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NORTH CAROLINA REPORTS

VOL. 95

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER TERM, 1886.

REPORTED BY
THEODORE F. DAVIDSON
(VOL. 4)

ANNOTATED BY
WALTER CLARK IN 1909
(FURTHER ANNOTATIONS ADDED, 1935)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

OCTOBER TERM, 1886

H. H. COOK, Adm'r, v. WM. E. MOORE, Ex'r.

Statute of Limitation—Computation of Time.

Where a judgment was rendered on the 20th of October, 1873, and an action was brought on the judgment on the 20th of October, 1883, *it was held* that the statute barring actions on judgment in ten years, was a defence to the action.

(*Barcroft* v. *Roberts*, 92 N. C., 250, cited and approved).

CIVIL ACTION, tried before *Gudger, Judge,* and a jury, at June Term, 1886, of HERTFORD Superior Court.

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

The facts appear in the opinion.

Mr. B. B. Winborne, for the plaintiff.

No counsel for the defendant.

ASHE, J. This action was brought upon a judgment rendered on the 20th of October, 1873, in favor of Peter S. Williams against G. C. Moore, who died on the 4th day of May, 1880, having made a last will and testament, in which he appointed the defendant, Wm. E.

(2) Moore, executor, who was duly qualified as such on the 2d day of August, 1880. The action was commenced by suing out the summons on the 20th day of October, 1883.

The original plaintiff, Peter S. Williams, having died intestate pending the action, on the 25th day of December, 1884, A. H. Cook, the present plaintiff, was duly appointed his administrator on the 26th day of February, 1885, and was made a party to this action. The defendant, among other defences set up in his answer, pleaded in bar of the plaintiff's action, "that more than ten years have elapsed since the rendition of the judgment sued on."

The following issue was submitted to the jury, to-wit: "Was the plaintiff's action commenced ten years from the rendition of the judgment declared in?" To which they responded, "No."

Upon the finding of the jury, the Court adjudged that the plaintiff's action was barred by the statute of limitations, and that the defendant go without day, and recover his costs.

The question in this case upon which its determination turned, was whether the action which was brought upon a judgment of the Superior Court, was barred by the statute of limitations?

It is provided by §152 of The Code, that actions upon a judgment or decree of any Court of this State, or of the United States, or of any State or Territory thereof, shall be commenced within ten years after the date of the rendition of said judgment or decree.

The judgment upon which the action was brought, was rendered on the 20th day of October, 1873, and the action commenced on the 20th day of October, 1883, and whether the action is saved from the operation of the statute, depends upon the question, whether the day on which the judgment was rendered is to be included or excluded in the computation of the time.

In the ordinary computation of time, there are no fractions of a day, and the day on which an act is done must be entirely excluded or included. *Angel on Limitations,* §50; *Wood on Limitations,* §54.

(3) This rule as to the indivisibility of a day is never departed from, except in those cases where questions as to the priority of claims arise, depending upon the order of events occurring on the same day. But even in those cases where the general rule applies, as when statutes of limitation fix the periods which date from the time of the accrual of the causes of action, there is some diversity in the decisions of the Courts, whether the day of the accrual of the cause of action is to be excluded or included. Yet the decided current of the authorities is, that the day of the accrual is to be excluded. So in the computation of time from an act done, the day on which the act is done will be excluded.

Mr. Angel, in his work on Limitations, §49, makes the distinction, that when the expressions are *from the date,* the rule is, if a private interest is to commence *from the date,* the day of the date is included, but if they are used merely to *fix a terminus* from which to commence, the day is in all cases excluded.

In *Cornell* v. *Moulton,* 3 *Denio* (N. Y.), 42, an action was brought upon a note, payable on demand. The note was dated February 14th, 1839, and the action was brought thereon February 14th, 1845.

The statute of limitations in that State being six years, the Court held that the action was barred. *Bronson, C. J.,* who spoke for the Court, said: "Our cases all go to establish one uniform rule, whether the question arises upon the practice of the Court or the construction of a statute, and the rule is, to exclude the first day from the computation." The same rule has been announced by their respective Courts, as obtaining in the States of Connecticut, Pennsylvania, Massachusetts, Maine, Kentucky and Missouri. See Wood on Limitation of Actions, pp. 96, 97, and notes. It is considered in Indiana to be the general rule, that when the computation of time is to be made from an *act done,* the day on which the act is done is to be excluded. *Jacob* v. *Graham,* 1 Black (Ind. R.), 393.

The same rule is maintained in the Courts of Pennsylvania, Massachusetts, Maine and New York. Angel on Limitations, §50. And in New Hampshire when in the computation of time from a date, or *from the day of the date,* the day of the date is to be excluded. (4) *Blake* v. *Crowningshield,* 9 N. Hamps., 598.

The same rule is adopted and maintained in Pennsylvania, Kentucky, Indiana, Illinois, Massachusetts, New York and Maine. *Wood on Limitations of Actions,* p. 97. Without going out of our State, we have a statute in regard to the computation of time, to be found in The Code, ch. 8, §596, which reads, "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

The only case we have found bearing upon the construction of this section, is *Barcroft* v. *Roberts,* 92 N. C., 250, which was a case involving the construction of §966 of The Code, which required petitions to rehear to be filed during the vacation succeeding the term of the Court at which the judgment was rendered, or *within twenty days after the commencement of the succeeding term.* The Court held, in computing the time, that the first day was to be excluded. Section 596 was not expressly referred to in the opinion of the Court, but the decision was founded upon the application of that section to the limitation contained in section 966; and if it applies to such a case, it must certainly do so to

a case like that under consideration. We think they both come within the meaning of section 596.

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

No Error. Affirmed.

Corrected, S. c., 100 N. C., 294. *Cited, Jenkins v. Griffin,* 175 N. C., 187.

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(5)

W. H. EDWARDS et al. v. JAMES H. COBB, Ex'r.

Clerk of Superior Court—Executors and Administrators—Jurisdiction.

1. Although the *office* of "Probate Judge" is abolished, the powers and jurisdiction of that officer are now exercised by the Clerks of the Superior Court—not as the servant or ministerial officer of or acting as and for the Superior Court, but as an independent tribunal of original jurisdiction.
2. The Clerks of Superior Courts have jurisdiction of proceedings for the removal of executors and administrators.
3. Whether the Superior Courts have such original jurisdiction, *Quære.*
4. The practice upon application to remove executors and administrators, discussed by *Merrimon, J.*

(*Brittain* v. *Mull,* 91 N. C., 498; *Barnes* v. *Brown,* 79 N. C., 401; *Simpson* v. *Jones,* 82 N. C., 323; *Murrill* v. *Sandlin,* 86 N. C., 54; *Taylor* v. *Biddle,* 71 N. C., 1; *In re Brinson,* 73 N. C., 278; *McFayden* v. *Council,* 81 N. C., 195; *Rowland* v. *Thompson,* 64 N. C., 714, cited and approved).

This was an APPLICATION for the removal of an executor, begun before the Clerk of GREENE Superior Court and heard by *Connor, Judge,* upon appeal, at Chambers, on 16th May, 1886.

Devereux Cobb died in July, 1883, in the county of Greene, leaving a last will and testament, which was duly proven, and James H. Cobb, the defendant, qualified as executor thereof, and thereupon took possession of considerable estate.

The *feme* plaintiff is a legatee named in the will, and the plaintiff Baker is a creditor of the estate.

At the instance of the plaintiffs, on the 22d of February, 1886, the Clerk of the Superior Court of the county named, issued a notice to the defendant to appear before him within ten days next after the service of the notice, and show cause why he should not be required to give bond as such executor, and on failure to do so, why he should not be removed from his office as such executor.

At the time of the issuing of the notice, the plaintiffs filed with the Clerk a verified complaint alleging the insolvency of the defendant, his extravagance and negligent management of the estate in his hands, as well as his own business affairs—that he received as executor personal property of the value of $5,000—that the greater part thereof he had converted to his own use, and had failed to pay most of the debts—that he had paid a debt of the seventh class, to the prejudice of creditors of the same and other prior classes—that he had paid a legatee $100 and thereby committed a *devastavit*—that he had received rents of the lands of the testator amounting to $3,000—that he had wasted (6) and misapplied the assets—that he had failed and neglected to make and file accounts of receipts and disbursements of the assets, and of his disposition of the property, and that he had not filed any complete and true inventory of the property and effects received by him as executor, &c.

The defendant appeared before the Clerk and filed his verified answer to the complaint, in which he admitted that he had paid a creditor of the seventh class and had paid one of the legatees $100, but he denied all the other material allegations, and alleged that he had filed a proper inventory, had rendered to the Clerk proper accounts of his disposition of all the personal property, that he had fully administered the assets that had come and ought to have come into his hands, and that there yet remained debts unpaid, &c., &c.

Thereupon the defendant moved before the Clerk that the material issues of fact raised by the complaint and answer so filed, be transferred for trial at the next term thereafter of the Superior Court. The Clerk denied this motion, and without hearing any evidence, except the complaint and answer, so far as appears, found the issues in favor of the plaintiffs, and made an order requiring the defendant to file a bond as executor within twenty days, and on failure to do so, that he be removed from his office.

From this judgment, the defendant appealed to the Judge at Chambers, who, without deciding any question of law, and without instructions, remanded the matter to the Clerk. Thereupon, the Clerk, on motion of the plaintiffs, made the following order, on the 15th of April, 1886:

"This cause having been remanded, and it appearing to the satisfaction of the Court that James H. Cobb, executor, is insolvent and incompetent, and has made no proper returns of the expenditures and assets of the estate of Devereux Cobb, it is adjudged that he be required to give a bond with security in the sum of $3,000, conditioned for the proper administration of the estate of his testator, within ten days after service of this judgment on him."

(7) This order was served on defendant and he appeared within the ten days mentioned, and gave notice of appeal from said judgment. On April 26th, the defendant not having appeared as required by said order, the Clerk made the following order, on motion of plaintiffs' attorney, to-wit:

"Whereas, an order was heretofore issued, requiring Cobb, as executor to give bond (as stated above); And whereas, said order has been served on him, and ten days have elapsed since said service; and whereas, Cobb has failed to file said bond as required: It is adjudged that his letters testamentary, as executor of Devereux Cobb, be revoked, and on motion of plaintiffs' attorney, W. H. Edwards is hereby appointed administrator with the will annexed of Devereux Cobb, upon his giving the necessary bond, and that letters of administration issue."

From this order the defendant appealed to the Judge at Chambers, who affirmed the judgment of the Clerk. The defendant excepted, and appealed to this Court.

Mr. Theodore Edwards, for the plaintiffs.

Messrs. Geo. V. Strong, T. C. Wooten and *Jno. Devereux, Jr.,* for the defendant.

MERRIMON, J. (after stating the facts as above). In this, and like cases, the Clerk of the Superior Court does not act in the place of, and for that Court, but he exercises jurisdictional functions conferred upon him as Clerk, separate and distinct from his duties as Clerk of the Court. Although the office of *Probate Judge* is abolished, nevertheless *jurisdiction* over matters of probate, and some other matters—particularly specified—is conferred upon the Clerk. The scope of his office is enlarged, so as to embrace this authority, distinct from his other ordinary duties, and he exercises judicial authority in the way prescribed, as certainly as if he were denominated Judge of Probate, and were not such Clerk. It seems that the Legislature deemed it wise, on the score of economy and convenience, to place the jurisdiction in respect (8) to matters of probate, in close connection with the Superior Courts, so that issues of fact arising before the Clerk, might be tried by a jury under the supervision of these Courts, and errors of law, and errors in other respects, of the Clerk, might be promptly corrected by them. In case issues of fact, to be tried by a jury, shall be raised, these must be *transferred* to the Superior Court for trial at the next succeeding term thereof, and if issues of law shall be raised, the complaining party may *appeal* to the Judge having jurisdiction, either in vacation or in term.

It will be observed that the jurisdiction of the Clerk is distinct from that of the Superior Court, and therefore, it is proper for the latter to *remand* the issues when tried, for other proper proceeding or matters in a proper case, to the Clerk. *The Code,* §§102, 116; *Brittain* v. *Mull,* 91 N. C., 498.

The Clerk of the Superior Court clearly had original jurisdiction of the application to remove the defendant as executor, and power to remove him in a proper case. It has been so decided repeatedly, and it is so expressly provided by statute. *The Code,* §§103, par. 3, 1397, 1400, 2171; *Barnes* v. *Brown,* 79 N. C., 401; *Simpson* v. *Jones,* 82 N. C., 323; *Murrill* v. *Sandlin,* 86 N. C., 54. Whether the jurisdiction of the Clerk is exclusive in such case, or whether the Superior Court, in administering principles of equity, may exercise the like original jurisdiction, are questions we are not now called upon to decide.

There is no statutory method of procedure prescribed, to be observed by the Clerk in the exercise of his authority in matters of probate. His proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. *The Code,* §112. In cases like the present one, the application might be made by any person rightfully interested, by petition or motion in writing, or formal complaint, setting forth and alleging the grounds of (9) the application, supported by one or more affidavits; and the allegations thus made, might be met by demurrer in a proper case, or by answer, denying or admitting the matters alleged, and alleging all proper matters of defence, supported by affidavits.

In this and similar cases, the proceeding is begun by an order made by the Clerk to show cause, &c., a copy or notice of which must be served on the party charged or proceeded against. *The Code,* §§108, par. 4, 2171.

This proceeding is neither a civil action nor a special proceeding under the Code of Civil Procedure. Its purpose is not to litigate the alleged rights and liabilities of adverse parties, settle the same, and give judgment against one party in favor of another, but it is to require one who is charged by the law with special duties and trusts, for whosoever may be interested, to show cause why, in some cases, he shall not give such bond as may be required of him, conditioned for the faithful discharge of his duties, and in others, why he shall not be removed from his place or office, because of some disqualification, malfeasance, misfeasance or nonfeasance, that disqualifies or unfits him in that respect,

and renders it necessary that he shall be promptly removed from it. While ordinarily, some person or persons rightfully interested, should make the application for such removal, suggest the grounds for it, and produce the appropriate and necessary proofs in that behalf, and become parties to a proceeding for the purpose, and responsible for costs, the Clerk, in the exercise of his jurisdictional powers, requires the executor or administrator, as the case may be, to answer before him and show cause, or be removed from his office, to the end that the interests of the estate may be subserved and the rights of parties interested protected by his removal, and the appointment of a suitable person in his stead. The Clerk has power, as we have seen, for proper cause, to make such removal, and pending any litigation in that respect, to make all necessary and interlocutory orders for the protection and better securing of the estate. *The Code,* §1521; *Taylor* v. *Biddle,* 71 N. C., 1; *In re Brinson,* 73 N. C., 278.

(10) Ordinarily, in such matters, issues of fact do not arise—only questions of fact are presented, and the Clerk hears the matter before him summarily—he finds the facts from affidavits and competent documentary evidence, and founds his orders and judgments on the same. He may, in his discretion, in some cases, direct issues of fact to be tried by a jury, and transfer them to the Superior Court to be tried, as directed by The Code, §116, but regularly he will not. No doubt, in some cases, he ought to do so. And also, by virtue of this section, the executor or administrator, or any person interested, may appeal from the findings of fact and the judgment of the Clerk, to the Judge having jurisdiction in term time, or in vacation, and the Judge may review the findings of fact, if need be, and decide such questions of law as may be raised, affirm, reverse or modify the order or judgment of the Clerk, and remand the matter to him for such further action as ought to be taken. From the judgment of the Judge, an appeal would lie to this Court, and errors of law only should be assigned. The Judge in reviewing the findings of fact, might, in his discretion, direct proper issues of fact to be tried by a jury, for his better information, and in some cases it may be he ought to do so.

The statute conferring power on the Clerk to remove executors and administrators, does not prescribe in terms how the facts in such matters shall be ascertained, but it plainly implies that he shall act promptly and summarily. Applying general principles of law, the method of procedure we have above indicated, or one substantially like it, is the proper one. *Rowland* v. *Thompson,* 64 N. C., 714.

Indeed, it has been in a measure repeatedly recognized. *McFayden* v. *Council,* 81 N. C., 195; *Murrill* v. *Sandlin,* 86 N. C., 54.

The Clerk, in this case, obviously treated the verified complaint and answer as affidavits, as he might do. In addition, he had immediate access to the records of his office, and might *ex mero motu* look to the same, and see whether the defendant had filed such inventories, accounts and reports, as the law required him to do. Upon such evidence he found the facts, and made the first order appealed from by the (11) defendant to the Judge at Chambers. The latter, for some reason not stated, remanded the matter. Thereupon, the Clerk, upon the same, or a like finding of facts, made a second order requiring the defendant to give a bond, conditioned that he would duly and faithfully administer the estate in his hands. The defendant gave notice of an appeal, but it seems he did not prosecute the same. He failed to give the bond required of him within the time designated in the order, and the Clerk made the order of removal, and appointed an administrator *de bonis non cum testamento annexo* in his stead. From this order he appealed to the Judge—upon what grounds does not appear. No exceptions as to the findings of fact are set forth, nor are errors of law assigned.

The Judge simply affirmed the judgment of the Clerk. In this we perceive no error. The judgment of the Clerk was not void—he had authority to find the facts, and upon his findings there was cause for the removal. He found that the defendant was insolvent and incompetent—that he had made no proper returns of the assets in his hands, or how he had disbursed the same, and in effect that he had mismanaged the estate. This was good and sufficient cause for the order of removal. As no errors are assigned, and the Clerk has made findings of fact and orders that he had authority to make, the judgment must be affirmed and the matter remanded to the Superior Court, with directions to that Court to remand the same to the Clerk for such further action before him as may be required in that behalf.

No Error. Affirmed.

Cited: Click v. R. R., 98 N. C., 392; *McLaurin v. McLaurin,* 106 N. C., 333; *Lewis v. Roper,* 109 N. C., 20; *In re Palmer's Will,* 117 N. C., 139; *In re Battle,* 158 N. C., 390; *In re Johnson,* 182 N. C., 525; *Clark v. Homes,* 189 N. C., 711; *In re Estate of Wright,* 200 N. C., 626, 627; *In re Estate of Styers,* 202 N. C., 717, 718.

(12)

JAMES H. STATON and ALFRED WHITE v. THEOPHILUS DAVENPORT and HOPE BELL.

Vendor and Purchaser—Notice—Equity—Vendee in Possession.

A purchaser of land is conclusively presumed to have notice of all equities of persons—other than his vendor—in possession of the premises. He should be diligent in informing himself of the condition of the title, and any loss incurred in consequence of his failure to do so, as between him and the occupant, must be borne by the former.

(*Edwards* v. *Thompson*, 71 N. C., 177; *Tankard* v. *Tankard*, 84 N. C., 286; *Bost* v. *Setzer*, 87 N. C., 187, and *Johnson* v. *Hauser*, 88 N. C., 388, cited and approved).

This was a CIVIL ACTION to recover the possession of land, tried by *Graves, Judge,* upon a referee's report and exceptions thereto, at Fall Term, 1885, of HALIFAX Superior Court.

At Spring Term, 1884, by consent of parties, the cause was referred to James M. Mullen, Esq., "to hear and try the issues involved in the pleading, and to take and state such accounts as may be required by his decision; that he report the testimony and his findings to the next term of said court." To Fall Term, 1884, the referee reported the testimony and submitted the following as his findings of the facts:

1. That on the 18th day of September, 1881, the premises in controversy, subject to the widow's dower, were sold by James M. Mullen, as administrator *d. b. n.* of George Davenport, deceased, to make assets to pay debts, &c. At that sale the defendant Davenport became the purchaser at the price of nine hundred and eighty ($980) dollars, which was duly reported and confirmed.

2. Davenport thereupon took possession of the land and has been in possession ever since.

3. On January 12th, 1875, the said Davenport owed a large amount on the purchase price, which, with interest to January 1st, 1876, amounted to $706.74, and being unable to pay the same, applied to the plaintiff Alfred White to take up the debt, which he did, and on that day Mullen, as administrator, and the defendant Davenport conveyed the premises to the said White by deed, which, after reciting the decree for sale, the sale, and purchase by Davenport and a payment by him of a portion of the price, contained these statements: "And whereas, the purchaser has made payment in part of said purchase money, and has obtained the assistance of one Alfred White to make payment of the

balance due thereon, and in consideration of said assistance has (13) desired the said administrator to convey said real estate to the said White: Now, therefore, this deed, made this the 12th day of January, 1874, between J. M. Mullen, administrator aforesaid, of the first part, and Alfred White, of the second part, all of the county and State aforesaid, witnesseth; that for and in consideration of the sum of nine hundred and eighty dollars, paid as aforesaid, the receipt whereof is acknowledged, the said party of the first part hath bargained and sold, and doth hereby alien and convey, unto the said party of the second part, his heirs and assigns, the real estate referred to in the premises," &c.

* * * * * * *

In testimony whereof, the said J. M. Mullen, administrator as aforesaid, and the said Theophilus Davenport, who joins in this deed as evidence of his assent to the conveyance to said White, have hereunto set their hands and seals.

And at the same time the defendant Davenport executed to White the following bond:

"January 12th, 1875, $706.74. On the 1st day of January, 1876, I promise to pay to Alfred White, or order, the sum of seven hundred and six dollars and seventy-four cents, being for the purchase of lands this day conveyed to the said White by James M. Mullen, administrator *d. b. n.* of George Davenport, and which said White has sold to me."

At the same time White and Davenport entered into the following agreement:

"This is to certify that I, Alfred White, of the county of Halifax and State of North Carolina, for and in consideration of the sum of $706.74, evidenced by note, and payable January 1st, 1876, have bargained and sold to Theophilus Davenport, of said county and State, his heirs and assigns, the tract of land situated in said county, and this day conveyed to me by James M. Mullen, administrator *d. b. n.* of George Davenport, deceased, and for fuller description reference is hereby made to said deed. And I bind myself, my heirs, executors and administrators to make said Davenport, his heirs and assigns, a fee- (14) simple deed for said land upon said Davenport paying or causing to be paid, the said sum, on or before the time above specified. And it is hereby understood and agreed that time, is of the essence of this agreement, and should said Davenport fail to pay said sum and every part thereof, punctually at the time specified, then the said White is absolved from all obligations to make said deed, and the said Davenport, his heirs and assigns, forfeit all right in law or equity to demand the same. Witness, my hand and seal, and the seal of the said Davenport, this the 12th January, 1875."

On the same day the plaintiff White signed the following agreement, and upon the paper containing the preceding contract:

"Should the said Davenport fail to pay all of the said sum on or before the 1st January, 1876, I hereby agree to extend the time for the payment thereof to 1st January, 1877, and bind myself as aforesaid to make him said deed if said sum is paid on or before the said last mentioned time."

The deed was registered 6th July, 1876, but the contract was never registered.

4. On the 1st January, 1877, the said Davenport paid to White one hundred dollars upon said note.

5. It was understood between the defendants, that defendant Bell was to help pay for the land and take half of it. They agree to pay White (8) eight per cent. interest, but there was no writing to that effect.

6. On the 18th January, 1877, White extended the time of payment for four years, the defendants obligating themselves to pay him annually nine hundred pounds of lint cotton, the same to be applied to the aforesaid note of Davenport, and on that day executed this contract:

"This is to show that I have this day leased to Hope Bell and Theophilus Davenport, a farm known as the George Davenport land, for the term of four years, for nine hundred pounds of lint cotton each year—good white cotton. I bind myself, my heirs and assigns
(15) to comply with the above obligation. This rent is for interest on a note held by me against Theophilus Davenport on said land.

ALFRED WHITE."

On the same day and at the same time with the foregoing the defendants executed the following agreement:

"We promise to deliver to Alfred White, two bales of lint cotton, weighing 450 pounds, by the first of November in each year, for four years.

HOPE BELL,
THEOPHILUS DAVENPORT."

7. On January 17th, 1881, another agreement was entered into by which the defendant Davenport agreed to rent the premises of White for two years, in these words:

"I have this day rented from A. White the place where I now live, for two years from the 1st January, 1881. I do hereby agree to pay to him nine hundred pounds of lint cotton yearly, over the widow's dower, for the rent of the said place. Dated January 17, 1881.

THEOPHILUS DAVENPORT."

At the same time the plaintiff A. White signed the following paper:

"This is to certify that I have this day rented to Theophilus Davenport the place where he now lives for nine hundred pounds of good lint cotton yearly, over the widow's dower. This the 17th January, 1881."

8. On the 19th July, 1882, the plaintiff White, without the knowledge of the defendants, sold the premises to the plaintiff J. H. Staton for $750 cash, and executed to him a formal deed in fee-simple, with covenants of warrant and seizin, which deed was duly proved and registered August 2, 1882. That at the times of this purchase White exhibited to Staton his deed from Mullen, administrator and Davenport, and Davenport's contract of rental for 1881, but did not exhibit to him his contract of 1877 with Davenport.

9. In addition to the one hundred dollars paid 10th January, (16) 1877, the defendants paid White nine hundred pounds of lint cotton for the years 1877, 1878, 1879, 1880, 1881, and 1882.

10. The price paid by Staton was a full and fair price therefor.

Upon these facts the referee finds these conclusions of law:

1. That the plaintiff James H. Staton purchased the premises without notice of the claims of the defendants, and is entitled to recover of them possession of the same; and for detention of the same should have judgment against the plaintiff White for interest on the amount, $750, paid by him to said White, from time of payment, July 19th, 1882, to the first day of this term, November 3d, 1884, making the sum of $103.13.

2. That the defendants are entitled to recover of the plaintiff White the several amounts paid by them, with interest at 6 per cent., together with the amount received by him from Staton, without interest (their possession for 1883 and 1884 being a set-off to interest thereon), less the note of the defendant Davenport, $706.74, with interest at 6 per cent., which is to be deducted from their recoveries.

To this report the defendants filed exceptions, the second and fourth of which are in these words:

"Second. For that he finds as a conclusion of law, that the plaintiff James Staton purchased the land described in the pleadings without notice of the claims of the defendants, and that he is entitled to recover possession of same.

"Fourth. For that he fails to find that the relation of mortgagor and mortgagee subsisted between White and the defendant Davenport, and that Staton purchased with notice of this relation."

Plaintiff White filed one exception, in words as follows:

"Alfred White excepts to the conclusion of law No. 2 of the referee, finding him liable to Davenport for the sums paid to him, aggregating

$412.34, for that by the contract of sale between himself and Davenport the latter expressly discharges him from his obligation to convey the land on default of the payment of the purchase money to him when contracted to be paid."

(17) The Court sustained exceptions 2 and 4, and overruled the others, and from the judgment entered in conformity therewith the plaintiffs appealed.

Mr. John Devereux, Jr., for the plaintiffs.
Mr. Charles M. Busbee, for the defendants.

SMITH, C. J. (after stating the facts). The defendants, one or both, have been in continuous possession since the sale by the administrator, and, by repeated and consistent adjudications in this State, such possession affects a purchaser with notice of all equities which the occupying party has, and of which upon inquiry he could obtain information.

Whatever disposition to relax or modify the rule may have been manifested in the adjudications elsewhere, it is well settled in this State.

In *Edwards* v. *Thompson,* 71 N. C., 177, where the purchaser resided in another State and did not know of the possession in part by another, it was held that he was equally affected as if he had such information, and *Rodman, J.,* in enunciating the proposition remarks:

"On the same principle" (constructive notice from registration), "it follows that open, notorious and exclusive possession in a person other than his vendor, is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so. If the rule were otherwise, every one who contemplated a fraud on his tenant under a contract to purchase, would evade it by going to another State to sell over him, and the purchaser would carefully abstain from all inquiry. A purchaser who *inquires only of his vendor,* is guilty of an imprudence which ought not to be encouraged," &c.

So in *Tankard* v. *Tankard,* 84 N. C., 286, where upon an issue the jury found the plaintiff to be a *bona fide* purchaser without notice, though the party was in possession, the finding was held to be "of no legal significance" against the presumption of notice from possession.

(18) The principle is recognized and approved in the subsequent cases of *Bost* v. *Setzer,* 87 N. C., 187, and *Johnson* v. *Hauser,* 88 N. C., 388.

From whom should this information be sought, with assurance of a disclosure of the equity, except from the party who, by his possession, is asserting it? The answer is furnished, if an answer were needed, in

the opinion in *Tankard* v. *Tankard, supra,* wherein *Dillard, J.,* says: "he" (the purchaser) "is taken to know, because he might know by inquiry, of the equitable title *of the party in possession.*"

The vendor by a full disclosure, might defeat his proposed sale, and is interested in withholding the information, so that the vendee shows culpable negligence in contenting himself with exhibits and communications coming only from that source.

Again, the true relations of the parties, are at least indicated in the deed, which was seen, as they are clearly and fully expressed in the contemporaneous writings which define them.

The deed, and the renting contract, which were exhibited, are somewhat incongruous, and a prudent person would naturally seek an explanation of the apparent repugnancy.

This it does not appear the plaintiff Staton did, but he took the deed upon the mere production of these instruments.

It is insisted, however, for the appellants, that the execution of the note for rent, and the admission of a renting for two years, was placing with White the means of practicing a deception, and that he, rather than the deceived purchaser, should bear any loss consequent upon it.

It is not pretended that any such fraudulent purpose was entertained, and this was but one of a series of writings that had passed between the parties, and the fraud, if any, consisted in the selection and exhibition of one of the series, and withholding the others, all of which were required to develop the full transaction, and disclose the true relations that existed between the parties. It was the act of White in making the partial and false representations by which he was enabled to bring about the contract of sale, and serves to illustrate the necessity of seeking information from the person in possession as to the nature (19) and extent of his equitable claims. To put the loss on the defendant Davenport, under the circumstances, would be manifestly unjust, and unwarranted by any act of his own. It should fall on him whose own negligence has caused it, and whose reasonable vigilance would have prevented it.

We therefore sustain the rulings of the Court upon the defendants' enumerated exceptions, and so much of that of the plaintiff White as seeks to exonerate him from the obligation to convey the land on payment of the remaining part of the purchase money. The judgment rendered in conformity to the findings, and drawn out in form, substituted for that in the printed record is obnoxious to no objection when rendered; it will require some modification, not in substance, but in particulars not pertinent, from lapse of time, and as so modified is

affirmed. It is so adjudged. The appellants will pay the costs of appeal, and the cause will be remanded for further proceedings in the Court below. *It is so ordered.*

Cited: Barnes v. McCullers, 108 N. C., 54; *Russ v. Hendrix,* 110 N. C., 405; *Smith v. Fuller,* 152 N. C., 13; *Lee v. Giles,* 161 N. C., 546; *Grimes v. Andrews,* 170 N. C., 524.

GEORGE W. ROBBINS v. JOHN J. KILLEBREW et al.

Arbitration—Award—Claim and Delivery—Counter-Claim Judgment—Surety—Undertaking.

1. An agreement to submit a controversy to arbitration will be presumed to embrace every issue of law and fact necessary to its final determination.
2. It is the policy of the law to encourage and uphold the settlement of disputes by arbitrators—they are not bound to decide according to law, being a law unto themselves.
3. An award against the sureties upon an undertaking for the redelivery of property in "Claim and Delivery" upon failure of their principal to pay a sum ascertained to be due, will be enforced by summary judgment against them.
4. It is too late, after submission to arbitration, to object that a counter-claim has been improperly pleaded; the objection should have been taken by demurrer or otherwise, in apt time.

(*Lusk* v. *Clayton,* 70 N. C., 185; *Leach* v. *Harris,* 69 N. C., 532; *Jones* v. *Frazier,* 8 N. C., 379; *Greensboro* v. *Scott,* 84 N. C., 184; *Council* v. *Averett,* 90 N. C., 168, cited and approved).

(20) CIVIL ACTION, tried at February Term, 1886, of WILSON Superior Court, before *Philips, Judge.*

The action was brought for an injunction against defendants, to prevent the sale of a steam engine and fixtures, advertised under a claim for balance due the defendants on the purchase price, by virtue of the following paper writing executed by plaintiff:

"It is hereby perfectly understood that the title to the engine, saw-mill and fixtures, for which I have this day given my notes to Messrs. Killebrew & Bullock, amounting to in principal twenty-one hundred dollars, remains in said Killebrew & Bullock, until the whole purchase money is paid. This 29th July, 1881."

The plaintiff alleged fraudulent representations on the part of defendants, inducing plaintiffs to give a much larger price for the engine and fixtures than they were worth. The answer denied these allegations, and the injunction was vacated and cause continued to the hearing.

On the 6th of May, 1885, the defendants made an affidavit, alleging that they were owners of and entitled to the immediate possession of the said steam mill, &c., and gave bond and obtained an order for the delivery of the property to them. And thereupon the plaintiff gave an undertaking, with J. J. Sharpe as surety, in the sum of $3,000, conditioned for the delivery of the property to defendants, if such delivery be adjudged, and that the defendants should be paid such sums as may, for any cause, be recovered against the plaintiff in this action.

No complaint or answer was filed in the claim and delivery action, and no summons issued, save that in plaintiff's original action, and no reference made to it in the pleadings.

At Fall Term (November 2, 1885), the following order was made at the instance of the defendants: "On motion, with consent of plaintiff and J. J. Sharpe, surety to the bond filed by plaintiff, it is ordered by the Court, that this cause be referred to Thomas S. Kenan and Thomas H. Battle, as arbitrators. After giving due notice to the parties, said arbitrators shall hear said cause, and make their award, and file the same with the Clerk, *and upon said award judgment shall be* (21) *entered as of next Term.*"

On the 17th of December, 1885, the arbitrators heard the case, and reported: "The arbitrators do find that the plaintiff is indebted to the defendants in the sum of $70.22, with interest at 8 per cent. from 16th of January, 1884, and in the further sum of $700, with interest at 8 per cent. from 29th of July, 1881, which said sums the defendants are entitled to recover from the plaintiff, together with the costs of this action."

At February Term, 1886, the attorneys for the defendants, upon the coming in of the report, moved for judgment against the plaintiff and J. J. Sharpe, his surety on the claim and delivery bond, for the amount of the debt found to be due from plaintiff and for foreclosure by sale of the steam engine, etc. To this the plaintiff objected, as transcending the award of the arbitrators. After argument, the Judge made this further order, to-wit: "The arbitrators having filed an award fixing only the amount due to the defendants from the plaintiff, it is resubmitted, by consent of the attorneys, to the arbitrators, to find all other issues of law and of fact involved in this case, and to file their report at as early a day as practicable."

On the 8th of February, 1886, (second week of the term) the arbitrators filed the following report, to-wit: "That the defendants are entitled to judgment for a sale of the property described in the pleadings,

the proceeds thereof to be applied to the payment of said indebtedness found due the defendants in former award, and to judgment against G. W. Robbins and J. J. Sharpe in the sum of $3,000.00, to be discharged upon the payment of any sum remaining due to defendants, after the appropriation of the proceeds of said sale to said indebtedness and costs of action."

Upon the coming in of which report, by judgment of the Court, the report was confirmed, and sale of the property ordered, and from this judgment the plaintiff appealed to the Supreme Court.

(22) Before the entry of said judgment and in opposition thereto, the plaintiff excepted to said award, for that the arbitrators had, in directing judgment for sale of the property described in the pleadings, and judgment against Robbins and Sharpe in the sum of $3,000, to be discharged as therein set forth, exceeded their power under the submission; and for that the said award and judgment are erroneous in passing upon matters not in issue.

Mr. H. F. Murray, for the plaintiff.
Mr. Jacob Battle, for the defendants.

ASHE, J. (after stating the facts). The only exceptions taken by the plaintiff to the award of the arbitrators are: *First,* that they award that the defendants are entitled to a sale of the property described in the pleadings, and *secondly,* that they are entitled to judgment against Robbins and Sharpe in the sum of $3,000, to be discharged upon the payment of any sum remaining due after the application of the amount raised by the sale. He contends that the arbitrators transcended in this respect, the power given to them by the order of reference.

The order of reference in this case, does not state, in so many words, that the award of the arbitrators shall be a *rule* of Court, but it does state that *judgment shall be entered upon the award,* which necessarily makes it a rule of Court. *Lusk* v. *Clayton,* 70 N. C., 185.

As by the contract the defendants were to retain the title to the property until the price was paid, the object and effect of that stipulation, was to give the defendant a security for his debt, and was in the nature of a mortgage on the property to secure the payment of the price, and without express authority for such a course, the defendant was entitled, *ex æquo et bono,* to have a judgment for the sale of the property. It is well settled, that arbitrators are not bound to decide a case "according to law," being a law unto themselves, but may decide according to their notions of justice, and without giving any reason. *Leach* v.

(23) *Harris,* 69 N. C., 532. They are a law unto themselves. *Jones* v. *Frazier,* 8 N. C.,.379.

The policy of the law is in favor of settlements by arbitrators, and their awards should be sustained whenever it can be done consistently with the rules of law. If no reservation is made in the agreement of submission, the parties are presumed to agree that every consideration of law and fact which can affect the final and ultimate decision of the cause, is included in the authority of the arbitrators, and is matter proper for their determination. They are not bound to decide upon mere dry principles of law, but may decide upon principles of equity and good conscience, and may make their award *ex æquo et bono.* 2 *Story Eq. Jur.,* §1454; *Johnson* v. *Nobor,* 38 Me., 487. We are of opinion, considering the broad terms of the order of recommitment, that the arbitrators in this particular have not transcended their authority.

The second matter excepted to, was evidently embraced within the order of reference. In the first report, only the amount of the indebtedness of the plaintiff to the defendant had been awarded by the arbitrators, and when the defendants moved for judgment on the claim and delivery bond, for the amount of the debt found to be due, and for foreclosure by a sale, the plaintiff objected, on the ground it would transcend the award of the arbitrators. Therefore, with the consent of the attorneys on both sides, the matter was resubmitted to the arbitrators, to find all other issues of law and fact involved in the case.

The recommitment of the case to the arbitrators would therefore, under the circumstances, to say nothing of the scope and meaning of the order itself, seem especially intended to embrace the question of foreclosure by sale. But if that were not so, the language of the second order is broad enough to cover it.

All issues of law and fact involved in the case are submitted. The defendant having pleaded a counter-claim, the question whether the defendant should have judgment on the bond of the plaintiff, was entirely a question of law involved in the case. The fact that (24) the counter-claim of claim and delivery was imperfectly pleaded, can make no difference in this case, for no objection was made to its form, by demurrer or otherwise, and in such case, it is too late after a reference to object to the matter of form. *Greensboro* v. *Scott,* 84 N. C., 184. And although the judgment in such a case, should strictly be in the alternative, it may be by *consent* of parties to the judgment, a judgment for a sum certain without the alternative judgment for the return of the property. *Council* v. *Averett,* 90 N. C., 168. But when the question is submitted to arbitration, it gives a discretion to the arbitrators which is equivalent to *consent.* And such a judgment is binding on the surety, and a summary judgment may be entered against him. *Council* v. *Averett, supra.*

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

No error. Affirmed.

Cited: Reizenstein v. Hahn, 107 N. C., 158; *Smith v. Kron,* 109 N. C., 105; *Herndon v. Ins. Co.,* 110 N. C., 283; *Nimocks v. Pope,* 117 N. C., 319; *Early v. Early,* 134 N. C., 260; *Millinery Co. v. Ins. Co.,* 160 N. C., 141; *Wallace v. Robinson,* 185 N. C., 532.

CALEB J. WINSLOW v. SAMUEL WINSLOW et al.

Drainage Lowlands—Practice—Statute—Constitution.

1. The Statute—ch. 30, vol 1 of The Code—authorizing the condemnation of private property for the purpose of draining lowlands, is the exercise by the State of its power for police regulation, and is constitutional.

2. Where upon an appeal from the report of the commissioners acting under that act, the jury found that the amount of land condemned by them for the purpose of the protection and reparation of the ditches was unnecessary, it was proper for the Court to remand the cause, with directions to constitute another commission.

(*Durden* v. *Simmons,* 84 N. C., 555; *Norfleet* v. *Cromwell,* 70 N. C., 634; *Brown* v. *Keener,* 74 N. C., 714, and *Pool* v. *Trexler,* 76 N. C., 297, cited and approved).

Issues arising upon SPECIAL PROCEEDING, tried before *Gudger, Judge,* at Spring Term, 1886, of PERQUIMANS Superior Court.

(25) This is a Special Proceeding, brought in the Superior Court of the County of Perquimans, by the plaintiff, the owner of a tract of lowland, to obtain the right and authority to drain the same by cutting and keeping in repair ditches through the lands of the defendants, respectively, as allowed by The Code, chapter 30, vol. 1.

The summons was duly issued and served upon the defendants, and at the hearing of the petition the Court (the Clerk), made an order, appointing three commissioners to view the lands of the plaintiff and the defendants. The commissioners met, were sworn, viewed the land, and made their report of their proceedings to the Court. They found that the lands of the petitioner could not be drained except through the lands of the defendants, and laid off the line of one ditch, to be cut not more than ten feet wide, and not more than two and one-half feet deep at the

beginning, and of sufficient depth elsewhere along its length to drain off the water, and on each side of the ditch they allotted eighteen feet of land for its protection; and also another ditch fifteen feet wide, and allotted ten feet of land on each side of it, for its protection. They also assessed against the plaintiff, in favor of the defendant Samuel Winslow, $23.75; in favor of the defendant Thomas A. Winslow, $16.60; to the defendant B. S. Riddick and wife Sarah A., $26; to the defendant C. T. White and John R. Jolliff each, one cent. To this report the defendants filed sundry exceptions, that need not be set forth here. The Court made an order confirming the report, and from it the defendants appealed to the Judge in term.

In term, the Judge submitted issues to the jury, whereof the following is a copy, to each of which they responded in the negative, except the last, in response to which they assessed damages:

"1. Has the relief prayed for by the plaintiff been heretofore granted as to the J. R. White ditch? Answer. No.

"2. Has the relief prayed for by the plaintiff been heretofore granted as to the C. J. Winslow ditch? Ans. No.

"3. Is the land on each side of the J. R. White ditch, condemned by the commissioners, necessary for its protection and (26) reparation? Ans. No.

"4. Is the land on each side of the C. J. Winslow ditch, condemned by the commissioners, necessary for its protection and reparation? Ans. No.

"5. What damages has each defendant sustained? Ans. Samuel Winslow, $23.75; Thomas Winslow, $16.60; Burrell Riddick, $26.00."

Thereupon, on motion, it was adjudged by the Court:

"1. That the plaintiff Winslow is entitled to the ditches and drains demanded by him and condemned by the commissioners.

"2. That he is not entitled to the amount of land condemned by the jury for the protection and reparation of said ditches.

"3. That the Clerk of this Court appoint another commission of three qualified persons, to view the said land and condemn such amount of land on each side of ditches as is necessary and proper for their protection and reparation, and report their action to the said Clerk, as required by the statute.

"4. Let the question as to costs await the final judgment in this case."

From this judgment the defendants appealed to this Court.

The material part of the case settled upon appeal is as follows:

"The Jury rendered the verdict upon issues submitted to them, as set out in the record. Whereupon, the plaintiff moved the Court for judgment as rendered. The defendants moved for judgment that the plaintiff be entitled to the ditches, but to no other relief.

"Upon consideration the Court rendered the judgment set out in the record.

"The defendants appealed from the judgment rendered.

"1. Because the findings of the jury conclude the plaintiff as to all relief except the drains.

"2. Because the effect of the judgment is to take private property for private use.

"They also appealed from the refusal of the Court to grant the
(27) judgment prayed for by them."

Mr. J. E. Bledsoe, for the plaintiff.

Mr. E. F. Aydlett, for the defendant.

MERRIMON, J. (after stating the facts). No question is made as to the regularity and propriety of submitting to the jury the issues set forth in the record, and we advert to them only for the purpose of saying that it may be questionable whether it is proper to submit such as they are. *Durden* v. *Simmons,* 84 N. C., 555.

The first exception cannot be sustained, because granting in this case, that the third and fourth issues were properly submitted to the jury, it does not follow from their finding that no land was necessary for the protection and reparation of the ditches.

The Court did not think so, and hence made an order that new commissioners be appointed to view the lands, and make further report. The statute, (The Code, §1302,) expressly provides, that the commissioners may designate the width of land on each side of such ditches, necessary for such purposes. It may be, that the new commissioners will designate the same in a less width of land, or none at all. They are made the judges of the necessity and its extent.

Nor can the second exception be sustained. It is true, that the property of the defendants cannot be taken simply for the private use of the plaintiff, nor is it proposed to do this in contemplation of law. It is well settled, that the statute that authorizes this and like proceedings, and providing for the drainage of low and swamp lands, does not conflict with the Constitution. The Legislature, in the exercise of the police powers of government, had authority to enact it, with a view to the promotion of the general welfare, and the mere fact that one or more individuals may derive from it peculiar and particular benefits and advantages, does not destroy in effect its validity. This is so well settled that we need not now add to a discussion already replete.
(28) *Norfleet* v. *Cromwell,* 70 N. C., 634; *Brown* v. *Keener,* 74 N. C., 714; *Pool* v. *Trexler,* 76 N. C., 297.

For the reasons already stated, the Court properly refused to give judgment as prayed for by the defendants, that the plaintiff "be entitled to the ditches, but to no other relief."

The judgment must be affirmed, and to that end let this opinion be certified to the Superior Court as the law directs.

No error. Affirmed.

Cited: Porter v. Armstrong, 134 N. C., 454; *Durham v. Cotton Mills,* 141 N. C., 644.

JAMES C. HARRISON and WIFE MARY E. v. A. HAHN et al.

Deed—Defective Description—Levy—Tax Sale—Parol Evidence.

1. Parol evidence may be admitted to fit the description to the thing intended to be conveyed in a deed, but not to add to or enlarge its scope.
2. Where the descriptive words in a deed are so indefinite that in order to give it effect something must be added, the conveyance is inoperative.
3. These rules are applicable to the assessment, levy, notice, &c., as well as the deeds, made in selling lands for taxes; and these defects being in essential matters, will not be cured by a second conveyance in which an accurate description of the land is made.

(*Farmer* v. *Batts,* 83 N. C., 387, cited and approved.)

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

The plaintiffs claimed under a levy, sale and conveyance by the Tax Collector of the city of Newbern, and offered in evidence the following entry on the tax book for the year 1879: "E. D. Jones, Pollock and Spring Sts., and part lot L. Nash. Tax and costs $6.13."

They also offered the following advertisement, duly published: "City Tax Collector's office, Newbern, N. C.

"Take notice, that I have levied on the lands and personal property of the following named persons, listed by them in the year 1879, for default in payment of city taxes, and shall proceed to sell the same at the Court House door in the city of Newbern, on the 5th (29) day of April, 1880. W. G. Singleton, City Tax Collector."

Name:	*Tax & Costs.*
E. D. Jones, Pollock and Spring Sts., and part lot L. Nash,	$6.13

Pursuant to the advertisement, the sale was made and a certificate given to the purchaser, the plaintiff Mary E., in these words:

RECEIVED, April 16, 1880, of Mary E. Harrison the sum of six $^{13}/_{100}$ dollars, of which amount————dollars is tax for fire department of the City of Newbern, and————dollars is tax for the current expenses of the City of Newbern,————dollars is for the special mandamus tax for the City of Newbern, and one $^{95}/_{100}$ dollars is cost incurred in the suit of W. G. Singleton, City Tax Collector, against E. D. Jones. Execution for taxes, 1879.

By virtue of the above mentioned execution issued from the Superior Court of Craven county on the 5th day of March, 1880, the said W. G. Singleton, City Tax Collector as aforesaid, did levy upon a certain piece or parcels of land, situated in the City of Newbern, N. C., on Pollock and Spring streets, and part Lafayette Nash Lot, and numbered on the chart of the City of Newbern————, listed by E. D. Jones, to satisfy the taxes due thereon for the year 1879, and did proceed to sell the same at the Court House door of Craven county, on Monday, the 5th day of April, 1880, after due advertisement according to law, whereupon Mary E. Harrison became the purchaser, at the sum of six $^{13}/_{100}$ Dollars, of $^{9}/_{10}$ interest in said lots.

W. G. SINGLETON,
City Tax Collector.

Probated, April 27th, 1880.
Registered, May 3, 1880.

On April 22, 1882, the Tax Collector executed a deed to the said Mary E., which contains these recitals:

(30) "Whereas, the city taxes assessed for the year A. D. 1879, on the following lands and tenements in the City of Newbern aforesaid, to wit: Parts of lots on corner of Pollock and Spring streets and part Lafayette Nash or back lot, listed by E. D. Jones on the tax book of the City of Newbern for the year 1879, remaining unpaid, after the time limited by law, Wm. G. Singleton, the then Tax Collector for said city, levied on said lands or lots, and returned a list of his levies to the Clerk of the Superior Court of Craven county; and the said Tax Collector, after advertising and giving notice according to law, sold said lands or lots to pay said taxes and costs, at public auction at the Court House in Newbern, on the 5th day of April, A. D. 1880, when and where Mary E. Harrison, party of the second part, became the purchaser of nine-tenths ($^{9}/_{10}$) interest in said lots, at and for the sum of six and $^{13}/_{100}$ dollars, and has paid the sum of money; and the owner of said lands or lots having failed to redeem the same," &c.

The deed then proceeds for the consideration of $6.13, the taxes and costs, to convey to the purchaser, in words to pass the fee, "an undivided nine-tenths interest in the above described lands and tenements."

A second deed was made to the said Mary E., on Sept. 24th, 1883, by the same collector, wherein after a preliminary recital in these words: "Whereas, the said party of the first part, did, on the 22d day of April, A. D. 1882, for the considerations therein mentioned, convey by deed to the said party of the second part, her heirs and assigns, in fee simple, an undivided nine-tenths interest in and to certain real estate, (which deed is recorded in the records of Craven county, N. C., in book No. 85, fol. 349); and whereas, said deed does not fully describe by proper metes and bounds, the said lands and tenements, therefore, * *" he proceeds for the same consideration to convey the lands, with a full and sufficient description to assure their identity and location.

The lots were conceded to be the property of the defendant Hahn when the tax was levied, and continues to be his, unless his title has been divested and transferred by the tax sale and deeds, and that Jones, then and since, has had no interest in them, though he (31) resided thereon.

There was no evidence as to any description or location of the land, except as shown by the tax book and said deeds.

Upon this showing, the Court was of opinion that there were no issues for a jury to pass on, to which counsel assented, and that the plaintiffs were not entitled to recover. In submission thereto the plaintiffs suffered a nonsuit, and judgment being rendered against them, they appealed.

Mr. W. W. Clark and *Mr. John Devereux, Jr.,* for the plaintiffs.
Mr. M. DeW. Stevenson, for the defendants.

SMITH, C. J. (after stating the facts). Among the numerous objections taken to the plaintiffs' claim under the proceedings to enforce the payment of the tax by a sale of land, as the property of one who had no interest in it, it is necessary, in the view we take of the case, to advert to but one, the incurable indefiniteness of the description of the lots as found in the tax book, in the published notice of sale, and in the sale itself and the deed made to give it effect.

The office of descriptive words, is to ascertain and identify an object, and parol proof is heard, not to add to or enlarge their scope, but to fit the description to the thing described. When they are too vague to admit of this, the instrument in which they are contained becomes inoperative and void. In respect to deeds, the subject is fully considered, and our own rulings reviewed, in *Farmer* v. *Batts,* 83 N. C., 387, and we do not propose a re-examination.

Now it is manifest, that the attempted designation of the lots utterly fails in indemnifying them, and the very evidence offered and rejected, was to add to the description.

(32) The deed of April 22, 1882, quite as definite, (if not more so,) as the preceding entry, describes the land as "Parts of lots on corner of Pollock and Spring streets, and part Lafayette Nash or back lot, listed by E. D. Jones on the Tax book," &c. If these streets intersected, there would be four lots, one at each corner, and which of the four is meant?

If the lot is located, what parts are intended to be separated and cut off? and what part of the other or back lot? There are no means provided to ascertain the parts, unless you superadd to the words of description.

The sale itself was of lots as *described in the tax book,* and the deed is in strict compliance with the announced terms of sale.

The second deed, made upon a description furnished by the plaintiff James C., and at his request, and entirely unwarranted by precedent facts, cannot help the infirmities incident to the proceeding. The result must be controlled by the facts, and only what was offered and sold can be conveyed by the collector.

We have not adverted to the anomaly of selling one man's land to pay the tax due by another, in face of a provision in the charter, §43, which requires the money to be raised, when it can be, from the personal estate of the debtor, before proceeding against his land, nor to the many other irregularities apparent in the proceeding, as it is sufficient to dispose of the appeal, to sustain the ruling of the Court upon the point noticed.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Blow v. Vaughan, 105 N. C., 203, 210; *Mizell v. Ruffin,* 113 N. C., 23; *Hemphill v. Annis,* 119 N. C., 516; *Cathey v. Lumber Co.,* 151 N. C., 595; *Gilbert v. Wright,* 195 N. C., 167; *Katz v. Daughtrey,* 198 N. C., 394.

SAMUEL L. WILLIAMS v. WILLIAM HODGES.

Evidence—Parol Trust.

To establish a parol trust in one who has acquired the title to land, something more than the simple declaration of the person sought to be charged is required; there must be proof of acts in connection therewith, inconsistent with a purpose on his part to purchase or hold the land for himself absolutely.

(*Clement* v. *Clement,* 54 N. C., 184, cited and approved).

This was a CIVIL ACTION, tried at Fall Term, 1885, of HYDE (33) Superior Court, before *Shepherd, Judge.*

The plaintiff alleged in substance, that sometime in the year 1883, the defendant, one Simmons and himself, agreed that they would jointly purchase for their common benefit, a tract of land then about to be sold; that accordingly at the sale thereof, the land was bid off by the defendant, and the title conveyed to him by a proper deed; that it was a material part of the agreement that the defendant should convey one hundred acres of the land, properly designated, to the plaintiff, and another part thereof to said Simmons; that by the agreement the defendant supplied the purchase money, with the understanding that the plaintiff and Simmons should afterwards pay to him their respective parts of it with interest thereon; that afterwards, the defendant made title to Simmons for his part of the land; that shortly afterwards, the plaintiff tendered to the defendant the money so supplied for him, with the interest due thereon, and demanded that he make to him title for that part of the land he was entitled to by the agreement, he being at the time and ever afterwards until the trial in possession thereof; that the defendant refused to receive the money so tendered and make title to the plaintiff.

The defendant denied the material allegations of the complaint.

At the trial, proper issues were submitted to the jury. The plaintiff introduced several witnesses, including himself, and the defendant testified in his own behalf, denying the main allegations of the plaintiff.

The defendant asked the Court to instruct the jury, that there was not sufficient evidence to go to the jury or to warrant the Court in declaring the defendant a trustee.

The Court declined to give the instructions, and the defendant excepted. There was verdict and judgment for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.

Mr. Ed. C. Smith, for the defendant.

MERRIMON, J. (after stating the facts). We are unable to (34) see any ground upon which the exception can be sustained. In our judgment, there was evidence competent and abundantly sufficient to go to the jury to prove the material allegations of the complaint put in issue by the answer, if the jury believed it. Several witnesses testified directly and expressly to the agreement as alleged, and others, to facts and circumstances that tended to prove the same thing.

It is not denied that the agreement is one that must be upheld, and may be enforced if it exists, and being so, it is quite clear that it may be proven by any competent evidence, and certainly by the evidence of

witnesses, who testify that they had personal knowledge of its existence and what it was.

There is nothing in the nature of a parol trust in respect to land in this State, that makes it necessary to establish it by a particular or peculiar sort of evidence—it may be done by any competent evidence that tends to prove it, whether it be declarations in part, or facts and circumstances, or the positive testimony of witnesses, or written evidence.

The defendant's counsel insisted on the argument, that the simple declarations of the defendant were not sufficient evidence of the alleged parol agreement on his part to purchase the land in question, and afterwards convey a specified part of it to the plaintiff, upon the payment of the price agreed upon. This may be true, but the plaintiff did not rely mainly, if at all, upon the declarations of the defendant to prove the agreement; he relied upon the testimony of witnesses, who testified positively that within their own knowledge, respectively, it was made substantially as alleged.

It was further insisted, that in order to establish such parol trust as that alleged, the plaintiff must prove facts and circumstances *dehors the deed* made to the defendant, inconsistent with his purpose to make an absolute purchase of the land for himself, and the counsel relied upon *Clement* v. *Clement,* 54 N. C., 184. If this were true, such evidence was produced on the trial. It was in evidence that the plaintiff
(35) was in possession of the land he seeks to have the defendant convey to him, at the time the latter made the purchase, and ever afterwards until the time of the trial, and the defendant had not required rent or complained of such possession; and that the defendant, in pursuance of the agreement, conveyed to Simmons the part of the land he was by its terms to have. Indeed, in a sense, all the evidence went to prove facts and circumstances *dehors* the deed.

The case cited and other like cases are in nowise inconsistent with what we have here said. These cases simply decide, that cases of parol trusts, in some of their features, like that sought to be established by this action, cannot be proven by the simple declarations of the party to be charged; that in addition there must be evidence of facts and circumstances or acts *dehors* the deed, absolute upon its face, made to the purchaser of the land, inconsistent with a purpose on his part to purchase absolutely for himself.

They do not, however, decide that such parol trusts must necessarily be so proven, or proven by a particular kind or standard of evidence, or that they may not be proven by any competent evidence, such as that of witnesses who can testify expressly that the parties interested agreed, for proper consideration, upon such a trust.

The question whether more than a preponderance of evidence is necessary to warrant the jury in rendering a verdict in favor of such a trust as that in question, is not raised by the exception. It is clear that there was evidence sufficient to go to the jury, and if they believed it, it was abundantly adequate to warrant the verdict they rendered. There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Harding v. Long, 103 N. C., 9; *Hinton v. Pritchard,* 107 N. C., 137; *Pittman v. Pittman, ibid.,* 167; *Blount v. Washington,* 108 N. C., 232; *Cobb v. Edwards,* 117 N. C., 253; *Lefkowitz v. Silver,* 182 N. C., 347.

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(36)

THE SINGER MANUFACTURING CO. v. G. C. BARRETT.

Amendment—Case on Appeal—Exceptions—Jurisdiction—Justice of the Peace.

1. The object of the "case on appeal" is to set forth the alleged errors appealed from, and if it sufficiently discloses these, the appeal will not be dismissed though the record does not show formal exceptions.

2. In an action before a Justice of the Peace in which two causes of action were alleged, the first sufficiently but the second defectively, for want of proper averment of jurisdictional facts, the Justice may proceed to judgment upon the first.

3. In an action before a Justice of the Peace for the recovery of the value or return of property under Sec. 267 of The Code, it must be averred in the summons that the value thereof does not exceed fifty dollars.

4. The Justice of the Peace, or the Superior Court on appeal, has power to make such amendments to the record of an action that will bring it within the jurisdiction of the Court where it originated.

5. The affidavit filed preliminary to obtaining requisition for the seizure and delivery of property will not be treated as a complaint, and its averments cannot cure a defect in the summons, or complaint.

6. The power to amend process, pleading, &c., under Sec. 887 of The Code, discussed by MERRIMON, J.

(*Allen* v. *Jackson*, 86 N. C., 321; *Noville v. Dew*, 94 N. C., 43; *Wilson* v. *Hughes*, Ibid, 182; *Ashe* v. *Gray*, 88 N. C., 190; *Deloatch v. Coman*, 90 N. C., 186; *Morris* v. *O'Briant*, 94 N. C., 72; *State* v. *Vaughan*, 91 N. C., 532; *State* v. *Crook*, Ibid, 536, cited and approved).

This action began before a Justice of the Peace, who gave judgment for the defendant upon the merits, and the plaintiff appealed to the Superior Court. The following is the case settled upon appeal for this Court:

"The summons issued by the plaintiff, demanded judgment for the non-payment of the sum of forty dollars and ..... cents, and interest on ..... from ..... day of ....., until paid, due by account, and for the claim and delivery of one sewing machine, and demanded by said plaintiff, and for cost. The defendant moved to dismiss, for the reason that the summons failed to show upon its face that the cause of action was within the jurisdiction of a Justice of the Peace, in
(37) that it failed to specify the value of the sewing machine claimed. The plaintiff insisted that the summons, taken in connection with affidavit, was sufficient—and it was moved to amend by inserting the value in the summons. The Court being of opinion that it did not have the power to make an amendment to confer jurisdiction, and that the plaintiff could not join the two causes of action set forth in the summons, refused to allow the amendment, and dismissed the action. From this judgment plaintiff appealed."

The appellee moved that the judgment be affirmed, "because no exception was made on the trial below, as appears from the record."

Mr. R. W. Winston, for the plaintiff.
Mr. Charles M. Busbee, for the defendant.

MERRIMON, J. We are of opinion that although the appellant's grounds of exception and assignment of errors appears informally, they appear sufficiently from the case settled upon appeal by the Court. The very purpose of the case settled, is to set forth the errors assigned and such matters and things as pertain thereto, and while exceptions might appear in the record proper, it is not essential that they should do so. The rulings of the Court adverse to the appellant complained of, distinctly appear, and the plain implication and just inference is, that it objected and excepted to each of these particular rulings. The Court can see with reasonable certainty the alleged errors, and this is sufficient, although it had been better if they had been assigned with more precision and formality.

The action was begun before a Justice of the Peace. The summons shows upon its face, that the plaintiff therein sued the defendant for the sum of forty dollars with interest, due by account, thus plainly stating a cause of action within the jurisdiction of a Justice of the Peace. It also sets forth, imperfectly and insufficiently, another cause of
(38) action, thus: "And for the claim and delivery of one sewing ma-

chine." This is insufficient. It ought to have stated the value of the property, and such facts as would show that the two causes of action could be united in the same action, as allowed by *The Code,* §267; *Allen* v. *Jackson,* 86 N. C., 321. It was competent for the Justice of the Peace to allow an amendment in this respect. It seems, however, that he did not deem this necessary, as he tried the case upon its merits, and gave judgment for the defendant.

In the Superior Court, the appellee, as we have seen, moved to dismiss the action upon the ground, that the "summons failed to show upon its face that the cause of action was within the jurisdiction of a Justice of the Peace, in that it failed to specify the value of the sewing machine claimed." It was insisted by the appellant, in reply in this connection, that the summons, taken with the affidavit in respect to the ancillary proceeding of claim and delivery, cured the defect as to the cause of action in relation to the machine. This is a misapprehension of the law. The affidavit, though it stated the value of the property, could not cure the defect, because the value of the machine should have been stated in the summons, and the affidavit was not a part of it, nor part of the complaint of the action, whether it be oral or written. *Noville* v. *Dew,* 94 N. C., 43. The provisional proceeding of claim and delivery was not an essential part of the action: it was only incidental and ancillary to it. *Wilson v. Hughes,* 94 N. C., 182.

But treating this cause of action as insufficiently set forth, and as quashed, as it ought to have been, in the absence of a demurrer, or a motion to amend in this respect, still there was another cause of action sufficiently alleged in the summons, treating it as the complaint, of which the Justice of the Peace had jurisdiction, and which the Superior Court ought to have proceeded to dispose of according to law. If the second cause of action went for naught, as it did, the plaintiff had the right to have this action tried upon its merits, as to the first cause of action. The two causes of action were distinct, and not essential to each other. The defective one did not oust the jurisdiction of the (39) Court as to the one well pleaded. There was therefore error in the order dismissing the action. *Ashe* v. *Gray,* 88 N. C., 190; *Deloatch* v. *Coman,* 90 N. C., 186; *Morris* v. *O'Briant,* 94 N. C., 72.

Precisely what amendment the appellant asked for, does not appear, but the reasonable inference is, that it asked to amend the allegation in the summons as to the second cause of action, so as to show the jurisdiction, and that the two causes of action might be united in the same action. So accepting the fact to be, we think the Court erred in refusing to allow the amendment asked for, upon the ground that it did not have the power to do so. In our judgment, it had such power.

It obviously appeared that the Justice of the Peace had jurisdiction of the action as to the first cause of action, which was well and sufficiently stated. It did not appear that he based his judgment on the ground that he had not jurisdiction, and especially for the present purpose, he did not decide that he had no jurisdiction of the second cause of action—any question in that respect was left open. It appeared from the affidavit mentioned, that he had jurisdiction; it states that the value of the machine was thirty dollars, and the Justice of the Peace had jurisdiction of civil actions not founded on contract, where the value of the property in controversy does not exceed fifty dollars. *The Code,* §887.

The statute, (The Code, §908,) provides, that "No process or other proceeding, begun before a Justice of the Peace, whether in a civil or a criminal action, shall be quashed or set aside, for want of form of the essential matters that are set forth therein; and the Court in which any such action shall be pending, shall have power to amend any warrant, process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time, either before or after judgment."

(40) The power thus conferred is remedial, thorough and comprehensive. Justices of the Peace are not usually men learned in the law, but they are nevertheless a large, useful and important class of public officers, who do a great deal of judicial and other business, that ought to be sustained, whenever it can be without injustice to parties and individuals. The purpose of the statute cited, is to help and uphold all actions and proceedings before such officers, in the furtherance of justice. The power thus conferred, extends not simply to matters of form, but as well to amending "any warrant, process, pleading or proceeding" in any action in respect to matters of substance—that is, in material and essential respects wherein they are defective and insufficient within the compass of the action or proceeding. The Superior Court cannot create and supply their jurisdiction, but it can amend a process or pleading to make the jurisdiction appear properly, when in fact it did exist, but did not so appear, thus rendering effectual a large and important class of judicial proceedings, that otherwise would very frequently entirely fail, to the injury of individuals and the prejudice of the public.

The power is large and important, but it is to be exercised by learned and just Judges, who will apply it on such terms and in such cases as they deem just, and with a view only to the furtherance of justice. *State* v. *Vaughan,* 91 N. C., 532; *State* v. *Crook,* Id., 536.

The purpose of the amendment asked for in this case, was not to create nor to confer jurisdiction, nor to constitute an action, nor to supply a cause of action not before the Justice of the Peace, but within

the scope of the action begun, to perfect the process, and make the jurisdiction which in fact existed, appear in the summons. The cause of action was imperfectly and insufficiently stated in the summons—the object was to cure this defect in the process, treated as the complaint, by amendment. The power to do this comes, it seems to us, within the letter and the spirit of the statute, and there is neither principal nor authority that forbids its exercise; the facts and merits of the motion to amend warrant it, and whether they do or not, the (41) Court will determine. The Justice of the Peace could have allowed the amendment, and there is no reason why the Superior Court may not do so in a proper case.

What we have here said is not in conflict with what is decided in *Allen* v. *Jackson, supra.* In that case the Justice of the Peace had dismissed the action because he had not jurisdiction, as according to the face of the summons he had not, and the plaintiff appealed to the Superior Court. The latter Court refused to allow an amendment of the summons, so as to make it show the jurisdiction, not because it did not have the power to do so in a proper case, but because the judgment of the Justice of the Peace was correct as the process appeared. The Court properly refused to absurdly reverse a correct judgment. Hence in that case the Chief Justice said, "Where the effect of a proposed amendment would be to reverse a judgment rightly rendered in the Inferior Court, and confer a jurisdiction wholly derivative and dependent upon that possessed by the Justice to entertain the cause, it is properly refused."

There is error. The judgment dismissing the action must be reversed. To that end, and to the further 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: Strange v. Manning, 99 N. C., 167; *Planing Mills v. McNinch, ibid.,* 520; *Leathers v. Morris,* 101 N. C., 187; *Allen v. R. R.,* 102 N. C., 389; *S. v. Smith,* 103 N. C., 411; *Sheldon v. Kivett,* 110 N. C., 410; *Godwin v. Early,* 114 N. C., 12; *Starke v. Cotton,* 115 N. C., 84; *McPhail v. Johnson,* 115 N. C., 302; *Elliot v. Tyson,* 117 N. C., 116; *Patterson v. Freeman,* 132 N. C., 359; *R. R. v. Hardware Co.,* 135 N. C., 80; *Smith v. New Bern,* 140 N. C., 387; *Wilson v. Batchelor,* 182 N. C., 94; *Baker v. Clayton,* 202 N. C., 743.

WILLIAM HEDGEPETH v. JOEL ROSE.

Action to recover Land—Statute of Frauds—Damages—Use and Occupation.

1. One who is induced to enter upon and improve land by a parol promise that it shall be settled upon him, as an advancement or gratuity, will not be evicted until compensation has been made him for betterments which he may have made to the property.

2. Nor is he liable for damages for withholding the possession or for the use and occupation of the land until after a notice to surrender.

(*Prince* v. *McRae*, 84 N. C., 674; *Bailey* v. *Rutjes*, 86 N. C., 517; *Baker* v. *Carson*, 21 N. C., 381, cited and approved).

(42) This ACTION was tried before *Philips, Judge,* at Spring Term, 1886, of NASH Superior Court.

The plaintiff's action is to recover possession of a tract of land in possession of the defendant, and the material facts were:

1. That in February, 1875, the defendant and his wife, a daughter of the plaintiff, were residing some two and a half miles from the premises and from the plaintiff, who urged the defendant to move upon the land in suit, then uncleared and with no buildings upon it, representing that he had a life estate, and the remainder in fee belonged to his two children.

2. That if he would do so, and would clear and build on the premises, the plaintiff would release his life estate, and in the partition between the tenants, the part improved would be allotted as her share to his said daughter.

3. That upon these assurances, defendant did enter upon the land, and there remained for eight years, during which he cleared twelve acres, and erected a dwelling house and out-buildings and made other improvements, enhancing the value more than $300.

4. That no claim for rent, or demand for compensation for the use of the land, was made until August or September, 1882, when a misunderstanding between the parties having taken place, plaintiff sent to defendant a notice, requiring him to surrender possession.

There being no contention as to the defendant's right to be allowed for betterments, a reference was made, by consent of parties, to ascertain the facts and report findings upon certain issues, which, with the responses to each, are set out in the record and in the referee's report. The referee found as follows:

1. "The defendant entered upon the land and occupied the same under a parol promise from the plaintiff that the defendant could reside upon and cultivate it during his lifetime.

2. "The permanent improvements are worth three hundred (43) dollars.

3. "The value of the rents and profits during the defendant's occupancy is three hundred and fifty dollars.

4. "Such rents and profits, since possession demanded, are worth one hundred and sixty dollars."

It was admitted by the parties, that when the defendant took possession of the premises, there was no requirement or expectation on the part of the plaintiff that his son-in-law, the defendant, should pay him rent, and nothing was ever said between the parties about rent, or improvements, from February, 1875, when the defendant took possession, until September, 1882, when the demand for possession was made upon him.

It was insisted for the plaintiff, that he was entitled to judgment for the possession of said land and for rents and profits during the time it was occupied by the defendant, subject to the value of the permanent improvements made thereon by the defendant, as a counter-claim or set-off to said rents and profits.

It was insisted for the defendant, that he was chargeable with the rents and profits, only from the date of the demand for possession, and that the defendant was entitled to judgment for the sum of one hundred and forty dollars ($140), with interest from the first day of the term, and that the said sum was a lien upon the land mentioned in the pleadings.

It was agreed, that if this question was decided in favor of the defendant, judgment should be rendered in his favor for one hundred and forty dollars and interest and costs.

After argument, the Court being of the opinion with the defendant, gave judgment accordingly, and the plaintiff appealed to the Supreme Court.

Mr. J. J. Davis filed a brief for the plaintiff.
Mr. Jacob Battle, for the defendant.

SMITH, C. J. We entirely concur in the ruling of the Court, that the defendant should only be charged for use and occupation from and after his refusal to surrender possession, when it became (44) tortious and adversary.

There can be a legal claim for the use and occupation of land when there has been a contract, express, or implied from the circumstances, to

pay therefor, or a wrongful withholding, and the recovery, while in some cases measured upon the basis of a rental compensation to the owner, of damages therefor.

When the possession is permissive and is taken under the mutual understanding of parties that it is gratuitous, no implied contract can arise, and the gratuity cannot afterwards, at the will of one who bestows it, be converted into a debt. It remains what both intended it should be, when no change in their relation has been subsequently made.

"A contract, express or implied, executed or executory," say the Court in *Prince* v. *McRae,* 84 N. C., 674, "results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understanding of one alone of the parties to it."

"To constitute any contract," in the words of *Ruffin, J.,* delivering the opinion in *Bailey* v. *Rutjes,* 86 N. C., 517, "there must be a proposal by one party and an acceptance by the other, resulting in an obligation resting upon one or both; or, in other words, there must be a promise."

Not only is there no misconception here on the part of the plaintiff, but it is manifest, both himself and the defendant considered the entry and occupation to be gratuitous and without charge.

When the defendant took possession, it is admitted, and so the case states, that "there was no requirement or expectation on the part of the plaintiff that his son-in-law, the defendant, should pay him rent, and nothing was ever said about rents or improvements until September, 1882."

Upon what reasonable grounds the appellant puts his claim to remuneration for the use of the premises for the antecedent period, we are unable to see. But our own reports furnish a precedent in *Baker*
(45) v. *Carson,* 21 N. C., 381, called to our attention in the brief of the appellee's counsel. The facts in this case are essentially those now before the Court. The defendant was the owner of a life estate in lands, which after his death were devised in fee to the children of herself and husband, the testator.

The plaintiff, of whom the wife was one of the devisees in remainder, residing several miles distant, was induced, by the defendant's anxious requests and promise, to release her life estate to her daughter, to remove to and settle upon uncleared land thus devised, the defendant proposing that upon a division, the improved part should be assigned to her said daughter.

This was done and the premises greatly improved.

The defendant, after several years' occupancy, refused to convey, and upon some disagreement, brought an action to recover possession. In

consequence, the bill was filed praying for a conveyance of the life estate, or an injunction, unless payment was made for improvements.

The defence was the act of 1819, avoiding parol contracts for the sale of land. The Court directed the Clerk and Master to inquire and report the additional value conferred on the defendant's life estate by the plaintiff's labor and expenditures, and the reasonable value of the use of the land "since the 1st of January, 1831, *when possession was required to be surrendered,*" as an adjustment of the equities subsisting between them.

The case is not analogous to one in which a person enters into possession of land under a parol contract of purchase which is afterwards repudiated by the vendor. In such case, the transaction is a nullity, and the parties are put in *statu quo,* as far as may be, as if no agreement had been made. But the defendant's possession, up to demand for its restoration, was not a nullity, but rightful and legal, and as no compensation was to be given for the use, it cannot now be required.

The sole question presented upon the appeal is, whether the defendant should be made liable for rent previous to September, 1882, and our ruling that he should not be, is confined to that single point. Nor in our opinion does the act of 1871-'72 (*The Code,* §473, *et seq.*), affect the mutual rights of the present parties. It provides a (46) remedy for a different class of cases.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Pitt v. Moore, 99 N. C., 91; *Vann v. Newsom,* 110 N. C., 126; *Field v. Moody,* 111 N. C., 358; *Pass v. Brooks,* 125 N. C., 131; *Luton v. Badham,* 127 N. C., 101; *Kelly v. Johnson,* 135 N. C., 648; *Jones v. Sandlin,* 160 N. C., 154; *Faircloth v. Kinlaw,* 165 N. C., 231; *Leffel v. Hall,* 168 N. C., 409; *Ballard v. Boyette,* 171 N. C., 26; *Ferrell v. Mining Co.,* 176 N. C., 477; *Deal v. Wilson,* 178 N. C., 604; *Carter v. Carter,* 182 N. C., 190; *Eaton v. Doub,* 190 N. C., 22.

B. B. WINBORNE v. W. J. JOHNSON et al.

Excusable Neglect—Mistake—Vacating Judgment.

1. Upon an application to set aside a judgment for mistake, inadvertence, surprise or excusable neglect, the Court should specifically find the essential facts.

2. What is mistake, inadvertence, surprise or excusable mistake is a question of law, and this Court will, upon appeal, review an erroneous judgment thereon.

3. Where the Court has ascertained the facts, and exercised the discretion conferred by the statute—*The Code*, §274—by granting or refusing the relief sought, the Supreme Court will not review its action.

(*Branch* v. *Walker*, 92 N. C., 91; *Foley* v. *Blank*, Id., 476; and *Beck* v. *Bellamy*, 93 N. C., 129, cited and approved).

This was a MOTION to set aside a judgment, heard at February Term, 1885, of the Superior Court of BEAUFORT county, before *Gudger, Judge.*

Among other statements of facts sent up by the Judge below, are the following:

"The defendant W. J. Johnson, is a man of limited education. He alleges, by affidavit, that when the summons was served on him, 'he understood he was to attend at Washington, D. C., and was much annoyed and greatly confused, as well as astonished, on that account.' The deputy who served the summons, states in his affidavit, that he explained he was to attend this court, and told him he must go to Washington, N. C., to court. The defendant W. J. Johnson also alleges, in his affidavit, that he was sick at the time of Spring Term of this court. The plaintiff states, in his affidavit, that he saw him riding through the streets of Murfreesboro, in Hertford county, during the time the

(47) Spring Term of this court was going on.

Both sides offered testimony—there being much conflict.

The Court, after hearing argument upon the facts, adjudged:

That the judgment heretofore rendered at Spring Term, 1885, of this court, be vacated and set aside, and that proper writs of restitution issue to replace the defendants in possession of the land, and that this cause be removed to the county of Northampton, when and where the defendants are allowed to defend said action as they may be advised and as the law will permit."

From this order the plaintiff appealed.

Mr. John Devereux, Jr., for the plaintiff.

No counsel for the defendant.

MERRIMON, J. (after stating the facts). The statute, (The Code, §274), among other things provides, that the Judge "may also in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

What is such "mistake, inadvertence, surprise or excusable neglect," is a question of law arising upon the state of facts found in each particular case. If the Court below errs in deciding this question, its decision in this respect may be reviewed, and any error corrected by this Court. If there be no error, the order appealed from will be affirmed, but if the Court should decide that there is no such mistake, inadvertence, surprise or excusable neglect, and on that account refuse to grant relief, when it appears from the facts found that there is, or if it decides that there is, when in point of law there is not, then such error may be corrected here upon appeal.

But if there is mistake, inadvertence, surprise or excusable neglect, and the Court grants or refuses to grant the relief demanded, this Court cannot review, change, modify or interfere with the exercise of the discretion of the Court in such respect, because, as to this, the (48) statute prescribes that the Judge may, in *"his discretion,"* grant or refuse it. The reason of this statute is, that the Judge who hears the motion for relief, is better informed and qualified to see and appreciate all the facts and circumstances, and decide upon the propriety or impropriety of granting the relief demanded, than a Court of Errors. This discretion of the Judge is not an arbitrary, but a sound legal one, and relief ought to be granted or refused in the cases allowed by law, solely with a view to justice. It is not in every case of mistake, inadvertence, surprise or excusable neglect that relief should be granted. Whether it ought or ought not to be, must depend upon the facts and circumstances of each case. *Branch* v. *Walker,* 92 N. C., 91; *Foley* v. *Blank,* 92 N. C., 476; *Beck* v. *Bellamy,* 93 N. C., 129.

But no question can arise in the respects mentioned until the facts are ascertained. The Judge should always first find the facts on the motion for relief. This is peculiarly his province. This Court cannot find them, or review his findings of them, as has often been decided.

In this case, the Judge has failed to find the most material facts. In the case stated on appeal, he says the defendant is a man of limited education—that "he *alleges* by affidavit, that when the summons was served on him, he understood he was to attend at Washington, D. C., and was much annoyed and greatly confused, as well as astonished, on that account; * * * * that he was sick at the time of Spring Term of this Court," &c.

There was evidence going to show that the defendant was poor and ignorant, and the Court was held a long distance from where he lived. There was also evidence of the appellant and others, more or less in conflict with the evidence of the appellee. The facts are not found, and it does not appear how ignorant and confused the defendant was, or that he was misled, or that he was sick, or if he was sick how sick he was

during the term of the Court, or that he was so ill that he could
(49) not get to the Court, or send some one to make known his condition. The Judge should have found all the facts bearing upon his alleged grounds of excuse from all the evidence, much of it conflicting, produced by the appellee and appellant.

It is possible, though not probable, that a party might be so ignorant and confused, his surroundings so wretched, his knowledge of men and things, and of his duty so poor, as that he could not know that he ought to attend Court at a particular time and place.

He might be so sick for a time, longer or shorter, as to forget and not be sensible that a summons had been served upon him, and that he ought to attend Court in person or by counsel. These and like facts, in some cases, might give rise to mistake, inadvertence, surprise or excusable neglect. In order to determine whether this was so or not in this case, the facts ought to have been found by the Judge who heard the motion for relief.

He could not decide satisfactorily without such finding, nor can this Court review, and affirm or correct his decisions of questions of law, arising upon the facts.

It was suggested on the argument, that taking the whole of the evidence produced in support of the motion as true, there was no ground proven for the relief demanded. In a very plain case, perhaps we might feel at liberty to pursue the course thus indicated. But in this case, the evidence is considerable, and in some respects conflicting, and it is not our province to consider the evidence in all its aspects and bearings, and to draw proper inferences from it. We cannot venture to do so. Besides, the Judge who will hear the motion, might allow the parties to produce other evidence.

The case must be remanded, to the end and with directions, that the order setting aside the judgment shall be reversed, that the Judge proceed to find the facts, and take further action in the motion to set the judgment aside, according to law. *It is so ordered.*

Error. Reversed.

Cited: Clemmons v. Field, 99 N. C., 402; *Weil v. Woodard,* 104 N. C., 98; *Taylor v. Pope,* 106 N. C., 269, 270; *Vick v. Baker,* 122 N. C., 99; *Marsh v. Griffin,* 123 N. C., 670; *Norton v. McLaurin,* 125 N. C., 188; *Creed v. Marshall,* 160 N. C., 398; *Gaylord v. Berry,* 169 N. C., 735; *Lumber Co. v. Cottingham,* 173 N. C., 327; *Sutherland v. McLean,* 199 N. C., 351.

GEORGE D. GREEN et al. v. C. F. GRIFFIN et al.

Appeal—Contempt—Injunction—Interlocutory Judgment.

1. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the Court upon that specific point. The order or judgment appealed from, is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the Court below.

2. It is where the judgment is final and disposes of the entire controversy, that the appeal, when properly perfected, vacates the judgment and the whole cause is transferred to the appellate court. Even then, it may, for some purposes, be proceeded with in the lower Court.

3. A decree or order granting or dissolving an injunction, is not vacated by an appeal.

4. A party who intentionally violates an interlocutory judgment of the Court is guilty of contempt, although he may have acted in good faith upon professional advice honestly given.

(*Bledsoe* v. *Nixon*, 69 N. C., 82; *Isler* v. *Brown*, Ib., 125; *Skinner* v. *Bland*, 87 N. C., 168; *McRae* v. *Commissioners*, 74 N. C., 415; *Coates* v. *Wilkes*, 94 N. C., 174; *Hinson* v. *Adrian*, 91 N. C., 373; *State* v. *Boyett*, 32 N. C., 336; *Baker* v. *Cordon*, 86 N. C., 116, cited and approved).

This was RULE upon C. F. Griffin, to show cause why he should not be attached for an alleged contempt of the Court, heard by *Connor, Judge,* at Chambers, in WILSON, on the 31st of July, 1886.

In the action pending between the parties, an interlocutory order was made for the issue of an injunction, restraining the defendants from joining the walls of a store which they were then putting up, to those of the plaintiffs. The injunction was issued on July 23d, 1886, and on the same day served on the defendant C. F. Griffin.

An appeal was taken from the order, and perfected on the next day.

Acting under the advice of counsel, and in the *bona fide* belief that the order was vacated by the appeal, and was no longer in force, the defendant named, continued to prosecute the work, and to unite the two walls, notwithstanding the restraining order.

A rule was, at the plaintiff's instance, served on said defendant, (51) requiring him to show cause before the Judge, why he should not be attached for contempt in disobeying the order. Upon the hearing of the motion, the Judge found as facts, that under the advice of their counsel, in whom they have confidence, the defendants continued, after perfecting their appeal as aforesaid, to join their wall to the wall of the plaintiffs, and to use the wall of the plaintiffs notwithstanding, and

in defiance of the said order, and that in this they acted in good faith, relying upon the advice of their counsel that said appeal vacated said order, and that the same was no longer in force, and that they had no intention of committing any contempt of the Court, except in so far as the refusal to obey said injunction might in law constitute a contempt, and rendered the following judgment:

Upon the foregoing facts, it is considered that the appeal taken by the defendants did not vacate the said order, and that the said injunction is in force, notwithstanding the said appeal.

It is further considered by the Court, that in refusing to obey the said order, the defendants are guilty of contempt, and that the said defendant, C. F. Griffin, pay a fine of $250, and that he be committed to the common jail of Wilson county until said fine is paid, and that said defendant pay the cost of this proceeding.

From this order the defendants appealed.

Mr. John Devereux, Jr., for the plaintiffs.
Mr. Hugh F. Murray, for the defendants.

SMITH, C. J., (after stating the facts). The record raises only two questions:

1. The effect of the appeal upon the interlocutory order; and, if still operative;

2. The sufficiency of the defence, that the act of alleged contempt was done with the advice of counsel, and in full assurance that it was not in violation of the order.

(52) Both of these propositions, in an affirmative form, have been strenuously maintained in the argument of appellants' counsel, and are before us for consideration.

The defendant insists that the appeal, when perfected, annulled the order for all purposes, and left the parties against whom it was directed as free to act as before it was made.

If this were so, it is manifest the right to arrest the action of one, committing irreparable damages, by a restraining order, could be easily defeated by taking an appeal, and consummating what was intended, before it could be acted upon in the higher Court. Shade trees could be cut down, property removed out of the jurisdiction of the Court, beyond recovery, or any other wrong, intended to be prevented, perpetrated, so that when a final judgment or perpetual injunction was rendered, it would be vain and useless. The remedy sought by the process might thus become illusory, and success in the suit, followed by no benefit to the aggrieved party.

The cases cited, in support of so unreasonable a contention, *Bledsoe* v. *Nixon,* 69 N. C., 82, and *Isler* v. *Brown,* 62 N. C., 125, followed in *Skinner* v. *Bland,* 87 N. C., 168, decide that the whole cause is removed by an appeal from a final judgment disposing of the controversy and constituted in the appellate Court, when it has been regularly and legally perfected. But while the judgment is vacated for the purpose of effectuating the transfer from the one Court to another, the cases do not decide that the restraining order becomes thereby, wholly inoperative, and that the mandate contained in it may be avoided.

The other cases cited, of appeals from a subsidiary order, made during the progress of a cause and necessary to secure the fruits of an ultimate recovery, simply declare that the *ruling* of the Court is withdrawn from the jurisdiction of the Judge, and must remain without addition, modification or other change, to be passed on by the appellate Court. *McRae* v. *Commissioners,* 74 N. C., 415; *Coates* v. *Wilkes,* 94 N. C., 174.

The action is not divided by appeals of the latter class, but the (53) whole cause is still in the Court below, and the *ruling* alone is brought up for review. Such is the clear import of the statute which authorizes such appeals. *The Code,* §962. This enactment, which is but a transcript from the Revised Code, chap. 33, §14, with only a change adapting it to a single Court, provides that "when an appeal shall be taken to the Supreme Court from any interlocutory judgment, the Supreme Court shall not enter any judgment reversing, modifying or affirming the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the Court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same, according to said opinion, and the Court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions."

The appeal, like a writ of error, does not disturb the interlocutory order, but suspends action on it, intended to carry it into effect, until its legality is tested in the Court above, and this being decided and certified to the Superior Court, then, if sustained, that Court is directed to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. The injunction requires no positive action, but that a party refrain from doing what is inequitable and injurious to another.

"An appeal from a decree dissolving an injunction," remarks a recent author, "does not have the effect of reviving and continuing the injunction itself, since the process of the Court, when once discharged, can only be revived by a new exercise of judicial power. An appeal being merely the act of the party, cannot of itself affect the validity of the order of

the Court, nor can it give new life and force to an injunction which the Court has decreed no longer exists." *High on Inj.* §893.

As the appeal does not vacate the decree of dissolution, but leaves the order to which it applies in force, so for reasons equally strong, the appeal does not neutralize the order for the injunction.

(54) The current of adjudications is in this direction. In *Sixth Ave. R. R. Co.* v. *Gilbert E. R. R. Co.,* 71 N. Y., 430, determined in the Court of Appeals, it is said:

"By the appeal with stay of proceedings on the part of the plaintiff, in enforcing the judgment, the judgment was not annulled or its obligation upon the defendant impaired. But its execution was stayed, that is, the plaintiff was prohibited from issuing process in execution of it. * * But this did not affect the validity or effect of the judgment pending the appeal, so far as it bore upon and restrained the action of the defendant, its servants or agents. It did not absolve them from the duty of obedience, and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as adjudged by the Court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages."

"A stay of proceedings pending an appeal," in the language of the Court in *Mer. Min. Co.* v. *Fremont,* 7 Cal., 130, "has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted." *Yocum* v. *Moore,* 4 Ky., 221.

So in the Slaughter House cases, 10 Wall., 273-297, *Clifford, J.,* says, "it is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in the Circuit Court, is reversed or nullified by an appeal or writ of error before the cause is heard in this Court."

While an appeal upon a final adjudication in ordinary cases, transfers the cause to the appellate Court, where, if not erroneous, it is ultimately rendered and becomes, as has been often held, the judgment of that Court, yet pending the removal, it is not for all purposes a nullity. It remains, as decided in *Bledsoe* v. *Nixon,* sufficiently in force to warrant an execution, to which a judgment is essential, in case no supersedeas appeal undertaking has been given.

(55) So when such undertaking has been executed, "the Court in which such judgment has been recovered," may "direct an entry to be made by the Clerk on the docket, of such judgment, that the same is secured on appeal, and thereupon it shall cease, during the pending of said appeal, to be a lien on the real property of the judgment debtor, as against purchasers and mortgagees in good faith." *The Code,* §435.

This is an evident statutory recognition of the efficacy of the judgment appealed from, even when such full security is furnished, for some purposes at least, and that its vitality is not extinguished altogether

while the appeal is undetermined. Surely, if for any purpose, the judgment should remain in force, to prevent such evasions, as the present disregard of the order would sanction, and secure the rights of a litigant.

