for one or another just cause. It is no part of the purpose of the right of challenge, to afford the prisoner opportunity to select a particular juror or jurors, most likely to acquit, or to give him undue advantage. He has no right to select, and have his own choice of jurors; he has only the right to object to twenty-three, without assigning any cause, and indefinitely, for cause allowed by law to be good. His right is to have a jury, fair, impartial, and free from just exception, and when the jury is selected without objection, the prisoner having the right to object further, it must be presumed conclusively, that such a jury has been obtained. His failure to object further, when he could, is an implied admission—declaration—on his part, that the jury is a fair and unexceptionable one, though perhaps not his choice. This is such a jury as the law contemplates and requires.

We are not to be understood as saying, that the right of the prisoner to have the jury taken from a particular panel, if it shall not be properly exhausted before passing to a second, or another one, can be abridged. We do not so decide, but the contrary, and hence, if a juror of a particular panel were improperly rejected or made to stand aside at the instance of the State, and the prisoner did not have opportunity afforded him to accept, or challenge such juror for cause, or peremptorily, if his right in this respect had not been exhausted, this would be error, and upon exception properly taken, ground for a *venire de novo*. The reason for this rule seems to be, that the prisoner has had opportunity allowed by the law to make proper inquiry, and consider the fitness, or want of fitness of the jurors composing the panel, and this may be of just advantage to him in obtaining an unobjectionable jury. *State v. Shaw, supra; State v. Washington,* 90 N. C., 664.

The prisoner is not, however, entitled at all events, to accept or challenge every juror named in the particular panel, not (1030) challenged peremptorily, or successfully for cause by the State. This right is subject to proper exception, such as that a juror had died, or had failed to appear, or where the Court, for any reasonable cause, had discharged one or more.

In this case, the prisoner was not entitled to have the particular juror, who was successfully challenged by the State, nor to select a jury of his own choice—he only had the right, as we have seen, to except to objectionable jurors, and to have an unobjectionable jury. The conclusive presumption is, that such a jury was obtained, because, the prisoner accepted jurors of the panel tendered, until the jury was completed, while he yet had the right to challenge four peremptorily. If one or more were not acceptable to him, it was his fault that he did

not exercise his right to object. Obviously he might have done so. So that, whether the challenge of the State complained of was properly or improperly allowed, an unexceptionable and lawful jury was obtained. That the challenge was allowed presently when made, instead of directing the juror to stand aside until all the other jurors of the panel had been called and accepted or rejected, cannot alter the case, because an unobjectionable jury was obtained, and the contingency in which the prisoner had the right to have him tendered, did not arise. The exception cannot, therefore, be sustained.

Evidence was offered by the prisoner and received, tending to prove that the deceased was a violent, quick-tempered man; that he frequently engaged in brawls, and resorted to deadly weapons, but this evidence was quite conflicting, and the weight of it tended mainly to show, that he was quarrelsome when excited by spiritous liquors. The prisoner also offered to show by the witness, that the deceased, on the day before the homicide, said to the witness, that he—Haney—or Hensley "had to die before the election was over." This was not communicated to the prisoner. The Court declined to receive such evidence, and the prisoner assigns this as error.

(1031) Generally, evidence to prove that the deceased was a person of bad temper, quarrelsome, violent and savage in his nature and habits, is inadmissible, upon the ground that the law no more allows the life of such person to be taken unlawfully, than that of the best of men. Its protecting arm extends to, and embraces all classes and conditions of men, without regard to their imperfections and infirmities, except in possible cases of outlawry. Such evidence ordinarily is irrelevant—does not tend to prove the issue, and might—generally would—mislead the jury to the prejudice of the prosecution. And evidence of threats of the deceased, are for like reasons, generally inadmissible. The mere fact that he made threats against the prisoner, could not justify the latter in taking his life. And especially, such evidence would not be admissible, when the prisoner is guilty of manslaughter or murder, for in no case can the prisoner be excused for committing the latter crime, nor can he be justified in voluntarily engaging in mutual combat with the deceased, and slaying him, although the law, in the latter case, pays such regard to the frailty of his nature, as to mitigate the killing to the offence denominated voluntary manslaughter. When the slaying is done with a felonious intent, evidence of the character of the deceased, and threats made by him, is not material, and is therefore inadmissible. *State v. Lilly*, 25 N. C., 424; *State v. Scott*, 26 N. C., 409; *State v. Barfield*, 30 N. C., 344; *Bottoms v. Kent*, 48 N. C., 154; *State v. Hogue*, 51 N. C., 381; *State v.*

Chavis, 80 N. C., 353; *State v. McNeill*, 92 N. C., 812; Wh. Am. Cr. L., 296; Wh. Am. Law. of Hom., Sec. 217 *et seq.*, to Sec. 249.