In the exceptional cases of an appeal from a collateral order, the rule is more necessary in its application, and the judgment, from necessity, and to sustain the ends of justice, must so far subsist, as to authorize the Court to preserve the *status ante quem,* and prevent any material change in it, before the appeal is determined. Still more forcibly must the principle apply, when a temporary restraining order is found to be necessary in the progress of the cause, and its validity is to be reviewed. *Hinson* v. *Adrian,* 91 N. C., 373.

2. The next inquiry is, has the contempt been purged?

When the disobedience is the result of erroneous legal advice, as to one's duty under such mandate in order to shape his conduct to its requirements, it is generally deemed a sufficient excuse. But such was not the case of this defendant. He knew he was restrained from proceeding with his work, and he sought advice only as to whether the order was in force, and if he was freed, by the appeal, from its obligations.

Neither the advice of counsel that the injunction was illegal, nor the declaration of the Justice that he would go on and try the case, notwithstanding the injunction, affords justification of the conduct of a party. *Capet* v. *Parker,* 3 Sandf., 662.

The fact that the defendant in violating the injunction, acted (56) under the erroneous advice of counsel, will not protect him. *Smith* v. *Cook,* 39 Geo., 191.

In a recent work on contempts, it is said, that "when an order is improvidently granted, or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority, and an attempt to justify disobedience, that the act was committed on the advice of counsel, will not avail the defendant. But when the act of contempt does not appear to be at all wilful or defiant, but merely the exercise of a supposed right, *under advice taken and given in good faith,* it does not deserve punishment as such, but the party should make the complainant whole as to the damages he has sustained thereby." *Rapalje on Contempt,* §49.

The Court is less disposed to entertain the excuse that the advice is based on an erroneous statement of law, which every one is presumed to know and understand, but to recognize this error as an element in mitigation of the act, but not in its justification. This presumed knowledge of the law was carried very far in *State* v. *Boyett,* 32 N. C., 336, wherein it is held, that it is no defence to a charge of *"knowingly and fraudulently"* voting at an election, that the defendant had taken the advice of a highly respectable and intelligent gentleman, not of the bar,

and was told he had a right to vote; and this by force of the maxim, *ignorantia legis neminem excusat.*

This Court, considering the effect of a disavowal of the imputed intent, remarked in *Baker* v. *Cordon,* 86 N. C., 116-121, that this excuse is confined to cases "when the *intention to injure* constitutes the gravamen of the offence."

The violation of a judicial mandate, stands upon different ground, and the only inquiry is, whether its requirements have been wilfully disregarded. If the act is intentional, and violates the order, the penalty is incurred, whether an indignity to the Court, or contempt of its authority, was or was not the motive for doing it.

(57) The act here charged was in direct disregard of the order, from which no harm could come to the defendant, other than delay from pausing in his work until the question was settled, he prefers to seek and act upon advice given, that the order was, while in fact it was not, defunct or suspended.

He must therefore abide the consequences of his choice. There is no error, and this will be certified to the Court below. *It is so ordered.*

No error. Affirmed.

Cited: Fleming v. Patterson, 99 N. C., 407; *Delozier v. Bird,* 123 N. C., 694; *James v. Markham,* 125 N. C., 152; *Herring v. Pugh,* 126 N. C., 857; *Reyburn v. Sawyer,* 128 N. C., 9; *Norwood v. Lassiter,* 132 N. C., 58; *S. v. Dewey,* 139 N. C., 560; *Dunn v. Marks,* 141 N. C., 233; *Comes v. Adams,* 150 N. C., 71; *Bonner v. Rodman,* 163 N. C., 3; *Pruett v. Power Co.,* 167 N. C., 600.

CURTIS H. GLOVER, Adm'r of BENNETT FLOWERS, v. J. N. FLOWERS et al.

Administrator—Judgment—Statute of Limitations.

1. The administration of estates, granted prior to the first day of July, 1869, must be conducted according to the law as it existed before that date. *The Code,* §1433.

2. There was no statute of limitations barring actions upon notes under seal executed, or judgments rendered, prior to 1868. A *presumption* of payment arose after ten years.

3. An executor or administrator could not avail himself of the limitations prescribed in §§11 and 12, chap. 65, of Rev. Code, unless he showed that he had disposed of the assets and made the advertisement required by §§24 and 27, chap. 46, Rev. Code.

(*Little* v. *Duncan*, 89 N. C., 416; *Gaither* v. *Sain*, 91 N. C., 304; *Cooper* v. *Cherry*, 53 N. C., 323, and *Rogers* v. *Grant*, 88 N. C., 440, cited and approved).

This was a SPECIAL PROCEEDING, commenced in the Superior Court of WILSON county, on the 24th of August, 1881, for license to sell for assets, certain real estate, which it was alleged, the intestate Bennett Flowers had conveyed with intent to defraud his creditors. The widow and heirs-at-law of the intestate and those claiming under the alleged fraudulent conveyance were made parties defendant.

The debt, for the payment of which it was sought to subject the land, was evidenced by a note, under seal, for $800, executed by the intestate to Wm. Peele, guardian, on the 26th of May, 1860. (58) The intestate died in October, 1867, and Edward Fulghum soon thereafter was appointed his administrator. He made a return in May, 1869, and died in December, 1880, without having fully administered the estate. The plaintiff was appointed administrator *de bonis non,* in August, 1881.

At Spring Term, June 3d, 1868, of the Court of Pleas and Quarter Sessions of Wilson county, judgment was rendered on the note.

On August 19th, 1881, D. B. Eatman and wife, who had become the owners of the debt, commenced suit thereon against the administrator *de bonis non,* in the Superior Court of Wilson, and at Spring Term, 1882, recovered judgment against him for $800 with interest from 26th May, 1860, and costs.

Among other defences, the defendants insisted that the said debt was barred by the statute of limitations, and the Court so held, and gave judgment accordingly.

The plaintiff appealed.

Mr. Jacob Battle, for the plaintiff.
Mr. Hugh F. Murray, for the defendants.

MERRIMON, J. The estate in the hands of the administrator and his successor, the present plaintiff, must be dealt with, administered and settled, according to the law, as it prevailed prior to the first day of July, 1869, except "as to the Courts having jurisdiction of any action or proceeding for the settlement of an administration, or the practice

and procedure therein." The statute, (The Code, §1433), so expressly provides. *Little* v. *Duncan,* 89 N. C., 416; *Gaither* v. *Sain,* 91 N. C., 304.

The note sued upon was under seal and executed on the 26th day of May, 1860, and came due before March, 1868. Judgment upon the same was taken against the first administrator of the intestate, it seems, at the Spring Term (which began the 3d day of June of that year) of 1868. There was, therefore, no statutory bar as to this bond or
(59) this judgment. There arose a statutory presumption that each had been paid after the lapse of ten years after the right of action accrued upon them respectively, excluding the time from the 20th day of May, 1861, to the 1st day of January, 1870, but this presumption might be rebutted by proper proof. The present statute of limitations does not apply to such bonds and judgment. *The Code,* §§136, 137; *Gaither* v. *Sain, supra.* What plea or pleas the first administrator pleaded in the action brought against him upon the bond mentioned, does not appear, nor does the defence to the action brought against the present plaintiff upon the judgment appear from the facts stated. But whatever may have been the defence, the debt, whether it be the bond, or the judgment, was not barred by the present statute barring such bonds and judgments after the lapse of ten years. What statute of limitations the Court intended to apply in its judgment, does not appear; if it intended to apply that above mentioned, there is none, as appears from what we have said.

If, however, the Court by its judgment intended to apply the statutes (Rev. Code, chap. 65, §§11, 12), barring creditors of deceased debtors, still there is error, because the first statute cited is not necessarily a bar—it is not, unless it appears that the administrator paid the assets to creditors, or next-of-kin, or both, entitled to the same, or that he has paid them to the University as the statute requires, or that there were no assets; and the second is not a bar, unless it appears that the administrator advertised within the time, and in the way prescribed, and paid the assets to the persons entitled to the same, and took refunding bonds for the benefit of creditors, as required by the statute, (Rev. Code, ch. 46, §§24-27), *Cooper* v. *Cherry,* 53 N. C., 323; *Rogers* v. *Grant,* 88 N. C., 440; *Little* v. *Duncan, supra,* and the cases then cited.

The question argued by the counsel for the appellant, whether the defendants can avail themselves of the statute of limitation, as they seek to do, is not presented by the exception specified in the record. A
(60) single question, as it arose vaguely upon the facts agreed upon by the parties and submitted to the Court, was decided by it, and the error assigned extends only to, and involves the Court's decision of that

question. It would be improper for us to go beyond that. We simply decide that upon the facts agreed upon, and submitted, the Court erred in deciding that the debt of the appellant was barred by the statutes referred to, or any of them, and in its judgment dismissing the action.

The judgment must be reversed, and further proceedings had in the action according to law.

To that end, let this opinion be certified to the Superior Court. *It is so ordered.*

Error. Reversed.

Cited: S. c., 101 N. C., 141; *Brittain v. Dickson,* 104 N. C., 550; *Love v. Ingram, ibid.,* 602; *Bobbitt v. Jones,* 107 N. C., 662.

T. C. OAKLEY v. C. M. VAN NOPPEN.

Issues—Judgment—Lien.

1. It is the duty of a party to an action to tender such issues as he conceives are necessary to try the case upon the merits; and an exception made after the trial, that issues, which might properly have been submitted, were not, comes too late.
2. The Court ought not to render judgment upon an aspect of the case not presented by the pleadings or verdict upon the issues submitted to the jury.
3. In an action to recover for work and labor upon the construction of a house, the Court may, in a judgment for the amount due, decree a lien on the premises, therefor.

(*Curtis* v. *Cash,* 84 N. C., 41, and *Simmons* v. *Mann,* 92 N. C., 12, cited and approved).

CIVIL ACTION, tried at March Term, 1886, of DURHAM Superior Court, before *Clark, Judge.*

The plaintiff alleged, that he agreed with the defendant to build for the defendant a house for the sum of $1,100.00, and in pursuance thereof, proceeded to erect the house; and the defendant took possession thereof.

The plaintiff further alleged, that no part of the said price had (61) been paid, except the sum of $397.82, and in consequence of the defendant's failure to pay the balance due, the plaintiff filed a lien upon said house and lot. He demanded judgment for the balance due, and

also that said judgment be declared a lien upon said house and lot, and the same be sold therefor, also for costs and such other relief as the case may require.

The defendant denied that the plaintiff had done any extra work on the house, or that he had executed the work and completed it according to the contract. He also denied the right of the plaintiff to file or have a lien upon defendant's property, as the alleged lien is filed for material furnished in the building of said house, and for money expended by plaintiff in payment for labor performed thereon, which he averred was not according to law.

For a further defence he pleaded a counter-claim, consisting of various charges, amounting in the whole, to five hundred and seventeen dollars and fifty cents.

The plaintiff in reply, denied the counter-claim as alleged.

The following issues were then submitted to the jury, with the assent of both parties:

1. Is defendant indebted to plaintiff? If so, how much? Answer, $805.93, with interest from the 26th of August, 1884.

2. Is plaintiff indebted to defendant? If so, how much? Answer, "nothing."

In the statement of the case, it is stated that "the defendant in his answer, alleged that the lien was invalid as against his homestead, and prayed that the Court might so determine." He objected to the judgment, unless it contained a clause declaring the lien invalid as against his homestead.

It appeared in evidence and in the pleadings, that the lien was for the balance due on the contract for building the house, and that the contract price included the price of work and labor done, as well as the cost of material; and the plaintiff contended that the credits given by him to defendant, covered all charges for material, and that it had been
(62) so agreed between them; and that the lien, as it stood, covered only the charges for work and labor done. Thereupon the Court offered to submit additional issues, as to how much of the contract price was for material, whether the cost of material used in the building had been proved by the contract and allowed the defendant, and whether there was any agreement between the parties that such credits should be so applied. To this, the defendant objected.

The Court thereupon signed judgment for the debt, according to the verdict, and the defendant excepted, because the judgment did not declare the lien invalid as against his homestead, and appealed.

Messrs. Jno. W. Graham and *Jno. Manning,* for the plaintiff.

Mr. W. W. Fuller, for the defendant.

ASHE, J., (after stating the facts). The only exception presented for our consideration by the record, is to the judgment, because it did not declare the lien was invalid as against the defendant's homestead. The exception cannot be sustained, for several reasons. First, because there was no such allegation in the answer of the defendant as that stated in the "case on appeal," to-wit: "that the defendant in his answer, alleged that the lien was invalid as against his homestead."

The only reference in the answer of the defendant to the lien, is contained in the second paragraph of the answer, which, upon a fair and reasonable construction, has reference only to the validity of the lien, and has no reference whatever to his homestead. Even if it did, there was no issue submitted to the jury upon that point, and that there was not, is no ground of complaint by the defendant. It was his duty to eliminate and tender such issues as he considered essential to present the merits of the action, and when he failed to do so, he cannot complain in this Court that such issues were not found by the Court below, and submitted to the jury. *Simmons* v. *Mann,* 92 N. C., 12; *Curtis* v. *Cash,* 84 N. C., 41.

And secondly, for the reason that the Court did offer to submit (63) issues to the jury, touching the character of the lien with reference to its bearing upon his right of homestead, and he objected. The Judge would have had to travel out of the record, and transcend his duty, if upon the pleadings in this case he had rendered such a judgment as that insisted upon by the defendant, and in fact, we do not see how the question of a homestead is raised by the pleadings in the case. If the action was brought to enforce the lien, the plaintiff has more cause to complain of the judgment than the defendant; for the Court rendered the judgment simply for the debt alleged to be due the plaintiff, without declaring that the land described in the lien should be sold for the payment of the debt. But the plaintiff did not appeal, and we must therefore assume that he was satisfied with the judgment, as rendered.

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

No error. Affirmed.

Cited: S. c., 100 N. C., 290; *Deberry v. R. R., ibid.,* 315.

STEPHEN HUSSEY v. W. L. KIRKMAN, Adm'r of JOHN WOODS.

Evidence—Transaction with Deceased Person—Statute of Limitations.

1. While a plaintiff in an action may be competent to testify to the *handwriting* of a deceased person to a paper writing—the subject of the action—it is clear that he is incompetent to testify to the *contents* of that writing.
2. When the Statute of Limitation is pleaded, it devolves upon the plaintiff to show that his cause of action accrued within the time limited by law for beginning it.
3. A new promise, to repel the bar of the Statute of Limitations must be clear, positive and distinctly refer to the debt sued upon. It must be made to the party, his agent, or attorney. A promise to a third party will not be recognized. Upon causes of action accruing since the adoption of the Code of Civil Procedure, the new promise must be in writing.

(*Peebles* v. *Maxwell*, 64 N. C., 313; *Rush* v. *Steed*, 91 N. C., 226; *Faison* v. *Bowden*, 72 N. C., 405; *Faison* v. *Bowden*, 76 N. C., 425; *Parker* v. *Shuford*, 76 N. C., 219, and *Kirby* v. *Mills*, 78 N. C., 124, cited and approved).

(64) CIVIL ACTION, tried before *Gilmer, Judge,* at December Term, 1885, of the Superior Court of GUILFORD.

The plaintiff's action, begun on April 8th, 1884, before a Justice of the Peace, was, as described in the summons, upon a debt of $54.50, with interest from June, 1875, and his complaint upon the trial was upon a promissory note, alleged to have been lost, of like sum and interest, subject to a credit of ninety cents.

The defendant denied the plaintiff's allegations and set up also a defence arising under the Statute of Limitation. Judgment was rendered against the defendant, and he appealed to the Superior Court.

Upon the trial in the Superior Court, the plaintiff introduced one Cullen Woods, who testified: I was well acquainted with John Woods and was at his store-house frequently about two months before his death, and about two weeks before he was taken down sick; and at this time had a conversation with him, in which he said he was going out West soon, if his health would permit, and that he owed a few debts, among which was a note held by the plaintiff, Stephen Hussey, for near the sum of sixty dollars; that it was just and due, and he intended to pay it if he ever got well enough. Woods was then complaining very much, and died in March, 1883. Witness remembered to have seen a note held by plaintiff dated 1844.

In this conversation, Woods said this note of near sixty dollars had been renewed. This conversation was had about two or three weeks before he was taken down sick, and about two months before he died.

Witness did not remember that he ever told plaintiff about this.

The plaintiff was next introduced, and testified: That he had lost the note which was spoken of by Cullen Woods; that he had made diligent search for the note and could not find it; that he was well acquainted with the handwriting of John Woods, and that the (65) signature was in his handwriting. Witness was then asked, what other part of the note was in John Woods's handwriting, and replied that the seal, and date, also was in said Woods's handwriting. Witness also said body of note was in his (witness') handwriting.

It being proven that witness had lost the note, and that the signature was in the handwriting of John Woods, the plaintiff proposed to prove what was the contents, &c., of the note, as setting up a lost instrument. Defendant objected, and the objection was sustained, and plaintiff excepted.

Cullen Woods was recalled, and testified, that in the conversation above referred to, John Woods told him that the note of near sixty dollars, held by the plaintiff against him, was a note that had been shortly before that renewed by him to the plaintiff.

Upon the foregoing facts, his Honor, Judge Gilmer, held, that there was no evidence to go to the jury, and to this ruling by the Court, the plaintiff excepted, and submitted to a nonsuit, and appealed.

Mr. John A. Barringer, for the plaintiff.

No counsel for the defendant.

SMITH, C. J., (after stating the facts). It will be perceived, that while the plaintiff was allowed to testify to the handwriting of the defendant's intestate in the signature and seal in the note, under the ruling in *Peebles* v. *Maxwell,* 64 N. C., 313, and in *Rush* v. *Steed,* 91 N. C., 226, yet he was not permitted to speak of the contents of the instrument, by reason of the interdict of The Code, §590, because it was written by the intestate.

The giving of the note in its entirety was, undoubtedly, a transaction between the plaintiff and intestate, as much the signing and sealing as any other part of it, and of this, the witness had the same personal knowledge. Indeed, it was a consummation from which the vitality of the contract is derived. Had it been present, this proof would have entitled the plaintiff to have it read to the jury, and, if not (66) controverted, to a verdict upon it.

If the ruling in *Peebles* v. *Maxwell* is to be followed, and it was followed with evident reluctance, as a precedent for the similar ruling in the other case, involving, in the opinion of the Court, "a very fine spun distinction," it would seem not very unreasonable to permit to be shown

the contents of the instruments, upon the same kind of testimony as is allowed to prove the execution. This might rest upon the memory of the witness, from reading the note with the recognized signature, and apart from his personal knowledge of the making, just as he testified to handwriting, from his general knowledge, irrespective of his seeing the signing.

But if any error was committed in excluding proof of the provisions of the note, after proof of execution, it would lie rather in the admission of the testimony, to show execution, than in the exclusion of testimony of the terms of the executed instrument. The latter ruling is clearly not erroneous, and the other, in the plaintiff's favor, supplies him with no just grounds of complaint.

Upon the received evidence, it does not appear when the note was made, nor when it matured; and when the statutory bar is set up, it devolves on the plaintiff, to show that the cause of action accrued within the time limited for bringing it.

If the note was made previous to the time when the Code of Civil Procedure went into effect, there would be no limited time for instituting suit, but only a presumption of payment raised by the lapse of time. If made and maturing on or after April 8th, 1874, the limitation in the present law would not have expired before the issue of the summons. *The Code,* §132, par. 2.

If it was executed and became due within the interval thus marked, the statutory bar would protect the intestate. The plaintiff did not show when the note was given, and when the cause of action accrued.

(67) To meet this difficulty, we suppose the intestate's admissions of his indebtedness, were given in evidence, and the inquiry is, were they sufficient to remove the bar.

The admission is, that the intestate owed a note to the plaintiff of about sixty dollars, which had been renewed.

The trouble is, that no note has been produced, nor its contents shown, to which the admissions can be attached, so as to admit of identification.

The acknowledgment is very like that in *Faison* v. *Bowden,* 72 N. C., 405, in which the testator said *to the plaintiff,* "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." The testator owed the plaintiff for medical services, running over a period from the beginning of 1854 to his death, in November, 1861, and the recognition of the debt was relied on to remove the bar as to the whole account.

It was held to be insufficient, and READE, J., for the Court, says: "The rule to be gathered from the numerous cases, to which we were referred by the counsel, may be thus expressed: The new promise must

be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the amount and nature of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied."

Again, it has been held, that the promise must be made to the creditor himself, (*Parker* v. *Shuford,* 76 N. C., 219, and *Faison* v. *Bowden,* Ib., 425), or to an attorney or agent for the creditor, (*Kirby* v. *Mills,* 78 N. C., 124), to repel the statute.

If, however, the note was executed since the Code of Civil Procedure became the law, (and the time is not shown), the promise or acknowledgment must be in writing (The Code, §172), and if before, there is no statutory limitation applicable.

The ruling of the Court, that there was no evidence before the (68) jury to warrant a verdict for the plaintiff, must therefore be sustained.

No error. Affirmed.

Cited: Hobbs v. Barefoot, 104 N. C., 228; *Buie v. Scott,* 107 N. C., 182; *Nunnery v. Averitt,* 111 N. C., 394; *Koonce v. Pelletier,* 115 N. C., 235; *Graham v. O'Bryan,* 120 N. C., 465; *Parker v. Harden,* 121 N. C., 58; *Bright v. Marcom, ibid.,* 87; *House v. Arnold,* 122 N. C., 222; *Moore v. Westbrook,* 156 N. C., 493; *Sprinkle v. Sprinkle,* 159 N. C., 82; *Garland v. Arrowood,* 172 N. C., 594; *McEwan v. Brown,* 176 N. C., 252; *In re Will of Saunders,* 177 N. C., 157; *Satterthwaite v. Davis,* 186 N. C., 571.

R. D. JOHNSTON v. GEORGE D. PATE.

Betterments—Construction of Statute.

Where, after a recovery by the plaintiff, in ejectment, the defendant, in apt time, applied to the Court to have the value of the betterments allowed him, and the Court directed that execution be stayed till such value could be ascertained, upon the defendant giving bond, conditioned to pay all damages, &c., which might be assessed against him, and the defendant failing to give such bond, a writ of possession issued, and was executed, *It was held,*

(1). That the failure to give the bond did not discontinue the action in respect to the claim for betterments.

(2). The Court has no power to refuse to institute an inquiry as to the defendant's right to betterments, when application has been properly made.

(3). The Court has discretion to direct the issuing or suspension of the execution of the judgment pending such inquiry.

(4). When a statute directs the performance of an act for the promotion of justice or the public good, if it is necessary to secure these objects, the word "*may*" will be construed as mandatory—equivalent to the word *shall*.

(*Barker* v. *Owen*, 93 N. C., 198, cited and approved).

The action was tried before *Shepherd, Judge,* at February Term, 1886, of CRAVEN Superior Court, upon a petition filed by defendant for an allowance for betterments.

After the termination of the plaintiff's action, in his recovery of the land sued for, reported in 90 N. C., 334, the defendant applied, in the Superior Court, for an allowance for the increased value imparted to the land by improvements made thereon, while he was in possession, and acting under a *bona fide* belief of his title, the facts of which, as therein stated, are verified by oath.

The allegations in the petition not being controverted, at Fall Term, 1880, it was ordered that the case be continued, and that the de-
(69) fendant enter into bond, payable to the plaintiff, in the sum of five hundred dollars, conditioned, to pay all damages, rents and profits that may be assessed against him, in the trial of the action, and in the meantime, that the defendant be enjoined from committing waste of any kind. And it is further ordered, that upon giving the bond, above required, execution be stayed.

The bond was never given, and on February 2d, 1881, a writ of possession and execution issued to the sheriff, who carried out the mandate, and returned the writ, with endorsement of satisfaction.

Upon the hearing of the defendant's petition, at February Term, 1886, the plaintiff's counsel moved to dismiss the application, upon the following assigned grounds:

1. For that upon the failure of the defendant to file the bond required in the order of *Graves, Judge,* and the issuing execution and return of the writ of possession and execution, as above set forth, the original action was at an end, and the petition, which was a proceeding in the cause, could not be entertained after the determination of the main action.

2. For that *Graves, Judge,* before whom said petition was presented, permitted said question of betterments to be tried and determined in said action upon a condition, to-wit: the filing of a bond by the defendant, as set forth in the order of *Graves, Judge,* and that as the trying and deter-

mining said question of betterments in the original action was within the discretion of the Judge before whom said petition was presented, and as the permission to try said question in said main action was granted, and the execution stayed, upon the condition above set forth, and as the condition had never been performed by the defendant, the petition was not properly before the Court in said action, and could not be entertained The motion was overruled, and the Court within its discretion, allowed the defendant then to proceed to trial upon his said petition. The plaintiff excepted. A jury was empaneled and found all issues in favor of the defendant. Motion for a new trial overruled. Plaintiff appealed.

Mr. W. W. Clark, for the plaintiff. (70)
No counsel for the defendant.

SMITH, C. J., (after stating the facts). We cannot give our assent to either of these propositions, nor yield to the force of the argument urged in their support.

The cause was not determined by the defendant's failure to give the required bond.

It was retained by the order of continuance, and the bond was but a prerequisite to the suspension of process for enforcing the judgment, and the issuing of the injunction against the plaintiff. Such is the obvious intent and effect of the interlocutory order.

The omission to furnish the indemnity, warranted the issue of the writ sued out by the plaintiff, and it has been executed. But the supplementary proceeding of the defendant remained in Court, and was properly taken up and acted on afterwards.

The appellant's counsel insists, that the words used in the statute, (The Code, §473), that a defendant "*may,* at any time before the execution of such judgment, present a petition," &c., and "thereupon the Court *may, if satisfied of the probable truth of the allegation,* suspend the execution of such judgment, and empanel a jury to assess the damages of the plaintiff, and the allowance to the defendant for such improvements," imply a discretion in the Court, and do not confer a right on the defendant to demand such allowance.

If that were so, the Court did exercise its discretion, and after overruling the plaintiff's motion, "within its discretion allowed the defendant to proceed to trial upon his said petition," as shown in the record, and, as we have seen, no obstacle in the way of so doing is presented in the requirement of an indemnifying bond.

But we do not concur in this construction of the act. The proceeding was instituted in time, and the words, that "the Judge or Court *may,* if satisfied of the probable truth of the allegation, suspend," &c., may con-

fine the Court to the order of suspension or arrest of proceedings,
(71) "but if satisfied," &c., the Court cannot, when the application is made in apt time and regular course, withhold the institution of the inquiry as to betterments, and deny to the defendant the statutory relief given him.

The term "may" is often construed as mandatory when the statute is intended to give relief.

In *Rex* v. *Barlow,* 2 Salk., 609, it is said that when a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall."

In *Mason* v. *Fearson,* 8 How., U. S., 248, Mr. Justice WOODBURY, after citing numerous cases, uses this language: "Without going into more details, these cases fully sustain the doctrine, that what a public corporation or office is empowered to do for others, and *it is beneficial to them to have done,* the law holds he ought to do."

There is no error in the rulings.

The method of procedure in cases arising under the act, is pointed out in the opinion in the late case of *Barker* v. *Owen,* 93 N. C., 198, and to the end that the cause may proceed according to law, in the Court below, it is remanded.

The appellant will pay the costs of the appeal. It is so ordered.

No error. Affirmed.

Cited: Hallyburton v. Slagle, 132 N. C., 959; *Bank v. Com'rs,* 135 N. C., 242; *Jones v. Com'rs,* 137 N. C., 592; *Davis v. Board of Election,* 186 N. C., 231; *Rector v. Rector,* 186 N. C., 620; *Curlee v. Bank,* 187 N. C., 124.

JOSEPHINE KIFF v. W. H. KIFF.

Widow's Year's Support.

1. The filing and recording of the list of articles allotted to the widow, as her year's support, as required by the statute, is essential to its validity, and to the vesting of the property or debt allotted to the widow, in her.

2. In such case, the allotment must be made with such reasonable certainty as to the thing allotted, as to indicate what property was intended by the commissioners, otherwise, the allotment will be void.

3. So, where the allotment of a year's support contained the following item, "labor for 3½ years, $173," *It was held,* void for uncertainty, and it was

not competent for the widow to show, by parol evidence, that the commissioners intended, by this, to allot to her a claim which the deceased husband had against the defendant for labor done for him.

4. *It is intimated,* that in such case, the widow could have the list corrected by a proper proceeding.

CIVIL ACTION, tried before *Gudger, Judge,* at Spring Term, (72) 1886, of HERTFORD Superior Court.

The plaintiff is the widow of John H. Kiff, deceased, and she brought this action before a Justice of the Peace, to recover from the defendant the sum of $173 and interest, a debt which she alleges was duly assigned to her as part of her year's support.

There was judgment for her, and the defendant appealed to the Superior Court, where she again obtained judgment, and the defendant appealed to this Court.

The following are the material facts:

On the trial, the plaintiff testified that her husband, from the time he was twenty-one years old, up to about the first of January, 1884, lived with the defendant, and worked on his farm as a laborer—a period of about four years—and his services were worth $10 per month. And to show that his wages had been assigned to her, she offered in evidence the record of the allotment of her year's support. The defendant objected to this evidence. Objection overruled, and defendant excepted. This record was then read in evidence.

The plaintiff next offered to show, by herself, that the commissioners intended, in allotting the year's support, to allot as a part thereof, the wages due as aforesaid, and that was what they meant when they allotted to her "labor for 3½ years, $173.00." The defendant objected, but the Court overruled the objection, and admitted the evidence, and defendant excepted.

No counsel for the plaintiff.

Mr. B. B. Winborne, for the defendant.

MERRIMON, J. (after stating the facts). The statute, (The (73) Code, §2122), prescribes, that a widow entitled to a year's support out of her deceased husband's estate, may apply to the personal representative of the deceased, and he shall apply to a Justice of the Peace of the township, or the adjoining township to that in which the deceased resided, to assign the same to her—that he shall summon two persons qualified to act as jurors, and having sworn them to act impartially, he and they shall ascertain the number of the family of the deceased, as directed by the statute, examine his stock, crop and provisions on hand, and assign to her so much thereof, as she may be entitled to

have, and among other things, it provides, "that in all cases, if there be no crop, stock, or provisions on hand, or not a sufficient amount, the commissioners may allot to the widow, any articles of personal property of the deceased, and also any *debt or debts known to be due to him,* and such allotment shall vest in the widow said property, and the right to collect the debts thus allotted." And it is further provided, (The Code, §2123), that, "The commissioners shall make and sign three lists of the articles assigned to the widow, stating the quantity and value of each, the number of the family, and the deficiency to be paid by the personal representative. One of these lists shall be delivered to the widow, one to the personal representative, and one returned by the Justice, within twenty days after the assignment, to the Superior Court of the county, and the Clerk shall file and record the same, and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the widow." Other sections provide that an appeal may be taken from the finding of the commissioners by the widow, or any creditor, legatee or distributee of the deceased, to the Superior Court, where any issues of fact or law raised, shall be decided according to law. The widow may also in her discretion, apply directly to the Superior Court to have her year's support allotted to her. *The Code,* §§2128-2134.

(74) The filing and recording of the list mentioned, in the Superior Court, and the entry of a proper judgment, as directed, are essential. It is the allotment thus consummated, or the judgment of the Court, in case of appeal, that establishes the right of the widow to the property so allotted, and the allotment thus made, is the proper evidence of her title. It is not sufficient that the commissioners intended to allot a particular piece of property or note, it must appear that they did so, by the list duly made and signed by them.

The allotment must be made with such reasonable certainty as to the thing and quantity allotted, as to indicate what is set apart, as so much corn or flour, a cow or horse, describing them, so much money, or a debt or debts, of the deceased, naming the debtors, or describing them in such way as that they may be certainly known. This is important; if it shall not be done, the allotment will be void, for uncertainty. Otherwise, the widow could not know what to demand, nor could the administrator or executor know what to deliver or pay to her; nor could the widow, the administrator or executor, or a creditor, or a legatee, or a distributee of the deceased, determine whether or not she or he ought to except to the finding of the commissioners, and appeal to the Superior Court. While the method of allotment, as at first above described, is summary in its nature, it must nevertheless possess the essential elements prescribed, and these must appear.

In the case before us, the commissioners, among other things, allotted to the plaintiff the item thus described: "Labor for 3½ years, $173." This item, on the list of allotment, is wholly unintelligible; if it be taken alone, it implies nothing tangible. It does not indicate crop, stock, or provisions, or a debt due from any person.

It cannot be determined from it that the deceased labored for a particular person, as the defendant, the length of time mentioned, and that such person owes his estate, so much as such labor was worth, or a sum of money therefor, upon a special contract of hiring, or whether some person owed the deceased labor for that length of time. To (75) allow witnesses to supply such essential facts of designation and description, would be in effect to ignore the statute, and to allow them to make the allotment, which the law requires shall be made by the commissioners, and established in the way prescribed. As we have said, the commissioners must make the allotment, and with such reasonable certainty as to description and quantity, as to indicate intelligibly what is allotted; else the allotment must fail, unless the defect shall be cured by the proper authority.

The item in question is meaningless. It may be, and probably is the fact, that the commissioners intended to allot to the plaintiff the indebtedness of the defendant, testified to by her, but this fact does not at all appear from the allotment made by them. The plaintiff ought to have made proper application to correct the omission. Perhaps she can yet do so.

There is error. The defendant is entitled to a new trial, and we so adjudge. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Parker v. Brown, 136 N. C., 282.

SAMUEL ESHON v. THE BOARD OF COMMISSIONERS OF CHOWAN COUNTY.

Undertaking on Appeal.

1. The Clerk has no authority to accept any substitute for the undertaking on appeal, or deposit of money in *lieu* thereof, provided by the statute.
2. *Quære*, whether an appellant can execute a mortgage on real property in *lieu* of a justified undertaking on appeal, under the provisions of The Code, §117; but even if this be so, the statute must be strictly followed.

3. Where the appellant deposited with the Clerk, a bond due to himself, and secured by a mortgage, as a substitute for the undertaking on appeal, *It was held*, not to be a compliance with the statute, and the appeal would be dismissed.

(76) Motion by the plaintiff to dismiss the defendant's appeal, heard at October Term, 1886, of the Supreme Court.

The facts appear in the opinion.

Mr. Chas. M. Busbee, for the plaintiff.

No counsel for the defendant.

MERRIMON, J. The appellee moved to dismiss the appeal, upon the ground, that no undertaking for costs upon appeal had been given, nor was there any sum of money deposited by order of the Court, in *lieu* of such undertaking; nor was there any waiver in writing, by the consent of the appellee, of such undertaking or deposit.

It appears that there was not any such undertaking, deposit or waiver. The Clerk, however, makes this statement: "No appeal bond filed, but on the 7th day of June, 1886, Jas. C. Warren deposited with me, notes, amounting to $219.94, payable to himself, secured by mortgage on real estate, and verbally instructed me to hold them, as security for the costs of the appeal, in the case of Eshon v. Commissioners, &c. The appellee did not consent to or have knowledge of the notes being deposited with me."

Manifestly, the Clerk had no authority to accept the notes mentioned, as security, and his action in that respect, went for nought. He only had authority to accept the undertaking, or deposit of money, in *lieu* of it, as allowed by the statute (The Code, §552), and if these had been waived, as they might have been, by the written consent of the appellee, the appeal would have come to this Court without security.

It was suggested on the argument, that it might be competent for the Clerk to take a mortgage of real property as security, upon appeal, as allowed by the statute, (Acts 1874-'75, Ch. 103; The Code, §117). If this be granted, that statute was not complied with, either in its terms or effect. It requires the mortgage to be of real property, made to the party to whom the undertaking would be required to be made,

(77) conditioned to the same effect as such undertaking, with power of sale, which power might be executed upon a breach of any of the conditions of the mortgage, after advertisement for thirty days. The mortgage must be made for the purposes prescribed. This statute is exceptional in its provisions, and must be strictly observed. In this case, the mortgage deposited with the Clerk was not made to the ap-

pellee, nor for the purposes of, or in lieu of the undertaking upon appeal. The Clerk had no authority to accept it, and it cannot serve the purpose of the law.

The motion to dismiss the appeal must, therefore, be allowed.

It is so ordered.

Cited: Hooper v. Power Co., 180 N. C., 652.

NORFOLK SOUTHERN RAILROAD CO. v. TIMOTHY ELY et al.

Corporations—Charter—Right to Condemn Land.

1. Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed.

2. The Legislature has the power to provide that neither party shall appeal from the award of commissioners appointed under the charter to assess the damage to land for the right of way, and if the charter does provide for an appeal, it must be taken within the time and in the manner therein provided.

3. Where a charter provided that the award of the commissioners should be final, unless appealed from within ten days, *It was held*, to mean ten days from the filing of the report, and not its confirmation by the Clerk.

(*Railroad Co.* v. *Warren*, 92 N. C., 620; *Holloway* v. *The Railroad*, 85 N. C., 452; *Skinner* v. *Nixon*, 52 N. C., 342; *Railroad Co.* v. *Jones*, 23 N. C., 24, cited and approved).

SPECIAL PROCEEDING, heard on appeal before *Gudger, Judge,* at Spring Term, 1886, of PASQUOTANK Superior Court.

The Proceeding was instituted before the Clerk of the Superior Court of Pasquotank county, to procure for the plaintiff, under its charter, (chapter 18, Laws of 1869-'70 and acts amendatory thereof), the condemnation of certain lands for the use of the plaintiff.

The petition of the plaintiff, after due service of notice on the (78) defendants, was heard by the Clerk on the 21st of February, 1885, who, after objection by the plaintiff, appointed three freeholders to condemn the land, under §1945 of The Code.

The commissioners made their report, and filed it with the Clerk on the 23d of April, 1885. The defendants filed exceptions to the report,

and the Clerk confirmed it on the 30th day of May, 1885, from which judgment the defendants appealed to the Superior Court.

At the September Term, 1885, of Pasquotank Superior Court, Judge Shepherd presiding, it was held that the Clerk had acted erroneously in proceeding to appoint commissioners under the general law, instead of the charter of the company, and remanded the case to the Clerk, with directions that he issue an order to the sheriff of Pasquotank county, to summon five disinterested and intelligent landholders, to make an award of a fair compensation and damages, to be made to the owners of the land described in the petition.

Pursuant to this order, the sheriff of Pasquotank summoned five commissioners, to meet upon the land described, who met on the 23d day of February, 1886, and after being first duly sworn, proceeded to examine the land, and to hear all testimony offered by the plaintiff and defendants; and on the same day made and filed their report with the Clerk of the Court.

On the 4th day of March, 1886, the defendant Terry filed with the Clerk exceptions to the report, and the defendant Ely also filed exceptions on the 5th day of March, 1886, praying, that the report of the commissioners be not confirmed, and that the same be set aside.

On the 13th day of March, 1886, the Clerk—the plaintiff and defendants Ely and Terry being present—heard the case; plaintiff objected to the Clerk's hearing the case with a view either to confirming or setting aside the report of the commissioners, on the ground, that he had no jurisdiction, and that the plaintiff's charter, (section 6), provided that

(79) the award of the commissioners should be final, unless one or other of the parties shall appeal to the Superior Court within ten days from the date of the filing of said report with the Clerk.

Both the objections of the plaintiff to the hearing of the case, and the exceptions of defendants to the report of the commissioners, were overruled by the Clerk, and thereupon the Clerk confirmed said report.

From this judgment of the Clerk, confirming said report, the defendants Ely and Terry prayed for an appeal to the Superior Court, which appeal was granted by the Clerk within ten days after the rendition of said judgment.

The case was put upon the trial docket of the Superior Court of Pasquotank county at March Term, 1886, his Honor, J. C. L. Gudger, presiding. The plaintiff moved the Court to dismiss the appeal of the defendants Terry and Ely, upon the ground, that the award of the commissioners in this case was final, because the defendants had not appealed to the Superior Court within ten days from the filing of the same, and also, because the action of the Clerk in hearing the case, receiving the exceptions of defendants Ely and Terry, and passing thereon, confirm-

ing said report, and allowing an appeal to the defendants from his judgment confirming said report, were null and void.

The Court denied the motion of the plaintiff, and ruled that the Clerk had jurisdiction of the case, and that the appeal from his decision was properly before this Court.

From the judgment of the Court, denying this motion of plaintiff, and ruling that the case was now properly before this Court upon appeal, the plaintiff appealed to the Supreme Court.

Mr. L. D. Starke, for the plaintiff.
No counsel for the defendants.

ASHE, J. (after stating the facts). It was very properly held by the Superior Court, that the commissioners to condemn land for the purposes of the plaintiff in obtaining a right of way, be appointed under the charter of the plaintiff company, and not under the (80) general law. It was so held in the case of *Norfolk Southern R. R. Co.* v. *Warren,* 92 N. C., 620; *Holloway* v. *University R. R. Co.,* 85 N. C., 452.

The sixth section of the plaintiff's charter provides, that "if the President and Directors, or their agents, cannot agree with the land-owners, in regard to the value of the land of the latter, through which they propose to run said road, either party may apply to the Probate Judge, (the Clerk), of their county, whose duty it shall be, to order the sheriff to summon five disinterested and intelligent land-owners, to make an award of the damages, if any, which the said land-owners have sustained, and report the same to the said Probate Judge, (Clerk), *and this award shall be final,* unless one or the other of the parties shall appeal to the Superior Court, *within ten days,* in which case, the issue shall be tried by a jury of the county in which the land lies."

The award or assessment of damages, as made by the report of the commissioners, is final, unless appealed from by one or the other of the parties. The question of commissioners appointed to condemn land, and assess the value thereof, in analogous cases has been settled by several adjudications of this Court. *Skinner* v. *Nixon,* 52 N. C., 342, and in the *Raleigh & Gaston Railroad Company* v. *Jones,* 23 N. C., 24, which was a proceeding like this, to condemn the land of the defendants to the use of the plaintiffs. But in that case, there was no appeal given by the charter, to either party, from the award of the commissioners, and although it was provided, that the report shall be *confirmed* by the Court, and made of record, and might be disaffirmed, or if the free-holders could not agree, or should fail to make a report in a reasonable time, the Court may supersede them, or any of them, appoint others in

their stead, and direct another report to be made, yet the matter in controversy between the parties, the *damages sustained by the condemnation,* is not one of which jurisdiction is given to the Court. Upon that matter, the law gives the Court no authority to pass; the powers given to the Court amount to no more than the right to appoint the
(81) tribunal which shall pass upon the matter in dispute, and in a limited degree, a supervision over that tribunal, in order to quicken its action, or to set it aside, when irregular or wrongful. The report of the commissioners must, indeed, be submitted to the Court, and can not be put on record until it is approved by the Court. But when so recorded, it declares, not the sentence, judgment, or decree of the Court, but merely, the *award* or *inquest* of the commissioners." No appeal having been given to the parties by the charter, it was held by the Court, that, the enactment in our statute regulating appeals, did not apply to such a case; for the reason, we take it, that the commissioners, as held in *Skinner* v. *Nixon,* 52 N. C., 342, constitute a separate and independent tribunal, and their award is final, unless an appeal is given by the charter.

But in the case before us, the right of appeal is expressly given to either party conceiving himself aggrieved by the award of the commissioners, but it further provides, that the appeal must be taken within ten days. Ten days from what time? It must mean ten days from the filing of the report, and not from the confirmation of the report, for the charter does not require the confirmation of the report, but even if that was necessary to constitute a judgment, from which the appeal might be taken, it would seem to follow, that the confirmation should be made within the ten days from the filing of the report, that the parties might have the right to take their appeal within the time prescribed, and that after the ten days, the Clerk would have no right to take any action in the matter. But here the appeal is taken after ten days from the filing of the report of the commissioners, and our conclusion is, it was too late, and the motion made by the plaintiffs, in the Superior Court, to dismiss the appeal, should have been allowed.

There is error. The judgment of the Superior Court is reversed, and this must be certified to that Court, to the end that the appeal be dismissed.

Error. Reversed.

Cited: Cook v. Vickers, 141 N. C., 107; *Beasley v. R. R.,* 147 N. C., 365; *Power Co. v. Power Co.,* 171 N. C., 255; *Dickson v. Perkins,* 172 N. C., 362; *Kornegay v. Goldsboro,* 180 N. C., 452; *Long v. Rockingham,* 187 N. C., 210; *Board of Education v. Forrest,* 193 N. C., 523.

D. G. BUSH et al., surviving partners, v. JOHN H. HALL.

Counter-claim—Judgment.

1. Where plaintiff sues on a note, and the defendant admits the cause of action, but pleads a counter-claim sounding in damages, which is the only matter tried before the jury, who find a verdict in the defendant's favor, the amount of the note sued on by the plaintiff must be deducted from the damages given by the jury, and judgment only entered for the balance.
2. Upon appeals, the Supreme Court will enter such judgment or decree, as upon inspection of the whole record, it shall appear, ought to be rendered.

CIVIL ACTION, tried before *Gudger, Judge,* and a jury, at March Term, 1886, of the Superior Court of PASQUOTANK county.

The complaint alleges the non-payment of a promissory note due them by defendant, a copy whereof is set out, in the sum of $\$696\frac{73}{100}$, bearing date the 23d day of December, 1881, and maturing ninety-seven days thereafter: and the plaintiffs demand judgment therefor. The pleadings were protracted and amended, but in the defendant's answer, he admits the execution of the note and his liability to the plaintiffs, but in extinction of the debt, sets up a counter-claim for damages. He alleges that the plaintiffs are the surviving members of the partnership firm of Conrow, Bush and Lippincott, the first named of whom, Thornton Conrow, as described in the summons, is dead.

That in May, 1868, the members of said firm entered into a written contract with him, wherein they leased to him at an annual rent of $500, a large portion of land known as the Great Park Estate, for the term of seven years, and further agreed, to convey the entire tract of 10,000 acres to him, should he so elect to purchase, at the price of four dollars per acre, and for his quiet and peaceful possession and enjoyment of the premises meanwhile; in which agreement, subsequent modifications were made, copies whereof form exhibits in the case.

That, under the agreement, the defendant occupied, and at (83) great expense in clearing, ditching, cultivating, and putting up buildings, improved the land, as required of him in the agreement, and gave the note sued on in part, for the stipulated rents.

That while in possession, and thus employed, the defendant was evicted from the premises, in an action brought by one Joseph S. Cannon, under a paramount title, against the lessors, in enforcing a mortgage made by them, at the time of their own purchase from him; and that thereby, great damage and loss were sustained by the defendant, to-wit, $10,000, for which judgment is demanded. At Spring Term,

1885, the "counter-claim and account" were referred, without prejudice, to a commissioner, and he was directed to report his findings of law and fact.

The referee made his report at Fall Term, 1885, of the evidence, and his findings, from which, it appears, that the defendant expended in improvements, $3,990^{67}/_{100}$, the increased value imparted to the land, by means of which, does not exceed the rental value; that neither has been ready or able to comply with their respective stipulations, and no damages are due defendant.

The referee further finds, that the defendant is indebted to the plaintiffs upon the said note, in the sum of $\$696^{73}/_{100}$, principal money, with interest from April 1st, 1882. Numerous exceptions were taken by the defendant to the report referable to the counter-claim, and upon his demand, certain issues were framed and submitted to the jury, which, with the responses to each, are as follows:

1. Did the plaintiffs comply with the contract with defendant, described in his complaint? Answer: No.
2. Were they at any time able to comply with the same? Answer: No.
3. Was defendant able to comply with his? Answer: Yes.
4. Was he prevented from so doing by the plaintiffs? Answer: Yes.
5. Did defendant, Hall, offer to perform his part of the contract? Answer: Yes.

(84) 6. What damages has defendant Hall sustained? Answer: $4,196.67.

7. Was Mr. Hall evicted from the premises? Answer: Yes.

There was a judgment upon this verdict for the defendant, and the plaintiffs appealed.

Mr. W. J. Griffin, for the plaintiffs.
Mr. E. F. Aydlett, for the defendant.

SMITH, C. J. (after stating the facts.) The only error assigned in the argument, in this Court, is in the judgment, rendered for the full amount of the counter-claim, and in disregard of the debt due the plaintiffs upon the undisputed note, the original cause of action. It is suggested for the appellee, that the amount due the plaintiffs was deducted by the jury from the damages ascertained, and that the sum found in response to that issue, is the excess of the damages. The counsel do not agree, that the jury acted upon any such instruction, and as it was not appropriate to the inquiry in which the response was returned, it does not find any countenance in the record.

We must be governed entirely by the latter. There was no controversy about the note, and the sole issue, assuming the defendant, upon the other findings, to be entitled to damages, was, "What damages has defendant Hall sustained?"

The case is a simple one. The plaintiffs' demand is admitted, the damage sustained by reason of the violations of the terms of the contract of lease, on the part of the plaintiffs, is assessed at $\$4{,}196\frac{67}{100}$, a sum slightly above the estimate made by the referee of the defendant's expenditures.

The latter must be reduced by the lesser sum, and judgment rendered in favor of defendant for what remains.

The appeal vacates the judgment, and there being error in it, this Court will proceed to "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.*" The Code, §957.

Judgments, thus modified, will be entered for the defendant. (85) The plaintiffs will pay the costs of the appeal to this Court, and the defendant, the costs incurred in the Court below, as there adjudged.

Error. Modified.

Cited: Rogers v. Bank, 108 N. C., 578; *Carter v. Rountree,* 109 N. C., 31.

DANIEL G. SMAW v. WM. COHEN et al.

Jurisdiction—Laborer's Lien—Married Women.

1. A want of jurisdiction apparent on the record, will be taken notice of by the Supreme Court, although not pointed out by a demurrer.
2. A proceeding under the statute (The Code, §1790), to establish a claim against a *feme covert*, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a Justice of the Peace, if the amount claimed is under two hundred dollars.
3. Where the proceeding is not under the statute, but a civil action, to coerce payment out of the separate estate of a *feme covert*, for her contracts, the Superior Court alone has jurisdiction, although the amount be less than two hundred dollars.

(*Murphy* v. *McNeill*, 82 N. C., 221, and *Fisher* v. *Webb*, 84 N. C., 44, cited and approved. *Dougherty* v. *Sprinkle*, 88 N. C., 300, and *Webster* v. *Laws*, 89 N. C., 224, distinguished and approved).

SMAW *v.* COHEN.

CIVIL ACTION, tried before *Shepherd, Judge,* at February Term, 1886, of CRAVEN Superior Court.

The action was heard upon complaint and demurrer, and his Honor overruled the demurrer, and the defendants appealed.

No counsel for the plaintiff.

Mr. W. W. Clark, for the defendants.

SMITH, C. J. This action, commenced in the Superior Court of Craven, on November 8th, 1884, is prosecuted to establish a claim against the *feme* defendant, for materials furnished for, and work and labor expended upon certain houses, erected upon lots belonging

(86) to her, in the town of Newbern, and to enforce the statutory lien.

The complaint alleges, that he was thus employed by her, through the agency of her husband, the defendant William, and his promise, on her behalf, of payment, and that there is due him therefor, one hundred and thirty-four dollars and interest on that sum. The defendants demur to the complaint, assigning as the grounds thereof, that it does not aver that the indebtedness was incurred, "either for her necessary personal expenses, or for the support of her family, or that it was contracted to pay her debts, existing before marriage, or that it was contracted with the written consent of her husband, or that she was a free trader at the time."

The demurrer was overruled, and time allowed to answer, from which judgment, the defendants appeal.

A preliminary difficulty in the way of proceeding in the cause, arises upon the question of jurisdiction, the sum claimed being less than two hundred dollars, and this we are required to take notice of, whether set up and relied on as a defence or not.

The statute, in terms, provides, that the demand shall be asserted, and the lien given enforced, by proceedings "commenced in the Court of a Justice of the Peace, and in the Superior Court, according to the jurisdiction thereof"—The Code, §1790—and when land is to be sold in enforcing the lien, that the judgment rendered in the Justice's Court, shall be docketed in the Superior Court, whence execution may issue. The Code, §1794.

These directions are positive and explicit, without saying where the indebtedness arises out of the contract of a married woman.

The higher jurisdiction was sought in this case, we presume, in consequence of the ruling in *Dougherty* v. *Sprinkle,* 88 N. C., 300, that the Court of a Justice of the Peace cannot entertain an action against a

married woman, upon her promise to pay for work done upon her separate real estate. The ruling is recognized in *Webster* v. *Laws,* decided at the next term, 89 N. C., 224.

The decision has reference to contracts generally entered into (87) by married women, and their enforcement against their separate estates. They are held to be obligatory, not upon the contracting *feme covert* personally, but upon her separate estate, and as the proceeding is in its nature equitable, as in a bill for foreclosure of a mortgage, the relief could not be had in a Justice's Court, as is held in *Murphy* v. *McNeill,* 82 N. C., 221, and in *Fisher* v. *Webb,* 84 N. C., 44.

But the present action, though instituted as well to enforce the lien, as to establish the debt to which it attaches, is, by the law, required to be prosecuted in the Court having jurisdiction, according to the amount claimed under the contract, and in no other. The statute must control and modify the general rule, as laid down in those cases, and as it denies jurisdiction in the Superior Court for the sum demanded, we cannot assume and undertake to exercise it. The action must be dismissed, for want of original jurisdiction in the Superior Court.

Error. Dismissed.

Cited: Planing Mills v. McNinch, 99 N. C., 519; *Berry v. Henderson,* 102 N. C., 527; *Hodges v. Hill,* 105 N. C., 131; *Farthing v. Shields,* 106 N. C., 300; *Weathers v. Borders,* 124 N. C., 611; *Finger v. Hunter,* 130 N. C., 532; *Harvey v. Johnson,* 133 N. C., 358; *Ball v. Paquin,* 140 N. C., 95; *Rutherford v. Ray,* 147 N. C., 258, 261; *Comrs. v. Sparks,* 179 N. C., 584.

JAMES L. MORING et als. v. W. G. LITTLE et als.

Undertaking on Appeal.

1. Where it appears that the undertaking on appeal was taken by the Judge, it cures any irregularity in the justification.

2. So, where the case on appeal stated, "Bond fixed at $50. Bond filed," which was signed by the trial Judge, *it was held,* to cure any defect in the justification.

(*Gruber* v. *The Railroad,* 92 N. C., 1, cited and approved).

This was a motion by the plaintiffs, to reinstate an appeal, dismissed at the February Term, 1886, of this Court.

The motion was entered at the last Term, and heard at the October Term, 1886.

The facts appear in the opinion.

(88) No counsel for the plaintiffs.

Mr. Hugh F. Murray, for the defendants.

SMITH, C. J. The appeal in this case was, at the last Term, on motion of appellees' counsel, dismissed, for an alleged insufficient justification of the undertaking, and at the same time, a motion was made to reinstate on the docket, the hearing of which was, by consent, deferred to the present Term. It has now been argued, and our attention called to the concluding part of the case stated by the Court, which was inadvertently overlooked when the order of dismission was made:

"Plaintiffs appealed to the Supreme Court. Notice of appeal waived. Bond on appeal fixed at fifty dollars. Bond filed.

H. G. CONNOR,
Judge 3d Jud. Dist."

The case falls directly within the ruling in *Gruber* v. *Railroad Co.*, 92 N. C., 1, where it is held, that words almost precisely the same, were a waiver of the strict statutory requirement, when found in the case prepared or adopted by the Court. The case must be reinstated on the docket, and stand for trial at the next Term.

It is so ordered.

JOHN F. McCOY v. JOSEPH LASSITER.

Chattel Mortgage—Pledge—Delivery—Registration.

1. The distinction between a pledge and a mortgage of personal property is, (1) that in the former the *title* is retained by the pledgor, while in the latter, it passes to the mortgagee, and (2) that, the delivery of the possession of the property to the pledgee, is absolutely essential to a pledge, while, *between the parties, but not against creditors or purchasers*, such delivery is not necessary to the validity of mortgage.

2. At common law, delivery and retention of the custody of the property, was necessary to the validity of a mortgage, as against creditors and purchasers, but now, by statute, registration is substituted therefor.

3. A mortgage of chattels, in parol, is good, between the parties. No particular form of words is necessary to the constitution of such a mortgage. It is sufficient if it appear that the parties intended it to operate as such.

This was an action for the recovery of a horse, and damages, (89) tried before *Avery, Judge,* at the Fall Term, 1885, of Lenoir Superior Court.

The plaintiff alleged that he was the owner, and entitled to the possession of the horse, of which he had been wrongfully deprived by the defendant.

The defendant denied these allegations.

The plaintiff testified that the horse was his property, and had been taken unlawfully from his possession, by the defendant Lassiter; that the defendant had signed a claim and delivery bond, as his surety, in an action brought by him against one Carman; that nothing was said by him or Lassiter about delivering the horse in controversy to defendant, when he signed the bond for him, and the horse was not then in his (Lassiter's) stable.

Lassiter testified that the plaintiff applied to him to become his surety on a claim and delivery bond, and at the time, having his horse in his stable to be fed, the plaintiff said to him, "you take this horse (pointing to the horse in controversy), and keep him till the suit is decided"; that he did not, at that time, agree to become surety, but they went to the store of Stanly, about one hundred yards off, and there he and Stanly signed the bond, and he then loaned the horse to the plaintiff, and he might have said, he loaned him to plaintiff until the suit was decided.

Stanly testified, that plaintiff and defendant came into his store, and plaintiff said he wanted him and Lassiter to sign his bond, and *he would turn over the horse in controversy,* and if the suit should go against him, and his sureties have the costs to pay, that he and Lassiter could sell the horse and pay it; that they thereupon signed the bond, and after it was signed, Lassiter said plaintiff, "we will loan you this horse."

Carman testified to the same effect. He stated, that plaintiff (90) asked Lassiter to go on his bond; Lassiter said, "I don't want to go on anybody's bond unless I am secured." McCoy said, "I will pawn my horse and buggy;" the horse was then in the stable. Lassiter then went up to Stanly's store and said to Stanly that plaintiff proposed to pawn his horse and buggy. Stanly said "all right," and they signed the bond; afterwards Lassiter turned around and said to plaintiff, as they went out, "that he would loan him the horse."

The Court instructed the jury:

1. That it appeared from the testimony, that the title to the horse was in the plaintiff, when the defendant and Lassiter signed the bond, in the case of McCoy *v.* Carman.

2. That in no view of the testimony, could the jury find that the horse was put in pledge to Lassiter, or that the legal title passed from McCoy

to Lassiter, and the jury must find the first issue in favor of plaintiff. Defendant excepted. Verdict and judgment for plaintiff, and defendant appealed.

Mr. W. R. Allen, for the plaintiff.
Mr. Geo. Rountree, for the defendant.

Ashe, J. (after stating the case). We think it is manifest from the testimony in the case, that the plaintiff intended to give to the defendant Lassiter and Stanly, the sureties on his bond, a lien on the horse in controversy. And it is equally manifest, that Lassiter supposed that he was secured by the transaction.

The evidence in the case was entirely sufficient to establish an agreement between the parties, that the defendant should have a lien on the horse, for his indemnification as plaintiff's surety; for the plaintiff, in the first instance, while the horse was in defendant's stable, made the proposition to Lassiter to sign the bond, as his surety. "You take the horse (pointing to the horse in controversy) and keep him until the suit is decided." Then, at Stanly's store, the plaintiff renewed the proposition, by saying, "he wanted the defendant and Lassiter to sign his
(91) bond, and he would turn over the horse, and if the suit should go against him, and his sureties had the costs to pay, that defendant and Stanly could sell the horse and pay it." Stanly and the defendant did sign the bond, and their doing so, was an acceptance of the plaintiff's proposition, and was as binding between the parties as if it had been agreed upon by them, in express terms. But what was the nature of the agreement? It was, that the defendant and Stanly should have a lien upon the horse, to secure their indemnity. There can be no question about that. But what kind of lien? It must have been either a pledge or mortgage. If a pledge, a delivery of the property into the possession of the pledgee was absolutely essential—Schouler on Personal Property, 513—but not so with a mortgage of chattels.

At common law, a parol mortgage of personal property was good *inter parties,* even without delivery of possession of the property.

To give a chattel mortgage validity at common law against creditors and purchasers, it was essential that the custody and possession of the goods should be delivered to, and retained by, the mortgagee, but *as between the parties,* delivery and possession, while essential to constitute a pledge, are not necessary to the validity of a mortgage. In this respect the common law rule has not been changed by statute. Jones on Chattel Mortgages, §176.

The intent of the statute requiring registration, was to do away with the necessity of delivery, and enable mortgagors to hold possession until default.

For this purpose, registration is required, as giving greater notoriety than delivery and retention of possession. Registration was intended as a substitute for delivery. *Ibid.*

Whether this transaction was a mortgage or a pledge, must depend upon the intention of the parties, as to whether it was intended that the title to the horse should be retained by the plaintiff or passed to the defendant, for that is the main distinction between a mortgage and pledge, and it was a question of fact to be determined by the jury, which virtually resolved itself into the question, whether it was a mortgage or pledge.

If the jury should have come to the conclusion that it was (92) intended to be a pledge, then, whether it was a valid pledge, would depend upon the further fact, whether the horse was in the possession of the defendant when the bond was given, and the agreement became complete.

The plaintiff stated that the horse was not in the stable when the bond was signed, but the circumstances of the transaction tend to a different conclusion.

His Honor then should have left the matter to the jury, with instructions as to what was a mortgage and what a pledge, and if they believed that the transaction was intended by the parties to be a pledge, they should then inquire, whether the horse was in the stable of the defendant when the bond was signed, and if there, in that view of the case, they should find in favor of the defendant, but if not, then they should find for the plaintiff. But if they should be of the opinion, that it was the intention of the parties, by this agreement, that the title of the horse should pass to the defendant, to be held by him as a security for his indemnity as surety on the bond, then the contract was a mortgage, and it was immaterial whether the horse was in the stable of the defendant at the time the bond was signed, and they should find for the defendant.

To constitute a mortgage, no particular words are necessary. "If a security for money is intended, that security is a mortgage, though not having on its face the form of a mortgage; it is the essence of a mortgage that it is a security." Jones on Chattel Mortgages, §24.

"We give a lien on the horse, Charley, to have and to hold until the debt is paid," has been held in Alabama, to be a mortgage. *Ellington* v. *Charleston,* 51 Ala., 116. So the words, "I hereby pledge and give a lien," *Langdon* v. *Bull,* 9 Wend., 80. So, also, the words, "turned out and delivered to A, one white and red cow, which he may dispose of in

fourteen days, to satisfy an execution," *Atwater* v. *Mann,* 10 Vt. And in addition to these authorities, "a Court of Equity will recog-
(93) nize and sustain a contract, creating a *lien* upon property, as a mortgage, whenever it appears from the contract the parties intended it to operate as such." Jones on Chattel Mortgages, §12.

Error. Reversed.

Cited: Comron v. Stanland, 103 N. C., 212; *White v. Carroll,* 146 N. C., 233; *Odom v. Clark, ibid.,* 551; *Bank v. Johnston,* 161 N. C., 509; *Brown v. Mitchell,* 168 N. C., 315; *Castelloe v. Jenkins,* 186 N. C., 173; *Kearns v. Davis,* 186 N. C., 523; *Cowan v. Dale,* 189 N. C., 688; *Grier v. Weldon,* 205 N. C., 578.

ISAAC SNOWDEN et al. v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

Assignment of Error—Negligence—Injury to Stock by Railroad.

1. An exception, "that the verdict is contrary to the law and the evidence," will not be considered, on appeal, as the jury is the sole judge of the effect of the evidence, and the exception, that the verdict is contrary to law, is too vague to be entertained by the Court.
2. Where a horse was feeding within three feet of a railroad track, in plain view of the engineer, who did not slacken the speed of the train, or take other precautions, until the train was within close proximity to the horse, and he had gotten upon the track, *It was held,* negligence.

(*Wilson* v. *The Railroad,* 90 N. C., 69, cited, distinguished, and approved).

CIVIL ACTION, tried before *Gudger, Judge,* and a jury, at March Term, 1886, of CURRITUCK Superior Court.

There was a verdict and judgment for the plaintiffs, and the defendant appealed.

The facts are stated in the opinion.

No counsel for the plaintiffs.

Mr. L. D. Starke, for the defendant.

SMITH, C. J. The object of this suit, is the recovery of the value of the plaintiffs' horse, killed on November 13th, 1884, by the alleged negligent running of a train of cars over the defendant's railroad. The testimony is concurrent to the effect, that the horse was feeding in a ditch, some three feet from the track, which passed through the pasture

of one of the plaintiffs, when, as the train approached, and came (94) within the distance of less than fifty yards from the place, the horse became frightened, ran a few yards along the ditch, and then, springing upon the track, dashed forward until he encountered the cattle-guard, over which he attempted to jump, and fell in the culvert, where he was struck by the locomotive and killed. The engineer testified to first seeing him, quietly grazing, about one hundred and fifty yards in advance, while others said he could have been seen for four hundred yards; that he at once sounded the alarm whistle, gave the signal to put down brakes, and reversed his engine, and thus checked the speed of the train, but could not bring it to a stand-still, until it came in contact with the horse.

This witness, a conductor in the service of the company, but not on this occasion in charge of the train, and the fireman, gave substantially the same account of the occurrence, and say, that whatever was practicable, was done to arrest the motion of the train, which was long and consisted of from 16 to 19 loaded cars, but so great was the *momentum,* that it could not be stopped before reaching the horse. This testimony was not in harmony with that of the plaintiffs' witnesses, one of whom was in his yard at the time, within twenty-five yards of the place of the accident, and saw what occurred, who says the train was running at its usual speed, and there was no halt in its onward progress; that he heard the alarm whistle when the cars were within 300 or 400 yards of the horse, and they continued on. Other witnesses gave evidence of similar import.

The train did stop, after striking the horse, a short distance beyond the place of the collision. We reproduce the substance and general character of the conflicting evidence, in order to a proper understanding of the exception, upon which the case comes before us, upon the defendant's appeal.

The defendant requested, and the Court gave, an instruction in these words:

"If the owner permitted his horse to stray off and get on the (95) track of defendant's railroad, and it got killed or hurt, the company is not liable, unless the agents were carelessly running the train, or could, by the exercise of proper care, after the horse was discovered, have avoided or prevented the injury. Proper care means reasonable care."

The following instruction was asked, and refused:

"It was not incumbent upon the servants of the defendant, to stop its train or slacken its speed, because of a horse browsing in a ditch in the field on the side of the railroad, and that, if the company and its servants were not carelessly or negligently running the train, when the horse was *discovered on the track,* the company is not liable in this action,

unless it could, by the exercise of reasonable care, after the horse was discovered on the track, have avoided or prevented the injury."

Instead, and as a substitute, the jury were charged:

"That, if the horse was discovered grazing, or could by reasonable care, have been discovered, in the ditch along the railroad track, it was the duty of defendant's servants to adopt such precautionary measures as would enable them to avoid injuring the horse, in case he should jump suddenly upon the track."

The errors assigned in the record, consist:

1st. In the refusal to give the second instruction.

2d. In giving that in substitution, and

3d. For that, the verdict was contrary to the law, and to the evidence.

The last exception we cannot consider, for the weight and effect to be given to the evidence belongs exclusively to the jury, and an averment that the verdict is "contrary to law," specifies no distinct error, and is in terms, entirely too vague and indefinite.

The refused instruction pretermits all reference to responsibility for the management of the train, and the duties imposed on those having it in charge, until the horse was actually upon the track, when, it is quite manifest, the proximity and speed of the train rendered the
(96) impact unavoidable; while the substituted direction covers also the antecedent time, when the animal was, or by the use of reasonable vigilance and care, could have been seen, involving the duty of keeping a proper lookout, and so delaying the train, as would admit of an avoidance of the injury, should he become alarmed and frightened, as the train came near, and jump, as in fact he did, upon the road, just in front of it, and but a short distance from it. We think the modification was eminently suitable, and that a proper vigilance was called for, to see what effect would be produced by the rapid approach of the train towards the place, and in a direction to pass but a few feet from him. A wild alarm might be reasonably expected under the circumstances, and it was quite as probable, that in the effort to escape impending danger, he would run upon, as fly from, the track. The "precautionary measures," mentioned in the charge, and looking to the possible consequences of the action of the horse, before an inrushing train, nervous and wild with fright, ought to have been taken, and it was proper for the obligation, thus imposed upon the officers in control, to have been brought to the attention of the jury.

Had the speed been sufficiently slackened, as it was *not, according to the evidence of the plaintiffs' witnesses,* while those of the defendant say it was, (and this fact was for the jury to determine,) the catastrophe could perhaps have been avoided; and at least it was negligence to disregard the indications of danger and make no effort to guard against it.

The action having been brought within six months, the *prima facie* case of negligence made by the statute (The Code, §2326), devolved upon the company the duty of showing that all proper care was used, and no neglect could be imputed to the company or its agents; and not only do the facts in proof, if the plaintiffs' testimony is accepted, fail to repel the *prima facie* evidence, but they show a want of care and vigilance such as the law demands.

The case of *Wilson* v. *Railroad,* 90 N. C., 69, cited for the (97) defence, does not in any degree militate against the view taken of the case.

In the opinion delivered by MERRIMON, J., this general rule, governing the conduct of those in charge of running railway trains, is stated:

"It may be conceded, that when cattle are quietly grazing, resting or moving near the road, not on it, and manifesting no disposition to go on it, the speed of the train need not be checked; but the rule is different when the cow or mule is on the road, and runs on, then off, along, near to, and back upon it. In such case, reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, to stop it, until the danger shall be out of the way."

All the reasoning applied to a frightened animal, running wildly on and off the track, in its reckless effort to escape, and which dictates a diminution of speed, is quite as applicable to the case of a nervous animal, such as a horse, which, when alarmed, seems often to be utterly heedless of consequences, or of the path of safety, in its mad efforts to escape. It was reasonably certain that the horse would be frightened, when he saw what was rapidly, in appearance, coming upon him, and would not remain quiet when it passed within some three feet of him. He would be quite as apt, as he did in fact, after rushing a short distance along the ditch, to leap upon the road as upon the opposite bank. This possible, if not probable, action, would suggest itself to any careful and considerate person, and the necessity of being on the lookout, and taking proper precautions, such as slowing the locomotive, to guard against mishap and danger. It is true, the officers of the company testify that this was done, but witnesses for the plaintiffs testify differently, and the fact, upon the opposing evidence, has been found by the jury.

There was no error in the instruction complained of in this aspect of the case, and upon the assumption that no attention was to be given to the moving of the engine until the animal was on the (98) track.

The judgment must be affirmed.

No error. Affirmed.

Cited: Carlton v. R. R., 104 N. C., 368; *Bullock v. R. R.*, 105 N. C., 189; *Randall v. R. R.*, 107 N. C., 755; *Ward v. R. R.*, 109 N. C., 360; *Hinkle v. R. R., ibid.*, 479; *Pickett v. R. R.*, 117 N. C., 630; *Doster v. R. R., ibid.*, 662; *Styles v. R. R.*, 118 N. C., 1089; *Brinkley v. R. R.*, 126 N. C., 93; *Moore v. Electric Co.*, 136 N. C., 556; *Snipes v. Mfg. Co.*, 152 N. C., 46; *Enloe v. R. R.*, 179 N. C., 85; *Davis v. R. R.*, 187 N. C., 152.

WEBSTER CHAMBLEE v. RALEIGH BAKER.

Appeal—Undertaking on, When to be Filed—Justification of Case on Appeal—Contracts for Service.

1. The ten days within which the undertaking on appeal must be filed, are not counted from the day on which the judgment is rendered, but from that on which the Court adjourned.
2. Where the justification to the undertaking on appeal was taken before a person purporting to be a Justice of the Peace, and who signed the *jurat* as such, it will be presumed that the person signing the *jurat* was a Justice, in the absence of evidence that he was not so in fact.
3. An undertaking on appeal is sufficient, although it does not recite which party appealed.
4. No case on appeal is necessary, when the case is tried in the Court below upon a case agreed, or on a demurrer.
5. Where the plaintiff contracted to work for the defendant for a year, and was to be paid by the month, but broke his contract and stopped work without excuse, before the year expired, *It was held*, that he could recover for the time he did work, at the contract rate per month.
6. When, in such case, the contract is entire and indivisible and by the nature of the agreement, or by the express provisions of the contract, nothing is to be paid until all is performed, the plaintiff cannot recover, unless he aver and prove compliance with the contract on his part.
7. Under the former practice, in actions on a special contract to pay for services to be rendered, and which were rendered, no evidence in defence, or to reduce the recovery, was admissible to prove any misconduct on the part of the plaintiff, or dereliction in the service, but since The Code, this defence may be set up, and the entire controversy settled in one action.

(*Worthy* v. *Brady*, 91 N. C., 265; *Turrentine* v. *The Railroad*, 92 N. C., 642; *Clerk's Office* v. *Huffsteller*, 67 N. C., 449; *Thigpen* v. *Leigh*, 93 N. C., 47; *Lawrence* v. *Hester*, Ibid 79; *Hobbs* v. *Riddick*, 50 N. C., 80; *Gorman* v. *Bellamy*, 82 N. C., 497, cited and approved).

APPEAL from a Justice's Court, tried on a case agreed, before (99) *Gudger, Judge,* at Spring Term, 1886, of HERTFORD Superior Court.

The action was on a *quantum meruit,* for services rendered the defendant by the plaintiff.

Plaintiff was hired by defendant on February 20th, 1885, to work on defendant's farm for the remainder of the year, at ten dollars a month, and it was agreed that the plaintiff's contract was an entire one for the remainder of the year. He worked under the contract until the 20th of September, 1885, and left without legal excuse. The defendant sustained no damages in consequence of plaintiff's leaving.

The value of plaintiff's services from the time he commenced work until he left, was seventy dollars. He has received from defendant twenty dollars.

Upon these facts, the Court gave judgment for plaintiff, and defendant appealed.

Mr. B. B. Winborne, for the plaintiff.
Mr. John E. Bledsoe, for the defendant.

SMITH, C. J. (after stating the facts). Upon the calling of the cause, the counsel for the appellee moved to dismiss the appeal, for several reasons:

I. For that the undertaking on appeal was not executed within ten days from the rendition of judgment.

II. For insufficient justification.

III. For that the undertaking fails to show by whom the appeal is taken, and

IV. For want of a case, as required by the rule on appeals.

In our opinion, none of the grounds assigned are sufficient to sustain the motion.

The Court, at which the cause was tried, began its session on April 12th, and the undertaking bears date the 24th, twelve days thereafter, and recites the judgment as having been taken, as it properly should do, on the first day of the Term. It does not appear, and we cannot assume, that the business was all disposed of on that day, fol- (100) lowed by an adjournment.

The period of ten days counts not from the day of the term when in fact the cause was determined, but from the day of its closing. *Worthy* v. *Brady,* 91 N. C., 265; *Turrentine* v. *Railroad,* 92 N. C., 642.

The justification appears to have been before a Justice of the Peace, who, acting in that capacity, is recognized as such officer, and we must

recognize his acts, in the absence of evidence, or suggestion even, that he was not in fact a Justice.

For that, it does sufficiently appear who appeals. The record reciting the judgment, adds, "from the foregoing judgment the defendant appeals to the Supreme Court." The fact also appears from the recitals in the undertaking itself, for it avers a judgment recovered by the plaintiff "against the defendant," and the appellant is designated by name, as well in the body of the instrument as in its execution. But if unnamed, the undertaking would be effectual, as held in *Clerk's Office* v. *Huffsteller,* 67 N. C., 449.

The motion to affirm the judgment, for want of a case, as well as to dismiss the appeal, for this cause, must be overruled.

The case is made out in the facts agreed and submitted, and the appeal from the adjudication upon them is a sufficient assignment of error. It does not, in this respect, differ from a ruling upon a demurrer to the complaint, when no separate case is required. In each case, the question is as to the plaintiff's right of action and recovery upon the facts as stated.

Disposing of these preliminary matters, we proceed to consider the controversy upon its merits.

The appellant insists, that the contract being special, for labor for the entire residue of the year, though the compensation is measured by months, that the plaintiff having left before the expiration of the time "without legal excuse," cannot recover for the partial service performed.

(101) The general rule is thus laid down, and is sustained by numerous adjudications, cited in the American Editors' Notes to the case of *Cutter* v. *Powell,* 2 Smith's Leading Cases, 1: "But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit."

The same rule has been repeatedly recognized and acted on in this Court, the more recent cases, wherein references to others may be found, being *Thigpen* v. *Leigh,* 93 N. C., 47, and *Lawrence* v. *Hester,* Ibid., 79.

Indeed, so stringent was the former practice, that in an action upon a special contract to pay for service to be rendered, and which was rendered, no evidence in defence or to reduce the recovery, was admissible to prove inattention, neglect, wasted time or other misconduct of the plaintiff, and dereliction in the undertaken duty, and the defendant was driven to a separate action for redress. *Hobbs* v. *Riddick,* 50 N. C., 80.

It is otherwise under the present system, and the entire dispute, involving opposing demands, is now adjusted in a single suit. This is

some relaxation of the doctrine regarding special contracts, and the enforcement of the obligations they create.

The manifest injustice upon such technical grounds, or refusing all compensation for work done and not completed, or for goods supplied short of the stipulated quantity, and of allowing the party to appropriate them to his own use, without paying anything, has been often felt and expressed by the Judges, and a mode sought by which the wrong could be remedied.

The mischief is adverted to by this Court, in *Gorman* v. *Bellamy,* 82 N. C., 497, when referring to the cases of *Dumott* v. *Jones,* 23 How. (U. S.), 220, and *Monroe* v. *Philips,* 8 Ellis and Black., 739, this language is used: "The inclination of the Courts, is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the *special,* excludes an implied contract to pay. In such case, if the (102) party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when by the nature of the agreement, or *by express provision, nothing is to be paid till all is performed.*"

If, by the terms of the agreement, certain sums are due on performance of certain parts of the work, thus severing the consideration, separate actions are maintainable for each. And in the construction of the agreement, the Court will be guided by a respect to general convenience and equity, and the reasonableness of the particular case.

Thus, the modified rule has been declared to be, that though the consideration and contract be entire by the apparent terms of the agreement, yet such may be the circumstances, as to entitle the plaintiff to a ratable compensation for part performance.

So, the inference, that compensation is payable in instalments at certain periods, as weekly or monthly, according to the service, unless there is a clear and distinct understanding that compensation, as a unity, is demandable only at the expiration of the full period of service.

These views are presented in the able discussion in the note from which we have extracted a part, and rest upon a series of adjudications cited.

In our case, the plaintiff's wages are measured by monthly sums, and for two months of his work he has received full compensation. This indicates an understanding between the parties, that the wages were to be paid as the work progressed, and the plaintiff's necessities may have required, that he should not be delayed until the end of the year.

The defendant loses nothing by the plaintiff's leaving, nor is it stated that the departure was against the defendant's will. Under these cir-

cumstances, and to avoid manifest injustice, we hold the ruling
(103) to be right, and that there is no error. The judgment must be affirmed.

No error. Affirmed.

Cited: Booth v. Ratcliff, 107 N. C., 8; *Markham v. Markham,* 110 N. C., 358; *Wooten v. Walters, ibid.,* 256; *Greensboro v. McAdoo,* 112 N. C., 360; *Arrington v. Arrington,* 114 N. C., 114; *Guano Co. v. Hicks,* 120 N. C., 29; *Coal Co. v. Ice Co.,* 134 N. C., 580; *Parker v. Brown,* 136 N. C., 285; *Tussey v. Owen,* 139 N. C., 461; *Wallace v. Salisbury,* 147 N. C., 60; *Willis v. Construction Co.,* 152 N. C., 105; *Jones v. Sandlin,* 160 N. C., 153; *Steamboat Co. v. Transportation Co.,* 166 N. C., 586; *McCurry v. Purgason,* 170 N. C., 468; *Ball v. McCormack,* 172 N. C., 681.

W. B. NIXON v. SALLY WILLIAMS.

Curtesy—Seizin—Entry—Possession.

1. Seizin implies the possession of an estate of freehold, and seizin in law means the right to have such possession.
2. At common law, to entitle a husband to curtesy in his wife's land, either the wife, or the husband in right of his wife, must have had a seizin in deed, which is the actual possession of the land.
3. Where a party entitled to the possession of land, enters thereon, he is presumed in law to enter under, and in pursuance of his right, no matter what may have been the motive for the entry, and he is at once clothed with every right he can have by virtue of his title which could be asserted by entry.
4. The possession of a widow, to whom no dower has been assigned, is not adverse to the heirs-at-law of her deceased husband.
5. Where the wife of the plaintiff, now dead, was entitled to the land in dispute as heir-at-law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land; *Held,* that she had such seizin as entitled her husband to an estate by the curtesy.

(*Gadsby* v. *Dyer,* 91 N. C., 311; *Gaylord* v. *Respass,* 92 N. C., 554, cited and approved).

CIVIL ACTION, for the possession of land, tried before *Gudger, Judge,* at Spring Term, 1886, of HYDE Superior Court.

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

It appears, that Lorenzo D. Williams died in the year 1874, seized and in the actual possession of the lands described in the complaint, leaving surviving him, his widow, the defendant, and one daughter, Parley Williams, his sole heir-at-law, upon whom the land descended. The latter, in the year 1879, intermarried with the plaintiff, and there was born alive of this marriage only one child, a son, who died some time in the year 1881, leaving surviving him no brother nor sister, nor the issue of such. Afterwards, in the year 1881, the wife of plaintiff, the said Parley, died, leaving no child, nor brother, nor (104) sister, nor the issue of such, surviving her.

During the marriage mentioned, the plaintiff cultivated the lands mentioned one year, as the tenant of the said Sally Williams, and paid her rent for the same. After that, he lived on the lands of a third party, and was living there at the time of the death of his wife, but the wife was ill for some time before her death, went upon the land in question to the dwelling house in which her mother resided, and died there, in September, 1881.

The widow named, has remained upon the lands of her deceased husband ever since his death, using and cultivating them, and at times, letting parts of them for rent, but she has never had dower therein assigned to her.

The parties, by consent, submitted to the Court the above, as the material facts of the case. Upon consideration thereof, the Court gave judgment for the plaintiff, and the defendant appealed to this Court.

No counsel for the plaintiff.

Mr. C. E. Aydlett, for the defendant.

MERRIMON, J. (after stating the facts). The plaintiff contends, that he has a life estate in the lands described in the complaint, as tenant by the curtesy, and is entitled to the possession thereof. The defendant, on the contrary, contends that he has not such estate, because his deceased wife never had *actual seizin* of the land.

Seizin, as applied to land, is a technical term, that implies the possession of an estate of freehold. Seizin in law, is the right to have such possession. Seizin in deed, is the actual possession of the freeholder. It means more than the mere possession—it is possession with the legal right to the estate in the land.

At the common law, it is essential that the wife, or the husband in the right of the wife, shall have *seizin in deed*—that is, actual seizin—actual possession of the estate, to entitle the husband as tenant by (105) the curtesy.

Now granting that the wife must have had seizin in deed, as contended by the defendant, she had such seizin. It is probable that she lived with her husband, on the land, during the year he cultivated it—it is fair to infer so; but it is certain she went upon it, and lived with her mother in the dwelling house for some time—how long, does not appear —before her death, and died there. She was there as of her own right, and not simply by permission or curtesy. She was upon, and in the actual possession of her own land, and she could not have been put out of possession rightfully. She had actual seizin and perfect title, and thus her husband became entitled as tenant by the curtesy, of the land whereof she was so seized. The Code §1838.

No matter what may have been her motive in going upon the land, as soon as she went upon it, the law at once clothed her with every right, and all the authority she could have by virtue of her title, and which she could assert by entry. She could not repudiate her right as the owner of the inheritance, and agree to become a trespasser, or to be in possession of some other than her real title.

In that respect, the law determined her condition and relation to the land. *Gadsby* v. *Dyer,* 91 N. C., 311; *Gaylord* v. *Respass,* 92 N. C., 554.

The widow entitled to dower remained upon the land after the death of her husband, and continued to do so for several years, but no dower was ever assigned to her. Her possession was not adverse to the wife of the plaintiff, in her life-time; indeed, she was in possession under her, and the defendant's presence did not have the effect to prevent the seizin of the plaintiff's wife, or his rights as the husband.

The plaintiff is entitled to have possession of the land as tenant by the curtesy, and the judgment must be affirmed.

No error. Affirmed.

Cited: Roberts v. Preston, 106 N. C., 421; *Atwell v. Shook,* 133 N. C., 393; *In re Dixon,* 156 N. C., 28; *Tyndall v. Tyndall,* 186 N. C., 277.

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(106)

JOHN L. HINTON v. JOSIAH ROACH.

Judgment—Execution—Dormant Judgments—Description of Land in a Deed.

1. A variance between the execution and the judgment, in regard to the sum due, does not vitiate a sale made under the execution.

2. A stranger purchasing at a sale under an execution issued on an irregular judgment, gets a good title, and even the plaintiff in the judgment gets a good title, unless the judgment is afterwards set aside, upon a motion by a party to the judgment who is prejudiced by the irregularity.

3. In an application to revive a dormant judgment, the affidavit of the judgment creditor is not the only evidence upon which the Clerk may proceed, and when the judgment debtor is present, and makes no objection to the order, it is sufficient evidence to warrant the revival of the judgment, although the judgment creditor does not make an affidavit at all.

4. Where a deed described the land, as "a certain tract in N. Township, adjoining the lands H. S. and others, said to contain 37½ acres;" *It was held*, a sufficient description to admit parol evidence to fit the description to the thing, and identify the land.

(*Marshall* v. *Fisher*, 46 N. C., 111; *Hervey* v. *Edmunds*, 68 N. C., 243; *Skinner* v. *Moore*, 19 N. C., 138; *Bender* v. *Askew*, 14 N. C., 149; *Green* v. *Cole*, 35 N. C., 425; *Parsons* v. *McBride*, 49 N. C., 99; *Bagley* v. *Wood*, 34 N. C., 90; *Surratt* v. *Crawford*, 87 N. C., 372; *Farmer* v. *Batts*, 83 N. C., 387; *Harrell* v. *Butler*, 92 N. C., 20, cited and approved).

CIVIL ACTION, to recover land, tried before *Gudger, Judge,* at June Term, 1886, of PASQUOTANK Superior Court.

The plaintiff introduced a Sheriff's deed, in which it is recited, that by virtue of an execution, issued from the Superior Court of Pasquotank county, the Sheriff had levied upon and sold to John L. Hinton, who was the plaintiff in the judgment, that certain tract of land, situated in Newland Township, joining the lands of the said Hinton, M. P. Stokely, and others, containing thirty-seven and a half acres. The deed bears date the 18th of September, 1878. He also offered in evidence, the execution under which the Sheriff sold the land, which is as follows, to-wit:

"WHEREAS, Judgment was rendered on the 23d day of April, (107) 187–, in action between Jno. L. Hinton, Plaintiff, and Josiah Roach, Defendant, in favor of the said Jno. L. Hinton against the said Josiah Roach, for the sums of $28, with interest from March 2d, 1854, and $63.25, with interest from May 8th, 1860, and $50, from Jan. 9th, 1862, as appears to us by the judgment roll, filed in the office of the Clerk of said Court. And whereas, the said judgment was docketed in said County, on the 23d day of April, 1870, and the sum of One Hundred and Forty-one Dollars and Twenty-five Cents is now actually due thereon, with interest on the same, as above stated. And the further sum of Four Dollars and Seventy Cents and Four Dollars and Twenty-five Cents, accrued costs and disbursements in said suit expended, whereof the said Josiah Roach is liable.

"You are therefore commanded, to satisfy the said judgment out of the personal property of said defendant within your county; or if suffi-

cient personal property cannot be found, then out of the real property in your county belonging to such defendant, on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be; and further to return this execution within the first three days of the next term of our Superior Court. Issued the 1st day of July, 1878."

The foregoing execution is endorsed on the back, as follows: "Received July 1st, 1878." (Signed) T. J. Murden, Sheriff.

"And levied on same day on thirty-seven and one-half acres of land in Newland township, bounded by the lands of J. L. Hinton, W. J. Spence and others, adjoining the farm where said Josiah Roach resides."

And across the back of same, in pencil mark is the following endorsement:

"Sold Josiah Roach's interest in 37½ acres land, Jno. L. Hinton, purchaser, at $25.00. This 18th of Sept. 1878, Fall Term."

He then offered the following documentary evidence from the judgment docket of Pasquotank Superior Court:

(108) No. 224, "John L. Hinton *v.* Josiah Roach. Judgment for $28, dated March 2d, 1854. Second given for $20: Third for $43.25, both dated May 8th, 1860. Fourth given for $50, dated Jan. 9th, 1862, and the further sum of $4.70 costs of action. April 23d, 1870. Judgment transcript, April 2d, 1870."

The following entries are made upon said judgment:

"John L. Hinton maketh oath in due form of law, that he obtained a judgment against the above person in the Magistrate's Court, April 23d, 1870, and the same was docketed on the judgment docket of the Superior Court of Pasquotank county, as appears from the record of said Court, April 23rd, 1870, for the sums of $28.00, with interest from March 2d, 1854, and for $20.00 and $43.25, with interest from May 8th, 1860, and for $50.00, with interest from January 9th, 1862, and the further sum of $4.70, the costs of the action.

"And asks the Court that the judgment may be revived, and execution issue thereon in manner as law directs, and to that end he will appear before the Clerk of said Court on the 22d day of June, 1878, and make motion for renewal, &c., as aforesaid."

On the back of the foregoing affidavit the following order was written:

"Upon the hearing, upon the motion in this cause (the defendant being before the Court), the same being heard upon the notice and affidavit in the cause, and the defendant failing to produce any receipt, or otherwise showing that said judgment was satisfied in whole or in part; it is therefore ordered, that execution issue in manner and form as the law directs for the sum, &c., set out in said judgment, together

with the additional costs of $3.25, advanced by plaintiff for the costs thereof, the day and date abovesaid."

"Execution issued July 1st, 1878, and levied on same day on 37½ acres of land in Newland township, bounded by the lands of J. L. Hinton, W. J. Spence and others, adjoining the farm where said Josiah Roach resides. (Signed) T. J. Murden, Sheriff."

The plaintiff then offered to show by parol testimony, that the (109) defendant, Roach, owned no other land than that described as joining the lands of M. P. Stokely, J. L. Hinton, W. J. Spence, and the lands on which said Roach lived, and that the land described in the Sheriff's levy and deed, and in the complaint, were the same, and that the defendant was in the wrongful possession of the same.