But there are exceptions to the general rule of law just stated, applicable to cases peculiar in the facts and circumstances attending them: First, if it appears from the evidence, that the prisoner may have slain the deceased in order to save his own life, or himself from enormous bodily harm or peril, and it is doubtful whether the killing was excusable homicide or manslaughter, it is then competent to give evidence of the violent and dangerous character of the deceased, and that he made threats against the prisoner, if the latter had knowledge of such character and threats. Second, if the evidence, in respect to the homicide, tending to prove the guilt of the pris- (1032) oner, is wholly circumstantial, and the character of the slaying is in doubt, such evidence will be competent.

In cases embraced by these exceptions, evidence of the violent and dangerous character of the deceased, and his threats, tends to remove the doubt. Such facts are some evidence, to be taken in connection with other evidence, tending to prove that the prisoner fought in defence of his life, or to save himself from enormous bodily harm, and that he did no more than the law allowed him to do, in view of the peril he encountered. In the absence of positive evidence, it is not an unreasonable inference, that the prisoner did not seek, attack, and slay the deceased, a violent and dangerous man, who had made threats against him, without just and adequate cause. The object of such evidence, is to let the jury see, as nearly as may be, all the facts attending the homicide, and the considerations that most likely at first deterred the prisoner from attacking, and at last drove him, when himself was attacked by the deceased, to slay him. But if the prisoner did not have knowledge of such character of the deceased, then such evidence would not be competent, because it could not be inferred, that he acted upon facts of which he was ignorant.

And so also, if the evidence as to the facts and circumstances of the homicide, are altogether circumstantial, and leave the character of the offence in doubt, then such evidence is admissible, and for the reasons already stated. The Court must determine when such evidence is admissible. *State v. Turpin*, 77 N. C., 473; *State v. Mathews*, 78 N. C., 523; *State v. McNeil, supra; Pritchet v. The State*, 22 Ala., 39; *Monroe v. The State*, 5 Ga., 85; Hor. & Thomp., Self Defence Cases, under the heads, "Character of the deceased for violence," 949, and "Threats," 987.

The evidence in this case, does not bring it within either of the exceptions stated above. The deceased did not seek (1033)

and attack the prisoner, or offer to do so, and thus render it necessary for the latter to kill him, in order to save his own life, or to prevent enormous bodily harm to himself; nor was the evidence as to the homicide circumstantial, nor was the character of the offence left in doubt. On the contrary, the whole of the evidence as to the slaying, was positive, and the prisoner himself sought the deceased, insulted and assaulted him, in a fierce and violent manner, in the presence of several reputable persons.

It is our duty to examine and consider the evidence, sent up as part of the case stated on appeal, in order to determine the merits of the alleged errors assigned, and we have done so, with that earnest care, the gravity of the case requires. Viewing the whole of it in the most favorable light for the prisoner, we cannot hesitate to conclude, that he was at least guilty of manslaughter.

Several witnesses, who were immediately present at, and saw the homicide, and all that was then done by the prisoner and the deceased and heard what each of them said to the other in that connection, gave substantially the same account of what was said and done. These witnesses were not contradicted in any material respect; they were unimpeached, and there was evidence of their reputable character.

It appears, that on a Saturday night, the deceased and the prisoner quarreled and fought, and as a result, the latter bled freely from a slight wound. That night, he sought and failed to obtain revenge, but made threats then and the next day, that he would have it. On the next Monday morning, about the hour of six or seven o'clock, the deceased and some other persons, were standing on the sidewalk of a public street, in front of a store. The prisoner was seen to come to the door of a store, thirty-five or forty yards distant from them, and look towards them. He immediately retired from the door out of sight—he soon reappeared, came out of the store, and closed the door. Then, with one hand in his pocket, he walked down the street, to a point
(1034) nearly opposite to the place where the deceased and the other persons with him were standing—he then turned suddenly and crossed the street, and as he stepped on the sidewalk, a few feet from the deceased, he said, "good morning gentlemen." This salutation was returned by several of the party, the deceased saying "good morning Jim." The prisoner then said, it seems at once, to the deceased, "Gray, what did you hit me for with that stick?" The deceased replied, "what did you follow me, and catch me and jerk me around, the way you did, for?" The prisoner said, "you called me a d—d rascal"—deceased said, "you called me that first." Prisoner said in reply, "Gray, you ought not to have struck me." Deceased said, "I know I ought not, Jim, and I am sorry I did, and I would not have done it