This testimony was received, and the defendant excepted, because, as he alleged, the deed was too vague and indefinite to convey anything.

The plaintiff rested his case, and the defendant asked for judgment, 1st, because the plaintiff had neither shown a judgment from the Justice of the Peace, nor a transcript of his judgment, and had only shown an entry on the judgment docket of the Superior Court of Pasquotank county; 2d, because the judgment was dormant at the time of execution issued, as it was not revived either upon satisfactory proof or affidavit; 3d, because the record shows no judgment in favor of plaintiff; 4th, because the deed and complaint are too vague and indefinite to allow the plaintiff to recover.

His Honor overruled the motion, and charged the jury, if they should find the defendant in possession of the land, to render a verdict for the plaintiff on the issues submitted to them.

There was verdict and judgment for the plaintiff, and defendant excepted and prayed an appeal to the Supreme Court.

No counsel for the plaintiff.

Mr. E. F. Aydlett, for the defendant.

ASHE, J. (after stating the facts). Upon the case as made out by the plaintiff, the defendant contended he had failed to make out his case, and that he was entitled to a judgment, upon these grounds:

1. Because the plaintiff had neither shown a judgment from the Justice of the Peace, nor a transcript of his judgment, and had only shown an entry on the judgment docket of the Superior Court of (110) Pasquotank, No. 224, Hinton *v.* Roach.

We do not think the objection is tenable. The judgment docket, offered in evidence, shows the entry "No 224, to-wit: John L. Hinton *v.* Josiah Roach, judgment for $28, dated March 2d, 1854," and then followed, the entry of several other judgments, for different amounts, ren-

dered at different times, making in all the sum of one hundred and forty-one dollars and twenty-five cents, "and the further sum of $4.70, costs of action, April 23d, 1870."

The entry was certainly very irregular, but it is manifest from the amounts, which are different, and the memorandum appended, that they were transcripts of judgments, rendered before a Justice of the Peace, in favor of John L. Hinton, against Josiah Roach. The execution recites the judgment in favor of Hinton *v.* Roach, for $28, and there stands upon the judgment docket, a judgment for that amount, in favor of Hinton *v.* Roach. The plaintiff, then, has shown an execution and a judgment. It is true, the execution recites other judgments, and calls for a larger sum than the $28, but that irregularity is cured by §1347 of The Code, (Acts of 1848, chap. 53), which declares, "wherever property may have been sold by an officer, by virtue of an execution, or other process, commanding the sale thereof, no variance between the execution and the judgment, whenever the same was issued, in the sum due, in the manner in which it is due, or in the time when it is due, shall invalidate, or affect the title of the purchaser of such property." *Marshall* v. *Fisher,* 46 N. C., 111. The plaintiff, then, has shown an unobjectionable execution.

But it is contended, that even if that be so, still, as the plaintiff in the execution was the purchaser at the Sheriff's sale, he is bound to show a judgment, which he has failed to do, because the entry of the judgment, offered by him in evidence, was a nullity. But that is not so. It purports to be a judgment of a Court of competent jurisdiction, and the most that can be said against its validity is, that it is irregular—not entered according to the course and practice of the Court, but it is conclusive, until set aside, and can only be set aside at the in-
(111) stance of a party to the action, who is prejudiced by it. *Hervey* v. *Edmunds,* 68 N. C., 243.

But, whether set aside, or not, a stranger, who purchases under an execution issued upon it, will get a good title, and so will the plaintiff in the judgment, if it is not set aside, but when set aside, it will no longer justify him, in any of the acts done under it. It is then the same as to him as if it had never been. *Skinner* v. *Moore,* 19 N. C., 138; *Bender* v. *Askew,* 14 N. C., 149. The judgment, then, not having been set aside, it will support the title of the plaintiff, until it is set aside, and even when that is attempted, the effort to do so, may possibly be defeated by a motion on the part of the plaintiff to correct the irregularity, by an amendment of the record. *Green* v. *Cole,* 35 N. C., 425; *Parsons* v. *McBride,* 49 N. C., 99; *Bagley* v. *Wood,* 34 N. C., 90.

The next exception taken by the defendant was, "that the judgment was dormant at the time of execution issued, as it was not revived either

upon satisfactory proof or affidavit." In *Surratt* v. *Crawford,* 87 N. C., 372, it was held: "It is not required that an affidavit be made that the judgment, or some part of it, remains unsatisfied and due, since while, if the fact is to be established by the plaintiff's own oath, it must be in that form, any other 'satisfactory proof' is admissible for that purpose." The fact that the defendant was present when the order was made by the Clerk, and offered no objection to the order, was sufficient proof to warrant the Clerk in concluding that the judgment was unsatisfied. His silence was properly taken as an admission of the fact.

The defendant's only other exception was, "that the deed and complaint are too vague and indefinite to allow the plaintiff to recover."

This exception goes to the description of the land sued for, in the complaint and Sheriff's deed. The complaint describes the land, as "that certain tract of land adjoining the land of the plaintiff, and of Marshall P. Stokely and others, now wrongfully possessed by (112) the defendant, containing thirty-seven and one-half acres"—and it is described in the deed, as a "certain tract of land, in Newland Township, joining the lands of said Hinton, M. P. Stokely and others, said to contain thirty-seven and a half acres more or less."

In the Court below, the plaintiff offered to show, by parol evidence, that the defendant Roach owned no other land than that described, as joining the lands of M. P. Stokely, J. L. Hinton, W. J. Spence and the land on which said Roach lived, and that the land described in the Sheriff's levy and deed, and in the complaint, were the same. The evidence was objected to by the defendant, but received by the Court. The description of the land, in the complaint and deed, was sufficient to admit extrinsic evidence of its identity. The description is very similar to that in *Farmer* v. *Batts,* 83 N. C., 387, where the description was, "One tract containing 193 acres, more or less, it being the interest in two shares, adjoining the lands of J., B., E., O., and others," and it was held, that the description was not too indefinite to admit parol evidence, to fit the description to the thing. That decision is so *apropos* to the question under consideration, that it must govern this case, and it is needless to cite any other authority to the same effect, except that of *Harrell* v. *Butler,* 92 N. C., 20, in which the decision in *Farmer* v. *Batts* is approved.

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

No error. Affirmed.

Cited: McCanless v. Flinchum, 98 N. C., 377; *Walton v. McKesson,* 101 N. C., 442; *Blow v. Vaughan,* 105 N. C., 207, 208; *Perry v. Scott,* 109 N. C., 381; *Marshburn v. Lashlie,* 122 N. C., 239.

(113)

M. E. WOODHOUSE v. ISAIAH CAIN.

Internal Commerce—Inland Navigation—Liability of Shipowner for Loss of Freight.

1. The statute of the United States, (Rev. Stats., §4282), does not relieve the owner of a vessel from the consequences of his own negligence, but only from that of his employés and servants.
2. Navigation upon a sound of limited area, lying entirely within a State, is inland navigation, and is not embraced in the provisions of the Act of Congress. Rev. Stats. of the U. S., §§4282, 4289.
3. Navigation on Currituck Sound, in this State, is inland navigation.

CIVIL ACTION, heard on appeal from a Justice of the Peace, before *Gudger, Judge,* at March Term, 1886, of the Superior Court of CURRITUCK county. There was a verdict and judgment for the plaintiff, and the defendant appealed.

The facts are fully stated in the opinion.

Mr. W. J. Griffin, for the plaintiff.
Mr. L. D. Starke, for the defendant.

SMITH, C. J. This action, commenced before a Justice of the Peace, and, by successive appeals of the defendant, removed to this Court, is to recover the value of five barrels of flour, shipped on board the steamer "Bonito," then owned and commanded by the defendant, to Poplar Branch, on Currituck Sound, in this State. The goods, as well as the steamer, were burned at the wharf, before she started on her voyage, by fire, which originated in a near warehouse, and was thence communicated to the vessel; and there is no allegation of negligence or want of care in the defendant, to which the damage could be attributed. The defence arises under the Act of Congress, of March 3, 1851, the provisions of which, so far as they apply to the present controversy, are as follows:

"No owner of any vessel shall be liable to answer for, or make
(114) good to any person, any loss or damage, which may happen to any merchandise, whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to, or on board the vessel, unless such fire is caused by the design or negligence of such owner." Rev. St. U. S., §4282.

"The provisions of this title," relating to the limitation of the liability of the owners of vessels, "shall not apply to the owners of any canal

boat, barge or lighter, or to any vessel of any description, whatsoever, used in river or inland navigation." §4289.

It is insisted for the defendant, that the contemplated voyage involved in the contract, was not wholly "inland navigation," within the qualification of the last recited section, inasmuch as the large area of water forming Currituck Sound was to be traversed before reaching the point of destination; and this is assimilated to the great lakes on our northern frontier, and to Long Island Sound, the former of which, in *Moore* v. *The Am. Nav. Co.,* 24 Howard, 1, and the latter in *Prov. & N. Y. Steam. Co.* v. *Hill Man. Co.,* 109 U. S., 578, are declared not to be "inland" waters in the sense of the statute.

The defendant is not only the *owner,* but also the *commander, having personal management of his vessel,* and the statute manifestly looks to an exoneration of one who owns or has an interest in a ship, under the control and direction of officers and agents, and results from the relation of agency, and in giving this relief, aims at encouraging investments in this kind of property. This is the construction put upon the act by the Supreme Court of the United States, in *Walker* v. *Trans. Co.,* 3 Wall., 150, in the opinion in which case Mr. Justice MILLER thus speaks: "The exception is of cases when the fire can be charged to the *owner's design, or the owner's neglect.* When we consider that the object of the act is to limit the liability of owners of vessels, and that the exception is not, in terms, of negligence generally, but only of negligence of the owners, it would be a strange construction of the act, and in derogation of its general purpose, to hold that the exception ex- (115) tends to the officers and others of the vessels, as representing the owners." He then proceeds to say, that any doubt in the construction of the words used, considered by themselves, which might arise, is removed by another clause, "which was the remedy to which any party may be entitled, against the masters, officers, or mariners of such vessel, for negligence, fraud or other malversation."

Now, while the owner, as such, may be protected from the consequences of the acts and neglects of his employés or servants in charge, he is not released from any liability growing out of his own conduct or want of care, from which damage may result; for their capacities are separate and distinct, and involve independent liabilities.

The case is not varied by the fact that the defendant, in this case, was both owner and captain, for while, if charged with responsibility for the loss, because he owned the steamer, and the negligence was that of his employés, he could have invoked the aid of the statute in relief, it would not avail when the act or neglect which caused the damage was his own, and not that of agents.

But passing this point, we think the case is with the plaintiff, upon its merits, and that the waters to be passed over in the proposed voyage, inclusive of Currituck Sound, are "inland," and that this navigation is not covered by the exemption claimed. In the case first referred to, the great lakes on our Northern frontier were claimed to be inland waters, and the proposition was maintained in a learned and exhaustive argument, fortified by numerous authorities. Delivering the opinion of the Court, Mr. Justice MILLER says of these waters: "They form a boundary between this foreign country and the United States, for a distance of some twelve hundred miles, and are of an average width of one hundred miles, and this without including Lake Michigan, itself 350 miles in length and 90 in breadth, which lies wholly within the United States. The aggregate length of these lakes is over 1,500 miles,
(116) and the area covered by their waters is said to be some 90,000 square miles."

Then, after speaking of the immense commerce carried on over these waters, he proceeds:

"This commerce, from its magnitude, and the well-known perils incident to the lake navigation, deserves to be placed on the footing of commerce upon the ocean; and we think in this view of it, *Congress could not have classed it with business upon rivers or inland navigation, in the sense in which we understand these terms.*" The other decided case, recognizes Long Island Sound, which may be deemed an inward projection of the waters of the ocean, and an arm of it for all practicable purposes, as entitled equally with the lakes, to the exoneration provided in the act.

It is manifest, these rulings fall far short of admitting to the statutory limitation, commerce carried on over the waters of a sound lying wholly in this State, of inconsiderable dimensions and depth, for purposes of navigation as compared with the great lakes, and entirely inland. We cannot undertake to extend the principle so far as to embrace this water, but as the rivers traversed before reaching the sound, and which are admittedly *inland navigation,* so must be the sound itself. Indeed, Mr. Justice CATRON refused to concur in the ruling, that the lakes were not included in the exemption, and held, in a dissenting opinion, that the distinction was between *internal* and *foreign* commerce, and that these waters being in fact *inland,* navigation upon them, however extensive, was left subject to the operation of the existing law.

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

No error. Affirmed.

(117)

FRICK & CO. v. LOUIS HILLIARD.

Conditional Sale—Mortgage—Lien.

1. In order to constitute a conditional sale, it is essential that the title to the property should remain in the vendor, for there can be no conditional sale, if the title is transferred to the vendee.
2. A lien is a right by which a person is entitled to obtain satisfaction of a debt, by means of property belonging to the person indebted to him.
3. No particular words of conveyance are necessary to make a mortgage of personal property.
4. Where a note given for the purchase of an engine and boiler, provided that it should be a lien upon the property sold for which it was given, until it was paid in full at maturity, at which time the engine and boiler should be at the disposal of the vendors, which note was never registered, *It was held*, not to be a conditional sale, and that a party who had purchased the engine and boiler from the vendee before the note was paid, without notice, took it discharged of any claim of the original vendors.

(*Ellison* v. *Jones*, 26 N. C., 48; *Ballew* v. *Sudderth*, 32 N. C., 176; *Parris* v. *Roberts*, 34 N. C., 268; *Vasser* v. *Buxton*, 86 N. C., 335; *Gaither* v. *Teague*, 29 N. C., 460; *Clayton* v. *Hester*, 80 N. C., 275, cited and approved. *Deal* v. *Palmer*, 72 N. C., 584, doubted).

This was a CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at Spring Term, 1886, of HALIFAX Superior Court, upon the following case agreed, to-wit:

1. That some time in April, 1878, the plaintiffs, who are manufacturers of machinery, boilers, engines, etc., agreed to sell unto one L. G. Estes, and his wife, Julia W. Estes, residing in the county of Edgecombe, North Carolina, at a price agreed on between them, and on the terms and stipulations contained in the notes, hereinafter set out, one 12 horse power "Eclipse" engine and boiler, manufactured by the plaintiffs, and Estes and wife executed and delivered their notes to the plaintiffs therefor, due and payable at divers times thereafter, the last of which was in the following words and figures:

"$322.97. ENFIELD, N. C., April 1st, 1878.

Twenty-four months after date, we, severally and jointly, promise to pay Frick & Co., or order, the sum of three hundred and twenty-two dollars and ninety-seven cents, without defalcation, value (118) received. We, the drawers and endorsers of this note, hereby waive presentment for payment and notice of protest for non-payment of same, and also waive all homestead and exemption laws as to this debt.

"It is also further understood and agreed, that this note shall be a lien upon the engine, boiler or other machinery for which it is given in payment, until this note is paid in full, with legal rate per centum from maturity, together with all reasonable attorney's fees for collecting, and all necessary expenses incurred, if not paid at maturity, at which time, said engine, boiler or other machinery, shall be at the disposal of said Frick & Co., or order, and for deficit, hold ourselves equally responsible until paid in full."

The other notes were in the same form, and none of them were registered. Thereupon, the engine and boiler were delivered to Estes and wife, who were then and still are insolvent.

2. That default was made in the payment of a balance on the note hereinbefore set out, and on the 27th day of February, 1883, the plaintiffs began an action in the Superior Court of Halifax, returnable to Spring Term of said Court, against Estes and wife, to subject the engine to the payment of the debt; and at Fall Term, 1883, judgment was rendered in favor of the plaintiffs, for the balance due on the note, $134.60, with interest on $109.60 from the 24th day of October, 1883, till paid, and $6.32 costs, and it was ordered by the Court, that the engine should be sold by the Sheriff, to pay off the balance due thereon. The Sheriff, to whom said order issued, returned that the engine could not be found in his county, and the plaintiffs have no means of making their debt, other than this action.

3. That on the 1st day of February, 1883, L. G. Estes, in Tarboro, sold said engine to the defendant, Louis Hilliard, who had no personal notice of plaintiffs' claim for $750.00, which amount was not paid in money, but was entered as a credit, as soon as Hilliard returned
(119) to Norfolk, on an antecedent debt due him by Estes. Hilliard did not agree with Estes, that he should retain possession till the Fall, but the engine was not delivered to him until the 30th of October, 1883; but it was subject to his order, and he did not remove it, because he could not find a purchaser, and he did remove it as soon as he did find one.

4. The engine is worth $750.00, and defendant has converted it to his own use, and after demand made upon him prior to the beginning of this action, refused, and still refuses, to pay plaintiffs' claim.

Upon these facts, the Court gave judgment in favor of the defendant, from which the plaintiffs appealed.

Messrs. R. O. Burton, Jr., and *Spier Whitaker,* for the plaintiffs.
Mr. W. H. Day, for the defendant.

ASHE, J. (after stating the facts). We have had a good many cases before this Court, involving questions like that presented by the record in this case, and there has been some conflict in these decisions, which we find it difficult to reconcile. There seems to be a distinction recognized by this Court, where a note is given for the price of personal property purchased, and there is in the note a stipulation that the property which is the subject of the contract, shall be a security for the payment of the note, whether the title of the property is retained by the vendor, or parted with, by the terms of the contract. In the former case, it has been uniformly held, that the transaction is a conditional sale, but otherwise, when the title has passed to the vendee.

In the following cases, the transactions have been held to be conditional sales, and not mortgages, because there was a stipulation in the contracts, that the property, or the title thereto, should remain in the vendor until the price was paid. *Ellison* v. *Jones,* 26 N. C., 48; *Ballew* v. *Sudderth,* 32 N. C., 176; *Parris* v. *Roberts,* 34 N. C., 268; *Vasser* v. *Buxton,* 86 N. C., 335.

In *Gaither* v. *Teague,* 29 N. C., 460, the action was founded (120) upon the following instrument: "Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly, with W. Gaither, which filly I want to stand as security until I pay him for her. I also promise to take good care of her." It was held, that upon the face of the paper, it was doubtful whether it was intended as a mortgage or a conditional sale, and it was properly left to the jury to determine its character from the accompanying circumstances. And it was held upon their finding, to be a conditional sale. But in *Deal* v. *Palmer,* 72 N. C., 584, where the construction of an instrument was involved, which was in the following words: "Six months after date, I promise to pay H. M., or order, forty dollars, the price of one mule colt, *bought of her,* the mule to stand security for the price until paid;" it was held to be a mortgage and not a conditional sale. PEARSON, C. J., who delivered the opinion of the Court, said, referring to the case of *Gaither* v. *Teague,* which was somewhat similar in its wording, that "after much deliberation, it was held not to be evidence of a sale, and mortgage to secure the price, but only of an executory agreement to sell; here the words of the agreement admit of no question—it was the intention of the parties, and the legal effect of the instrument is, to make a sale of the mule, with a mortgage to secure the price." It will be observed, that the dissimilarity of these two cases consists in the wording of the instruments. In *Gaither* v. *Teague,* the wording is, that the vendee has *bargained* for a sorrel filly, and in the last case, the wording is, *"one mule colt bought of her."*

In the more recent case of *Clayton* v. *Hester,* 80 N. C., 275, where the instrument offered in evidence of the contract, was, "One day after date, I promise to pay to J. C., the full and just sum of one hundred and fifty dollars, for one bay mare bought of him, and to secure him, *the horse stands his own security;*" and it was held to be a conditional sale, and not a mortgage. This decision would seem to be in conflict with that in *Deal* v. *Palmer,* for there is scarcely a shade of difference in the words of the instruments. In the one case, the words are, "the mule to
(121) stand security for the price until paid," and in the other, "to secure him, the horse stands his own security." But conceding that *Deal* v. *Palmer* is overruled by this last cited case, yet it will be seen, that it was held to be a conditional sale, because the title to the property still remained in the vendor. For the Chief Justice, who spoke for the Court, said, "It is quite apparent the parties intended the owner should retain the property, while possession was transferred until the price was paid, or in other words, as a security for it. This is effected, and can only be effected, by leaving title in the plaintiff until the condition is accomplished. The writing declares, that 'the horse stands his own security,' by which is plainly meant, that the *property* in the horse should 'stand,' *remain undisturbed,* in the owner, as his security, a security incident to his retaining title, until the money was paid."

If it is held, as in this and other cases, that the retention of the title to the property is essential to constitute a conditional sale, the converse of that proposition must be true, that if the title is parted with to the vendee, it cannot be a conditional sale, and that is what distinguishes the case before us from those cited.

In this case, the possession of the property was transferred to the vendees, and the instrument taken to secure the price of the articles sold, was substantially as follows: After the stipulation for the price to be paid for the property purchased, it contains the following agreement: "It is also further understood and agreed, that this note shall be a lien upon the engine, boiler, or other machinery for which it is given in payment, until this note is paid in full, with legal rate, &c., and all necessary expenses incurred, if not paid at maturity, at which time said engine, boiler, or other machinery, shall be at the disposal of said Frick & Co., or order."

The instrument bears intrinsic evidence of a sale, and the transfer of the legal title. It gives a lien on the property purchased, for the payment of the note given for the price, and the plaintiffs accept the instrument. In other words, he parts with the property, and consents
(122) to take a lien thereon, as a security for the purchase money. The lien is inconsistent with the retention of the title to the property, for a person does not take a lien upon his own property. A lien

is a right by which a person is entitled to obtain satisfaction of a debt, by means of property belonging to the person indebted to him.

The title, then, not being retained by the plaintiffs, the transaction with the defendant, cannot be a conditional sale, but as there is a lien given in the written contract, by the defendant to the plaintiffs, upon the property purchased, to secure the price agreed to be paid, therefore it follows that it must be a mortgage.

No particular words are necessary to create a mortgage. In *Langdon* v. *Bull,* 9 Wend., 80, where the action was founded, upon an instrument very similar to this, which ran thus: "Now therefore, for the payment of the said notes, I hereby pledge and give a lien on the said engine, to the said Langdon, and in case the notes are not paid, hereby consent that Langdon shall hold the same as security, and see himself harmless, it being understood that I keep possession of the same until the time comes for the payment of the notes, and in case they are not paid, Langdon may take the same." This was held to be a good mortgage, and it will be seen in its terms, to bear a striking similarity to the instrument under consideration.

We think it very clear, that the instrument is a mortgage, and there was no error in the judgment of the Superior Court in favor of the defendant upon the case agreed. The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

Cited: Comron v. Stanland, 103 N. C., 212; *Pate v. Oliver,* 104 N. C., 462; *Perry v. Young,* 105 N. C., 466; *Tufts v. Griffin,* 107 N. C., 49; *Trust Co. v. Motor Co.,* 193 N. C., 665; *Weeks v. Adams,* 196 N. C., 513.

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(123)

A. E. BRAID v. R. LUKINS, Jr., and W. E. LUKINS, trading as LUKINS & CO.

Appeal.

1. An appeal from an order granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right, and as a matter of law.
2. Where an appeal is taken from such an order, the facts and considerations which induced the trial Judge to grant or refuse a new trial, should be stated on the record, in order that the appellate Court may see that the judgment is subject to review.

3. Where the record only shows that the trial Judge set the verdict aside, and granted a new trial, without specifying the facts or reasons which induced him to do so, and these do not appear, with certainty, in the record, it will be presumed that the new trial was granted in the exercise of the discretionary powers vested in the trial Judge, and the appeal will be dismissed.

(*Vest* v. *Cooper*, 68 N. C., 131; *Moore* v. *Edmiston*, 70 N. C., 471, cited and approved).

CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Fall Term, 1886, of PASQUOTANK Superior Court.

At June Term, 1886, a judgment by default and inquiry was entered, and at the next subsequent term, the Court proceeded to execute the inquiry, and submitted to the jury the following issues:

1. What amount is due to plaintiff for placing defendants' lumber on vessel "Mogee" at Elizabeth City? Answer: $36.

2. What was the value of the lumber delivered by plaintiff to defendants in Philadelphia in 1884? Answer: We, the jury, decide that the plaintiff is entitled to $8 per thousand, net, and interest from sale at 6 per cent., 46,571 feet.

Thereupon the plaintiff moved for judgment of $451, which was refused, and plaintiff excepted. Defendants moved to set aside the verdict, because it was irregular. Plaintiff objected, and offered to release all interest, and asked for judgment for $408.56, to-wit.: $8 per thousand for 46,571 feet and $36.

(124) The Court refused judgment, and plaintiff excepted. The Court set aside the verdict and granted a new trial. The plaintiff excepted, and appealed to this Court.

Mr. E. F. Aydlett, for the plaintiff.

No counsel for the defendants.

MERRIMON, J. (after stating the facts). The statute (The Code, §548), among other things, provides that "An appeal may be taken from every judicial order or determination of a Judge of a Superior Court, upon or involving a matter of law or legal inference * * * * *, which grants or refuses a new trial."

It will be observed, that the judicial order or determination granting or refusing a new trial that may be appealed from, must be *upon or involve a matter of law or legal inference*—that is, the order or judgment must be one that involves and raises the question, whether or not, in law, and as of right, a party to the action or proceeding is entitled to a new trial? For example, if a party to the action, pending the trial, entertained and fed the jury while they were considering of their verdict, which they afterwards rendered in his favor, and the Court, upon

motion of the opposite party for a new trial for that cause, made an order refusing to grant the motion: In that case, an appeal to this Court would lie, because such decision would involve a question of law as to the legal validity of the verdict. Or, if the jury rendered a verdict in an action, and for some consideration, the Court decided that it was void, and therefore entered an order directing a new trial—in that case, an appeal would lie, because the decision involved the question of law, was the verdict void? Or, if in an action, a party should make his motion for a new trial, and the Court should make an order refusing to grant it, upon the ground that he had no power to do so, the party making the motion might appeal, because the order involved the question of law, had the Court power to grant the motion? Or, if in the course of the trial, the Court should decide some question of law arising, and after verdict should be of opinion it had erred, and for that reason should set the verdict aside and grant a new trial, in that case an (125) appeal would lie.

In such and like cases, the Court could review the decisions of the Superior Court, and correct its errors of law. In all such cases, the Court should state upon the record the facts and considerations that induced it to make the order granting or refusing a new trial. This is necessary, to enable this Court to see and determine whether or not the order or judgment presents questions of law the subject of review, or whether it was made in the exercise of discretionary power, and therefore not reviewable here.

No appeal lies when the new trial is granted or refused in the discretion of the Court, as where the Court is of opinion that the verdict is against the weight of evidence, or that the damages allowed are excessive. And it has been held, that where a referee made his report, in the nature of a verdict, the defendant moved to refer the matter back, with instructions to open the account, on account of newly discovered evidence, and the Court allowed the motion at the costs of the defendant, the order of the Court could not be reviewed in this Court. *Vest* v. *Cooper,* 68 N. C., 131; *Moore* v. *Edmiston,* 70 N. C., 471.

And where the Court simply sets the verdict aside and grants a new trial, without specifying the matters that induced it to make the order, and these do not appear with sufficient certainty in the record, it must be taken that the Court granted a new trial in the exercise of its discretionary powers. The presumption is, that the order was properly made for good and sufficient cause, nothing to the contrary appearing.

Now, in the case before us, it does not appear upon what ground the learned Judge placed his decision. He may have thought that the verdict was against the weight of evidence, or that the price allowed for the

lumber was excessive, or some other like cause may have prompted his action. The defendant, it is true, moved to set the verdict aside, "because it was irregular," but it does not appear that the Court placed its (126) decision upon that ground.

The Judge was familiar with the law, and if he had intended to decide upon the ground that the verdict was irregular and void, thus raising a question of law, he would most probably have stated the grounds of his decision, so as to give the appellant the benefit of an appeal. In that case, as we have seen, he ought to have stated what induced his decision. The burden rests upon the appellant to show sufficient grounds for the appeal, and to show error.

The order in question was one within the discretion of the Court, and therefore no appeal lay from it. The supposed appeal must therefore be dismissed. It is so ordered.

Dismissed.

Cited: Bird v. Bradburn, 131 N. C., 490; *Abernathy v. Yount,* 138 N. C., 342; *Likas v. Lackey,* 186 N. C., 401; *Goodman v. Goodman,* 201 N. C., 811; *S. v. Riddle,* 205 N. C., 594.

W. H. BALLARD et als. v. W. T. WILLIAMS.

Mortgage—Interest—Vendor and Vendee.

1. The *status* of the mortgage relations, after the transfer of any interest by the mortgagor to a third party, cannot be changed to the detriment of the latter, without his consent.

2. So, the parties to a mortgage cannot stipulate for a higher rate of interest than that reserved by the mortgage, nor can they incorporate any additional debt into the mortgage, nor can they agree that arrears of interest should be converted into principal money, and bear interest, as against *puisne* encumbrancers, or other assignee of the equity of redemption.

3. In applying these rules, a vendor and vendee, when the purchase money, or a portion thereof, remains unpaid, will be regarded in the same light as a mortgagor and mortgagee.

CIVIL ACTION, tried before *Connor, Judge,* upon exceptions to the report of a referee, at Fall Term, 1885, of FRANKLIN Superior Court.

There was a judgment for the defendant, and the plaintiffs appealed

The facts appear in the opinion.

Mr. Jos. B. Batchelor, for the plaintiffs. (127)
Mr. Charles M. Busbee, for the defendant.

SMITH, C. J. In the year 1852, W. O. Green executed a title bond to N. G. Whitaker and Frank Whitaker, and therein covenanted, on payment of the purchase money, to convey to them a tract of land, containing about five hundred acres; and soon after, the said Frank sold and released his interest, under the contract, to his associate vendee.

Before 1857, the latter, who had gone into possession, paid a large part of the purchase money, and during the interval, agreed with defendant to sell to him a part of the tract, consisting of about sixty-five acres, and on July 30th, of the year mentioned, the purchase money being paid, made him a deed for said part, which was registered on the 5th day of September following.

On June 1st, 1859, the balance due on the original contract by N. G. Whitaker, inclusive of interest, was $1,131.35, and on the same day, the vendor, W. O. Green, for that sum, conveyed the entire land, subject to the vendee's equity, and for his benefit, to W. W. Green, whereby the latter assumed the relations of W. O. Green to the said N. G. Whitaker.

On May 2d, 1870, the last named being thus indebted, and in renewal thereof, gave his two notes to said W. O. Green, one in the sum of $2,000, the other in the sum of $653.77, each bearing interest at the rate of eight *per cent. per annum,* the consideration of which was the indebtedness then due for the land, and the price of another tract then sold by Green to Whitaker. Of this transaction the defendant had no notice.

W. O. Green afterwards died intestate, and his administrator, under proper legal proceedings instituted against his heirs, sold the original tract, except the portion bought by the defendant, for the sum of $2,319.40, which is its fair value. In January, 1882, the said Whitaker surrendered possession of the land, sold by the administrator, to said W. W. Green, who and his heirs-at-law have since received the rents and profits accruing from it. There was a reference and report, from which it appears that if the defendant's liability is meas- (128) ured by adding to the balance of the original purchase money, as due when the defendant contracted to buy and acquired his title, and simple interest thereon, the rents and profits will absorb the whole sum, and nothing remains due; while, as is contended, in the argument for the plaintiff, if he is chargeable with so much of the principal and interest as enters into the renewal notes, and interest thence on the combined amount, a considerable sum will be due upon the land. The referee disallowed interest on the enlarged sum, and charged it for the whole period upon the original ascertained balance of $1,131.35, and in this he is sustained by the Court, and from the judgment that the de-

fendant go without day and recover his costs, the plaintiffs appeal. The substantial facts set out in detail, are found and declared by the Court, and while the record shows other exceptions to have been taken to rulings of the Judge, none have been pressed in the argument before us, except the claim to superadd the interest to the principal embodied in the two specified notes, and to make the aggregate an interest-bearing principal, for his ratable share of which, the defendant is sought to be held liable. We suppose these unurged exceptions are abandoned, and do not therefore consider them in disposing of the appeal.

We concur in the decision of the Court, that the indebtedness existing when the defendant bought his part, is the measure of his liability for his share of the purchase money due to Green, and that it was not increased by Whitaker's renewal and conversion of interest into principal, nor by his stipulation for a higher rate of interest, while the new contract may be obligatory on Whitaker himself. The authorities cited by defendant's counsel, are so full and directly in point, that we are relieved of further research, and can do little more than reproduce them.

"If a mortgage secure a specific sum," to quote the words of a recent author, "the parties cannot, by parol agreement, as against others who have acquired rights in the property, extend the mortgage to
(129) cover other debts or further advances. Neither can the mortgagor, as against them, increase the charge upon the land, by confessing judgment, and thus compounding the interest. The mortgage being given to secure a certain debt, *is valid for that purpose only.*" 1 Jones on Mort., §357.

Again he remarks: "The parties to a mortgage, cannot, *as against subsequent parties in interest,* stipulate by an unrecorded agreement, *for a higher rate of interest* than that provided in the mortgage as recorded; nor can they, by such means, incorporate into the mortgage any additional indebtedness." *Ib.,* §361.

Another author uses this language: "Equity considers the arrear of interest so converted into principal, by agreement between the parties, in the light of a *further advance.* But inasmuch as a further loan made by a mortgagee after notice of a *puisne* incumbrance, is not allowed to be tacked, but must be postponed to that incumbrance, it follows, that a mortgagee *shall not be allowed to convert interest into principal,* as against a subsequent charge of which he had notice at the time of the agreement."—Coote on Mort., 431, 86 Law Lib.

These declarations of the law, not less applicable to the relations subsisting between vendor and vendee in this respect, are fully borne out in the adjudications.

In *Stoddard* v. *Hart,* 23 N. Y. (9 Smith), 556, it is held, that an agreement that a mortgage on land shall stand as a security for further

advances, and an insertion of the advances in the secured bond, is not protected by the mortgage.

In *McGready* v. *McGready,* 17 Mo., 507, a note secured by the mortgage was sued on, and judgment recovered, including the interest. This large sum then bore interest, and it was declared that owners of the equity of redemption, or vendees thereof, could redeem by paying the debt and interest as in the mortgage.

In *Largo* v. *Van Dorn,* 14 N. J. Eq., 208, Chancellor Green says: "It is not in the power of the mortgagee to revive the lien for the original amount, by refunding or returning the money paid, to the prejudice of a *bona fide* incumbrancer, whose incumbrance is subsequent to the mortgage, but prior to the repayments." (130)

Again, *Reese, J.,* delivering the opinion in *Gardner* v. *Emerson,* 40 Ill., 296, thus explains the law: "It is perfectly obvious, that if this agreement (that a note bearing five per cent. interest should thereafter bear ten) was entered into for a valuable consideration, and is valid against Whitney (the mortgagor), personally, it could not be made a lien on the land to the prejudice of subsequent incumbrancers. *They had a right to redeem from this mortgage, by paying the amount due, according to its terms as recorded.*"

To the like effect are *Lord* v. *Morris,* 18 Cal., 482, and *Lent* v. *Morrell,* 25 Cal., 492.

The doctrine thus established, and which commends itself to the approval of the judicial mind, is that the status of the mortgage relations, after the transfer of any interest of the mortgagor to an assignee, cannot be changed to the detriment of the latter, without his consent, and it must be upon principle, not less applicable to the relations of vendee and vendor.

The appellant's counsel, Mr. Batchelor, does not controvert the general proposition, but insists that the giving interest upon interest, after so long an interval, is an equity inherent in the contract, to the exercise of which the assignment is subject.

The authorities are the other way, and the exercise of the assumed right of the Court to allow such accumulated interest, involves the addition of a large sum to the incumbering debt, which did not exist at the time of the assignment.

We think this can no more be done, than can the rate of interest be increased to the defendant's injury. There is no error.

No error. Affirmed.

Cited: Blake v. Broughton, 107 N. C., 230; *Graves v. Currie,* 132 N. C., 312.

(131)

SUSAN COUNCIL v. W. H. AVERETT et als.

Executors and Administrators—Powers of Sale in a Will.

1. An administrator, *cum testamento annexo,* can execute any power conferred by the will on the executor therein named.
2. As a general rule, where a will directs lands to be sold for division among devisees, and no person is designated to make the sale, neither an executor, nor an administrator with the will annexed, can execute the power, but such power may be conferred upon them, either by express words, or by reasonable implication from the provisions of the will.
3. Where the fund to be divided is to be raised by a sale of both real and personal property, or where the fund to be raised by the sale is to pay debts, or discharge legacies, or is to pass into the hands of the executor, to be applied by him by virtue of his office, the executor can execute the power of sale, as to the realty, although the will does not confer it on him in direct terms.
4. So, where a testator gives all of his property of every description, to his wife for life, and at her death, to be sold and divided among his children, *It was held,* that by necessary implication, the will conferred the power of sale on the executor, and a sale, by an administrator with the will annexed, of the realty, made after the death of the life tenant, passed a good title.

(*Vaughan* v. *Farmer,* 90 N. C., 607, cited and approved).

CIVIL ACTION, for the possession of land, tried before *Boykin, Judge,* at Spring Term, 1886, of BLADEN Superior Court.

It appears that John Cashwell died prior to the month of April, 1882, leaving a last will and testament, which was proven in that month. The following is a copy of so much thereof as is material to be set forth here:

"I give and bequeath to Sally Cashwell, my dearly beloved wife, all my property of every kind whatsoever, freely by her to be possessed and enjoyed during her natural life or widowhood, and at her death or marriage, as soon as may be, for it all to be sold, and equally divided among my children, except James and Thomas Lee. James to have but fifty cents, as he has had, I think, his part before. Thos. Lee to have eighty dollars more than an equal part with the rest of my children, as he has paid for some land more than the rest. I also do make and ordain Neavel Cashwell, Jr., and Reuben Fisher, to be the only and sole executors of this my last will and testament."

(132) The persons named in the will as executors, at once renounced their right to qualify as such, and A. McA. Council was then appointed administrator *cum testamento annexo,* in that behalf.

Afterwards, Sally Cashwell, named in the will, and who was the surviving widow of the testator, died.

The land mentioned in the complaint, and which the plaintiff seeks to recover possession of, is embraced by the will. The administrator named, by virtue of his authority under the will, sold it, and the plaintiff became the purchaser thereof. She having paid the purchase money, the administrator executed to her a proper deed therefor, on the 10th day of May, 1885. It is stated in the case settled upon appeal, that after verdict, "defendants moved for judgment, because the executor named in said will was not empowered by the terms thereof to sell the land therein devised for the purpose of executing the trust therein created, and that therefore the administrator with the will annexed of said Cashwell, was not empowered to do so." This motion was refused by the Court. Judgment for plaintiff. Appeal by defendants.

No counsel for the plaintiff.

Mr. W. A. Guthrie, for the defendants.

MERRIMON, J. (after stating the facts). The single question presented by the record for our decision is, did the will above set forth, confer on the executors therein named, power to sell the land embraced by it? If it did so, then the administrator *cum testamento annexo,* mentioned, had the like power by virtue of the Statute (The Code, §2168), which confers on such administrators the like power as the will conferred upon the executors, and the deed under which the plaintiff claims title, is valid.

The testator, by his will, gave and devised to his widow, "all my (his) property of every kind whatsoever," for life or during widowhood, and at her death or marriage, directs "it all to be sold," &c. He had both real and personal property, and the broad sweeping words employed in disposing of it, carried the whole. (133)

Generally, when the will directs lands embraced by it to be sold for the purpose of division among devisees, and no person is designated and empowered to make the sale, the power to sell cannot be exercised by the executor, nor by the administrator, in cases like the present one.

But the testator may confer such power on the executor, and this may appear from the express terms of the will, and as well and certainly, by reasonable implication from its provisions. Thus, it has been held, that when the fund to be divided is to come out of the proceeds of the sale of both real and personal property, the executor has power to sell the real estate, because he must sell the personal property, and nothing to the contrary appearing, the reasonable inference is, that the testator intended that he should sell the real property also.

And so also, it has been held, when the property is directed to be sold to raise a fund to pay debts, or discharge legacies, or the fund to be created by the sale is to pass into the hands of the executor, to be applied by him by virtue of his office, that the power is conferred on him by reasonable and necessary implication, in the absence of anything to the contrary. This whole subject is well discussed, and numerous authorities cited, by the Chief Justice, in *Vaughan* v. *Farmer,* 90 N. C., 607.

The principle applied in the case just cited, is applicable in the present one, and must govern it. The will directs a sale of all the property "of every kind whatsoever," and the fund produced by the sale to be divided as in the will directed. The intention and direction that the executors named should sell the land as well as the personal property, is plainly implied.

The sale, in the absence of fraud, is therefore valid.

No error. Affirmed.

Cited: Woodlief v. Merritt, 96 N. C., 228; *Gay v. Grant,* 101 N. C., 222; *Orrender v. Call, ibid.,* 402; *Saunders v. Saunders,* 108 N. C., 331; *Maxwell v. Barringer,* 110 N. C., 82; *Epley v. Epley,* 111 N. C., 506; *Foil v. Newsome,* 138 N. C., 123; *Powell v. Wood,* 149 N. C., 240; *Lumber Co. v. Swain,* 161 N. C., 567; *Broadhurst v. Mewborn,* 171 N. C., 402; *Wells v. Crumpler,* 182 N. C., 358; *Dulin v. Dulin,* 197 N. C., 221.

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(134)

J. H. DANIEL v. JESSE ROGERS and wife.

Transcript on Appeal.

Where the transcript of the record upon appeal does not show any process, or pleading, but only contains a statement of the facts agreed upon, a judgment, and an undertaking on appeal, the case will be remanded, in order that the record may be perfected.

(*Rowland* v. *Mitchell,* 90 N. C., 649, cited and approved).

CIVIL ACTION, tried before *Clark, Judge,* at September Term, 1886, of the Superior Court of NEW HANOVER County.

For the reasons set out in the opinion, the case was remanded.

Mr. John D. Bellamy, for the plaintiff.

No counsel for the defendants.

SMITH, C. J. The transcript in this appeal, consists only of the case agreed, the judgment of the Court thereon, and the undertaking on appeal. It is not a controversy "submitted without action" under §507 of The Code, nor can the record be upheld as such, for want of compliance with its requirements. There is no process, or waiver of process, apparent, and there is no pleading, by which we can see that it was properly constituted in the Court from which the appeal comes, nor except from the agreed statement of facts, what are the respective contentions of the parties. The case is the same as that of *Rowland* v. *Mitchell,* 90 N. C., 649, and must be disposed of in the same way, by remanding it to the Court below; and it is so ordered. Had these substantial imperfections in the record been called to our attention before argument upon the merits, the argument would have been unnecessary.

Remanded.

Cited: Jones v. Hoggard, 107 N. C., 350; *Wyatt v. R. R.,* 109 N. C., 307.

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(135)

JULIUS HAMMERSLAUGH et als. v. D. L. FARRIOR.

Pleading—Verification—Judgment by Default.

1. The statute in regard to the verification of pleadings, contemplates only two cases in which the affidavit may be made by the attorney: One, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney.

2. Where a verification to a complaint stated that it was made by the attorney because the plaintiffs were non-residents, and that his means of knowledge were derived from an affidavit of the plaintiff, and from admissions made to him by the defendant, but did not state that the material allegations were within his personal knowledge; *It was held,* to be insufficient, and the defendant had the right to file an unverified answer.

3. A judgment by default final cannot be rendered unless the complaint is verified.

(*Cowles* v. *Hardin,* 79 N. C., 577; *Witt* v. *Long,* 93 N. C., 388, cited and approved).

This was a CIVIL ACTION, heard by *Gilmer, Judge,* at February Term, 1886, of the Superior Court of DUPLIN County.

The case was heard upon a motion of the defendant to file an unverified answer, and a motion by the plaintiffs for judgment upon the complaint, which alleged in substance, that certain goods were sold by the plaintiffs to the defendant on a credit of four months, and that the defendant had paid the plaintiffs nothing for said goods, and the plaintiffs demanded judgment for five hundred and ninety-eight and $^{11}/_{100}$ dollars, and interest on the same until paid, from four months after the 26th day of March, 1885.

The following was written on said complaint as a verification thereof:

"E. J. Hill being duly sworn, says: That he is the attorney of the plaintiffs in this action, and that the facts set forth in this complaint are true, except as to those stated on information and belief, and as to those he believes it to be true, and that his knowledge and belief of the facts is derived from an affidavit of the plaintiff Julius Hammerslaugh, and from admissions of the defendant Farrior, made in frequent interviews with this affiant: and that this affidavit is not made by the
(136) plaintiffs, because they are non-residents, as this affiant is informed and believes."

The defendant insisted, that what purported to be a verification was not in conformity with the requirements of The Code, and that the complaint stood without verification, and offered to file an unverified answer, denying the second article of the complaint, and setting up a counterclaim.

His Honor held, that the complaint was properly verified, and that the defendant could not file an unverified answer. The defendant declined to verify his answer, and his Honor gave a judgment by default final against him, from which he appealed.

Mr. E. J. Hill, for the plaintiffs.
Mr. W. R. Allen, for the defendant.

ASHE, J. (after stating the facts). The question presented for our determination by the appeal is, whether the complaint was verified in compliance with the statutory requirements.

It was verified by the attorney of the plaintiff.

By §257 of The Code, it is provided: "Every pleading in a Court of record, must be subscribed by the party, or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also;" and by §258, it is declared: "The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, he believes it to be true, and must be by affidavit of the

party, or if there be several parties united in interest, and pleading together, by one at least, of such parties, acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations be within the personal knowledge of the agent or attorney." (137)

The act contemplates only two cases where the affidavit may be made by the attorney. The one, when the action is founded upon a *written instrument for the payment of money* only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. The one or the other of these facts are essential to the validity of a verification by an attorney.

But in this case, the attorney does not pretend to have any personal knowledge of the allegations of the complaint; and the action is not founded upon a written instrument for the payment of money, but is in the nature of assumpsit for goods sold and delivered. *Cowles* v. *Hardin,* 79 N. C., 577. The verification is not in compliance with any provisions of the statute, and is, therefore, insufficient, and the complaint must be regarded as unverified, and it was error in the Court to refuse the defendant the right he claimed to file an unverified answer, and to give a judgment final against him for want of answer; for a judgment by default final can only be rendered when the complaint is verified. *Witt* v. *Long,* 93 N. C., 388.

There is error. The judgment of the Superior Court is reversed, and a *venire de novo* awarded.

Error. Reversed.

Cited: Griffin v. Light Co., 111 N. C., 436; *Miller v. Curl,* 162 N. C., 4.

M. D. BAXTER v. S. P. WILSON et als.

Jurors—Challenge—Boundary—Natural Objects—Judgment in the Supreme Court.

1. A challenge to a juror must be made before the jury is empaneled, and if not made in apt time, it is a matter in the discretion of the trial Judge whether he will set aside the verdict.

2. So where one of the jurors was related to the plaintiff, but no objection was made on this ground until after verdict, the refusal of the trial Judge to set aside the verdict cannot be assigned as error on the appeal.

3. As a general rule, natural objects called for in a deed will govern course and distance, but there are exceptions to the rule, one of which is, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object, not reached by such line.

4. Ordinarily, the number of acres contained in a deed constitutes no part of the description, but where the description is doubtful, it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, it may have a controlling effect.

5. Where the judgment was rendered in the Superior Court against three defendants, only one of whom appealed, the Supreme Court, upon affirming the judgment, will remand the case, in order that the judgment may be enforced against all of the defendants.

(*State* v. *Perkins*, 66 N. C., 126; *State* v. *Davis*, 80 N. C., 412; *Hartsfield* v. *Westbrook*, 2 N. C., 258; *Sandifer* v. *Foster*, Ibid, 237; *Cherry* v. *Slade*, 7 N. C., 82; *Campbell* v. *McArthur*, 9 N. C., 33; *Cooper* v. *White*, 46 N. C., 389; *Spruill* v. *Davenport*, 44 N. C., 134; *Reed v. Schenck*, 13 N. C., 415; *Rogers* v. *Mabe*, 15 N. C., 180; *Harrell v. Butler*, 92 N. C., 20; *McPhaul v. Gilchrist*, 29 N. C., 169, cited and approved).

(138) This was an ACTION OF TRESPASS, tried before *Gudger, Judge,* and a jury, at Spring Term, 1886, of CURRITUCK Superior Court.

The plaintiff in her complaint, alleged that she was the owner in fee of the land described in the complaint, and set forth in the accompanying plat.

Beginning at the letter B and runs to Stewart's bridge on the main road; thence with Stewart's run to the letter H on the creek; thence with the run of the creek south 94° east 26 chains; thence north 12° east 44 chains; thence 35° 19 chains to the road, and with the road south 63° east 15 chains; thence north 1° east 12½ chains; thence north 7° west 8½ chains; thence north 60° west 27½ chains; to the first station, containing 189 acres more or less.

Her claim of title under this description is embraced in the boundaries—B, A, H, G, F, E, D, C and back to B.

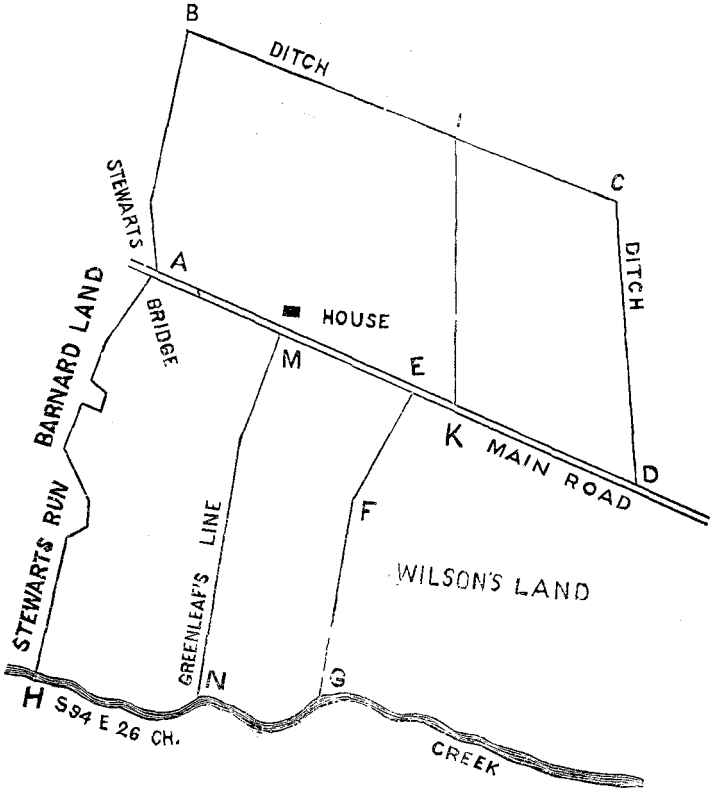
She complained that the defendants committed the trespass upon that part of her land contained within the boundaries N, M, E, F, G;

(139) by cutting down, working up, and carrying off, a large quantity of cypress timber, in shingles and other forms of timber. That the trespass was committed by the defendants Dough and Leary, who were authorized by the other defendant Wilson, who claimed to own the *locus in quo.*

The defendants admitted that the plaintiff owned the land set forth by metes and bounds in the complaint, but alleged that the boundaries as described did not cover the *locus in quo*.

The following issues were submitted to the jury:

1. Have the defendants trespassed upon the lands of the plaintiff? Answer: They have.



2. What damage has she sustained by reason of said trespass? (140) Answer: $137.40.

3. Did S. P. Wilson authorize Dough and Leary to cut on the lands of the plaintiff? Answer: He did trespass over the line E, F, G, up to the line M, N.

Plaintiff and defendants agree that the line runs as indicated on the plat to the creek at H. The plaintiff contends that the next call, "S. 94° E. 26 chains with the creek," must, in this case, be run to the point G,

without regard to course and distance, the evidence being, that it was thus actually run, when the land was divided, as hereafter stated.

The plaintiff contends, that the 26 chains must follow the various courses of the creek and stop at N, where the distance gives out when thus run. The plaintiff introduced one M. J. Ferebee, a surveyor, who states that Tully Bell once owned the land now owned by the plaintiff and defendant Wilson; that after Bell's death, his heirs instituted proceedings to sell the same for a division, and employed the witness to divide it into smaller tracts before a sale. He made the survey of the whole tract, and after establishing the lines on the north side of the main road, as shown on the plat, the ditch running from E on the main road was selected as a division line on the south side of said road, and the line H, G, F, was run from the creek, as the calls in the complaint require, to F on said ditch, thence with the ditch to the road at E., and thence to beginning. Witness stated, that the courses and distances were taken from his field notes of this survey; he stated that the division line E. F. G. on the map, is the actual division line established by him. He stated, that from the point H. on the creek, he actually ran a line 26 chains to a tree on the creek at G, and marked the tree, thence he ran the course stated to F. on the ditch, and thence along the ditch to E on the main road. He stated that the call S. 94° E. from H, on the creek, is a typographical error not found in his notes, and that it is an impossible course.

(141) Witness also stated, that he made no plat at the time, and that the land was sold according to the courses and distances reported by him in his survey, which are the same set out in the complaint. At the sale a Mr. Sanderson bought the tract in controversy, and afterwards conveyed it to the plaintiff.

S. K. Abbott, a surveyor, appointed under order of the Court to survey the land in dispute, stated that the land embraced within the calls set out in the complaint, could not be located otherwise than by making E, F, G, the true division line; that if the line M, N, were taken as the true division line, and the other calls were run out, it will throw the points B, and line B, A, fifteen chains west of the known natural boundary, Stewart's bridge at A. He reversed the line H, G, E, F, beginning at E on the road and running the calls to G on the creek. He then platted the whole survey, and found that the distance from H on the creek to G on the creek was about one-half chain shorter than 26 chains. He did not actually run it, but calculated the distance. He found no marked tree at G on the creek, but the line F, E, is a ditch.

T. B. Boushall, a practical surveyor, stated that he was called upon to run out the disputed line between plaintiff and defendant; that the

defendant Wilson told him that the point E, on the road, thence down the ditch, was a part of the disputed line, but he contended that the ditch should be followed to its beginning, and thence to the creek, but that he ran to the point F on the ditch, and then to the point G on the creek, according to the calls in the plaintiff's deed, as set out in the complaint and shown on the plat.

Neither the plaintiff nor the defendant was a party to the survey and division of the Bell land by the witness, M. J. Ferebee.

His Honor charged the jury, that if Ferebee actually ran and located the line from H, on the creek, to G, and marked a tree at the place G, it was a location of the line, and they should find the line from H, on the creek, to G, on the creek, to be the true line, whether the distance of 26 chains with the creek, reached from H, to G, or not. And he also charged the jury, that if he then ran the line from G, on the creek, to F, on the ditch, and thence to E, on the road, the line (142) E, F, G, would be the true line.

He also charged the jury, that if Ferebee did actually run and locate the line spoken of, then they should follow the course of the creek for a distance of 26 chains, and the line N, M, would be the true line.

In this charge defendant claims there is error.

After the plaintiff had passed upon the jury, the defendants' counsel announced, that if any one on the jury was related to the plaintiff by blood or marriage, such juror would object to himself. One juror who had married the plaintiff's sister, left, and another juror was called in his place. After the new juror had taken his seat, the same announcement was made by the defendants' counsel.

No one on the jury retiring, the defendant declared himself content with the jury, and the trial went on. The last juror who came in after the one who objected to himself, was a first cousin to the plaintiff. He was also connected by marriage with the defendant Wilson, whose father had married the aunt of the juror (mother of plaintiff), and whose nephew had married the sister of the juror.

Upon motion to set aside the verdict of the jury for the foregoing reason, the juror was called and asked if he heard the challenge of counsel. He replied that "he must have heard the words, but if he did, he forgot for the time that he was a connection of the parties." He also stated that he was impartial between the parties.

It was also shown that the defendant Wilson knew of the relationship of the juror both to plaintiff and himself; that said defendant was present during the whole progress of the trial, and knew that the juror was serving, and that he made no objection until after the verdict of the jury was returned.

The defendant Wilson is the real defendant in this action. The other defendants are nominal parties and did not defend the action or unite in an appeal.

(143) Defendant Wilson moved for a new trial because of the relationship of the said juror to the plaintiff.

His Honor denied the motion and gave judgment for the plaintiff upon the verdict.

Defendant Wilson appealed to the Supreme Court.

No counsel for the plaintiff.

Mr. W. J. Griffin, for the defendants.

ASHE, J. (after stating the facts). After the verdict was rendered, the defendant moved for a new trial, on the ground that one of the jurors was related to the plaintiff. There was no error in the refusal of the Court to allow the motion. A challenge to a juror must be made in "apt time." A challenge made after the jury is impaneled, is not in apt time, and especially so after verdict, and it is a matter of discretion with the Judge whether he will grant a new trial. *State* v. *Perkins,* 66 N. C., 126; *State* v. *Davis,* 80 N. C., 412.

The main question in controversy between the parties, is whether the dividing line between their lands, is the line N, M, or the line E, F, G. The plaintiff insists that the true line between them is E, F, G, because that was the line actually run when the land was divided, and the defendant contends that N. M. must be taken to be the line, because the call from H., as claimed by the plaintiff, is *with the run of the creek,* 26 chains, and the creek being a natural boundary, the line must follow its course and terminate at the end of the distance.

As a general rule, the position contended for by the defendant is correct. It has been so held by several decisions in this State, notably in *Hartsfield* v. *Westbrook,* 2 N. C., 258; *Sandifer* v. *Foster,* Ibid., 237; *McPhaul* v. *Gilchrist,* 29 N. C., 169. But this is not an inflexible rule. It has its exceptions. For instance, when there has been a practical location of the land, as when it can be proved that there was a line actually run and marked, and a corner made, such a boundary will be upheld, notwithstanding a mistaken description in the deed. *Cherry* v. *Slade,* 7 N. C., 82.

(144) The construction has been adopted by our Court, to carry out the intentions of the parties, when it is clearly made to appear; and to effect that object, course or distance will be disregarded, if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so, when some monument is erected contemporaneously with the execution of the deed. *Campbell*

v. *McArthur,* 9 N. C., 33; *Cooper* v. *White,* 46 N. C., 389; *Spruill* v. *Davenport,* 44 N. C., 134; *Reed* v. *Schenck,* 13 N. C., 415. So it has been held, when the call in a deed for a line, running with the river, though according to the general rule, it must pursue the course of the stream, yet that such a call might be controlled by other calls, as for a line of marked trees, or a visible and permanent course, and a construction given to the words *with the river,* as equivalent to *up the river,* but by no call less certain can it be controlled. *Rogers* v. *Mabe,* 15 N. C., 180. In Indiana, it has been held, in a controversy involving the location of a boundary line, fixed by commissioners of partition, that monuments fixed at the time, and mentioned in the report, will control distances, and that in such a case parol evidence is admissible to explain an ambiguity arising from that omission "to describe the monument at one corner." *Hodge* v. *Sims,* 29 Ind., 574.

And now let us apply the principles announced in these decisions to our case. The plaintiff and defendant, if the witness Ferebee is to be believed, claim the land in dispute, and that lying adjacent thereto, under the heirs of one Tully Bell, who had the land, being a large tract, cut up into smaller parcels, with the view to enhance the price at a contemplated sale. To that end, they employed him as surveyor, to divide the land into smaller tracts before a sale. He stated that he made a survey of the whole tract, and after establishing the lines on the north side of the main road, the ditch running from E on the main road was selected as the division line on the south side of the road, and the line H G F, was run from the corner at H to G, the distance of 26 chains, and he established a corner at G upon a tree, which he marked as a corner. He states that the courses and distances (145) were taken from his field notes, and that the line E, F, G, is the actual division line, run and established by him at the time. And the land was sold according to the courses and distances reported by him. The land to the west of the line, was bought at the sale by one Sanderlin, and sold to the plaintiff; and we take it that the defendant Wilson was the purchaser of the land on the east of the line. They purchased with reference to this dividing line made by the surveyor Ferebee at the time, and according to the authorities above cited, that must be taken as the true line of division, notwithstanding any uncertainty in the calls of courses and distances, and this is especially so, as in this case the subsequent calls in the original survey, have a more certain description than the line running with the creek, and must therefore control that line. For instance, the lines called for from the end of the 26 chains on the creek 12° east 44 chains, was run actually to the ditch at F and along the ditch to E on the road, which is a natural object, and was not only selected by the heirs of Bell, under whom both the plaintiff and the

defendant claimed, but was admitted by Wilson to be a part of the disputed line. It is true, he contended that the ditch should be followed to its beginning, and thence to the creek, but where was the beginning, and how that might vary the line of division, he did not say, and it is not made to appear.

The next call in the plaintiff's deed, corresponding with the Ferebee survey, is to the main road, another natural object, then down the road 15 chains, and thence by courses and distances around to the beginning. In looking at the accompanying plat, it will be seen that if N, M, is taken as the true dividing line, the call of 15 chains down the road from the point where the line N, M, strikes it, would terminate about K, and pursuing the calls from that point, it would throw the termination of the distance in the last call 15 chains, beyond the beginning at B. But if the line E, F, G, is taken as the true line, then all the calls in the plaintiff's deed comport with those made by the survey of Ferebee.

(146) And, moreover, the plaintiff's deed running with the boundary established by the Ferebee survey, calls for one hundred and eighty-nine acres, but if the line N, M, should be taken as the line of division, it would lessen the number of acres by nearly one-half. "Ordinarily the quantity of acres contained in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located, but in doubtful cases it may have weight, as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." *Harrell* v. *Butler,* 92 N. C., 20, and cases there cited; 1 Greenleaf on Evidence, §301, and cases cited in note to same effect.

After a careful consideration of the question presented by the record, our conclusion is, there is no error. The judgment of the Superior Court is therefore affirmed, and as the judgment below was against all three of the defendants, two of whom did not appeal, the case must be remanded to the Superior Court, that the judgment may be enforced by process from that Court.

No error. Affirmed.

Cited: Mfg. Co. v. Hendricks, 106 N. C., 492; *Marsh v. Richardson, ibid.,* 546; *S. v. DeGraff,* 113 N. C., 697; *Cox v. McGowan,* 116 N. C., 133; *Brown v. House,* 118 N. C., 879; *Deaver v. Jones,* 119 N. C., 599; *Higdon v. Rice, ibid.,* 626, 628; *Smathers v. Gilmer,* 126 N. C., 759; *Tucker v. Satterthwaite, ibid.,* 959; *S. v. Council,* 129 N. C., 517; *S. v. Maultsby,* 130 N. C., 664; *Elliott v. Jefferson,* 133 N. C., 214; *Whitaker v. Cover,* 140 N. C., 284; *Currie v. Gilchrist,* 147 N. C., 656; *Mitchell v. Wellborn,* 149 N. C., 349; *Lance v. Rumbough,* 150 N. C., 25; *Lumber*

Co. v. Hutton, 152 N. C., 541; *Sherrod v. Battle,* 154 N. C., 355; *Lumber Co. v. Hutton,* 159 N. C., 450; *S. v. Watkins,* 159 N. C., 487; *Clarke v. Aldridge,* 162 N. C., 332; *Allison v. Kenion,* 163 N. C., 585; *May v. Mfg. Co.,* 164 N. C., 267; *Lumber Co. v. Lumber Co.,* 169 N. C., 89; *Power Co. v. Savage,* 170 N. C., 632; *S. v. Upton,* 170 N. C., 771; *Gray v. Coleman,* 171 N. C., 347; *Lupton v. Spencer,* 173 N. C., 128; *Carter v. King,* 174 N. C., 551; *Wilson v. Batchelor,* 182 N. C., 95; *McQueen v. Graham,* 183 N. C., 496; *Watford v. Pierce,* 188 N. C., 433.

W. K. GIBBS et al. v. JOHN LYON.

Non-suit.

1. Where the trial Judge intimates an opinion that upon the plaintiff's own evidence he cannot recover; upon the appeal, the Supreme Court will consider all the evidence offered by the plaintiff as true, and in the most favorable light for him.
2. Where in such case, the appellee founds his objection to the right to recover on the inadmissibility of the appellant's evidence, it must appear of record that he objected thereto, otherwise the Supreme Court will consider such evidence as admissible and competent.
3. So, where the plaintiff offered evidence tending to show title to the *locus in quo* in the defendant, and then offered an assignment in bankruptcy, and a deed for the *locus in quo* from the assignee in bankruptcy, but there was no evidence to show that the defendant had been duly declared a bankrupt; *It was held,* in the absence of any objection by the defendant to the evidence, error in the trial Judge to intimate that upon no view of the evidence could the plaintiff recover.

CIVIL ACTION, for the recovery of land, tried before *MacRae,* (147) *Judge,* and a jury, at Fall Term, 1886, of DAVIE Superior Court.

The plaintiffs allege, that they are the owners in fee of the land described in the complaint, and that the tract of land formerly belonged to one Joel Lyon, now deceased, who was, upon his own petition, duly adjudged a bankrupt by the District Court of the United States for the Western District of North Carolina, and the reversionary interest in said lands sold by W. A. Clement, assignee of said bankrupt, on the 28th day of March, 1874, subject to the homestead interest of the bankrupt and his wife Nancy therein, and purchased by the plaintiffs, who paid for the same, and took from the assignee a deed therefor.

It is alleged and admitted, that Joel Lyon and his wife died, the former in 1880, the latter in 1882. The defendant denies the other material facts. On the trial the plaintiffs produced evidence of title, as follows:

1. Deed from A. M. Harris, executor of Joseph Chaffin, to Joel Lyon, dated 25th September, 1849, for ninety-nine acres and eighty-eight poles; said deed was recited to be in pursuance of a bond for title, executed in 1842, from Joseph Chaffin to Joel Lyon.

2. Bond from Joseph Chaffin to Joel Lyon, executed December 12th, 1842, for title of a certain tract of land, said to contain one hundred acres more or less.

3. Deed from Lemuel Bingham, Clerk and Master in Equity, to Joel Lyon, executed December 18th, 1857, reciting a decree of the Court of Equity of Davie county, for the partition of the lands belonging to the heirs of William Tucker, and the sale, on November 5th, to William Clark, who assigned his bid to Richmond Bailey and Joel Lyon, one-half of a certain tract of land, the one-half bounded as follows, &c.,
(148) forty-seven and a half acres more or less.

4. Deed from W. A. Clement, assignee in bankruptcy of Joel Lyon, to the plaintiff, executed March 28th, 1874, for 150 acres of land subject to the bankrupt's homestead.

5. Assignment of R. H. Broadfield, Register in Bankruptcy, to W. A. Clement, assignee in bankruptcy of Joel Lyon, executed July 2d, 1873, acknowledged before the Clerk of Buncombe Superior Court by said Broadfield, April 12th, 1886, registered in Davie, October 9th, 1886.

Richmond Bailey testified, that he had heard the complaint read, and the deeds, and was acquainted with the lands; that he lives quite near them in this county, and is 77 years old and has known said lands all his life. The lands described in the complaint are the same lands described in the deeds; James Peck was in possession of them, claiming them as his own, when witness first knew them sixty-five years ago. Witness cannot tell how long Peck was in possession; Joseph Chaffin went into possession after Peck. Witness does not remember how long he was in possession; Joel Lyon went into possession after Chaffin, and died on, and in possession, of them, some few years back—several years ago this was the "hundred acre tract." Joel Lyon and witness went into possession of the "eighty-eight acre tract" in 1851, and paid for it afterwards. William Tucker's heirs were in possession for several years before that, and William Tucker was in possession for twelve years before he died, in 1846. Phelps had it for about five years before Tucker got in. Armsby was in possession for a few months before Phelps, and Sheets had been in possession for a great many years before

Armsby. The defendants are in possession now. The annual rental value of the land is not more than fifty dollars.

This witness, on cross-examination, testified that very little of the land was cleared when Joel Lyon went into possession; there was a house surrounded by woodland, the house in the center. Lyon cleared up a good deal of the land, but before him not much was cleared. The fifty acres when he purchased was all outlying; he went into possession and commenced cultivating certain portions of the land, the (149) rest of it all lying out.

Defendant offered an assignment from R. H. Broadfield, Register in Bankruptcy, to W. A. Clement, assignee in bankruptcy of P. R. Martin, executed July 19th, 1875.

The presiding Judge having intimated his opinion that upon their own evidence the plaintiffs were not entitled to recover, the plaintiffs submitted to a non-suit, and appealed to the Supreme Court.

Messrs. J. A. Williamson and *A. E. Holton,* for the plaintiffs.
Messrs. C. B. Watson and *W. B. Glenn,* for the defendant.

MERRIMON, J. (after stating the facts). The Court's opinion intimated adversely to the appellant, seems to have been founded entirely upon the insufficiency of the evidence of title produced by him, accepting it as true, and not upon any defects inherent in it, rendering it incompetent. This must be so, because, so far as appears, no objection was made to any deed put in evidence, upon the ground that it had not been properly proved, or was obnoxious to any other objection. If there had been grounds of objection, and the appellees intended to avail themselves of them, they should have done so, and this ought to appear in the record. In the absence of objection, the evidence was pertinent and competent, and for the purpose of deciding the question before us, it must be taken as true, and in the most favorable view of it for the appellants, because the Court held, that in no view of it, could they recover. So accepting it, we think the jury might have found a verdict in favor of the appellants, and they might have recovered.

The testimony of the aged witness, though not very precise and definite, tended to show a continuing possession of the land by various persons for a long period—more than thirty years—thus showing title out of the State, and the jury might have so found.

Nothing to the contrary appearing, the fair inference is, that (150) the several deeds of conveyance put in evidence, each contained apt words to convey the fee simple estate in the lands in question to the alienee in each named. Joel Lyon, under whom the appellants claim to

derive title, had two deeds made to him, one dated the 25th day of September, 1849, from Joseph Chaffin; the other, dated the 18th day of December, 1857, from Lemuel Bingham, Clerk and Master in Equity, that purported to convey the fee in the land to him, and he had continuous possession thereof, adverse to every other person—such is the fair inference from the evidence—for more than seven years. He had more than seven years' adverse possession of the land under color of title, and thus perfected in himself title in fee to the same.

So far as appears in the record, no objection was made to the assignment made by R. H. Broadfield, Register in Bankruptcy, to W. A. Clement, assignee in bankruptcy of Joel Lyon, named above, on the 2d day of July, 1873, nor to putting it in evidence for the purpose of showing title in the appellants. It must, therefore, be taken that the assignment was in all respects a proper one, and passed the title of Lyon to the land to the assignee, and was *prima facie* evidence that he was duly adjudged a bankrupt in the proper Court of Bankruptcy. If the assignment was in any way or respect defective and inoperative, the appellees should have objected to its admission in evidence, and that they did, should appear in the record, so that the Court could see the objection, and properly pass upon its merits; and if the Court founded its opinion upon such objection, it should have so stated in the record. Otherwise, this Court cannot see or know that objection was made.

It was suggested by the counsel of the appellees in the argument, that the assignment was not duly proven, nor did it appear that Lyon had been duly adjudged a bankrupt. This may be so, but in the total absence of objection to it, noted in the record, we cannot so decide. We must be governed by the record and what appears in it. As no objection was made, the presumption is, that there was no ground for it, or
(151) that the appellees waived informalities and imperfections, and that the assignment was a proper and effectual one to pass the title of the bankrupt to the assignee. *Omnia præsumuntur soleniter esse acta.*

Nor was there any objection to the deed from the assignee to the appellants, and in the orderly course of such things, it passed the title to the appellants, as it purported to do. So that, upon the evidence, the appellants *might* have recovered.

It may be that the appellants failed to prove a good title to the land, and could not therefore recover. We do not decide that they did or did not. We only decide that the Court erred in intimating its opinion, that in no aspect of the evidence of the appellants, could they recover. As it appears to us in the record, in its most favorable aspect for the appellants, they might have done so.

There is error. The judgment of non-suit must be set aside, and a new trial allowed.

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

Error. Reversed.

Cited: Springs v. Schenck, 99 N. C., 555; *Benton v. Toler,* 109 N. C., 241; *Asbury v. Fair,* 111 N. C., 258; *Young v. Conelly,* 112 N. C., 648; *Collins v. Swanson,* 121 N. C., 69; *Cable v. R. R.,* 122 N. C., 895; *Whitley v. R. R., ibid.,* 989; *Thomas v. Shooting Club,* 123 N. C., 288; *Cox v. R. R.,* 123 N. C., 607; *Printing Co. v. Raleigh,* 126 N. C., 521; *Coley v. R. R.,* 129 N. C., 413; *Bessent v. R. R.,* 132 N C., 936; *Craft v. R. R.,* 136 N. C., 51; *Kearns v. R. R.,* 139 N. C., 482; *Millhiser v. Leatherwood,* 140 N. C., 235.

E. A. BYERLY v. R. H. HUMPHREY.

Cloud upon Title—Defence—Counter-claim—Res judicata.

1. The jurisdiction of a Court of Equity to remove a cloud upon title, is founded on the inadequacy of the remedy at law, and it does not arise when the plaintiff has a remedy by an action at law.

2. Where it appeared that the defendant had a registered mortgage on the land of the plaintiff, purporting to be signed by the plaintiff, but it was admitted that said mortgage was a forgery, and that the plaintiff had never executed it, a Court of Equity will entertain a suit to remove the cloud upon the plaintiff's title, although he is still in possession of the land.

3. A defendant cannot set up as a defence or counter-claim any and every cause of action he may have against the plaintiff.

4. Where, in an action to have an alleged forged mortgage cancelled as a cloud upon title, the defendant sets up as a defence, that the money advanced upon such forged mortgage was used to pay off a prior genuine mortgage, and asks to be subrogated to the rights of the first mortgagee; *It was held,* that these facts could not be pleaded either as a defence or counter-claim in this action, but the defendant must set them up in a new action.

5. *It is intimated,* that where irrelevant facts, which should be the ground of a new action, are set up as a defence or counter-claim, and the Court proceeds to pass upon it, instead of striking it from the record, that the judgment will be *res judicata,* and an estoppel upon the defendant, if he should afterwards bring a new action upon the same facts.

(*Busbee* v. *Macy,* 85 N. C., 329; *Busbee* v. *Lewis,* Ibid., 332; *Pearson* v. *Boyden,* 86 N. C., 585, cited and approved).

(152) CIVIL ACTION, tried before *Boykin, Judge,* and a jury, at September Term, 1886, of DAVIDSON Superior Court.

The plaintiff alleged, that she was the owner in fee of the lands described in the pleadings—that the defendant threatened and was about to sell the same, by virtue of a power contained in a deed of mortgage thereof, which it is pretended by the defendant she and her husband, now deceased, in his life-time, on the 22d day of October, 1883, executed to him to secure a pretended debt due from her and her husband to him for $750, evidenced by their single bond, dated the day last mentioned, and to be due twelve months next thereafter; that she never signed her name to the said mortgage deed, nor authorized any person to sign the same for her, or in her name, nor was she privily examined touching her consent to the execution of the same, nor did she know of the said pretended mortgage deed until about a year after its pretended registration, when she was greatly surprised to hear of it; that she did not sign, nor authorize any person to sign for her, the pretended single bond mentioned in the said mortgage deed; that she is not now, nor has she ever been, indebted to the defendant in any sum, on any account; that a sale of her land by the defendant, under such false and fraudulent color of power and authority, would greatly embarrass and imperil her right to her lands mentioned, if a person ignorant of the false and spurious nature of said pretended mortgage should buy the same, and her title would thereby be clouded and her land depre-

(153) ciated in value, and she could be prevented from selling the same, if she should find it necessary to sell it, &c., &c.

The mortgage deed mentioned, upon its face appears to have been regularly executed by the plaintiff, and to have been acknowledged by her before a Justice of the Peace, and it was registered.

The defendant, in his answer, denied the material allegations of the complaint, and alleged the due execution of the bond and mortgage deed by the plaintiff, and he further alleged as follows:

"For a further defence, defendant says, this mortgage and the bond secured thereby, were duly executed by plaintiff and her late husband, to secure the money borrowed by plaintiff and her said husband from defendant, to enable them to pay off and discharge a mortgage executed by them to John S. Henderson, to-wit: on the 14th day of Feb., 1882, upon the same land, for $500, and under which the said Henderson, Trustee, was threatening to sell said land of plaintiff embraced in defendant's mortgage, and this defendant, in order to relieve the plaintiff and her said husband and save the lands of plaintiff from sale, advanced the sum of about $600, principal and accrued interest due said Henderson on his mortgage, and paid the balance of about $150.00 to C. C. Byerly, late husband of plaintiff; and defendant having thus relieved

the lands of plaintiff, insists that in any event, he would be entitled to be subrogated to the rights of said Henderson in the prior mortgage."

On the trial, it was distinctly "admitted that the plaintiff did not sign the mortgage purporting to be executed to the defendant R. H. Humphrey by C. C. Byerly and his wife, the plaintiff, and both parties, plaintiff and defendant, agreeing (agreed) that no issues should be tendered upon that point."

It appears further from the case stated on appeal, that: "After a jury was impaneled, upon reading the pleadings, the defendant contended that upon the second defence set out in his answer, he was entitled to be subrogated, *pro tanto,* to the rights of Jno. S. Hen- (154) derson, prior mortgagee upon plaintiff's land. His Honor held, that admitting the facts set out in said second defence of the answer to be true, defendant was not entitled to be subrogated to the rights of Jno. S. Henderson in the prior mortgage. Defendant excepted. Thereupon, verdict was entered for the plaintiff."

There was judgment declaring the mortgage void; that the defendant be perpetually enjoined, &c., from which he appealed to this Court.

No counsel for the plaintiff.

Mr. Emery Raper, for the defendant.

MERRIMON, J. (after stating the facts). The defendant having conceded that the plaintiff had not executed the mortgage deed under which he proposed and claimed the right to sell her land, obviously the Court properly granted the relief sought by her. She was in possession of the land, and could not bring an action at law, by which she could test the validity of the deed as to herself. It had such color and legal sanction, by reason of its apparent genuineness, the spurious probate of it, apparently regular and fair, and the registration thereof, as rendered it a standing menace and cloud upon her title. If the defendant had sold the land, as he claimed the right to do, and the purchaser had brought his action to recover the possession of it, the present plaintiff would in that case, have been obliged to produce evidence to defeat a recovery. The deed was clearly a cloud upon her title, against which she was entitled to relief. There was no legal remedy—certainly no adequate one—of which she might have availed herself and obtained prompt relief. It would be unjust, and expose her to hazard, expense, and great annoyance, to delay her remedy until the defendant should sell the land under the pretended power to sell, and test the validity of the deed by an action the purchaser might bring to recover the possession of the land. The defendant might not sell for a long while; the (155) purchaser might postpone his action for an indefinite period of

time, and in the meantime the plaintiff might suffer great detriment, arising from the cloud upon her title.

The jurisdiction of a Court of Equity to prevent and remove a cloud upon the title to realty, is founded in sound principles of right and justice. It arises out of the inadequacy of the remedy at law, and is well settled, although it is sometimes difficult to determine what constitutes such cloud as warrants the interference of such Court. *Pettit* v. *Shepherd,* 5 Paige, 493; *Oakley* v. *Trustees,* 6 Paige, 262; *Rixby* v. *Higgins,* 15 Cal., 127; *Key* v. *Mensil,* 19 Iowa, 105; High on Injunctions, §269 *et seq.*

This case differs from the cases of *Busbee* v. *Macy,* 85 N. C., 329; *Busbee* v. *Lewis,* Ibid., 332, and *Pearson* v. *Boyden,* 86 N. C., 585. In these cases the party seeking equitable relief had a legal remedy, as the Court held; but the Court recognized the jurisdiction to grant such relief in a proper case.

We think, however, that the Court erred in considering and passing upon the merits of the matter set forth in the answer as a *second defence,* thus perhaps concluding the defendant in respect thereto. This was not matter of defence at all in this action: it was impertinent matter, that the Court might, *ex mero motu,* have directed to be stricken from the answer. It constituted no defence, as a *counter-claim,* or otherwise. If the defendant was entitled to be subrogated to the rights of the mortgagee of the first mortgage mentioned in the answer, then in that respect he had a distinct cause of action, that he could not set up in this action, but must enforce by a separate and distinct action, if he shall see fit to do so. The defendant could not set up in this action any and every cause of action he might have against the plaintiff, without regard to its nature. He could only plead such a cause of action as constituted a valid *counter-claim,* or defence, and as is allowed by the Statute (The Code, §244).

The matter set forth as a *second defence* is very imperfectly and informally alleged, but it seems that it was intended to be a *counter-*
(156) *claim.* But clearly, in no aspect of it, can it be so treated. The alleged cause of action—treating it as such—did not arise "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," nor was it "connected with the subject of the action." Nor does the plaintiff's cause of action arise *ex contractu,* nor does the defendant's alleged cause of action; but if the latter did, it would not be good as a *counter-claim* in this action, because it is not such a cause of action as the statute cited, allows to be pleaded as a *counter-claim.*

It may be, that the defendant has such a cause of action as he suggests in his answer, against the plaintiff. If he has, he ought to have just

opportunity to seek an appropriate remedy, and, therefore, the Court ought to have stricken the supposed defence from the answer, or to have dismissed it without passing upon its merits, and without prejudice to any action he might bring on that account. The judgment must be so modified as to conform to this opinion, and as thus modified, affirmed.

Modified. Affirmed.

Cited: Murray v. Hazell, 99 N. C., 172; *Peacock v. Stott,* 104 N. C., 155; *Browning v. Lavender, ibid.,* 74; *Milling Co. v. Finlay,* 110 N. C., 412; *McArthur v. Griffith,* 147 N. C., 550; *Thompson v. Buchanan,* 195 N. C., 159; *Wallace v. Benner,* 200 N. C., 132.

W. W. CAMPBELL et als. v. JACOB J. CRATER et als.

Wills—Statute of Limitations.

1. In the construction of wills, the meaning of the testator is to be gathered both from the text and context of the will.
2. Where the words of a will were, "I leave to my son, W. R. C., a tract of land (describing it) and certain negroes (naming them), that to his heirs, but the said W. R. C. to have jurisdiction over said land and slaves;" *It was held,* that no estate whatever passed to W. R. C., when it appeared from the other portions of the will that it was the intention of the testator to leave his property to his grandchildren, and not to his children.
3. The provisions of The Code, allowing a *feme covert* to sue alone regarding her separate property, does not remove the disability of coverture, so as to allow the statute of limitations to bar her right of action.
4. When two or more disabilities co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought, shall not begin to run until the expiration of the latest disability.

(*Lippard* v. *Troutman,* 72 N. C., 551, cited and approved).

This was a CIVIL ACTION, tried before *Boykin, Judge,* at Fall (157) Term, 1885, of IREDELL Superior Court, upon the following case agreed between the parties:

1. That Percephal Campbell died in Iredell county in the year 1854, leaving a last will and testament, which was duly admitted to probate at the August Term, 1854, of the late Court of Pleas and Quarter Sessions for said county. A copy of this will is set out below. The widow, Sarah Campbell, died prior to testator, Percephal Campbell.

2. That Williams R. Campbell, the party therein named, was a son of the said Percephal Campbell, and who died on the ..... day of July, 1883, leaving the following named children and grandchildren, to-wit: James A. Campbell, aged 49 years, but who died on the ..... day of ....., 18....., leaving him surviving Mary I. Campbell, aged 26 years; W. W. Campbell, aged 23 years; Mamie Campbell, aged 14 years; Charles Campbell, aged 11 years; and Emma Campbell, aged 3 years; W. W. Campbell, aged 47 years; A. A. Campbell, aged 45 years, who intermarried with one Jennings, and was born January 11th, 1841; was married to said Jennings on the 14th day of October, 1860, and died February 11th, 1872, leaving her surviving the following children, to-wit: Preston, aged 19 years, Carrie, aged 17 years; Mollie, aged 15 years; A. W. Campbell, aged 39 years; Henry F. Campbell, aged 37 years; Mary E. Campbell, aged 33 years, now Puckett, was married before she was 21 years of age, and her husband is still living; S. P. Campbell, aged 31 years; Preston B. Campbell, aged 29 years; Alice C. Campbell (now Felts), aged 27 years, who intermarried with said Felts before she was 21 years of age, and her husband is still living.

3. That Williams R. Campbell sold and conveyed the land mentioned in the complaint to Joseph James, in fee simple, in the fall of 1854, and Joseph James sold and conveyed the same to Jacob Crater on the 22d day of September, 1856, in fee simple; that Jacob Crater went into possession of the land immediately after the date of the deed from James to him, and he and the other defendants have remained
(158) in the possession of the land ever since, claiming the absolute title thereto under the deed from Joseph James.

4. That this action was commenced on the 6th day of October, 1885. If the Court should be of opinion that the plaintiffs are entitled to recover the whole of the land described in the complaint, judgment shall be so entered, and if the Court shall be of the opinion that all the plaintiffs are not entitled to recover, but that a part of them are, then a judgment shall be entered for their proportional part of said lands as appears from this case, there being nine children of the said Williams R. Campbell. And if the Court shall be of the opinion that none of the plaintiffs are entitled to recover, then judgment shall be entered for the defendants.

Percephal Campbell's will was as follows:

In the name of God, amen:

I, Percephal Campbell, of the State of North Carolina, Iredell county, do this day make my last will and testament, being weak in body but of sound mind and memory, blessed be God for his mercy and blessings bestowed on me.

In the first place I give unto my wife, Sarah, all my lands and mills and machinery thereunto belonging, and likewise all my negroes and all my horses and wagons, and all my stock and household and kitchen furniture, and all notes and money that I now possess, during her life-time or widowhood.

And I likewise appoint my son Percephal Campbell, Jr., and Milas Dobbins my lawful executors, and at her death to be divided, as follows:

Item first.—I give to my eldest son William Campbell's heirs, with what I have given him to his living, if living, his son Alford and his sister Thersy one hundred dollars each.

Item second.—My second son, Percephal Campbell, Jr., all my land on the North side of Hunting Creek and likewise big Isaac and Susannah, Marion and Canah.

Item third.—Son Theophilus M. Campbell I leave his lawful (159) heirs three hundred acres of land adjoining Elijah Salmons, and four negroes, viz: James, Peter, Silvy and Andrew, when his heirs become of age, but for the said Theophilus M. Campbell to have no title nor claim to the said property.

Item fourth.—I leave to my son John R. Campbell five hundred acres of my land on the South side of Hunting Creek on the waters of Rocky Branch, and four negroes, that is: Nelson, Betty, Lee and Mirandy, that is to heirs. I likewise leave to my son Williams R. Campbell five hundred and fifty acres of land on the waters of Rocky Creek, including the house that I now live in, and likewise four negroes, Bryant, Frank, Burton and Rachael, that to his heirs, but for him the said Williams R. Campbell to have jurisdiction over the said negroes or land. My oldest daughter, Sarah Morgan, I leave her five negroes, that is: Hudley, Jane, Eli, Catherine and Emily. To the heirs of my second daughter heirs, that is, to John P. Parks, I leave him one dollar, Dabney W. Parks one dollar, Richard Parks one dollar and Theophilus C. Parks on dollar. To my third and youngest daughter, Frances Dobbins, I leave her my mills and all the machinery thereunto belonging, and likewise two hundred and fifty acres of land adjoining said mills, and a negro boy by the name of little Isaac, and a girl by the name of Mary.

In witness hereof, I hereunto set my hand and seal, November 1st, 1844. PECREPHAL CAMPBELL, [Seal.]

Take notice, that I leave my oldest daughter, Sarah Morgan, another negro girl by the name of Sarah, but take notice that her husband Bartlett Morgan to have no title nor claim to said negroes, but her to dispose of said negroes as she sees proper at her death.

In witness whereof, I set my hand and seal, November 1st, 1844.

PERCEPHAL CAMPBELL, [Seal.]

His Honor, upon a construction of said will, held that the plaintiffs were not entitled to recover any land whatever, and that none
(160) of them were so entitled, and accordingly gave judgment for the defendants.

From this judgment the plaintiffs appealed.

Messrs. M. L. McCorkle and *T. B. Bailey,* for the plaintiffs.
Messrs. D. M. Furches and *John Devereux, Jr.,* for the defendants.

ASHE, J. (after stating the facts). The plaintiffs claim the land in controversy as devisees under the will of Percephal Campbell, who died in 1854. The defendants deny the title of the plaintiffs, and say they have had possession of the land with color of title for forty years.

Both parties claim title derived from Percephal Campbell. The defendants by a deed from Williams R. Campbell in 1854, to Joseph James, and a deed from him to Jacob Crater, on the 22d day of September, 1866.

The first question to be solved is: Did Williams R. Campbell take an estate in the land devised in "Item fourth" of the will of Percephal Campbell, or did the estate pass by the devise to the heirs or children of said Williams R. Campbell, to his exclusion. We are of the opinion the land was devised directly and absolutely to the children, for here the word *heirs* evidently meant children of the said Williams R. Campbell—but that he derived no legal estate whatever in the land by the will of his father. The clause in the will bearing upon the point is, "I likewise leave to my son Williams R. Campbell, five hundred and fifty acres of land on the waters of Rocky Creek, including the house that I now live in, and likewise four negroes, Bryant, Frank, Burton and Rachael, that to his heirs, but for him the said Williams R. Campbell to have jurisdiction over the said negroes or land."

In the construction of wills, the intention of the testator is the great object of inquiry; and to this object technical rules are, to a certain extent, made subservient.
(161) The intention of the testator, to be collected from the whole, is to govern, provided it be not unlawful or inconsistent with the rules of law—4 Kent, 634—or as has been said, the intention is to be collected from the four corners of the will.

Looking at this will in all its parts and provisions, it must appear that the testator, for some reason, had no confidence in his sons generally, and therefore made the devises to their children. His son Percephal, in the same *Item,* is the only one of them to whom he devises land unequivocally. In the first *Item,* his bequest is to the *heirs* of his son William, naming his son and daughter as the objects of his bounty. In

the third *Item,* he mentions his son Theophilus, and gives land and negroes to his heirs, but provides that Theophilus shall have no title nor claim to the said property.

In the fourth *Item,* he leaves land and negroes to his son John, but adds, *that is to heirs,* and in the same clause, he leaves to his son Williams, land and negroes, and after superadding the words, *"that to his heirs,"* provides that Williams is to have jurisdiction over the land and negroes.

We think the words *"that to his heirs,"* evidently express the intention of making the grandchildren the objects of his bounty. And the reason why the names of the fathers are mentioned in each *Item,* was to designate the more readily the different classes of his grandchildren, among whom he was intending to distribute his property. If he had intended to give the property claimed and bequeathed in the fourth *Item* to Williams, why say after using the words, *that to his heirs,* "but for him to have jurisdiction over the said negroes and land." This provision is totally inconsistent with any intention of giving Williams any estate in the land. It gives Williams no use of the land nor enjoyment of the profits, but simply jurisdiction, that is, the superintendence of the land and negroes, not for his benefit, but for that of his children, who were minors at the time of the testator's death.

If then, as we think, the devise in the fourth *Item* was to the children of Williams R. Campbell, the next question that arises, is, are the plaintiffs, as the devisees of Percephal Campbell, or any of (162) them, entitled to recover in this action. The defendant says they are not, because he has had more than seven years' possession, with color of title.

The statutory limitation in such a case is, that seven years' actual adverse possession, with color of title, shall be a bar to all persons, except those who are laboring under any disability—such as infancy, and in that case, even after the expiration of the time of the limitation, they may bring their action within three years after full age, (The Code, §§141, 148), but it is provided by §149, that when two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed, within which an action may be brought, shall not begin to run until the limitation of the latest disability.

This last section can have no application, when there is a clear running of the statute for the seven years after the disability is removed, as when an infant attains his majority.

In this case, all the sons of Williams R. Campbell had attained their majorities more than ten years before the commencement of this action, in October, 1885. Percephal Campbell, the youngest of the sons, was

29 years old when his father Williams R. Campbell died, in July, 1883. He then must have been born in 1854, and arrived at 21 years of age in 1875. The statute then began to run against him, and he was barred before the action was commenced, and if he was barred, so likewise were his brothers, who were his seniors. It is true, the case states that James A. Campbell died, but without giving the date of his death, and we must assume that he died after his father, for it states that Williams R. Campbell died, leaving him and other children and grandchildren, but it can make no difference whether he was 49 years at his own death or that of his father, for he was old enough to be barred by the long adverse possession of the defendants, running from 1856, and if he was barred, of course the plaintiffs, who are his heirs-at-law, are likewise.

(163) A. A. Campbell, another son, who died in 1872, at the age of 45 years, was barred, and also his heirs-at-law, who are plaintiffs, for the same reason.

This disposes of all the plaintiffs except the two daughters, Mary E. Puckett and Alice C. Felts. Both of these females married under the age of twenty-one years, and are still under coverture. We are of the opinion they are not barred—for admitting the action is to recover their separate estate, and they may sue without joining their husbands with them in the action by virtue of §178 of The Code, which declares, that "when the action concerns her separate property she may sue alone," but this does not subject them to the operation of the statute of limitations, for in *Lippard* v. *Troutman,* 72 N. C., 551, it was held, that the provisions of The Code allowing a *feme covert* to sue or be sued concerning her separate property, does not remove the disability of coverture, so as to allow the statute of limitations to bar a *feme covert's* right of action.

The right of suing alone is a privilege, which may be used for the advantage of a *feme covert,* but a failure to exercise this privilege cannot operate to her prejudice.

We are of the opinion there was error, and the plaintiffs Mary E. Puckett and Alice E. Felts are entitled each to recover one undivided ninth part of the land in controversy.

This, therefore, must be certified to the Superior Court of Iredell county, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Faggart v. Bost, 122 N. C., 522; *Wilkes v. Allen,* 131 N. C., 280; *Carroll v. Mfg. Co.,* 180 N. C., 368; *In re Will of Witherington,* 186 N. C., 154.

LAURA SMITH v. SAMUEL McDONALD et als.

Homestead and Personal Property Exemptions.

1. The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her.

2. A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even although no homestead was allotted to him during his life.

(*Johnson* v. *Cross*, 66 N. C., 167; *Watts* v. *Leggett*, 66 N. C., 197; *Branch, ex parte*, 72 N. C., 106, cited and approved).

PETITION for the allotment of a homestead and personal prop- (164) erty exemption, heard on appeal from a justice of the peace, by *MacRae, Judge,* at August Term, 1886, of STOKES Superior Court.

The petition was filed before a justice of the peace by the plaintiff, as widow of Charles Smith, to have her homestead and personal property exemption laid off and allotted to her, in the property of her deceased husband.

The following facts were admitted by counsel upon a case agreed, after the defendants, who were the creditors and heirs-at-law of Charles Smith, had made themselves parties defendant before the justice of the peace.

Charles Smith died intestate on the — day of ——, 1886, owning at the time of his death, one-half acre lot in the town of Danbury, on which is a small store house, as the only improvement, worth about two hundred and fifty dollars, and no other real estate. He also owned personal property, and solvent credits to the amount of about five hundred dollars, and at the time of his death was indebted to the amount of about three hundred dollars. There had been no administrator appointed to administer his estate. No homestead nor personal property exemption had been allotted to him previous to his death, nor had he ever applied for the same.

At the time of his death, he left him surviving the petitioner, his widow, and no children, but brothers and sisters as his only heirs-at-law.

The petition in this case is on the part of the widow, to have the above-mentioned town lot and personal property assigned to her as a homestead and exemption for the benefit of herself.

At the time of his death he was indebted to Samuel McDonald and others to the amount of about three hundred dollars.

From the above facts it is for the Court to say whether the said Laura Smith is entitled to a homestead and personal property
(165) exemption in the above-mentioned house and lot and personal property.

The creditors and heirs-at-law resist the application, on the ground that inasmuch as the intestate had made no application for, nor had his homestead and exemption laid off and allotted to him during his lifetime, that she cannot now do it.

Upon this state of facts the justice of the peace gave judgment for the petitioner, granting the prayer of the petition, from which the defendants appealed.

In the Superior Court, the judgment of the justice was affirmed, and the defendants appealed to this Court.

Mr. Glenn, for the plaintiff.
Mr. Holman, for the defendants.

ASHE, J. (after stating the facts). We assume that the proceedings had in the Court below were regularly taken, as no objection was made in this Court upon that ground.

As to the personal property exemption, we think there was error in the judgment of the Court below. The widow was not entitled to that exemption. There is no provision in the Constitution, nor any act of the Legislature, which gives her such a right. In *Johnson* v. *Cross,* 66 N. C., 167, it is held, that the personal property exemption provided by Art. X of the Constitution, and laws passed pursuant thereto, exists only during the life of the homesteader, and after his death passes to his personal representatives, to be disposed of in a due course of administration.

But there was no error in the judgment so far as it gave to the widow her homestead in the land of her husband. The defendants contended that the widow was not entitled to a homestead in the land of her deceased husband, unless it had been laid off, and quantity and valuation fixed with some definite description, in the lifetime of the husband, for §5, Art. 10, of the Constitution provides, "If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt
(166) from the debts of her husband, and the rents and profits thereof shall inure to her benefit, during her widowhood, unless she be the owner of one in her own right." That the meaning of this provision is, that the widow is not entitled to a homestead in the lands of her husband unless he himself was the *owner* of the homestead, which

he cannot be unless it has been laid off and allotted to him in his lifetime, and that the act of 1868-'69 (The Code, §514), cannot have the effect of enlarging the benefits given by the Constitution.

It is too late to raise these questions, for they have been too well settled by the decisions of this Court.

The constitutionality of the section of The Code referred to, was considered and decided in the case of *Watts* v. *Leggett,* 66 N. C., 197, when PEARSON, C. J., who delivered the opinion of the Court, held that, "the manifest purpose of the act of 1868-9, Chap. 137, (The Code, §514), is to prevent the widow and children from being prejudiced by the omission of one entitled to a homestead to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution, when its professed object was to carry into effect its provisions."

And as to the other exception taken by the defendants, that the widow was not entitled to a homestead because it had not been allotted to her husband in his lifetime: Without going into a discussion of the question, and showing that the husband is the owner of the homestead, because he was the owner of the land, and the *title* to the homestead thereon was vested in him by the Constitution, and not by virtue of any act of the Legislature, we need only refer to the case of *Jemima Branch ex parte,* 72 N. C., 106, which is a case directly in point, and a decision of the question under consideration. That was a case where the widow, after the death of her husband, no homestead having been allotted to him in his lifetime, filed her petition before a justice of the peace to have a homestead laid off and allotted to her in the land of her deceased husband. The creditors had themselves made parties defendant (167) before the justice, and from the judgment therein rendered in favor of the plaintiff, appealed to the Superior Court, where the judgment of the justice was sustained, and upon an appeal to this Court, the judgment of the Superior Court was affirmed.

The only difference in the facts of that case and this is, that there the husband had made a conveyance of his land to a trustee for the benefit of certain creditors, in which was the following claim: "Except so much thereof as may be laid off and assigned as a homestead under the act of Assembly, and which is expressly excepted from this conveyance." That claim in the deed in no way distinguished that case from this, for by the exception in the deed, the land remained liable to the homestead, just as if no deed had been made.

The judgment of the Superior Court must be reversed, so far as it relates to the exemption of the personal property, and affirmed as to the

homestead. Let this be certified to the Superior Court of Stokes County, that the case may be disposed of in conformity to this opinion.

It is so ordered.

Cited: Tucker v. Tucker, 103 N. C., 172; *Kirkwood v. Peden,* 173 N. C., 462.

D. J. MIDDLETON v. THE WILMINGTON AND WELDON RAILROAD CO.

Penalty—Parties—Arbitration.

1. Where the statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration, until an action has been brought.

2. The person claiming the penalty, and not the State, is the proper party plaintiff in an action for the penalty imposed on railroads by §1967 of The Code.

(*Norman* v. *Dunbar*, 53 N. C., 319; *Branch* v. *Railroad*, 77 N. C., 347; *Katzenstein* v. *Railroad*, 84 N. C., 688; *Keeter* v. *Railroad*, 86 N. C., 346; *Whitehead* v. *Railroad*, 87 N. C., 255; *Branch* v. *Railroad*, 88 N. C., 570, cited and approved. *Duncan* v. *Philpot*, 64 N. C., 479, overruled).

(168) This was a CIVIL ACTION, tried before *Clark, Judge,* and a jury, on appeal from a judgment of a justice of the peace, at Fall Term, 1886, of DUPLIN Superior Court.

The action was brought for the recovery of the penalty prescribed in §1967 of The Code.

The plaintiff introduced as a witness, O. P. Middleton, who testified that he was a son of the plaintiff, and that on the 20th day of December, 1884, a bale of cotton marked "D. J. M.", which were the initials of the plaintiff, was brought to his store in Warsaw, by a negro servant of plaintiff; and he and other witnesses testified to facts tending to show, that said bale of cotton was received on that day, for shipment by defendant's agent at its depot at Warsaw, and that it was not shipped until the first or second day of January, 1885.

The defendant, by way of defence, offered to prove that O. P. Middleton set up a claim against the defendant for the same penalty as sued for in this action, and that the said O. P. Middleton and defendant, on the 11th day of February, 1885, agreed to refer, and did refer, the matter to two arbitrators, who made an award, of which said O. P. Middleton and the defendant company were duly notified.

It was admitted that said O. P. Middleton had never commenced any suit to recover said penalty, and had never caused any process to be issued against the defendant company.

His Honor excluded this evidence, upon the ground that no suit had been commenced by said O. P. Middleton by the issue of process, and that the award was therefore no bar to action of the present plaintiff.

Defendant excepted. Verdict and judgment for plaintiff. Appeal by defendant.

Mr. W. R. Allen, for the plaintiff.
Mr. Chas. M. Stedman, for the defendant.

SMITH, C. J. (after stating the facts). The action is for a penalty which the statute gives "to any person suing for the same." The defendant company sets up in bar of the recovery, an agreement (169) entered into between itself and O. P. Middleton, a son of the plaintiff, who was claiming the penalty, for a reference, and the award made against the defendant's liability. The evidence in support of this defence was properly ruled out. No interest is acquired by any person which can be the subject of compromise or arbitration, until the demand for the penalty is asserted by the institution of suit for its recovery. The reference and arbitration were entirely gratuitous on the part of O. P. Middleton, and whatever misplaced confidence his assuming to act in the controversy may have inspired in the company, that it was with the concurrence of his father, the owner, and that the award would be acquiesced in, it can form no defence to the action by whomsoever brought, for it is not for the benefit of the owner of the goods, but wholly punitory in its effect. When the suit is commenced, an interest vests in the plaintiff, contingent upon his success, but no sooner, to the exclusion of others. The matter offered in evidence was therefore wholly irrelevant. Our attention has been directed to the question, in whose name the action should be brought, and to the conflicting rulings upon the point made in this Court. The construction of the §§ 1212 and 1213 of The Code, in *Norman* v. *Dunbar,* 53 N. C., 319, is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of *Duncan* v. *Philpot,* 64 N. C., 479, it is held that, it should be prosecuted in the name of the State for his use. But in looking to the cases which have been maintained in this Court, and to which no objection on this ground seems to have been taken, we find that all have been in the name of the person suing and none in the name of the State. *Branch* v. *Railroad,* 77 N. C., 347; *Katzenstein* v. *Railroad,* 84 N. C., 688; *Keeter* v. *Railroad,* 86 N. C., 346; *Whitehead* v. *Railroad,* 87 N. C., 255; *Branch* v.

Railroad, 88 N. C., 570. This uniform practice, acquiesced in, if not sanctioned by the Court, must be deemed a settlement of the con-
(170) struction of the statute. There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Maggett v. Roberts, 108 N. C., 177; *Burrell v. Hughes,* 116 N. C., 437; *Sutton v. Phillips, ibid.,* 505; *Goodwin v. Fertilizer Co.,* 119 N. C., 122; *Carter v. R. R.,* 126 N. C., 442; *S. v. Maultsby,* 139 N. C., 585.

ELIZABETH SPENCE v. O. F. BAXTER et als.

Evidence—Jury—Practice.

1. Where there is a conflict between the recollection of the trial judge and counsel as to what a certain witness testified, it is not error for the judge to leave the matter to the jury as to what the evidence is.
2. In such case it is not error for the trial judge to refuse to tell the jury that the witness had testified to certain facts, when his notes do not show any such testimony, and he has no recollection of it. It is entirely proper for him to leave the matter to the jury to remember what the evidence was.

(*State* v. *Keath,* 83 N. C., 626, cited and approved).

This was a CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at Fall Term, 1886, of CAMDEN Superior Court.

The plaintiff complained that the defendants, under the avowed purpose of searching for the body of an unknown man, alleged to have been murdered during the late war, and buried upon her plantation, obtained permission from the plaintiff in June, 1885, to search for the body.

In pursuance of the license, the defendant Baxter and one Jones met upon her land, and after digging it up in several places, abandoned the search.

That some time after this, the defendants, O. F. Baxter, Sr., O. F. Baxter, Jr., and one Tatum, charged her with having some information about the facts they were investigating, and offered her one hundred dollars if she would disclose them. She denied knowing anything about it, refused their money, and told them that if she knew anything about the matter she would disclose it without money.

Not long after this, the defendants again came to her house (171) and asked permission to renew the search, which she refused, and ordered them to leave, and forbade them from entering upon her premises again for any purpose whatever. But in disregard of her refusal, and order to leave her premises, the defendants, prior to the institution of this action, wrongfully, wantonly and maliciously, and with strong hand, entered on her premises, and with a spade dug up her land, damaged her premises, and in a rude and offensive manner, used violent and abusive language, and threatened to do her bodily harm, asserting at the time that they would make the search at all hazards, in defiance of her protestations; that she could make the most of it, and pursue any course she thought proper.

There were a good many witnesses examined on both sides, and among others one J. R. Etheridge, who testified among other things, that at the Court preceding, he carried the plaintiff to Court three days, and on one of the days, while returning home, she stated to him that Dr. O. F. Baxter, one of the defendants, promised to pay her for the digging: that she had not been damaged at all, and if she had not brought the suit she would not.

It was claimed by the counsel for defendants, that Etheridge further testified that she said "she would not have brought the suit, but for other persons who got her to do it."

Counsel for the defendants, in the argument of the case, stated this testimony to the jury and commented on its bearing upon the case.

Counsel was not interrupted either by counsel for the plaintiff or by the Court; and counsel for plaintiff did not make mention of the evidence referred to at any time.

When the Judge came to charge the jury, he repeated the evidence of the other witnesses, and this evidence of the witness Etheridge, omitting the latter part of it, to-wit: "that she would not have brought the suit, but for other persons who got her to do it." After the Court had completed reading over all of the evidence and fully charging the law upon the same to the jury, the counsel for defendants said that (172) the witness Etheridge testified that plaintiff told him that she would not have brought the suit but for other persons who got her to do it, and asked the Court to tell the jury that said witness testified to the same.

The Court stated that he did not hear that part of the witness' testimony; *that he had heard the defendants' counsel commenting upon it, and thought of calling it to his attention at the time, but did not;* that he did not have it on his notes, but he left it to the jury to say what the testimony was. The Court then told the jury, they were the judges of

the facts; that they must take the testimony from the witnesses and not from his notes.

Defendants' counsel, after verdict for the plaintiff, moved for a new trial on account of the remarks of the Judge on this part of the testimony. Motion overruled, and judgment for the plaintiff.

Counsel for the defendants excepted, on the ground that the Court did not tell the jury that witness Etheridge stated in his testimony that plaintiff told him "that she would not have brought it but for other persons who got her to do it;" and the further ground that the remarks of the Judge were calculated to cast doubt upon and weaken the testimony of the said witness.

Mr. E. F. Aydlett, for the plaintiff.
Mr. E. C. Smith, for the defendants.

ASHE, J. (after stating the facts). We are unable to see how the defendants could have been prejudiced by what occurred on the trial. There was nothing said by his Honor that was calculated to influence the jury, or create a wrong impression upon their minds prejudicial to the defendants. The remark complained of, "that he had heard the defendants' counsel commenting upon it (the testimony of Etheridge), and thought of calling it to his attention at the time, but did not," was fully explained, by telling the jury that he did not have it on his notes,
(173) but he left it to the jury to say what the testimony was; that they were the judges of the facts, and must take the testimony from the witnesses and not from his notes. This was fair and proper, and all that the defendants had the right to expect. There was no conflict between the Court and the counsel of the defendants. His Honor did not insist that the testimony had not been given. It was the province of the jury to determine whether the evidence had been given, and his Honor, very properly, submitted it to their recollection and determination.

This case is very like that of *State* v. *Keath,* 83 N. C., 626, when there was a conflict of memory between the Court and counsel of the prisoner as to what a witness had testified. This Court said, "His Honor might very properly have insisted upon his notes as the correct statement of the testimony of the witness, but as his Honor candidly told the jury that he might be mistaken in the notes of the testimony, and they might use the notes for refreshing their memory as to what he did say, but it was from the mouth of the witness they were to get the testimony upon which to found their verdict, it was fairly submitting the question of fact to the recollection of the jury." And the exception was overruled and a new trial refused upon that ground.

As to the other ground of exception, that his Honor did not tell the jury that Etheridge testified that plaintiff told him "that she would not have brought it (the suit) but for other persons who got her to do it," is, we think, duly disposed of by the comments upon the other exception. His Honor could not conscientiously tell the jury that evidence had been offered which he had not heard; all he could do, was what he had done—submit the matter to their recollection.

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

No error. Affirmed.

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(174)

JAMES EVANS, Admr., v. R. K. BRYAN, Jr.

Partnership—Personal Property Exemption.

1. In the absence of a special contract, one partner has no lien on his co-partner's interest in the partnership property for individual debts due him from the co-partner.
2. A partner is entitled to his personal property exemption out of the partnership property before a debt due by him individually to his co-partner can be deducted therefrom, on a settlement of the partnership.

Controversy submitted without action, heard by *MacRae, Judge,* at November Term, 1885, of CUMBERLAND Superior Court.

On the 10th day of March, 1884, the plaintiff's intestate and the defendant entered into a co-partnership under written articles. By this partnership agreement, the plaintiff's intestate bargained and sold to the defendant, a half interest in what was theretofore the individual property of Josiah Evans, the plaintiff's intestate, and took in part payment the individual promissory note of R. K. Bryan, Jr., the defendant, for three hundred and fifty ($350) dollars, dated 10th day of March, 1884. The partnership debts have all been settled, and upon a sale of the partnership property, after deducting the amount of the debts outstanding at the dissolution, there is still a balance of about $——— remaining for division between the co-partners or their representatives. The $350 note above referred to, has never been paid. The plaintiff's intestate, Josiah Evans, died on the 3d day of October, 1884, and the plaintiff, James Evans, is his administrator. The defendant, R. K. Bryan, Jr., does not own any property outside of his share of the division of the surplus of partnership assets above stated, and the matter of contention between the parties is this:

Is the defendant as against the aforesaid note, entitled to his personal property exemption out of the surplus of partnership property? If he is, then it is agreed that the plaintiff shall pay over to him one-half (175) of the surplus; if he is not, then it is agreed that the same, or so much thereof as is necessary to pay said note, shall be so applied.

The defendant, R. K. Bryan, Jr., consented that the plaintiff might take possession of the partnership assets, pay off the partnership debts, and wind up the business of the firm, but expressly reserved to himself the legal right to claim a personal property exemption against the aforesaid note in the division of the surplus assets of the partnership.

Upon these facts, his Honor adjudged that the defendant was entitled to his personal property exemption out of the partnership funds, and the plaintiff appealed.

Mr. Thos. H. Sutton, for the plaintiff.
Mr. W. A. Guthrie, for the defendant.

MERRIMON, J. It appears from the agreement under seal, that the intestate of the plaintiff was the owner of a newspaper and printing establishment, in the town of Fayetteville, and it likewise appears from its terms, too plainly to admit of question, that he sold to the defendant an undivided one-half interest in the property mentioned, for the price of $1,250; that of this sum the defendant paid to the intestate $714, in cash, and the balance he discharged by promissory notes, including one of himself, payable to the intestate, for $350.

This sale was unconditional and without qualification—no lien upon the property of any kind was provided to secure the payment of the note. Thus the interest in the property so sold, became absolutely that of the defendant, to be used, sold or disposed of, as he might see fit, consistently with the rights of the intestate, the latter having reserved a "one-half interest in the entire establishment * * * * for his own use."

It seems that this sale was made in contemplation of a business partnership between the intestate and the defendant, for, upon its completion, they at once formed a partnership "for the publication of (176) said paper, and also for conducting the job printing and general stationery business in said town." It was agreed that the parties should be "equal as to capital invested; the general profits and losses of the concern shall be equally divided in general settlements, as often as may be mutually agreed upon." It was intended that the parties should be upon an equal footing in all respects. The obvious purpose was to form a partnership, in which the parties were to contribute equally to the capital to be employed, and share equally in the profits and losses. Hence, the intestate sold to the defendant an undivided one-half interest

in a business he had already established, taking his note for a part of the purchase money. It does not appear that an increase of the capital of the partnership was intended, or that it was increased after its formation. Nor does it appear from the agreement—neither from its terms, nor by implication—that the parties agreed that the note of the defendant should constitute a part of the capital of the partnership; it does not appear in any way that the partnership ever had any interest in it; it was made payable to the intestate, and so far as appears, it continued to be his separate property, until his death, and now belongs to the plaintiff or his administrator. Nor does it appear from the agreement, or otherwise, that the intestate had a lien upon the defendant's part of the capital of the partnership to secure the payment of the note, nor that he had the right to receive of the defendant's share of the profits a sum of money sufficient to discharge the note. Nor does it appear that the note was treated in any sense as an advancement of money for the partnership, or that he desired or intended that it should be so treated.

So that the plaintiff is no more entitled to have the note in question paid out of the defendant's share of the assets of the partnership, than if it had been given for a horse or other consideration in no way connected with the partnership property. It seems to us that the contention of the appellant is entirely unfounded.

The intestate had a specific lien on the property of the part- (177) nership, for his debts and liabilities due to other persons, for his share of its capital and funds, for all moneys advanced by him for its use, and for debts due it from the defendant, if there were such, beyond his share, but he had no such lien for a debt due to him for property he sold to his co-partner, in the absence of a special contract to that effect. Story on Part., §97.

It appears that the defendant has no property, except his share of the assets of the partnership above mentioned. As the intestate of the plaintiff had no lien upon these assets, the defendant is entitled to have his personal property exemption set apart to him out of the same, according to law.

The defendant's share of the assets of the partnership must be treated as if they were in his hands as surviving partner. When he consented to allow the plaintiff to wind up and close the affairs of the partnership, he expressly reserved to himself the right to claim and have his personal property exemption set apart to him.

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

No error. Affirmed.

H. & E. HARTMAN & CO. v. DAVID L. FARRIOR.

Judgment by Default Final and by Default and Inquiry.

1. Where the complaint alleges that the plaintiff sold to the defendant certain goods, wares and merchandise, for which he promised to pay a sum certain, and the complaint is verified, the plaintiff is entitled to a judgment by default final upon a failure to answer, or upon the filing of an unverified answer.

2. Where the complaint only alleges the value of the goods sold, without also alleging a promise to pay, or where the complaint is not verified, upon a failure to answer, the judgment should be by default and inquiry.

(*Witt* v. *Long*, 93 N. C., 388, distinguished and approved).

CIVIL ACTION, tried before *Clark, Judge,* at September Term, 1886, of DUPLIN Superior Court.

(178) His Honor gave a judgment by default final upon the following facts:

The complaint was verified, and the following is a copy of the material parts thereof, necessary to be set forth here:

"II. That on or about the 21st day of September, 1885, they sold to the defendant, D. L. Farrior, a large lot of goods, wares and merchandise, and that the same was duly received by him.

"III. That the defendant Farrior promised to pay the plaintiffs three hundred and seventy-three and 50-100 dollars for the said goods, wares, and merchandise.

"IV. That the defendant has paid the plaintiffs nothing whatsoever for the said goods, wares, and merchandise.

"V. That payment has been demanded of the defendant."

At the appearance term of the Court no answer was filed, but the defendant appeared by attorney and offered to submit upon the complaint to a judgment by default and inquiry.

Judgment absolute was rendered, to which defendant excepted, and from which he appealed to this Court.

Mr. W. R. Allen, for the plaintiffs.
Mr. Kornegay, for the defendant.

MERRIMON, J. (after stating the facts). It is obvious that the complaint alleges a cause of action, and the breach of an express promise to pay absolutely a definite sum of money, particularly specified, for a valuable consideration. The complaint is verified; it appears that the

defendant was served personally with the summons, and that no answer or other pleading was filed. The plaintiff was therefore entitled to have judgment by default final, for the sum of money specified, and for costs. The statute, (The Code, §385,) expressly provides, that in such case the plaintiff may thus have judgment at the return or appearance term of the Court.

The appellant's counsel cited and relied upon *Witt* v. *Long,* 93 N. C., 388. That case is very different from the present one. In it, the complaint alleged that the plaintiffs had sold and delivered to the (179) defendants, at their request, goods of the reasonable value of a sum of money specified, but it did not allege that the defendants promised to pay absolutely a particular sum of money for the goods, but only their reasonable value. Besides, the complaint was not verified. In that and like cases, the plaintiffs could only have judgment by default and inquiry.

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

No error. Affirmed.

Cited: Skinner v. Terry, 107 N. C., 108; *Williams v. Lumber Co.,* 118 N. C., 936; *Currie v. Mining Co.,* 157 N. C., 218; *Miller v. Smith,* 169 N. C., 210; *Hyatt v. Clark,* 169 N. C., 179; *Montague v. Lumpkins,* 178 N. C., 272; *Supply Co. v. Plumbing Co.,* 195 N. C., 633.

WM. G. LEWIS v. THE ALBEMARLE AND RALEIGH RAILROAD CO.

Pleading—Issues—Corporation—Power of Officers—Ratification—Judge's Charge.

1. Where the complaint alleged that the plaintiff was employed as the engineer of the defendant, and rendered services to the defendant, *It was held,* that he could recover either on the special contract, or on the common count.

2. It is not error to refuse to submit an issue which is not raised by the pleadings.

3. Where the charter and by-laws of a railroad corporation, provided that the Chief Engineer could only be appointed by the President and Directors, but the Vice-President and Superintendent were the officers who had the management of the affairs of the corporation, *It was held,* that they had implied authority to employ an engineer, especially when there was no Chief Engineer, and the services of an engineer were necessary for the proper conduct of the business of the corporation.

4. If in such case, the President and Directors are notified of such appointment, and receive the work of the engineer without objection, they are held to have ratified the appointment.

5. It is not error for the Court to refuse to charge the jury upon a point not raised by the pleadings, and upon which there is no controversy.

6. Where a person is employed to work for another for an indefinite time, if he is ready and willing to do the work required, he is entitled to recover for the entire time, although employment is not furnished him regularly; but if the employment is to do a particular thing, or there were intervals when he was at liberty to make other contracts for his services, then he could only recover for the time during which he was actually employed.

7. While the charge to the jury may be incorrect in part, a new trial will not be granted if the trial judge in a subsequent part of the charge corrects it and leaves the matters in controversy fairly to the jury.

(*Jones* v. *Mial*, 82 N. C., 252, cited and approved).

(180) CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at August Term, 1886, of EDGECOMBE Superior Court.

The plaintiff in substance alleges, that the defendant, being the owner of a railroad, and intending to extend it to points east and west of it, through its agents, its Vice-President and Superintendent, employed him as Civil Engineer for the company, to act and serve them as its Engineer for an indefinite period of time. That he accordingly served it in that capacity from the 9th day of March, 1883, until the 29th day of January, 1884. That although he was not constantly actively engaged all that time, he was in its employment, actively engaged in making surveys, maps, examinations, &c., &c., a great part of the time, which maps and charts, he, as its Engineer, sent to its President, in New York, and all the time he was under its direction and at its command, to do any service of the nature of his employment; and that his services were reasonably worth two hundred dollars per month. He further alleges, that the President and Vice-President of the company resided in New York City; that the latter often visited the line of the said road, and when he did so he conducted and controlled its management and made contracts for it. Other facts evidential in their nature, are stated in the complaint, apparently as matters of inducement, but they are unnecessary and might properly have been omitted; they are simply redundant matter in the pleading.

The defendant denies broadly the material allegations of the complaint, and specially, that it employed the plaintiff as its engineer. It also denies the authority of the Vice-President and Superintendent to employ the plaintiff as its civil engineer, and alleges that the only authority of its Vice-President "to manage, control or make contracts, is such only as is given by the by-laws of the defendant, or by the

Board of Directors, or the Executive Committee of said Board, (181) under the authority of said by-laws," and that these authorities never empowered the Vice-President, or any other person, to appoint the plaintiff as such engineer. It alleges that the plaintiff was employed, from time to time, to do certain particularly specified services—such as such engineers do—which he did, and that he was fully paid for the same; it denies that he was ever employed as its regular engineer, or for a certain or an indefinite period of time.

The following is a copy of so much of the case settled on appeal as is necessary to be set forth here:

"There was evidence for the plaintiff, tending to show that he was a civil engineer by education, and had surveyed for and directed the construction of more than one railroad; [that on the 9th day of March, 1883, one Dorsch, who was the Superintendent of the defendant road, in the presence, and with the concurrence of H. J. Rogers, who was its Vice-President and one of its Directors, appointed plaintiff engineer of defendant company].

"Exception No. 1.—The testimony as to the appointment of plaintiff which is in brackets, was objected to by defendant, and admitted by the Court. The defendant excepted. At public meetings of the citizens held along the line where the plaintiff was well and favorably known, [it was publicly proclaimed by the Vice-President, Rogers, that the plaintiff was the chief engineer of the road].

"Exception No. 2.—The foregoing in brackets was objected to by defendant, and he excepted to its admission.

"That in the canvass so conducted, a large amount, ($85,000) in money subscriptions was obtained; that under the direction of the Vice-President, the plaintiff made surveys of the line from Rocky Mount to Nashville, with all necessary drawings and estimates of the cost of construction, which was forwarded to the President of the road, in New York; that under the direction of the Vice-President, he made a survey from Williamston to Jamesville, with a lengthy report of the resources of the country along and east of that line, which he (182) forwarded to the President, in New York City.

"The plaintiff also introduced evidence (the defendant objecting) that many of the payments credited in plaintiff's complaint were made by the local Treasurer, and his receipts given as Chief Engineer were, at the close of each month, forwarded to the President of the company, in New York City, and no objection made by the authorities there to such payments.

"Exception No. 3.—The defendant excepted to the admission of this testimony.

"It was in evidence, that other payments, credited in plaintiff's complaint, were made by drafts in his favor, drawn by the Vice-President upon Baltzer and Litchenstein, of New York City, who were the President and General Treasurer of defendant company, which were paid upon presentation; that under the direction of the Superintendent, he examined and reported the condition of the railroad bridge across the Tar River, at Tarboro; that while not actively engaged upon some work of defendant company, he regularly reported to the Superintendent for employment, and was recognized by the Vice-President and Superintendent as Engineer of the defendant company, up to the date of his resignation, 29th January, 1884.

"It was in evidence that the President, Vice-President and Directors of the defendant company lived in New York, where was also the general business office; that the President was rarely in North Carolina, but twice during the years 1882 and 1883; that the road was actually managed and controlled by the Superintendent and Vice-President when the latter was in North Carolina, where he frequently was; that the plaintiff had no knowledge of the by-laws of defendant as to appointment of an Engineer. There was evidence that the plaintiff's services were worth $2,500 per year, and that he had received over $1,000 for his services.

(183) "The by-laws of the defendant company were put in evidence by the defendant, and it was shown by them that the appointment of Chief Engineer could only be made by the President, with the approval of a majority of the directors, and that he was to receive a fixed salary. It was conceded that no such appointment was made under these by-laws.

"The Court submitted the following issues to the jury:

"1. Did the plaintiff render services to the defendant as Engineer?

"2. What is due him on account of such services?

"The defendant asked the Court to submit the following issue to the jury:

"Was the plaintiff employed as a regular or permanent Engineer of the company?

"This the Court declined to do, and the defendant excepted.

"The defendant asked the Court to charge the jury:

"1. That there was no competent evidence to show that the plaintiff was appointed Chief or Regular Engineer.

"2. That there was no evidence that the company ever ratified any appointment as Chief or Regular Engineer.

"3. That under the by-laws, the President alone cannot appoint a Chief or Regular Engineer without the approval of the Directors.

"4. That the Vice-President or Superintendent could make no appointment as claimed by plaintiff.

"5. That there is no evidence that Rogers ever acted as President.

"6. That plaintiff is only entitled to recover the value of services actually rendered.

"His Honor charged the jury, that in this action, the office of Chief Engineer could only be created by the President and Board of Directors, and this not being shown, he is not entitled to recover as such. But, the plaintiff says, while he may not have been regularly appointed, still he was employed to act as such by the Superintendent, and in the presence of and with the concurrence of the Vice-President and (184) Director Rogers; that in pursuance of his employment, he performed certain work, and reported regularly, and was at all times ready and willing to render services as such; that his employment as permanent Engineer was recognized by all of the officers of the company who were in North Carolina and engaged in the operation of the road; that he was paid as Chief Engineer by the local Treasurer and Secretary, and statements containing such payments as Chief Engineer, after examination by the Superintendent here and were sent to the President, who made no objection to the same.

"The Court charges, that if the President and Board of Directors resided in New York, leaving the active management and control of the road to the Superintendent here, and such Superintendent employed the plaintiff permanently to render the services of an Engineer or Chief Engineer, and the plaintiff acted and served as such, was recognized as such by all of those operating the road in North Carolina, and such employment was known to the President and other officers, and acquiesced in or ratified by them, then the plaintiff would be entitled to recover the value of his services rendered as such Engineer, provided he discharged his duties as such. If employed permanently, you will give the plaintiff the value of such employment and services while so employed. If not employed permanently, you will give the plaintiff the value of the services actually rendered.

"His Honor gave charges Nos. 1, 3, 4 and 5, and declined to give Nos. 2 and 6.

"To the first issue the jury responded 'yes.'

"To the second they responded $2,000, less $1,032 paid plaintiff by defendant."

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

Messrs. John Devereux, Jr., and *R. H. Battle,* for the plaintiff.

Mr. J. E. Moore, for the defendant.

(185) MERRIMON, J. (after stating the facts). The defendant's counsel contended on the argument, that it is alleged in the complaint that the plaintiff was employed "as a regular or permanent engineer of the company," the defendant—that this allegation is denied by the answer, and, therefore, the issue, "was the plaintiff employed as a regular or permanent engineer of the company?" proposed by the defendant on the trial, and which the Court refused to submit, ought to have been submitted to the jury. The refusal of the Court to submit this issue is assigned as error.

The complaint seems to have been prepared hastily, and it must be conceded that it is not very formal,—that it lacks precision, and contains redundant matter. While it is alleged in terms that the plaintiff was employed by the Vice-President and Superintendent of the defendant *"to act and serve thereafter as its engineer,"* it is plain that the scope and purpose of the complaint is to allege, informally it is true, that the plaintiff was employed as a civil engineer for an indefinite period of time, to render service as such to the defendant, not for a stipulated salary, or any particular measure of compensation, but so much as his services might reasonably be worth while his employment continued. It is not alleged in terms or effect that he was employed as Chief Engineer, or "as a regular or permanent engineer," but simply to "act and serve as its engineer." The facts constituting the plaintiff's cause of action are so fully and broadly stated, that he might recover upon the special contract, or on a *quantum meruit,* as was held in the similar case of *Jones* v. *Mial,* 82 N. C., 252.

The gist of the action is not to recover a salary claimed by the plaintiff as Chief Engineer, or as "a regular or permanent engineer" of the defendant, but to recover reasonable compensation alleged to be due the plaintiff for services rendered the defendant in pursuance of the alleged employment, or for services rendered as engineer to it, of which it took and had benefit, under such circumstances as created an obligation upon it to pay the plaintiff just compensation for the same. The issue
(186) therefore raised by the pleadings, was substantially the first one submitted by the Court to the jury.

That proposed by the defendant was immaterial and unnecessary, because the question raised was not as to the character, kind, or grade of the office or place filled, as whether he was Chief, or regular or permanent engineer, but whether or not he rendered services as engineer of the defendant, as alleged.

It was further contended, that the evidence produced on the trial did not support the allegations of the complaint, upon the ground that the Vice-President of the defendant had no authority to employ, or to sanction the employment of the plaintiff as Chief Engineer by the Superin-

tendent of the defendant. It was conceded, and the Court so told the jury, that the Vice-President had no such authority. But really that was immaterial, for the reason already assigned, that the plaintiff does not sue to recover salary or compensation as Chief or regular or permanent engineer.

But granting that the Vice-President could not appoint, nor sanction the appointment of the plaintiff as such Chief Engineer, it does not necessarily follow that he could not employ or sanction the employment of him by the Superintendent "to serve and act as engineer," as alleged in the complaint.

The defendant admits in the answer the projected extension of its road east and west. In the nature of such work, it needed and required the services of a Civil Engineer. If its President and Directors lived in New York; its general business office was kept there; its President seldom visited the road—only twice during the years 1882 and 1883—and the projected extension of the road was actually managed and controlled by the Vice-President and Superintendent, as the evidence tended to prove, then the Superintendent and Vice-Prsident might have employed the plaintiff as alleged "to act and serve as its Engineer," and any fair and just contract in that respect would be binding on the defendant, because the nature and scope of the work they had the control and management of, rendered the employment of an Engineer necessary, especially in the absence of a Chief, regular, or perma- (187) nent Engineer.

The fact that they were permitted by the defendant—its chief officers residing in New York—to have the control and management of such work, implied their agency and authority to employ the necessary labor, of whatever kind, to prosecute it successfully, and for such length of time as might be necessary. No formal resolution or order of the President and Board of Directors of the defendant was necessary to confer on the Vice-President and Superintendent power to prosecute its work, and employ engineers and laborers to that end. Their power, their agency, for that purpose was implied from the nature and scope of the work to be done, and the absence of the President and Directors at so great a distance, while they were openly and notoriously in charge of it. From the nature of the work to be done, persons dealing with those in charge of it, had the right to understand and infer that they had authority to employ such service as was necessary to its prosecution.

Moreover, if the Vice-President and Superintendent assumed the authority to employ the plaintiff as alleged, and afterwards the President and Directors of the defendant recognized such employment and ratified it formally, or by acts that implied such ratification, such as receiving from the plaintiff as engineer, reports of surveys, maps and

charts, and paying checks drawn by the Vice-President to pay the plaintiff compensation from time to time, and the like acts, it would be bound by the contract of employment. Such acts would imply notice of such employment and its nature, and a ratification of it.

The evidence objected to by the defendant, embraced by its two first exceptions, was obviously pertinent and competent. It went strongly to show that its agents had employed the plaintiff as alleged in his complaint.

And so also was the evidence embraced by the third exception. It tended to show that the President, and through him the Directors,
(188) had knowledge of the employment, and their approval of it.

The Court properly declined to give the jury the second special instruction asked for by the defendant, because there was no allegation in the complaint that the plaintiff was the Chief or regular Engineer, nor was there any issue raised or submitted in that respect.

It also properly declined to give the sixth special instruction. If the plaintiff was employed as engineer, as he alleges, for an indefinite period of time, and during all the time of his employment he was under the direction and control, and at the command of the defendant through its officers, and ready and willing to do service, he ought to receive compensation. It would be unjust and unreasonable for the defendant to employ the plaintiff, have the control and disposition of his time, and not pay him for it. It may be, that the defendant's agents had a wise motive in keeping him unemployed part of the time; if they did not, it was their neglect or their folly to do so, and the defendant ought in justice to pay for it. There was evidence tending to prove that the plaintiff was employed as he alleged, and that he was at all times at work, or ready to work, during the time of his employment, and it was for the jury to give it proper credence and weight.

It would be otherwise, however, if the plaintiff was employed, as alleged by the defendant, to do particularly special service; or if there were intervals when he did, or was at liberty to do, service for third persons.

We think the instructions given the jury by the Court were substantially correct. What it said of the evidence tending to show that the plaintiff was employed as Chief Engineer was scarcely correct—that evidence was pertinent only for the purpose of showing that the plaintiff was employed as engineer, with the knowledge and implied sanction of the President and other officers. But this inaccuracy was corrected, in that the Court told the jury expressly, that the plaintiff was not Chief Engineer nor entitled as such—that if he was employed
(189) permanently to do service as engineer, and such employment was known to the President and other officers, and they acquiesced in

or ratified it, and he discharged his duties as such, then he would be entitled to recover the value of his services while so employed; and if he was not employed permanently, then he would be entitled to the value of the services he actually rendered. This gave the jury to understand the purpose of the first issue submitted to them, and the reason why they should allow him compensation for the whole time of his employment, or only for the work he actually did.

There was evidence tending to prove that the employment was continuous, and in that sense permanent while it lasted, and it was the province of the jury to determine its weight.

No error. Affirmed.

Cited: Stokes v. Taylor, 104 N. C., 397; *Rumbough v. Improvement Co.,* 106 N. C., 466; *Fulps v. Mock,* 108 N. C., 605; *Hood v. Sudderth,* 111 N. C., 222; *Brittain v. Payne,* 118 N. C., 991; *Beach v. R. R.,* 120 N. C., 507; *Everett v. Spencer,* 122 N. C., 1011; *Speight v. R. R.,* 161 N. C., 85; *Morris v. Y. & B. Corp.,* 198 N. C., 716.

COMMISSIONERS OF DARE COUNTY v. COMMISSIONERS OF CURRITUCK COUNTY.

Counties—Legislative Power.

1. The Legislature has power to create new counties, out of territory theretofore embraced in existing counties, and it can provide that the inhabitants of such territory shall still be taxed to pay a proportionate part of the debts of the county from which it has been severed, or it may exonerate them from such debts.
2. In the creation of new counties, the tax-payers thereof are exonerated from any tax to pay any portion of the debt of the county from which they have been taken, unless the act creating the new county shall provide differently.
3. Counties are created for the purposes of the State government at large, and not entirely for the convenience of the people who inhabit them.
4. Counties are the creatures of the Legislature, and it has power to abolish them or to alter and control their corporate powers in any manner.
5. The people inhabiting a county have no right to its property, as corporators, but it belongs to the county as an organization.
6. Where the act creating a new county provided that such new county should pay its *pro rata* of the debt of the county to which its territory formerly belonged, but the act contained no provision giving it any interest in the

property of the old county; *It was held*, that the new county could not recover its *pro rata* of the proceeds of the sale of certain stock owned by the old county, although the debt of the old county was in fact to pay for this stock.

(*Mills* v. *Williams*, 33 N. C., 558; *Watson* v. *Com'rs*, 82 N. C., 17; *White* v. *Com'rs*, 90 N. C., 437; *McCormac v. Com'rs*, Ibid., 441; *Currituck County* v. *Dare County*, 79 N. C., 565, cited and approved).

(190) CIVIL ACTION, heard on demurrer, by *Shipp, Judge,* at September Term, 1886, of CURRITUCK Superior Court.

It appears from the complaint, that the county of Currituck was authorized by statute to subscribe, and did subscribe, for shares of the capital stock of the Albemarle and Chesapeake Canal Company, of the nominal value of $44,000.00, and issued its bonds, thus creating a debt for that sum, to pay for its stock; that some time afterwards, in the year 1870, the county of Dare was created by statute, and part of it was taken from the county of Currituck, but the people of the part thus taken were not released from paying their proportionate part of the debt of Currituck county, contracted in aid of public improvements; that the part of the debt to be paid by the people of the county of Dare, thus taken from the county of Currituck, has been ascertained, and it amounts to 15 $^{1}\!/_{20}$ *per centum* of the entire debt, and the latter county has obtained judgment for the same, and has sold and assigned this judgment to its creditors in payment of their debts; that this judgment has not yet been paid; that afterwards the county of Currituck sold its stock in the Canal company named, for the price of $5,000.00, and received the money. It is alleged that the county of Dare is entitled to 15 $^{1}\!/_{20}$ *per centum* of the sum of money thus realized; that it has made demand upon the defendant for the same, and payment has been refused. Judgment is demanded for $777.50, with interest from the first day of January, 1880, and for costs. The defendant demurs to the complaint, upon the ground that it does not set forth facts sufficient to constitute a cause of action, in that it fails to allege that the act creating the county of Dare, gave or assigned to said county, any portion of the property or assets of the county of Currituck.

(191) The Court sustained the demurrer, and gave judgment for the defendant. The plaintiff excepted and appealed to this Court.

Mr. E. F. Aydlett, for the plaintiff.
Mr. W. J. Griffin, for the defendant.

MERRIMON, J. (after stating the facts). It cannot be questioned seriously, that the Legislature has power to create new counties, composed of territory and the people inhabiting it, taken from one or more

existing counties, and to change the boundaries of counties. It likewise has power, in the formation of new counties, to require that the people who live in the portion of territory so taken from a county, shall continue to pay their proportionate part of the county debt of the county from which they shall be so separated, existing at the time of the separation; and it may likewise relieve them from such debt. Indeed, they would be relieved if there were no provision to the contrary. It may also provide that the new county shall have such parts of the property of the county or counties from which its territory is taken, as it shall deem wise and expedient, or it may entirely omit to allow it any part thereof. The power thus possessed by the Legislature is a necessary one. It is legislative in its nature, in the absence of any constitutional provision to the contrary, and the exercise of it gives character to counties when established. These are not created for the particular, special, or exclusive benefit of the people having property in them. They are of, and constitute parts of the State government. They are created for political and civil purposes of the State, and may be created without special regard to the will, wish, or convenience of the people who inhabit them. They are instrumentalities of the State government, and subject to its legislative control; they possess such corporate powers and delegated authority as the Legislature may deem fit to confer upon them, and such power and authority must be exercised in the way, and only for the purpose prescribed by legislative enactment; and moreover, they are always subject to legislative control, and their (192) powers may be abolished, enlarged, abridged, or modified. The property of a county of whatsoever nature, is required for its purposes as a county, that is, for the purposes of government in the particular locality or territory embraced by it, and in aid, and as part of the State government and subject to the legislative control. The people inhabiting it have no right to, or personal interest in its property, as corporators, that they can use and control for their private benefit or advantage, independent of legislative authority; nor have a portion of the people, residing in a particular part of its territory, separated from it and made part of a new county, a right to or interest in its property, as a body of people. Its property does not belong to the people, as such, individually or collectively; it belongs to the county as an organization —an instrumentality of government, possessed of prescribed corporate powers, and subject to the legislative control. The State, in the exercise of its function, through the county, acquired the property by means of its revenues, taken from the people by taxation and otherwise, and the exercise of other lawful powers of government, and thus the property is of, and belongs to the government. The people have only an interest in it, as citizens of the State. Hence, the Legislature may make such dis-

position of it, under the constitution, for the purposes of government, as it may deem just and expedient. Of course, we mean that this, like all other legislative powers, is always subject to such limitations as may be imposed by the constitution. Nor do we mean to say that the Legislature can in any way interfere with the vested rights of individuals. The constitution is paramount, and all authority must have its sanction. *Mills* v. *Williams,* 33 N. C., 558; *Watson v. Com'rs,* 82 N. C., 17; *White* v. *Com'rs,* 90 N. C., 437; *McCormac* v. *Com'rs,* Id., 441; *Com'rs of Currituck Co.* v. *Com'rs of Dare Co.,* 79 N. C., 565; *Laramie Co.* v. *Albany Co.,* 92 U. S., 307; *Mount Pleasant* v. *Beckwith,* 100 U. S., 514.

(193) The Legislature could, therefore, by enactment, detach a part of the county of Currituck, and attach it to, and make it part of, the county of Dare, as it did by statute (Acts 1869-70, ch. 36). By section four of this statute, it is, among other things, provided, that the part thus detached, and the people inhabiting the same, shall "not be released from their proportions of the outstanding county debt, contracted for public improvements (of Currituck county), before the passage of this Act, to be determined by the Commissioners of Currituck and Dare counties." This provision has been upheld by this Court as valid; *Currituck County* v. *Dare County, supra.* But there is no provision in that, or any statute amendatory of it, that in terms, or by the remotest implication, grants to the people so detached, or to the county of Dare for them, or on their or any account, any part of the property of Currituck county, and particularly any part of the stock of that county in the Albemarle and Chesapeake Canal Company mentioned, or the proceeds of the sale thereof. The plaintiffs have no right whatever to the money sued for and demanded by this action, and the Court properly sustained the demurrer. The judgment must be affirmed.

No error. Affirmed.

Cited: Manuel v. Comrs., 98 N. C., 11; *Brown v. Comrs.,* 100 N. C., 98; *Comrs. v. Comrs.,* 107 N. C., 302; *Board of Education v. Comrs.,* 111 N. C., 585; *Board of Education v. Comrs.,* 113 N. C., 383; *Harriss v. Wright,* 121 N. C., 181; *Tate v. Comrs.,* 122 N. C., 813; *Jones v. Comrs.,* 143 N. C., 64; *Burgin v. Smith,* 151 N. C., 566; *Board of Trustees v. Webb,* 155 N. C., 385; *Comrs. v. Comrs.,* 157 N. C., 518; *Marsh v. Early,* 169 N. C., 467; *Woodall v. Highway Com.,* 176 N. C., 384; *Martin County v. Trust Co.,* 178 N. C., 30; *Coble v. Comrs.,* 184 N. C., 354; *Plott v. Comrs.,* 187 N. C., 134; *Sparkman v. Comrs.,* 187 N. C., 247; *O'Neal v. Jennette,* 190 N. C., 99; *O'Neal v. Wake County,* 196 N. C., 186.

ANN C. LEAK, Extrx., v. E. P. COVINGTON, Extr., et als.

Appeal.

1. An appeal from an interlocutory order only lies when it affects some substantial right and will work injury to the appellant if not corrected before an appeal from the final judgment.

2. Where an action was submitted to referees, and exceptions filed to their report, some of which the Court overruled, and retained the case in order to try the other issues raised by the pleadings, *It was held*, not to be an appealable order.

(*Lutz* v. *Cline*, 89 N. C., 186; *Jones* v. *Call*, Ibid., 188; *Arrington* v. *Arrington*, 91 N. C., 301; *Hicks* v. *Gooch*, 93 N. C., 112; *Welch* v. *Kinsland*, Ibid., 281, cited and approved).

CIVIL ACTION, heard upon exceptions to the report of a referee, (194) by *MacRae, Judge,* at December Term, 1885, of RICHMOND Superior Court.

This is an action brought by creditors against the principal defendant, as executor of the will of William L. Covington, deceased. In the course of the action, an account was ordered to be taken. The referees took and stated an account, and made report thereof, to which the defendant filed numerous exceptions. The Court heard the action in part, upon the report and exceptions, and entered an order, whereof the following is a copy:

"The exceptions of the defendant are overruled, except in the particulars in which they are sustained, and the report of the referee modified in this order.

"This cause is retained for the trial of issues raised by the pleadings, and for further directions."

From this order the defendants appealed to this Court.

Mr. Platt D. Walker, for the plaintiff.

No counsel for the defendants.

MERRIMON, J. (after stating the facts). It is manifest that the order appealed from is interlocutory in its nature. It does not put an end to the action; indeed, it is expressly stated that "it is retained for the trial of the issues raised by the pleadings, and for further directions." The account is incidental to other questions and matters yet to be settled in the further progress of the action.

It will not destroy or seriously impair any substantial right of the defendant involved in the order, to postpone the correction of the errors

assigned, if they are such, until after the final judgment, when the defendant may appeal and have the errors now specified in the record, and any others he may possibly complain of in the further progress of the action, corrected all by one appeal.

If appeals like this should be entertained, an indefinite number of them might be taken in the same action, thus producing delay, confusion and increased costs.

(195) Generally, appeals do not lie until after final judgment. The cases are exceptional where they lie from interlocutory orders. Actions cannot be brought to this Court for the correction of errors piecemeal—in fragments and sections. Such a practice would be fruitful of the evils suggested, and would greatly tend to impair the order, unity and consistency of the action, while there is practically no necessity for it.

It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error shall not be corrected at once, and before the final hearing, that an appeal lies before final judgment. There are many decisions to this effect. *Lutz* v. *Cline,* 89 N. C., 186; *Jones* v. *Call,* Ib., 188; *Arrington* v. *Arrington,* 91 N. C., 301; *Hicks* v. *Gooch,* 93 N. C., 112; *Welch* v. *Kinsland,* Ib., 281.

The appeal must be dismissed. It is so ordered.

Dismissed.

Cited: Spencer ex parte, post, 274; *Martin v. Flippin,* 101 N. C., 453; *Wallace v. Douglas,* 105 N. C., 43; *Royster v. Wright,* 118 N. C., 155; *Smith v. Goldsboro,* 121 N. C., 357; *Hosiery Mill v. Hosiery Mill,* 198 N. C., 598; *Bank v. Bank,* 204 N. C., 380.

A. J. PLEASANTS v. THE RALEIGH AND AUGUSTA AIR-LINE RAILROAD COMPANY.

Appeal—Assignment of Error—Master and Servant—Contributory Negligence.

1. Where no errors are assigned in the case stated on appeal, and nothing appears in the record, either in terms or by implication, which shows that the appellant was not satisfied with the judgment, it will be affirmed.

2. The Code, §412, par. 3, does not allow errors to be assigned for the first time on the hearing of the appeal.

3. By MERRIMON, J. This section of The Code (412) provides for the entries to be made on the record in the course of the trial, and motions subsequent thereto, in order that appellant may properly present his case to the appellate Court, and has no reference to the assignment of error in the Supreme Court for the first time.

4. A master is bound to furnish to his servant, tools and appliances reasonably good and proper for the work the servant is to do, and to do everything essential to the proper prosecution of the work, without exposing the servant to any unnecessary danger, but he is not a guarantor of his safety, nor is he bound to protect him against his own neglect.

5. Where a section-master on a railroad was injured by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car, *It was held*, that the injury was the result of his own carelessness, and that he could not recover.

6. If, in such case, both the master and servant had known of the dangerous condition of the car, and the servant had continued to use it and been injured in consequence, he could not recover; but it would be otherwise, if the servant had reported the condition of the car to the master, and he had promised to have it repaired promptly, and the servant had used it for a reasonable time, while waiting for the repairs to be made.

7. What constitutes negligence, or contributory negligence, is a question of law to be decided by the Court, and should not be left to the jury.

(*Fry* v. *Currie*, 91 N. C., 436; *Lytle* v. *Lytle*, 94 N. C., 522; *Bost* v. *Bost*, 87 N. C., 477; *Crutchfield* v. *The Railroad*, 76 N. C., 320; *Johnson* v. *The Railroad*, 81 N. C., 458; *Herring* v. *The Railroad*, 32 N. C., 402; *Biles* v. *Holmes*, 33 N. C., 16; *Heathcock* v. *Pennington*, Ibid., 640; *Smith* v. *Railroad*, 64 N. C., 238; *Anderson* v. *Steamboat Co.*, Ibid., 399; *Avera* v. *Sexton*, 35 N. C., 247, cited and approved).

CIVIL ACTION, tried before *Clark, Judge,* and a jury, at Febru- (196) ary Term, 1886, of CHATHAM Superior Court.

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

Mr. John Manning, for the plaintiff.
Mr. E. C. Smith, for the defendant.

MERRIMON, J. In this case, what is intended to be the case stated on appeal simply states the substance of the pleadings, the issues, the evidence, the instructions of the Court to the jury, the findings upon the issues submitted to them, and the judgment. No exceptions appear to have been taken, and no errors are assigned. There is nothing in the

record that shows in terms, or by reasonable implication, that the appellant was in any respect dissatisfied with the rulings of the Court or the judgment, except the appeal.

(197) Now, manifestly, this is not a compliance with the statute (The Code §550,) prescribing how exceptions shall be taken, and errors assigned. It provides 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 an exception thereto, and the requests of the counsel of the parties for instructions, if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered, the errors alleged." This provision is plain, and we have frequently said that it must at least be substantially complied with, except in certain exceptional cases. It is unnecessary to repeat or reproduce what has been so often said in this respect here. *Fry* v. *Currie,* 91 N. C., 436; *Lytle* v. *Lytle,* 94 N. C., 522; *Bost* v. *Bost,* 87 N. C., 477.

The learned counsel for the appellant contended on the argument, that he had the right by virtue of the statute (The Code, §412, par. 3), to assign errors specifically in this Court on the argument. This is a misapprehension of the meaning of the paragraph relied on, as was decided in *Lytle* v. *Lytle, supra.* Speaking for myself and not for my brethren in the comments I now make, in my judgment, all the clauses of the section last cited, have reference to, and provide for, the entries to be made on the record in the course of the trial, and the entry of judgment and motions subsequent thereto, in such way as to enable the parties to the action to appeal to this Court, if they, or any of them, should see fit to do so. This appears from its terms, and from the just and reasonable implications arising from its connection with and relation to other statutory provisions. It is of the chapter of the Code of Civil Procedure in respect to "Trial by Jury," which chapter is of "Title 10," entitled *"Of Trial and Judgment in Civil Actions,"* while the subject of appeals is regulated under a different title and by a chapter entitled "Of Appeals in Civil Actions."

The first paragraph of the section under consideration, prescribes what entries the Clerk shall make when the Court receives the

(198) verdict of the jury. The second has reference to, and prescribes how exceptions shall be taken in the course of the trial, such as exceptions to rulings of the Court in respect to questions of evidence and in like respects. The third, the one in question, to *instructions to the jury;* how they shall be noted or set down in the record. The fourth, to motions to set aside the verdict and grant a new trial for the causes prescribed in it. It will be seen, that if an exception be taken on *the trial,* it must be reduced *to writing at the time when taken,* with so

much of the evidence as may be necessary to present it. And so, also, if the Court shall hear a motion to set aside the verdict and grant a new trial, and there be an appeal from the decision in that respect, "a case, or exceptions, must be settled in the usual form upon which the argument must be had." It thus appears that there was no purpose to dispense with exceptions in these respects.

Paragraph three in question, has reference only to *instructions* given by the Court to the jury, first, to such as are prayed for, which must be reduced to writing, (The Code, §415); secondly, instructions given generally, without any prayer from a party. If there be error in such instructions—that is, grounds of exceptions—they shall be deemed excepted to without "filing any formal objections," that is, the party complaining shall have the right, *although he did not formally except at the time the objectionable instruction was given,* to assign errors in the statement of the case on appeal, as directed by the statute, (The Code, §550), which prescribes how the case on appeal shall be stated and settled, and errors assigned. It cannot be, that as to some matters, errors shall be assigned, and as to instructions, there should be none! There is neither reason nor provision for such distinction.

This, it seems to me, is a just and proper interpretation of the statute (The Code, §412, par. 3). It gives that paragraph intelligent effect, and renders it consistent with other provisions of the same section, and the statutory regulations in respect to appeals generally. If the interpretation contended for by appellant's counsel is the proper one, then the provision of the statute (The Code, §550), is useless and (199) nugatory, although it expressly prescribes, and its purpose is to prescribe, how errors shall be assigned on appeal. Moreover, it would lead to the vicious and unjust practice of assigning errors on the argument here for the first time, without notice to the appellee, and in respect to matters, which, if excepted to in the Court below, might have been cured by amendment. This Court would be at liberty, perhaps called upon, to roam through the record, without chart or compass. This would be most unreasonable and unheard of in a Court of Errors. The statute does not so provide.

We have examined the record with care, and may add that we have not discovered error in it. The plaintiff had for many years been a section-master of the defendant on its railroad, at the time he encountered the accident by which he was injured. He used in prosecuting his business, "a dump or pole car," moved by hand, for transporting the workmen under him, tools, etc., from place to place, on such parts of the road as he was charged with.

The evidence was more or less conflicting, but plainly, there was evidence tending to prove that the plaintiff knew of the unsafe and dan-

gerous condition of the car, for a month before the accident; that he reported its condition to the road-master over him, about ten days before the accident, who instructed him to send it to the shops to be repaired, and use another car he had in its stead; that he failed to obey this command, and continued to use the dangerous car; that the car he was instructed to use was in fairly good repair, and for several months thereafter it was used by the plaintiff's successor without accident. There was also evidence, that the plaintiff had a standing order given to him directly, and also all other section-masters, to send such cars to the shops for repairs, when they required the same, and to call on him for new ones when needed. As said above, there was evidence more or less in conflict with this, but for the present purpose, it is not necessary to state particularly what it was.

(200) As the evidence was conflicting, the Court properly gave the jury instructions directing them to consider it in various pertinent aspects of it—some favorable to the plaintiff, others favorable to the defendant. Of the latter, the plaintiff complains, as his counsel informs us. But we see no substantial objection to them. They were clearly warranted by the evidence.

The defendant having directed that the plaintiff, as its section-master, should use a "dump car" in the prosecution of the continuous work with which he was charged, was bound to supply him with such a car, reasonably well adapted to the service to which it was to be applied, and in all respects sufficiently strong, safe and sound to answer its purpose in the ordinary course of the work to be done, without exposing the section-master and the workmen under him, to peril not ordinarily incident to such service, and likewise to keep such car in reasonable repair. The work to be done was that of the defendant, and it was reasonable and just that it should supply and do all things essential to its effective prosecution, without exposing the persons whom it employed to do it, to extraordinary and unnecessary danger, in the course of its execution. But it was not a guarantor of their safety. Nor was it bound to protect the plaintiff against his own carelessness, neglect and default. He, by the usual contract of employment, agreed to be subject to the ordinary dangers incident to the labor and business he engaged to do, but he did not agree to accept hazard beyond that.

While the defendant was thus bound, the plaintiff was not free from obligation. On the contrary, by the nature and terms of his employment, express or implied, he assumed obligations and duties corresponding with those of the defendant, to a great extent. He was bound to reasonable care and diligence in the discharge of his duties as section-master in all respects. He was bound to be prudent, careful and industrious himself, and see that others, workmen under him, were so; to

take due care of the cars and all implements of labor with which he was charged—particularly for the present purpose, it was his duty to keep the "dump car" in good and safe condition as far as he conveniently could, in the course of his business, and when it required (201) repairs he could not make, and especially when it was dangerous to use it, to report its condition to the road-master or other proper officer of the defendant, to the end that the needed repairs might be made, and another safe and suitable car might be supplied. In the nature of such things and business, the defendant's other officers and agents could not be always or frequently present to examine the car used by the plaintiff. He was charged with it, to look after it, take care of, and use it. It was a material part of his duty to know its condition, and he was bound to report it when dangerous, to the proper officer or agent; if he failed to do so he was in default. In the nature of his business he was so charged.

And if he continued to use it while it was unsafe and dangerous, and he knew the fact, he was himself careless and negligent, and thus contributed to the peril to which he was exposed. He was not bound by his duty to the defendant to so expose himself—he did so in this case, of his own neglectful will and purpose, and must justly take the consequences of his own default. This was especially so, if he reported to the road-master the dangerous condition of the car, and the latter directed him to send it to the shop for repair, and to use another that was safe and in tolerable repair, and he nevertheless continued to use the dangerous car. He thus took upon himself the whole risk of his carelessness and reckless conduct, and when at last he encountered accident and suffering, and injury resulted to him, he could not be heard to complain of the defendant. However much he may have suffered, and however great the injury he sustained, it was the result of his own neglect, not that of the defendant, and it ought not, in justice, to answer to him for his own default. Indeed, if after the plaintiff notified the defendant of the dangerous condition of the car, with full knowledge of its condition, he continued to use it, such continued use on his part, was contributory negligence, and he could not recover damages from the defendant. A party shall not take advantage of his (202) own negligence, and reap reward therefor.

And so also, and for the like reason, if the plaintiff and the defendant had each like knowledge of the dangerous condition of the car, and the former continued to use it, each party took the hazard, and neither could legally complain of the other. The negligence of both parties would, in that case, be the occasion of the accident.

It would be otherwise, however, if the plaintiff reported the dangerous condition of the car, and the defendant promised that repairs should

be promptly made, and the plaintiff, trusting to such promise, continued to use it for a reasonable time, expecting the repairs to be made. In that case, the defendant would assume the whole risk for a time, to be determined by the circumstances of the matter; but if the plaintiff continued to use the car, indefinitely as to time, not trusting to the promise to repair, he would contribute to the peril.

The plaintiff was bound to reasonable care and diligence, whether he knew of the dangerous condition of the car or not. The law requires that all men shall do their duty in all employments and businesses, without regard to the default or neglect of others, although the manner of discharging and the nature of such duties may be modified by the default of others. *Crutchfield* v. *The Railroad,* 76 N. C., 320; *Johnson* v. *The Railroad,* 81 N. C., 458; *Railroad Co.* v. *Barber,* 5 Ohio St., 541; Whar. on Neg., §221.

The counsel for the appellant, on the argument, insisted that the Court ought to have submitted to the jury the question, "Whether or not the plaintiff used due diligence?"; or to state it more definitely and appropriately, "whether what the plaintiff did or failed to do, that was material, as shown by the evidence, constituted negligence or contributory negligence on his part."

We think the Court ought not to have submitted such a question. It is not the province of the jury to decide such questions. In this
(203) State, what constitutes negligence or reasonable diligence, is a question of law to be decided by the Court. The facts appearing, the Court decides that there is or is not negligence, or that there was or was not due diligence. If the evidence is all to the same effect, the Court may tell the jury, that if they believe the evidence, there is or is not negligence, as the case may be. When, however, the facts are to be found by the jury from the evidence, upon proper issues submitted, the Court submits the evidence to them, with instructions that if they find from it one state of facts suggested, then there is negligence; if another, then there is no negligence; if a third, then there is negligence; if a fourth, there is none, and so on, as the case may require. It is sometimes difficult, when the evidence is voluminous and conflicting, presenting many and varied possible aspects of the facts, to apply the law satisfactorily. This is attributable to the uncertain and complicated nature of the evidence, and the Court should be careful to present the various possible aspects of it to the jury, so that injustice will not be done to either party. It is the province of the jury to find the facts from the evidence; that of the Court, to determine what is or what is not negligence upon the facts as found. What facts the evidence proves is for the jury to find; what their legal effect is, is for the Court. *Herring* v. *Railroad,* 32 N. C., 402; *Biles* v. *Holmes,* 33 N. C., 16;

Heathcock v. *Pennington,* Ibid., 640; *Avera* v. *Sexton,* 35 N. C., 247; *Smith* v. *Railroad,* 64 N. C., 238; *Anderson* v. *Steamboat Co.,* Ibid., 399.

The instructions given were substantially correct. The plaintiff got the full benefit of the evidence favorable to him, and he has no just ground of complaint.

No error. Affirmed.

Cited: Porter v. R. R., 97 N. C., 73; *Dupree v. Tuten, ibid.,* 94; *Carroll v. Borden, ibid.,* 192; *Sellers v. Sellers,* 98 N. C., 20; *Allen v. Griffin, ibid.,* 121; *Burwell v. Sneed,* 104 N. C., 122; *McKinnon v. Morrison, ibid.,* 362; *Hudson v. R. R., ibid.,* 502; *Emry v. R. R.,* 109 N. C., 592; *Mason v. R. R.,* 111 N. C., 491; *Miller v. R. R.,* 128 N. C., 27; *Coley v. R. R., ibid.,* 537; *Ausley v. Tob. Co.,* 130 N. C., 36; *Pressly v. Yarn Mills,* 138 N. C., 433; *Reid v. Rees' Sons Co.,* 155 N. C., 234.

DAVENPORT & MORRIS v. W. J. LEARY, JR., Admr., et als.

Appeal—Confession of Judgment.

1. No particular assignment of error is necessary, when the appeal is taken from a judgment pronounced on an agreed statement of facts.

2. A judgment confessed under Section 571 of The Code must contain a verified statement of the facts and transactions out of which the indebtedness arose. Where the affidavit of the debtor set out that he was justly indebted to the judgment creditor in a certain amount, but did not embrace the account which was filed, *It was held,* not a compliance with the statute, and that the judgment was void.

(*Davidson* v. *Alexander,* 84 N. C., 621, cited and approved).

CIVIL ACTION, heard upon a case agreed, by *Gudger, Judge,* at (204) Spring Term, 1886, of PERQUIMANS Superior Court.

The facts are as follows:

1. F. W. Bond died intestate in September, 1885, and administration was granted upon his estate, by the proper Court, to Wm. J. Leary, Jr., who is now acting as such. His estate is hopelessly insolvent. During the whole of the year 1884, said Bond was a resident of Chowan county.

2. At the date of the judgments named herein, and up to his death, Bond owned an interest in real estate in Perquimans county, which has been, since his death, duly sold, and the proceeds of sale after paying

all prior liens, is under the control of Wm. J. Leary, Jr., administrator, for such of the judgment creditors herein named as the Court may adjudged entitled thereto.

3. Davenport & Morris claim by virtue of certain judgments obtained by them before a justice of the peace, aggregating four hundred dollars, and interest, and which were duly docketed in Perquimans county, August 20th, 1884.

4. Chas. Watkins & Co. claim by virtue of a judgment confessed by said Bond, in Chowan Superior Court, August 18th, 1884, in their favor, for three hundred and ten dollars and three cents, a transcript of which was docketed in Perquimans county, August 19th, 1884; copies of the affidavit on which this judgment was based, and the account filed with the same, are set out below.

5. Rawlins, Whitehurst & Co. claim the fund by virtue of a judgment confessed by Bond, in their favor, August 18th, 1884, for seven hundred and ninety-eight dollars and eighty-eight cents, in Chowan Superior Court, a transcript of which was docketed in Perquimans county, August 19th, 1884; copies of the affidavit on which this judg-
(205) ment was based, the note and statement of account, are also set out below.

6. The affidavit, statement of account, original note, and judgment of the Clerk in case of Rawlins, Whitehurst & Co., were folded together on August 18th, 1884, by the Clerk, and endorsed on the back of the package, after giving the name of the cause, "Judgment confessed before Clerk," and the affidavit and statement of judgment in case of Watkins & Co. were also folded and endorsed in same way on the back, and on the same day.

Across the face of the above statement was written August 18th, 1884, "Judgment confessed, August 18th, 1884.

WM. R. SKINNER, Clerk."

The affidavit on which the judgment of Rawlins, Whitehurst & Co. was confessed, was as follows:

"*Whereas,* F. W. Bond is indebted to the firm of Rawlins, Whitehurst & Co., of the city of Norfolk, State of Virginia, in the sum of four hundred and thirteen dollars and forty cents, due by note dated July 5th, 1883, due September 6, 1883, and by open account, three hundred and eighty-five dollars and forty cents, the whole amount being up to this date, including interest, seven hundred and ninety-eight dollars and eighty-eight cents. Whereas, the said Bond, the defendant, at the instance of the plaintiffs to secure by way of judgment the said sum of $798.88, the said Bond hereby confesses judgment therefor, and makes oath that the said debt is *bona fide,* and that he justly owes the same,

and under oath directs the Clerk of Chowan Superior Court to enter the same of record in his Court."

The note and account were as follows in the judgment of Rawlins, Whitehurst & Co.:

NORFOLK, VA., July 5, 1883.

$390.10.

Sixty days after date, I promise to pay to the order of Rawlins, Whitehurst & Co., three hundred and ninety dollars and ten cents, at the Home Savings Bank of Norfolk, Va., without defalcation, for value received; and we, maker and endorser, do hereby waive the (206) benefit of our homestead exemption as to this debt.

(Signed). F. W. BOND, Edenton, N. C.

No. 26,047, due September 6.

MR. F. W. BOND,
Bought of Rawlins, Whitehurst & Co.

1883.			
Jan.	31,	20,730 pounds of Ice	$ 31 10
Feb.	12,	20,850 pounds of Ice	31 28
Feb.	20,	181,400 pounds of Ice	272 10
1884.			
Feb.	29,	31,865 pounds of Ice	55 62
Feb.	13,	10,260 pounds of Ice	17 89
Feb.	16,	10,750 pounds of Ice	18 81
March	8,	121,980 pounds of Ice	182 47
March	8,	two pairs of Hooks	3 00
March	8,	50,460 pounds of Ice	75 64
March	8,	40,620 pounds of Ice	60 93
March	8,	10,280 pounds of Ice	15 42
			$764 26

The note and account on which the judgment in favor of Chas. Watkins & Co. was entered, was substantially the same as in the case of Rawlins, Whitehurst & Co.

It was admitted: 1. That if neither of the said confessed judgments is valid, Davenport & Morris are entitled to judgment for the money and for costs against the defendants other than Leary, administrator.

2. That if either or both of the confessed judgments are valid, Davenport & Morris are not entitled to the money, and the other parties shall recover of them the costs of the action.

3. That if both the said confessed judgments are valid, Watkins & Co., and Rawlins, Whitehurst & Co. shall share the fund *pro rata,*
(207) and the judgment shall be rendered in accordance therewith.

4. That if only one of the said confessed judgments is valid, the parties owning the said valid judgment are entitled to the fund and judgment shall be so rendered.

The Court was of opinion, and so ruled, that the contesting creditors, the defendants Watkins & Co. and Rawlins, Whitehurst & Co. were entitled to the funds in the hands of the administrator, in preference to the plaintiffs' claims, and directed the payment to be made to them *pro rata* according to the amount of their respective debts, and adjudged that the plaintiffs be taxed with the costs of the suit. From this ruling and judgment the plaintiffs appealed.

Mr. W. D. Pruden, for the plaintiffs.
Mr. Chas. M. Busbee, for the defendants.

SMITH, C. J. (after stating the facts). The plaintiffs' judgments, rendered by a justice of the peace, were docketed in the Superior Court, on the 20th day of August, 1884, while the others, confessed before the Clerk of the Superior Court of Chowan, were put upon the docket the day previous, would have priority, if effectual and sufficient as judgments. The ruling assumes them to be invalid, and hence this is the only question to be determined in the appeal.

The Code authorizes the entry of a judgment by confession, in or out of term, in the manner, and subject to the conditions mentioned in Section 571 and those succeeding. Among them it provides that when the claim is for money due, or to become due, there must be a statement in writing, verified by the oath of the debtor, of "the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due." The affidavits accompanying both judgments fail to show for what the debts were contracted, or the facts out of which the liabilities arose.

(208) They simply aver that the debts are *bona fide* due, and truly owing to the named creditors. It is true an account rendered accompanies each, and is filed among the papers, but they are not embraced in the affidavits so as to assure their correctness with the superadded sanctions of the debtor's oath, which the statute makes essential to the proceedings.

The case cited in the brief of plaintiffs' counsel, *Davidson* v. *Alexander,* 84 N. C., 621, is an adjudication decisive of the question, and the clear and conclusive argument contained in the opinion leaves us nothing to say in its support.

A preliminary motion was made by appellants' counsel to dismiss the appeal, because the undertaking is not in the sum prescribed by law, nor has any other sum been fixed by the Court, which motion was afterwards withdrawn; and further to affirm the judgment, for the reason that no specific errors are assigned.

This motion is overruled. An error is sufficiently assigned in an appeal from the ruling as to the law upon an agreed state of facts, by the party against whom the ruling is made. What greater particularity can be required? The issue is joined by the adverse contentions as to the law arising upon the facts, and an appeal from an adverse decision distinctly presents it for reviewal.

This is a compliance with the rule.

There is error, and the judgment must be reversed and judgment entered here for the contesting creditor-plaintiffs.

The appellees will pay the costs of the appeal.

Error. Reversed.

Cited: Sharp v. R. R., 106 N. C., 321; *Uzzle v. Vinson,* 111 N. C., 142; *Greensboro v. McAdoo,* 112 N. C., 360; *Bank v. Cotton Mills,* 115 N. C., 525; *Smith v. Smith,* 117 N. C., 350; *Martin v. Briscoe,* 143 N. C., 359; *Wallace v. Salisbury,* 147 N. C., 60; *Bank v. McCullers,* 201 N. C., 444.

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

Appeal—Partnership—Statute of Limitation.

1. Where no case on appeal accompanies the transcript of the record on appeal, and no error is apparent on the face on the record, the judgment will be affirmed.

2. Every presumption is made in favor of the correctness of the judgment in the Court below. So, where it appeared from the record, that the judgment was rendered on the verdict and the admissions of the parties, but no admissions appeared in the record, *It was held,* that it would be presumed that the admissions would warrant the judgment, and it would be affirmed.

3. Partners stand in the relation of trustees for each other, and something must be done to render that relation adversary, before the Statute of Limitations will begin to run.

(*State* v. *Murray,* 80 N. C., 364; *State* v. *Edney,* Ibid., 360; *State* v. *Leitch,* 82 N. C., 539; *Bank* v. *Its Creditors,* 80 N. C., 9; *Paschall* v. *Bullock,* Ibid., 8; *Neal* v. *Mace,* 89 N. C., 171, cited and approved).

(209) CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at Spring Term, 1885, of ORANGE Superior Court.

There was a judgment for the defendant and the plaintiff appealed.

The facts appear in the opinion.

Messrs. John Manning, A. W. Graham and *E. C. Smith,* for the plaintiff.

Mr. John W. Graham, for the defendant.

SMITH, C. J. The complaint alleges that a verbal agreement was entered into between the parties to the action, for the formation of a co-partnership for the purpose of negotiating a sale of a large estate in New Mexico, belonging to the New Mexico Mining Company, upon a commission of ten per cent. of any and all proceeds, of whatever kind, received by the company, and arising from the sale of the property, and to this end their united efforts were to be directed.

The action is for an account and settlement of the joint business, prosecuted for several years, and judgment for what may be found due the plaintiff. The answer admits the co-partnership as alleged, and the efforts of each to carry out its purposes, but avers that in the winter of 1875-'76, a final settlement took place, and all claims of either were adjusted, except in certain notes jointly due in New Mexico, and twenty-five shares of stock in the company.

(210) The answer further alleges, that from that time no claim was ever made against defendant until November, 1881, when $75 was demanded on account of one of the notes, and this claim was abandoned by the plaintiff after his correspondence with Dr. Stubb, to whom it had been referred. The answer also set up as a defence, the lapse of time since, of more than three years, and the bar interposed by the statute of limitations.

Two issues were submitted to the jury, which, with the response to each, are as follows:

1. When did the partnership between the plaintiff and defendant terminate? Answer—In 1875.

2. Was there a settlement of the affairs of said partnership in the winter of 1875-'76? Answer—No.

Thereupon judgment was rendered in these words: "This cause coming on to be heard, and the issues having been found by the jury, it is now, on said finding *and the admission of the plaintiff,* adjudged that the action is barred by the statute of limitations, and that it be dismissed." From this judgment the plaintiff appealed.

There is no case containing exceptions to any ruling of the Court accompanying the record, nor do any appear in the record itself. What

admissions were made by appellant, upon which and the verdict the judgment is based, are not stated, so that we can see if there was error in the ruling and correct it. It is not said that the admissions are contained in the complaint, and that these alone were acted on in passing upon the application of the statute, but there may have been oral admissions also, and these must be assumed to have been sufficient to warrant the ruling, as judicial action is deemed rightful in the absence of all evidence to the contrary. Error must be shown or the judgment will be affirmed.

This rule of action in the appellate Court is firmly established by numerous cases, of which we cite but a few; the more recent criminal ones: *State* v. *Murray,* 80 N. C., 364; *State* v. *Edney,* Ibid., 360; *State* v. *Leitch,* 82 N. C., 539. Civil: *Bank* v. *Creditors,* 80 N. C., 9; *Paschall* v. *Bullock,* Ibid., 8; *Neal* v. *Mace,* 89 N. C., 171. The (211) cases cited in the argument for the appellee, show that partners stand in relation of trustee to each other, and something must be done to render that relation adversary, and put the statute in motion, so that when it has run its course it affords protection. The verdict establishes the fact that the partnership expired in 1875, and that there was then no statement of its affairs. Upon this finding "and the admission of the plaintiff," the Court makes its final adjudication against the plaintiff. No exception is taken until at the hearing before us, and we must in conformity with the rule, assume that the admissions were sufficient to uphold the ruling.

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

No error. Affirmed.

Cited: Johnson v. Loftin, 111 N. C., 323; *Baker v. Brown,* 151 N. C., 16.

M. WOODLIEF v. W. S. HARRIS and R. E. PARHAM.

Agricultural Advances—Chattel Mortgage.

1. In order to constitute an agricultural lien under the statute, the advances must have been made in order to raise the crop to which the lien attaches.
2. It is not necessary for its validity, that a mortgage on crops then growing or to be planted, should contain a provision that the mortgagee should have the right to take possession on default.
3. Where a mortgage of a crop to be thereafter produced, described it as follows: "gives to M. W. a lien on all crops raised on lands owned or rented

by me during the present year," and it was found by the jury that the mortgagor owned a farm on which the cotton in dispute was raised: *It was held*, that the description was sufficient, and the mortgage valid.

(*Patapsco Guano Co.* v. *Magee*, 86 N. C., 350; *Reese* v. *Cole*, 93 N. C., 87; *Harris* v. *Jones*, 83 N. C., 318; *Atkinson* v. *Graves*, 91 N. C., 99, cited and approved).

CIVIL ACTION, tried on appeal from a justice of the peace, before *Clark, Judge,* and a jury, at October Civil Term, 1885, of WAKE Superior Court.

(212) The action is for the recovery of the value of a bale of cotton, converted by the defendants to their own use; and on the trial before the jury, they rendered the following special verdict:

"The jury find as a special verdict, that the defendants bought three bales of cotton, raised by the mortgagor Pearce on his farm in Franklin county during the year 1883; and the jury further say, that if the Court is of opinion that the mortgage from Pearce to Woodlief of February 20th, 1883, and registered February 23d, 1883, in Franklin county, is valid as against the defendants, they return their verdict in favor of the plaintiff, and assess his damages at forty-five dollars, with interest thereon from November 7, 1883, at 8 per cent. per annum. If the Court should be of opinion that said mortgage is invalid as against the defendants, they return their verdict in favor of the defendants."

The mortgage deed referred to and made part of the verdict, is in these words: "On or before the 1st day of November next, I promise to pay M. Woodlief, of Youngsville, or order, forty-five (45) dollars, for value received in fertilizers delivered to me by M. Woodlief, agent for said ———. It is agreed that payment may be made with 450 lbs. clean white lint cotton, of the first picking, not below the grade of middling, for each ton, to be delivered to their agent at Youngsville depot; Provided it is so delivered in merchantable order, on or before the 1st day of November, 1883; after that date, the option expires, and payment will be made in currency, at the rate of forty-five dollars per ton, with interest at 8 per cent. after maturity.

"In consideration of the contract made by———to deliver said fertilizers, and as security for this obligation, the maker of this note hereby gives M. Woodlief a lien on all crops raised on lands owned or rented by me, during the present year, pursuant to provisions of the acts of the Legislature in such cases made and provided; and also agrees to pay all costs and charges incurred in enforcing this lien and collecting the amount due. And as a further security, I do hereby convey to

(213) him these articles of personal property, to-wit: one mule and one horse. But on this special trust, That if I fail to pay said debt

on or before the first day of November, 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, and apply the proceeds of such sale to the discharge of said debts, and pay any surplus to me.

"Witness, my hand and seal, this 20th day of Feb. 1883."

The Court ruled that the instrument was inoperative; first, as an agricultural lien under the statute, because it attempts to secure a pre-existing debt; and secondly, as a mortgage at common law, for the reason that there are no conveying words, nor authority conferred to take possession of the property on default, and for the further reason, applicable to the instruments in either aspect, that it fails to describe the land on which the cotton was to be raised. Judgment being accordingly rendered for the defendant, the plaintiff appealed.

Messrs. Jos. B. Batchelor, Jno. Devereux, Jr., and *D. G. Fowle,* for the plaintiff.

Mr. Armistead Jones, for the defendants.

SMITH, C. J. (after stating the facts). We concur in the opinion that the deed is ineffectual under the statute, and for the reason given. The advancements must be to aid in the making of the crops to which the lien attaches. *Patapsco Guano Co.* v. *Magee,* 86 N. C., 350; *Reese* v. *Cole,* 93 N. C., 87. But we differ from the Judge, as to the efficacy of the deed as a common law mortgage. In *Harris* v. *Jones,* 83 N. C., 318, it was decided that the words "convey a lien upon each and every of said crops to be cultivated and made upon the said lands," were sufficient to constitute a mortgage. In the view of a Court of equity, such is the substantial effect of a conveyance of the legal title as the security for an assumed obligation or liability. Nor is it necessary that there should be a provision for taking possession of crops in case of default, since the lien may be enforced through the Courts, and possession is only required to enable the mortgagee to enforce it himself and (214) without judicial assistance.

The other objection, that no place is described on which the crop is to be made, is not sustained by the deed. It gives a lien on all crops raised on lands *owned or rented by me during the present year.* It was executed late in February, and the special verdict describes the three bales of cotton converted by the defendants, as having been *"raised by the mortgagor Pearce, on his farm in Franklin county, during the year* 1883." The mortgagor then did have a farm of his own, and the cotton covered by the lien grew upon and was gathered from it. The conjunction "or" couples the owned and rented land, and the conveyance dis-

tributively applies to each and both. Then the grant was of such a crop as was capable of transfer, and to which the operative words would attach, as soon as it came into existence, under repeated rulings of this Court, of which the case of *Atkinson* v. *Graves,* 91 N. C., 99, furnishes an illustration. But this is not adverse to our present ruling, as the learned Judge who tried the cause in the Superior Court interpreted it. There the description was "of one bale of good middling cotton, that I may make or cause to be made, or grown, during this year," &c., without designating the land upon which it was to be grown; and this was properly held to be too vague to pass an interest in any cotton, and was not within the compass of the restricted rule, that permits a mortgage upon an unplanted crop, which must or may have a future potential existence, as the offspring or increment of a *corpus,* in which the mortgagor has property or a right to possess, as applied to the fruits of the earth. Thus far the general rule is enlarged, which permits to be conveyed only what then existed.

There is error, and the judgment must be entered upon the special verdict for the plaintiff.

Error. Reversed.

Cited: Taylor v. Garris, 98 N. C., 736; *Gwathney v. Etheridge,* 99 N. C., 575; *S. v. Howe,* 100 N. C., 457; *Taylor v. Hodges,* 105 N. C., 348; *Brown v. Miller,* 108 N. C., 398; *Weil v. Flowers,* 109 N. C., 216; *Crinkley v. Egerton,* 113 N. C., 146; *Strouse v. Cohen, ibid.,* 352; *S. v. Surles,* 117 N. C., 723.

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GEO. F. BUTTS v. JOS. SCREWS.

Conditional Sale—Registration—Mortgages—Process—Deputy Clerk—New Trial.

1. As between the parties, a conditional sale is binding, although not reduced to writing or registered. The Code, §1275, only requires them to be reduced to writing and registered, as against creditors and purchasers for value.

2. At common law, mortgages of personal property were not required to be reduced to writing, and our statute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value.

3. After a party has pleaded, it is too late to take any objection to the process by which he was brought into Court.

4. So, where an order to seize property in an action for claim and delivery was signed by an unsworn deputy clerk, who had never been formally inducted into office, but the objection was not made until after an answer to the merits had been filed, *It was held*, too late.

5. A new trial will not be granted where the action of the trial Judge, even if erroneous, could by no possibility injure the appellant.

(*Clayton* v. *Hester*, 80 N. C., 275; *Ellison* v. *Jones*, 26 N. C., 48; *Ballew* v. *Sudderth*, 32 N. C., 176; *Vasser* v. *Buxton*, 86 N. C., 335; *Parris* v. *Roberts*, 34 N. C., 268; *Brem* v. *Lockhart*, 93 N. C., 191; *Deal* v. *Palmer*, 72 N. C., 584; *Gay* v. *Nash*, 78 N. C., 100; *Reese* v. *Cole*, 93 N. C., 87; *Duffy* v. *Averitt*, 27 N. C., 455; *Mills* v. *Carpenter*, 32 N. C., 298, cited and approved).

This was an action to recover a horse, cart and harness, tried before *Connor, Judge,* at April Term, 1886, of WAYNE Superior Court.

As ancillary to the action, the plaintiff, at the time of suing out the summons, obtained a requisition for the delivery of the property, issued to the Sheriff of Wayne county, who, in pursuance of said order, seized the said property and delivered the same to the plaintiff.

The plaintiff in his complaint alleged, that he was the owner and entitled to the immediate possession of one horse, cart and harness, and that the same was wrongfully detained by the defendant.

The defendant answered, and denied the allegation in the complaint, and demanded judgment that the property be returned to him, and that damages be awarded him for the wrongful taking and detention of the property.

The summons and requisition having been issued by a deputy (216) of the Clerk, who had not been sworn, and it appearing that he had inadvertently omitted to sign the requisition, upon motion of the plaintiff, the Court, under objection by the defendant, allowed the party, who was present in Court, to affix his signature to the requisition. The defendant moved the Court to dismiss the action, and render judgment against the plaintiff for the re-delivery of the property to him. This motion the Court refused, and the defendant excepted.