for anything in the world, I haven't anything against you Jim, and don't want any fuss with you." Another version of this colloquy is, that the prisoner said, "Gray, what did you hit me with that stick for Saturday night?" Deceased said he was sorry he had done it, and hated he had done so, and would not do it again for the world. Prisoner and deceased were about six feet apart, a person standing between them. Deceased was lame in one leg, and his voice trembled, as if he were excited by fear—he seemed frightened. The prisoner said, "Yes, by G—d, I guess you are sorry," jerked his hand out of his pocket, and threw a stone or some other missile, violently at deceased, missing him, saying, "take that damn you," or, "damn you, take that." The deceased was seen, just at that time, to put his hand to his pocket. The prisoner at once put his hand to his hip pocket, and drew a pistol, saying to deceased, "damn you, draw it," or, "draw if you dare." Deceased at first drew a small knife from his pocket; tried to open it, but it fell from his hands to the ground. He also drew a pistol, and endeavored to use it, holding it in both hands. It is not certain that he fired it at all. It may be that he fired it once. As to this, the evidence is conflicting. A witness, seeing the prisoner about to fire his pistol, seized him, trying to prevent him from doing (1035) so, and the two, in the struggle, came to their knees, the prisoner endeavoring all the while to shoot the deceased, and firing two shots. At last, wrenching himself loose from the witness, he stepped off the sidewalk into the street, and fired the fatal shot, the deceased falling to the ground. As the prisoner turned to get away, another of his shots went into the ground.

Now, if the prisoner sought the deceased for the purpose of revenge, and brought on the combat, intending to kill him if he resisted, and he did kill him, then he was guilty of murder, notwithstanding he may have encountered great peril from the deceased, because, in that case, the slaying was attributable to the preconceived malice. *State v. Hill,* 20 N. C., 629; *State v. Martin,* 24 N. C., 101; *State v. Lane,* 26 N. C., 113; *State v. Hogue,* 51 N. C., 381.

Manifestly, there was evidence of such purpose. The prisoner was sorely dissatisfied with the result of the fight of the Saturday night previous—the loss of blood galled him—he repeatedly declared his purpose to have blood and revenge for the insult and injury done him. Armed with a pistol and a missile of some sort, he sought the deceased, cursed and insulted him grossly, and threw at him violently the missile he had concealed in his pocket, notwithstanding the ample and submissive apology of the deceased. Seeing the latter about to put himself on the defensive, or resent the insult offered him, he drew his pistol, and challenged the deceased defiantly to draw his weapon. The

meaning of this conduct on his part, in the light of other surrounding facts, could scarcely be mistaken. It is plain that the jury might not unreasonably have rendered a verdict of guilty of murder; but they mercifully rendered that of manslaughter.

In no possible, just, and reasonable view of the evidence, can it be contended, that the prisoner fought *se defendendo*. Armed, he deliberately went to where the deceased was, brought on and began the encounter, under circumstances that plainly indicated his unlawful and criminal, if not as well, his bloody purpose. The fact that a
(1036) bystander seized and endeavored unsuccessfully to prevent him from using his pistol, could not excuse him from the guilt of manslaughter, even if such interference increased his peril, and thus rendered it necessary for him to kill the deceased, in order to save himself, because he unlawfully and criminally provoked and began the combat, and he cannot be allowed to take advantage of his own wrong, and take shelter behind his own lawless conduct. It is said by Lord Hale, that "if A. assaults B. first, and upon that assault, B. re-assaults A., and that so fiercely, that A. cannot retreat to the wall or other *non ultra*, without danger of his life, and then A. kills B., this shall not be interpreted to be *se defendendo*, but to be murder, or simple homicide, according to the circumstances of the case; for otherwise, we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*. The party assaulted indeed, shall, by favorable interpretation of the law, have the advantage of this necessity, to be interpreted as a flight, to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant, makes his flight impossible; but he that first assaulted, hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong, to gain the favorable interpretation of the law, that that necessity which he brought on himself, should, by way of interpretation, be accounted as a flight, to save himself from the guilt of murder or manslaughter." 1 Hale Pl. Cr., 482.