The following issues were submitted to the jury:

1st. Is the plaintiff the owner and entitled to the possession of the property described in the complaint?

2d. Is the same wrongfully detained by the defendant?

George F. Butts, the plaintiff, testified in his own behalf:

I sold the horse and cart January, 1885, to the defendant for $100.00. He was to pay me in the Fall. He said that he might not be able to pay the whole of the price in the Fall. I told him to pay me what he could, and if he got along all right, I would wait for the balance. He paid me $40.00. The horse and cart were to be mine until the price was paid in full. The defendant moved off my land in the Fall, and I

demanded the horse and cart. He refused to give them up. He owes me on the price $61.80. I retained the title until they were paid for. I did not sell the property on two years' time.

The defendant was then examined in his own behalf, and testified as follows:

The plaintiff said, "I will sell you the horse and cart on two years' time, and if we can agree, and you cannot pay the whole of the price at the end of two years, I will give you the third year."

There was other evidence tending to sustain the defendant.

The defendant demanded judgment upon the testimony, because the conditional sale was not reduced to writing, as the statute required; that the condition was void and the title vested in the defendant absolutely.

The Court refused to render judgment as prayed for, and in-
(217) structed the jury:

"That if, from the evidence, they believed that it was agreed between the parties at the time of making the contract, that the title to the horse and cart was to remain in the plaintiff until the purchase money was fully paid, and that it had not been so paid, they would find the issues in favor of the plaintiff, unless they believed from the evidence that there was an agreement that the property was to remain in the possession of the defendant until the time of credit had expired."

To this charge the defendant excepted.

The jury found the issues for the plaintiff.

Whereupon the Court rendered judgment for the plaintiff for the possession of the property described in the complaint and for the costs, and the defendant appealed.

No counsel for the plaintiff.

Mr. Geo. M. Lindsay, for the defendant.

ASHE, J. (after stating the facts). There are many cases in the reports of the decisions of this Court, where the Court has been called upon to put a construction upon instruments similar in terms to this contract, and it has been almost uniformly held, that they are evidences of conditional sales. To that effect is *Clayton* v. *Hester,* 80 N. C., 275; *Ellison* v. *Jones,* 26 N. C., 48; *Ballew* v. *Sudderth,* 32 N. C., 176; *Vasser* v. *Buxton,* 86 N. C., 335; *Parris* v. *Roberts,* 34 N. C., 268. The difference between this and those cases is, that this was a parol agreement, and the others were in writing, but it is nevertheless, according to the authorities, in its terms a conditional sale, and the defendant insisted that inasmuch as it was a conditional sale, the condition was void, the sale not having been reduced to writing and registered, as is required by §1275 of The Code. The section provides, that "all condi-

tional sales of personal property, in which 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 now provided by law for chattel mortgages." (218)

This section has had the construction of this Court. In *Brem* v. *Lockhart,* 93 N. C., 191, the Court held that the effect of the Act requiring all conditional sales of personal property to be reduced to writing and registered, is to render inoperative as against creditors and purchasers for value, so much of the contract as reserves the title in the vendor, unless and until the contract is registered.

As between the parties, the sale is binding without registration, and is only void if not reduced to writing and registered as against creditors and purchasers for value. *Deal* v. *Palmer,* 72 N. C., 584; *Gay* v. *Nash,* 78 N. C., 100; *Reese* v. *Cole,* 93 N. C., 87. And as between the parties it is not essential that it should be reduced to writing, for the Act gives to conditional sales the same effect as that given by law to chattel mortgages; but chattel mortgages are not required to be reduced to writing, except when it is necessary to have them registered to validate them against creditors and purchasers for value, and then only for the reason they could not be registered without being reduced to writing.

But as between the parties, where there are no creditors or purchasers to be affected by the transaction, the mortgage of personal property is good at common law without being reduced to writing. It is so laid down in Benjamin on Sales, p. 2, where the text is supported by numerous authorities. But aside from this, it is familiar learning, for which no authority need be cited, that at common law a sale of personal chattels is good without writing.

Here there are no creditors or purchasers whose rights are interfered with. The transaction is confined entirely between the parties to the original contract of sale, and we can see no reason why the plaintiff may not have judgment for the property, unless he may be debarred from a recovery by some of the other exceptions taken by the defendant.

The exception taken to the summons, on the ground that the deputy who signed and issued it, had never been sworn and (219) inducted into office, is untenable. The defendant had pleaded by filing his answer before the exception was taken. It was then too late, even if well founded, to take any exception to the process by which he was brought into Court. *Duffy* v. *Averitt,* 27 N. C., 455; *Mills* v. *Carpenter,* 32 N. C., 298.

The other exception to the ruling of his Honor, in allowing the Deputy Clerk to affix his signature to the requisition, is no ground for a *venire de novo,* for even if his Honor had no power to allow the amendment, it was perfectly harmless, for the action being in nature of detinue

for the recovery of specific property, and it appearing that the plaintiff had the right to recover the property in that form of action, it was entirely unnecessary for him to resort to the ancillary remedy of claim and delivery, for upon the law and facts of the case, he was entitled to a verdict, even if that proceeding had been omitted. Whether then it was error or not in the Court to allow the signature to be affixed to the order of requisition, it was immaterial, and in no way prejudiced the defendant.

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

No error. Affirmed.

Cited: Perry v. Young, 105 N. C., 466; *Kornegay v. Kornegay,* 109 N. C., 190; *Wallace v. Cohen,* 111 N. C., 107; *Blalock v. Strain,* 122 N. C., 288; *Balk v. Harris,* 132 N. C., 16; *Cherry v. Canal Co.,* 140 N. C., 426; *S. v. Hodge,* 142 N. C., 685; *Bateman v. Lumber Co.,* 154 N. C., 253; *Comrs. v. Indemnity Co.,* 155 N. C., 227; *Ewbank v. Lyman,* 170 N. C., 507; *Corp. Com. v. R. R.,* 170 N. C., 566; *Observer Co. v. Little,* 175 N. C., 43; *Brewer v. Ring,* 177 N. C., 485; *Rankin v. Oates,* 183 N. C., 520; *S. v. Beam,* 184 N. C., 742; *Gover v. Malever,* 187 N. C., 776; *Perry v. Surety Co.,* 190 N. C., 292; *Steel Co. v. Rose,* 197 N. C., 465; *Bank v. McCullers,* 201 N. C., 443; *Bechtel v. Weaver,* 202 N. C., 856.

W. J. PARKER, Admr., v. JOHN A. McDOWELL et al.

Promissory Notes.

1. Where an accommodation note was made payable to the accommodation endorser, to be discounted at a particular bank, but it was not discounted at this bank, but sold to a private individual; *It was held,* that the endorsers were liable, although the sale was made without their knowledge.
2. Where a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is not a fraudulent misapplication of the note, if it is discounted at another bank, or used in the payment of a debt, or in any other way for the credit of the maker.
3. Where in such case, the note is made payable to the order of the cashier of a particular bank, to be discounted at that bank, but the bank refuses to discount it, and never acquires any right to the note, and it is afterwards discounted by a third party; *It was held,* that the note was void, although the cashier endorsed it "without recourse."

4. If the accommodation paper is a bond, which the obligee refuses to accept, it is void in the hands of a third person, for want of delivery, although he is a purchaser for value.

(*Ray* v. *Banks*, 51 N. C., 118, cited and approved. *Respass* v. *Latham*, 44 N. C., 139; *Dewey* v. *Cochran*, 49 N. C., 184, and *Southerland* v. *Whitaker*, 50 N. C., 5, distinguished and approved).

CIVIL ACTION, tried before *MacRae, Judge,* at Fall Term, (220) 1885, of BLADEN Superior Court.

The action was heard upon a case agreed, and the facts are as follows:

The plaintiff's action is based upon a certain paper writing of which the following is a copy:

FAYETTEVILLE, N. C., Dec. 5, 1882.

$205.00.

Sixty days after date, I promise to pay to A. Moore, or order, two hundred and five dollars, for value received, negotiable and payable at the People's National Bank, of Fayetteville, N. C., with interest after maturity at the rate of eight per cent. per annum, until paid, for money loaned.

[Signed] N. A. STEDMAN, JR.

The above was in the common printed form of paper used by said bank; upon the back of said paper writing are written the names of the defendants, Jno. A. McDowell and A. Moore, endorsed in blank.

It is agreed that N. A. Stedman, Jr., is the principal obligor, and that the defendants, Jno. A. McDowell and A. Moore, were endorsers to the within named bank, at the request and for the accommodation of the said N. A. Stedman, Jr., in order to enable him to borrow money from that bank, and their endorsement and contract as such was solely for that purpose.

That this note was not presented or offered at said bank for (221) discount, or if so offered or presented, it was refused, and afterwards the said N. A. Stedman, Jr., without the knowledge or consent of the endorsers (the defendants), sold the same to, or discounted it with the plaintiff's intestate, Jas. McK. Mulford, who purchased it for value from the said N. A. Stedman, Jr.

That the defendants, McDowell and Moore, accommodation endorsers for said Stedman, had no knowledge of the sale of the note to the plaintiff's intestate by said Stedman, until a short time before the bringing of this action, nor did they agree with the plaintiff's intestate that the same might be sold to him by said Stedman.

That plaintiff's intestate had no notice of any understanding or agreement that the note should be discounted by said bank other than what appears on the face of the note.

Upon the foregoing facts agreed, it being further agreed by counsel that the Judge might take the papers and decide the matter at Cumberland, the presiding Judge being of the opinion that there is nothing upon the face of the note to give notice to the purchaser for value before maturity, of the understanding between the maker and endorsers that the said note was to be negotiated only at the People's National Bank, but that the clause making it negotiable and payable at said Bank was collateral matter, which might have been introduced for the accommodation of the holder, and not affecting the validity of the note, it is adjudged that the plaintiff recover of the defendants the sum of two hundred and five dollars, with interest at eight *per cent. per annum,* on the same from February 8th, 1883, together with the costs of this action, to be taxed by the Clerk.

From which judgment the defendants appeal to the Supreme Court.

Mr. C. C. Lyon, for the plaintiff.
Mr. Thos. H. Sutton, for the defendants.

(222) ASHE, J. (after stating the facts). The defendant insisted there was error in the judgment of the Court below, and to sustain his contention, relied upon the decision of the Court in the cases of *Respass* v. *Latham,* 44 N. C., 139; *Dewey* v. *Cochran,* 49 N. C., 184, and *Southerland* v. *Whitaker,* 50 N. C., 5. But these decisions do not have any application to the case under consideration. *Respass* v. *Latham* was an action upon a sealed instrument, brought by the assignee against the obligee. The obligees refused to receive the bond, and returned it to one of the obligors. Some eight days after its presentation and refusal, the person named obligee, was induced to sign an endorsement "without recourse" to the assignee, who brought the action against the obligors, and it was held that the bond was void for want of delivery. The action in *Dewey* v. *Cochran,* was upon a promissory note, payable to "Thomas W. Dewey, cashier, or order, negotiable and payable at the branch of the Bank of the State of North Carolina at Charlotte," and signed by Caldwell & Huggins, as principals, and by R. T. McIntyre and W. B. Cochran, as sureties.

The note was presented at the bank, and the holder was informed by the President of the bank, that the bank would not discount it. The note was thereafter transferred by one Huggins, a partner of the firm of Caldwell & Huggins, to Farrior & Bros., of Charleston, South Caro-

lina, in payment of a debt due them by Caldwell & Huggins. The action was brought in the name of Thomas W. Dewey. There was a special verdict, finding the foregoing facts, and the Court rendered judgment of nonsuit against the plaintiff, on the ground that Dewey had never accepted the note; that his assent to it was essential to the validity of the contract; that he had not the legal title to the note, and therefore, the action could not be maintained in his name, and on the further ground, that by making the note payable to the Cashier of the bank, and negotiable at the bank, it showed upon its face that the undertaking of the sureties was, that it should be discounted there and nowhere else.

In the case of *Southerland* v. *Whitaker,* the note upon which the action was brought, was in its terms identical with the note in (223) *Dewey* v. *Cochran.* It was payable to William Reston, Cashier. It was never presented to the bank to be discounted, and when past due W. Reston was requested by one Kelly to endorse it in blank, "without recourse," which he did, and it was never delivered to him or accepted by him, under any contract or agreement with the makers or either of them, and that he had no title or interest in the note, and nothing was paid him for it by Kelly, who thereafter endorsed it without consideration to the plaintiff, to enable him to bring the action in Duplin county. It was held that the note was void, because it was manifest upon its face, being payable to the Cashier, that it was the understanding of the parties that it should be discounted at one of those banks designated in the note, and for the further reason that there was no proof of a consideration. But PEARSON, *Judge,* who delivered the opinion in that case, proceeded to say: "There is a distinction between that case, and when the note is payable to the seller." The intent that it is to become a note, and have validity from the time it is written, and its being made afterwards negotiable and payable at bank, is a collateral circumstance, introduced for the accommodation of the seller, and not intended to affect the validity of the note.

The note upon which this action was brought, was what is called an accommodation note, and is in the following words and figures:

"Sixty days after date, I promise to pay to A. Moore, or order, two hundred and five dollars, for value received, negotiable and payable at the People's National Bank of Fayetteville, N. C., with interest after maturity at the rate of eight *per cent. per annum* until paid, for money loaned. (Signed) N. A. STEDMAN, JR."

On the back of the note were written the names of John A. McDowell and A. Moore.

The case of *Ray* v. *Banks,* 51 N. C., 118, was similar to this, (224) and the note upon which the action was founded was so far iden-

tical in its terms with that in this case, that we think the adjudication there is decisive of this case.

The note there was made by James Banks, payable to William S. Mullins, ninety days after date, negotiable at the Branch Bank of Cape Fear, at Fayetteville, or at the Bank of Fayetteville, at the option of the holder, and endorsed in blank by W. S. Mullins and McKethan. Banks, at the date of the note, being indebted to Ferdinand McLeod in an amount agreed to be that of the note, transferred the note to him in payment of the indebtedness, and McLeod endorsed to the plaintiff for value. The note was never discounted nor offered for discount at the bank. It was held by this Court, that the plaintiff, the endorsee of McLeod, could recover against the maker of the note, or any of the endorsers thereon, *though it had never been discounted at bank, nor offered for such a purpose.* Judge RUFFIN, delivering the opinion of the Court, distinguished the case from that of *Dewey* v. *Cochran* and *Southerland* v. *Whitaker.* He said those cases were much misconstrued in applying them. "They were not intended to affect, and do not affect, notes and endorsements founded on actual transactions for value; as, for example, notes given upon sales, or intended to raise money in the general market. The decision applied to the cases before the Court, which were of notes made to enable the principal to borrow money from a bank, and with that purpose sufficiently indicated, as it was thought, on the face of the papers themselves." The notes in these cases were payable to the cashiers of the banks; in the case of *Ray* v. *Banks* it was payable to Mullins. Hence the distinction.

The opinion of the learned Judge is fully sustained by Daniel in his work on Negotiable Instruments, vol. 1, §792, where it is said: "It is now well settled, that when a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent mis-
appropriation of the note if it is discounted at another bank, or
(225) used in the payment of a debt or otherwise for the credit of the maker."

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

No error. Affirmed.

Cited: Parker v. Sutton, 103 N. C., 194; *Bank v. Couch,* 118 N. C., 439.

F. A. L. CASSIDEY et al. Ex parte.

Clerk of Superior Court—Executors and Administrators—Jurisdiction.

1. Moneys paid into the office of the Clerk of the Superior Court by executors, administrators and collectors, under the provisions of The Code, §§1543 and 1544, do not pass into the jurisdiction of the Superior Court, but the Clerk receives and is responsible for them, officially, as a public depository.
2. It is the duty of the Clerk on demand, promptly to pay over such moneys to those who were entitled to receive them from the executor, administrator, or collector; and should he fail to do so, the same remedies are available against him as are provided by Sections 1510 and 1511 of The Code, against executors, administrators and collectors.
3. The Superior Court has no jurisdiction upon petition, motion or summary orders to direct the disposition of such moneys.

This was an *Ex parte* PETITION to direct the payment of certain moneys, heard before *Clark, Judge,* at September Term, 1886, of the Superior Court of NEW HANOVER.

The facts necessary to an understanding of the questions presented by the appeal are fully stated in the opinion.

Mr. Charles M. Busbee, for the petitioners.
No counsel *contra.*

MERRIMON, J. It appears from the case stated on appeal, that Robert Henning, executor of the will of James Cassidey, deceased, had paid to each of five of seven legatees under the will, the amount of his legacy; that as to the other two legatees, to-wit: F. A. L. Cassidey and H. C. Cassidey, for some reason, he did not pay them, but more than twelve months having elapsed after the date of the letters testamentary, he paid the sum of money, $919.80, due them, one-half to the (226) credit of each, into the office of the Clerk of the Superior Court of New Hanover county, where the letters testamentary were granted, and took the receipt of the Clerk for the same, in exoneration of his liability as executor, as allowed by the statute, (The Code, §§1543, 1544).

Afterwards the last named legatees demanded of the Clerk of the Court mentioned, that he pay to them the money so in his office, according to their respective rights. For causes not necessary to be stated here, the Clerk declined to do so.

Thereupon they filed their *ex parte* petition in the Superior Court, alleging the facts and circumstances in relation to the fund last men-

tioned, and praying that the Court should make an order directing such application of the fund, as was indicated in the petition.

The Clerk undertook to hear the petition, and upon consideration thereof, he refused to pay or apply the fund in his office as prayed for in the petition, and made an order to that effect, from which the petitioners appealed to the Judge in Term. In Term the Judge dismissed the petition, upon the ground that it was irregular and wholly without warrant of law.

The petitioners excepted and appealed to this Court.

The Court very properly dismissed the petition. There is no statutory provision that authorizes it, nor can it be upheld upon general principles of law or practice.

The statute (The Code, §§1543, 1544), provides that, "It shall be competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of Clerk of the Superior Court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector, and his sureties on his official bond, to the extent of the amount so paid.

(227) Sec. 1544: It shall be the duty of the Clerk in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office."

It must be observed, that the moneys thus authorized to be paid into the office of the Clerk, do not, when paid in, pass within the jurisdiction and control of the Superior Court. The Clerk receives, takes charge of, is chargeable with, has control of, and is answerable for them, by virtue of and in exercise of his powers, duties and authority distinct from those as Clerk of the Court. The statute does not, in terms or effect, place such moneys within the jurisdiction and control of the Superior Court, so that it could, upon summary application, or by motion or petition, direct the payment of them to such persons as may be entitled to have them. Such moneys may be paid into *"the office of the Clerk"*—not into the Court. Nor is there anything in the nature of the office of Clerk, that implies that the Court shall have control of it, especially as the Clerk is charged by statute with many duties apart from the ordinary duties of his office as Clerk of the Court. That this is the proper interpretation of the statute, is made more manifest by the fact that the original statute (Act 1881, Chap. 305, §§1, 3), which is in substance that now in The Code set forth above, in terms provides that such moneys may be paid "into the office of the Judge of Probate," and

it is made the duty of the "Judge of Probate" to give receipt, &c. The draftsman of the original statute, obviously was not advertent to the fact, that at the time it passed the Legislature there was no Judge of Probate, so denominated by law, but the Clerk was commonly called the Judge of Probate, and by statute he exercised, by virtue of his office as Clerk, probate powers, and had jurisdiction of matters of probate. The statutory provision above set forth, plainly so modifies the original statute as to make it harmonize with other statutes prescribing and defining the powers of the Clerk separate and apart from his ordinary duties as Clerk.

The statute does not in terms prescribe what disposition the (228) Clerk shall make of moneys thus paid into his office, but clearly he is answerable for them officially, and the plain and necessary implication is, that he must receive, keep, dispose of or pay them out to, or for the benefit of those persons entitled to them while they remained in the hands of the executor, administrator or collector, unless after he received them, their respective rights should in some way pass to other persons, or be modified by some event or circumstance, in which case he should pay them to the persons entitled. He must receive such moneys and dispose of them as the executor, administrator or collector ought and might be required to do, if respectively they had not paid them into the office of Clerk. The purpose of the statute is to provide a safe public depository for such moneys, and the exoneration of executors, administrators and collectors, if in the case provided for, they shall see fit to avail themselves of the benefit of the provision made.

The Clerk ought at all times to pay promptly any such moneys in his office to the persons properly entitled to receive them, but if for any cause, upon demand, he will not, then the person or persons entitled, may have his or their remedy by special proceeding or civil action in the Superior Court, as allowed by the statute (The Code, §§1510, 1511), against executors, administrators or collectors for the recovery of legacies and distributive shares, and no doubt the Clerk might have relief by action in a possible case, when it is doubtful who is entitled to have the moneys in his office if the party claiming will not assert his right.

It is manifest that the petitioners misapprehended their remedy, and the Clerk his duties and powers. The latter seems to have thought that he was acting as and for the Court, in respect to a matter of which it had jurisdiction without summons, special proceeding, or civil action.

There is no error. The judgment must be affirmed.

No error. Affirmed.

Cited: Presson v. Boone, 108 N. C., 85; *Smith v. Patton,* 131 N. C., 398.

(229)

JOHN S. MILLER v. JANE LEACH, Executrix of ANGUS LEACH.

Action, survival of—Evidence—Judgment of another State—Limitations.

1. By virtue of the Constitution of the United States, and Acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the Court.
2. Where the record of a judgment of the Court of another State is sued upon in this State, it is not necessary to allege in the complaint, or to prove that it was warranted by the law of the State in which it was pronounced. The record is the highest and conclusive evidence of that fact.
3. All causes of action founded upon contract, debt or other duty, survive against the personal representative of the person chargeable therewith.

(*Davidson* v. *Sharpe*, 28 N. C., 14, cited and approved).

CIVIL ACTION, tried before *Boykin, Judge,* at February Term, 1886, of RICHMOND Superior Court.

A jury trial was waived, and by consent the Court found the facts as follows:

The summons in this case issued on the 3d of December, 1881. Jane Leach qualified as Executrix of Angus Leach, who was a resident of and died in Richmond county. Jane Leach is a resident of Richmond county.

On the 8th of January, 1872, the plaintiff recovered judgment for $60, the amount of the debt, and for one hundred and thirty dollars costs, with interest on both sums from the 8th of January, 1872, against Angus Leach, in the Court of Common Pleas of Chesterfield county, in South Carolina; that this judgment has been duly certified by the proper authorities of South Carolina in the manner prescribed by law, and that such judgment was rendered according to law in the said State; that this action is instituted to enforce the collection of said judgment under the laws of North Carolina; that the plaintiff did not exhibit or

(230) produce in evidence any statute or other law of the State of South Carolina, nor offer other evidence under which said judgment was rendered at the trial of this cause; that this action was commenced in the court of a Justice of the Peace of Richmond county, and the pleadings therein were oral; that the plaintiff complained that the testator of the defendant was indebted to him upon the said judgment in the sum of $60, the amount of the debt, and $130 costs, with interest on

both sums from the 8th of January, 1872, and that the defendant denied the judgment, and pleaded the statute of limitations in bar thereof.

Upon the foregoing findings of fact, the Court found the following conclusions of law, to-wit: That the said judgment does not survive the defendant Angus Leach; that after his death its character as a judgment is *functus officio,* and that it cannot be enforced against his executor. And it was adjudged that the defendant go without day and recover his costs. The plaintiff excepted to the above ruling and appealed.

Mr. James A. Lockhart, for the plaintiff.
Messrs. Platt D. Walker and *Frank McNeill,* for the defendant.

ASHE, J. (after stating the facts). The only question presented by this appeal, is whether there was error in the judgment of the Superior Court, in holding that the judgment rendered in South Carolina does not survive the defendant therein, Angus Leach, and cannot be enforced against his executrix in this State.

The action is upon a judgment rendered by a Court of competent jurisdiction in South Carolina. It is regularly authenticated under the Act of Congress; and by Article IV, §1, of the Constitution of the United States, it is declared that "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State." By virtue of this provision of the Constitution, and the Act of 1790, prescribing how records, etc., are to be authenticated, the judgments of the several States are put upon the same footing (231) with domestic judgments, not for all purposes, but only to give a general validity, faith and credit to them as evidence, so as to make them conclusive, only so far as to preclude all inquiry into the merits of the subject matter. *Mills* v. *Dunyear,* 7 Cranch., 481; *McElmoyle* v. *Cohen,* 13 Pet., 312; but leaving the questions of jurisdiction, fraud in the procurement, and whether the parties were properly brought before the Court, open to objection, 1 Greenleaf on Ev., §548; Freeman on Judgments, §548; 2 Taylor on Evidence, §1533; and it is held by the same author, §1534, "that the Courts of this country will so far presume that a foreign tribunal has acted within the limits of its authority, and that its proceedings are regular, that if an action be brought upon a foreign judgment, the plaintiff need not allege in his declaration either that the foreign Court had jurisdiction over the parties or the cause, or that the proceedings have been properly conducted. * * * The only exception to this is when such a judgment is pleaded by way of estoppel or justification."

The principle here laid down is fully sustained by this Court in the case of *Davidson* v. *Sharpe,* 28 N. C., 14, where it is held, that "when

a judgment or decree in another State is produced in evidence in one of our Courts, it is not necessary to show by any extrinsic evidence, that the judgment or decree was warranted by the law of the State in which it was pronounced. The judgment or decree is the highest evidence of that fact." The same doctrine is held in most of the States. 1 Am. Lead. Cas., p. 647, and authorities there cited.

As to the question of survivorship, it has been established from the earliest history of the law, that as to all personal claims, such as are founded upon any obligation, contract, debt or other duty, upon which a testator might have been sued in his lifetime, the right of action survives his death, and is enforceable against his executors. 2 Williams on Executors, §1557.

The action was not barred by the statute of limitations. The Code, §152.

(232) There is error, and this opinion must be certified to the Superior Court of Richmond county, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Arrington v. Arrington, 127 N. C., 196; *Levin v. Gladstein,* 142 N. C., 486; *Marsh v. R. R.,* 151 N. C., 162; *Mottu v. Davis,* 151 N. C., 246; *Bank v. Dew,* 175 N. C., 82; *State v. Herron,* 175 N. C., 757; *Webb v. Friedberg,* 189 N. C., 172; *Van Kempen v. Latham,* 195 N. C., 391; *Bonnett-Brown Corp. v. Coble,* 195 N. C., 495; *In re Osborne,* 205 N. C., 719.

W. H. SIKES v. W. J. PARKER, Admr. of J. McK. MULFORD.

Diligence—Evidence of Transactions with Deceased Persons—New Trial—Partnership.

1. Upon the trial of an issue as to the existence of a partnership between the plaintiff and the intestate of defendant, the former is not a competent witness to prove the fact of the partnership, nor the fact that his property went into the possession of the intestate as a portion of the partnership stock, unless it affirmatively appears that his knowledge of such facts was not derived from conversations and transactions with the deceased.

2. A new trial for newly discovered testimony will not be granted in the Supreme Court, unless it clearly appears that the applicant therefor used all reasonable diligence to procure it on the former trial; that it is not merely cumulative or corroborative, and that it is necessary to prevent gross injustice, and that another trial will produce a different result.

3. It is not sufficient in an application for a new trial, for applicant to state generally that he exercised diligence in his attempts to secure the evidence; he must set out the particulars of his efforts, so that the Court may see and judge of his diligence.

(*Lockhart* v. *Bell*, 90 N. C., 499; *Bledsoe* v. *Nixon*, 69 N. C., 82; *Shehan* v. *Malone*, 72 N. C., 59; *Henry* v. *Smith*, 78 N. C., 27; *Simmons* v. *Mann*, 92 N. C., 12, cited and approved).

CIVIL ACTION, tried before *MacRae, Judge,* at Fall Term, 1885, of BLADEN Superior Court.

The plaintiff alleged that he and the intestate of the defendant, in 1871, entered into a copartnership in the general mercantile business, to be carried on in the name of the intestate; that such business was so conducted for several years, until the death of the intestate, when the defendant took into his possession all of the partnership assets, and refused to account with him therefor. The defendant answered that he had "no knowledge or information sufficient to form a belief as to the truth of these allegations."

The following issues were, by agreement of counsel, submitted, (233) as covering the matter to be submitted to the jury:

Was the plaintiff W. H. Sikes a co-partner in the business of J. McK. Mulford from 1871 to the death of said Mulford?

The plaintiff offered himself as a witness, and his counsel asked the following questions: Were you or were you not a partner of J. McK. Mulford? Objection by defendant. Objection sustained and plaintiff excepted.

The plaintiff testified that before Mulford came to Elizabethtown, and at the time he came, plaintiff was doing a liquor and grocery business in the store which Mulford afterwards occupied.

The plaintiff's counsel asked him the following questions: What became of your goods and business at the time that Mulford came to Elizabethtown? This question was asked, as stated by counsel for plaintiff, for the purpose of establishing the fact of a partnership, showing that the plaintiff's goods and business went into the hands of Mulford. Objections by defendant. Objections sustained. Plaintiff excepted.

W. A. Atkinson, a witness for plaintiff, was asked the question: Did you ever hear plaintiff at any time before the commencement of this suit (if so, when), say that he was a partner with Mulford? Objection by defendant. Objection sustained. Plaintiff excepted.

Much testimony was offered on each side.

The jury responded to the issue—No.

The appellant moved in the Supreme Court for a new trial, upon the ground of newly discovered evidence material to the issue. This motion was supported and opposed by affidavits.

Mr. Thomas S. Sutton, for the plaintiff.
Mr. C. C. Lyon, for the defendant.

MERRIMON, J. The plaintiff was examined on the trial as a witness in his own behalf. In the very nature of the matter in respect to which the question embraced by both the exceptions were propounded, he would, in any answer he might make to them, unless he should
(234) answer in the negative, almost necessarily have to testify concerning a personal transaction or communication between himself and the intestate of the defendant. This he could not do, as the defendant was not examined. The Code, §590. The fact to be proven was that of a partnership between the plaintiff and the intestate.

Ordinarily, the partnership, if it existed, would in its nature imply such a transaction or communication—that they had conversations and an agreement, each with the other, of which each had knowledge from the other personally. About such a matter, each would see and talk with, and have transactions with the other. This would be in the usual order of things. It might, perhaps, be possible that the plaintiff could have answered the questions thus put to him without testifying to such a transaction or communication; but if he could, it ought to have appeared that he could, in order to render his answers competent. He might have been interrogated as to the source of the information he had pertinent to the matter inquired about, with a view to determine the question of the competency of such answers as he might make. He was competent to testify that he did not derive his information from a transaction or communication between himself and the intestate. *Lockhart* v. *Bell,* 90 N. C., 499.

The plaintiff was first interrogated as to the existence of the alleged partnership, and obviously it was expected and intended that he should testify that it did exist. This he could not do, because in doing so he would be a witness "concerning a personal transaction or communication between himself and the intestate." The Court having disallowed an answer to the first question, the second one was put to the witness, the counsel saying, that its purpose was to prove the partnership "by showing that the plaintiff's goods and business went into the hands of the intestate." The witness could not testify as proposed for the reasons stated above. Certainly, unless it appeared to the contrary, the intestate if living, could contradict the plaintiff, because he would have
(235) had knowledge of the matter—the transaction in respect to which the plaintiff proposed to testify. The purpose of the statute is to prevent the surviving party from testifying in such case. The deceased cannot be heard, and in his absence by death, the surviving party shall

not be heard. So that, the exceptions specified in the record cannot be sustained.

The plaintiff moved in this Court for a new trial, upon the ground that he had discovered since the trial in the Superior Court, much evidence going to prove the alleged partnership, that he did not know of at the trial, and that he could not by due diligence on his part have then produced. It has been frequently held, that this Court will always entertain such a motion with caution and scrutiny, and will not grant a new trial except in a clear case, coming within the well settled rules of practice in such respect. It is unnecessary to here restate the reasons upon which this rule is founded. They will be found stated in ample clearness in *Bledsoe* v. *Nixon,* 69 N. C., 82; *Shehan* v. *Malone,* 72 N. C., 59; *Henry* v. *Smith,* 78 N. C., 27; *Simmons* v. *Mann,* 92 N. C., 12.

It is not sufficient that the defendant has discovered evidence pertinent and competent, since the trial, to prove his case; he must show that he used reasonable diligence before the trial to produce evidence appropriate and sufficient for that purpose. Did he do this? Let us inquire. It appears that the intestate did an extensive business in the town of Elizabethtown for many years next before his death, as a merchant, and he had many, continuous, and varied transactions with many people in connection with his mercantile and other business. He must have bought and sold goods and other property from time to time, and continuously. It is probable therefore, that many persons had more or less knowledge of the character of his business, and whether or not he did business on his own sole account exclusively, or in partnership with the plaintiff or some other person. He must have kept numerous books of account; invoices of goods purchased by him from time to time, purchased goods from many persons in the markets, have written many letters on business, executed conveyances and other papers (236) in writing, all showing to some extent the nature of his business transactions. He very probably had salesmen, book-keepers, relatives, and friends, not a few, familiar with his business relations. It would seem, therefore, to have been comparatively easy to find witnesses who could testify fully as to his business and business relations. In support of the motion for a new trial, the plaintiff states in his affidavit that in order to prepare the above action for trial, and to prove the affirmative of the issue which was raised by the pleadings, he issued subpœnas up to the term of the Court at which the said action was tried, for every person who he knew, or whom he had any reason to believe, knew anything about the business transactions of the plaintiff and the defendant's intestate, and that in order to ascertain who did know anything about the matters involved, he made diligent inquiries.

It will be seen that he does not state that he made personal inquiry of any person as to what he might know of the intestate's business and business relations, and the alleged partnership. He only summoned such persons as "he knew, or whom he had any reason to believe, knew anything about the business transactions of the plaintiff and the defendant's intestate." He does not state what reason he acted upon, nor the names of the persons whom he summoned, nor their opportunity to be informed.

He does not state that he made such inquiry of persons who sold the intestate goods and other property from time to time and frequently, to whom he gave his notes for money, to whom he frequently wrote, and who wrote to him, on business, to whom he frequently sold goods and other property, his salesmen, his book-keepers, his intimate friends. While he says that he "made diligent inquiry" and effort to produce evidence, in general terms, he fails to state what he did, of whom he made inquiry, what they knew, and what opportunity they respectively had to obtain and have information, so that the Court could see
(237) and judge of the character and measure of his diligence. This he ought to have done, if not with particularity, certainly in a summary manner. The Court, not himself, must judge of the reasonableness of his diligence, and to this end what he did, what effort he made, must appear. *Shehan* v. *Malone, supra; Henry* v. *Smith, supra.* The plaintiff further states that the defendant had possession of his intestate's books of account, papers, documents, &c., and before the trial declared, (to whom does not appear), that there was nothing in them that indicated the existence of the alleged partnership, and therefore he did not summon or require him to produce them; that since the trial he is informed that the defendant has said he has the inventory of the stock of goods taken at the time the partnership was formed; but he does not state that he ever asked to be allowed to examine the books and papers referred to, nor did he ask the Court to require the production of them for his inspection, as he might have done. In this there would seem to have been gross neglect. So that it does not appear to us, that the plaintiff exercised reasonable diligence in his efforts to obtain the evidence before the trial that he has since then discovered.

Moreover, the Court will not grant a new trial, if the newly discovered evidence is simple or mainly cumulative and corroborative. What the precise nature of the evidence produced on the trial was—whether direct or circumstantial, or both—does not appear, as it should on applications like this, so that the Court could see the application and bearing of the new evidence. It is said in the case settled upon appeal, however, that "much testimony was offered on each side." It may be fairly inferred from this, and the nature of the issue, that the evidence was varied in its

nature and application. So taking the fact to be, the newly discovered evidence is of a very similar character. The names of several persons are given together, who, the plaintiff states, would testify to conversations they respectively had with the intestate, in which he said in some connection that does not appear, that there was a partnership, and he further states that one of the persons heard a private con- (238) versation between the plaintiff and the intestate, in which they "talked freely about the conduct and management of the business;" but he does not state how such a conversation came about, or its purpose. They seem to have been loose, casual and indefinite. The affidavits of the persons named, as to what they know, are not produced, with one or two exceptions, and those produced are indefinite and unsatisfactory. Indeed, the evidence, so far as we can see and judge, is mainly, if not altogether, cumulative. It is fragmentary, indefinite and uncertain, and adapted in its nature only to turn the scale if the issue were left in doubt. Such newly discovered evidence does not entitle the plaintiff to have his motion granted. To do this, the evidence should be clear, strong and convincing, if not conclusive. The object in granting a new trial is *not* to afford the party asking for it simply another opportunity to correct his mistakes, and test fortune a second time, but only to prevent probable, gross, substantial injustice, occasioned by no inexcusable neglect or default of the party complaining.

We do not deem it necessary to advert to the affidavits produced by the defendant in opposition to the plaintiff's motion, further than to say that they tend strongly to show that the motion is without real merit.

The motion must be denied and the judgment affirmed.

No error. Affirmed.

Cited: Thompson v. Onley, 96 N. C., 13; *Armfield v. Colvert,* 103 N. C., 157; *Carey v. Carey,* 104 N. C., 175; *Watts v. Warren,* 108 N. C., 522; *Black v. Black,* 111 N. C., 303; *Lyon v. Pender,* 118 N. C., 151; *Fertilizer Co. v. Rippy,* 123 N. C., 658; *Cox v. Lumber Co.,* 124 N. C., 82; *Hicks v. Hicks,* 142 N. C., 233; *State v. Casey,* 201 N. C., 624.

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SALLIE G. WORTH v. JOHN L. WORTH, Admr. of JOB WORTH, et al.

Legacy—Will, Construction of.

1. In the construction of wills the intention of the testator is to be ascertained from the document itself in the light of surrounding circumstances, and no evidence, *dehors*, of his intention is competent.

2. A bequest of a pecuniary legacy "out of the estate," or "to be paid," or "to be raised out of my estate," is a charge first upon the personal, and after its exhaustion, upon the real estate of the testator, unless it can be seen from the context, or other parts of the will, that these terms were used in a more restricted sense, and including only the personal estate.

3. The testator having in the first clause of his will, given a pecuniary legacy to his wife to be paid to her in cash or bonds at her option out "of my estate," and in subsequent clauses made specific devises of the greater part of his "*real* estate," but in disposing of his personal property used the terms "my estate." *Held*, that the real estate specifically devised was not chargeable with the payment of the pecuniary legacy to the wife.

(*Bray* v. *Lamb*, 17 N. C., 372; *Biddle* v. *Carraway*, 59 N. C., 95; *Hart* v. *Williams*, 77 N. C., 426; *Devereux* v. *Devereux*, 78 N. C., 386; *Brawley* v. *Collins*, 88 N. C., 605; *Page* v. *Foust*, 89 N. C., 447, cited and approved).

CIVIL ACTION, tried before *MacRae, Judge,* at Fall Term, 1886, of SURRY Superior Court.

Job Worth died in 1875, having executed a will in due form to pass his estate, which was duly proved, and the executors therein named having renounced, letters of administration with the will annexed issued to the defendant, John L. Worth.

The will is in form as follows:

I, Job Worth, of the county of Surry, in the State of North Carolina, being of sound mind and disposing memory, do make and ordain the following as my last will and testament, viz.:

I give and bequeath to my beloved wife, Sally, the sum of eighteen hundred dollars, to be paid to her in cash or in cash bonds, at her option, out of my estate. At our marriage, she, my wife, was possessed of some estate, which I have never reduced to possession, and to which I lay no claim whatever, but if it should be adjudged or decreed that I have any interest whatever therein, I hereby will, bequeath and devise the same to her forever in addition to the eighteen hundred dol-
(240) lars above mentioned, the whole of both sums to be her absolute property forever. I furthermore will, devise and bequeath to her forever, my household and kitchen furniture, to be her absolute property. Furthermore, I will, devise and bequeath to her one-third part of all my real estate for and during her natural life.

I will, devise and bequeath to my daughter, Phœbe B. Davis, wife of B. F. Davis, and to my son, David W. Worth, the other two-thirds of all my real estate, to be theirs absolutely and forever, and at the death of my beloved wife, I will, devise and bequeath to my daughter, Phœbe B. Davis, and my son, D. W. Worth, the land herein willed to my wife.

I further direct and require that after my estate shall be settled, then any and all portions of the same shall be equally divided between my

beloved wife, Sally, my daughter, Phœbe B. Davis, and my son, D. W. Worth, share and share alike, D. W. Worth first accounting to my estate for the sum of one thousand dollars which he has received in excess of the other children, by way of advancements.

Lastly, I hereby appoint and constitute my son-in-law, B. F. Davis, and my brother-in-law, W. R. Hollinsworth, my executors to this my last will and testament.

The testator owned at his decease considerable real estate lying in Surry county, and much personal estate, consisting of farm stock, agricultural implements, household and kitchen furniture, and of accounts, notes and bonds.

Since the institution of this action, an account of the administration has been taken, and it appears therefrom that the entire personal estate has been expended in payment of debts, except the household and kitchen furniture which have been delivered to the plaintiff Sally, under the first clause of the will. There is nothing left in the hands of the administrator with which to pay the $1,800, legacy, unless the real estate is chargeable therewith, and it must be sold to raise a fund for the purpose.

The present action was commenced on the 24th day of October, (241) 1881, against the administrator and the other defendants, legatees, and devisees, for an account of the personal estate, and, if found insufficient, for a judge declaring the $1,800 legacy a charge upon the land other than the life estate devised to the plaintiff, and for a sale of so much thereof as may be necessary for its discharge.

Upon these facts the plaintiff contended:

1. That she was entitled to have allotted to her one-third in value of all the real estate of the testator for life.

2. That she was entitled to have so much of the residue of the land sold as might be necessary to pay to her the legacy of $1,800, with interest thereon from the time it became due and payable to her by the administrator.

The defendants contended:

1. That the plaintiff was not entitled to have her legacy of $1,800 paid out of the real estate, but that it was only a charge on the personal estate.

2. That if a charge at all, then it was a charge on the whole realty, and must be paid out of the entire real estate, and her one-third interest for life must be allotted to her out of the remainder of the real estate after the payment of the legacy.

3. That the $1,800 legacy was a charge on the personal estate. The widow must account for the household and kitchen furniture admitted to be in her possession.

And these questions of construction were submitted to the Court.

Thereupon was rendered the following judgment:

This cause having been submitted to the Court upon the statement of facts agreed, it is considered and adjudged, that the $1,800 bequeathed by the testator to the plaintiff is a charge upon the whole estate, except the personal property specifically bequeathed to plaintiff, and it being agreed that the personal property has been exhausted in the payment of debts, the said sum is charged upon all of the real estate of the testator. The defendant administrator *c. t. a.* is directed to sell so much of said real estate as may be necessary to pay the said legacy, and
(242) the balance of the real estate is to be divided according to the directions of the will.

From which judgment the defendants appealed.

Mr. C. B. Watson, for plaintiff.

Messrs. Holton and *W. B. Glenn,* for defendants.

SMITH, C. J. (after stating the facts). In the construction of testamentary dispositions of property, the primary purpose should be to ascertain and give effect, as far as allowed by law, to the testator's meaning, and this is to be found within the written instrument itself, in the light of surrounding circumstances. No outside evidence of that intention, furnished by his contemporary or other declarations, are receivable.

And when the sense in which he uses certain words can be ascertained from the provisions of the will, it is to be considered that such is their meaning, and such becomes their legal effect.

Unaided by other provisions of the will, a direction for the payment of a pecuniary legacy "out of the estate" would charge both the personalty and land, the latter, after exhausting the former, and both, if required for its payment. So it is declared in *Bray* v. *Lamb,* 17 N. C., 372, where the $500 bequest was directed *"to be raised and paid out of my estate,"* and there was nothing to qualify the import of the expression found elsewhere in the writing.

A similar interpretation, under like circumstances, was put on a bequest "of five hundred dollars, to be paid by my executors *out of my estate,"* in the subsequent case of *Biddle* v. *Carraway,* 59 N. C., 95. In *Hart* v. *Williams,* 77 N. C., 426, where the real and personal estate, "except as hereinafter mentioned," were given to the plaintiff (who was also executor) in trust for the testator's mother during life, and then for an equal division between his father and two brothers; and this clause is followed by another, in which the executor is required to
(243) pay $250 to a freed man, a former slave of the father, it was

properly decided that as there was no undisposed property out of which the money bequest could be paid, the will was, in effect, a gift of the whole estate, subject to the bequest, which must first be provided for.

So an estate devised and bequeathed *"subject to the devises and bequests herein* otherwise made," was held to charge such estate with them, as if in express terms they had been directed to be taken from such estate, in *Devereux* v. *Devereux,* 78 N. C., 386.

While such is the established rule of interpretation, and the word "estate" unexplained, and in its general meaning as comprehending both realty and personalty, would make the pecuniary gift a charge upon both, if by the use of other annexed terms, or from other parts of the instrument, it can be seen or fairly inferred that the term was used in a more restricted sense, and was intended to designate only the personal property of the deceased, such must be its confined effect. *Brawley* v. *Collins,* 88 N. C., 605; *Page* v. *Foust,* 89 N. C., 447.

Let us see how this is. The testator owned a considerable personal estate, of which he gives his wife specifically his household and kitchen furniture. How much in value this was, we are not informed in the record; that it must have been quite large, or at least so estimated by the testator, is fairly inferrable from the fact that as a surplus, after payment of debts and legacies, it is distributable between the same beneficiaries before provided for. In this he was mistaken, but the belief has some significance in interpreting other parts of the will.

The legacy of $1,800 is to be paid "in cash or cash bonds, at her option, out of my estate." This left to his wife's election the acceptance of such bonds as were on hand, or the requirement of money when realized.

There were such bonds on hand, and if not needed in payment of debts and charges of administration, she had a right to require them from the executor towards the satisfaction of her legacy.

The just and fair way of arriving at the sense in which the (244) word *"estate"* is used in the direction about using the money to meet this pecuniary gift, is to see how it is employed, and with what meaning, elsewhere in the will. It is used by him three times more, and most evidently as embracing, in each case, personal property alone.

Immediately thereafter, in the same general clause, the testator speaks of his wife's being at their marriage "possessed of some estate," which he had never reduced to possession, and to which he laid no claim, but if it should be adjudged that he had any, he gives it to her. The testator must have used the word here as confined to personalty, since any interest he could acquire in his wife's land would terminate at his death.

On the other hand, in the devise of his lands, one-third to his wife for life, and the other two-thirds to daughter Phœbe, and son, David W., he designates the subject of her gift as "real estate," and the remainder in that given the wife as "land."

Here he maintains the distinction in these two species of property.

Again, in a posterior clause, he directs, "after my *estate* shall be settled," then what is left shall be equally divided between the three objects of his bounty, the son, "D. W. Worth, accounting to my estate for the sum of $1,000, which he has received in excess of the other children by way of advancements." Plainly the testator intends the personal and not the real estate when he employs the term in this part of his will, and indicates an expectation, by the required direction of the advancements, that the surplus after settlement would be very considerable.

Again, could he have intended to subject the same lands to a sale to pay the legacy, if the personal assets proved insufficient?

While it is true the one-third devised to the wife for life, as if allotted as dower in case of intestacy, would be exempt from liability for debts by virtue of the statute (The Code, §2105), still the general expression, to be paid "out of my estate," would include it, and may furnish (245) some guide in arriving at the testator's intent.

Indeed, it has been held, but our own adjudications are to the contrary, that a charge of legacies on all the testator's real estate does not form a lien upon lands specifically devised. *Carson* v. *Carson,* 7 H. L. C., 168; O'Hara on Wills, 241.

But we put our decision upon the ground, that the testator discriminates between disposition of his real and personal estate, using appropriate words for the latter, and employing the word in its general form *"estate,"* when he was referring to the personal estate. Such being his intention, we must give it effect in putting the same meaning upon the word as does the testator himself.

There is error. Only such, if any, of the property comprehended in the residuary clause is liable for the said legacy. This will be certified for further proceedings in the Court below. Judgment modified accordingly.

Error. Modified.

SUSAN KING v. JOHN R. PHILLIPS.

Interest.

Where a bond or other instrument for the payment of money, does not specify on its face that interest is to be paid, interest is in the nature of damages, and the payment of the principal money will bar an action for the interest; but where interest is stipulated for in the contract itself, it becomes a part of the debt, and may be recovered, although the principal sum has been paid.

(*Bledsoe* v. *Nixon*, 69 N. C., 82, cited and approved. *Moore* v. *Fuller*, 47 N. C., 205, distinguished and approved).

This was a petition filed by the defendant, to rehear the decision rendered in this case at the last term of the Court, and reported on page 555 of volume 94.

The errors assigned were:

1st. That this Court overlooked the fact that the payment of $907.00 was made and accepted as a settlement and discharge of all the principal money, leaving interest only unsettled, and the plaintiff's action was one to recover the interest after the principal had been (246) settled.

2d. That in the opinion, the Court erroneously proceeded upon the idea, that in order to relieve the defendant from liability, it was necessary to establish that the executor accepted said sum of $907.00, &c., in satisfaction of the debt, whereas the acceptance of the amount, in payment of the principal, in law discharged the whole debt and interest thereon.

3d. That the Court misapprehended the verdict of the jury, in that, in the opinion, on page 557, it is said, "It, (the verdict,) does not find that the executor did more than receive and credit the sum which the defendant admitted and was willing to pay," whereas, the finding on the issue establishes the fact that there was an agreement to pay the principal, and that the sum of $907.00 was paid in pursuance of said agreement in settlement of the principal.

4th. That in the opinion, the Court erroneously proceeded upon the idea, that the defendant contended that a compromise was understood and intended to be brought about under §574 of The Code, whereas the defendant did not rely upon any compromise under said section, but insisted that the jury by their verdict, having established the fact that the principal had been paid, no recovery could be had in this action for interest.

5th. That the verdict of the jury was misapprehended, and the law applied to facts not set out in the statement of the case on appeal.

Mr. Geo. Rountree, for the plaintiff.
Mr. W. R. Allen, filed a brief for the defendant.

ASHE, J. (after stating the facts). Upon a careful consideration of the errors assigned, we see no reason for overruling the decision made at the last term. We do not think there was any error in the interpretation given by this Court to the finding of the jury upon the second issue. But conceding its meaning was such as contended for by (247) the defendant, that it establishes the fact that the principal had been paid, and only the interest remained unsettled, still we are unable to see the error complained of by the defendant. It is true, this Court did not take into consideration the question now presented as a ground of error, that the action could not be sustained for the interest after the principal had been paid, but if it had done so, it could have come to no other conclusion than it did; for there is a marked and admitted distinction between these cases where the interest is stipulated to be paid in the note or bond, and when there is nothing said with respect to the interest, and it is left to be recovered as a part of the damages for the retention of the debt.

To be more specific. When interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt. *Hamilton* v. *Van Rensselaer,* 43 N. Y., 244; Byles on Bills, 240. And in such a case the payment of the principal is a bar to an action to recover the interest. *Hamilton* v. *Van Rensselaer, supra; Hentz* v. *Miller,* 94 N. Y., 64.

But when interest is stipulated for in the contract, it is as much a part of the debt as the principal itself. 1 Daniel on Neg. Ins., 919; 2 Edwards on Bills and Notes, §1012; *Boodily* v. *Bellamy,* 2 Burr., 1096; *Southern Central R. R. Co.* v. *The Town of Moravia,* 61 Barb., 180; *Fake* v. *Eddy,* 15 Wend., 76; *Bledsoe* v. *Nixon,* 69 N. C., 82; where the distinction here drawn is clearly stated. It was there held, "when there is no agreement to pay interest, interest when allowable, is allowed not as a part of the contract, but as an *incident,* and by way of damages for the default to make the creditor good for the loss he has sustained by reason of the breach of contract." In this class of cases, it has always been held that after the principal of the debt has been paid and received in full, no action could be maintained to recover interest; the reason being that interest, in such cases, being a mere incident, cannot exist without the debt, and the debt being extinguished, the interest must necessarily be extinguished also.

A distinction has been made between such cases and those (248) where interest is payable by the terms of the contract. In the latter case, the interest is as much a part of the contract as the principal, and not a mere incident.

The case of *Moore* v. *Fuller,* 47 N. C., 205, which was relied on in the argument when the case was first before us, is a case where the bond sued on was silent as to the interest, but in the case now under consideration, there is an express stipulation to pay interest, which, according to the authorities, is not a mere incident to the debt, but as much a part of it as the principal itself. Consequently, there is no reason why in such case the interest may not be recovered even after the principal has been paid.

We see no reason for disturbing the decision heretofore made. The petition is therefore dismissed.

Dismissed.

Cited: Scott v. Fisher, 110 N. C., 314; *Broadfoot v. Fayetteville,* 128 N. C., 531; *Bond v. Cotton Mills,* 166 N. C., 22; *Grocery Co. v. Taylor,* 175 N. C., 38; *Parker v. Mott,* 181 N. C., 441.

A. K. CLEMENTS v. M. A. ROGERS, Extrx., et als.

Appeal—Evidence—Issues—Character—Judge's Charge.

1. Where an action is brought for an account, and the answer pleads matter in bar of the account, and a trial is had of the issues raised by the plea in bar, an appeal lies by the defendant from a judgment ordering an account before the account is taken.

2. In an action by a principal against his agent for an account and settlement, it is error to admit the declarations of a partner of the agent, that a firm, of which the agent was a member, had paid a debt to him as agent of the plaintiff. Such evidence is hearsay, and as it manifestly tends to the injury of the defendant, it is error to let it go to the jury.

3. Where, in such case, the agent pleads a settlement and discharge, a witness cannot testify to such declarations of a partner of the agent, to explain why he advised the plaintiff not to sign a discharge of the agent, the debt from the partnership not being embraced in the statement rendered by the agent at that time.

4. A new trial will not be granted because of the submission of alleged improper issues, when they were submitted after argument and without objection, and substantially cover the merits of the case.

5. In an action against the executrix of an agent for an account and settlement, evidence of the character of the testator, whether good or bad, is incompetent.

6. If a special instruction asked for is substantially given, it is all that is required. A party has no right to have his prayers for instruction, even if proper, given to the jury in the very words in which they are asked.

7. The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered.

(*Price* v. *Eccles*, 73 N. C., 162; *Smith* v. *Barringer*, 74 N. C., 665; *Sloan* v. *McMahon*, 85 N. C., 296; *Commissioners* v. *Raleigh*, 88 N. C., 120; *Humble* v. *Mebane*, 89 N. C., 410; *Burton* v. *The Railroad*, 84 N. C., 193; *Heileg* v. *Dumas*, 65 N. C., 214, cited and approved).

(249) CIVIL ACTION, tried before *Clark, Judge,* and a jury, at October Civil Term, 1885, of WAKE Superior Court.

The defendants appealed.

The facts appear in the opinion.

Messrs. Geo. V. Strong and *A. M. Lewis,* for the plaintiff.

Mr. Daniel G. Fowle, for the defendants.

MERRIMON, J. The motion to dismiss the appeal, upon the ground that the order appealed from is interlocutory and an appeal does not lie at the present stage of the action, cannot be allowed. The action involves the settlement of an alleged agency that embraced numerous and important pecuniary transactions, running through many years. The defendants allege that there was a settlement of all matters embraced by that agency in July, 1875, and that the principal then executed to the agent, who was the testator of the defendant executrix, an acquittance and discharge as to all liabilities on his part, as agent, prior to that time. This the plaintiff denies, and thus an issue is raised.

The defendant executrix admits, however, that the agency mentioned continued after the alleged settlement, for several yars, and concedes that an account of transactions embraced by it since the time of the alleged settlement ought to be taken, and she avers her readiness
(250) to account in that respect. The action was tried upon the issues raised by the pleadings, and the jury found by their verdict, that there had not been any such settlement, and that the principal did not execute an acquittance and discharge to the agent, as alleged by the defendants. Thereupon, the Court entered an order directing a referee to take, state and report, an "account of the matters embraced in the complaint." From this order the appeal was taken.

It is settled by many decisions, that an appeal lies from such an order, upon the ground that if the discharge or release shall be established, then the plaintiff will not be entitled to an account, and the action will be at an end. It would be unjust and vexatious to compel a party to account, if he had already done so. The defence puts in issue the cause of action. And an account will not be directed, although the defendant admits that an account of transactions subsequent to the alleged settlement and discharge is necessary. This latter rule of practice seems to rest upon the ground, that the whole account demanded by the action should be taken at the same time, on the score of orderly procedure, convenience and economy. *Price* v. *Eccles,* 73 N. C., 162; *Smith* v. *Barringer,* 74 N. C., 665; *Sloan* v. *McMahon,* 85 N. C., 296; *Commissioners* v. *Raleigh,* 88 N. C., 120; *Humble* v. *Mebane,* 89 N. C., 410.

In the lifetime of Mary Ann Rogers, deceased, she had very considerable and important business transactions. The testator of the defendant executrix, John W. Rogers, had been her business and "financial" agent for about thirty years; in him she greatly confided, and he had charge of her business matters generally. The question at issue was, whether or not she and her agent had a settlement of his agency in July, 1875, and she then executed to him a release and discharge as her agent. The defendants alleged the affirmative of this question, the plaintiff the negative, and he averred moreover, that if there had been any such settlement, and such release and discharge, the same were fraudulent and void, and procured by the fraudulent and undue influence of the agent.

On the trial, a witness for the defendants was asked, and he answered questions put to him on the examination in chief as (251) follows:

"Question: State what was the result of the settlement; that is, what amount was ascertained to be in the hands of John W. Rogers, as agent, in the way of notes or other property, and what amount, if any, was John W. Rogers found indebted to her? Answer: About $3,500 in notes and bonds, considered good, was found in his hands, as her agent; he gave his note to her in the settlement, about $900, for amount due Mary Ann Rogers from Leslie, Rogers & Rogers for turpentine boxes. Question: What period of time did the settlement embrace? Answer: From 1850 to 1875."

On the cross-examination of the same witness, he was interrogated, and answered as follows:

"Question: In regard to this turpentine transaction that you spoke of in your examination in chief, and for which John W. Rogers gave Mary Ann Rogers his note for about $900, please state if John W. Rogers did not then and there tell Mary Ann Rogers that he would pay her one-third of that debt, provided that she would release him, and that

the other two parties had not paid and were not able to pay, and that you objected to her doing so? Answer: John W. Rogers did say that he would pay her one-third, if she would acquit him; said that as to Leslie, one of the partners, nothing could be got out of him; she asked me about releasing Mr. Rogers, and I told her I would not do it.

"Question: State whether you had not been informed by J. W. F. Rogers, one of the partners in the turpentine transaction previous to that time, that the rent of the turpentine boxes had been paid to John W. Rogers, and if that was not the reason you objected to the release above mentioned? Answer: I had a conversation, but do not recollect whether it was before or after the settlement; J. W. F. Rogers did in substance state that the rent had been paid. This was not the reason I objected to the release."

(252) The defendant objected to the last question and the answer thereto. The Court allowed the question to be answered, and this is assigned as error. As appears from its terms, the purpose of the question objected to, was to elicit hearsay evidence. And the material part of the answer was simply hearsay. John W. F. Rogers was not a party to the action, and, so far as appears, he was not in any way authorized to speak for, nor could his declarations bind or affect John W. Rogers. What he said to the witness was not said under oath, nor was he, nor could he be, cross-examined. He was not a witness; what he said may have been a careless, unguarded, unfounded remark, or misunderstood. Clearly it was not competent evidence on the trial.

As however, the Court admitted it, the jury, it must be presumed, accepted it as evidence and gave it weight as such. Its direct tendency was to the prejudice of the defendant executrix. It went to prove that her testator, as agent, sought by false and fraudulent representations, to avoid paying to his principal two-thirds of a debt of nine hundred dollars, one-third of which he owed himself, and the other two-thirds of which he had received as agent, and was bound to account for to her. Besides, it went also to show his fraudulent purpose to take advantage of, and conceal from his principal, information which he had as agent, and thus help himself to make a false and dishonest settlement to his own advantage. If competent, the evidence was very important, and went far towards warranting the verdict rendered. *Burton* v. *The Railroad,* 84 N. C., 193.

It was said on the argument, that this evidence was not substantive in its application—that it was called out on the cross-examination, to show the motive of the witness for advising the principal not to release the agent. Such motive was not material, nor is it clear that the purpose was simply to ascertain the motive; but if that were the purpose, the plaintiff ought not to have been allowed to introduce hearsay evi-

dence highly prejudicial to the defendant, especially without a word of caution or direction from the Court to the jury, to consider it only for the purpose of showing motive.

It was error to admit the evidence in question, and as it clearly (253) tended to prejudice the defendant, she is therefore entitled to a new trial.

The other exceptions seem to be without merit, so far as they are sufficient to assign grounds of error at all.

The issues submitted to the jury were agreed upon by the parties, after debate and consideration. It is too late after verdict to insist upon a new trial, as matter of right, to the end that an issue submitted by agreement shall be modified, or another or others submitted, to suit the convenience or advantage of the party complaining, not necessary to meet the merits of the matter in controversy. The Court might, in its discretion, grant a new trial for such cause, if it deemed it necessary to reach the substantial ends of justice; not otherwise.

The Court properly excluded the proposed evidence as to the character of the testator of the defendant executrix. His general character, whether good or bad, had no proper bearing upon the issues submitted to the jury; indeed, evidence in that respect could only tend to confuse and mislead the jury. *Heileg* v. *Dumas,* 65 N. C., 214.

As to the special instruction asked for, we think the Court, in substance, gave it, in the course of the instructions given to the jury. This was sufficient. A party is not entitled to have special instructions given in the very language in which the same are set forth—it is sufficient to give the substance of them.

The other "exceptions" are meaningless, and insufficient for any purpose. They neither in terms, nor by reasonable implication, assign error.

It is not generally sufficient simply to "except" to the whole instructions given by the Court to the jury. Properly, errors should in all cases be formally assigned, as directed by the statute (The Code, §550), but in any case, they must appear assigned in terms, or by such reasonable implication as to indicate what they are. Otherwise, "exceptions" must be rejected, as too vague and uncertain to be noticed.

Appellants should remember that appellees have rights as well (254) as themselves, and they have the right to know, with reasonable certainty, the grounds of the appeal taken.

The appeal is as much a part of the procedure in the action as the complaint or answer, and it is essential to its effectiveness that it shall be prosecuted intelligently, observing the forms of law prescribed. It is not sufficient to take an "appeal"—it must be perfected.

The very purpose of the "case stated or settled on appeal" is to specify the grounds of error. Counsel should be careful in stating the case, to assign the errors alleged with particularity and clearness, and so also should the Courts, in settling the case. It is seldom, as we know by daily experience, that this is done even tolerably well. That it is not, is to the prejudice of litigants, as well as orderly legal procedure.

There is error. For the cause stated there must be a new trial, and to that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Grant v. Hughes, 96 N. C., 190; *Wiley v. R. R., ibid.,* 411; *Sellers v. Sellers,* 98 N. C., 20; *Quarles v. Jenkins, ibid.,* 261; *Michael v. Foil,* 100 N. C., 191; *Bridgers v. Bridgers,* 101 N. C., 75; *Sprague v. Bond,* 113 N. C., 553; *Driller Co. v. Worth,* 117 N. C., 520; *Royster v. Wright,* 118 N. C., 155; *Smith v. Goldsboro,* 121 N. C., 357; *Oldham v. Rieger,* 145 N. C., 260; *Ogden v. Land Co.,* 146 N. C., 444; *Drennan v. Wilkes,* 179 N. C., 514; *Wallace v. Bellamy,* 199 N. C., 764.

F. O. VEGELAHN v. D. A. SMITH.

Supplementary Proceedings—Code Practice.

1. Proceedings supplemental to the execution are chiefly equitable in their nature and are in the nature of an equitable execution.
2. The fact that the sheriff has an *alias* execution in his hands unreturned, which was issued on the same judgment on which supplementary proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed.
3. An execution can issue on a judgment pending supplementary proceedings which have been taken out on the same judgment.
4. Since the adoption of the Constitution of 1868, the Superior Courts administer both legal and equitable rights, and when necessary both are administered in the same action.

(*Coates* v. *Wilkes,* 92 N. C., 377, cited and approved).

(255) Appeal from a judgment of the Clerk, in a proceeding supplemental to execution, heard by *Connor, Judge,* at January Term, 1886, of NEW HANOVER Superior Court.

The plaintiff had judgment in the Superior Court against the defendant. Execution issued thereon, and the Sheriff returned the same wholly unsatisfied.

Thereupon, on the 7th day of October, 1885, the plaintiff began proceedings supplementary to the execution. The Court (the Clerk) made an order that the defendant appear and answer concerning his property, &c., &c.

Pending these proceedings, on the 12th day of October, 1885, at the request of the counsel of the plaintiff, another execution issued upon the same judgment, and while it was in the hands of the Sheriff, the defendant moved before the Court (the Clerk) to dismiss the proceedings mentioned, and the motion was allowed. From the order in this respect the plaintiff appealed to the Judge.

In term, the Judge considered of this appeal, and in that connection, received and considered the affidavit of the Clerk of the Court, to the effect that the Sheriff had returned the last mentioned execution after the appeal from the order last mentioned wholly unsatisfied.

The Judge reversed the order of the Clerk dismissing the proceedings, and directed that he take further action to the proceedings according to law. The defendant excepted and appealed to this Court.

Mr. Jno. D. Bellamy, for the plaintiff.
Mr. D. L. Russell, for the defendant.

MERRIMON, J. (after stating the facts). A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. Indeed, executions may be so issued (256) at the same time to different counties. The Code, §§441, 444.

If the Sheriff cannot find property of the debtor leviable, sufficient to satisfy the execution in his hands, and this fact appears from his return thereof, or by the affidavit of the creditor, or his agent or attorney, the statute (The Code, §§488, 500,) gives the further remedy of "proceedings supplementary to the execution." Such proceedings are chiefly equitable in their nature; they are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same, according to law, to the payment of the judgment. *Coates* v. *Wilkes,* 92 N. C., 377.

When the ordinary execution is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return, within three

years from the time the execution is issued, is entitled to an order of the Court, requiring the debtor to appear and answer respecting his property. The Code, §488.

The chief object of this inquiry, is to ascertain what property the debtor has that ought to be applied to the payment of the judgment against him in favor of the moving creditor, that the Sheriff has not been able to find, levy upon and sell, in pursuance of the execution. It might be, that the debtor has property leviable of which the Sheriff has not knowledge. But the inquiry is not confined to leviable property, but it extends to all manner of property, including rights and credits.

And while an ordinary execution continues in the hands of the Sheriff, upon proof by affidavit of the creditor, his agent or attorney, to the satisfaction of the Court, or a Judge thereof, that the debtor residing in the judicial district where the Judge resides, has property which he unjustly refuses to apply toward the satisfaction of the judgment, such Court or Judge may require the debtor to appear and answer concerning such property, and proper proceedings may be had to apply the property to the satisfaction of the judgment, as directed by the statute. (257) The Code, §488, par. 2.

It thus appears, that the currency of the ordinary execution in the hands of the Sheriff, does not necessarily so operate as to prevent such proceeding. On the contrary, it seems that in a proper case, they and the execution may be concurrent. If the execution in the hands of the Sheriff shall be satisfied, then upon proper application the proceedings will be dismissed; if the execution shall be satisfied in part, then the proceedings as to the unsatisfied part of the judgment may be prosecuted as prescribed by the statute, until the debtor has fully answered concerning his property, and so much of it as may be necessary has been applied to the liquidation of the judgment.

We can see no reason why an execution may not issue after such proceedings are begun in an action. The latter are in the Court from which the executions issue, and both are in and of the same action, and under the control of the Court. If the Sheriff should discover property, and the execution should be satisfied, then the proceedings would be arrested; otherwise, they would be prosecuted according to law. It might be, that after the return of an execution unsatisfied, property of the debtor, leviable, might be discovered otherwise than by the proceedings supplementary to the execution. If so, why may not another execution be issued, to the end that such property may be levied upon and sold? What injustice could it work to the creditor or the debtor? Why should it supersede and displace the proceedings? There is nothing in the nature of either that renders such a result necessary. If it be said, the

proceedings are pending, and the equitable jurisdiction has attached to the debtor and his property and the action, the answer is, that the proceedings and the execution are in and of the same action and in the same Court, and that Court applies and administers both legal and equitable remedies in the same action, as the circumstances of the case may require. The execution and the proceedings are alike, and both under the control of the same Court, in the same action, and it may apply each in aid of the other, and both to enforce the judgment. The (258) present procedure in Courts is essentially different from that which prevailed before the adoption of the present Constitution. Before that time, there were Courts of law, and distinct Courts of equity—now, Courts of law and equity are the same, and principles of law and equity are applied and administered in the same Court, and, when need be, in the same action.

The statute of this State, in respect to proceedings supplementary to the execution, is substantially like that of the State of New York on the same subject, and the Courts of that State have repeatedly decided, that a new execution—one issuing after such proceedings began—does not supersede the same, unless it clearly appears that the property levied upon is the undisputed property of the debtor, and is sufficient to satisfy the judgment. *Sale* v. *Lawson,* 4 Sandf., 718; *Lillienthal* v. *Fellerman,* 11 How. Pr., 528; *Farqueharson* v. *Kimball,* 18 Id., 33, and see numerous cases cited in 2 Bliss (N. Y.) Ann. Code, §558, t.

So that we do not hesitate to decide, that the execution issued after the proceedings supplementary to the execution began in this case, did not have the effect to supersede the same, nor did it warrant the order of the Court (the Clerk), dismissing the proceedings. It did not appear, nor was it even suggested, that the execution had been levied upon property of the debtor at all; but it did appear before the Judge, that it had been returned wholly unsatisfied. The Judge properly reversed the order, and his judgment must be affirmed.

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: Rice v. Jones, 103 N. C., 231; *Bank v. Burns,* 109 N. C., 109.

(259)

A. J. WALTON et al. v. WILLIS PARISH and wife.

Husband and Wife—Deed—Fraudulent Conveyance—Meritorious Consideration—Evidence of Fraud—Registration.

1. Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed, and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884.

2. Before the Constitution of 1868, a deed directly from the husband to the wife was void at law, but it would be upheld in equity as a defective conveyance, if the wife could show herself to be meritorious; that is, when it was the intention of the husband to divest the estate from himself, and to create a separate estate for her, which she should have the immediate power to dispose of; and that the estate thus intended for her, was a reasonable provision.

3. All gifts from a husband to his wife, will be upheld *inter se*, and as against all persons claiming under them, and such gifts are good against existing creditors, if the husband retain property sufficient to pay his debts, and are only void if made with a fraudulent intent.

4. Where, in 1862, a husband was about to enter military service, made a deed to his wife of certain land, for her support, but retained sufficient property to pay all of his existing debts; *It was held*, that the consideration was a meritorious one.

5. Where a deed was made from husband to wife in 1862, for her support which it was alleged was lost until 1884, when it was registered, and in the meantime, the husband lived on the land, and no efforts were made to set up the lost deed; *It was held*, strong evidence of fraud, as against subsequent creditors of the husband.

6. Such deed relates back after registration to its date, and is not a marriage settlement, which is only valid from its registration.

7. Where husband and wife are jointly sued for the wife's land, the plaintiff is not entitled to a judgment for the husband's interest upon his failure to answer.

(*Liles* v. *Fleming*, 16 N. C., 185; *Elliott* v. *Elliott*, 21 N. C., 57; *Garner* v. *Garner*, 45 N. C., 1; *Paschal* v. *Hall*, 58 N. C., 109; *Warlick* v. *White*, 86 N. C., 141; *Smith* v. *Smith*, 60 N. C., 581; *Taylor* v. *Eatman*, 92 N. C., 602; *Cecil* v. *Smith*, 81 N. C., 285; *Taylor* v. *Apple*, 90 N. C., 343, cited and approved).

CIVIL ACTION, tried before *Philips, Judge,* and a jury, at August Civil Term, 1886, of the Superior Court of WAKE County.

(260) This action, commenced on January 20th, 1885, upon an averment of title in the plaintiff, is to recover possession of the tract

of land described in the complaint, and damages for the withholding, and the defendant Willis Parish, makes no answer thereto. The *feme* defendant, Mary, his wife, does answer the allegations of the complaint, and both denies the plaintiffs' ownership and asserts title in herself. The plaintiffs derive title under and by virtue of an execution issued on a judgment recovered at February Term, 1882, of Wake Superior Court, by Andrew Syme, administrator, against the defendant Willis, a sale thereunder, and the Sheriff's deed to B. B. Lewis, Junior, purchaser, and a succession of deeds thence to the plaintiffs, Walton, mortgagor, and Leach, mortgagee. The judgment was rendered on debts contracted in 1865 and 1866, in the aggregate sum of $926, besides interest thereafter. The defendant Mary deduces her title and claim, from a deed made on June 7th, 1862, to her by her husband, with two attesting witnesses, who died before the probate thereof, and the same was acknowledged and registered on December 10th, 1884, shortly before the bringing of the present suit. The said Willis testified at the trial, to the execution of the deed and the circumstances under which it was made, as follows:

That at the time he owed no debts; had been married since 1854, and had two children, respectively of three and two years of age, and his wife was then pregnant; that he got some cattle, sheep, horses, household and kitchen furniture through her; that soon after making the deed he was conscripted and put in the military service of the Confederate States, and remained in the army two years, and that his personal property in 1862 was more in value than the land was assessed at for taxation.

The defendant Mary, examined on her own behalf, stated that the deed was delivered to her the day it was signed; that she placed it in her trunk, and after her husband left, she took out what was in it, with other papers, and carried them to her father's, who took possession of them; that she never saw the deed afterwards until about three years ago; it had slipped down between the back of his desk and (261) the drawer, and when found she placed it in her trunk again; and that herself and family have been living on the land ever since the making of the deed.

The only issue upon the trial, of which the foregoing facts were given in evidence, was: "Is the plaintiff the owner of the land?" and the plaintiff asked a series of instructions, to-wit:

I. Upon all the evidence, the plaintiff is entitled to recover;

II. The paper executed by Willis Parish to his wife is void as to the plaintiff;

III. If not void, it can have no operation before December 10th, 1884, the date of its registration;

IV. Plaintiff is entitled to judgment against Willis Parish by virtue of the sale of what interest he had in the premises.

The Court declined to give these instructions, and charged the jury as follows:

"The defendant Mary Parish seeks to avoid the plaintiffs' recovery, by showing that on the 7th June, 1862, her husband executed a deed conveying to her the lands in controversy. The plaintiffs contend that as to them the deed is absolutely void. The deed made by Willis Parish to his wife Mary, in June, 1862, is void at common law, the husband and wife being treated as one person. But if at the time the deed was made and delivered, the defendant, Willis Parish, not being indebted, had the honest purpose to make a reasonable provision for his wife, Mary, out of his estate, and to create a separate estate for her, and not with any fraudulent intent to hinder, delay or defraud, the deed would be upheld by a Court of equity in favor of the wife, and the plaintiffs would not be entitled to recover. But the fact that the deed was executed in 1862, and the husband, Willis Parish, after his return from the army, lived on the land with his wife, and no registration of the deed was made, and no effort to substitute a new deed for the lost deed, and no notice was given that the wife claimed the land, is strong evidence of a fraudulent intent, and must be rebutted by the claimant, Mary Parish, else the plaintiffs would be entitled to recover."

(262) Plaintiffs excepted.

The jury returned a verdict for defendant, on which there was a judgment in their favor.

Plaintiffs moved for a new trial. Motion denied. Appeal by plaintiffs.

Mr. J. H. Fleming, for the plaintiffs.
Mr. E. C. Smith, for the defendants.

SMITH, C. J. (after stating the facts). The instrument made in the year 1862, in the form of a deed of conveyance as to its operation and effect, is governed by the law then in force, and is unaffected by the changes in the marital relations since made under the Constitution and by statute. It is of course inoperative in passing the legal estate in the land, because of the legal unity of the parties, between whom no contract, executory or executed, could be entered into. If it has any efficacy, it must be found in the principles and rules recognized and enforced in equity.

"In England," says RUFFIN, C. J., "it has been certainly held that a gift from the husband to the wife, without the intervention of a trustee, may be made under such circumstances as to render it valid in equity, and induce that Court to constitute the husband himself the trustee. * * * As the contract is void at law, the case in this Court must always be that of an application to aid a defective conveyance. The wife cannot have that assistance, unless she shows herself to be meritorious; and shows further, a clear intention that what was done should have the effect of divesting the interest of the husband, and of creating a separate estate for her, which she should have the immediate power to dispose of as she chose; and that the estate thus intended for her, was but a reasonable provision." *Elliott* v. *Elliott,* 21 N. C., 57. "It has been long settled," says BATTLE, J., "that a husband may, after marriage, make gifts or presents to his wife, which will be supported in equity against himself and his representatives." *Garner* v. *Garner,* 45 N. C., 1. The same language is repeated in *Paschal* v. (263) *Hall,* 58 N. C., 109. In a more recent case, RUFFIN, J., speaking for the Court, and asserting the invalidity of such a deed at common law, proceeds to say: "But a Court of Equity, having a greater regard to the intention and convenience of the parties, and treating the deed merely as a defective conveyance, will uphold it in favor of the wife, if a clear and present purpose on the part of the husband to make the gift, can be seen, and the gift itself appear to be no more than a reasonable provision for the wife." *Warlick* v. *White,* 86 N. C., 141. To same effect see *Smith* v. *Smith,* 60 N. C., 581; *Liles* v. *Fleming,* 16 N. C., 185. The same doctrine has been held in *Deming* v. *Williams,* 26 Conn., 226; *Bunch* v. *Bunch,* 26 Ill., 401; *Johnson* v. *Hines,* 31 Geo., 720; *Wells* v. *Wells,* 35 Miss., 638; *Shepard* v. *Shepard,* 7 John, Ch. 57. There were no creditors of the husband at the time of making the deed, though he did incur an indebtedness afterwards, to pay which the land was sold under execution, and conveyed to the purchaser for an inconsiderable sum, and thence title has passed to the plaintiffs. The plaintiffs insist that the conveyance will not be upheld as to them. This very point was passed on in the recent case of *Taylor* v. *Eatman,* 92 N. C., 602, in the opinion in which ASHE, J., uses this language: "It is not pretended that the deed to Chacy Eatman was made with a fraudulent intent" (an intent negatived in the jury finding in the case before us), "and conceding it to have been only a voluntary deed, it is not *void as against creditors,* if the donor retained at the time, property sufficient to pay his indebtedness, out of which the claims of the creditors might be satisfied." The principle is thus enunciated in a recent work, with a reference to cases in its support: "All gifts from a husband to his wife are

good *inter se,* and *against all persons claiming under them; and good against all persons, if he is not in debt at the time;* but such gifts are voidable as to existing creditors, if their rights are not secured, and as to subsequent purchasers without notice, and creditors, if made with
(264) intent to delay or defraud them." Kelly Cont. of Mar. Women, Chap. 6, §9, at page 137.

The "subsequent purchasers" are defined in our statute, The Code, §1646, to be such "who shall purchase for the full value thereof the same lands," &c., without notice. *Taylor* v. *Eatman, supra.* The sale under execution was for $50, of a tract of 119 acres, which, with a piece of 20 acres sold off, was in 1862 returned at $313 for taxation, and estimated by the defendant Mary to be worth in 1882 $12 per acre.

The next enquiry is, as to the meritorious quality of the consideration of the conveyance. The relations of the husband and wife were such as became them, and she had been true and faithful to her marital duty. Her health was not good, and he was about to embark in a perilous military service, from which a return was uncertain. The care and support of three helpless children was about to devolve upon her. He was not in debt, but had received and used personal goods belonging to his wife. Under these circumstances, in the presence of two witnesses, the deed was made, he still reserving, (as he says,) personal property greater than the assessed value of the land. We think these do constitute a meritorious consideration for the provision thus made for the support of his wife and children, when he could not otherwise contribute to it. It is true, the evidence of a fraudulent intent was *strong,* as the Court told the jury, and must be rebutted by the defendant Mary, or the plaintiff would be entitled to a verdict. No more emphatic charge could be asked for, and the verdict declares the rebuttal sufficient.

Plaintiffs' counsel contended also, that the deed was ineffectual until registration, on December 10, 1884. In this we do not concur. The deed in form is absolute, and does not belong to the class of "marriage settlements and other marriage contracts" which are void unless registered in six months after execution. The Code, §1269. The Sections of The Code, 1820 and 1821, apply to instruments entered into since the enactment, and pursuant to its provisions.

(265) Nor is there error in refusing to charge that the plaintiffs are entitled to recover possession of the husband by virtue of the sale under execution of his interest in the premises. The wife is defending *her own* title and possession, and this she may do though her husband is sued. *Cecil* v. *Smith,* 81 N. C., 285; *Taylor* v. *Apple,* 90 N. C., 343. The plaintiffs may take judgment by default against him, but must fail against the wife. We have treated the wife's equity to relief under the

deed, as an answer to the action and to the issue submitted, upon the principle that what a Court of equity would do, will be regarded in a defence as if done.

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

No error. Affirmed.

Cited: Sims v. Ray, 96 N. C., 89; *Winborne v. Downing,* 105 N. C., 21; *Jones v. Coffey,* 109 N. C., 518.

M. J. YOUNG, Guardian, et als., v. P. B. KENNEDY et als.

Executors and Administrators—Counsel Fees—Insanity—Taxes—Scale—Equitable Set-off—Exceptions.

1. Executors and administrators are allowed reasonable attorney's fees for advice and assistance in managing the trust estate, and this even when they are employed to defend a suit for a settlement by the *cestuis qui* trust, if such services are proper and necessary.
2. So where services were rendered by an attorney, which were paid for out of the trust money by an administrator who was afterwards judicially declared to be insane at the time the services were rendered, the disbursement will be allowed, in the absence of any allegation that the services of the attorney were not necessary.
3. An administrator will not be allowed, on the settlement of his administration account, with taxes which he has paid on the lands which descended to the heirs.
4. Where collections were made by an administrator in 1862 and 1863, and afterwards paid out, the scale must be applied to the receipts at the time the money was received, and to the payments when they were made.
5. Where one of the distributees dies before a settlement, and the administrator pays a portion of the fund for the support of one of the next of kin of the dead distributee, he is entitled in equity to a credit for this amount in an action by the administrator of the deceased distributee, if there are no creditors.
6. An exception to the report of a referee will not be considered, when it is vague and indefinite, and imposes on the Court the necessity of an examination of the entire record to find out its meaning.
7. Where certain land lying in another State was sold to pay debts by an administrator in that State, and there was a surplus, as to which the Court finds as a fact that it was not received by the administrator in this State nor by any authorized agent of his, it does not constitute assets with which the administrator should be charged.

(*Hester* v. *Hester*, 38 N. C., 9; *Whitford* v. *Foy*, 65 N. C., 265; *Ransom* v. *McClees*, 64 N. C., 17; *Carr* v. *Askew*, 94 N. C., 194; *Baker* v. *The Railroad*, 91 N. C., 308, cited and approved).

(266) CIVIL ACTION, heard by *MacRae, Judge,* upon exceptions to the report of a referee, at May Term, 1886, of IREDELL Superior Court.

Both parties appealed.

The facts appear in the opinion.

Mr. E. L. Gaither, for the plaintiffs.

Messrs. D. M. Furches and *John Devereux, Jr.,* for the defendants.

SMITH, C. J. Thomas M. Young died in 1860, intestate, and A. L. Young took out letters of administration on his estate. He left a widow, Margaret J. Young, and two children, Mary and Thomas M. Young, junior. Mary died in 1862, aged seven years, and her distributive share in her father's estate was distributable between her mother and brother Thomas M. and J. H. Stewart, a maternal half brother, born of a previous marriage. The present action was begun on July 29th, 1876, for an account and settlement of the intestate's personal estate, in the name of the said Thomas M., by the said Margaret J., who had become his guardian, and such proceedings were had therein, that in the fall of 1878, judgment was recovered by the plaintiff for the sum of $2,945 $^{44}/_{100}$, with interest thereon from the commencement of the action, and costs. At Fall Term, 1879, Philip B. Kennedy, who, upon an inquisition and finding of his lunacy, had been appointed guardian to said administrator, was permitted to become a party to the action, and on his application the said judgment was vacated, the Court finding and

(267) declaring that the said A. L. Young then was, and for fourteen years had been of unsound mind, and incompetent to manage his own affairs. At the same time a second order of reference was made to J. B. Connelly, who had reported the former account, to take and state it anew. In May, 1880, J. M. Howard, who had become administrator of the said Mary, and the said Margaret J. in her own right, were admitted as co-plaintiffs in the action.

At August Term, 1882, the order of reference was amended by adding R. A. McLaughlin as an associate referee, and they reported the account at Fall Term, 1883.

To this report exceptions were filed by both parties, and from the adverse rulings upon them by the Court, they respectively appeal, and ask for a reviewal. The plaintiffs' exceptions are first to be considered.

I. The defence to the suit, terminating in the judgment subsequently

set aside for the lunacy of the administrator, was conducted by J. E. Kerr, an attorney employed by J. D. McNeily, the intestate's brother-in-law, and $100 paid him for his services.

The voucher for this disbursement was admitted as a credit by the referees and disallowed by the Court, upon the ground of the mental incapacity of the administrator to confer authority upon the agent, assuming to act as such, to bind him, or to use the trust fund in payment.

It is not pretended that the services were not rendered, or that they were not needed, or that the charge therefor is unreasonable. Reasonable fees paid counsel for advice and assistance in the management of a trust, and this even in meeting a demand, by action, for a settlement, when necessary, are allowed to the trustee. *Hester* v. *Hester,* 38 N. C., 9; *Whitford* v. *Foy,* 65 N. C., 265.

Nor do we feel the force of the objection founded on the incapacity of the administrator to enter into a valid contract. The services rendered were not officious, and it is but reasonable, as the trust estate had the benefit of them, that it should be charged therewith in reimbursement of the money advanced, and this upon the higher ground of the necessity of protecting the estate. We reverse the ruling of (268) the Judge, and reinstate the credit.

II. The plaintiffs' second exception is overruled by the Judge in the Court below, and rests upon the following facts: In the division of the shares between the tenants in common, the share allotted to the said Margaret J. was in value $550 in excess of the other two shares, and was charged therewith. This sum was extinguished by being used in the payment of the allowance of the years provisions to her, to complete which, $105 more was paid in money. The administrator should be credited with $655, their added amount, and charged with the first mentioned sum—the difference being the money paid, and the result the same as if that alone stood on the credit side of the account, as the only item in the transaction. But the estate is enlarged by the use of the sum due in the division of the shares, and in the distribution the said Margaret J. gets the benefit of one-third, and the others the benefit of the two-thirds of this augmentation of the distributable estate. The adjustment between them will be effected by transferring the one-third of the sum from the account of said Margaret J. to the shares of the other two distributees, whereby she will have received none, and they all of the charged excess. The interest will of course follow the principal money.

III. The charge for taxes assessed upon descended lands of the intestate since his death, are without the sphere of representative duty, and do not belong in the administration account.

IV. The objection to the application of the scale to certain receipts has little support in the facts found by the Judge. He states that the collections were made in 1862 and 1863, when it was not imprudent to receive Confederate money, and the disbursements are presumed to have been made in currency, at that time.

V. The referees charge J. H. Stewart with, and allow the administrator for various sums expended in his education, and for other necessary purposes. The Judge confirms this action of the referees,
(269) and overrules the plaintiffs' exception thereto. Strictly speaking, whatever is due to the deceased distributee, Mary, should be paid to her administrator, the plaintiff, J. M. Howard, and his disposition of the fund recovered would be the subject of an account of his administration. But the administrator, A. L. Young, aware of the fact that the distributee, Mary, had no debts to pay, and that her share, when passing into her administrator's hands, would at once be distributable among her next of kin, has advanced moneys in support of one of them, her said half-brother; and the referees, as her administrator is before the Court to be bound by what is done, have sub-divided her share of her father's estate, and have charged against the distributee's portion, the expenditures made on his behalf. Her administrator would, if payment were made to him, be called on to pay over to her distributees, and under such circumstances we do not see why the adjustment may not at once be made, instead of compelling the first administrator to resort to an action to get it back. Why make him pay it, when it is to be paid back to him? We think this course is sanctioned, as convenient in practice, and in accord with the provisions and purposes of The Code. *Ransom* v. *McClees,* 64 N. C., 17; *Carr* v. *Askew,* 94 N. C., 194; *Baker* v. *Railroad,* 91 N. C., 308.

VI. The sixth exception is withdrawn.

VII. The seventh objection is wanting in precision of statement, and is not properly presented, and we do not entertain it, for the reason given by the Judge, that it imposes upon the Court the necessity of an exploration of the record to find out its import and bearing.

VIII. For a like reason this exception is not considered.

IX. The subject matter embraced in the 9th exception is disposed of in what we have said in regard to the 5th exception, and we reverse the ruling of the Court, and sustain that of the referees.

We proceed now to an examination of the defendants' exceptions, and the action of the Court upon them.

(270) I. This exception to the reduction of the defendants' credits by the application of the scale, was properly overruled by the Court, as the payments were made in 1862, and are presumed to have been made in the currency then in use.

II. The subject matter of this is embraced in the second of the plaintiffs' exceptions, and is already disposed of in our ruling upon that.

III. The remaining exception, sustained by the Court, is to the defendants' being charged with the proceeds of sale of lands of his intestate in the State of Missouri by the public administrator, for payment of a debt, the residue of which was received. The purchasers at the sale agreed to increase the sum bid, and to pay $1,225.80, and on May 15th, 1874, he paid to J. D. McNeely, acting for the administrator, $612.90, and gave his note for a like sum to the said administrator. The note was afterwards endorsed by the administrator to McNeely, and to him the money due thereon was paid. This money was applied to certain store accounts due by the administrator to the firm of Walton & Ross, and that of McNeely & Walton, whereof the said agent was a member. The Court finds that the money was not received by the administrator, was not a part of the personal estate of the intestate, Thomas M., nor was it collected by any authorized agent. It does not therefore constitute assets for which he is accountable to the plaintiffs in this action, and was properly eliminated from the account. We concur in this ruling of the Court.

The account will be re-formed in accordance with this opinion, and in order thereto will be referred to the Clerk, and when so re-formed judgment will be entered.

It is so ordered.

DEFENDANTS' APPEAL.

This was the defendants' appeal in the preceding case, and was argued at the same time and by the same counsel.

SMITH, C. J. The rulings upon the several exceptions taken (271) both by the plaintiff and defendant and brought up for review are so connected that we have passed upon them all in disposing of the plaintiffs' appeal.

It is not needful to say any more.

When upon the reference the account is re-formed according to this opinion, final judgment will be entered.

It is so ordered.

Cited: Young v. Kennedy, 100 N. C., 393; *Bean v. Bean,* 135 N. C., 94; *Kelly v. Odum,* 139 N. C., 280; *Comrs. v. Erwin,* 140 N. C., 194; *In re Stone,* 176 N. C., 344; *In re Will of Howell,* 204 N. C., 438.

JAMES W. SPENCER, Extr., et al., Ex Parte.

Appeal—Clerk—Special Proceedings—Finding of Fact.

1. Whenever an order or judgment puts an end to the action or proceeding, or an interlocutory order will deprive a party of a substantial right, if the alleged error shall not be corrected before the final judgment, an appeal lies.

2. In appeals from the Clerk, in that class of cases of which he has jurisdiction, not as and for the Court as in special proceedings, but in his capacity as Clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the Judge any statement of the case on appeal.

3. In appeals in such cases, it is the duty of the Judge to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The Judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury.

4. Where a Clerk has gone out of office, it is not proper to order him to file with the Court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was Clerk.

(*Leak* v. *Covington*, 95 N. C., 193; *Lovinier* v. *Pearce*, 70 N. C., 172; *Brittain* v. *Mull*, 91 N. C., 498; *Rowland* v. *Thompson*, 64 N. C., 714, cited and approved).

Appeal from the Clerk, in a proceeding instituted before him, heard by *Graves, Judge,* at July Term, 1884, of RANDOLPH Superior Court.

This is an *ex parte* proceeding, begun on the 16th of December,
(272) 1880, before the Clerk of the Superior Court of Randolph county, in the exercise of his jurisdictional functions, by James Spencer and Sallie Keerans, executor and executrix of the will of Nathan Spencer, deceased, (the same having been duly proven), and the legatees named in that will, for an account, and to settle and distribute the estate of the testator, as therein provided and directed.

In pursuance of notice to the parties interested, and in accordance with the prayer of the petition, the Clerk of the Court proceeded, on the 20th day of May, 1881, to take and state an account of the estate in the hands of the executors, and made report thereof.

Afterwards, on the 24th of March, 1882, T. W. Andrews and his wife Amy, legatees, filed exceptions to the report.

And afterwards, on the 26th day of August, 1882, the Clerk made his order overruling the exceptions and confirming the report, from which

the said Andrews, his wife Amy, and others, legatees, appealed to the Judge of the Superior Court in term time. Thereupon the Clerk filed all the papers in the cause with the civil trial papers, and docketed the cause in the civil issue docket.

Thereupon the Judge in term time, made an order, of which the following is a copy:

"It appearing to the Court, that A. M. Diffee, late Probate Judge, has failed to send up with the appeal in the case, along with his report and the exceptions, the evidence and the admissions of parties; it is ordered that the said Diffee file said evidence and admissions in writing, to the next term of this Court. Ordered, that a copy of this order be made and served upon the said A. M. Diffee within ten days after the adjournment of this Court."

Thereafter the ex-Clerk made a "report," in which he gave a history of the proceeding before him, and among other things said:

"No witnesses were sworn, but the parties presented invento- (273) ries of the property of the testator, accounts of sales, and the various other vouchers and papers filed in the case and included in the Court papers. These are referred to in the exhibits attached to my report, and marked 'A' and 'B.' They were presented by the executor and executrix to the other parties, and without dispute were admitted to be true by them, and that was the evidence upon which I made my report aforesaid. The copy of the will, annexed to the petition, was treated as a true copy of the original will by all the parties, without objection, and under those circumstances, used as evidence."

Afterwards, the matter came on to be heard before the Judge in Term time. Calvin Cagle and his wife Emeline, and others, legatees, insisted that the Judge ought to proceed to hear the matter upon the exceptions specified in the papers sent up by the Clerk, but he declined to do so, and made an order, of which the following is a copy:

"This proceeding having been brought into this Court, by appeal on the part of T. W. Andrews and wife Amy, and Calvin Cagle and wife Emeline, and also upon the appeal of Silas Keerans and his wife Sarah, as appears from the judgment of the Clerk of this Court, made August 26th, 1882, and the orders thereon made by the said Clerk, A. M. Diffee; and it appearing to the Court, that no statement of the case on appeal has been filed by the Clerk of this Court; and it further appearing that the Clerk from whom said appeal was taken, has gone out of office, and that the papers filed by him at the present Term, are not legally sufficient to supply a statement of the case on appeal: It is now ordered, that this proceeding be remanded to the Clerk of this Court, to hear said proceeding *de novo,* according to law."

From this order T. W. Andrews and his wife Amy, and Calvin Cagle and his wife Emeline, appealed to this Court.

(274) *Mr. M. S. Robbins,* for the appellants.
No counsel *contra.*

MERRIMON, J. (after stating the facts). The counsel for the appellees insisted on the argument, that no appeal lies from the order in question. We think otherwise. It puts an end to the present proceeding, and to the appellants' right to have the benefit of so much of the account, stated and confirmed by the Clerk, as they do not except to, and their right to have their exceptions to the report reviewed, and sustained or overruled. Whenever an order or judgment puts an end to the action or proceeding, or an interlocutory order will deprive a party of a substantial right, if the alleged error shall not be corrected before the final judgment, an appeal lies therefrom to this Court. *Leak* v. *Covington,* 95 N. C., 193.

It seems that the learned Judge misapprehended the nature of this proceeding. It is not a Special Proceeding, under the Code of Civil Procedure, nor did it begin in the Superior Court. It began before the Clerk, in the exercise of his jurisdictional functions, as prescribed and conferred by the statute (The Code, §103), which provides, among other things, that the Clerk shall have jurisdiction: "To audit the accounts of executors, administrators, collectors and guardians." In such cases, the statute (The Code, §116,) further provides, that: "All issues of fact joined before the Clerk, shall be transferred to the Superior Court for trial at the next succeeding term of said Court; and appeals shall lie to the Judge of the Superior Court having jurisdiction, either in Term time or vacation, from the judgments of the Clerk of the Superior Court in all matters of law. In case of such transfer or appeal, neither party shall be required to give an undertaking for costs, and the Clerk shall *transmit* on such transfer or appeal, to the Superior Court, to or the Judge thereof, *the pleadings, or other papers,* on which the issue of fact or law arises." In such cases of appeal, the Clerk is not required to "prepare a statement of the case, of his decision and of the appeal," as he is required to do by the statute (The Code,
(275) §254). This latter provision applies to a different class of appeals, than those from the judgment of the Clerk when he is acting as and for the Superior Court. *Lovinier* v. *Pearce,* 70 N. C., 172; *Brittain* v. *Mull,* 91 N. C., 498.

The account is settled by the order of the Clerk confirming the report thereof, except so far as it may be affected by the exceptions thereto, and the parties are entitled to have the benefit of what has been correctly done. The Judge should have proceeded to consider and sustain

the exceptions, or should have overruled them, and make proper order in that respect. It was his province and duty to determine the matters of fact and law involved in the exceptions. If the evidence before him in the papers was not sufficient and satisfactory, he might have required the production of other and further appropriate evidence. He could himself have found the facts, because in the nature of the matter, only questions of fact were presented. If he should deem it necessary to do so for his better information, he might have submitted issues of fact to a jury. *Rowland* v. *Thompson,* 64 N. C., 714.

Obviously, we cannot overrule the exceptions. They have not yet been considered by the Judge of the Court below.

We advert to the order directing the ex-Clerk to "file the said evidence and admissions in writing to the next term of this Court," to say that we cannot see the propriety of it. He had no official or authoritative control over the papers, or any of them, in the proceeding. These all passed, in contemplation of law, to his successor in office, and ought to have done so in fact, and to the Clerk in office such order should be directed. If the ex-Clerk had the papers—it seems from his "report" he did not—he ought to have been required to return them to the office of the Clerk, and thence they should pass to the Superior Court.

There is error; the order appealed from must be reversed, and the Judge will proceed according to law. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Blackwell v. McCaine, 105 N. C., 463; *Mills v. McDaniel,* 161 N. C., 115; *In re Hege,* 205 N. C., 630.

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(276)

JOHN BURGESS et als. v. E. J. KIRBY et als.

Appeal.

When both parties appeal, and the judgment on the plaintiffs' appeal disposes of the questions presented by both, the defendants' appeal will be dismissed, as having been improvidently taken.

(*Davenport* v. *McKee,* 94 N. C., 325, cited and approved).

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

Both parties appealed from the judgment of the Court below, and the plaintiffs' appeal was disposed of at the last Term of this Court.

Messrs. D. G. Fowle and *John W. Graham,* for the plaintiffs.
Mr. R. H. Battle, for the defendants.

MERRIMON, J. The plaintiffs in the above named case, appealed to this Court. Their appeal was heard and determined at the last Term, and the action was dismissed. It hence becomes unnecessary to decide the question presented by the present, the defendants' appeal. Indeed, it turns out that this appeal was unnecessary, and it must therefore be dismissed, as having been improvidently taken. *Davenport* v. *McKee,* 94 N. C., 325.

Dismissed.

(277)

ALBERT KRAMER v. THE THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, of Boston, Mass.

Attachment—Cause of Action—Counter-claim—Evidence—Witness.

1. The answer of a witness, who is also a party to the action, to a question put with a view to disparage him by showing his interest in or relation to the controversy, cannot be contradicted—it being not only collateral, but irrelevant.
2. No cause of action for wrongfully suing out a warrant of attachment can arise until there has been a legal determination of the proceedings thereunder.
3. The facts constituting a counter-claim must arise out of the same transaction that is the subject of the complaint, and they must exist at the time of the commencement of the action.

(*State* v. *Patterson,* 24 N. C., 346; *Clark* v. *Clark,* 65 N. C., 655; *Hiatt* v. *Patterson,* 74 N. C., 157; *State* v. *Davis,* 87 N. C., 517, cited and approved).

CIVIL ACTION, tried before *Clark, Judge,* at May Term, 1886, of DURHAM Superior Court.

The plaintiff commenced this action on the 12th day of February, 1886, to recover the value of certain services, which he alleged he rendered to the defendant at its request. On the 25th day of the same month, he obtained a *warrant of attachment* in aid of his action, which was levied upon a certain debt due to the defendant.

The defendant, in its answer, denied the material allegations of the complaint, and alleged a *counter-claim* for damages sustained, as is

alleged, by the warrant of attachment mentioned, which, it is alleged, was sued out without any sufficient cause, &c.

The plaintiff demurred to the *counter-claim,* upon the grounds:

First. That "the cause of action stated therein, did not arise out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, nor is it connected with the subject of the action."

"Second. That the cause of the action set forth in the said counter-claim, did not exist *at the time* of the commencement of (278) the action."

The Court overruled the demurrer, and the plaintiff excepted.

The plaintiff then made reply to the *counter-claim.*

The plaintiff was introduced as a witness in his own behalf, and was asked upon cross-examination, if, after the sale of the apparatus to the Durham Company had been agreed on, but before the sale was concluded and the delivery of the apparatus made, he did not say to C. M. McNett, the general agent of the defendant, that unless he, (McNett), added $1,000 to the price of the apparatus, to be paid by the Durham Company therefor, and gave him (Kramer) one-half of this sum, that he (Kramer) could and would break up his trade in Durham. Witness denied making use of the language imputed.

Defendant introduced the said C. M. McNett, and he was allowed to testify, after objections, that plaintiff did make use of the language above set forth. Plaintiff excepted.

The jury rendered a verdict in favor of the defendant upon all the issues submitted to them.

Thereupon, the Court gave judgment for it, and the plaintiff, having excepted, appealed to this Court.

Messrs. R. C. Strudwick and *J. A. Long,* for the plaintiff.
Messrs. John Manning and *W. W. Fuller,* for the defendant.

MERRIMON, J. (after stating the facts). The evidence elicited by the defendant on the cross-examination of the plaintiff, tesitfying as a witness in his own behalf, was simply collateral to the issues submitted to the jury. It was irrelevant and immaterial as substantive evidence; it did not tend to prove or disprove the material issue as to the question of the defendant's indebtedness to the plaintiff. As to this, it only tended to mislead and confuse.

What the defendant suggested by its question might be true, and yet the defendant might owe the plaintiff for services as (279) alleged in the complaint.

The only legitimate purpose of the question and an affirmative answer to it, would be to disparage and discredit the witness.

The credit of a witness may be thus attacked, but generally, the party calling for the answer must be bound by it; he cannot contradict it by a witness called for the purpose, as was done in this case. The general rule, however, is relaxed in cases when the cross-examination relates to collateral matters that tend to show the temper, disposition or conduct of the witness cross-examined, in relation to the action, or the parties to it.

As to such matters, the witness may be contradicted, because the examination in such respects, tends to show that he is or has in some way, or for some consideration, identified himself with the fortunes of the action or the parties to it, adverse to the party attacking his credibility.

But the purpose of the cross-examination here, did not come within such exceptions. It was not to show the temper, disposition or conduct of the plaintiff as a witness for himself in relation to the action or the parties. These things, in the nature of the matter, were manifest—he was himself the plaintiff, with the temper of the plaintiff, with interest and disposition avowedly adverse to the defendant—and these considerations went into the scale against him as a witness, as much and as certainly as if the same had been testified to by himself and many other witnesses.

The sole purpose of the cross-examination was to disparage and discredit the witness, and the defendant was concluded by his answer. It was therefore error to receive the testimony going to contradict his answer to the question put to him. *State v. Patterson,* 24 N. C., 346; *Clark* v. *Clark,* 65 N. C., 655; *Hiatt* v. *Patterson,* 74 N. C., 157; *State* v. *Davis,* 87 N. C., 517; Greenleaf on Evidence, §449.

(280) We are also of opinion that the Court erred in overruling the demurrer. In our judgment, in no possible aspect of the matter alleged as a *counter-claim,* can it be upheld as such. The warrant of attachment was incidental and ancillary to the plaintiff's action. It was not discharged, but continued from the time it was granted to be, and still is in force, and the plaintiff may avail himself of it, if he shall recover judgment, unless for good cause, it shall, in the meantime, be discharged.

The ground of the alleged *counter-claim,* is the wrongful suing out of this warrant of attachment, and the execution of the same upon a debt due to the defendant from a third party.

But so far as appears from the pleadings, including the answer itself, the warrant was regularly granted, and it continues in force for all proper purposes. No cause of action in that respect has yet arisen in favor of the defendant, and none may ever arise. Certainly, none will arise, if it shall turn out that the plaintiff recovers judgment, as he may

possibly do. The mere fact of bringing a groundless action, or the suing out in it of a provisional remedy, ancillary thereto, does not of itself constitute a case of action; the wrong and injury cannot be complete, until the action or provisional remedy in it, is determined; then only can the cause of action on that account arise and be complete. The groundlessness of the action or provisional remedy, is an essential element of such a cause of action, and this cannot completely exist or appear, until the action or provisional remedy is ended. It would be anomalous and absurd to sue upon a cause of action before it had arisen. And quite as absurd to sue upon a constituent part of a cause of action that may never arise! There was therefore no *counter-claim* alleged.

But if this were not true, and the matter alleged constituted a cause of action, it could not be pleaded as a *counter-claim* in this action, as allowed by the statute (The Code, §244), because it did not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor was it connected with the subject of the action. The plaintiff sues to recover the value of certain (281) services rendered by him to the defendant at its request. The supposed cause of action alleged as a *counter-claim* grew out of alleged wrongful procedure in the course of the plaintiff's action, which, in no proper sense, grew out of his *cause* of action, but grew out of the action itself, through and by which the plaintiff seeks redress. The defendant alleges that the plaintiff in the course of his action, prostituted a legal remedy, to his injury and damage, and this he seeks to make the ground of a *counter-claim.*

Nor did such supposed *counter-claim* arise out of a contract existing at the time of the commencement of the action. The supposed cause of action, as we have seen, arose after the action had begun.

It is unnecessary to take further notice of the exceptions. It is clear that the plaintiff is entitled to a new trial. The judgment must be reversed, the demurrer to the *counter-claim* sustained, and a new trial had according to law.

Error. Reversed.

Cited: Hinton v. Pritchard, 98 N. C., 357; *Bynum v. Comrs.,* 101 N. C., 416; *Powell v. Allen,* 103 N. C., 50; *Asher v. Reizenstein,* 105 N. C., 217; *S. v. Morris,* 109 N. C., 822; *Phipps v. Wilson,* 125 N. C., 107; *Griffin v. Thomas,* 128 N. C., 313; *Satterthwaite v. Ellis,* 129 N. C., 71; *Carr v. Smith, ibid.,* 234; *S. v. Crook,* 133 N. C., 674; *Smith v. French,* 141 N. C., 9; *Wright v. Harris,* 160 N. C., 554; *Carpenter v. Hanes,* 167 N. C., 560; *In re Craven,* 169 N. C., 566.

J. R. CASTLEBURY v. J. Q. MAYNARD.

Specific Performance—Homestead—Married Women—Deeds.

1. A purchaser of land is never required to accept a doubtful title, and the inability of the vendor to make a good title, is a defence to an action for the purchase money.
2. Where land was acquired and a marriage took place prior to the adoption of the Constitution of 1868, the husband can make a good title without the joinder of the wife, but if the land was acquired, or the marriage took place after that date, the wife must join in the deed.
3. Where land is allotted to a person as a homestead upon his own petition, it is a dedication of it by him, to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired.
4. Without the joinder of the wife, the deed of the husband for the homestead is a nullity, since the Constitution of 1868.
5. A divorce *a mensa et thoro*, does not change the property rights of either the husband or wife.
6. Where a marriage took place in 1844, and in 1869 the husband had a tract of land allotted to him as his homestead upon his own petition, which he afterwards sold, taking a note for the purchase money, and he was then divorced *a mensa et thoro* from his wife; *It was held* in an action on the note given for the purchase money, that he could not make a good title to the land, without the joinder of his wife in the deed, and that the vendee would not be compelled to take the title and pay the purchase money unless the wife joined in the deed.

(*Batchelor* v. *Macon*, 67 N. C., 181; *Motts* v. *Caldwell*, 45 N. C., 289; *Reeves* v. *Haynes*, 88 N. C., 310; *Bruce* v. *Strickland*, 81 N. C., 267; *Jenkins* v. *Bobbitt*, 77 N. C., 385; *Rogers* v. *Vines*, 28 N. C., 293; *Taylor* v. *Taylor*, 93 N. C., 418, cited and approved).

(282) CIVIL ACTION, tried before *Clark, Judge,* and a jury, at October Civil Term, 1885, of WAKE Superior Court. There was a judgment for the plaintiff, and the defendant appealed.

The facts are fully set out in the opinion.

Mr. A. M. Lewis, for the plaintiff.

Messrs. J. H. Fleming and *W. J. Peele,* for the defendant.

ASHE, J. The following are substantially the facts as found by the jury, with consent of the parties, or admitted by the pleadings: On the 20th of September, 1881, the plaintiff entered into a written contract with the defendant, to sell him a tract of land, lying in the county of Wake, in White Oak Township, on the waters of Crabtree Creek, adjoin-

ing the lands of A. D. Jones, William Upchurch, Margaret Maynard and others, containing one hundred and thirty-seven acres, more or less, for and in consideration of $1,500, one thousand dollars of which was paid in a note on one Samuel House, and the defendant gave his own note for the balance of $500, payable on the 1st day of October, 1882, with interest at 8 per cent.; and it was agreed, in case the suit then pending in Wake Superior Court, wherein Marion Castlebury was plaintiff, and J. R. Castlebury was defendant, for divorce, should by that time be ended, and if not, whenever said suit should be determined, and in case the said Marion Castlebury should, in her said suit for divorce, obtain a judgment for alimony, then the said J. Q. Maynard should pay the sum out of the deferred payment, to the said Marion Castle- (283) bury, and the balance, if any, of the purchase money, he should pay to the said J. R. Castlebury, and upon the payment of the balance of the purchase money, the said J. R. Castlebury bound himself, his heirs, executors and administrators, to make to the said J. Q. Maynard, his heirs, executors, assigns, &c., a good fee simple title to the land. This agreement was signed and sealed by J. R. Castlebury and J. Q. Maynard. The note for five hundred dollars was executed by Maynard according to the agreement. At the January Term of the Superior Court of Wake, there was a judgment in the case of divorce: "That the plaintiff and defendant be divorced and separated from bed and board, and that the plaintiff receive from the defendant the sum of one hundred and twenty-five dollars, in full satisfaction of all alimony."

It was admitted on the trial, that the land, which was contracted to be sold, was the same land which was allotted to the plaintiff as his homestead, on his own request and petition, on the 5th day of April, 1869, and that said allotment was duly recorded in Wake County, according to law; and that the plaintiff was married about the———day of————, 1844, and that his wife is still living in this State, as a resident therein, and they have one child about fifteen years of age. It was further admitted, that the plaintiff was ready and willing to make a deed for said land, executed by himself, but without his wife joining therein.

The plaintiff demanded a judgment for the five hundred dollars, with interest, and that the land be sold and the money applied to the satisfaction of the judgment.

The defendant resisted the plaintiff's cause of action, and set up as a defence that the homestead is still a charge upon the land, and the plaintiff cannot make a title.

The contention of the parties presents for our consideration, (284) the question whether the plaintiff can make, under the facts of

the case, a good title to the land described in the complaint. If he cannot, it would be against equity and good conscience that he should recover the amount of the note in suit, for a purchaser of land is never required to accept a doubtful title. *Batchelor* v. *Macon,* 67 N. C., 181; *Motts* v. *Caldwell,* 45 N. C., 289.

The plaintiff contends, that as the marriage took place before the adoption of the Constitution of 1868, and the land was owned by the plaintiff prior to that time, that the right of homestead did not attach to the land, and the plaintiff could make a good indefeasible title to the land, without joining his wife in the conveyance. That, as a general proposition, has been too often decided by this Court to be controverted. But the decisions referred to, have held that to give the husband such a right, the *marriage* and the *ownership* of the land must both have existed before the adoption of the Constitution; *Reeves* v. *Haynes,* 88 N. C., 310; *Bruce* v. *Strickland,* 81 N. C., 267. And the same principle has been applied to the right of dower by numerous adjudications of this Court. But in this case, while it appears that the plaintiff was the owner of the land where he had his homestead allotted, in April, 1869, there is nothing in the record from which it is to be inferred that he owned the land prior to 1868. But, conceding that he did own it previous to that date, still it does not follow that he can make a good title, free from any encumbrance.

When, on his own petition, he had his homestead in the land allotted to him in 1869, it was such an acquiescence in the appropriation of his land, as a homestead, as must be deemed a voluntary surrender of his absolute right of alienation, and it could not be impeached by creditors, and the homestead would then pass to his infant children or widow, as the law directed. *Bruce* v. *Strickland,* 81 N. C., 267. The wife takes or acquires no interest in the homestead until after the death of the husband, and not then if he had children surviving him. But
(285) so soon as the homestead is allotted to the husband on his petition, it is a dedication by him of the land, to all the uses, privileges and restrictions of a homestead, no matter when the land was acquired, and the constitutional inhibition attaches to it, and the husband cannot convey it without the wife joining in the deed, and undergoing a privy examination as to its execution by her. Without such a formality, the deed of the husband is a nullity. As was said by PEARSON, C. J., in *Jenkins* v. *Bobbitt,* 77 N. C., 385, the proper construction of Art. 10, §8, of the Constitution, is as if it read: "But no deed purporting *to dispose of the* homestead made by the owner of the homestead, shall be valid without the voluntary signature and assent of the wife, signified on her private examination, according to law."

But it is urged that there can be no use of the wife joining in the deed of the husband in this case, for even if she should survive her husband, and no child be alive at that time, she would be debarred of any right to the homestead, by reason of the decree of divorce.

There is nothing in that objection, for it is well settled that a decree of divorce, *a mensa et thoro,* has no effect to change the property relations of the husband and wife. *Rogers* v. *Vines,* 28 N. C., 293, and *Taylor* v. *Taylor,* 93 N. C., 418, and the authorities there cited.

We are not called upon to suggest any remedy to the parties. They of course will take such remedies as they may be advised. There is error. Let this be certified to the Superior Court of Wake, to the end that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Gilmore v. Bright, 101 N. C., 387; *Hughes v. Hodgin,* 102 N. C., 249; *Leach v. Johnson,* 114 N. C., 88; *Dixon v. Robbins, ibid.,* 103; *Wittkowsky v. Gidney,* 124 N. C., 441; *Joyner v. Sugg,* 131 N. C., 339, 348; *Woodbury v. King,* 152 N. C., 680.

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HENRY B. OWENS et al. v. URIAH H. PHELPS et al.

Issues—Vendor and Vendee—No Evidence—Prayers for Instruction—Ratification—Infants—Evidence.

1. When a material defence is pleaded, it is proper for the Court to submit an issue on it.
2. So where an action was brought by the heirs-at-law of a deceased vendee of land, asking that the vendor be forced to make title to them, and he pleaded that the administrator had agreed with him to rescind the contract, which was ratified by the heirs-at-law, an issue as to such ratification was properly submitted to the jury.
3. Where a party asks the Court to charge the jury that if the other party has not satisfied them by a preponderance of evidence, they should find a certain way, it is an admission that there is some evidence to go to the jury to prove the fact.
4. It is too late to ask an instruction that there was no evidence to sustain a verdict on a certain issue after the verdict has been rendered.
5. Where there is some evidence, it is entirely within the discretion of the trial Judge to say whether he will allow the verdict to stand.

6. Where it is sought to show that an infant has ratified a contract in regard to his property, made while he was an infant, evidence is admissible to show that the money received in pursuance of such contract, was used for the infant's advantage, with his knowledge. This evidence does not of itself show a ratification, but is admissible as explanatory of what occurred.

CIVIL ACTION, tried before *MacRae, Judge,* and a jury, at Fall Term, 1886, of DAVIE Superior Court.

This case was before the Court on the plaintiffs' appeal, at February Term, 1885, but not upon the points presented in the present transcript.

The case is simply this: William A. Owens, the ancestor of the plaintiffs, his heirs-at-law, in his lifetime entered into an agreement with the defendant Uriah H. Phelps, for the purchase of the tract of land described in the complaint, for which, in 1857, he gave his three several notes, payable at one, two and three years, each for the sum of $600, and took from the vendor his bond to make title when the purchase money was paid, entering at once into possession. He paid off two of the notes in full, and a part of the other, previous to his death in the (287) year 1859. Letters of administration on his estate thereafter issued to his brother, A. J. Owens, who paid the residue due on the third note. Unable to obtain title from Phelps to the heirs-at-law of the intestate, the administrator attempted to rescind the contract made with Phelps, and accepted from him notes in return for the purchase money paid, and in place of the obligation to convey the land.

In 1868, Phelps having resumed possession, sold and conveyed one moiety of the land, for the consideration of $1,300, to the defendant J. Harvey Sparks, and mortgaged the other moiety to the defendant F. M. Phillips, each of whom, it is alleged in the complaint, took the title with notice of the facts upon which the plaintiffs' equity rests. The action seeks to have the attempted rescission of the agreement and what was done under it, declared a nullity, and the heirs-at-law, upon whom the intestate's equitable estate descended, reinstated in all the rights they before possessed under and by virtue of the title bond.

The defendants, who answered, deny that they or either of them, had such notice before and when the deeds were made to them, and defend against the present demand, by alleging that the plaintiffs have ratified and made valid the rescinding contract made by the administrator, and have elected to take the money paid by Phelps in *lieu* of the land; and further, that the contract of sale of the widow and heirs to Fannie Williams, whereby their several interests have vested in her, and she has become sole proprietor, is champertous and void.

The issues tendered by the plaintiffs, to be submitted to the jury, were as follows:

"1. Did J. H. Sparks have notice of plaintiffs' equity in the lands in controversy, as alleged in plaintiffs' complaint, before his purchase from Uriah H. Phelps?

"2. Did F. M. Phillips have notice of plaintiffs' equity in the lands in controversy, as alleged in plaintiffs' complaint, before his purchase from Uriah H. Phelps?

"3. Had the purchase money agreed to be paid by W. A. Owens (288) to Uriah H. Phelps for the lands in controversy been paid before the commencement of this action?"

The following issues were tendered by the defendants, and submitted to the jury, after objection by plaintiffs, and plaintiffs excepted.

"4. Did the plaintiffs, the widow and heirs-at-law of W. A. Owens, or either of them, ratify the rescission of the contract between U. H. Phelps and W. A. Owens, as alleged by defendants?

"5. Was the contract of sale from the widow and heirs to Fannie Williams champertous?"

The jury returned an affirmative response to the first three issues; to the fourth, "Yes, all of them," and answered the fifth in the negative.

The Court instructed the jury at length upon all the issues, to which no exception was taken, except to the charge in reference to the fourth issue. Upon this the Court said to the jury: "I will present you this issue, with the instructions asked for by both parties, for there is no great difference between them, as to the law bearing upon the matter."

These instructions, presented by the plaintiffs, were as follows:

"That the attempted rescission of this contract by A. J. Owens, as the administrator of W. A. Owens, and Uriah H. Phelps, was without authority of law, and a nullity so far as the heirs of W. A. Owens were concerned, and did not affect them nor their rights to the land in controversy, unless they afterwards ratified and affirmed the same; and nothing they said or did before they were twenty-one years of age, or after they were married (if girls), and while their husbands were still living (unless the husband assented thereto with full knowledge of the facts, or with knowledge of such facts as ought to have put him upon inquiry), could ratify the attempted rescission of A. J. Owens and Uriah H. Phelps.

"That defendants allege, that the heirs of W. A. Owens have (289) ratified the attempted rescission of the contract by A. J. Owens, as the administrator of W. A. Owens, and Uriah H. Phelps, and, as they have made the allegation, it devolves upon them to prove that it is true, or it cannot benefit them in this action; and to do this, they must prove to your satisfaction that the heirs of W. A. Owens, after they arrived at the age of twenty-one years, and when not under coverture, (that is, if they are girls, it must be after they are twenty-one years of

age and before they are married), that they expressly ratified this attempted rescission, or that they have done some act inconsistent with their rights to enforce the contract made by Uriah H. Phelps to sell said land to their father, W. A. Owens, and that they knew when they did said act, that they had the right to enforce said contract, and that said act would prevent them from afterwards doing so; and if defendants have not so satisfied you by a preponderance of evidence, you should find the fourth issue, 'No.'"

The prayers for instruction presented by the defendants were as follows:

"That if you believe from the evidence, and so find, that the widow of W. A. Owens and his heirs-at-law, after they became of age, have ratified the action of A. J. Owens, it is equivalent to a prior command, and has the same effect as if they had all been of full age, and had made the rescission themselves, under the maxim, *'omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.'*"

Plaintiffs moved for a new trial, &c., as follows:

Motion to set aside verdict as to fourth issue and for new trial, and the grounds thereof:

The jury having returned their verdict, answering the first three issues "Yes," and the fourth issue "Yes, all of them," the plaintiffs moved to set aside the finding of the jury as to the fourth issue, upon the grounds:

(290) 1. That this issue, which was tendered by defendants and submitted to the jury under the objections and exceptions of plaintiffs, was not a proper or necessary issue in this case.

2. That if it was a proper issue, there was no evidence, or not sufficient evidence, (taking all the evidence in the case,) to authorize or justify the jury in their finding, and that the finding of the jury upon this issue, was contrary to the evidence in the case and the law, as asked by both plaintiffs and defendants, and as charged by the Court; that the finding of the jury upon this issue is: "Yes, all of them," that is, that Priscilla Owens, the widow of W. A. Owens, and all the children of W. A. Owens, had ratified the attempted rescission of the sale of the lands in controversy by A. J. Owens and Uriah H. Phelps in 1861, when the plaintiff Stanly Owens and Ed. L. Owens were minors, under twenty-one years old, when this action was commenced, and Julia Lineberry was married to her husband, the plaintiff Lineberry, when she was only eighteen or nineteen years old, and when, as plaintiff alleges, there is no evidence, or none such as to authorize the finding of the jury as to any of the plaintiffs.

3. That as this issue was not a proper issue, no evidence should have been received in its support.

4. That the Court erred in allowing Stanly Owens to testify under objection and exception by plaintiffs, that "we did not receive $250; don't remember exact sum; according to my best recollection it was $180. This suit was then pending." This was said as to the consideration of Fannie Williams, who purchased the estate of the original plaintiffs, there being no issue as to this matter, and it was only calculated to prejudice the plaintiffs' case.

5. That the Court erred in allowing the following question and answer thereto, under the objection of plaintiffs: "State what you and your brothers and sisters did in regard to the Phelps debt;" as it already appeared to the Court, that witness was under twenty-one years of age when this action was commenced, and that his testimony as to his brothers and sisters was only hearsay, and it also appearing that (291) they were all minors at that time.

For these reasons the plaintiffs moved for a new trial and a *venire de novo* of this issue, and the several motions of plaintiffs being disallowed, they appealed.

Mr. D. M. Furches, for the plaintiffs.
Messrs. J. A. Williamson and *W. B. Glenn,* for the defendants.

SMITH, C. J. (after stating the facts). The exceptions are in our opinion untenable, for the reasons we proceed to state.

1st Exception. The defendants assert that the plaintiffs ratified and took the fruits of the arrangement made between the personal representative and the vendor Phelps. It was therefore a subject of inquiry, and the issue was necessary in order that the jury might pass upon the disputed fact.

2d Exc. As to the existence of any evidence, or its sufficiency to warrant the verdict.

1. That there was evidence produced, is conceded in the plaintiffs' prayer for instructions at the conclusion of which, they say the jury should be charged, that, "if defendants have not so satisfied you by *a preponderance of evidence,* you should find the fourth issue 'No.'" The preponderance has reference to ratification by each, after attaining full age and when not under coverture. This is an admission that there was some evidence proper for the jury to consider and pass upon.

2. No instruction was asked that there was no evidence to sustain the affirmative, and no objection made on this ground until after verdict.

3. As to its reasonable sufficiency to authorize the finding. This was matter fit to be urged upon the Judge to induce him to set aside that finding and re-open the inquiry, as within the discretion con- (292) fided to him, and his decision is conclusive.

3rd Exc. This objection is substantially that already examined.

4th Exc. The reception of the evidence set forth in this exception, given by W. S. Owens, (Stanly Owens), one of the intestate's heirs, and examined for the defendants.

The facts of his testimony are so vaguely set out, and the objection to it not pointed, that we are unable to appreciate the force of the objection. We cannot see why it is incompetent.

The testimony embraced in the objection, was to show that in fact the moneys paid to the administrator on the rescindinng of the contract, were in fact spent by their mother and acting guardian in the tuition of the intestate's children. It was an appropriation to their use, and being by them so known strengthens the evidence of their subsequent ratification. The fact testified to, is not itself a ratification, but as explanatory of what occurred after attaining full age, seems admissible, and this independently of the fact of infancy then existing, brings to the knowledge of such as were aware of the source from which the funds came thus used, information of the moneys so received being thus used for their benefit.

There is no error.

No error. Affirmed.

Cited: Main v. Field, 144 N. C., 308; *Brown v. Ruffin,* 189 N. C., 266; *Gaskins v. Mitchell,* 194 N. C., 277; *Colt Co. v. Barker,* 205 N. C., 172.

R. P. McDOUGALL v. GEO. CRAPON et al.

Laborers' Liens.

1. Possession of the chattel on which a lien is claimed for work done at common law, is absolutely necessary for the existence of the lien, and by the surrender of the possession, the lien is lost.
2. Under the statute in regard to the liens of laborers and artisans, if the laborer has possession of the chattel on which he claims a lien, he can enforce it by a sale, but if he surrenders it, he loses his lien both at common law and under the statute.
3. If the laborer has never had possession of chattel on which the lien is claimed, or in cases when he cannot get possession, as in cases of repairs to houses, he can enforce his lien in the manner provided by the statute.

4. So, where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, *it was held*, that the laborer had no lien on the wagon, either at common law or under the statute for his work done and materials furnished in making the repairs.

CIVIL ACTION, tried before *Connor, Judge,* at January Term, (293) 1886, of NEW HANOVER Superior Court.

The defendant Crapon sent his wagon to the plaintiff's shop for repairs, which were made, and the vehicle returned to the owner on January 13th, 1883. The charge for repairs was in materials used, three dollars, and for labor performed twelve dollars. Having possession, the said Crapon ten days thereafter, made a general assignment of his property for the benefit of creditors, including the wagon, to the defendant Ricaud, to whom it was delivered. On January 29th, 1883, the plaintiff filed his claim, in order to perfect his lien, in accordance with the directions of the statute, (The Code, §1784), until which the assignee had no notice of the asserted lien. The present action, begun on the 7th day of May following, before a justice of the peace, is to recover judgment for the debt, and enforce the alleged lien upon the wagon in order to its payment; and after judgment, was removed by appeal into the Superior Court. Upon the trial, both before the justice and in the Superior Court, the indebtedness was admitted, and the sole controversy was in reference to the existence and validity of the alleged lien. Upon the hearing, the Court adjudged, that the claim of the plaintiff for $15 is a lien on the said vehicle, and that the said lien dates back to the 13th of January, 1883, and attaches thereto in the hands of the assignee. And it was further adjudged, that if the said sum, and interest thereon from the 13th day of January, 1883, and the costs of this action, be not paid on or before the 18th day of April, 1886, that the said vehicle be sold to satisfy said judgment, in the manner prescribed by law, and after such sale, any and all persons shall be barred of any interest therein, claimed by, through, or under the (294) defendants.

From this judgment the said assignee, Ricaud, appealed.

Mr. John D. Bellamy, Jr., for the plaintiff.
Mr. D. L. Russell, for the defendants.

SMITH, C. J. (after stating the facts). In determining the question presented, it becomes necessary to examine the statute in regard to liens, since it is plain that the lien given by the common law in cases like the present, is extinguished by the voluntary return to the owner, of the goods to which it adheres while possession is retained. The lien is

inseparable from possession, and the surrender of the article is a surrender of the lien. *King* v. *Canal Co.*, 11 Cush., 231; *Baily* v. *Quint*, 22 Verm., 474.

But withholding possession does not satisfy the debt, and was available only as a form of distress to coerce payment from the debtor, who could only thus regain his property. This defect is remedied by an enactment which not only enlarges the circle of liens for the security of the laborer and mechanic, but provides a direct remedy for making the security effectual.

The act of March 28th, 1870, renders, subject to a lien, for the payment of all debts contracted for work done on houses, built, rebuilt, repaired or improved, with the lots on which they stand, every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated. The Code, §1781.

Section 1783 is in these words: "Any mechanic or artisan who shall make, alter or repair any article of personal property, at the request of the owners or legal possessor of such property, shall have a lien on such property, so made, altered or repaired, for his just and reasonable charge for his work done and materials furnished, and may hold and retain possession of the same, until such just and reasonable charges shall be paid, and if not paid within the space of thirty days, provided it does not exceed fifty dollars, if over fifty dollars, ninety days (295) after the work shall have been done, such mechanic or artisan may proceed to sell the property so made, altered or repaired, at public auction, by giving ten weeks' notice, etc., * * * * and the proceeds of the said sale shall be applied: First, to the discharge of said lien and the expenses and costs of keeping and selling such property; and the remainder, if any, shall be paid over to the owner thereof."

This then is a self-executing enactment, conferring upon the mechanic or artisan, the means of making his debt out of the property by his own act, in selling after thirty days' retention, without the intervention of judicial proceeding, either in the Superior Court or that of a justice of the peace.

Section 1780, which, for the preservation of the lien, requires notice of it to be filed within twelve months after completing the labor, and §1790, which points out the mode and Court, according to its jurisdiction, in which proceedings *must* be commenced in order to its enforcement, cannot have been intended for a case in which a resort to any Court is unnecessary, and a complete and efficient measure of relief is committed to, and may be obtained by the party's own act. How could a lien be kept up by filing a notice, when the property may be sold in thirty or ninety days, according to the amount of the claim? And

what need can there be of these provisions, when a party may make his money by exercising the conferred right of selling himself?

These enactments must have been intended for cases where possession is not in the mechanic or artisan, and where an action is necessary for his relief.

So, too, Section 1781, though it puts the lien not only upon buildings and lots, but also upon "any kind of property, real or personal," provides in other sections how it may be available, and gives to one who *has possession* and holds the article for the specified time, a right at once to sell, while others must seek the aid of a Court, to obtain which notice must be filed. This construction renders the enact- (296) ment self-consistent, and secures every needed advantage to the creditor. It follows, that the mechanic or artisan may exercise his common law right to retain the property, and the statute, recognizing the right, authorizes him to advertise and sell and pay himself, after the specified period of possession.

It is also a necessary consequence that the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since these rights are incident to and dependent on possession, both at common law and under the provisions of the statute. "The pledgee," in the words of a recent author, "certainly loses the benefit of his security, whenever by a complete out and out delivering back to the pledgor, he voluntarily places the property beyond his own reach." Schou. Pers. Prop., 515.

As the lien ceased when the plaintiff restored the repaired wagon, it of course did not follow it into the hands of the assignee, whether his position is or is not more favorable than that of his assignor.

As no objection was made to the recovery of the plaintiff's debt, he will recover only the costs incurred in the Justice's Court, and must pay those subsequently incurred in prosecuting his claim to the lien. There is error.

Error. Reversed.

Cited: Sugg v. Farrar, 107 N. C., 127; *Black v. Dowd,* 120 N. C., 404; *Tedder v. R. R.,* 124 N. C., 344; *Glazener v. Lumber Co.,* 167 N. C., 678; *Thomas v. Merrill,* 169 N. C., 627; *Auto Co. v. Rudd,* 176 N. C., 499; *Reich v. Triplett,* 199 N. C., 681.

WM. T. MORGAN et al. v. A. LEWIS et al.

Judge's Charge.

1. When the evidence on a question at issue is conflicting, the losing party cannot complain when the trial judge leaves the question to the jury, with an impartial charge as to the law.
2. The trial judge is not required, in the absence of a prayer for special instructions, to present the evidence in his charge in every possible aspect. If the parties desire more specific instructions, they must ask for them at the proper time.

(297) CIVIL ACTION, tried before *MacRae, Judge,* and a jury, at August Term, 1886, of STOKES Superior Court.

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

The facts are fully set out in the opinion.

Mr. John T. Morehead, filed a brief for the plaintiffs.

Messrs. W. N. Mebane, W. B. Glenn and *C. B. Watson,* for the defendants.

MERRIMON, J. It is stated in the case stated on appeal, that the only point contested on the trial, was as to whether the note, (the single bond sued upon), was executed by L. D. Lewis, as contended by the plaintiffs, or whether the same was a forgery, as alleged by the defendants. This being so, we are unable to discover any error in the instruction of the Court to the jury, complained of by the appellant. It was admitted that Lewis did not himself sign the bond, but the plaintiffs both testified that he could not write, and that he was present, and by his direction the plaintiff W. T. Morgan signed the bond for him. This the defendant flatly denied, and there was conflicting evidence. The Court told the jury, that the single question was, whether the defendant L. D. Lewis stood by and directed the plaintiff W. T. Morgan to sign his name to the bond for him; that if he did, then the bond was his, and they should find the first issue in the affirmative, otherwise in the negative. The plaintiffs could not complain of this. In view of the evidence, it was a proper presentation of the question to the jury.

The Court properly told them, that if they should find the first issue in the negative, then they should also find the second one in the
(298) negative, because there was no evidence that the defendants, or either of them, owed the plaintiffs, on any account other than the

alleged bond. The issue was simple, and the facts were few and plain. The Court gave the jury the brief instruction complained of, not unfavorable to the plaintiffs, that enabled them to see clearly the issue submitted to them, and the evidence bearing upon it. This was sufficient. If the plaintiffs desired that the instructions should be fuller—more explanatory—or that some possible view of the facts, not obvious, should be presented to them, then they should have asked the Court so to do. As they did not, that it was not done, was not error. The Court is not required to present possible aspects of the facts in their bearing on an issue, certainly not when they are not requested to do so.

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

No error. Affirmed.

Cited: Willey v. R. R., 96 N. C., 411; *Boon v. Murphy,* 108 N. C., 192; *Emry v. R. R.,* 109 N. C., 602; *Gwaltney v. Timber Co.,* 115 N. C., 584; *Russell v. R. R.,* 118 N. C., 1112; *Nelson v. Ins. Co.,* 120 N. C., 306; *Patterson v. Mills,* 121 N. C., 269.

EPHRAIM CLAYTON v. THE TRUSTEES OF NEWTON ACADEMY.

Contract.

Where the plaintiff contracted with a committee of citizens to build a schoolhouse on the lands of a corporation, and to pay the expenses a subscription list was made, and it was agreed that the plaintiff should get payment for his work from the parties whose names were on the subscription list, *it was held*, that the corporation was not liable for the work done by the plaintiff, and much less so was a new corporation, created long after the work was done, for the same purposes as the old one.

This was a CIVIL ACTION, tried before *Shipp, Judge,* at June Term, 1886, of BUNCOMBE Superior Court.

The action was to recover the value of work and labor done for defendants, in building an academy, known as the Newton Academy, in the county of Buncombe, about the year 1858.

The plaintiff introduced one Thos. L. Clayton, who swore that (299) his father built the wood work of a house on the land of the defendant, in 1857 or 1858; that he superintended the work, and that this was all he knew about the matter, except what his father had told him.

The plaintiff then introduced one W. W. McDowell, who swore that he, one evening after banking hours, in 1857 or 1858, went out on the streets in Asheville, and without the solicitation of any one, and because he felt an interest in the Newton Academy school, his father having been educated there, and being desirous of educating his sons there, he procured a subscription from the citizens to build the present building, and that shortly afterwards, there was a public meeting in the Court House in Asheville, to consider the necessary steps to take to put up the building. At that meeting, many persons were present. M. Patton, one of the original incorporators, was present. He, M. Patton and W. J. Alexander, were appointed by the meeting a committee to make contracts for the erection of the building. They were instructed to offer the subscription list to the contractors for the erection, and they did so. He bid in the brick work through his partner. Mr. Shackelford and Mr. Clayton bid in the wood work at $1,250. It was agreed that Mr. Clayton, as well as himself, should take the subscription in payment for the work. He was fully paid in the subscription, and knows a part of a list, amounting to over $800, was given by him to Mr. Clayton. It was his understanding that Alexander gave Mr. Clayton a list to make up the balance.

The subscriptions were all good, and were about $3,600 in amount, and it only required about $2,800 to complete the building. The remainder of the subscription, after paying for the work done by Clayton and his firm, was spent in putting up a teacher's house on the grounds. The trustees of the academy had not met for many years, and most of them were dead. They did not know of the subscription, nor did they have anything to do with the work. Their consent was not asked.
(300) It was a movement on the part of the citizens. The trustees of Newton Academy had nothing to do with it in any way. He only collected a part of the subscription list, but it was his fault that he did not get it all. The trustees of the Newton Academy never received the work. The committee never formally accepted it. There was no meeting of the trustees of Newton Academy from 1847 to 1874. When the Legislature appointed new trustees, or some time afterwards in 1874, there was a meeting and new organization. They then went into possession of the house, but never said or did anything looking towards paying for it. They found the house there, and went into it, and that is all. They have had a school there ever since. This is one of the oldest educational institutions in this part of the State, and is just outside of the corporate limits of Asheville.

E. Clayton swore, that he made the contract to do the wood work with a committee, but did not remember who the committee were.

Turned over the work to the committee. Contracted to do the work for the committee. Was not paid but about $600. He thought he was to be paid out of the subscription list. Was a subscriber himself to the amount of $100. Thinks he was present at the meeting of the citizens, but not certain. He is now 82 years old.

The plaintiff here closed his case, when his Honor intimated that it was his opinion that there was no evidence to show that the defendant was liable to the plaintiff for his demand.

The plaintiff, in deference to the opinion of the Court, submitted to a judgment of nonsuit, and appealed to the Supreme Court.

Mr. Geo. A. Shuford, for the plaintiff.
Mr. Chas. A. Moore, for the defendant.

ASHE, J. (after stating the facts). This action is manifestly without merit.

The plaintiff built the house in question, under a special con- (301) tract made with a committee of the citizens of the county of Buncombe. The funds raised for the purpose of building the Academy was by subscription, and it was expressly agreed between the plaintiff and the committee, as proved by W. W. McDowell, one of the contractors to do the brick work, that Mr. Clayton, the plaintiff, as well as himself, should take the subscription in payment for the work. The subscriptions were all good, and were about $3,600.00, and it only required about $2,800.00 to complete the building. The then trustees of the Academy had not met in many years, and most of them were dead. They did not know of the subscription, nor did they have anything to do with the work. Their consent was not asked. The plaintiff himself testified that he thought he was to be paid out of the subscription list. Had the original trustees all been alive when the building was completed, they would not have been liable to the plaintiff for his work, for it was a special contract between him and the committee of the citizens who had gotten up the subscription for the erection of the building.

There was no privity of contract between the plaintiff and the original trustees, and there being a special contract that the plaintiff was to look to the subscription list for his compensation, they were in no sense liable to him for the work done by him. So if they were not liable, much less are the present trustees liable, who had at the time no corporate existence, and were only brought into existence by an act of the Legislature some twenty-five years after the work was done, under a new organization.

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

No error. Affirmed.

(302)

ATLANTIC, TENNESSEE AND OHIO RAILROAD CO. v. J. K. PURIFOY et als.

Issues—Verdict.

1. The verdict must be taken in connection with, and interpreted by the issue, and when by necessary implication the answer to the issue disposes of the matter in controversy, it will not be set aside, although not so full as might be desirable.

2. So, where in an action to set up a lost deed, the jury found that the defendant had not executed a deed for any part of the land, but did not specifically find that no deed was ever executed, *it was held*, that the verdict was sufficiently responsive.

CIVIL ACTION, tried before *Shipp, Judge,* and a jury, at August Term, 1885, of MECKLENBURG Superior Court.

The following is a copy of the issues submitted to the jury on the trial, and the response to the first one. They did not respond to the second and third ones:

I. "Did Mortimer Johnson execute and deliver a deed to the Atlantic, Tennessee and Ohio Railroad company in 1859 or 1860, for the land in controversy, or any part thereof? If so, what part?" Answer: "No part."

II. "Has same been lost or destroyed?

III. "When was the deed lost or destroyed, if lost or destroyed?"

It appears from the case stated on appeal, that upon the rendition of the verdict set out in the record, the counsel for plaintiff moved in arrest of judgment, upon the ground that the verdict was not a proper response to the issue, and was insensible; and also moved that the verdict be set aside, and a new trial granted. The Court refused the motion of the counsel of plaintiff, and rendered judgment for the defendant.

Plaintiff appealed to Supreme Court.

(303) *Mr. R. D. Johnston,* for the plaintiff.
Mr. T. M. Pittman, for the defendants.

MERRIMON, J. (after stating the facts). It had been better if the jury had answered in terms and formally each question embraced by the first issue. But by plain and necessary implication, the response to it is, in effect, a negative answer to each of these questions. The verdict must be taken and interpreted in connection with the issue, and thus interpreted, it unmistakably implies that there was no such deed as that described in the issue, for any part of the land in question. If there was

no such deed for any part of the land, then there was none such as inquired about. There was, therefore, no such deed lost or destroyed at any time, and hence, the second and third issues were immaterial, and a verdict upon them was unnecessary.

The verdict was intelligible, and in effect, ascertained the fact in question. It was clearly not void, and the Court properly declined to so declare. If in any aspect of the matter, the Court could see that the plaintiff had suffered prejudice because the verdict was not fuller and more explicit, it might have set it aside, and directed a new trial; but it seems that the Court was satisfied with it, and therefore refused to grant the motion of the appellant in the exercise of its discretionary power.

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

No error. Affirmed.

Cited: Todd v. Mackie, 160 N. C., 356.

JAMES M. HEGGIE v. CHAS. HILL et als.

Joinder of Causes of Action—Multifariousness.

1. The provisions of The Code in regard to the joinder of causes of action, have not made any substantial change from the rules of equity practice in regard to multifarious bills, except to enlarge the right to unite in one action different causes of action.

2. Under the former equity practice, the bill was not multifarious, when there was a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct.

3. Where there were two mortgages on a tract of land, and it was sold first under the second mortgage, and afterwards under the first, and then the interest of the purchaser at the sale under the first mortgage was sold under execution, an action by the purchaser at the sale under the second mortgage, against the purchaser at the execution sale, the purchaser at the sale under the first mortgage, and the first mortgagee, alleging that the first mortgage debt was paid, or nearly so, at the time of the sale under that mortgage, and asking judgment, 1st. For the possession of the land if the debt had been paid, and if not; 2d. For an account of the amount due on the first mortgage, and for the payment to him of the excess of the purchase money after paying the debt; *It was held,* that the complaint was not multifarious, and a demurrer for misjoinder of causes of action would be overruled.

(*Bedsole* v. *Monroe,* 40 N. C., 313; *Parish* v. *Sloan,* 38 N. C., 607; *Watson* v. *Cox,* 36 N. C., 389; *Young* v. *Young,* 81 N. C., 92, cited and approved).

(304) This was a CIVIL ACTION, tried before *Clark, Judge,* at the January Term, 1886, of the Superior Court of GRANVILLE county, and brought to this Court by the appeal of the defendants, other than the defendant The People's Building and Loan Association, which did not appeal.

The action was brought to recover the possession of the land described in the complaint, from the defendants Hill and Watkins, in one aspect of the case, and in the other, the recovery from the People's Building and Loan Association of the surplus of the proceeds of the sale of the same land, after satisfying a debt due them, and secured by a mortgage upon the said land. The facts of the case are fully stated in the opinion of the Court. The defendants demurred to the complaint, and assigned as grounds of demurrer, that there are united in the complaint separate and distinct causes of action against the People's Building and Loan Association and the other defendants, which have no connection with each other, and because these causes of action, as alleged, are respectively founded upon allegations that are so contradictory, that they are destructive the one of the other, and for these reasons the complaint is multifarious, and the action should be dismissed.

(305) The demurrer was overruled by the Court, and the defendants appealed.

Mr. A. W. Graham, for the plaintiff.
Mr. H. T. Watkins, for the defendants.

ASHE, J. (after stating the facts). The grounds assigned for the demurrer, present the sole question for our consideration: "Whether the complaint is obnoxious to the objection of multifariousness."

A bill is multifarious, as the term is generally understood, when there is a misjoinder of distinct and independent causes of action. Adams Equity, p. 309, note. 1.

Whether a complaint is multifarious, usually resolves itself into the question, whether the causes of action united, are such that they may be joined in the same action. The Code, §267, Sub. Div. 1, provides, "that causes of action may be joined when they arise out of the same transaction, or transactions connected with the same subject of action."

This section of The Code, we do not think, makes any substantial change in the rules of practice which obtained before the adoption of The Code in the Courts of Equity with regard to multifariousness.

Whatever effect it may have had, has been to enlarge the right of uniting in one action different causes of action.

The rule in such a case as existing prior to The Code, was thus announced by RUFFIN, C. J., in *Bedsole* v. *Monroe,* 40 N. C., 313: "If the

grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the *same transaction,* or series of transactions, forming one course of dealing, and all tending to one end—if one unconnected story can be told of the whole, the objection cannot apply." And it has been held not to apply: "When there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct." *Whaly* v. *Dawson,* 2 Sch. and Lef., 370, and *Dimmock* v. *Nixby,* 20 Pick., 368. Nor will (306) it apply, when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights, and in such a case, they may be all charged in the same bill, and a demurrer for that cause will not be sustained. *Parish* v. *Sloan,* 38 N. C., 607; and to the same effect is *Watson* v. *Cox,* 36 N. C., 389; and in *Obin* v. *Platt,* 3 How. (U. S.), 411, it is held, that: "When the interests of different parties are so complicated in different transactions, that the entire justice could not be conveniently done without uniting the whole, the bill is not multifarious." And in Alabama it has been held, that the objection of multifariousness is confined to cases where the cause of action against each defendant is entirely distinct and separate in its subject matter from that of his co-defendants. *Kennedy* v. *Kennedy,* 2 Ala., 571.

We have referred to these cases as authorities upon the question under consideration, for the reason that in the case of *Young* v. *Young,* 81 N. C., 92, this Court held, in view of the conflicting and unsatisfactory interpretations given to the section in question by the different Courts and text writers, it was a safe guide to resort to the principles and rules adopted and used by the former Courts of Equity, especially as The Code practice has been assimilated in a great measure to that of the Courts of Equity.

But in addition to these authorities, we refer to what Mr. Bliss, in his work on Code Pleading, §110, has laid down as the rule of practice in such cases. Speaking of the improper union of defendants under this section of The Code, he says: "When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause." And in §126, treating of the joinder of distinct causes, he says: "Not only under this class may all causes of action be united in one proceeding, that arises out of the same transaction, but also those that arise from different transactions, provided they are connected with the same subject of the action."

Now applying the principles announced by these authorities to (307) the facts of this case, the question recurs, is the complaint multi-

farious? The facts are, C. C. Heggie became indebted in about one thousand dollars to the defendant, the People's Building and Loan Association, and gave them a mortgage on the land in question, in the year 1873, to secure the debt, and subsequently, in 1874, the said C. C. Heggie gave a second mortgage on the same land, to John W. Hays, trustee, to secure a debt of five hundred dollars which he owed to Finch and Harris, and in February thereafter, Hays foreclosed the second mortgage by a sale of the land, and the plaintiff became the purchaser, at the price of $625.00, and obtained a deed from the trustee in fee simple.

On the 5th of July, 1875, the People's Building and Loan Association foreclosed its first mortgage by sale of the land, when the defendant N. M. Wilson became the purchaser, at the price of $1,066, and afterwards, to-wit, on the 4th day of August, 1879, the land was sold by the Sheriff, under an execution in favor of the defendants Hill and Watkins, against said Wilson, and purchased by the said C. C. Hill and Charles Watkins. And that on the 4th day of August, 1879, the said Wilson, Hill, and Watkins knew of the equity of the plaintiff.

The plaintiff alleged in the complaint, that he had been informed and believed that the indebtedness of Heggie to the People's Building and Loan Association had been discharged, but if not, there was only $177.57 due to the Association.

This balance, we must assume, was claimed by the Association, as the plaintiff had alleged that he was informed and believed that the entire debt had been paid.

The plaintiff, as he alleged, was the owner of the equity of redemption, and entitled to the surplus, if any, after satisfying the debt secured by the first mortgage, provided there was any part of the debt secured by that mortgage remaining due at the time of the sale, but if the mortgage had been satisfied before the sale, the sale was void, and the purchasers, Wilson and Hill and Watkins, got no title to the land;
(308) and if they obtained no title, by reason of the nullity of the sale, the incumbrance of the first mortgage having been put out of the way, the plaintiff obtained a good and perfect title to the land, by his purchase, under the second mortgage, and would be entitled to recover the possession from the defendants Hill and Watkins.

The plaintiff's action is in the nature of a bill in equity with a double aspect.

He says if the first mortgage was satisfied before the sale to Wilson, he is entitled to the land, but if not satisfied, he is entitled to recover the surplus, if any, after paying the debt secured by the first mortgage.

In this view of the case, it would seem to involve the necessity of an account, as prayed for, of the payments made by Heggie, the mortgagor,

to the People's Building and Loan Association, in the result of which the other defendants are quite as much interested as the Association, for their title depends upon the fact that the mortgage under which they purchased was unsatisfied at the time of the sale. All of the transactions of the different defendants, tend to and center upon the one question, whether the first mortgage was satisfied when the sale was had under it. This being so, upon all the authorities cited, whether existing before or since The Code, warrants the joinder of the causes in this complaint. What is the subject of an action, is more easily described than defined. Judge Bliss thus illustrates it: He says, in §126, "In an action to recover the possession of land, the right is to the possession, the wrong is the dispossession; the object is to obtain possession, and the *subject,* or that in regard to which the action is brought, is the land." Here the plaintiff's interest in the land is the subject of the action, and although the purchase by the plaintiff under one mortgage, and that by Wilson, Hill and Watkins under the other, are distinct transactions, they are transactions connected with the same subject of the action.

The right asserted by the plaintiff covers the whole case, and (309) upon the authorities we have cited, it can make no difference that the rights of the defendants are distinct. But they are not so distinct but that the liabilities of some of the defendants are dependent upon the liabilities of the others, and this necessarily requires an account to be taken to determine their respective rights and liabilities. This, it seems to us, settles the question of misjoinder; and our conclusion is, the complaint is not multifarious, and the judgment of the Superior Court is consequently affirmed, and the cause remanded to the Superior Court of Granville county, that the defendant may answer the complaint, if he should be so advised.

No error. Affirmed.

Cited: Outland v. Outland, 113 N. C., 75; *Pretzfelder v. Ins. Co.,* 116 N. C., 496; *Solomon v. Bates,* 118 N. C., 316; *Cook v. Smith,* 119 N. C., 355; *Daniels v. Fowler,* 120 N. C., 16; *Fisher v. Trust Co.,* 138 N. C., 240; *Ricks v. Wilson,* 151 N. C., 49; *Chemical Co. v. Floyd,* 158 N. C., 462; *Lee v. Thornton,* 171 N. C., 213; *Sewing Machine Co. v. Burger,* 181 N. C., 256; *Craven County v. Investment Co.,* 201 N. C., 529.

DAVID BETHEA v. L. W. BYRD.

Evidence—Boundary—Declarations.

1. The declarations of deceased persons, who were disinterested at the time the declarations were made, in respect to the location of boundary lines and corners of land, are competent evidence to prove their location, if the deceased person had opportunity to be informed in respect thereto.
2. Such declarations are not evidence if the person making them is still alive, whether living in this State or not, nor if made by a person interested at the time of making them, nor if made *post litem motam.*
3. The mere fact that the witness whose declarations it is sought to give in evidence, owned a tract of land adjoining that whose corners he pointed out, does not make him incompetent.

(*Sasser* v. *Herring*, 14 N. C., 340; *Hartzog* v. *Hubbard*, 19 N. C., 241; *Mason* v. *McCormick*, 85 N. C., 226; *Fry* v. *Currie*, 91 N. C., 436; *Halstead* v. *Mullen*, 93 N. C., 252; *Smith* v. *Walker*, 4 N. C., 127; *Dancy* v. *Sugg*, 19 N. C., 515; *Hedrick* v. *Gobble*, 63 N. C., 48; *Caldwell* v. *Neely*, 81 N. C., 114, cited and approved).

CIVIL ACTION, tried before *Shepherd, Judge,* and a jury, at Fall Term, 1884, of HARNETT Superior Court.

The part of the case settled upon appeal necessary to be stated here, is as follows:

(310) 1st EXCEPTION.—In attempting to establish the location of the Clevins grant, among other evidence relating to the second corner at "M" (on the plat), the defendant offered to prove by a witness named Byrd, that many years ago an adjoining proprietor, J. T. McLean, now dead, pointed out to him this corner, at the corner of the Byrd garden, and told him this was a corner of the Timothy Clevins 300 acres. The evidence was objected to by the plaintiff, for the reason that the deceased informant, being an adjoining proprietor, was interested in the location of the grant, and was in effect making evidence for himself; it being also in evidence that the said adjoining proprietor claimed under a grant of younger date than the grant to Timothy Clevins, referred to in statement of plaintiff's case.

Defendant excepted.

There was a verdict of the jury for the plaintiff, and the Court gave judgment accordingly. Thereupon, the defendant appealed to this Court.

No counsel for the plaintiff.

Mr. J. H. Fleming, for the defendant.

MERRIMON, J. (after stating the facts). It is settled by numerous decisions of this Court, that the declarations of deceased persons who were disinterested at the time such declarations were made, in respect to boundary lines and corners of land, are competent evidence to prove their location, if such persons had opportunity to be informed in respect thereto. It is true, that such evidence is hearsay in its nature, but it has been deemed necessary to classify it with, and make it one of the exceptions to the general rule of law, that hearsay is not competent as evidence. Whether this exception comes strictly within the spirit and reason of the rule, may admit of some question, but however this may be, it is now, and has been for a long period, the law of this State. The reason of the exception seems to have been, and indeed, still is, the circumstances of the country, and the uncertainty, confusion, and indistinctness generally, of boundary lines and corners of tracts of land that belong to individuals.

These and like considerations have rendered the exception (311) necessary. Such evidence is not of a very high type, and may not ordinarily be very satisfactory, still, it is found that it subserves the ends of justice. *Sasser* v. *Herring,* 14 N. C., 340; *Hartzog* v. *Hubbard,* 19 N. C., 241; *Mason* v. *McCormick,* 85 N. C., 226; *Fry* v. *Currie,* 91 N. C., 436; *Halstead* v. *Mullen,* 93 N. C., 252.

Such declarations are not, however, evidence, if the person making them is still alive, in or out of this State, nor if made by a person *interested* at the time of making them, however long ago they may have been made, nor if made by deceased persons *post litem motam.* They must be such as were made by a person entirely disinterested, and they will have more or less wight, accordingly as the maker of them had opportunity, good or indifferent, to have knowledge of the boundary line or lines, or corner referred to, and as he may have made them casually and loosely, or with care and upon consideration. *Smith* v. *Walker,* 4 N. C., 127; *Hartzog* v. *Hubbard, supra; Dancy* v. *Sugg,* 19 N. C., 515; *Hedrick* v. *Gobble,* 63 N. C., 48; *Caldwell* v. *Neely,* 81 N. C., 114; *Mason* v. *McCormick, supra.*

The declarations mentioned in the exception, as offered by the appellant, and which were rejected by the Court, seem to us to have been pertinent and competent. They were of a person deceased, made many years ago. It does not appear that he had the slightest interest in the location of the corner which he pointed out to the witness as that of the grant in question, at the time he did so, or indeed at any time. He did not, so far as appears, claim under that grant, or against it, or have any interest in it, and if he claimed a tract of land adjoining that of the grant, under a grant prior to it, this could not of itself render him interested. The mere fact that he was the owner of an adjoining tract

of land did not necessarily make him interested—he was not seeking to point out his own corner, but that of the "Clevins grant"—not to promote his interests and advantage—to enlarge or change his boundary, or those of any other person. So far as we can see, he was content
(312) with his own lines and boundary. It seems that he was entirely disinterested, and his declarations come exactly within the exception above pointed out. He had lands adjoining the lands embraced by the grant, and therefore very likely had knowledge of the lines and corners of the grant, co-incident with his lines, and he could probably speak knowingly and advisedly. The case of *Mason* v. *McCormick, supra,* is in some respects like this. In that case the Chief Justice said: "The declaration, moreover, is not used to ascertain and fix the limits of the declarant's own land, but the corner of an adjoining tract, to determine its location, and the evidence is not rendered incompetent because that corner is co-incident with one of his own boundaries." *Fry* v. *Currie, supra,* and *Halstead* v. *Mullen, supra,* are to the same effect.

It behooved the appellee to show that the person who made the declarations in question, was interested at the time he made them. As we have seen, the facts that he was "an adjoining proprietor," and that he "claimed under" a junior grant, did not prove that he was interested. If there were other facts tending to show that he was, these ought to appear. As such facts do not appear in the record, it must be taken that they did not on the trial.

There is error, because of which the appellant is entitled to a new trial. To that end, let this opinion be certified to the Superior Court, according to law.

Error. Reversed.

Cited: Dugger v. McKesson, 100 N. C., 10; *Fry v. Currie,* 103 N. C., 204; *Lewis v. Lumber Co.,* 113 N. C., 62; *Yow v. Hamilton,* 136 N. C., 359; *Hemphill v. Hemphill,* 138 N. C., 506; *Singleton v. Roebuck,* 178 N. C., 203; *Brown v. Buchanan,* 194 N. C., 678.

JOSEPH DOBSON et als. v. ROXANA SIMONTON, Extrx., et als.

Creditor's Bill—Right to Participate in Fund.

Where, upon the pretended organization of a bank, a person allowed himself to be held out as President, and after the failure of the bank, he was sued by one of the depositors of the pretended bank, for the amount of his deposit, and a recovery had against him, which he paid, such depositor

cannot afterwards come in and prove his entire debt against the bank, in a proceeding instituted by its creditors for the purpose of distributing its assets in payment of its debts.

(*Hauser* v. *Tate*, 85 N. C., 82, cited and approved).

CIVIL ACTION, in the nature of a creditor's bill, heard by (313) *MacRae, Judge,* upon exceptions to the report of a referee, at February Term, 1886, of IREDELL Superior Court.

The statute (Pr. Acts, 1869-'70, ch. 64,) authorized the organization of the "Bank of Statesville," with a capital stock not exceeding $500,000.

Such bank was never in fact organized, but certain parties subscribed for shares of stock, preparatory to a contemplated organization of it. R. F. Simonton professed to be *Cashier* of such a bank, and Samuel McD. Tate was held out to the business community as *President* thereof, and the business of banking was done under the name of the "Bank of Statesville." In the course of such business, many persons made deposits with said Simonton as Cashier of such bank, and it purported to exist and to assume business liabilities as banks ordinarily do.

At length the business so conducted failed, and the supposed bank no longer paid its debts due depositors, and others. Thereupon, the present appellant, T. C. Hauser, as a depositor in this supposed bank, brought his action against the said Tate, alleging that he had allowed himself to be held out to the business world as President of a real bank, of the name mentioned, when in fact there was none, and had thus given the supposed bank character and credit, and thus he had rendered himself personally liable to him for the amount of his deposit mentioned. In that action, the plaintiff obtained judgment for so much of the money he so deposited with said Simonton, Cashier, as he demanded in his complaint, leaving a balance not embraced in the action and judgment. This judgment Tate paid and discharged. See *Hauser* v. *Tate,* 85 N. C., 82.

Afterwards, the creditors of the supposed bank brought this, a creditor's action, to wind up its affairs, and obtain payment of their debts respectively. In the course of the action, a referee was (314) appointed, and directed to take proof of debts, and to state and report an account thereof. The appellant went before the referee, and proved his debts, claiming the whole amount of his deposit, including the part thereof he had received from the said Tate in the action first above mentioned, and his debt thus proven was allowed by the referee. Other creditors excepted to the report of the referee, upon the groundn that the appellant had received from Tate the greater part of his debt, and he was not therefore entitled to be paid this same part a second time. There was a further reference, to ascertain the facts in respect

to the appellant's claim. The referee reported his findings of fact, and further action was had in the Court below, as follows:

"4th. I find that the same evidences of debt were sued upon in the action of T. C. Hauser against the Bank of Statesville, in Iredell Superior Court, that were sued upon in the action in Rowan Superior Court of T. C. Hauser against S. McDowell Tate."

To this finding of the referee, T. C. Hauser filed the following exception:

3. The referee erroneously finds (4th finding), "That the same evidences of debt were sued upon in the action of T. C. Hauser against the Bank of Statesville, in Iredell Superior Court, that were sued upon in the action in Rowan Superior Court of T. C. Hauser against S. McDowell Tate," but failed to find, as he should have done from the evidence, that the two actions were founded upon entirely different causes of action. That the former was an action upon a contract to repay certain sums of money, with eight per cent. interest, as evidenced by certain certificates of deposit given by the Bank of Statesville to T. C. Hauser for money deposited by him in said bank; while the latter was an action in tort for damages, because of the wrongful and fraudulent acts of the defendant.

Upon this exception his Honor ruled, and found the facts as follows:

(315) "While the finding of the referee is not, strictly speaking, correct, when he states that the same evidences of debt were sued upon in the action of T. C. Hauser against the Bank of Statesville, in Iredell, that were sued upon in T. C. Hauser against S. McDowell Tate, in Rowan Superior Court, yet the action in Rowan was for damages for loss to plaintiff, by reason of the conduct of defendant in inducing plaintiff to make deposits in the Bank of Statesville, and the damages ascertained in that action were the balance due on plaintiff's certificates, afterwards reduced to come within the sum demanded in the complaint, which was $2,500.00.

"While the action against the bank was upon the certificates as evidences of indebtedness, it is found as a further fact, that it does not appear that S. McD. Tate has set up any claim against the receiver for the sum paid by him, on the judgment against him, or any part thereof.

"This Court is, in this proceeding, administering the effects of the Bank of Statesville for the benefit of all its creditors who choose to avail themselves of its aid, and in the opinion of the Court, it would be inequitable to pay to this plaintiff such proportion of the fund as if he had received nothing from his judgment against the President of the Bank, Mr. Tate.

"But as each judgment is a separate and original judgment, the proof of the judgment against the Bank should stand, and plaintiff be paid in

the same proportion as the other creditors up to a sufficient amount to satisfy the balance due on his certificates, after deducting the amount received by him in satisfaction of the Tate judgment."

To this ruling of his Honor, the plaintiff T. C. Hauser excepts.

From the judgment, the plaintiff T. C. Hauser appeals to the Supreme Court.

Messrs. E. S. Gaither and *John Devereux, Jr.,* for the plaintiff Hauser.

Mr. D. M. Furches, for the defendants.

MERRIMON, J. (after stating the facts). It was earnestly con- (316) tended by counsel on the argument before us, that the appellant's action mentioned against Tate was founded upon a tort, and his recovery thereon was damages for a tortious injury, and therefore his debt against the supposed bank referred to, remained unpaid, and unaffected by such recovery, and he has the right to share in the assets of the bank to be distributed to its creditors in this action, to the extent of the whole of his alleged debt.

If this contention were well founded, it is not at all certain that the appellant would be entitled to prove so much of his claim as is equal to the sum of money he recovered and received from Tate in the action referred to. The recovery from the latter was so much of the appellee's *deposit* in the supposed bank, as was demanded in that action; it was expressly made the ground and the measure of the recovery. If the cause of the action had been *tort,* and the recovery damages therefor, then the measure of damages would have been—not the debt demanded—but only a sum of money equal to so much of the debt as the bank could not pay.

But we think the counsel for the appellant misapprehends the nature of the cause of action sued upon against, and the recovery from Tate. The Court held in that action, that he, having allowed himself to be advertised and held out to the business community as President of the supposed bank, thereby made himself liable directly for the plaintiff's debt—the deposit—the very debt the appellee seeks to prove and have paid in this action. In the action against Tate, the Court allowed the plaintiff, the present appellant, not to recover damages as for a tort, but his debt—the debt in great part he now seeks to prove and have paid a second time. This appears from the record of that action, and as well from what this Court said on the appeal in it. In that appeal, *Hauser* v. *Tate,* 85 N. C., 81, this Court, the Chief Justice delivering the opinion, said: "The remaining exception is to the direction as to the damages, and is equally untenable. If the defendant's legal undertaking was

collateral and subsidiary, the damages would consist in the money
(317) actually lost, that is, the entire sum, less that receivable in the distribution of the assets by the receiver. But the obligation is *direct and original,* as that imposed on Simonton himself, because of his participation in giving the bank credit, and inducing the plaintiff to make deposts."

The appellant having been allowed to recover from Tate the greater part of the very debt he now seeks to prove in this action, and having received the money in discharge of that recovery, he has not the shadow of right to have the same amount allowed and paid a second time.

There is no error in the order appealed from, of which the appellant can complain, and the other creditors do not appeal.

Let this opinion be certified to the Superior Court, to the end that further proceedings may be had in the action according to law. It is so ordered.

No error. Affirmed.

Cited: S. c., 100 N. C., 57.

W. C. MAXWELL, Admr., v. J. H. BLAIR et al.

Judgment—Excusable Negligence—Special Proceedings—Interlocutory Order.

1. The Clerk of the Superior Court cannot set aside a judgment in a special proceeding, for excusable negligence, under the provisions of §274 of The Code, but he can allow an amendment under the provisions of §273.

2. Interlocutory orders are under the control of the Court, and upon good cause shown, they can be amended, modified, changed or rescinded, as the court may think proper.

3. So, where in a proceeding to sell land for assets, the decree for sale embraced some land which was the property of one of the defendants, and which did not belong to the ancestor, but by a mistake the defendant did not discover it until after the sale, and when the notice to confirm the sale was made, *it was held,* that the Clerk had the power, and that he committed no error in amending the order of sale, so as to omit the defendant's land therefrom.

(*Brittain* v. *Mull,* 91 N. C., 498; *Jones* v. *Desern,* 94 N. C., 32; *Shinn* v. *Smith,* 79 N. C., 310; *Molyneux* v. *Huey,* 81 N. C., 107; *Miller* v. *Justice,* 86 N. C., 26; *McEachern* v. *Kerchner,* 90 N. C., 177; *Williamson* v. *Hartman,* 92 N. C., 236, cited and approved).

MAXWELL *v.* BLAIR.

SPECIAL PROCEEDING, heard on appeal from a judgment of the (318) Clerk, by *Graves, Judge,* at Fall Term, 1886, of MECKLENBURG Superior Court.

This special proceeding was brought by the plaintiff, as administrator of Joseph Blair, deceased, to obtain license to sell the lands of his intestate, to make assets to pay debts.

In the course of the proceeding, the Clerk made an order whereof the following is a copy:

"This cause coming on to be heard upon the motion of defendant, E. C. Ellington, to set aside the decree of sale, so far as the same affects the tract of land described in the pleadings as 'Dry Hollow,' or forty-seven and a half acre tract upon the ground that they were ignorant of the fact, at the time of accepting service of summons, that it was proposed to sell the 'Dry Hollow' tract, and that the said E. C. Ellington believed at the time she signed the deed to Jos. Blair, that it conveyed the lands for the life of her husband, and not in fee. From the affidavits and evidence submitted, I find the facts to be as follows: The plaintiff's intestate, Jos. Blair, was the father of Mrs. E. C. Ellington, and conveyed to her a tract of land in year 18—, of which the 'Dry Hollow' tract was a part. Mrs. Ellington married in 18—. In the year 18— her husband, T. S. Ellington, was indebted to Jos. Blair in the sum of $205, for a horse and wagon, and agreed to convey to Jos. Blair the 'Dry Hollow' tract, for the sum of $500, of which the debt of $205 was to be applied in part payment of the purchase money. The deed to Jos. Blair was signed by T. S. Ellington and his wife, E. C. Ellington, but the privy examination of the said E. C. Ellington was not taken at that time nor since. Said deed was sufficient in form to convey the land in fee, if privy examination had been taken. Jos. Blair having died intestate, the plaintiff, W. C. Maxwell, began this action on the 17th June, 1884, to subject the real estate of intestate to payment of debts, and T. S. and E. C. Ellington accepted service of the summons, but failed to appear, and answer or demur to the complaint filed. That an order of sale of said land was made on the 24th August, 1884, and sale made on the 29th September, 1886, and reported to the (319) Court. Said sale was set aside, and a resale ordered, which was made on the 5th day of January, 1885, and reported to the Court. That said Jos. Blair took possession of said land under said deed, and held the same up to the time of his death, and his widow has been in possession ever since. That after the lands were advertised and about to be sold, Mrs. E. C. Ellington was informed that the 'Dry Hollow' tract was to be sold, but she was advised and believed that the deed executed by her husband to her father, Jos. Blair, conveyed an estate during the life of her husband and supposed that the sale was confined to that life

estate, but when notice was given to confirm said sale, she ascertained that the sale was intended to convey the whole land. She immediately employed counsel and instituted the proceeding to set aside the sale of said tract. I find as a fact, that she was ignorant of her real interest in said land until the notice to confirm had been given her, and that she did not have full knowledge of her rights in said land until the sale and notice to confirm had been given.

"And all the parties being before the Court and represented, and after argument by counsel: It is considered and adjudged by the Court, treating the affidavits as an answer to the complaint herein, that the decree, in so far as it orders the sale of the 'Dry Hollow' tract, be and the same is hereby set aside, and all proceedings had thereunder, and that the plaintiff shall return to the purchaser of said tract or his assigns, all money paid and all notes given therefor. It is further considered and adjudged by the Court, that the deed made by T. S. and E. C. Ellington did not convey to Jos. Blair, the plaintiff's intestate, any interest in said land, for the want of the privy examination of Mrs. E. C. Ellington, who was a married woman at the time, and the title to said lands still remains in Mrs. E. C. Ellington."

To this order the plaintiff filed exceptions, whereof the following is a copy, and appealed to the Judge:

(320) "The plaintiff excepts to the findings and rulings of the Clerk in this case, as follows:

"1. That the Clerk has ordered the decree of sale and proceedings thereunder to be set aside, so far as it relates to the 'Dry Hollow' tract, he having no power or jurisdiction to make said order setting aside said decree, &c., the motion of E. C. Ellington to set aside said decree, &c., not having been made in one year after said decree was made, and no mistake, inadvertence, surprise or excusable neglect having been shown.

"2. That said Clerk has found as a fact that said E. C. Ellington was ignorant that the whole interest or estate in the 'Dry Hollow' tract was to be sold, before she received notice to confirm the sale, and was not advised that said interest and estate was to be sold or had been sold, until said notice was served upon her.

"3. That said Clerk fails to find as a fact, that the purchase money was paid by Joseph Blair to Mrs. E. C. Ellington for the 'Dry Hollow' tract.

"4. That the Clerk fails to find as a fact that the order or decree of sale, which is set aside as to the 'Dry Hollow' tract, was made on the 24th August, 1884.

"5. That the Clerk fails to find that the deed of T. S. Ellington and E. C. Ellington, his wife, to Jos. Blair, was in form sufficient to convey a fee-simple.

"6. That the Clerk finds that Mrs. E. C. Ellington was ignorant of the fact that said deed purported to convey a fee-simple estate."

Upon consideration of the appeal, the Judge made an order, of which the following is a copy:

"This case coming on to be heard upon the appeal from the order of the Clerk and the exceptions to the finding of facts by the Clerk.

"It is considered and adjudged by the Court, that exceptions four and five of the plaintiff to the findings of facts by the Clerk are sustained, and the facts are found as set forth in the said exceptions, and the facts are amended in accordance therewith. The other (321) exceptions are overruled. And upon the facts so amended, it is considered and adjudged that the judgment of the Clerk be affirmed, and the case is remanded, to be proceeded with according to law."

From this order the plaintiff appealed to this Court.

Mr. Platt D. Walker (*Messrs. A. Burwell* and *J. E. Brown* were with him on the brief), for the plaintiff.

Mr. J. J. Vann, for the defendants.

MERRIMON, J. (after stating the facts). This is a special proceeding, and there can be no question that the Clerk of the Superior Court, acting for the Court, had authority to make the order in question, if it were a proper one to be made at all. The Code, §251; *Brittain* v. *Mull,* 91 N. C., 498; *Jones* v. *Desern,* 94 N. C., 32.

The Clerk could not, and did not in this case, exercise authority under the statute (The Code, §274); the Judge alone could do so, because he is specially charged with such authority. But the "Judge or the Court" exercises authority under the statute (The Code, §273), in respect to "Amendments by Order," and he may exercise authority generally, acting for the Court, under the statute (The Code, §251), "unless the Judge of said Court (the Superior Court), or the Court at a regular term thereof, be expressly referred to."

This proceeding had not been determined when the application for relief under consideration was made in it. No final judgment had been entered. The orders made in it were interlocutory, and under the control of the Court. Upon proper application, and for just cause shown, the Court could change, modify, or rescind them, or any of them, altogether, especially as it is not suggested that the right of third parties would be prejudiced by such action of the Court. *Shinn* v. *Smith,* 79 N. C., 310; *Molyneux* v. *Huey,* 81 N. C., 107; *Miller* v. *Justice,* 86 N. C., 26; *McEachern* v. *Kerchner,* 90 N. C., 177; *Williamson* (322) v. *Hartman,* 92 N. C., 236.

The appellee does not seek the remedy allowed by the statute, (The Code, §274). She claims the benefit of the jurisdiction of the Court to grant equitable relief against mistake. The ground of her application is, that under the circumstances of the case, it would be inequitable and against conscience on the part of the appellant to take advantage of her mistake in failing to set up her title to a part of the land, which he seeks unjustly to sell. The land in question was hers—not that of the appellant's intestate. She did not know that it was embraced by the appellant's petition—it seems that he did not know that it was hers—if he did, so much the worse on his part. She was content to let an order of sale be entered as to her ancestor's land, but she did not consent that her own should be sold—she had no reason to suppose that an effort would be made to sell it—she had technical notice—no notice in fact—nor did such as she had lead her to suppose, infer or expect that it was proposed to sell her land, in no sense liable to be sold. The naked proposition is, that the appellee's land shall be sold by the appellant, without any consideration moving her to consent to the sale, to make assets to pay the debts of her deceased father, and this, because she failed by mistake that she might not unreasonably make, to answer the appellant's petition and set up her title to the land! Manifestly, this is inequitable—unjust! And a Court of equity will not allow it to be done, simply to uphold a naked advantage gained in the course of procedure, and that by mistake and misapprehension on the part of the party complaining.

The authorities cited in the brief of the appellant's counsel, do not apply to a case like the present one. In these cases no equitable feature was presented, and the Court was simply asked to exercise its discretionary authority, as allowed by the statute, (The Code, §274).

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

No error. Affirmed.

Cited: Jones v. Coffey, 97 N. C., 350; *Bank v. Hotel Co.,* 147 N. C., 602; *Bland v. Faulkner,* 194 N. C., 429.

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(323)

W. L. WAGGONER et als. v. PHILIP BALL et als.

Evidence.

1. It is not error to rule out evidence which could not aid the jury in passing on the issue to be tried. So, where the issue was, whether a certain tract of land in dispute, was intended by a testator to pass under a devise of his "home place," evidence that he had given parcels of land to certain of his sons, before his death, is irrelevant.

2. The admission of immaterial evidence is no ground for a new trial, unless it appears that its admission probably worked injury to the appellant.

CIVIL ACTION for the recovery of land, tried before *MacRae, Judge,* and a jury, at Spring Term, 1886, of DAVIDSON Superior Court.

The following is a copy of so much of the case settled on appeal as is necessary to a proper understanding of the opinion of the Court:

The land in controversy is the 64 acres known as the "Ball Tract." Both plaintiffs and defendants claim under Joseph Waggoner, deceased.

The plaintiffs claim that this tract is a part of the "Home Place," described in the will of Joseph Waggoner, a copy of which will is hereto attached, and that by the first and ninth sections of said will, it was devised to Joseph Waggoner's widow for her life, and after her death to the father of plaintiffs, William Waggoner, who is dead, leaving plaintiffs his heirs-at-law.

The defendants claim under a deed from Henry Waggoner, executor of Joseph Waggoner, deceased, and it is admitted that said Henry was at the time of the sale, in September, 1868, the sole executor of Joseph Waggoner, and which sale and conveyance, defendants say, was made under the authority and in pursuance of the 12th section of said will, and passed title to the 64 acres, the same not being part of the "Home Place."

The defendants set up several other defences, but upon the trial, after much testimony had been given, all others were abandoned, and it was agreed that the only question was whether the home place (324) includes the Ball Tract of 64 acres.

On the trial, the plaintiffs offered evidence, tending to prove that the land in controversy, which had been bought by the testator from Peter Myers in the year 1812, together with the other tracts, one known as the Jacob Waggoner grant, containing 360 acres, on which the testator's dwelling-house and out-buildings stood, and the other known as the Joseph Waggoner grant, containing 87 acres, all being contiguous tracts, were cultivated and treated as one farm by the testator, and were known and called by him his "home place"; that one field cultivated by the testator up to the time of his death, extended over portions of the three tracts, covering near five or six acres in controversy. That the tract called by him "the Shuler Tract," mentioned in the 9th item of the will, adjoined the Joseph Waggoner grant and the tract in controversy, which latter tract is on this trial for convenience called the "Ball Tract." That the Myers tract, which is directed in another item of the will to be sold by the executor, was bought by the testator from David Myers, and lies about one mile from the home place.

And on the other hand, testimony was offered by the defendants, tending to prove that the Ball Tract did not join the Shuler place, and was not considered by the testator a part of the home place, but was treated by him as a separate and distinct tract.

D. W. Waggoner, a witness for the defendants, testified that Joseph Waggoner died in 1858, aged about 74 years.

On cross-examination by plaintiffs' counsel, this witness testified that Joseph Waggoner had eight or ten children, naming them. Witness was asked: "If at the time he, Joseph Waggoner, made this will, he had not placed his other sons in possession of valuable tracts of lands formerly belonging to him?"

Defendants objected. Objection sustained. Plaintiffs excepted.

(325) Dempsey Clinard, a witness for the defendants, testified that there were about 340 acres at the home place left after a sale of 105 acres by the administrator of William Waggoner; that a considerable portion on the east end is woods, and there is some clearing on the south-west portion.

Objected to by plaintiffs. Overruled, and plaintiffs except.

The material parts of the will are as follows:

"My will and desire is further, that my said wife, Margaret, shall continue to reside at my home place, and occupy my dwelling-house during her life, together with my son William, and that they shall farm together on my home place; but should they disagree, and should my said wife determine to live alone without my said son William, then and in that case, my will and desire is, that all the improved and cultivated land on my home place shall be divided equally and fairly between them, by five disinterested men selected by them, or by suit, so that each shall have one-half in value of said improved land, and shall farm separately, my said wife to occupy the dwelling-house, and to have and farm upon half of said improvement during her life, and all the products and profits made on said land, also a sufficient amount of timber to keep up said place and improvement, including fire-wood.

* * * * * *

"9. I give and bequeath to my son William Waggoner, my home place upon which I now reside, except the life interest or estate heretofore given to my wife for and during her life. Also all of my Shuler tract of land, adjoining my home plantation, to have and to hold to him and his heirs in fee simple forever."

* * * * * *

"12. It is my desire and will that my interest in the mill and tract of land situated on Abbott's Creek, (it being three-fourths of said mill

and tract of land), adjoining Jacob Miller, Peter Owen and others, be sold by my executors hereinafter named, and also that my Myers place, adjoining William C. Robertson, Sam'l Yokely and others, be sold by my said executors, both tracts to be sold on such terms and time as my executors may deem best." (326)

There were no exceptions to the charge of the presiding Judge.