On the same subject, Sergeant Hawkins says: "Neither shall a man, in any case, justify the killing of another, by pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavor to re-take it." 1 Hawk. Pl. Cr., 82, 83. *State v. Brittain*, 89 N. C., 500; *Adams v. The*
(1037) *People*, 47 Ill., 376; *Stancifer's case*, 6 Cal., 407; *State v. Linney*, 51 Mo., 40; *Vaiden v. Commonwealth*, 12 Grat., 717; Hor. & Thomp. Cases on Self-defence, 985.

But if such excuse could in any possible case be allowed, it could not in this. It is by no means certain that the prisoner's peril was at all increased by the interference of the by-stander, to prevent him from using the pistol. While the struggle continued, he manifested not the slightest disposition to desist from the fight, or act upon the defensive—on the contrary, while it continued, he manifested the fierce purpose to persist in the combat, and twice fired his pistol at the deceased, missing him. And as soon as he freed himself from restraint, instead of retreating, or showing the slightest disposition to do so, he stepped off the side-walk into the street, and fired the fatal shot. Besides, at no time during the deadly struggle, did the deceased act in such a bold, fearless and determined manner, as to place the prisoner in great, much less extreme, peril. He was lame in one of his legs—he seemed from the first to be alarmed, and anxious to avoid a conflict. When the missile was thrown at him, he at first took his knife from his pocket—could not open it, and it fell to the ground—he promptly then drew his pistol, and held it awkwardly in both hands. It is doubtful whether he discharged it at all—he certainly did not more than once, and without effect. He accomplished in the fight nothing—did not touch the prisoner. A dangerous antagonist, would have discharged every chamber of the pistol at his adversary under such circumstances.

There is no reasonable ground—not the slightest—for insisting that the prisoner's case should be treated as if he had abandoned the fight, fled to the wall, and slain the deceased to save his own life, or himself from great bodily harm. If he was not guilty of murder, it is much clearer, that he cannot be heard to insist that he fought *se defendendo*.

In each of the special instructions asked for by the prisoner, the Court was requested to tell the jury, that if they should (1038) find the facts to be as therein suggested, then they should render a verdict of not guilty. We have seen, that the evidence did not, in any aspect of it, warrant such instructions. The Court ought not to have given the two instructions granted, and it properly denied the others.

There are several other exceptions specified in the record, which the counsel for the prisoner submitted without argument. Upon a careful examination of them, we find them without merit, and we do not deem it necessary to advert to them, further than to say that they cannot be sustained.

The action of the Court and jury towards the prisoner, in the discharge of their respective duties, was beneficent and merciful, and he has no just or reasonable ground of complaint at it.

There is no error. Let this opinion be certified to the Superior Court, to the end that that Court may proceed to enter judgment according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Gooch, 94 N.C. 1006; *S. v. Jones,* 97 N.C. 472; *S. v. Freeman,* 100 N.C. 432; *S. v. Potts,* 100 N.C. 462; *S. v. Preston,* 104 N.C. 736; *S. v. Pritchett,* 106 N.C. 669; *S. v. Brogden,* 111 N.C. 657; *S. v. Whitt,* 113 N.C. 718; *S. v. Rollins,* 113 N.C. 732; *S. v. Stanton,* 118 N.C. 1183; *S. v. Smarr,* 121 N.C. 670; *S. v. Byrd,* 121 N.C. 687, 688; *S. v. Perry,* 122 N.C. 1021; *S. v. Kinsauls,* 126 N.C. 1096; *S. v. Medlin,* 126 N.C. 1130; *Moore v. Guano Co.,* 130 N.C. 231; *S. v. Bohanon,* 142 N.C. 697; *Hodgin v. R.R.,* 143 N.C. 95; *S. v. Banner,* 149 N.C. 521; *S. v. Peterson,* 149 N.C. 534; *S. v. Kimbrell,* 151 N.C. 704, 706; *S. v. Blackwell,* 162 N.C. 680; *S. v. English,* 164 N.C. 507; *S. v. Johnson,* 172 N.C. 924; *S. v. Little,* 174 N.C. 802; *S. v. Carroll,* 176 N.C. 731; *S. v. Lewis,* 177 N.C. 558; *S. v. Hines,* 179 N.C. 759; *S. v. Mallard,* 184 N.C. 673; *S. v. Levy,* 187 N.C. 584; *S. v. Holland,* 193 N.C. 719; *Butler v. Ins. Co.,* 196 N.C. 205; *S. v. Kirksey,* 227 N.C. 447; *S. v. Koritz,* 227 N.C. 555.

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