The case was left to the jury, by consent of all parties, upon the question whether the 64 acre tract was or was not part of the home place, and all the testimony bearing on other matters was withdrawn from the jury.

The jury responded in favor of the defendants.

Rule for new trial for errors as alleged. Rule discharged.

Judgment in favor of defendants, and the plaintiffs appealed to this Court.

Messrs. D. G. Fowle and *Raper,* for the plaintiffs.
Mr. M. H. Pinnix, for the defendants.

MERRIMON, J. (after stating the facts). On the trial, the findings of the jury upon the issues submitted to them, were made to turn upon the question, whether or not a particular part of land described in the complaint, and designated as the "Ball Tract," constituted a part of the testator's "home place," devised by the ninth clause of his will to his son William, who was the ancestor of the plaintiffs. Evidence was introduced on the part of the plaintiffs, tending to prove that it did, and on the part of the defendants to prove the reverse.

On the cross-examination of a witness for the plaintiffs, he was asked, "if at the time he, Joseph Waggoner, (the testator,) made this will, he had not placed his other sons in possession of valuable tracts of land, formerly belonging to him."

This question and any answer to it were objected to by the defendants, and the objection was sustained by the Court. This is assigned as error. Any answer to this question, so far as we can see, could have no material bearing upon the issues submitted to the jury, or upon the material question, which both parties conceded must control the findings of the jury upon them. Neither an affirmative nor a negative answer to it would tend to prove that the "Ball tract" was or was (327) not part of the testator's "home place," and could not therefore be material. Apparently, the question was intended to elicit immaterial evidence. If in any possible view of the matter at issue, the excluded evidence could be pertinent and material, it should have been made so to appear, to the end the Court could pass upon its competency. The

burden was on the defendants to show its relevancy and materiality, and this should appear in the assignment of error.

It was insisted in the argument by the counsel of the appellants, that the evidence was competent to show the condition and circumstances of the testator's family at the time he executed his will. In some possible cases, where the will is to be construed, such evidence might be competent, but no question arose on the trial as to the proper interpretation of the testator's will. The question was, whether or not a particular clause of it embraced the land in question. There is no question as to the testator's purpose—that is plain—he devised, and intended to devise, to his son named, his "home place." This in nowise dependent, so far as appears, upon what he had given his other sons, whether by deed or will. The difficulty arises, not in ascertaining the meaning of the will, but in identifying the land in question as part of the "home place," fitting it to the description in the will.

The evidence embraced by the second exception seems to have been unimportant. It tended slightly to identify the "home place," and may have borne upon the issue as to damages. It does not appear that it was incompetent. If, however, it were not strictly so, it did not of itself tend to injure or prejudice the appellants, nor does it appear that it did so. The admission of immaterial evidence that does not tend to injure the appellants is not ground for a new trial, unless it appears that it did, or probably did so. It is because the complaining party has suffered, or probably has suffered, wrong, by reason of the error of the
(328) Court, that he is entitled to have his case retried. It is not every harmless slip or mistake that affords him such right.

The law does not temporize or trifle with parties. It seriously intends that every person shall have substantial justice administered to him and for his benefit, and that he shall have fair legal opportunity to obtain it. Generally, what is inconsiderately conceded to one party, is to the prejudice of another party.

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

No error. Affirmed.

Cited: Glover v. Flowers, 101 N. C., 144; *S. v. Shoemaker, ibid.,* 695; *Jones v. Mizell,* 104 N. C., 14; *S. v. Eller, ibid.,* 856; *Jeffries v. R. R.,* 129 N. C., 237.

J. R. JONES v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Railroads—Fences—Negligence.

There is no requirement at common law, and no statute in the State, obliging railroad companies to fence their tracks. So, where in constructing a railroad, a portion of the plaintiff's pasture fence was removed, and a cut about eight feet deep was made where the fence had been, into which the plaintiff's horse fell and was killed; *It was held*, that the railroad company was not liable.

(*Railroad Co.* v. *Wicker*, 74 N. C., 220; *Freedle* v. *The Railroad Co.*, 49 N. C., 89, cited and approved).

This was a CIVIL ACTION, tried before *Avery, Judge,* at August Term, 1886, of the Superior Court of BUNCOMBE county.

The action was brought to recover the value of a horse. The testimony offered by the plaintiff, tended to show that the defendant company had completed its road, in accordance with its charter, through the land of defendant, and in making a cut through a hill on said land, had cut off an angle of plaintiff's fence that surrounded his pasture field, including several panels of fence, and leaving the ends of the fence not destroyed, jutting against the cut, the banks of which were left to serve the purpose of a fence, for a distance of twenty yards, the bank being along the whole of the distance between the ends of (329) the fence, from ten to eighteen feet high; that the defendant had finished and was running and operating the road through said lot, but had not erected any fence along the margin of the cut.

The plaintiff offered testimony further to show, that he owned a black mare, worth fifty dollars; that the mare was blind in one eye and moon-eyed in the other eye; that plaintiff turned the mare into said pasture about four months before the action was brought, and the mare stepped over the bank and fell into the cut and her neck was broken, so that she was killed by the fall.

The plaintiff contended, that the defendant company had destroyed a portion of his fence, and was guilty of negligence in failing to replace it, or construct a fence along the margin of the cut, and asked that the jury be so instructed.

The Court instructed the jury, that in any view of the case arising out of the testimony, the plaintiff was not entitled to recover, and that they should find all issues in favor of the defendant. Plaintiff excepted to instructions given and instruction refused. Verdict for defendant. Motion for new trial refused. Appeal.

No counsel for the plaintiff.
Mr. C. A. Moore, for the defendant.

ASHE, J. (after stating the facts). The plaintiff seeks to recover damages from the defendant, upon the ground that the defendant, in constructing its road through his land, excavated a cut from ten to eighteen feet deep, and failed to fence it up, in consequence of which the plaintiff's mare, blind in one eye and sore-eyed in the other, fell into it and broke her neck.

The sole question presented in this case is, whether a railroad company is bound to fence the excavations made in the construction of its road, so as to prevent horses and cattle from falling into them.

(330) A railroad company, at common law, is under no obligation to fence its road. The matter of fencing their lines by railroad companies, is wholly one of statute regulation. In the absence of a statute requiring it, there is no duty to maintain fences. *Campbell* v. *New York and New England Railroad Co.,* 50 Con., 128.

The same doctrine is laid down by Wood, in his work on Railway Law, vol. 3, p. 1543, where it is said: "A railway company, at the common law, is under no other or different obligation respecting the premises occupied by it, than any other owner or occupant of real estate, and unless so required by statute, it is under no obligation to fence its track; and as the owner of adjoining lands is bound to restrain his cattle, it is not liable for cattle killed or injured upon its track, simply because it had omitted to erect fences or other barriers to prevent them from getting there; and consequently, in such cases, a railroad company is only liable for injuries to cattle upon its track, which result from its negligence."

In this State, we have no statute which requires railway companies to fence their roads.

In the assessment of damages against railway companies, when land is condemned to the use of the road, the costs of fencing is held to be an element in the measure of damages to the owner of the land. *Railroad Co.* v. *Wicker,* 74 N. C., 220, and *Freedle* v. *North Carolina Railroad Co.,* 49 N. C., 89.

The plaintiff has no cause of action against the defendant. It was his own folly to have turned his mare into an enclosure where it was liable to fall into such an excavation.

No error. Affirmed.

Cited: Winkler v. R. R., 126 N. C., 373.

(331)

WILLIAM HODGES v. SAMUEL WILLIAMS et als.

Navigable Waters—Entry and Grant—Riparian Owner—Relicted Land.

1. Land covered by navigable water is not the subject of entry and grant.
2. By the common law the criterion whether a water was navigable was the ebb and flow of the tide, but this test has no application to the waters of this State, where the test is, whether or not the water is navigable for sea vessels.
3. A water way lying wholly within a State, and not connected with other waters leading to the sea, is not navigable under the laws of the United States.
4. The riparian owner of land bordering on a river which is technically not navigable, but which is used as a highway of commerce, owns the land in the bed of the river, subject to an easement in the public to use the river for the purposes of transportation.
5. A lake fifteen miles long and eight miles wide, which is three and one-half feet deep, and which has no important inlet, and does not form a link in a chain of water communication, is not navigable.
6. The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ* if the State has granted the bed of the stream to another.
7. Where the bed of an unnavigable stream has been granted, a riparian proprietor is not entitled to land made by a withdrawal of the waters.
8. Where land is relicted by a sudden withdrawal of navigable waters it belongs to the sovereign, but where the withdrawal is gradual it belongs to the riparian proprietor.

(*Collins* v. *Benbury*, 25 N. C., 277; *State* v. *Glen*, 52 N. C., 321; *Wilson* v. *Forbes*, 13 N. C., 30; *Williams* v. *Buchanan*, 23 N. C., 535; *Ingram* v. *Threadgill*, 14 N. C., 59, cited and approved; *Broadnax* v. *Baker*, 94 N. C., 675, distinguished and approved; *Murry* v. *Sermon*, 8 N. C., 56, overruled).

EJECTMENT, tried at February Term, 1886, of HYDE Superior Court, before *Gudger, Judge.*

A jury trial was waived, and the Court found the facts as follows:

That the land in dispute was granted by the State, a portion thereof to John Hall in 1795, and the remaining portion in 1819 to Green Hill.

That the plaintiff is the owner and in possession of the land set out and described in the plat hereto annexed, beginning at the figure 7 thereon, running thence to 8, 9, 10, 11, 13, 38, 12, 31, 29, 1, 25, 7; that the beginning thereof is at a gum stump on the margin of (332) Mattamuskeet Lake at 7, thence running by 8, 9, 10, &c., to a pine at 38 on the margin of said lake, thence along the margin of said lake by 12, 31, 29, 1, 25, to the gum stump at 7, the beginning.

The plaintiff does not connect himself with either of the grants heretofore mentioned, but shows color of title and possession thereunder, since 1824, of the land contained in the boundaries above set out, beginning at the figure 7. It is admitted that he is the owner and in possession of the said land within the boundaries above named.

The land in dispute was covered by the waters of Mattamuskeet Lake in 1824, and has since that time "grown up" or been made, (to use the words of the witnesses), by the gradual and imperceptible recession of the waters of said lake, and left bare by reason of the drainage by the canals and by evaporation. The recession of the waters of the lake was first indicated and made apparent by the gradual appearance of two islands in the lake near the shore, and the land in controversy, (of which the said islands are a part), has been gradually and imperceptibly left bare by the recession of the water. The land has been making, since the waters were taken down by the canals, and not much before, if any. The land admitted to be the land of the plaintiff, is immediately adjoining the land in dispute, which first mentioned land runs down to the water's edge of said lake as it was in 1824.

That Mattamuskeet Lake is fifteen miles long and eight miles broad, and until the cutting of the canals hereinafter mentioned, had no known or visible outlet to, or connection with other waters. That fifty or more years ago, the water in the deepest part of the lake was from eight to eleven feet deep; that forty years ago it was six feet deep, and that it is now about three and one-half feet deep. That about the year 1835, and soon thereafter, three canals were cut, connecting said lake with Pamlico Sound, and that in consequence thereof, some of the water of said lake was drained off and into the said sound.

(333) That from the earliest recollection of the witnesses, fifty or sixty years ago, the said lake has been navigated by canoes. That at one time, a flat-bottomed vessel, with a mast and sail, carried corn, staves and other produce from one side of the lake to the other, and that about 1862 or 1863, an open boat passed through and out of said lake, through one of the said canals, into Pamlico Sound, and thence to New Bern, N. C., loaded with and carrying produce and other articles to the said market.

The defendants introduced no evidence. The plaintiff has never had the possession of the land in dispute, and the defendants have been in possession thereof for four or five years prior to the commencement of this action, and are still in possession thereof.

Upon the facts found above, the Court was of the opinion that the plaintiff was entitled to recover the land mentioned in the complaint.

From the judgment the defendants appealed to the Supreme Court.

Mr. E. F. Aydlett, for the plaintiff.

Mr. Geo. H. Brown, Jr. (*Mr. J. W. Albertson* was with him on the brief), for the defendants.

ASHE, J. (after stating the facts). In considering the questions involved in this appeal, that which presents itself *in limine* is, whether Mattamuskeet Lake is a navigable water. If navigable, then the land covered by its waters is not the subject of entry and grant, and the doctrine of accretion applies, but if not navigable, then the soil underlying its waters is the subject of entry and grant, and when granted, is the private property of the grantee.

By the common law, the criterion for determining whether a water was navigable or not, is the ebb and flow of the tide, extending so far up the rivers entering into the sea as there is a flux and reflux of the tide. Gould on Water Courses, §42.

But the tidal test has no application to the rivers and other (334) waters in this State, as it has not in any of the other States. It has been decided in most of the States as inapplicable to the geographical condition of this country.

The decisions of the Courts in the different States of the Union are so diverse on this question, that it is needless to go beyond our own decisions to determine what are navigable waters.

The criterion adopted by this Court in several adjudications upon the subject, is that all waters which are actually navigable for *sea vessels,* are to be considered navigable waters under the laws of this State.

In *Collins* v. *Benbury,* 25 N. C., 277, it is held, that a navigable stream in this State, does not depend upon the common law rule, but waters which are sufficient in depth to afford a common passage for people in *sea vessels,* are to be taken as navigable. And in *State* v. *Glen,* 52 N. C., 321, Judge BATTLE in his opinion used this language: "We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of *sea vessels,* are navigable waters, the soil under which is not the subject of entry and grant under our entry laws." And in *Wilson* v. *Forbes,* 13 N. C., 30, the Court made it no question as to what general rule was to be adopted to determine the character of a water-course, but held that a stream eight feet deep, sixty yards wide, and with an *unobstructed navigation for sea vessels from its mouth to the ocean,* is a navigable stream, and its edge *at low water-mark* is the boundary of the adjacent land, and it was in that case held, that any water-course not navigable for *sea vessels,* but capable of being navigated by boats, floats and rafts, technically styled navigable streams, are the subject of special grant by the State under the entry law.

This lake is not a navigable water under the laws of the United States, for it has been held in 11 Wallace, 411, that a water-way wholly within a State, and not connected with other waters, rivers, and streams
(335) leading to the sea, is not navigable. But this lake had no such connection. Being then not a navigable water under the laws of the United States, the question remains, is it navigable under the laws of this State? According to the definition of navigable waters as given in these cases, they must be navigable for *sea-going vessels.* But this rule has been somewhat modified by the recent decision of this Court in the case of *Broadnax* v. *Baker,* 94 N. C., 675.

But that decision is not really inconsistent with the authorities cited. It only qualifies them by holding that in this State, the question whether a water is navigable, not in a technical sense, but as a public highway, has reference to the operation of our entry laws upon their underlying beds. The principle there decided is, that whenever a water-course has a capacity to float freight and passenger boats, whereby they become highways or channels of commerce, the right to use them as such, becomes paramount to any rights of a riparian proprietor, or even the owner of the soil over which the waters flow. The consistency is apparent in what is said in the opinion in *State* v. *Glen, supra,* where the grant covered the soil under the stream: "As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil clear across the river, *subject to an easement in the public for purposes of the transportation of lime, flour and other articles in flats and canoes.*" It was in this sense only that the water of the lake was navigable, if at all, for the bed of the lake had been the subject of entry, as we will hereafter show.

We have not overlooked the fact that it was held in *Murry* v. *Sermon,* 8 N. C., 56, to be navigable. But that case does not seem to have occupied very seriously the attention of the Court, nor does the report of the case disclose what was the evidence in the Court below upon the question of its navigability.

But in the case before us, the facts are, that fifty or more years ago, the water in the deepest part was from eight to eleven feet deep, but what portion of it was that depth is not made to appear.
(336) Forty years ago it was in the deepest part six feet deep, and at the commencement of this action only three feet in depth. This reduction in the depth of the lake has been effected gradually and imperceptibly by three canals, cut about the year 1835, and within a few years thereafter, connecting the lake with Pamlico Sound. Fifty or sixty years ago the lake was, and still is, navigated by canoes. At one time a flat-bottom boat, with mast and sail, carried corn, staves and other produce from one side of the lake to the other, and about 1862 or

1863, an open boat loaded with produce, passed through and out of the lake, through one of the canals, to New Bern.

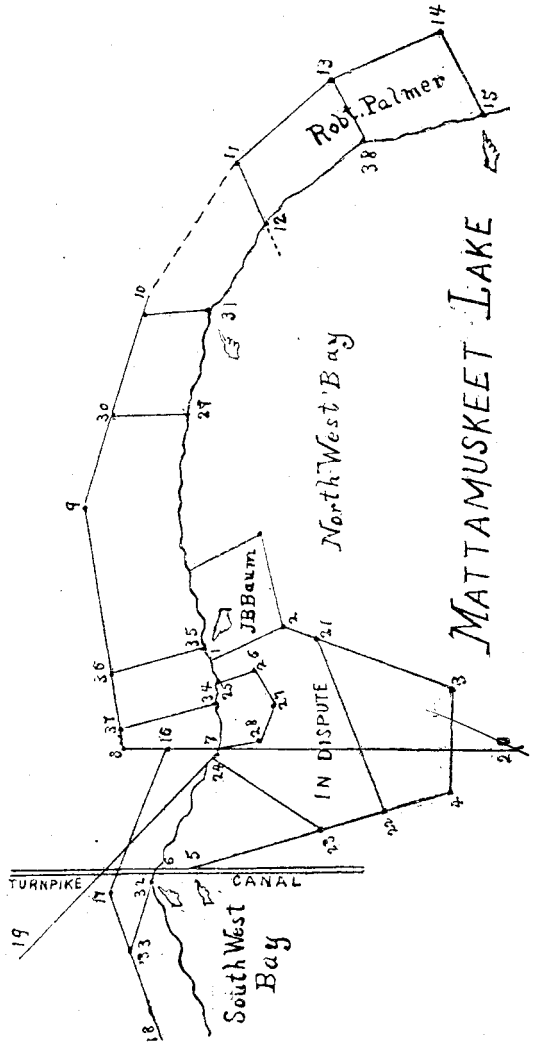
The infrequency of this sort of navigation is strong evidence that the lake was not a navigable water in the sense of the definition. Just such craft, except as to the sail and mast, pass down the Yadkin river, and it was held in *State* v. *Glen, supra,* that that was not a navigable stream. A mast and sail do not make a boat *a sea-going vessel.* They may be used upon any kind of vessel, even upon a raft, and are often seen upon canoes and other small craft.

In New York it has been held, that an inland lake, five miles long and three-quarters of a mile wide, which has no important inlet, and does not form a part of a chain of connecting water, is subject to the common rule as to fresh-water streams. *Ledyard* v. *TenEyck,* 36 Barb., 102. And in New Jersey it has been held, that a fresh-water lake three miles long and one mile wide, and of a sufficient depth to float large vessels, but which had no navigable outlet, and had never been navigated by vessels larger than a fishing craft thirty feet long, was private property. *Cobb* v. *Davenport,* 32 N. J., 337. And without going beyond the State for these authorities, the State has recognized and virtually declared the lake to be unnavigable, by grants of parts of the land covered by its water as early as 1795 and 1819, and by the several acts of 1827, 1835 and 1855, prohibiting the entry of the lands covered by the waters of any lake which shall be gained by the recession, draining or diminution of such waters, and the last act (337) expressly excepts all grants theretofore lawfully made.

The first of the grants referred to, as found by his Honor to have been issued by the State for a part of the bed of this lake, was a grant to John Hall in 1795, represented on the plat by the lines (338) 19, 7, 20, and the other to Green Hill in 1819, by the lines 1, 2, 3, 4, 5, 6, 7, which covered the whole of the land in dispute. These grants, we must take it, were offered in evidence, and no objection was opposed to their admission. We must therefore assume, for the purpose of this investigation, that they were valid grants. The plaintiff claimed the land represented in the plat by the lines, 8, 9, 10, 11, 13, 38, 12, 31, 29, 1, 28, 7, which called for the margin of the lake, which will be seen by reference to the foregoing plat, which accompanies the record and is made a part of the case, and was used as such in the argument of the case before this Court.

The plaintiff did not connect himself with any grants, but his title by possession since 1824, and color of title to the tract of land bordering on the lake, was admitted; and he claimed the land in controversy, designated in the plat by the lines 7, 22, 26, 27, 28, 7, which is caused by the reliction of the water of the lake, and was in the possession of the

defendant Williams. The plaintiff had never had any possession of this land, but claimed it as riparian owner by virtue of the recession of the water of the lake.



The question then arises, can he claim the relicted land of the lake shore by such a title? It is well established, that in navigable streams the riparian proprietor owns the land, *usque ad filum aquæ*. *Williams*

v. *Buchanan,* 23 N. C., 535; *Ingram* v. *Threadgill,* 14 N. C., 59. Of course this principle cannot apply, when the bed of the stream had been previously granted. We find no case where this principle has been applied to large bodies of water like this lake, which is fifteen miles long and eight miles wide; and it cannot apply to this lake, because the land in dispute covered by the water of the lake, had been granted by the State prior to any title acquired by the plaintiff to the land bordering upon its shore, as shown by the facts found by his Honor.

If then, the plaintiff by his grant acquired no title to the land (339) in dispute covered by the water of the lake, he could not acquire any to the land relicted by the recession of the water, for that right is derived mainly from the rule that the riparian proprietor is owner of the soil under the water, and by the general law of property, becomes entitled as of right to all accessions. See 9 Cush., 544, and *Ingraham* v. *Wilkinson,* 4 Pick, 268.

To illustrate this principle in its application to unnavigable streams, suppose the State has granted the land in the bed of the stream covered by the water, to A, as we have shown it may do, and afterwards grants the land on each side of the stream to B and C respectively, calling in each grant for the margin of the stream as the boundary, and the river afterwards changes its course, so as to leave the bed of the stream bare, the relicted land would belong to the grantee of the bed of the stream, no matter whether the reliction occurred suddenly or gradually and imperceptibly, for in such a case the riparian proprietors had no right to the land covered by the water, by virtue of the principle of ownership *ad filum aquæ.* The case is analogous. Here the land covered by the water of the lake, had been granted by the State prior to any grant of the plaintiff, and by his grant he acquired title only to the margin of the lake, and none to any of the land of the lake covered by its water. When the land in dispute, then being covered by the water, was reclaimed, the relicted land would belong to the first grantee and not to the plaintiff as riparian owner. This principle, of course, does not apply to lands relicted by the recession of the sea, or other waters technically navigable, for then the principle is well settled, that if the land covered by the water lying adjacent to the shore is relicted by a sudden recession of the water, the land belongs to the sovereign, but if relicted gradually and imperceptibly, it belongs to the riparian proprietor.

But we have shown upon the facts found and the authorities to (340) which we have had reference, that this lake is not navigable water, and our conclusion is, the plaintiff has failed to make out his title to the land in controversy, and that there was error in the judgment of the Superior Court.

This opinion will therefore be certified to the Superior Court of Hyde county, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. v. Club, 100 N. C., 481, 482; *S. v. Eason,* 114 N. C., 790; *S. v. Baum,* 128 N. C., 605; *S. v. Twiford,* 136 N. C., 606.

L. M. SCOTT v. J. H. QUEEN.

Practice.

1. Where, by inadvertence, a judgment is entered in this Court for a new trial, when it should have been one remanding the case, it will be corrected on motion.
2. Where the relief sought in an action was the reformation of a deed, and for damages and a partition, and the Court below rendered judgment on the verdict in favor of the defendant, which was reversed on the appeal; *It was held,* that a *venire de novo* should not be granted, but the case should be remanded to be proceeded with as if no erroneous ruling had been made.

MOTION by the plaintiff to correct a judgment of this Court made at October Term, 1886.

The facts appear in the opinion.

Mr. C. M. Busbee, for the plaintiff.

No counsel for the defendant.

SMITH, C. J. This action is prosecuted to obtain a reformation in the terms of the deed made by Mary McElrath, conveying the tract of land therein described, in equal parts to her daughters, the *feme* plain-
(341) tiff and defendant, so that three-fourths of the estate shall vest in the former, and the remainder, one-fourth, in the latter—for a partition upon this basis, and for damages for spoliation and rent. No issues upon the demand for rent and damages were drawn up and submitted to the jury, and their findings were directed to the source from which came the funds used by the grantor in making the purchase. These were responded to favorably to the plaintiff; notwithstanding which, the court gave judgment against the plaintiff, and she appealed.

Upon the hearing the judgment was reversed, and judgment inadvertently entered giving a new trial, instead of which, as there were undisposed matters in controversy, and partition to be made, the cause should have been remanded to be proceeded with as if no erroneous ruling had been made, and in accordance with the opinion of this Court.

The Court is now moved to correct the judgment entered at the last Term, notice thereof having been given the counsel for the defendant in the Court below. The motion is so far allowed as to strike out the order for a new trial, and remand the case to be proceeded with, after reversal of the judgment below. *It is so ordered.*

Remanded.

Cited: Cook v. Moore, 100 N. C., 296; *Solomon v. Bates,* 118 N. C., 322; *Bernhardt v. Brown, ibid.,* 711; *S. v. Marsh,* 134 N. C., 187; *Durham v. Cotton Mills,* 144 N. C., 714.

N. G. PENNIMAN v. J. H. DANIEL.

Appearance—Jurisdiction.

1. A general appearance by counsel cures all antecedent irregularity in the service of process, and puts the defendant in Court, just as if he had been personally served with process.
2. Where it is desired to take advantage of any defect in the service of process, a special appearance should be entered for that purpose.
3. So, where a defendant demurred because he had not been properly served, but a general appearance was entered by his counsel; *It was held,* that the appearance waived any irregularity in the service, and the demurrer was properly overruled.

(*Wheeler* v. *Cobb,* 75 N. C., 21, cited and approved).

This was a CIVIL ACTION, tried before *Clark, Judge,* at May (342) Term, 1886, of CATAWBA Superior Court.

The action was brought to recover the balance due on a promissory note, made by the defendant to the plaintiff.

The plaintiff and defendant were both non-residents of this State.

On the 14th day of March, 1883, the plaintiff sued out a summons against the defendant, which was returned "not to be found," and on the same day the plaintiff sued out a warrant of attachment against the

defendant, which was levied upon certain real and personal property of the defendant.

The case was continued from Term to Term, until January Term, 1886, when an order of publication was made for the defendant to be and appear at the next Term of the Superior Court, then and there to plead, answer or demur to the complaint.

The defendant demurred to the complaint, and for cause of demurrer showed:

I. That this is a civil action founded on a note for the payment of money, and the plaintiff and defendant were at the commencement of the action both non-residents of the State of North Carolina, and no personal service of the summons in this action has ever been made upon defendant, and no service at all, except an attempted service by publication, and therefore he says that this Court has no jurisdiction of his person, and he asks judgment that the plaintiff take nothing by his summons, that the defendant go without day, and recover his cost of this action.

The case coming on to be heard upon the complaint and demurrer thereto filed, and upon agreement of counsel, it was adjudged by the Court that the demurrer be overruled. It was further adjudged
(343) that the defendant have leave to file an answer to the plaintiff's complaint. From this judgment the defendant appealed.

Mr. M. L. McCorkle, for the plaintiff.
Mr. L. L. Witherspoon, for the defendant.

ASHE, J. (after stating the facts). The defendant demurs to the complaint upon the ground that both he and the plaintiff are non-residents of the State, and there has been no personal service of the summons upon him, and no service at all, except an attempted service of the summons by publication, which he insists gives the Court no jurisdiction of his person.

But the defendant has filed this demurrer, and did so by his attorneys, who must have made an appearance for him to do so. The appearance, for aught that appears, is unqualified, and the reasonable construction is, that it was a general appearance, that is, for all purposes, otherwise the counsel would have asked leave of the Court to make a special appearance, which cures all antecedent irregularity in the process, and places the defendant upon the same ground as if he had been personally served with process. *Wheeler* v. *Cobb,* 75 N. C., 21; and cases there cited.

We are of the opinion there was no error.

Let this opinion be certified to the Superior Court of Catawba County, that further proceedings may be had according to law.

No error. Affirmed.

Cited: Caldwell v. Wilson, 121 N. C., 453; *Harris v. Bennett,* 160 N. C., 342; *Luther v. Commissioner,* 164 N. C., 245; *Electric Co. v. Light Plant,* 185 N. C., 537; *McCollum v. Stack,* 188 N. C., 465.

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WILLIAM CAMPBELL v. B. F. WHITE.

Personal Property Exemption.

1. A debtor is entitled to $500 of personal property, as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other personal property he may have exempted, up to the prescribed limit.

(*Citizens Bank* v. *Green,* 78 N. C., 247, cited and approved).

CIVIL ACTION, tried before *Clark, Judge,* at October Term, 1886, of NEW HANOVER Superior Court.

The plaintiff caused execution to issue upon a docketed judgment in the Superior Court, upon which personal property of the value of $500 was laid off to the defendant, and the sheriff made return of a levy upon what was found in excess. Some two weeks afterwards, on July 27th, 1886, upon affidavit, made under §488, par. 2 of The Code, the clerk issued notice to the defendant, requiring him to appear at a time and place specified, for examination in regard to his property, and to show cause why a receiver thereof should not be appointed, and meanwhile to desist from making any disposition thereof.

Upon the hearing before the clerk, the plaintiff's counsel moved to subject all the estate of the debtor, outside of that exempted and allotted to him, to the payment of the execution, which was refusd, the clerk "being in doubt as to whether the defendant is entitled to the choses in action, in addition to his former exemptions," so as to run up the aggregate value to the limit fixed by law, and a receiver was appointed to take charge of the property.

Upon the appeal by the plaintiff to the Superior Court, it was adjudged that the personal property collected by the receiver appointed in this cause, shall be held by the Court, subject to the application

(345) of the defendant to have so much thereof laid off to him as a personal property exemption, as will make his exemption up to $500, and that the surplus thereof shall be paid by said receiver to the plaintiff, to be applied to the satisfaction of plaintiff's execution.

From this ruling the plaintiff appealed, and brings up for review, the question, whether a judgment debtor can claim, *toties quoties,* as exempt, the full measure allowed by law, against every final process.

No counsel for the plaintiff.

Mr. Bellamy, for the defendant.

SMITH, C. J. (after stating the facts). The words of the Constitution, that personal property of the value of $500, and belonging to any resident, "shall be, and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt," (Art. 10, §1), is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and of course, the diminution from use, loss, or other cause, must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him, as not liable to seizure.

"The law," in the language of this Court, in *Citizens Bank* v. *Green,* 78 N. C., 247, "is aimed at the creditor only, and it is upon him that all the restrictions are imposed; and the extent of these restrictions is the measure of the privileges secured to the debtor; and these restrictions imposed on the creditor, are that *in seeking satisfaction of his debt, he shall leave to the debtor, untouched,* $500 *of his personal, and* $1,000 *of his real estate.*"

There is no error.

No error. Affirmed.

Cited: Thomas v. Fulford, 117 N. C., 680; *Gardner v. McConnaughey,* 157 N. C., 483; *Kelly v. McLeod,* 165 N. C., 384; *Kirkwood v. Peden,* 173 N. C., 462; *Hicks v. Wooten,* 175 N. C., 602; *Comr. of Banks v. Yelverton,* 204 N. C., 447.

(346)

EMILY NEVILLE v. J. R. POPE.

Coverture—Jurisdiction of Justices of the Peace—Injunction—Pleading—Irregular Judgments.

1. A *feme covert* may be sued in the court of a justice of the peace, for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free-trader.

2. In an action to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, a transcript of the record should be set out, so that the court can see from the record itself, whether or not there was a fatal lack of jurisdiction.

3. Where the court has jurisdiction, errors in the judgment cannot be corrected by an injunction, but only by appeal, except where fraud is alleged.

4. Where it is sought to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, every presumption is in favor of the jurisdiction, and it must be made to appear affirmatively from the record, that the court had no jurisdiction.

5. A motion in the cause is the proper remedy for setting aside an irregular judgment.

6. Where a *feme covert* was sued with her husband, whom she instructed to make a proper defence to the action, which he failed to do; *It was held*, no ground for an injunction to restrain the collection of the judgment, in the absence of fraud.

7. The defence of coverture must be made in apt time in order to be available.

(*Vass* v. *The Building Association*, 91 N. C., 55; *Grantham* v. *Kennedy*, *Ibid.*, 148; *Spillman* v. *Williams*, *Ibid.*, 483; *Williamson* v. *Hartman*, 92 N. C., 236; *Burgess* v. *Kirby*, 94 N. C., 575; *Nicholson* v. *Cox*, 83 N. C., 48; *Vick* v. *Pope*, 81 N. C., 22, cited and approved; *Dougherty* v. *Sprinkle*, 88 N. C., 300, cited, distinguished and approved).

MOTION to continue an injunction to the hearing, heard by *Philips, Judge,* at Chambers in HALIFAX, on November 18, 1885.

This action is brought to obtain relief by injunction for the causes specified in the verified complaint, the material parts of (347) which are as follows:

"1. That on the ..... day of October, 1869, she and her husband, Elijah K. Neville, executed their note to one Rosa Pope, in the sum of fifty-five dollars, and that on the 3rd day of August, 1880, the defendant caused a judgment to be rendered on said note against the plaintiff and the said Elijah K. Neville, before John O'Brien, Esq., a justice of the peace of Halifax county, and caused the same to be docketed in the office of the Clerk of the Superior Court of said county, in judgment docket, vol. 4, number 1188, on the said 3rd day of August, 1880.

"2. That at the time of the execution of said note, and the rendition of said judgment, the plaintiff was a *feme covert* domiciled in Halifax county, and living with her husband, the said Elijah K. Neville, and at the aforesaid times she was not a free-trader, and never has been one.

"3. That in the trial of said cause before the said justice, the defendant did not allege in his pleadings that the plaintiff was possessed of a separate estate, and that the contract was such as the statute renders her competent to make, nor did he allege that it was for her advantage to make said note or contract.

"4. That the plaintiff instructed her husband, the said Elijah K. Neville, to make the proper defences for her, to appeal from said judgment to the Superior Court, but for some cause, unknown to this plaintiff, he failed so to do."

It is further alleged, that the defendant has caused an execution to be issued upon the judgment mentioned, and is about to require the sheriff to sell a part of a tract of land in which the plaintiff has a life estate, to her "irreparable damage," &c. She demands judgment:

1. That the defendant, his agents and attorneys, be restrained from selling, disposing of, or in any way interfering with said land.

(348) 2. That said judgment be set aside and declared void, and of no effect.

3. For such other relief as may be just and proper, and for costs.

The defendant filed the following affidavit:

"Jacob R. Pope, being duly sworn, says that at the time, before the justice of the peace, when the judgment set out in the complaint was rendered against the plaintiff herein, the defence of *coverture* was not set up, nor was it made to appear to the court that she was a married woman; nor, as he is informed and believes, was she so described in the summons in said action."

Treating the complaint as an affidavit, the Court, at Chambers, granted a restraining order, and afterwards continued the same as an injunction until the case should be heard upon the merits. From this order the defendant appealed to this Court.

Messrs. E. T. Banch and *David Bell,* filed a brief for the plaintiff.
Mr. R. O. Burton, Jr., for the defendant.

MERRIMON, J. (after stating the facts). It is not true, as seems to be supposed, that the court of a justice of the peace has no jurisdiction in any case of a married woman, and of a cause of action against her, of which that court would ordinarily have jurisdiction, if the party sued were a *feme sole,* or a male person. There is no provision of the constitution, or any statute of this State, that excepts her from such jurisdic-

tion, nor is the nature of her marital relation such, under existing law, as to exempt her from it in all cases. She may be sued in that court for a debt due from her, or a contract made, or for a wrong done by her before the marriage. The statute, (*The Code,* §1822-§1823), expressly provides that the husband shall not be liable on such account, and that the liability of the wife "shall not be impaired or altered by such marriage." And so, also, she may be sued as a "free-trader" (349) under the statute, (*The Code,* §1828). As such, she is allowed to contract and deal as if she were a *feme sole.* And perhaps she may be so sued in some other cases.

The precise nature of the cause of action before the justice of the peace, in which the judgment complained of was given, does not appear, as it should do. A properly certified transcript of the record of that action, including the judgment, ought to have been set forth in the complaint, or attached to it with proper averments, or ought to have accompanied the motion for an injunction, so that the Court could see from the record itself whether or not, in that action, the justice of the peace could, in any view of it and the cause of action, have jurisdiction of the defendant therein; because, if upon the face of the record, the Court had any jurisdiction at all, then any errors of the Court in the course of the action could only be corrected upon appeal, and irregularities corrected, or the judgment set aside for irregularity, by motion in the action. From what appears, it may be that the justice of the peace had jurisdiction and authority to give a judgment. As it is alleged that the defendant in the action was served with a summons, and he assumed jurisdiction, the presumption is that he properly had it, unless it appears from the record itself that he did not, in which case, the judgment would be void.

If the verified complaint in this action be taken as true, it does not appear from it that the justice of the peace had no jurisdiction of the *feme* defendant, the present plaintiff, in the action before him. It is not alleged that the judgment is void, nor do the facts alleged render it so necessarily—that it is, is left to vague inference. In this, and like cases, the material facts should be alleged positively and with precision, and as we have said above, a duly authenticated copy of the record of the action in which the judgment complained of was given, should be produced.

Judgments are serious and important things, and are supposed (350) to have been given by Courts upon mature consideration, and they should not be interfered with for light, trivial and possible causes of objection to them. There should be substantial cause, and this should appear with reasonable certainty to warrant interference with them by injunction or otherwise.

The judgment complained of was not, so far as appears, absolutely void, and thus to be treated everywhere. It may have been erroneous. If so, the party against whom it was given ought to have appealed to the Superior Court, where the error might have been corrected. It may have been, and may be, irregular in material respects. If so, then the remedy would be by motion in the action to set the judgment aside, because of such irregularity. *Vass* v. *Building Association,* 91 N. C., 55; *Grantham* v. *Kennedy, Ibid.,* 148; *Spillman* v. *Williams, Ibid.,* 483; *Williamson* v. *Hartman,* 92 N. C., 236; *Burgess* v. *Kirby,* 94 N. C., 575.

That the plaintiff instructed her husband to make proper defences for her, and to appeal to the Superior Court, if need be, and he failed to do so, is no ground for relief by injunction, in the absence of fraud, and this is not alleged. She might have applied at any time within twelve months next after the judgment was given, to set it aside because of her mistake, inadvertence, surprise or excusable neglect. That she did not, if she had good cause, was her neglect or her misfortune. *Nicholson* v. *Cox,* 83 N. C., 48.

A married woman may sue and be sued, and when sued, must make defence, or her husband, who must be served with the summons served upon her, (*The Code,* §1824,) may, by leave of the Court, with her consent, defend the action in her behalf. If she and he fail to make defence, the Court may give judgment, and it will be effectual and conclusive, although erroneous, until it shall be modified or reversed in the regular course of procedure. In every such case, it must be
(351) assumed that the cause of action sued upon, and the facts appearing, were such as warranted the judgment, in the absence of any defence made at the proper time and in the proper manner. If the *feme covert* could avail herself of the defence of coverture, she ought to have made it in apt time. As she did not, it must be taken that she could not, or that she did not desire or intend to avail herself of it. This was decided in *Vick* v. *Pope,* 81 N. C., 22.

In that case, the plaintiff took judgment by default against the husband and wife, simply filing the note sued upon, without a complaint, the defendants having been served with process, but failing to appear and make defence. In the opinion of the Court, the Chief Justice said: "The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defence was set up in opposition, to defeat it. As then, a married woman may sue, and with her husband be sued on contracts, they and each of them must, at the proper time, resist the recovery as the defendants, and their failure to do so, must be attended with the same consequences."

This Court did not decide in that case, that the note executed by the wife was or was not void. It only decided that as she failed to make defence, it must be conclusively taken that the cause of action was such a one as warranted the judgment. And so it must be taken in this case, until the judgment shall be set aside, because of irregularity, or other good cause made to appear in some proper way allowed by law, if this can be done.

The counsel for the plaintiff relied upon and laid great stress upon *Dougherty* v. *Sprinkle,* 88 N. C., 300. In that case, the plaintiff sued a married woman before a justice of the peace, "upon a promise to pay for work done upon premises owned and held as her separate property"; and this Court held that the court of the justice of the peace did not have jurisdiction, as the promise sued upon was void because of her coverture; that in such case, the remedy of the plaintiff was (352) in a court of equity, if he had any, and the justice of the peace did not have such jurisdiction. The action was dismissed. But the defendant, the *feme covert,* made defence, pleaded her coverture, and from an adverse judgment appealed, first to the Superior Court, and from a like judgment there, to this Court.

It may be, that if the plaintiff in this case had made defence, pleaded her coverture, and had appealed from the adverse judgment given against her, she would have been successful; but she did not make defence at all, and as there was judgment against her according to the course of the Court, it must be treated as conclusive that the cause of action, and the facts, were such as warranted the judgment given. The purpose of this action is plainly to obtain equitable relief against an alleged erroneous judgment at law. It is clear that equity will not grant such relief. A court of equity will never set aside or enjoin the enforcement of a judgment at law, on the ground of error or a mistake in granting it. Error or irregularity must be corrected in the way pointed out above. It would be otherwise if fraud were alleged and made the ground of application for the relief sought. *Grantham* v. *Kennedy, supra,* and the authorities there cited.

There is error. The Court ought not to have granted the injunction. To the end the order appealed from may be reversed, and further steps taken in the action according to law, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Planing Mills v. McNinch, 99 N. C., 519; *Hodges v. Hill,* 105 N. C., 131; *Baker v. Garris,* 108 N. C., 228; *Patterson v. Gooch,* 108 N. C., 506; *Beville v. Cox,* 109 N. C., 269; *Sikes v. Weatherly,* 110 N. C., 133; *Williams v. Whitaker, ibid.,* 396; *Green v. Ballard,* 116

N. C., 146; *Wilcox v. Arnold, ibid.*, 711; *McLeod v. Williams,* 122 N. C., 453, 456; *Moore v. Wolfe, ibid.*, 717; *Henderson v. Moore,* 125 N. C., 384; *Roseman v. Roseman,* 127 N. C., 498; *Ditmore v. Goings,* 128 N. C., 332; *Finger v. Hunter,* 130 N. C., 532; *Harvey v. Johnson,* 133 N. C., 358; *Smith v. Bruton,* 137 N. C., 89; *Earp v. Minton,* 138 N. C., 204; *McAfee v. Gregg,* 140 N. C., 449; *Rutherford v. Ray,* 147 N. C., 256, 260; *Scott v. Ferguson,* 152 N. C., 348; *Robinson v. Jarrett,* 159 N. C., 167; *Craddock v. Brinkley,* 177 N. C., 127.

(353)

L. D. GARRISON et al. v. JULIUS A. COX, Admr.

Administrators—Appointment of—Bond of.

1. The appointment as administrator of a person other than the one designated by the statute, although such person has not renounced, is not void, but such appointment may be set aside in favor of the person entitled, provided such person has not waived his right to administer, or otherwise concluded himself.
2. In such case, the only person who can complain of such appointment, is the person who is entitled to administer under the statute.
3. Where there are several persons entitled in equal degree to administer, the clerk may select such one of them as in his discretion is most fit, and issue letters to him.
4. Where persons entitled to administer do not apply for letters within six months of the death of the intestate, they are presumed to have waived their right to do so, and if the public administrator does not apply for such letters, as it is his duty to do, the clerk may appoint any fit person as administrator.
5. The appointment of an administrator is not void because his bond is not justified, but if he fails to file a good bond, upon proper notice, he may be removed for this cause.

(*Hyman* v. *Gaskins*, 27 N. C., 267; *Stoker* v. *Kendall*, 44 N. C., 242; *Jinkins* v. *Sapp*, 48 N. C., 510; *Atkins* v. *McCormick*, 49 N. C., 274; *Wallis* v. *Wallis*, 60 N. C., 78; *Hill* v. *Alspaugh*, 72 N. C., 402, cited and approved).

MOTION before the clerk to remove an administrator, heard on appeal by *Avery, Judge,* at Spring Term, 1885, of BURKE Superior Court.

It appears that Wesley Cox died in the county of Burke, in the month of September, 1883, leaving a widow surviving him, and likewise numerous children, most, or all of them, it seems, of the age of twenty-one

years. The widow did not apply for letters of administration on the estate of the intestate.

In November, 1884, neither the public administrator, nor any other person having applied for such letters, the defendant, one of the intestate's sons, was appointed administrator of his estate, but the (354) widow had not at the time of such appointment, renounced her right to be appointed administratrix, in that behalf, nor had any citation issued to her to show cause why she should not be deemed to have renounced. She had afterwards, in the course of this proceeding, filed her written renouncement, and her approval of the appointment of the defendant, with the clerk. No notice was given to the next of kin of such appointment. The defendant gave bond with sureties, as required by law, as such administrator, except that it was not justified.

On the 12th of December, 1884, the plaintiff began this proceeding before the Clerk of the Superior Court of the county mentioned above, in the exercise of his jurisdictional functions, to revoke the letters of administration granted to the defendant, and the order appointing him administrator, as having been improvidently granted and made, upon the ground that the widow had not renounced her right to administer, nor had any citation been issued to her or the next of kin, to show cause why they should not be deemed to have renounced; that the bond of the defendant had not been justified as required by law, and is not now, although the defendant has a special proceeding pending to sell the land of the intestate to make assets to pay debts.

At the hearing before the clerk, he made an order dismissing the proceeding, from which the plaintiffs appealed to the Judge of the Superior Court, who affirmed the order of the clerk, and from this order of affirmation, the plaintiffs appealed to this Court.

Mr. E. C. Smith, for the plaintiffs.
Mr. S. J. Erwin filed a brief for the defendant.

MERRIMON, J. (after stating the facts). The chief purpose of the law in cases like this, is to have the estate of the intestate duly administered by a competent person. The statute (*The Code,* §1376), (355) however, provides that the husband or the widow, and certain other classes of interested persons, shall have the right, first in the order prescribed, to apply for and receive letters of administration, but if for any cause they do not, any competent person may. It is not essential that a person of a class in the order prescribed shall administer. Hence, an appointment, though the person appointed may not be of such classes, would not be void, although the appointee would, in such case, be subject to have his letters of administration revoked, and his appointment set

aside, in favor of the person entitled, if the latter had not, in some way, waived his right, or otherwise concluded himself. The appointment is not void because the proper person was not the appointee. *Hyman* v. *Gaskins,* 27 N. C., 267; *Stoker* v. *Kendall,* 44 N. C., 242; *Jinkins* v. *Sapp,* 48 N. C., 510; *Atkins* v. *McCormick,* 49 N. C., 274; *Wallis* v. *Wallis,* 60 N. C., 78.

In this case, the widow of the intestate, had the right, if she were in all respects qualified, first in order, to be appointed administratrix. But she did not at any time apply to be appointed, nor did she, nor does she now, complain of the appointment made; on the contrary, after this proceeding was begun, she filed with the clerk her written renunciation of her right, and this appears as a fact. She alone could complain that the clerk had failed to appoint her, and she is now concluded. As said above, the fact that the defendant was appointed before she renounced her right, did not make his appointment void. Indeed, if it had been made at once, after the death of the testator, it would not on that account have been void. In that case, the widow, and she alone, might have applied to have the letters revoked, on the ground that her right had been prejudiced. It was not essential that she should be appointed, and she might forego and waive her right; and also, the next class of persons in the order of right to be appointed, and the third class in such order, might likewise waive their rights respectively. So that,
(356) the objection that the widow was not appointed, is without foundation.

The defendant was of the next of kin, of the degree entitled to apply for letters of administration. He was therefore eligible to be appointed, as were also the others of the next of kin of a like degree with him. The clerk had authority to appoint him—to select him from among the others. The statute, (*The Code,* §1376), expressly provides that where the next of kin are of equal degree, the clerk may appoint one or more of them, *in his discretion.* He ought, of course, to appoint the one best qualified, but if he selects one fit and competent, his exercise of discretion is not reviewable. The right of the plaintiff to be appointed was not absolute. *Atkins* v. *McCormick, supra.* They cannot, therefore, be heard to complain that the defendant, as to them, was not eligible, and not entitled to be appointed.

But if this were not so, the appointment of the defendant was authorized, regular, and valid upon another ground. More than six months had elapsed next after the death of the intestate before his appointment was made, and as those who were entitled to apply for letters of administration, failed to do so within that time, they were properly treated as having waived or abandoned their right to have letters granted to them; and as the public administrator failed to apply for letters of administra-

tion, as he ought to have done, the clerk was authorized to appoint any fit and competent person to administer the estate. This seems to be implied from the statute, (*The Code,* §1394), which authorizes the public administrator to apply for letters of administration on the estates of intestates, when no such letters have been granted within six months next after their deaths respectively. This Court so held in *Hill* v. *Alspaugh,* 72 N. C., 402. And it had been repeatedly held, before the present statute was enacted, that persons entitled under former statutes to be appointed administrators of estates of intestates, waived or lost their rights by failing to apply for letters within a reasonable (357) time. *Stoker* v. *Kendall, supra; Jinkins* v. *Sapp, supra.*

The appointment of the defendant was not void, simply because his bond as administrator was not justified, nor was it necessarily voidable on that account. It may be, that it was good and solvent. The clerk may, at the suggestion of the plaintiffs, or any person, or *ex mero motu,* require him yet to justify it, and he ought to do so. If the defendant cannot justify it, or cannot make it good, or give an additional satisfactory one, he might, for that cause, upon proper notice, be removed by the clerk, and he might appoint another administrator instead of the present one. The provision of the statute requiring the bonds of admintrators and collectors to be justified, should be carefully observed by Clerks of the Superior Courts in the exercise of their jurisdictional functions, but obviously it is directory and not essential to the appointment of the administrator or collector, and the failure to justify the bond, does not render the appointment void. Nor does the fact that the defendant is applying for license to sell the real estate of his intestate to make assets to pay debts, affect the matter of this proceeding. If the defendant's present bond is not sufficient, he may be required to give another bond for double the value of the real estate he asks permission to sell, as allowed by the statute, *The Code,* §1388.

The Judge properly affirmed the order of the clerk dismissing the proceeding, and his order must be affirmed.

No error. Affirmed.

Cited: Lyle v. Siler, 103 N. C., 264; *Williams v. Neville,* 108 N. C., 566; *Springer v. Shavender,* 116 N. C., 17; *S. c.,* 118 N. C., 45; *Shields v. Ins. Co.,* 119 N. C., 385; *Withrow v. DePriest, ibid.,* 544; *In re Bailey Will,* 141 N. C., 195; *Batchelor v. Overton,* 158 N. C., 399; *Tyer v. Lumber Co.,* 188 N. C., 271.

(358)

JOHN W. WILEY v. GEORGE W. LOGAN.

Reference—Jurisdiction of Supreme Court—Partnership—Demand—Agent—Interest.

1. Where there is any evidence to support the finding of fact by a referee, the jurisdiction of the Supreme Court is limited to correcting any errors of law, and the findings of fact are conclusive.

2. Where claims due a partnership were placed in the hands of an attorney for collection, he is not liable to be called to an account in an action by one of the partners, unless it appears that the other partner is dead.

3. Where notes were put in an attorney's hands for collection, and when sued for an account, he neither produces the notes, nor gives any explanation of their non-production; *It was held*, that he was chargeable with them.

4. A demand previous to bringing suit in an action for money collected by an agent, is to enable the agent to pay it over without incurring the costs of a suit, but a demand is not necessary where the agency is denied, or where a claim is set up exceeding the amount collected, or where the agent's liability is disputed in the answer.

5. An agent or other person who is entitled by contract, or under the law, to compensation measured by a *per centum* of the amount collected, is authorized to at once deduct the amount of his commissions, and is only accountable for the residue.

6. In such case, in an action for an account, if the agent is charged with the entire amount collected, with interest, he is entitled to be allowed interest on his commissions from the date of the receipt of the money.

7. Where exceptions are vague and indefinite, or where they are based upon an alleged want of evidence, but do not point to the evidence itself, but compel the appellate court to search for it in the entire evidence sent up, they will not be considered.

(*State* v. *Wall's Executors*, 30 N. C., 11; *Potter* v. *Sturges*, 12 N. C., 79; *Moore* v. *Hyman*, 34 N. C., 38; *Hyman* v. *Gray*, 49 N. C., 155; *Kivett* v. *Massey*, 63 N. C., 240; *Waddell* v. *Swann*, 91 N. C., 108; *Currie* v. *McNeill*, 83 N. C., 177; *Overby* v. *Fayetteville B. & L. Ass'n*, 81 N. C., 56; *Morrison* v. *Baker*, *Ibid.*, 76; cited and approved).

CIVIL ACTION, heard by *Philips, Judge,* upon exceptions to a report of a referee, at Spring Term, 1885, of the Superior Court of MECKLENBURG county.

(359) The plaintiff placed numerous claims which he held against divers persons, in the hands of the defendant, an attorney-at-law, for collection, at different periods during the years 1857, 1858 and 1859, and the present action was instituted on November 4, 1875, against him, for an account and settlement. The complaint also alleges a personal

indebtedness of the defendant for goods sold and services rendered, of the value of $200, which is also demanded. The answer meets the charge of indebtedness growing out of the agency for collection or otherwise, by a direct denial, and insists that the plaintiff, upon these transactions and on an adjustment, will be found indebted to the defendant.

At Fall Term, 1876, an order of reference was made, directing J. D. Shaw to take and state an account between the parties, with power to take testimony, when necessary, and to report at the next term of the Superior Court of Mecklenburg. The commission was executed by the referee, and he made his report, finding both the facts and the law, and showing, as the result, a balance of $26.48 due on February 26th, 1877, by the plaintiff to the defendant.

Numerous exceptions were entered by the plaintiff, and passed upon by the Judge, who overruled them, confirmed the report, and gave the defendant judgment for the sum ascertained to be due him, and for costs, from which the plaintiff appealed.

Mr. Samuel F. Mordecai, for the plaintiff.
Mr. W. P. Bynum, for the defendant.

SMITH, C. J. (after stating the facts). As the findings of fact, where there is any evidence in their support, are conclusive, our appellate jurisdiction can be exercised only in reviewing alleged erroneous rulings in law, and these, as appellant's counsel frankly admits, are few in number, and, in our view, not difficult of disposal.

1. *Exception.* The debts against Whitlock, Maginnis and N. G. (360) Howell, are stricken from the list of claims that are chargeable against the defendant, because, as the referee reports, they were due to the partnership firm of Wiley & Ford, the plaintiff being a member, and were settled in a suit in equity, instituted by Ford against the plaintiff and defendant in 1861, for a settlement of partnership matters, there being no evidence that this suit terminated in a decree, or that the debts were ever paid by the defendant.

Assuming, as we must, that these were partnership funds, they were, or ought to have been, disposed of in that proceeding. We notice but two of these claims, those against Whitlock and Howell, specified in the referee's finding, unless that against "Maginnis" is intended for some other debtor, whose name is miscalled, (and there are other specified debtors in the clause of the report to which the referee's ruling equally applies), but the underlying principle on which the referee acted is common to all.

In the absence of the partner, Ford, from the present suit, unless by his death the joint interest survives, of which we have no information,

these claims ought not to have place in the individual account of the plaintiff. This exception is disallowed.

2. *Exception.* The next exception is to the referee's refusal to charge the defendant with the three notes of Sylvester Weaver, respectively of $100, $85 and $40. The referee reports that these claims were solvent, and it does not appear that they were produced at the hearing, or any explanation offered of their absence.

They are rejected on the ground that no demand was made before suit on defendant for payment or settlement.

The exception must be sustained for the reasons given, for their exclusion from the defendant's debits are wholly insufficient, and without support in law.

(361) The notes not being produced, and no explanation made concerning them, after their having been so long in the defendant's hands, furnishes evidence that the moneys have been collected and misused. It was so held in regard to a constable, acting as a collecting agent, in *State* v. *Wall's Executors,* 30 N. C., 11: "This presumption arises," in the words of NASH, J., "from the fact that when the action is brought, the note is neither surrendered, nor is it in any way accounted for." If so, this was a direct breach of the defendant's undertaking.

A demand previous to bringing an action for money collected by an agent, is to enable the latter to pay it over without incurring the cost of suit, for the principal must seek him, and not he the principal. *Potter* v. *Sturges,* 12 N. C., 79; *Moore* v. *Hyman,* 34 N. C., 38; *Hyman* v. *Gray,* 49 N. C., 155; *Kivett v. Massey,* 63 N. C., 240. But a demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer. *Waddell* v. *Swann,* 91 N. C., 108, and cases cited in the opinion. The defendant must be charged with these sums.

3. *Exception.* The exception to an allowance of interest on the defendant's commissions, cannot be supported. An agent or officer, entitled under contract or by law to compensation, measured by a *per centum* on the amounts he may collect, is authorized at once to deduct the sum to be retained, and to charge himself with the excess only.

If he does not do this, but charges himself with the whole sum, and credits his account with his commissions, interest should be computed thence on both, and the same precise result is reached as if he had pursued the course just suggested.

The other exceptions relate largely to questions of fact, and are vague in terms, while others, based upon an alleged want of evidence, do not point to the evidence itself, but compel us to search for it in the mass of testimony reported, and we cannot entertain them without a disregard of

established practice. They are not considered. *Currie* v. *McNeill*, 83 N. C., 177; *Overby* v. *Fay. B. & L. Ass'n*, 81 N. C., 56; (362) *Morrison* v. *Baker, Ibid.*, 76.

The account must be reformed as directed in this opinion, and in order thereto, it is referred to the clerk to make the required modification and report, so that final judgment may be entered.

Error. Reversed.

Cited: S. c., 96 N. C., 511; *Moore v. Garner*, 101 N. C., 378; *Wadesboro v. Atkinson*, 107 N. C., 319; *Rich v. Hobson*, 112 N. C., 82; *Buffkins v. Eason, ibid.*, 163; *Falkner v. Thompson, ibid.*, 456; *Lamb v. Ward*, 114 N. C., 257; *Woolen Co. v. McKinnon, ibid.*, 668; *Heath v. Morgan*, 117 N. C., 508; *Lumber Co. v. Lumber Co.*, 169 N. C., 91; *Gooch v. Bank*, 176 N. C., 215.

ELIZABETH MILLS v. H. R. THORNE AND WIFE.

Rule in Shelley's Case—Wills.

1. *Quære*, whether the rule in Shelley's Case has been abrogated in this State by statute.
2. In this State, when an estate is settled on the ancestor, with remainder to his heirs, "equally to be divided among them," or "share and share alike," the addition of these words prevents the application of the rule in Shelley's case, and the heirs take as purchasers.
3. Since the act of 1784, words in a will which would give the absolute property, if bequeathing chattels, will give a fee if used in a devise of lands, the effect of the statute being to put chattels on the same footing as land, and to make the same rule applicable to both.
4. A bequest of chattels to A for life, and at his death to be equally divided between his heirs, vests only a life estate in A in the chattels, with a remainder to his heirs, as tenants in common.
5. Where land is devised to the ancestor for life, with a limitation that the remainder is to be equally divided among his heirs, or the heirs of his body, or his issue, the remainder men take as tenants in common, *per capita* and not *per stirpes*, and they take as purchasers.

(*Ward* v. *Jones*, 40 N. C., 400; *Swain* v. *Rascoe*, 25 N. C., 200, cited and approved).

This was a CIVIL ACTION, tried before *Philips, Judge,* at the (363) Fall Term, 1886, of WILSON Superior Court, upon the following case agreed:

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

One child was born to Gray and Rebecca Lodge, who died during the late war, leaving no issue.

At the date of Gray Lodge's will, he was sixty years old, Rebecca, his wife, fifty years old. Prissy Little is now living. Rebecca Lodge, wife of Gray Lodge, died in the month of January, 1885, devising all her estate of every description to Louisa Shavers, now Louisa Thorne, wife of H. R. Thorne, and defendant in this action, who together with her said husband, H. R. Thorne, under said devise, took possession of the said Odom tract of land bequeathed by the aforesaid Gray Lodge as aforesaid, and are now in possession of the same.

Elizabeth Mills and Ann Smith, together with others, are the lawful heirs of Rebecca Lodge.

If from this statement of facts, the Court shall find that Rebecca Lodge had an estate for life only in said land, it is agreed that the plaintiffs have judgment for possession of same with damages. But if the Court shall find that Rebecca Lodge had an estate in fee simple in said land, or one-half thereof, then the defendants to have judgment
(364) against plaintiffs for costs in this action.

His Honor gave judgment in favor of the defendants.

From this judgment the plaintiffs appealed.

Mr. John Devereux, Jr., for the plaintiffs.
Mr. John F. Bruton, for the defendants.

ASHE, J. (after stating the facts). The question to be decided in this case is, whether the rule in Shelley's case applies. The rule is: "That when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately to his heirs in fee or in *tail,* the word heirs are words of limitation of the estate, and not words of purchase." 1 *Coke,* 104. Without deciding the question whether the rule has been

abolished by statute in this State, if we should consider the case solely in view of English adjudications, we would unhesitatingly hold that it did apply. In England, ever since the leading case of *Jepson* v. *Wright,* 2 Bligh., 1, it has been held, that the words "equally to be divided," or "share and share alike," superadded to limitations to the heirs of the body, &c., do not prevent the application of the rule. But in this State, it would seem that the superaddition of like words to the limitation to the heirs, or heirs of the body, or issue, do prevent the application of the rule.

In *Ward* v. *Jones,* 40 N. C., 400, the devise, (since the act of 1784), was to A for life, and should he have lawful issue, then to be equally divided between his lawful issue, but should he not have lawful issue, then, it was held, that A took only a life estate in the land. PEARSON, J., who delivered the opinion of the Court, said: "The will in the case under consideration, was made in the year 1778, and unless the acts of 1784 alter the law, it is clear that A took an estate tail, which by the act of 1784, ch. 204, was converted into a fee-simple. We think the acts of 1784 do alter the law, and that in all devises of land, (365) made since that time, the words *'to be equally divided,'* prevent the application of the rule in Shelley's case, and the first taker has only an estate for life." He proceeds to say: "The rule in Shelley's case only applies when *the same persons* will take the same estate, whether they take by descent or purchase, in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seignories, and to the right of creditors, that the first taker should have an estate of inheritance; but when the person taking by purchase would be different, or would have different estates, then they would take by descent from the first taker, and the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, take as purchasers. The words, *'to be equally divided between the issue,'* include different persons than simply the word *issue* when used as a word of descent. For in the latter case, the person or persons to take, would be ascertained by the rules of descent, there would be representation, and the taking would be *per stirpes;* while in the former, the rules of descent would have no application, and there must be an equal division *per capita.* Hence, the use of these words prevents the application of the rule."

It will be perceived that his Honor makes no distinction between the limitation to *heirs, heirs of the body,* and *issue.* But whenever the words *"equally to be divided"* are superadded, it prevents the application of the rule, for the reason given, that the issue or heirs, take *per capita,* that is, as tenants in common, and not as heirs in line of succession. It is true, in our case, the words are, "to share and share equally,"

but they are words of similar import. In *Theobald's Law of Wills,* p. 320, it is laid down that words of division or distribution, such as "to be divided," or "equally," or "between," or "amongst," or "share," or similar words, make a tenancy in common. This would seem to be a controlling authority for holding that the words "share" and "to
(366) share equally," as used in the will in this case, had the effect to prevent the application of the rule in Shelley's case. But the learned Chief Justice, in further pursuing the subject in that case, held that the act of 1784 had also an important bearing on the question. He argued, that in a bequest of chattels, words which would create an estate tail in land devised, the same words give an absolute estate, and before the act of 1874 the same words that gave an absolute estate in chattels, gave an estate tail in lands, but since the act of 1784, lands cannot be entailed, and the words which before gave but an estate tail, after that gave an estate in fee simple, or an absolute estate. So that now, the same words give an absolute estate in lands, that would give an absolute estate in chattels. Hence, the effect of the act of 1784 has been, to put lands on the same footing with chattels, and the same rule is applicable. But in bequests of chattels, the words *to be equally divided between the issue,* make an exception to the general rule, and prevent the vesting of an absolute estate in the first taker, "it being inferred from these words, that the testator could not intend that the issue should take as issue, but that they should take distributively as *purchasers,* so as to give the first taker an estate for life, and then to the issue as tenants in common." To support the position, he cited the case of *Swain* v. *Rascoe,* 25 N. C., 200, where it was held, that a bequest of personal property to A for life, and at his death, if he should die leaving heirs lawfully begotten of his body, that the said property should be equally divided between them, was a limitation for life only to A, with remainder to his children as tenants in common. Judge Daniel spoke for the Court in the case, and cited numerous English decisions in support of the opinion.

It would seem then to follow as a corollary, that like words of distribution used in a devise of land would have the effect of creating a tenancy in common, or a distribution *per capita* among the heirs, heirs of the body, or issue of a life tenant.

(367) In England, ever since the decision in *Perren* v. *Blake,* decided in the Exchequer Chamber, and reported in 4 Burr, 2579, the rule in question has been regarded as one of the most firmly established rules of property, and it has been strictly maintained by all her courts; but in the United States, the leaning of our courts and legislatures has been against the rule, and in many of the States the rule has been abolished.

In *Prescott* v. *Prescott,* 10 B. Mon., 56, MARSHALL, C. J., said: "It is true, the words 'heirs of the body,' are appropriate words of limita-

tion, and commonly and properly used for the creation of an estate tail, which is an estate to a person, and the heirs (general or special) of his body. But it is also well settled by numerous decisions, that not only heirs of the body, but the more general word 'heirs,' or the more specific terms 'heirs male, or heirs female of the body,' or of 'two bodies,' may be used and operate as words of purchase. It is a question of intention whether these words are used to denote the whole line of heirs of the sort described to take in succession as such heirs, or to denote only a particular person, or a class of persons who are to come under that description at the time. When used in the former sense, they are words of limitation, defining or limiting the previous estate to which they apply. When used in the latter sense, they operate merely as *designatio personæ,* or *personarum,* and are held to be words of purchase, giving a new estate to the persons designated."

The consideration we have given the question leads us to the conclusion that the rule in Shelley's case does not apply to this case; that the words *"to share and share equally,"* indicate an intention on the part of the testator to give the property to his sister Prissy or her heirs, and the heirs of his wife, to be divided between them as tenants in common, the sister to take one moiety, and the heirs of his wife the other moiety, to be distributed *per capita* between such persons as may bring themselves under that description when the life estate terminated, and that the words *heirs* of his wife, were used not in a technical sense, but (368) as *designatio personarum.*

There is error. Let this be certified to the Superior Court of Wilson county, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Jenkins v. Jenkins, 96 N. C., 259; *Howell v. Knight,* 100 N. C., 257; *Leathers v. Gray,* 101 N. C., 164; *Hodges v. Fleetwood,* 102 N. C., 124; *Nichols v. Gladden,* 117 N. C., 499; *May v. Lewis,* 132 N. C., 117; *Hauser v. Craft,* 134 N. C., 329; *Wool v. Fleetwood,* 136 N. C., 470; *Perry v. Hackney,* 142 N. C., 375; *Gilmore v. Sellars,* 145 N. C., 284; *Campbell v. Cronly,* 150 N. C., 470; *Jones v. Whichard,* 163 N. C., 244; *Haar v. Schloss,* 169 N. C., 229; *White v. Goodwin,* 174 N. C., 727; *Smith v. Moore,* 178 N. C., 374; *Blackledge v. Simmons,* 180 N. C., 543; *Wallace v. Wallace,* 181 N. C., 162; *Curry v. Curry,* 183 N. C., 84; *Williams v. Sassar,* 191 N. C., 456; *Welch v. Gibson,* 193 N. C., 689.

A. F. McDOUGALD v. WM. COWARD.

Evidence—Damages—Slander.

1. In an action for damages for making slanderous charges against the plaintiff, evidence is competent, in mitigation of damages, to show the mental distress of the defendant at the time the words were spoken, caused as he believed, by the act of the defendant.
2. Objections to evidence are to the answer and not to the question, and where the answer is not calculated to prejudice the objecting party, it becomes immaterial.
3. The Court can receive evidence, although not strictly proper when offered, when counsel undertake to make it relevant by evidence to be thereafter introduced.
4. In an action of slander in charging a female with incontinence, the defendant offered evidence to show his mental condition when the slanderous words were spoken, caused by his belief that the plaintiff had enticed his son, with whom he charged that she had had connexion, to leave his home and go off with her, and *It was held*, that such evidence was admissible to rebut malice, and in mitigation of damages.
5. Where, in such action, the plaintiff, as a witness in her own behalf, testifies that she is of untarnished virtue, evidence is admissible that she has allowed men to take liberties with her, not reaching to sexual intercourse, although such acts are not charged in the pleadings. Such evidence is irrelevant if originally offered, but is competent to contradict.

(*Bost* v. *Bost*, 87 N. C., 477; *Perry* v. *Jackson*, 88 N. C., 103, cited and approved).

(369) CIVIL ACTION, tried before *Philips, Judge,* and a jury, at Spring Term, 1886, of GREENE Superior Court.

The plaintiff's action, begun on July 6th, 1885, is prosecuted for the recovery of damages, for the utterance, by the defendant, of defamatory words concerning the plaintiff, on several different occasions, imputing a want of virtue, and charging acts of illicit sexual intercourse with divers persons, and among them the defendant's son. The speaking of the words, substantially as set out in the complaint, is not denied by the defendant, and he admits he meant to charge incontinency. Some of the charges he justifies as true, and disclaiming any malicious purpose, he sets out the mitigating circumstances under which the words were spoken.

The plaintiff avers her innocence.

The defendant alleges, that one of his conversations set out in the complaint, was a confidential and privileged communication, made under

a sense of moral duty to the brother of certain unmarried young ladies, relatives of the defendant, for their safety and good name.

The parties disagreeing as to the issues raised by the pleadings, the Court prepared and submitted to the jury, issues, which with the responses to each, are as follows:

I. Did the defendant, in speaking of the plaintiff, use the words set out in the second article of the complaint, thereby make a charge of incontinency against her? Answer, by consent: Yes.

II. Did the plaintiff have illicit sexual intercourse with Mike Coward? Answer: Yes.

III. Did the plaintiff have illicit sexual intercourse with John Coward? Answer: Yes.

IV. Did the plaintiff have illicit sexual intercourse with Dempsy Wood? Answer: Yes.

V. Did the defendant, in speaking the words to Luby Harper, as stated in the second article of the complaint, intend to charge sexual intercourse with the person there mentioned? Answer, by (370) consent: Yes.

VI. Were the words true? Answer, by consent: No.

VII. Did the defendant, in uttering the language set out in the complaint, to Grimsley, intend to charge plaintiff with unlawful intercourse with William Coward? Answer, by consent: Yes.

VIII. Were these words true? Answer, by consent: No.

IX. Was the communication made to Grimsley privileged? Answer: Yes.

X. What damage is the plaintiff entitled to? Answer: Five cents.

The plaintiff moved for a new trial, which was refused, and judgment being rendered that she recover the sum awarded by the jury for damages, and the same sum in costs, she appealed to this Court.

The facts stated in the case on appeal, which cannot be much abridged without producing obscurity in regard to the rulings upon the evidence brought up for consideration, are these:

After two of the plaintiff's witnesses, who had been previously examined, had testified on cross-examination, without objection, that the defendant was much distressed in mind about the absence of his son John, the plaintiff introduced one John Patrick, who testified in substance, that on Saturday, the 20th of June, 1885, the defendant said to witness, that his boy John was gone again, and asked the witness if he had heard from him. The defendant said that it was the first boy he had ever known to be seduced, and that the plaintiff had seduced him. He further said that the plaintiff had gone to Black Mountain, and he had gone to Goldsboro to see if his son John had not followed her off,

and that he went to Goldsboro to look for his son the day that plaintiff left for Black Mountain.

(371) The defendant also stated that his son Mike had had something to do with the plaintiff in Snow Hill, but that he knew nothing of his own knowledge of the plaintiff's improper connection with his said sons, and that when the plaintiff went to his house, he did not think there would be any trouble between her and his son John, and that his older boys were not at home. The witness then asked the defendant why he did not get his son Heber, a grown young man, to help attend to her, and defendant replied, that he "reckoned Heber had all he wanted of it, and was disgusted at it." Defendant asked witness, if he, the witness, heard from his son John, to let him know it, and if, further, he had heard the report about the plaintiff and his son John, and the witness replied he had heard some reports about John, and William Ormand.

This conversation was on Saturday, after the defendant came back from Goldsboro.

On cross-examination by the defendant, this witness testified, that no one was present and heard the conversation between himself and the defendant. Witness testified further, that defendant, in said conversation, said he watched around the train going West, on which the plaintiff was at Goldsboro, and his son Mike went in the train to see if his son John was there; that he had known the defendant thirty years; had seen him often and knew him well.

The defendant asked the witness the following question: "What was the mental condition of the defendant at the time of said conversation?" Question objected to by plaintiff, and the defendant's attorney stated that it was asked to show the mental excitement of defendant at the time of the conversation, and not to show insanity; the plaintiff having shown a conversation, not set up in the complaint, to increase damages, the defendant asked this question in mitigation, and the Court overruled the objection, and the plaintiff excepted. Thereupon the witness answered, that defendant's mind was as good as at any other

(372) time, and that his manner was uneasy about his boy John being gone.

In support of the admissibility of the evidence thus admitted, the defendant's counsel promised the Court to give, and afterwards gave, evidence tending to show that the plaintiff had taught school in a school house within a short distance of defendant's dwelling; that his son John, aged about fourteen years, had been a pupil of the plaintiff in said school; that plaintiff had boarded at the house of the defendant; that defendant, believing that plaintiff had had sexual intercourse with his son John while he was her pupil, had about four weeks before dis-

charged her as such teacher, and she had left his house; that soon thereafter, his said son had left his house on account of the said plaintiff, as the defendant believes, and had been absent about a month, and was then absent; that neither the defendant nor any of his family knew where John was, and supposed he had committed suicide; that defendant had searched extensively for him, and had been unable to find him, and that defendant and his wife were much distressed on account of John's absence.

There was also evidence on part of plaintiff, tending to show that defendant had not discharged the plaintiff for the cause above set forth.

The plaintiff was introduced as a witness in her own behalf, and testified, among other things, that no one had ever had sexual intercourse with her. On cross-examination, she said that she knew slightly Robert Taylor; that Taylor carried her in a buggy nine or ten miles to Snow Hill and returned with her at night, and "that he did not kiss her on that trip;" he did not kiss her "time and again on that trip," and did not "put his arm around her time and again on that trip."

The plaintiff was asked if Thomas Harvey had ever kissed her, and she replied he never had. She was asked if he ever felt of her leg, and this she denied.

Evidence was offered by defendant, and admitted by the Court, (373) tending to show that between January and June, 1885, Mike and John Coward had had illicit intercourse with the plaintiff; and that on July 20th, 1883, Dempsy Wood had had illicit intercourse with her.

Defendant introduced Thomas Harvey as a witness, who testified that he was not related to the plaintiff, and was not engaged to be married to her. He was then asked the following question: "What liberties have you ever taken with the plaintiff, if any?" Objected to by plaintiff, and the defendant's counsel stated that the question was asked to contradict the plaintiff. Objection overruled, and plaintiff excepted. The witness answered that he had kissed her five or six times, and had hugged her five or six times, and put his arms around her when no one else was present, that he had pinched her thigh once or twice at church one night, when they were sitting on a back seat, and that he went with her to church that night and returned to her home with her after church was out.

The said Robert Taylor was introduced by the defendant, and was asked, "What liberties have you ever taken with the plaintiff, if any?" Objection by plaintiff; objection overruled, and plaintiff excepted. The witness testified, that not being related to plaintiff, and not being engaged to be married to her, he took her to ride some ten or twelve miles to Snow Hill, and returned with her at night; that on the ride that night in a buggy together and alone, he had his arms around her and

kissed her; had no idea how many times he had put his arms around her and kissed her.

It was admitted that plaintiff had never been married, and that Alice Grimsley was the youngest child of W. P. Grimsley and his wife Mary C. Grimsley, and that Alice was, at the time of the trial, about six years of age. It was also admitted that Mary C. Grimsley was the mother of the plaintiff.

The Court delivered, in writing, the following charge:

(374) A general charge of incontinency is made in the second allegation of the complaint, and the issue thereon is submitted marked 1. By consent of counsel, it is agreed that the response thereto shall be "Yes."

The law infers malice, as a presumption of fact from the proof of the falsity of defamatory words, uttered without privilege. Defendant pleads justification; that is, the charges made by him were true. Truth is a complete bar. The justification must establish the substance of the truth justified. Specific offences of the kind charged in the second allegation of the complaint, are offered in evidence in justification, and it is for the jury to say, whether plaintiff did have actual illicit sexual intercourse with Mike Coward, John Coward and Dempsy Wood, or either of them, from the evidence adduced. The burden to show these facts is on the defendant. The jury in civil cases decide according to the preponderance of evidence.

The defendant further pleads facts and circumstances which induced him to suppose the charges set out in the second, third and fourth allegations of plaintiff's complaint to be true, when he made them, and offers testimony before you to prove them in mitigation of damages. The jury may, if they please, give exemplary damages; that is, damages given by way of punishment and example for the public good, and they are allowed, as calculated to prevent moral wrong, violence, outrage and oppression, and to preserve public tranquillity. It is proper for the jury to consider all the facts and circumstances immediately connected with the transaction, tending to exhibit or explain the motive of defendant, and if satisfied the defendant spoke the words concerning the plaintiff, as alleged, in the *bona fide* belief that they were true, and under such circumstances as would incline a reasonable person so to believe, the jury can consider that in mitigation of any damages they may give in their verdict, but this could not justify or exonerate from the consequences of the false accusation.

(375) Specific charges of slanderous words are set out in the third and fourth articles of the plaintiff's complaint, and issues number five and seven are submitted; and by consent of counsel, it is agreed that the response may be "yes" to each of these issues. It is also agreed, by

consent, that the jury may respond "no" to issues number six and eight.

The specific acts as alleged in these sections, are admitted to be true, and the words spoken are likewise admitted not to be true. But the defendant says that his relations to John D. Grimsley, and the circumstances of the communication set out in allegation four of the complaint, made the same privileged, and that the jury ought to find the ninth issue in the affirmative.

If the words so spoken to John D. Grimsley on the 13th of June, were made in good faith, and with no actual wrongful motive, and under a moral duty to warn him for the benefit of his sisters, it would be a privileged communication.

Where the communication, if made in good faith, is privileged, the burden is on the plaintiff to show express malice; that is, actual wrongful motive. But it is not necessary to prove it by extrinsic facts. It may be inferred from the facts and circumstances attending the communication, the manner in which it was made, and whether the defendant repeated substantially the same charge to other persons at any other time before suit brought. The Court charges you, that upon the responses to issues number five and six, made by consent, the plaintiff is entitled to a verdict for some damages; and the jury will say what damages the plaintiff is entitled to in response to the tenth issue, even if you should find the issues two, three, four and nine in the affirmative.

The jury rendered a verdict assessing the plaintiff's damages at five cents. Motion for new trial overruled. Judgment. Appeal by plaintiff.

Messrs. W. R. Allen and *Monroe,* for the plaintiff.

Mr. John Devereux, Jr. (*Messrs. Geo. V. Strong* and *Jos. B.* (376) *Batchelor* were with him), for the defendant.

SMITH, C. J., (after stating the facts). We are now prepared to enter upon an examination of the plaintiff's exceptions, and they have reference to the rulings upon the admissibility of evidence.

I. The defendant asked of one John Patrick, a witness introduced by the plaintiff, and examined as to a conversation with the defendant, in which the latter made charges of her improper relations with his son John, the following question: "What was the mental condition of the defendant at the time of that conversation?" stating, on the plaintiff's objection to its being answered, that it was not asked to show insanity, but the mental excitement under which the defendant was then laboring. The objection was overruled, and the witness answered, that his mind was as good as at any other time, and that he seemed uneasy about the absence of his son.

Two of the plaintiff's witnesses, on cross-examination, had before testified to the defendant's mental distress about John, and this without objection. This testimony was offered and received in mitigation of damages, and to repel the charge that the slanderous remarks were the promptings of a causeless malice, and we do not see why it was not competent for such purpose. As actual malice shown, would authorize an enlargement of damages, we think the defendant's distress about his son's absence, caused, as he believed, by their unlawful relations and her presumed influence over one so young, was competent to be shown in reduction of damages.

Besides, the response elicited no fact calculated to prejudice the plaintiff's case, and the objection, when well taken, is directed not to the question, but to the evidence drawn out in response. *Bost* v. *Bost,* 87 N. C., 477; *Perry* v. *Jackson,* 88 N. C., 103.

(377) Moreover, testimony was received under a promise of counsel thereafter to lay a basis for its admissibility, by showing the facts which gave rise to the defendant's anxiety and trouble, and this was done, as shown in the case.

II. The plaintiff, examined on her own behalf, swore that no one had ever had sexual intercourse with her, as she had, in her verified complaint, before averred her chastity. She was then, on cross-examination, interrogated in reference to her permitting indecent liberties to be taken with her person, by certain named individuals, which she denied. These persons were then called by defendant and permitted to prove the lewd conduct, after objection, as shown in the case. This testimony, while irrelevant if originally offered, as being out of the sphere of the controversy made in the pleadings, is rendered competent by the plaintiff's own testimony to her own untarnished virtue, and as tending to show the contrary, for where a woman thus surrenders her person to such liberties taken by men, the transition to personal prostitution is easy, and the space between them not wide.

There was no exception to the charge, and these being the only errors assigned, the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: S. v. Hinson, 103 N. C., 376; *Harper v. Pinkston,* 112 N. C., 303; *Upchurch v. Robertson,* 127 N. C., 128.

CHARLES McDONALD v. JAMES H. CARSON, et als.

Rehearing—Issues—Production of Papers—Evidence—Declarations.

1. Where a party to an action prepares issues which are submitted, and then objects to another issue submitted by the Court, he cannot be heard to assign as error that the Court did not submit an issue on a particular question, upon which he did not ask an issue.
2. It is too late, after the trial, to complain that certain issues were not submitted to the jury, if they were not asked for in apt time.
3. Where, in the opinion of the Court, additional findings are necessary in order to do justice between the parties, the case may be sent back for the trial of additional issues.
4. Where, under the Judge's charge, the appellant gets the substantial benefit of an issue raised by the pleadings, he cannot object, on appeal, that the issue was not submitted more formally, when he does not ask for such issue on the trial.
5. Under the present statute (*The Code*, §1373), no affidavit is necessary in order to get an order for the production of papers in the possession of the adverse party, but the Court now has power, on motion and due notice, to require the production of papers or books which contain evidence pertinent to the issue.
6. Due notice, is notice sufficient to enable the party to have the document present when called for.
7. In petitions to rehear, the petitioner will not be allowed to assign other grounds for an alleged error than those presented at the first hearing.
8. Any and all declarations pertinent to the subject matter, and bearing upon the issue, coming from parties to the action, or any of them, are competent against the party making them, and are also competent against all, when their interests are joint.

(*Kidder* v. *McIlhenny*, 81 N. C., 123; *Curtis* v. *Cash*, 84 N. C., 41; *Bryant* v. *Fisher*, 85 N. C., 70; *Alexander* v. *Robinson*, 85 N. C., 275; *Moore* v. *Hill*, 85 N. C., 218; *Simmons* v. *Mann*, 92 N. C., 12; *Burton* v. *The Railroad*, 84 N. C., 193; *Allen* v. *Baker*, 86 N. C., 92; *Lawton* v. *Giles*, 90 N. C., 374; *Fry* v. *Currie*, 91 N. C., 436; *Graham* v. *Hamilton*, 25 N. C., 381, cited and approved).

PETITION by the defendants to rehear, filed at October Term, (378) 1886, of the Supreme Court.

The case is reported in the 94th volume, at page 498.

Messrs. Charles M. Busbee and *W. W. Flemming,* for the plaintiff.

Messrs. Paul B. Means, John Devereux, Jr., and *Jos. B. Batchelor* (*Mr. Chas. Price* was with them on the brief), for the defendants.

(379) SMITH, C. J. This case was, after an elaborate and exhaustive argument, oral and by brief, at the last Term, carefully considered, and all the numerous errors assigned, examined and determined adversely to the appellants. The petition to rehear, points out three alleged errors, the subjects of which have been fully reargued at the present term, and we are now called on to revise those rulings, and pass upon their correctness.

I. The first assigned error is specified in these words: "The Court says: The defendant's first exception is to the action of the Court in preparing the issue numbered two. In this there is error. The real exception made by defendants, and argued in the printed brief, is that the Court failed to submit an issue, or to incorporate in issue two, 'whether the plaintiff did induce and carry Larrabee and Smart to the defendants.'"

Let us see how far this contention is borne out in the record, and whether the exception has been misconceived by the Court. In the case on appeal, at page one, is this entry: "Exception 1. The plaintiff proposed certain issues, and the defendant others. His Honor at first adopted the issues submitted by the defendants, but during the argument he also submitted the issues which appear in the record proper as No. 2, to which ruling the defendant excepted." Again, at page 11 of the record, the first in the enumerated exceptions, is thus stated: "1. To his Honor submitting issue No. 2 to the jury, after argument began." The exception is thus disposed of in the opinion at page 500 of the case reported in 94 N. C. Reports.

"1. The defendant's first exception is to the action of the Court in preparing issue numbered 2.

"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."

(380) Do these recitals show a misapprehension of the exception prescribed in both the record and case prepared on appeal by the defendant's own counsel? The appellants now insist, basing their contention upon the very grounds on which the exception is overruled, that there is error in not submitting the second issue in a more definite form as to the plaintiff's agency in bringing about the sale. This is now urged, in presence of the fact, that the issues which the defendants themselves prepared and presented were accepted, while those offered by the plaintiff, which for aught that appears, may have caused the alleged omissions, were rejected, and appellant's complaint was, that any intermediate issue was submitted *at all,* not that it was insufficient in eluci-

dating the controversy. If the inquiry of the plaintiff's agency in bringing about the sale under the terms and conditions of the contract set up in the complaint, was deemed material, why was not an issue involving it presented by the defendants when they presented the other two issues? Or, why were they silent when that drawn up by the Judge was made known, and no suggestion made to render it more specific in form, contenting themselves with an objection to any addition to their own issues? It would be a reproach upon the administration of the law, if under such circumstances, the Court were to entertain such an objection, and that upon a rehearing, which is allowed, to correct erroneous rulings upon the law as it may be declared in the opinion.

But let us examine the force of the objection as if it had been made and overruled upon the original hearing. In *Kidder* v. *McIlhenny,* 81 N. C., 123, it was insisted by the defendant, that the issues passed on did not dispose of the matters in controversy in the pleadings, and that there should have been, and should now be, a further issue passed on involving the validity of the mortgage as against the *feme* defendant, and the objection is thus disposed of in the opinion of the Court: "Nor ought the defendants to have been content with the proposed issue, if they desired others. They should have asked for other issues, and if necessary they would have been allowed, or if not allowed, (381) the refusal would have constituted matter of exception. It might produce serious inconveniences and delays, if, when a party has opportunity to propose other and further issues, and he refuses or fails to do so, he could then be heard to complain of the consequences of his own neglect, and thereby increase the costs, as well as delay the determination of the cause."

This rule of practice has been re-affirmed in *Curtis* v. *Cash,* 84 N. C., 41; *Bryant* v. *Fisher,* 85 N. C., 70; *Alexander* v. *Robinson,* Ibid., 275; *Moore* v. *Hill,* Ibid., 218; and still more recently in *Simmons* v. *Mann,* 92 N. C., 12, where MERRIMON, J., uses this language in answer to such an exception: "It is too late, after the trial, to complain that possible issues were not submitted to the jury, if they were not insisted upon before the trial." In opposition to this concurrent and consistent ruling, we have been referred to two cases which are relied on in support of the argument for defendants, *Burton* v. *The Railroad,* 84 N. C., 193, and *Allen* v. *Baker,* 86 N. C., 92. The first of these cases enunciates the general proposition, that in expounding the law, it should be stated correctly, and if a false enunciation of a legal proposition is made, it is open to correction in the appellate court, without a special assignment of the error. This is but in accord, as we have interpreted the statute, with the legislative declaration contained in §412 of *The Code; Lawton*

v. *Giles,* 90 N. C., 374; *Fry* v. *Currie,* 91 N. C., 436. In *Allen* v. *Baker,* the issues were deemed by the Court not to cover the whole merits of the controversy, so that, without other findings on the part of the jury, it was "impossible to do justice to the rights of both parties," and so, without depriving the plaintiff of the benefit of the verdict rendered, the cause was sent back for the trial of additional issues. This was done by the Court for its own guidance, and not upon any exceptions of the parties. Such action is taken on an insufficient special verdict, upon which it cannot be seen what judgment ought to be rendered, ex-
(382) cept that in the last case, a new trial is ordered, because the verdict is a single finding, and the parts constitute an indivisible whole, while in the other, the new issues could be passed on without disturbing the others. The repeated enunciation of the practice since, as well as before, shows clearly that it has not been understood as impaired or modified by the exceptional case we have been considering. But is the second issue really such, and so understood by the Court and contestants, as construed by the appellants? The first issue is an inquiry into the making of the contract described in the complaint, with the conditions on which the alleged commission could be claimed. The next inquiry is, whether a sale was effected by defendants to the alleged purchasers, meaning, of course, such sale as is described in the preceding issue, induced and brought about in the manner and by the agency therein stated. Such is a fair and reasonable interpretation of the language used in the two issues in their relations to each other, and to the subject matter in contest. So it was considered and treated by the Court in the charge to the jury. In reference to the first issue, the jury were directed to inquire, "not whether any contract was entered into between the parties, but what was their contract; that is, was a contract substantially the same as this entered into between them? If it were that the plaintiff was to bring them a party who would pay cash, it is not this contract. * * * * It is for you to say, upon the testimony, was such a contract made, yes or no." Proceeding then to the second issue, and the response to be rendered to it, he continues: "The plaintiff says that this contract was made, and he afterwards introduced Larrabee and Smart to the defendants, and that negotiations ensued between the defendants and Larrabee and Smart, one or both of them, and in consequence of such negotiations, a sale was made for $35,000.00. 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 and con-
(383) flicting testimony as to what sale was made, if any. It is for you to answer the question. If a sale was made to Larrabee and

Smart, or to either of them, or if either of them aided defendants in making a sale of the property, and such sale was made with the assistance of one or both of them, you must answer 'yes.'"

The instruction to find affirmatively, manifestly proceeds upon the assumption of a sale of the mine, brought about by the plaintiff's introducing the purchasers, and the consequent negotiations resulting in a sale, as if the issue was so formed as to include the plaintiff's participation. The defendants have therefore had the benefit of the issue, as if put in the form contemplated in the pleadings, and can have no just cause of complaint in the premises.

II. The second error pointed out in the petition, is in the disposition of exceptions 6 and 7, which are to the order for the production of the contract between the defendants and J. H. Whitney and others. The Court, it is asserted in the petition, misunderstood the objection, which was not to the power of the Court to compel the production of the paper, but to the irregular exercise of it, which is not sustained by precedent or practice. Recurring to the defendants' series of exceptions, that numbered 6 is "to the order of his Honor requiring production by defendant of agreement between defendant and J. H. Whitney, dated August 25, 1879." That numbered 7 is "to the admission of said agreement in evidence." Record, page 12.

Notice to produce the document, as seen at page 4, was issued and served on the defendant on March 7th, 1885.

A second notice to produce it was given during the trial, or to show cause why it was not produced at once, which was served in January, 1886. Record, page 8½.

No other answer was made than an unexplained refusal to produce the writing. It was in their possession. The order was thereupon made by the Court, to which exception is taken, assigning no reason therefor, nor the grounds in its support. It was then produced, (384) and the execution proved by defendant, Carson, put on the witness stand by the plaintiff, and then read to the jury. The power thus exercised has long been possessed by the courts of common law jurisdiction, and found very beneficial and conducive to fair trials. It was at first conferred to be exercised where the parties might be compelled to produce books or writings in their possession or control, "by the ordinary rules of proceeding in equity." Rev. Code, ch. 31, §82.

While the statute was in this form, and the law and equity courts were separate and distinct, some proceeding similar to that pursued in the latter courts, was deemed necessary. It was held, therefore, in several cases, that analogous action must be taken to secure the presence of the writings desired, such as a previous order for their production,

Graham v. *Hamilton,* 25 N. C., 381; and that some basis should be laid for the issuing of the order, by affidavit or otherwise, before the Court would be called on to act. But the present enactment has no such restrictions as have been mentioned, but is simple and unqualified, giving to the Court "full power, on motion and due notice, to require the parties to produce books or writing in their possession or control, which contain evidence pertinent to the issue," &c., *The Code,* §1373.

Due notice is sufficient notice to enable the party to have the document present, and its prompt production shows that it was in the defendant's possession, so that the order could be, as it was, promptly obeyed, and no delay was necessary. No reason was suggested in opposition to the order, and when, on the appeal, we understood the objection to be to the power of the Court so to rule, and so passed on it, we are now asked to put the exception upon ground wholly different. To say the least, such a practice, if tolerated, will not conduce to a fair and just judicial administration of the law, and must find little favor with the Court, especially upon a second hearing, in wresting the fruits (385) of a successful prosecution of his claim from the plaintiff.

III. The last imputed oversight is in regard to a conversation had between the plaintiff and the defendant Wadsworth, of which it is enough to say, that any and all declarations, pertinent to the subject matter and bearing upon the issues, coming from the defendants, or any of them, are competent, at least against the persons making them, and may be against all, when their interests are joint and they are engaged in a common enterprise. This objection has not been pressed in the argument, and we dismiss it without further comment. The points made in this appeal were well considered upon the former, and our opinion upon them, upon this re-examination, remains unchanged. The judgment must be affirmed, at the costs of the defendant.

No error. Affirmed.

Cited: Weathersbee v. Farrar, 98 N. C., 257; *DeBerry v. R. R.,* 100 N. C., 315; *Maxwell v. McIver,* 113 N. C., 291; *Shaffer v. Gaynor,* 117 N. C., 24; *Wagon Co. v. Byrd,* 119 N. C., 461; *Whitten v. Tel. Co.,* 141 N. C., 363; *McManus v. Railroad,* 150 N. C., 665; *Medlin v. Board of Education,* 167 N. C., 243; *Byrd v. Spruce Co.,* 170 N. C., 435.

H. L. WHITSON v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Attorney and Client—Excusable Neglect—Judgment.

1. The rule that a defendant in an action, who employs an attorney to appear and defend—but who fails to do so—is entitled to have a judgment by default set aside upon the ground of excusable neglect, does not absolve the client from all attention to the cause. It is still his duty to furnish the information necessary for the preparation of the answer and for the trial.

2. Where the attorney entered an appearance at the return term, but did nothing else then, nor at the succeeding term, when judgment by default was rendered; *Held*, not to be such excusable neglect as entitled the defendant to relief.

(*Griel* v. *Vernon*, 65 N. C., 76; *McLean* v. *McLean*, 84 N. C., 366; *Wynne* v. *Prairie*, 86 N. C., 73; *Geer* v. *Reams*, 88 N. C., 197, and *Churchill* v. *Insurance Company*, Ibid., 205, cited and approved).

MOTION to vacate a judgment, heard by *Shipp, Judge,* at Octo- (386) ber Term, 1886, of BUNCOMBE Superior Court.

The action was prosecuted to recover in damages the value of two mules alleged to have been killed by the negligent running of the defendant's locomotive and cars on their track, on or about the first day of November, 1883. The summons issued January 19th, 1884, and was served nine days thereafter. A verified complaint was filed on June 2d, 1884, the first day of the Term to which the process was made returnable. No answer was put in at that or the succeeding Term, though counsel for the defendant company entered an appearance for it at the first Term, who promised the company that they would give their attention to the case, and defend it.

At Fall Term, the presiding Judge being quite unwell, and able only occasionally to be in the court-room, near the close of the session, affixed his signature to a judgment in form final, drawn up by plaintiff's counsel, and not read over to him, under the impression that it was interlocutory only, and with the distinct direction that it should be stricken from the record, if an answer came in during the Term. Execution issued, and the fact being called to the attention of the Judge, he wrote to the plaintiff's counsel of his own misapprehension of the judgment when it was signed, to which counsel promptly replied that he would recall the execution, and consent to its being made a judgment by default and inquiry. The defendant first moved in the matter by issuing, on May 29th, 1885, notice of an intended motion to be made at the ap-

proaching Term of the Court, for an order setting aside the judgment, and re-opening the action to a defence to be made, which motion was made and heard upon opposing affidavits at the time designated. The Court being of opinion that the facts as found by the Court and herein before recited, did not bring the application within the meaning of the Act, refused the motion, but directed a modification to be entered, making the judgment interlocutory instead of final. From this ruling the defendant appealed.

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Mr. George A. Shuford, for the plaintiff.
Messrs. Chas. Price and *Chas. A. Moore,* for the defendant.

SMITH, C. J. (after stating the case). The distinction made in the early case of *Griel* v. *Vernon,* 65 N. C., 76; and recognized in numerous subsequent adjudications, is between personal neglects of the suitor and neglects of his counsel, and the latter are held not to be so attributable to the suitor as to deprive him of the advantages of the enactment.

Where he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf. But the principle does not extend so far as to excuse all attention to the cause after the employment of counsel, so that the inattention of both may run over years of time. It is so decided in *McLean* v. *McLean,* 84 N. C., 366. Ordinarily, a cause is put at issue at one Term, and stands for trial at the next. Counsel should be informed of the defence after the complaint is filed, and the purpose of the action known, and it is the duty of a defendant to furnish the required information in order that the answer may be drawn. *Wynne* v. *Prairie,* 86 N. C., 73.

The necessity of communicating the facts to counsel must have been understood by the company. Under the old practice, the reasons for this were less forcible, since the defence was in mere memoranda entered upon the docket in the cause. But acquitting the defendant of negligence in this, no kind of attention seems to have been given to the action until after another Term of the court had passed, and the defendant's activity quickened only a few days before the arrival of another Term.

Was there no personal remissness in this, aside from neglect of counsel? Is a defendant to abandon all care of his case when he has engaged counsel to look after it? May this condition of things continue indefinitely until the lapse of time interposes? We concur with the court that there was culpability on the part of the defendant, and that it finds no excuse in the mere employment of counsel with-

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out further action or notice on its part for so long a space afterwards. *Geer* v. *Reams,* 88 N. C., 197; *Churchill* v. *Insurance Company,* Ibid., 205.

There is no error, and this will be certified, that the cause may proceed in the court below.

No error. Affirmed.

Cited: Gwathney v. Savage, 101 N. C., 107; *Roberts v. Allman,* 106 N. C., 394; *Vick v. Baker,* 122 N. C., 100; *Phifer v. Ins. Co.,* 123 N. C., 409; *Norton v. McLaurin,* 125 N. C., 190; *Osborn v. Leach,* 133 N. C., 431; *Schule v. Insurance Co.,* 171 N. C., 431.

EDWIN BATES & CO. v. E. B. HERREN & CO.

Limitations—New Promise.

1. A new promise, to repel the plea of the statute of limitations, must be in writing. *The Code,* §51.
2. An acknowledgment that the contract sued upon was correct, and a promise by the obligor that it should be paid as soon as he could sell some stock and make collections, is a conditional promise, and will not obstruct the running of the statute.
3. A promise by an obligor that he will pay, if he is not put to trouble, unaccompanied by a request for an indulgence, or an agreement for forbearance, will not avoid the operation of the statute.

(*Barcroft* v. *Roberts,* 91 N. C., 363, distinguished and approved).

CIVIL ACTION, tried before *Avery, Judge,* and a jury, at Fall Term, 1886, of HAYWOOD Superior Court.

This was an action commenced before a justice of the peace on the 10th day of May, 1883, for the recovery of the sum of one hundred and sixty-five dollars and seventy-three cents and interest thereon from the 16th of February, 1876, alleged to be due by note not under seal,
and carried to the Superior Court by appeal of the plaintiffs. (389) The defendants pleaded the statute of limitations.

The plaintiff introduced the note, signed "E. B. Herren & Co.," dated October 16th, 1875, and due four months after date.

Then plaintiff introduced as a witness, W. M. Cocke, Jr., who testified that the note was sent him for collection some time in the year 1877; that he notified A. J. Herren, administrator of E. B. Herren, deceased,

(E. B. Herren having died in the spring of 1876), who said the note was correct, and that he would pay it as soon as he could sell some stock and make collection; that A. J. Herren never asked any indulgence or forbearance on said note, and there was no agreement for forbearance. Witness also spoke to defendant, W. E. Miller, about the note, and Miller said it was correct, and that A. L. Herren had been paid to pay it. The witness also testified that he presented the note to S. C. Herren, (who had succeeded A. J. Herren as administrator of E. B. Herren), who said that if the witness or his clients would not put them to trouble he would pay the note. This conversation took place not more than one or two months after said S. C. Herren was appointed administrator *de bonis non* of E. B. Herren, which appointment was made on the 15th day of February, 1879.

Cocke further testified, that he would have brought suit within the three years if A. J. Herren had denied the note, and if defendants had not promised to pay it.

Upon demurrer to the testimony, on the ground that the plaintiff's right of action was barred by the statute of limitation in any view of the testimony, the court intimated that the jury would be instructed that there was no promise of forbearance, or other promise, sufficient to prevent the bar by the statute of limitation, and that the plaintiffs were not entitled to recover. The question whether there was a new promise was the only question raised.

Whereupon plaintiffs submitted to a non-suit and appealed to (390) Supreme Court.

Mr. Geo. A. Shuford, for the plaintiffs.

No counsel for the defendants.

ASHE, J. (after stating the facts). The only question presented by this record for our determination, is whether the debt sued for is barred by the statute of limitations.

The promise made by the first administrator, A. J. Herren, was conditional, depending upon his selling some stock and making collections, and it does not appear that he ever sold the stock. This promise had no effect in obstructing the running of the statute.

Then the promise of the administrator, S. C. Herren, that he would pay the note, if Mr. Cocke and his client would put him to no trouble, was made more than three years after the cause of action accrued on the note, and more than five years prior to the commencement of the action. So that, taken either way, the action was barred. But the plaintiff says he was prevented from bringing suit in time, in consequence of the first administrator not denying the note, and the promise

of the last administrator to pay it. But the witness Cocke testified, that A. J. Herren did not ask "any indulgence or forbearance, and there was *no agreement for* forbearance," nor was there any promise on the part of A. J. Herren or S. C. Herren that they would not rely upon the statute of limitation, and that distinguishes this case from that of *Barcroft* v. *Roberts,* 91 N. C., 363. And now, by section 51 of *The Code,* it is required that a promise to take a case out of the operation of the statute, should be reduced to writing. This is conclusive. If the contention of the plaintiff that he was prevented from suing at an earlier date, was sustained, then every new promise to pay a debt, barred by the statute, would be sufficient to repel the statute, and would defeat the purpose of the Legislature in requiring such promises to be in writing. There is no error in the judgment of the Superior (391) Court, and it is affirmed.

No error. Affirmed.

Cited: Murray v. Penny, 108 N. C., 326; *Helm Co. v. Griffin,* 112 N. C., 358.

POLLY ANN LAFOON v. ELIZA SHEARIN.

1. A judgment of nonsuit against a portion of the plaintiffs, terminates the action as to all.
2. Where it is desirable or necessary to continue the action as to some, and discontinue it as to the other plaintiffs, the proper course is to permit or order a withdrawal of those who go out.
3. Whether the jury, having retired under instructions to which there was no exception, shall be recalled for further directions, is within the discretion of the Court, and not reviewable.
4. It is not error to refuse to allow a deposition read upon the trial, to be taken into the jury room, upon the request of only one of the jurors.
5. Where the contention was whether the disputed land was embraced within the boundaries of another and larger tract, and there was conflicting evidence, it was proper to submit the facts to the jury.
6. The testimony of a juror will not be received in support of a motion to set aside a verdict in which he has joined.
7. Where a portion of the plaintiffs have been compelled to withdraw from the action upon their refusal to file a prosecution bond, it is not erroneous to enter judgment against them for costs.

(*State* v. *Royal,* 90 N. C., 755; and *State* v. *Brittain,* 89 N. C., 481, cited and approved).

LAFOON *v.* SHEARIN.

CIVIL ACTION, tried before *Clark, Judge,* at August Civil Term, 1885, of WAKE Superior Court.

The facts are stated in the opinion.

Messrs. D. G. Fowle, J. B. Batchelor and *Jno. Devereux, Jr.,* for the plaintiffs.

Mr. E. C. Smith, for the defendant.

(392) SMITH, C. J. This action was prosecuted to recover possession of part of a tract of land, devised in 1837 to the plaintiff by her grandfather, John Shearin, which she alleges is wrongfully withheld by the defendant.

The complaint avers that the plaintiff, at the age of sixteen years, intermarried with one Jas. Lafoon, who died in August, 1878.

All the material statements in respect to the subject matter in controversy made in the complaint, are denied in the answer. In the progress of the cause, the plaintiff died, and her heirs-at-law were made parties to the action in her place, as to a portion of whom, according to the record, a nonsuit was entered, (or, as we must understand, a withdrawal from the action by request, since a *nonsuit* terminates the same, and must be the result common to all), and the action was carried on by the five that remained.

The usual issues were submitted to the jury as to the plaintiff's right to recover possession of the premises, and the wrongful detention by the defendant, and both were answered in the negative.

Judgment thereupon being rendered against the plaintiffs, they appealed.

Upon the trial the plaintiffs exhibited in evidence the will of John Shearin, who died in 1837, wherein are contained the following dispositions:

"3d. I give unto my grandson, Aaron Shearin, son of Drewry Shearin, deceased, a certain tract of land in Granville county, adjoining the lands of Geo. Brogden and others, containing one hundred acres, be the same more or less. But my son, Bartholomew Shearin, is to have the privilege of living on it until he and his wife both die, to him and her forever.

"12. I give unto my beloved granddaughter, Polly Ann Shearin, the daughter of John Shearin, all the balance of my estate not heretofore disposed of, to-wit: the tract of land on which I now live, with all (393) the improvements, &c., containing four hundred acres, more or less, adjoining the lands of Thomas D. Bennehan and others, also my negroes," (naming three of them), "with all the balance of my estate not heretofore disposed of, and the expense of settling my estate."

A succession of deeds, beginning in 1783, and extending down to the testator, showed the transmission of the title and the vesting of it in him. The tract of one hundred acres, in possession of the defendant, was claimed by the plaintiffs to be a part of the four hundred acres devised to their ancestor, and testimony was introduced tending to support the contention; while evidence to the contrary was offered by the defendant and heard, and to this no exception was taken by the plaintiffs.

The plaintiffs asked the Court to charge that "if the one hundred acre tract, now in defendant's possession, belonged to John Shearin at his death, it vested in Polly Ann Lafoon."

Whilst defendant's counsel was arguing the case to the jury, and just before concluding, the Court remarked to the plaintiff's counsel: "I cannot give the charge as asked, but will give it with words added, 'and was not the Aaron Shearin land.'" Thereupon the counsel addressed, suggested that two persons of that name had been spoken of, and it might confuse the jury, unless the words were inserted "in which Bartholomew had a life estate," and as thus amended the instruction was given, and in such case the Court said "the plaintiffs were entitled to recover," that is, in more appropriate words, as we have often remarked, the response to the first issue should be in the affirmative.

The Court further charged, that although but five of the thirteen tenants in common were prosecuting the suit, this did not affect the controversy with the defendant, and these would be entitled to recover possession as much as if all continued in the cause as plaintiffs, that there was no statutory bar in the way of the plaintiffs, she, their ancestor, becoming a *feme covert* before attaining her full age, (394) and bringing her suit in time after the removal of that disability; and that the burden was on the plaintiffs to make out their case by a preponderance of testimony, explaining what was meant thereby.

There was no exception to the charge. Soon after the jury retired, plaintiffs' counsel suggested that the jury might not understand the directions of the Court, and they were at once recalled and asked if they needed any further instruction. One of them said, "I would like to know if the Ladd land could not possibly have been the same as the Bartholomew land." The Court in answer said, "the jury must decide the question of identification for themselves. It is a question of fact, and the jurors are the sole judges of fact. If any of the jury are in doubt about any fact, I will recall any witness that may be designated, in order to his being examined." The jury declined any further examination of the witnesses, and did not desire any further directions from the Court. One of their number wished to take the deposition of

one Brogden into the jury room, but when the Court inquired if this was the wish of the jury, all the others dissented, and the deposition was not taken out.

After a second retirement, plaintiffs' counsel requested that they might again be recalled for further instructions, and this request was, as a matter of discretion, refused. Upon the motion for a new trial, the affidavit of a juror was filed, in which he stated, that being in the neighborhood of the disputed land, he gave information to the other jurors, which in his opinion was considered by them in forming the verdict.

The Court refused to act upon the affidavit, and in this was governed by a well settled rule of practice. *State* v. *Royal,* 90 N. C., 755; *State* v. *Brittain,* 89 N. C., 481.

The errors assigned, briefly stated, are:

(395) I. The Court did not tell the jury when recalled, that there was no evidence that the land in the defendant's possession was the Bartholomew land, but, on the contrary, left the question of identification to them.

The answer to this is manifold and plain:

1. No such point was made, and no instructions to sustain it requested before the withdrawal of the jury for deliberation upon the issues.

2. Nor was such instruction asked when the jury were first recalled at the instance of plaintiffs' counsel, upon a suggestion that the directions of the Court may not have been understood.

3. The jury did not wish, when asked, any further instruction.

4. The case expressly states that conflicting evidence was offered upon the question whether the one hundred acre tract was part of the four hundred acre tract devised to the plaintiffs' ancestor.

II. The Court should have given the instruction unamended as demanded for plaintiffs.

The addition was entirely proper, if not necessary, to a proper understanding of the matter.

The defendant claimed the land under the devise to Bartholomew and Aaron Shearin, and it would have been a vague and unmeaning declaration, unless upon the assumption that the small was part of the large tract, the very subject of controversy. The superadded words left the question open to the jury.

The prayer was, stripped of the explanatory additions, that the jury should find for the plaintiffs the controverted fact, and this, in view of the contradictory testimony received without objection, was wholly inadmissible.

III. The refusal to bring the jury a second time before the Court for further instructions, the purport of which is not given, was wholly

within the discretion of the Court, and it would seem not to be a reasonable request at that advanced stage of the pro- (396) ceeding.

The remaining exception is to the form of the judgment, in awarding a nonsuit as to those of the plaintiffs who did not unite in the affidavit to prosecute in *forma pauperis*. As we have said, this was not a regular and formal entry of what was done, but must be deemed a compulsory withdrawal of those persons from the cause; and in this we see no error inasmuch as a bond for prosecution was properly required of them, and they refused to give it.

The appellants, upon a suggestion from their counsel of an imperfection in the statements of the case, and of his assurance that the Judge would make the proposed corrections, was permitted to withdraw the papers and lay them again before the Judge, but this action has resulted in no important charge.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Gatewood v. Leak, 99 N. C., 366; *Winborne v. Lumber Co.*, 130 N. C., 33; *Campbell v. Power Co.*, 166 N. C., 490.

STATE ex rel. S. T. MORGAN, Adm'r, v. W. A. SMITH.

Amendments—Evidence—Official Bonds—Burden of Proof.

1. Where the trial Judge allowed an amendment after verdict, but stated to opposing counsel that if they would show by affidavit that the defendant had any evidence to offer to the complaint as amended, which had not been already offered, that he would either refuse to allow the amendment, or would set aside the verdict; *It was held*, to cure any possible error. It is intimated that allowing amendments after, as well as before verdict, is discretionary with the trial Judge.

2. In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk, and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk.

3. Where money is paid into the clerk's office, the obligations to hold and pay it over to the party entitled, when called on, is incurred when the money is received, and the bond then in force is responsible. If the clerk was elected to another term of office, and became his own successor, the burden

is on the sureties on the bond in force when the money was received by the clerk, to show that he has paid it over to himself as his own successor.

4. The failure of the clerk to pay over the money when it is demanded, is strong evidence of a conversion at some previous stage, and the burden of proof is on the defendants to show that the conversion was not made when the money was received.

(*Armistead* v. *Harramond*, 11 N. C., 339; *Strickland* v. *Murphy*, 52 N. C., 242; *Badger* v. *Daniel*, 79 N. C., 372; *State* v. *Lackey*, 25 N. C., 25, cited and approved).

(397) CIVIL ACTION, tried before *Connor, Judge,* and a jury, at April Civil Term, 1886, of Wake Superior Court.

The action was brought on the official bond of one John N. Bunting, as Clerk of the Superior Court of Wake County, given for a term of office beginning in 1868, and ending on September 4th, 1874, at which time said Bunting was re-elected Clerk, as his own successor, and gave a new bond.

The defendant, one of the sureties on the bond given in 1868, pleaded, among other things, that said Bunting had paid the money, which it was admitted he had received as clerk, over to himself as his own successor, and that the bond given in 1874 was alone liable.

The plaintiff's relator introduced evidence tending to show that at the time of his qualification in 1874, the said Bunting had no money to his credit as clerk in any of the banks in Raleigh.

The other facts fully appear in the opinion.

Messrs. Charles M. Busbee, Jos. B. Batchelor and *John Devereux, Jr.,* for the plaintiff.

Messrs. T. M. Argo and *Daniel G. Fowle,* for the defendant.

(398) SMITH, C. J. S. D. Morgan, residing in Wake county, died intestate in the year 1864, and letters of administration on his estate soon afterwards issued to one William Laws, who also died on March 15th, 1871, without having executed and closed his trust by a final settlement. During the course of his administration, he sued for and recovered divers judgments against persons indebted to his intestate, on which executions issued, and the moneys due were collected and paid into the clerk's office, in amounts specified in the complaint, between August 11th, 1870, and May 4th, 1871.

John N. Bunting was elected clerk, and entered upon his official duties on the first Monday in September, 1868, having executed a bond with Willie D. Jones, James M. Harris, and the defendant William A. Smith, his sureties, in the form and with the condition prescribed by law, for the due discharge of the duties of said office. This term of office ex-

pired on the first Monday in September, 1874, when being re-elected, he entered upon a new term of office for the four years next ensuing, and gave other bonds. No administration was granted on the intestate's estate, until letters *de bonis non* issued to the present plaintiff, on July 3d, 1879, who brought his action on the bond against the clerk, and the sureties, Jones and Harris, and recovered judgment, but has been unable to obtain satisfaction thereof.

The present action is on the same bond, against the defendant, the other surety, who answers denying his liability in the premises, and most of the facts upon which it is dependent, and setting up as a defence, the three and six years limitation of time for bringing actions specified in the statute.

Upon the trial, the defendant moved to dismiss the action, for that the complaint failed to aver a conversion of the funds and breach of official obligation to have taken place during the clerk's first term of office, or to negative his transfer of the moneys to himself, as his own successor, after entering upon his second term. The Court refused the motion, remarking that if necessary or proper in the (399) progress of the trial, he would allow an amendment remedying the alleged defect. Such an amendment was subsequently put in, after the rendition of the verdict. To this the defendant's counsel objected, upon the ground that if made during the trial, he would have introduced other testimony.

In response to this suggestion, the Court remarked that if the defendant would, by affidavit, show during the term that he had any evidence pertinent to the case as presented after the amendment, the amendment should be refused, or the verdict set aside and a new trial granted. No such affidavit was made.

In our opinion, if any cause of complaint was afforded, it was removed by this action of the Court, and we think none was, since the allowance of amendments at any time before final judgment, if not after, rests in the sound discretion of the Judge.

The issues, four in number, submitted to the jury, and their responses to each, are in substance, the following:

I. Did Bunting, by virtue and color of his office as clerk, receive the amounts and at the dates specified in the complaint? Answer: Yes.

II. Did he pay over the same to the persons entitled, prior to his entering upon his second term of office, and if so, how much? Answer: No.

III. Did he safely keep and have in his hands, as clerk, the moneys so received, at the time of his second induction into office? Answer: No.

IV. Did the plaintiff demand said moneys, and if so, when? Answer: Yes; between the 3d and 14th days of July, 1879.

Judgment was accordingly rendered in favor of the relator, and the defendant appealed.

1. The appellant's first exception is to the admission in evidence, of the record of the judgment upon the same bond, in the action
(400) before instituted against the principal and other sureties, to show the extent of the clerk's liability.

The testimony and record were competent for that purpose.

In *Armistead* v. *Harramond,* 11 N. C., 339, HALL, J., said that a "judgment against an administrator is evidence against him of a debt due by the intestate, and is evidence also of assets in his hands to discharge it; and although, for the reason before given, it is also evidence of a debt due, as far as it relates to his sureties," &c.

So, in *Strickland* v. *Murphy,* 52 N. C., 242 (244); BATTLE, *J.*, remarks: "If a judgment had been obtained against the administrator, they (the sureties to his bond), would be concluded as to the debt, though not as to the assets." In the construction of the Act of 1844, Rev. Code, ch. 44, §10, it is decided that the judgment against the principal upon such official bond as the act mentions, is not only conclusive of the debt, as it was without the aid of the enactment, but of assets also, and this effect is given to a judgment against a guardian upon his official bond, in *Badger* v. *Daniel,* 79 N. C., 372, (379).

The Statute was amended by the act of January 20th, 1881, and made to furnish a presumption, instead of conclusive evidence against the sureties. *The Code,* §1345.

The rule was thus explained in the charge to the jury, and they were directed to consider the evidence as raising a presumption, which was open to disproof or rebuttal.

The fifth issue demanded by the defendant was unnecessary, and is covered by those on which the jury passed as determining the liability of the bond in suit for the moneys claimed.

The evidence in reference to the deposit in the two banks, offered to show that the clerk had misused the trust money, though not objected to, was wholly unnecessary, as will be seen later in this opinion.
(401) The instructions requested and refused by the Court were these:

"1. Before the jury can find that the surety, W. A. Smith, is liable, they must find as a fact, that a demand was made by one authorized to make it, before the first Monday in September, 1874, and that there was a refusal to pay; or that before said date, Bunting misappropriated said fund, or converted it to his own use.

"2. The presumption of law is, that Bunting had the money in hand at the time of his re-election and re-qualification in 1874; and it is incumbent on him who denies the fact to show it.

"3. The liability of W. A. Smith expired on the first Monday in September, 1874, and he is not responsible for any acts of Bunting thereafter done."

His Honor charged the jury, "that the liability of the defendant as a surety on the official bond of Bunting, expired on the first Monday in September, 1874, and that he was not responsible for any act or default of Bunting after that time; that the judgment introduced by the plaintiff against Bunting and certain sureties on his bond as clerk, if the jury should believe the evidence, (it being admitted that the defendant Smith was a co-surety on the same bond), was presumptive evidence under the statute, of the liability of the defendant; that there was also a presumption of law, that Bunting, as clerk, had done his duty, and that he had the money received by him, as alleged in the complaint and admitted in the answer, on hand at the time of his re-election and re-qualification as clerk in September, 1874; and that he had paid it over to himself as his own successor. But that both these presumptions could be rebutted, and that it was for the jury to say, considering all the evidence, whether the plaintiff had rebutted the presumption that Bunting paid the money over to himself as his own successor in September, 1874, or whether the defendant had rebutted the presumption of the defendant's liability raised by the statute; that (402) it was a matter to be determined by the jury upon the evidence.

* * * * That before you can find that the defendant is liable, you must find that Bunting received the money and converted it to his own use, prior to the first Monday in September, 1874, and after the date of the bond signed by the defendant; and that a demand has been made upon Bunting for the money by the plaintiff, and that he refused or failed to pay it."

His Honor further charged, that the law requires public officers to keep funds entrusted to them carefully and safely, and although they should believe that Bunting had to his individual credit, in the Citizens National Bank, on the first Monday in September, 1874, the amount shown by the witness Brown, yet if they should believe from the evidence, that he had used the money collected upon the judgment in favor of Laws, administrator, they should find the third issue in the negative.

The charge was quite as favorable, as and we think more so, than he could reasonably ask, for the whole burden of showing the misuse of the money during the first term of office seems to have been put on the shoulders of the relator.

The case of the *State* v. *Lackey,* 25 N. C., 25, is so directly in point as to be decisive of the liability of the first bond. In that case, the claims were placed in the constable's hands in October, 1840. During this year, he collected the money. He was re-appointed in 1841, and in

May the money was demanded. The action was upon the bond given at March Term, 1841. GASTON, J., delivers the opinion, and uses these words: "In the case before us, the sureties in the bond of March Term, 1841, stipulated for the faithful performance by their principal of the duties of the office then conferred, and for his diligence in endeavoring to collect, and his punctuality in paying over what might be collected on claims that should be put in his hands for collection. But the (403) moneys, the non-payment whereof gives rise to this suit, were either collected *by virtue* of his antecedent office of constable, or upon claims put into his hands for collection, and satisfied before he received his second office. In the former supposition, the non-payment is a violation of the duty which that former office imposed; and in the latter, it is a failure to comply with the stipulation in the bond when that office was conferred. The sureties on the bond then given, are therefore liable, but not the sureties in the bond of 1841."

The governing principle is this: the obligation to hold and pay over the money to the party entitled to it when called on, is incurred when the money is received, and if not so paid over, without other proof, the bond then in force is responsible. It is matter of defence and excuse that it has been paid over to the successor, and this the defendant ought to show. The failure of the clerk to pay over when the fund is demanded, is cogent evidence of a devastavit committed at some previous stage, and to shift the liability from one term to another, and from the bond formerly liable to another, proof ought to come from the delinquent, or from his sureties. Instead of this, the Judge required the relator not only to prove the delivering of the moneys to the clerk, but also affirmatively that the *devastavit* took place during the first official term. If this burden rested on him, while the officer might be able to tell, the relator would usually fail to show the time of the misappropriation, and thus would recover on neither bond. Yet the jury do find, under these disadvantages, that the clerk did not safely keep the funds during his first term—that is, misapplied them in violation of his bond.

These are all the exceptions presented in the case on appeal, and we find no error in the rulings prejudicial to the appellant.

The judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Patton v. Smith, 131 N. C., 397; *Marshall v. Kemp,* 190 N. C., 493; *Gilmore v. Walker,* 195 N. C., 464.

(404)

C. L. SUMMERS, Extr., v. HUGH REYNOLDS, et als.

Executor—Fiduciary Duty—Devastavit—Compromising Claims.

1. Where an executor sold land during the war, under the power given him by the will to sell and divide the proceeds among certain legatees, but the executor would not say in what currency he would take payment, and by this conduct prevented certain parties, who wished to purchase, from bidding at the sale, and said executor, unknown to the parties in interest, procured his partner to purchase the property on their joint account, and accepted payment of the bid in Confederate money; *It was held*, that the executor was chargeable with the value of the property in good money.

2. Where, in such case, the legatees accepted the Confederate money in payment, the executor is entitled to credit for the scaled value of such payments, in his accounts with the legatees.

3. Where a debtor of an estate attempts to compromise his debt, but the executor refuses, on the ground that he has no power to do so, and does not ascertain even what the debtor will give, and afterwards sells the claim for an inconsiderable sum, at a sale of the debts due to the estate made under an order of Court; *It was held*, that the executor was liable for the amount which the debtor afterwards pays to the party who purchased the claim.

4. If an executor or administrator place funds of the estate in bank to his individual credit, it is an appropriation of them to his individual use, and he becomes liable for them, upon the failure of the bank; and this is so although he has no money of his own on deposit in the bank.

5. *It seems*, in such case, that the *cestui qui trust* may either follow the fund, when he can identify it, or he may elect to hold the trustee personally, when the fund has been lost.

6. *It seems*, that if the executor, acting in good faith, thinks that, under the will, the fund is his individual property, he will not be held accountable for converting it into securities payable to himself individually, which afterwards become valueless.

(*Peyton* v. *Smith*, 22 N. C., 325; *Shipp* v. *Hettrick*, 63 N. C., 329, cited and approved; *Syme* v. *Badger*, 92 N. C., 706, distinguished).

CIVIL ACTION, heard upon exceptions to the report of a referee, (405) before *Boykin, Judge,* at August Term, 1886, of IREDELL Superior Court.

William H. Watts died in the month of June, 1863, leaving a considerable estate, real and personal, and having made a will, which at August Term ensuing of Iredell County Court, was admitted to probate, and the plaintiff, Charles L. Summers, nominated therein sole executor, was qualified as such by taking the prescribed oath.

The testator, in the first clause of the will, devises to Phillip and Eliza Shuford, and the survivor of them, the tract of land whereon they then resided, containing about one hundred and eighty acres. In the second, he bequeaths to Geo. C. Watts, his brother, $1,000; and in the third, a like sum to Jane C. Reynolds, a sister, who, with her husband, is a defendant.

In the concluding clause of his will, which follows the special dispositions mentioned, the testator directs, excepting a small lot occupied by Thomas Pond, that the remainder of his property particularly described, be sold, and the proceeds with other funds, after the payment of his debts, be distributed among his nephews and nieces, and the children of such as may die before himself leaving issue, the latter taking representatively the share of the parent, with deductions from the share of each, of the indebtedness of the parent or children, and excluding from the distribution a niece, Margaret, for the reason that she had been provided for by her friends.

The plaintiff proceeded in the execution of the trusts of the will, until March 20th, 1876, when he sued out a summons against the defendants, beneficiaries under the will, for an account and settlement of his administration, and in order to the payment of what may be found to be due to each. The legatee, George C. Watts is omitted, as it is alleged in the complaint he has been fully paid.

The pleadings being filed, the clerk proceeded to hear the evidence, pending the taking of which the plaintiff filed a supplemental complaint, wherein he states that of the moneys in his hands when the original complaint was filed, a considerable portion, setting out (406) the several sums, had been deposited for safe keeping, and to await the result of the suit, in the Bank of Statesville, and was lost by its unexpected insolvency, from responsibility for which loss, he claims to be exonerated.

The clerk made his report, and after exceptions thereto taken by both parties, and his rulings upon them, the cause was removed by appeal to the Judge.

The cause coming on to be heard before him, the report was set aside and a new reference ordered, at Fall Term, 1882, and the referee directed to hear and determine the cause *de novo*. This second report was accordingly made, with the evidence and finding of the referee, when two series of exceptions were filed by counsel representing different defendants, as follows:

"1. That the clerk fails to find the fact that the executor, C. L. Summers, was interested in the purchase at his own sale of the store-house and lot bid off by M. Boger, and he failed to charge said executor with the value of the said store-house and lot.

2. That he erred in not charging said executor with the full amount of the T. R. Watts judgment, $....., instead of the amount for which it was sold.

3. That he erred in not charging said executor with the full amount of the certificates of deposit in the Bank of Statesville, $1,250 and interest, instead of finding him only liable to the amount he may hereafter realize on the same out of the assets of said bank.

4. That he erred in not charging said executor with interest on all moneys received, from the date of receipt to day of settlement, as said executor kept no interest account in managing said estate.

5. That he erred in adding a premium of ten *per cent.* on the scaled value of the legacy of Jane Reynolds.

6. That he erroneously allowed said executor a credit for any (407) Confederate money.

7. That he erred in allowing said executor his commissions in greenbacks on the Confederate account, when he had Confederate currency on hand all the time, and is now credited with the same."

The other exceptions were as follows:

"1. The defendants except to the clerk's report in this: That he fails to find as a fact, that the executor, C. L. Summers, was personally interested in the purchase by M. Boger, the highest bidder, at his own sale, of the store-house and lot bid off by M. Boger, and in that he fails to charge the executor with the value thereof, the evidence being that he was the actual purchaser of said house and lot for himself and others.

2. That the clerk erroneously finds as a fact, that the plaintiff sold the real estate of his testator for Confederate money, and charges the proceeds in Confederate money, whereas the weight of evidence is that the sales were not for Confederate money.

3. That the clerk erred in not charging the executor with the full value of the real estate sold in good money, it being gross negligence in said executor to sell real estate for Confederate money in October, 1863, the estate of his testator not being indebted so as to make it necessary to sell real property for assets.

4. That he erred in not charging the executor with the amount of the T. R. Watts judgment, $252, principal and interest, of which $157 was principal, instead of the amount for which it was sold, to-wit: $1.00.

5. That he erred in not charging the executor with the full amount of the certificates of deposit in the Bank of Statesville, to-wit: $1,250 principal, with interest thereon, instead of finding him only liable to the amount he may realize on the same out of the assets of said bank. (408)

6. That the clerk erred in allowing the executor credit for any Confederate money."

All the other exceptions which were filed were withdrawn.

The facts developed by the proofs, and the rulings of the Judge based upon them, are thus set out in the record:

"1. That the first exception be sustained, and the following facts are found:

Previous to the sale of the house and lot in Statesville, on the 13th day of October, 1863, it was agreed between plaintiff and H. B. Reece, who was his partner in business, that plaintiff and said Reece, should buy the said house and lot at said sale. Reece told M. Boger to bid it off for $3,000. Subsequently Boger was let in with plaintiff and Reece.

The deed was made by plaintiff to Boger, on the 9th of January, 1864, and on the same day Boger conveyed two-thirds of said property to Reece and plaintiff. The purchase money was paid out of the partnership business of plaintiff and Reece.

It was not announced at the sale, nor was it stated in the notice of sale, whether Confederate money or specie would be taken in payment for the property sold, but to several persons who made inquiries, plaintiff replied that the sale was to be for good money, or such money as would be taken by the heirs. Some persons who desired to bid in Confederate currency, upon this information declined to bid. It does not appear that the legatees knew that the plaintiff was personally interested in the purchase.

The house and lot was worth $1,500 in the present currency, and the plaintiff should be charged with that sum, with interest from the date of sale, as the sale was made upon a credit of six months with interest from date of sale. And the plaintiff should be credited with the amounts paid out of the $3,000, in Confederate money, reduced by the scale, with interest from the time of the payments. Plaintiff excepts.

(409) 2. The second exception is overruled, and it is found as a fact, that the lands were sold for good money, or what would be received by the legatees, and that several of the legatees were present at the sale, and made no objection thereto, and soon afterwards received their shares of the purchase money arising from said sale in Confederate currency, as did the guardian of several of the minors who were legatees. Defendant excepts.

3. The third exception is overruled, and it is found as a fact, that the plaintiff, construing the will to direct an immediate sale of the property and payment of legacies, did make such sales, and paid out the moneys arising from said sales, to the persons entitled or their guardians; that no objection was made by those interested, and that

they accepted their shares of the funds arising from said sales, except the Shuford heirs, who had no guardian, and Reynolds and wife who made no objection to the sales.

The sales and distribution seem to have been made with the assent of nearly all who were interested, or their guardians. Defendants except.

4. The fourth exception is sustained, and the following facts found:

Plaintiff had a judgment against one T. R. Watts, for $252 and interest. He caused executions to be issued, and the sheriff made return, 'Nothing to be found.' Subsequently to this return, plaintiff was approached by one N. P. Watts, the son of the defendant in the execution, and told that said N. P. Watts wanted to compromise said judgment. Plaintiff told him that he could not compromise a judgment, but was going to sell it, and Watts could come to the sale and buy in the judgment. Watts was present at the first sale, and the judgment was not offered, plaintiff saying afterwards that he did not know that N. P. Watts was present. At a subsequent sale, the judgment was sold for $1.00, and N. P. Watts afterwards compromised the same for $150.

The executor had authority to compromise such claims, and (410) did not use due diligence, after notice that the party desired to compromise, and he should be charged with the amount which was paid in satisfaction of the said judgment, less the amount which he received for the same. Plaintiff excepts.

5. The fifth exception is sustained, and the following facts found:

The institution called the Bank of Statesville, was considered a safe place of deposit for funds, prudent business men were doing business with the said bank, and there was no apparent reason to question the safety of funds so deposited.

On the 22d of November, 1873, plaintiff deposited in said bank, $650, and took from the cashier, R. F. Simonton, a certificate of deposit, payable ten days after notice, and bearing eight per cent. interest. And on December 17th, 1873, plaintiff deposited in the same bank $100, and took from the cashier a like certificate of deposit, and on the 8th day of January, 1874, plaintiff deposited $500 additional, and took a certificate of deposit for the same, bearing like interest and payable on call. These funds belonged to the estate of plaintiff's testator. Plaintiff had funds of his own in this bank and other certificates in his own name. These certificates were all in the name of C. L. Summers, (the plaintiff), and there was nothing upon the face of the certificate, and nothing was endorsed upon the same, to indicate that they represented trust funds held by the plaintiff. It was evident to the plaintiff, at the time he made the deposits, that he would have to hold the money in his hands belong-

ing to the estate of his testator for some time, and it was a prudent disposition of the said funds to invest the same in certificates of deposit in said bank.

Plaintiff told the cashier at the time he made these deposits, that the fund belonged to the estate of W. F. Watts, and that he made
(411) it as a call deposit, and would draw it out when he needed it in the settlement of the estate.

The cashier died, the bank became bankrupt, and but a portion of the fund so deposited will be realized. He must be charged with the sum so deposited, and interest. Plaintiff excepts.

6. The sixth exception is overruled. It appears as a fact that a large amount of Confederate money came into the hands of the plaintiff, as on hand at the death of his testator. Defendant excepts.

And it is ordered that the referee reform his report in accordance with the foregoing rulings, and make report to the next term of this court."

The report being reformed according to these rulings, the plaintiff's counsel also filed an exception, as follows:

"The plaintiff, in addition to the exceptions heretofore taken upon the rulings of *MacRae, Judge,* and noted in the record, files the following exceptions to the reformed report, made to this term of the Court:

1. For that it appears from said report, that plaintiff paid to the legatees the sum of $3,453.86 in Confederate currency more than he received from testator's estate, and for which he should have credit against them for at least its scaled value. And in commissions not allowed, this plaintiff alleges error.

The reformed report of the clerk charges the executor, Summers, with $1,285.75, with interest from 13th October, 1863, to 9th August, 1886. The clerk did not allow the executor commission on the interest so charged. The plaintiff excepts to said report, because no commission was allowed on said interest by the clerk. Exceptions not sustained. Appeal."

The facts upon which the ruling is made are embraced in first exception of defendants, heard and decided at February Term, 1886,
(412) by his Honor, Judge MacRae, and the facts then found are the facts upon which this exception is heard.

There was a judgment for the defendants upon the reformed report, and the plaintiff appealed.

Messrs. D. M. Furches, John Devereux, Jr., M. L. McCorkle and *Jos. B. Batchelor,* for the plaintiff.

Mr. Charles Armfield, for the defendants.

SMITH, C. J. (after stating the facts):

I. The circumstances attending the sale of the house and lot in Statesville, the plaintiff's answer to inquiries from persons intending to bid as to what currency payment would be required to be made in, which prevented them from bidding, and the private arrangement between himself and partner, H. B. Reese, to buy in the property for themselves, carried into effect through the agency of Boger, so strongly mark the *mala fides* with which the sale was conducted, and the utter disregard of fiduciary duty on the part of the plaintiff, as to fully warrant the ruling of the Judge in charging him with the real value of the lot in the present currency. And so far as he has paid out portions of the Confederate money, received from his own firm in discharge of the bid, to the legatees, he should be credited with the scaled value of such payments in his separate accounts with each.

II. The next exception, numbered 4 in the series, is taken to the ruling by which the plaintiff is charged with the debt of $252, and interest, due by T. R. Watts to the testator's estate. N. P. Watts, a son of the debtor, proposed to compromise the claim, which the plaintiff declined, saying that Watts could attend the sale and buy the judgment. The judgment was accordingly sold, and bought by Watts for $1.00, and he afterwards, in compromise, obtained $150.00 for it. It was a culpable indifference to fiduciary duty to entertain no proposition, and not even to inquire what sum would be offered, and with this information of the debtor's desire to settle the claim, permit it to be (413) bought for so inconsiderable a sum. While he had authority to dispose of the debt at public sale, his general obligation remained to see that the assets of the estate were not thrown away and lost.

But we do not concur in the opinion of the Court, that the plaintiff should be held responsible for the entire amount. Assuming that the sum paid the assignee was the full measure of its value, and that the executor could have obtained that sum, he ought to be held liable for $150, instead of $1; but not for the excess of the debt above that limit.

III. The next exception is to the plaintiff's being charged with the full amount of the deposits in the bank. The first of the certifications, and the others are substantially in the same form, is as follows:

BANK OF STATESVILLE,

No. 1019. STATESVILLE, N. C., January 8th, 1874.

C. L. Summers has deposited in this bank five hundred dollars, payable ten days after notice is given to R. F. Simonton, Cashier, on the return of this certificate properly endorsed, with interest at the rate of eight *per cent. per annum*, on call.

$500.00. R. F. SIMONTON, Cashier.

The facts all show entire good faith, and a purpose to preserve the fund for distribution among the legatees, and not to derive any personal benefit from the deposit, and the executor is charged with the full amount, because his fiduciary character is not annexed to his name, so as to mark the moneys as belonging to the trust estate, and this, in the opinion of the Court, is an act of maladministration, and a *devastavit.* The liability is adjudged solely upon the ground that the certificates were issued to the plaintiff, not designating the representative character in which, as declared to the cashier, the deposit in fact was made, and this, we suppose, upon the authority of the case of *Peyton* v. *Smith,* 22 N. C., 325. In that case, the deposits were to the credit of the de-
(414) positor, and were not distinguishable from those of his own, not held in trust. "From these accounts, then," says GASTON, J., speaking for the Court, "it is to be collected that the trust funds went *into the mass of the executor's property,* and, by no visible marks or signs, were in any respect distinguished from his private moneys. They swelled the executor's personal credit at bank; upon his death they become assets in the hands of his personal representative; and could not have been claimed as the assets of the testator by a representative of that estate;—they were liable to his creditors, were in all respects his property, he charging himself with the amount thereof in account with his *cestui qui trusts.*"

Such an intermixture of funds held in trust, with his own, so as to constitute one aggregate credit, it must be admitted, is an appropriation of the former to his own individual use, for which he at once becomes liable.

If the executor pays the money of the testator into a bankers, not on any distinct account, but *"mixing it with his own money,"* (the italics are those of the author), "it should seem that the executor will be answerable for the loss sustained by the failure of the banker." 2 Williams on Ex., 1292.

In *Shipp* v. *Hettrick,* 63 N. C., 329, where the executor sought to be delivered from the loss of Confederate money which came into his hands, but which he did not separate and set apart, so that it could be identified, the Court say: "If he, (the executor), had separated the money from all other moneys in his hands, and retained it as a special deposit for Louisa E. Hettrick, the case would have been different, notwithstanding the fact that it became worthless. But he did none of these things; on the contrary, he kept it with his own moneys. If he had made a general deposit of this money in bank in his own name, it would not have relieved him; but if he had made a special deposit of a particular parcel for this particular purpose, it would have been otherwise."

The trustee is responsible, "if he deposits it at his banker's (415) mixed up with his own moneys;" Adams Eq., 60, and such is generally the language employed by the authorities. We do not suppose it is necessary that there should be personal funds of the trustee to his credit when those held in trust are deposited. It is sufficient to make the conversion, that the account is opened with the depositor in his individual name, and would blend with money of his own, when deposited, and thus a common credit be secured.

In *Brown* v. *Durham,* 2 Gray, 42, a guardian sold property belonging to his ward, and took therefor promissory notes, payable to himself or bearer, on some of which payments had been made. The guardian died, and his estate was insolvent. The minor, through a succeeding guardian, sued the administrator of the former for these notes, as the property of the ward. Delivering the opinion, THOMAS, J., says: "They were retained by the guardian, not negotiated nor pledged, nor in any way used for his own business. They are clearly identified and traced. The fact that they were made payable to the guardian, in his own name, and negotiable, without any evidence of appropriation, or of any attempt to appropriate them to his own use, is not sufficient evidence of his conversion of the money, and mingling it with his own. Such breach of duty is not to be presumed, and the mere form of the notes fails to establish it." This ruling establishes the right of the equitable owner of the fund, where the guardian is insolvent, to pursue and recover it, where its identity is clearly shown, but it does not decide that he may not elect to hold the guardian personally liable, when the fund has been rendered valueless, as in our case.

In *Parsley* v. *Martin,* 46 Amer. Rep., 733, money held in trust, was deposited by the guardian in a Richmond bank, and a certificate taken in his individual name. He had no money of his own on deposit. The bank went down in the financial catastrophe which attended the downfall of the Confederacy, and the fund was lost. The guard- (416) ian was relieved of the loss, the Court remarking that "a *bona fide* deposit of the money of his ward by the guardian in his individual name, provided that it can be shown that it was in fact the money of his ward, will acquit and protect the guardian from the responsibility for loss which ensues, not by the form or designation of the deposit, but which has been lost by the *general and universal destruction of the whole currency, and all the banking and financial interests of the State.*" This ruling, contrary to the current of the decisions, may perhaps find a support in the extraordinary circumstances attending the conduct of the guardian, and his inability to take any better care of the trust estate, and when perhaps any other disposal of the money would have shared a like fate.

We have been referred to a recent case in our own reports, *Syme* v. *Badger,* 92 N. C., 706, where an exchange was made by an executrix, of a note that came into her hands, and a new security taken, payable to herself. This was done under the belief (from advice of counsel perhaps) that the testator's entire estate belonged to herself, and in effect to render it more secure. It was not an intended interference with the funds of the estate, but the management of what was supposed to be her own. In this respect that case is distinguishable from the present, for here the executor was dealing with a fund not his own, nor supposed to be his own, but as a trustee with the trust estate. At least, we cannot carry the ruling in that case so far as to cover and protect the plaintiff in this transaction.

Harsh as may seem, the rule of responsibility in the case before us, where any element of wrong is absent, and the penalty is incurred solely in consequence of the form of the certificate, it is too well founded for us to disregard it. The case of *Williams* v. *Williams,* 15 Wisc., 300, is so full and exhaustive a discussion of the doctrine, with an examination of the adjudications from early times, and the reason-
(417) ing so conclusive, as to dispense with a further discussion. The deposit was upon a similar certificate, and realizing the harshness of the operation of the rule, the Court thus speaks: "To hold the administrator answerable in this case, is undoubtedly a great hardship; but to exonerate him from liability is to encourage the mismanagement of trust funds and to open the door to frauds innumerable against those whose age and weakness entitle them to the most rigid protection of the law. The rule, therefore, should not be slackened, even if the question were a new one, much less in view of the authorities cited." We therefore concur with the Court in the disposition made of this exception.

The plaintiff's last exception must be upheld, and he should be allowed commissions upon the amount of the increased interest also.

There must be a reference to the clerk, in order to a reformation of the account in accordance with this opinion, unless by consent, the reference be made to the former referee, whose familiarity with the case will render its execution less laborious, and with such consent, to said referee, to the end that judgment final may be entered.

Error. Modified.

A. D. McGOWAN v. THE WILMINGTON & WELDON RAILROAD CO.

Evidence—New Trial—Common Carriers—Railroads—Failure to Ship Goods—Constitutional Law.

1. In assigning error for the exclusion of evidence, the record should disclose what the evidence would have been, if the witness had been allowed to answer, otherwise the exception will not be considered.

2. In an action against a railroad company for the penalty imposed by the Statute for failing to ship freight delivered to it for transportation, within five days after the delivery, evidence which goes to show that other freight was delivered by agents of the plaintiff, who gave instructions to the agent of the corporation in regard to its shipment, is immaterial, and it is not error to exclude it.

3. Where evidence is admitted, after objection, which brings out nothing material, and nothing to the prejudice of the objecting party, it cannot be assigned as error, and is no ground for a new trial.

4. Where freight is delivered by a shipper to a common carrier for transportation, in the absence of an express contract to the contrary, there is an implied agreement that it shall be forwarded in a reasonable time, and the Statute (*The Code*, §1967) fixes five days as such reasonable time.

5. Where a bill of lading provided that the corporation should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered, or imperfectly marked; *It was held*, not to cover a failure to duly forward goods only marked with an initial.

6. The Legislature has power to compel railroad corporations, and common carriers of a like kind, to discharge the obligations which they owe to the public, by reasonable statutory regulations, because of their *quasi* public nature, and because they exercise and enjoy rights and franchises, granted by the public.

7. The Legislature may regulate the methods of business of such corporations, in a general way, so as to promote the public good, and to the extent that the exercise of the powers conferred on them affect the public, it has the right, through the Legislature, to have a voice in their exercise.

8. A clause in the charter of a railroad corporation, which confers upon its officers the power to fix its charges for the transportation of freight, is not infringed by a Statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation.

9. *It seems*, that the Legislature cannot part with any essential power of government, but if it can do so, it must be by positive grant, or by words so plain in their meaning, as to leave no doubt as the purpose.

(*Branch* v. *The Railroad*, 77 N. C., 347; *Katzenstein* v. *The Railroad*, 84 N. C., 688; *Whitehead* v. *The Railroad*, 87 N. C., 255; cited and approved).

(419) CIVIL ACTION, tried before *Connor, Judge,* and a jury at April Term, 1886, of WAYNE Superior Court.

The following is a copy of so much of the case stated on appeal as is necessary to a proper understanding of the opinion of the Court:

"The plaintiff declared for the penalty of $25 per day, for failing to ship twenty-seven bags of rice, as freight, from Mount Olive to Goldsboro, from the 21st day of November, 1884, to the 21st day of March, 1885.

"A. D. McGowan, the plaintiff, was introduced as a witness for himself, and testified that he got the bill of lading for said rice from Robert Merritt in the month of December, 1884. John H. Toler was agent of defendant at Mount Olive. Witness saw the rice on the 21st day of March, 1885, at defendant's warehouse at Mount Olive. It was marked 'G.' He took three sacks of it home, and shipped the balance to Henry Lee & Co., Goldsboro, that day, taking a new bill of lading therefor.

"On cross-examination, the witness testified that he went to Mount Olive once or twice between the 21st day of November, 1884, and the 21st day of March, 1885.

"Robert Merritt was introduced by plaintiff, and testified that he carried the twenty-seven bags of rice in the Fall of 1884, to Mount Olive, and put them in the warehouse of the defendant, and took from the agent the bill of lading referred to in the testimony of the preceding witness, and that he delivered said bill to the plaintiff; that he told the agent to ship to Henry Lee & Co., Goldsboro, and the agent said he would ship it in two or three days. The said bill of lading was put in evidence. The plaintiff rested his case.

"The defendant introduced J. H. Toler, who testified that he was agent of defendant at Mount Olive in November, 1884, and that the bill of lading was signed by him; that the rice delivered by Robert Merritt,
the next preceding witness, was shipped according to said bill of
(420) lading; that there was a lot of rice in the warehouse which was
not shipped, and which was delivered by one Phillips and one Garner for the plaintiff, and that orders were to be given for shipping the same when the whole lot should be delivered, and that witness never received any order to ship same; that plaintiff, by his agents, several times deposited rice for shipment; that he had no instructions not to ship the rice delivered by Robert Merritt, and the same was shipped; that he, Toler, had no directions from the plaintiff about shipping rice generally.

"The defendant proposed to ask the witness the following question, viz: 'Did persons who delivered rice for the plaintiff, give any instructions at the time of delivery in regard to the time of shipment?' Objected to by plaintiff. Objection sustained. Defendant excepted.

"On cross-examination, the witness testified that he was not now agent for the company, and that it was his custom to enter freight on the books when shipped, and not before.

"The plaintiff then proposed to ask the witness: 'Have you examined the defendant's books, and do they not show that this lot of rice was not entered?' Objected to by defendant on the ground that the books were the best evidence. Objection overruled. Defendant excepts. The witness answered, 'I do not think I have examined the defendant's books. I do not remember whether this lot of rice was on the books. I think the books show shipments between November 21st, 1884, and March 21st, 1885.'

"After the evidence was closed, and before the charge was delivered to the jury, His Honor asked the defendant's counsel if he insisted that any instructions were given by the plaintiff, or his agents, not to ship the rice about which the controversy arose; to which he replied, he did not. That the only question was, whether or not the rice had been shipped; and that His Honor might answer all the issues except the sixth, in favor of the plaintiff. (421)

"The defendant's attorney insisted that the plaintiff could not recover, because of the following words in the bill of lading, viz: 'No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked.'

"His Honor reserved the question, and charged the jury as follows, viz: 'If you find the first issue in the affirmative, the contract made by the defendant with the plaintiff, as set out in the bill of lading, was to ship the twenty-seven bags of rice in a reasonable time, and the law has fixed such time to be five days after its receipt, unless it was otherwise agreed. You will then proceed to inquire whether the rice was shipped within the time named, if not, was it by reason of any agreement made at the time of delivery? This will depend upon your finding upon the issue. If the rice was shipped, as alleged by the defendant, and testified to by Toler, you will answer the last issue in the negative. If, however, you find upon the evidence, that it was not shipped until March 21st, 1885, you will answer the issue in the affirmative. The defendant sets up no excuse for a failure to ship, if there was such failure. The burden of proof is upon the plaintiff upon the issues. You will find the facts as you may find the preponderance of the evidence. The plaintiff is confined to the rice delivered by Merritt, and you cannot consider the evidence in regard to the Phillips and Garner rice, except as throwing light upon the question as to whether the Merritt rice was, or was not, shipped.' "

At the conclusion of the charge, and before the case was given to the jury, his Honor asked counsel of both parties, if any other instruction was desired, to which was replied, there was none.

The jury returned a verdict for the plaintiff. His Honor decided the question reserved against the defendant.

(422) Motion by defendant for new trial. Motion refused. Judgment for plaintiff.

The issues submitted to the jury, and the responses to them were as follows:

"1. Did the plaintiff on the 21st day of November, 1884, deliver to the defendant at its warehouse in Mount Olive, 27 bags of rice for shipment to Henry Lee & Co., at Goldsboro?

Yes.

2. Was the said rice the property of the plaintiff?

Yes.

3. Was said rice received by defendant for shipment?

Yes.

4. Did plaintiff agree or consent that said rice should remain unshipped?

No.

5. Was said rice received by defendant without payment of freight, and without demand therefor?

Yes.

6. Did defendant unlawfully allow said rice to remain unshipped at its warehouse in Mount Olive, from the 21st day of November, 1884, until the 21st day of March, 1885?

Yes."

The following are the exceptions of the defendant:

"The defendant excepts to the rulings and judgment of his Honor in this action, as follows:

1. To the exclusion, on objection by plaintiff, of the following question asked by defendant of the witness, J. H. Toler, viz: 'Did persons who delivered rice for the plaintiff, give any instructions at the time of delivery, in regard to the time of shipment?'

2. In not sustaining the objection of defendant to the following question, asked by plaintiff of the witness, J. H. Toler, viz: 'Have you examined the defendant's books, and do they not show that this lot of rice has not been entered?'

(423) 3. His Honor erred in his charge, that 'The contract made by defendant with the plaintiff, as set out in the bill of lading, was to ship in a reasonable time, and the law has fixed such time to be five days after its receipt, unless it was otherwise agreed. You will proceed to inquire whether the rice was shipped within the time named; if not,

was it by reason of any agreement made at the time of delivery. This will depend upon your finding upon the issue.'

4. His Honor erred in stating to the jury, that 'Defendant sets up no excuse for a failure to ship, if there was such failure.'

5. His Honor erred in stating to the jury, that 'They could not consider the evidence in regard to the Phillips and Garner rice, except as throwing light upon the question as to whether the Merritt rice, was or was not shipped.'

6. His Honor erred in deciding the question reserved against the defendant.

7. In giving judgment for plaintiff."

Mr. W. R. Allen, for the plaintiff.

Mr. Ramsay, filed a brief for the defendant.

MERRIMON, J. (after stating the facts). The first exception cannot be sustained. What the witness would have said in reply to the question specified does not appear, as it should do, but inferring that he would have answered in the affirmative, such evidence was irrelevant and immaterial. The plaintiff sued to recover penalties which he alleges the defendant incurred by its failure to ship twenty-seven bags of rice marked ◇G◇, as it was bound to do within five days next after the rice was delivered to it for shipment. The evidence of the plaintiff, including the bill of lading, went to prove that the particular bags of rice in question, were delivered by his agent, the witness Robert Merritt, to the defendant, for shipment, on the 21st day of No- (424) vember, 1884. The only witness introduced by the defendant, J. H. Toler, testified that he was agent of the defendant at the station where the rice was delivered for shipment at the time of the delivery. He admitted that the plaintiff's rice mentioned, was so delivered for shipment on the day named, and that he did not receive any instructions not to ship it, but on the contrary, he testified that he did ship it. Whether he did or not was the sole question at issue. It was therefore, immaterial to inquire whether persons who delivered rice for the plaintiff to the defendant, gave directions in respect to the time of shipment or not. As to the rice in question, the uncontradicted evidence, both of the plaintiff and defendant, went to show that no instructions were given not to ship it. This being so, in the course and order of such business, it was the duty of the defendant to ship the rice promptly. This leaves out of view the evidence of the witness of the plaintiff,

who testified that he told the agent of the defendant to ship it, and the latter promised to do so within two or three days.

Nor can the second exception be sustained. If it be granted that the book of shipments referred to should have been produced, the answer to the question objected to by the defendant, did not prejudice it; it was not favorable to the plaintiff at all, but rather tended to help the defendant. When the question objected to but allowed, elicits nothing material, and nothing to the prejudice of the party complaining, this is not ground for a new trial. A new trial in such case, will be granted, only when such party has suffered prejudice, or has probably done so.

We think also, that the third exception is groundless. It is clear that, in the absence of any express contract between the shipper of goods and the common carrier to the contrary, if the latter receives goods to be shipped, there is an implied agreement on its part,
(425) to ship them within a reasonable time, and the Statute (*The Code* §1907) has fixed that time to be within five days next after the carrier received the goods for shipment.

Besides, the Statute expressly provides, that the carrier—a railroad company—shall ship them within five days after it receives the goods for shipment, unless otherwise agreed between the company and the shipper. *Branch* v. *W. & W. R. R. Co.*, 77 N. C., 347.

And so, also, the fourth exception is without force. The Court manifestly intended to tell the jury, and did so in effect, that the defendant had not set up any legal excuse for failing to ship the goods, but it was cautious to say in that immediate connection, "if there was such failure," thus leaving to them the sole question submitted to them, as both parties conceded: "whether or not the rice had been shipped."

The fifth exception is without merit. The evidence in respect to the rice delivered by Phillips and Garner for the plaintiff to the defendant, was immaterial; that rice was not in question. The sole question was whether or not the twenty-seven bags of rice delivered by Merritt for the plaintiff, were shipped?

As we have seen, the evidence of the defendant, as well as that of the plaintiff, showed that as to that rice, there were no instructions not to ship it. This being true, what just or proper weight could the testimony as to the rice delivered by the parties first named, have upon the matter in issue?

Nor can the sixth exception prevail. The liability provided against by the exceptive words in the bill of lading, set forth in the exception, is to "wrong carriage, or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked."

It is no part of the plaintiff's complaint that the rice was wrongly carried or wrongly delivered to a supposed consignee; the ground of

the action is, that it was not shipped at all. It was not set up as a matter of defence, that the rice was not marked with proper (426) directions, nor was any imperfection in that respect brought to the attention of the plaintiff within a reasonable time, as ought to have been done, if they existed.

What we have said, in effect disposes of the seventh exception. We see no reason why the Court ought not to have given the judgment it did give.

The twenty-sixth section of the defendant's charter, (2 Rev. Statutes, p. 344), provides that its officers may establish its rates of freights and fares in their discretion, not exceeding a maximum prescribed.

The counsel of the defendant appellant contended in his brief, that the Statute (*The Code,* §1967), could not be construed as applying to it, or if so, as to the defendant, it was void, because it impaired the obligation of the contract between it and the State, in the respect mentioned.

The statutory provision last cited, applies to all railroad companies doing business in this State, and its obvious purpose is to compel them to ship over their roads respectively, goods delivered to them for shipment, within a reasonable time after receiving them, which is declared by its terms to be within five days next after that time. The Legislature has deemed it a just, reasonable and necessary regulation, and it is the plain duty of the Courts to give it effect, in all proper cases in the course of procedure. It is severe, it is true, but it is not unreasonable. It may be observed without serious inconvenience, and yet it seems that it is not infrequently disregarded, thus demonstrating the necessity for it.

That the Legislature has power to compel railroad companies, and other like common carriers, to discharge the duties and obligations they owe to the public, and individuals who travel on, and ship freights over their roads, by reasonable statutory regulations, and to compel a due observance of these by fines and penalties, is too well and thor- (427) oughly settled by judicial authority to admit of question. Because of their *quasi* public nature—their relations to the public—the fact that they hold themselves out to the world as ready to carry freights for shippers, regularly, for reasonable compensation, and especially as to railroad corporations, because they have and exercise franchises, rights, privileges, and advantages of the public, and granted by the public authority, they are subject to just legislative control.

The Legislature may reasonably regulate their methods of business in a general way so as to promote the public good, having due regard for their rights in all respects. They have rights as well as the public, that the law protects, but to the extent that the exercise of their rights

by themselves concern and effect the public, the latter through its constituted authority, must have a voice in such exercise of them. This Court has repeatedly upheld the statute now under consideration, as a valid exercise of legislative authority. Indeed, it has been so upheld in its application to the defendant. *Branch* v. *W. & W. R. R. Co., supra.* See, also, *Katzenstein* v. *Railroad Company,* 84 N. C., 688; *Whitehead* v. *Railroad,* 87 N. C., 255.

This Statute does not regulate the price of freights and fares of the defendant, nor does it purport to do so. It simply imposes a penalty of twenty-five dollars on each railroad doing business in this State, for every day it may fail to ship goods delivered to it for shipment, after five days next after such delivery, unless the shipper and the company agree otherwise. It leaves the defendant free to determine its charges for carrying freights—its only purpose is to compel it to ship goods promptly in the absence of agreement otherwise. The provision of the defendants' charter referred to above, does not abridge the power of the Legislature to make all reasonable regulations to expedite and render certain the shipments of freights over its roads. There is nothing in its charter that in terms, or by necessary implication, (428) indicates a purpose to part with such power.

It is difficult to understand how the Legislature could part with, or barter away any measure of an essential power of government, but if it could do so at all, it could only do so by positive grant, or by words and provisions so plain in their meaning as to leave no doubt of such purpose. *Stone* v. *Farmers Loan and Trust Company,* 116 U. S., 5, 307; *Stone* v. *Railroad Company,* Ibid., 347; *Stone* v. *Railroad Company,* Ibid., 352; *Missouri Pacific Railroad Company* v. *Humes,* 117 U. S., 512.

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

No error. Affirmed.

Cited: Hodge v. R. R., 108 N. C., 32; *S. v. Stubbs, ibid.,* 775; *Street v. Andrews,* 115 N. C., 422; *Sutton v. Phillips,* 116 N. C., 505; *Carter v. R. R.,* 126 N. C., 442; *Grocery Co. v. R. R.,* 136 N. C., 404; *Stone v. R. R.,* 144 N. C., 223; *Efland v. R. R.,* 146 N. C., 138; *Reid v. R. R.,* 150 N. C., 758.

W. H. McGWIGAN v. WILMINGTON & WELDON RAILROAD COMPANY; SAME PLAINTIFF v. SAME DEFENDANT; C. E. McGWIGAN v. THE SAME DEFENDANT.

Inter-State Commerce—Constitutional Law—Construction of Statutes.

1. Where a statute is capable of two constructions, that one will be adopted by the Courts, which will render the Statute constitutional and valid, rather than one which would render it unconstitutional and void.
2. The Courts will not declare an act of the Legislature unconstitutional and void, unless its unconstitutionality is beyond a reasonable doubt, and every reasonable doubt must be solved in favor of its constitutionality.
3. An act of the Legislature of a State, which undertakes to regulate the charges made by railroads for transportation on freight to be carried from one State to another, is unconstitutional and void.
4. State interference with interstate commerce, is absolutely forbidden by the Constitution of the United States, and the failure of Congress to take any action in the premises, does not give the States power to pass any law in relation thereto.
5. The Statute in this State (*The Code*, §1966), imposing a penalty on any railroad which shall charge for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States, and the penalty imposed by the Act is not incurred by a violation of its provisions in transporting this class of freight.
6. If this Statute had in terms been made to apply to freight to be transported from one State to another, it would have been in conflict with Art. I, §8, of the Constitution of the United States, and consequently void.

(*Commissioners* v. *Ballard*, 69 N. C., 18; *King* v. *The Railroad*, 66 N. C., 277; cited and approved.)

These were CIVIL ACTIONS, tried before *Graves, Judge,* on a case (429) agreed, at Spring Term, 1885, of HALIFAX Superior Court.

The facts are as follows:

1. That from May, 1884, and ever since then, the plaintiff has been a merchant in the town of Enfield, Halifax county, State of North Carolina.

2. That, during the whole of said time, the defendant was, and still is, a corporation duly chartered and created under the laws of North Carolina, under the corporate name of the Wilmington & Weldon Railroad Company, and as such corporation, long before and ever since May, 1884, has been doing business under said charter, as a common carrier

of freight and passengers from Weldon to Wilmington, both of which towns are in the State of North Carolina, and to and from the intermediate stations and depots on said road, of which the town of Enfield is one.

3. That on the 7th day of May, 1884, there was shipped to the plaintiff upon his order, from the city of Richmond, State of Virginia, and consigned to him at Enfield, *via* the Atlantic Coast Line, its northern terminus being at Weldon, of which Coast Line the defendant was a part, the following articles of freight, to-wit: three barrels of
(430) flour; and the defendant charged therefor as freight on the same, from Richmond, Va., and received from the plaintiff at said Enfield station, one dollar and thirty-five cents.

4. That said charges and the money so paid, were at that time on the same class of freight, and for the same quantity, to Goldsboro one dollar and sixty-five cents, and to Wilmington seventy-five cents, from Richmond, Va.

5. That the distance from Weldon to Enfield is nineteen miles, from Weldon to Goldsboro seventy-eight miles, from Weldon to Wilmington one hundred and sixty-two miles, the said Enfield, Goldsboro and Wilmington being stations and points of delivery on said road, south of Weldon in said State.

6. That before, during, and after May, 1884, the defendant and the railroads leading from Weldon to Richmond, were connecting lines of railroads at Weldon, N. C., and that the said rates of freight from Richmond to said points on the defendant's road were established by said connecting lines, running from Weldon to Richmond, by their authority in Richmond, Va., but were accepted and acquiesced in by the defendant.

7. That according to said rates of freight, the defendant received of said freight, as its share of the aforesaid rates for transportation from Weldon southward, on the aforesaid freight from Richmond, seventy-two cents to Enfield, and at that time charged and received for the transportation of equal quantities of the same class of freight shipped from Richmond, to be transported over its line from Weldon to Goldsboro, seventy-two and six-tenths cents, and to Wilmington forty-six and one-half cents.

8. That said freight was less than a car load.

9. The defendant company's charter was passed by the General Assembly of North Carolina at the session of 18...., and amended at the session of 18...., contained in the Revised Statutes, volume two,
(431) pages....., and the laws of North Carolina, which said charter and amendments are made a part of this case.

His Honor upon these faces agreed, gives judgment against the defendant for the amount of the penalty imposed by the statute, and the defendant appealed.

Messrs. J. M. Mullen and *John A. Moore,* for the plaintiffs.

Messrs. W. H. Day, J. W. Hinsdale, A. W. Haywood, John L. Bridgers, (Messrs. A. C. Zollicoffer and *Ernest Haywood,* were with them on the brief), for the defendant.

SMITH, C. J. The statute with the violation of which the defendant is charged in the present action, instituted for the recovery of the penalty imposed, is in these words: "It shall be unlawful for any railroad corporation, operating in this State, to charge for the transportation of any freight of any description over its road, a greater amount as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, and any railroad company violating this section shall forfeit and pay the sum of two hundred dollars for each and every offence to any one suing for the same. Nothing in this chapter shall be taken in any manner as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight, to be of not less quantity or bulk than one car load." *The Code,* §1966.

It is a wise and well understood rule in interpreting a legislative enactment, whose terms are reasonably capable of two constructions, the one of which is, and the other is not, consistent with the fundamental and paramount law delegating or restraining the authority to enact, to adopt that construction which renders it effectual, rather than that which in whole or in part defeats its operation. *Commissioners* (432) *of Granville* v. *Ballard,* 69 N. C., 18. This is in consonance with another rule, prescribed by the Court for its own action, under which it refuses to declare a statute void, unless the invalidity of the act is, in its judgment, placed beyond a reasonable doubt; and such reasonable doubt must be solved in favor of legislative action. *King* v. *Railroad,* 66 N. C., 277; and numerous other cases. Under the guidance of this principle, a fair and reasonable interpretation of the statute may limit its application, not only to railroads operating within the State, but to contracts of carriage to be executed *within its limits,* and not to such as extend beyond them. An examination of its structure and language tends to sustain a construction thus circumscribing its provisions. It forbids "any railroad corporation *operating* in this State" from making the unequal charges for freight transported *"over*

its road, or any portion of the *same railroad of equal distance,"* &c. No reference is made to transportation beyond the State lines, under a contract of affreightment, nor does any apportionment of the one price for the entire carriage seem to be contemplated or provided for in its terms. Certainly, contracts involving inter-state commerce and traffic, are not specially embraced in its words.

It is not material to inquire in what manner different corporation carriers, who unite to form a single line, continuous in passing through different States, apportion the common fund among them; nor whether the contract is that of each, so that all are responsible for the delinquencies of others; nor whether the successive roads, retaining their several liability, co-operate as forwarding agents for the shipper at their different connecting points; since in every case, the entire transportation is undertaken from the receiving to the delivery terminus of the route, for a single consideration. The essential oneness of the contract remains, and the act does not, at least in terms, touch it. If the toll or compensation be distributable among the companies, upon
(433) an arrangement made by themselves, the unity of the contract with the shipper is not affected or impaired, and in no just sense can it be said that the latter is charged, under any agreement with him, the fractional part of the entire compensation which the domestic road receives therefrom, and to such cases the prohibitory words extend.

In this view, the acts complained of do not constitute the offence to which the penalty is affixed. But assuming the act to have a wider scope, and to embrace inter-state carriage as well, under the late decision of the Supreme Court of the United States, as yet unreported, this imputed extra territorial effect is an invasion of the exclusive right vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Const. of U. S., Art. I, §8.

To this ruling, made by the Court to which is committed authority to determine conclusively the consistency of a State enactment with the Constitution and laws of the United States passed in pursuance of it, we give our adherence as a final determination of the point.

The dissenting opinion, proceeding upon the idea that the power thus conferred does not, until exercised, interfere with all State action in the premises, nevertheless concedes that, when exercised, the grant is exclusive. We have not seen the opinion to examine for ourselves, but such is the effect upon the information we possess.

The ruling of the Court is, however, that State interference with inter-state commerce is absolutely forbidden, and the failure of Congress to take any action in the premises is an indication that such commerce shall remain unfettered and free, subject only to the common law. *Passenger cases,* 7 How., 286; *Hall* v. *DeCuir,* 95 U. S., 485.

We do not undertake to venture upon the field traversed by the Court, further than to say that the consequences of an opposite view, that permits interfering by State legislation, would be mis- (434) chievous in the extreme. If one State may interfere, so may every other through which the freight is to be carried, in respect to its own chartered companies, and a succession of hostile enactments might cripple and so embarrass the roads in carrying out the contract, as almost to destroy such commerce, and deprive the country of those beneficial arrangements for transporting from distant points, so general in use, and so conducive to the Nation's prosperity and business. The former is, therefore, wisely committed to a single body, whose regulations may be harmonious and self-consistent.

In either aspect of the case, the action does not lie, and must be dismissed.

Error. Dismissed.

MERRIMON, J., does not concur in the limited operation of the statute as construed in the opinion of the Court.

Cited: McLean v. R. R., 96 N. C., 2; *Hodge v. R. R.*, 108 N. C., 32; *Bagg v. R. R.*, 109 N. C., 290; *S. v. French*, 109 N. C., 725; *Sutton v. Phillips*, 116 N. C., 505; *Marble v. R. R.*, 147 N. C., 56; *S. v. Casey*, 201 N. C., 628.

HINES & BATTLE v. THE WILMINGTON & WELDON RAILROAD COMPANY; SAME PLAINTIFF v. SAME DEFENDANT.

Construction of a Penal Statute—Railroads—Laws Regulating Freights Foreign Corporations—Amendment.

1. The rule that a penal statute must be strictly construed, means no more than that the Court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the Court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning.

2. This rule is, however, never to be applied so strictly as to defeat the clear intention of the Legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail.

3. The Statute of this State (*The Code*, §1966) which imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, is to be construed to mean, that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, at any time while its list of charges for carrying freight remains unchanged.

4. This Statute embraces all railroads doing business in this State, whether incorporated by the laws of this State or not, the object of the Statute being to secure uniformity in charges for transporting freight by all railroads doing business in this State.

5. Where a railroad corporation chartered by another State, leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation.

6. Where a railroad corporation is chartered by the laws of this State, and also of another State, it is completely subject to the laws of this State, except as otherwise expressly provided by its charter.

7. The penalty imposed by §1966 of *The Code*, is incurred when the prohibited charge is made. It is not necessary that the illegal charge should have been paid.

8. The words in this Statute, "transported in the same direction," etc., mean the direction in which the freight is carried from the depot where the shipment is made, and embraces branches of the same road in that direction, which are used in connection with, and as a part of the same road. If the corporation uses two or more distinct roads, not in connection, *it may be*, that it could have a different class of charges for each of its roads.

9. Discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance.

10. Where the meaning of a statute is doubtful, the title may be resorted to to aid in its construction.

11. The evil consequences to the public which will arise from a statute, will be considered when its meaning is doubtful, in order to give it a more beneficial construction, but when the legislative intent is clearly expressed, it cannot be considered.

12. *Quœre*, whether the provision in the charter of a railroad, fixing a maximum rate for freights and fares, must be treated as such a contract with it on the part of the State as to prevent the Legislature from passing a law regulating such freights and fares.

13. A statute which only requires uniformity in the charges to be made for transportation, does not provide a maximum for such charges, and there-

fore does not profess to interfere with the power conferred by the charter on a railroad corporation to fix the freights it will charge, inside of a certain maximum charge allowed by the charter.

14. The purpose of the Legislature to part with the right to require a corporation to make its charges for transportation equal and uniform, must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference.

15. *Quære*, whether the Legislature has the power, by contract or otherwise, to part with any of the essential powers of government; but if this can be done, it can only be done by a clearly expressed purpose to do so.

16. A motion to dismiss because the complaint does not state facts sufficient to constitute a cause of action, will not be entertained, when the cause is tried upon an agreed statement of facts, which supply the omissions in the complaint.

17. Where it is agreed in the Court below, that a complaint may be amended so as to supply necessary averments, but it is not done, the Supreme Court will allow the amendment to be filed in that Court.

(*State* v. *Midgett*, 85 N. C., 539; *Coble* v. *Shoffner*, 75 N. C., 43; *State* v. *Matthews*, 48 N. C., 452; cited and approved).

CIVIL ACTIONS, tried before *Graves, Judge,* on a case agreed, (436) at Spring Term, 1885, of HALIFAX Superior Court.

The facts are substantially the same as in the preceding cases of *McGwigan* v. *The Railroad,* except that in these cases, the freight was shipped from a point within the State to a point within the State, and so the question of inter-state commerce did not arise.

There was a judgment for the plaintiff and the defendant appealed.

Messrs. B. H. Bunn and *Jacob Battle,* for the plaintiff. (437)

Messrs. John L. Bridgers and *A. W. Haywood,* (*Mr. Ernest Haywood* was with them), for the defendant.

MERRIMON, J. This action is brought to recover a penalty which, it is alleged, the defendant has incurred by a violation of the statute, (*The Code,* §1966), which provides that "It shall be unlawful for any railroad corporation operating in this State, to charge for the transportation of any freight of any description over its road a greater amount, as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance; and any railroad company violating this section, shall forfeit and pay the sum of two hundred dollars for each and every offence, to any person suing for the same. Nothing in this chapter shall be taken in any manner, as abridging the right of any railroad

company from making special contracts with shippers of large quantities of freight, to be of not less in quantity or bulk than a car load."

The defendant contends first, that this statute is penal, and must, therefore, be construed strictly, and so construed, what it is conceded it did, is not forbidden by the law.

It is an old, but not very precisely defined rule of law, that penal statutes must be construed strictly. By this is meant no more than that the Court in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search for an intention not certainly implied by them. If there is no ambiguity in the words or phraseology, nothing is left to construction—their plain meaning must not be extended by inference, and when there is reasonable doubt as to their true meaning, the Court will not give them such interpretation as to impose the penalty. Nor will the purpose of
(438) the statute be extended by implication so as to embrace cases not clearly within its meaning. If there be reasonable doubt arising as to whether the acts charged to have been done, are within its meaning, the party of whom the penalty is demanded is entitled to the benefit of that doubt. The spirit of the rule is that of tenderness and care for the rights of individuals, and it must always be taken that penalties are imposed by the legislative authority only by clear and explicit enactments. That is, the purpose to impose the penalty must clearly appear. Such enactments, as to their words, clauses, several parts and the whole, must be construed strictly together, but as well, and as certainly in all respects, in the light of reason.

This rule, however, is never to be applied so strictly and unreasonably as to defect the clear intention of the Legislature. On the contrary, that intention must govern, in construing penal as well as other statutes. This is a primary rule of construction, applicable in the interpretation of all statutes. The meaning of words and sentences shall not be narrowed or strained so as to exclude the meaning intended and while the purpose of the statute shall not be extended by implication, it shall not, on the other hand, be narrowed so as to abridge the intention that reasonably appears from its words, phraseology and constituent parts. If words and sentences, and parts of sentences, having no very definite signification in their ordinary use, are employed and clearly intended to have a particular and definite meaning and application, and this appears from their particular use, connection and application in the statute, that meaning and application must be accepted as proper and controlling. If the intention to impose the penalty certainly appears, that is sufficient, and it must prevail. Otherwise, the legislative intent would or might be defeated by mere interpretation, which can never be allowed. Bacon's Abr. Tit. Statute 9, Rule 9; *United States* v.

Willberger, 5 Whea., 76; Potter's Dwarris on Stats., 245, and note 35, and cases there cited; *State* v. *Midgett,* 85 N. C., 539; (439) *Coble* v. *Shoffner,* 75 N. C., 43.

Now, applying the rule of construction, thus explained, to the statute above set forth, it clearly appears from its terms, its constituent parts, their bearing upon each other, and taking it as a whole, that its purpose is to prohibit and prevent each railroad corporation, doing the business of transporting freights over its railroads in this State, from charging one shipper of freights, at any time while its current list of charges for carrying freights remains unchanged, a greater amount of compensation for carrying a certain quantity of a certain class of freight a certain distance in a particular direction on its railroad, than it charges another shipper for transporting an equal quantity of the same class of freight an equal length of distance in the same direction on the same railroad, or its branches, whether the transportation for each is over the same, or a different part of the same road, and whether the freight of one shipper is carried a greater distance than that of another, with the exception, that such corporation may make special contracts without restraint, as to rates of compensation with shippers of large quantities of freight, not less than a car load. That is to state the same differently, the compensation to be charged shippers respectively for carrying an equal quantity of the same class of freight for each, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, and although the freight of one shipper is to be transported a different and longer distance than that of the other. In such case, the charge to each must be the same for any equal distance. The statute really embodies and prescribes a scheme to prevent discrimination and secure equality and uniformity in charges for transporting freights by railroad companies doing business in this State.

An analysis of the material parts of the statute will serve to (440) show that its purpose is what it is thus stated to be.

1. It plainly embraces all railroad corporations, whether incorporated by the laws of this State or not, "operating," that is, doing the business of transporting freights over their respective railroads in this State. The language used is broad and comprehensive—in no sense, that can reasonably be attributed to it, does it imply exception or limitation. The word "any" is used in the sense of each, every and all. There is nothing in the statute, its terms, nature or purpose, that suggests that it does not embrace every and all such corporations. Nor is there anything in the nature of a foreign railroad corporation doing such business in this State that gives it any legal advantage or immunity in any such respect. When it comes into this State to do business, it at once volun-

tarily becomes subject to its laws regulating the business of transportation on railroads. Although it may not be the absolute owner of the railroad it uses, except as lessee, it is the temporary owner for the purposes of its business, and answerable as the owner in that respect.

And as to a railroad corporation created by and under the laws of this and an adjoining and other States, it is completely subject to the laws of this State, except as otherwise expressly provided in its charter, because it is a corporation of this State, and within its jurisdiction and control, just as are all other corporations created by its authority, subject to the limitation mentioned.

2. The clause, "to charge for the transportation of any freight," &c., implies to settle, require or demand of the shipper, as of right, certain compensation for the transportation of any freight already transported, or delivered to the corporation to be transported. As to this, the penalty is incurred when the charge is certainly made against the shipper, in the case provided against by the statute. It cannot be that the compensation charged must first be paid, because it is made unlawful "to charge" otherwise than is allowed. This does not, in any ordi-
(441) nary sense, imply to *receive* the compensation, and there is nothing that, in terms or by just implication, goes to show that any such meaning was intended. The purpose is to give the penalty at once upon making the charge, and thus the more certainly to prevent the evil intended to be suppressed, and a violation of the statute.

3. The phrase, "a greater amount as toll or compensation," &c., obviously means to charge one shipper of a certain class of freight over its road, in a particular direction, greater compensation than is charged to another shipper of "an equal quantity of the same class of freight, transported in the same direction, *over any portion of same railroad of equal distance,*" not necessarily over the same distance, but any equal distance. The words "greater amount," "an equal quantity," "in the same direction," and "of equal distance," and "over any portion of one railroad of equal distance," are employed to fix and establish the basis of the equality of the *charge* allowed to be made. This equality of charge is not limited to the *same,* but to an *"equal quantity,"* not to the *same,* but to an *"equal distance,"* over any part of the same road. These provisions are significant and important, and must receive such interpretation as their use and meaning may allow, and as will give the statute intelligent practical effect.

It would be comparatively seldom that two shippers would ship precisely the same quantity of the same class of freight; and the number of instances in which two shippers would ship exactly the same quantity of freight of the same class from and to the same places, would be very small indeed, as compared with the vast number of shipments that would

generally be made from the same place to a large and indefinite number of other places. The words employed, in themselves do not imply such a restricted meaning, and this must not be narrowed so as to defect the purpose of the statute, reasonably appearing. It will be observed, that there is an absence of any provision in the statute, in this connection, or at all, that "equal distance" shall apply to cases (442) where the freight of two shippers is shipped from and to the same place, and this omission seems to have been intentional, because the express provision is *"over any portion of the same railroad, of equal distance."* If *equal,* thus used, means the *same* distance, then why are the words "over any portion," used? In that case, they would be unnecessary, mere surplusage, and meaningless. This cannot be allowed in order to give the statute the narrow and unreasonable effect just pointed out.

The statute does not, in terms or by reasonable implication, authorize such corporations to graduate their charges of compensation for carrying freights, by the different lengths of distance the same are to be transported. Indeed, the purpose is to prevent that very thing, and to establish the rule of equality of charges among shippers of the same class of freights for all "equal distances," although the freight of one may be carried further than that of the other. For the equal distance, the charge must be the same, and the same as that charged to any shipper *over any part* of the same road.

It is expressly made unlawful, in the cases provided for in the statute, to charge one of two shippers of freight, greater compensation than another, and there is no exception or distinction made or allowed in this respect, upon the ground that the freight of one of two shippers is to be carried a greater distance than that of another. The end to be secured is, to make the compensation, to the extent of the "equal distance" the same, and not greater as to one shipper than another, although the freight of one of them is carried a greater distance than the equal distance. Hence, if such a corporation should transport for one shipper a certain quantity of freight of a particular class in one direction one hundred miles over its road, for ten dollars, and it should charge another shipper of an equal quantity of the same class of freight in the same direction, at the same time, fifty miles, ten dollars, it would charge the latter just double the amount of compensation it (443) charged the former for the equal distance of fifty miles. The presumption would be in that case, that the charge was made for the whole distance the freight was carried for each shipper, because in the order of business, the corporation would not carry freight to the end of fifty miles, the equal distance, for compensation, and beyond that for

nothing! It is not sufficient to say that the corporation would have carried the freight, that stopped at the end of fifty miles, one hundred miles for the same price, because, the shipper for the shorter distance, had the right to be charged only a sum of money equal in amount to that charged to the shipper for the longer distance, *"over any portion of same railroad of equal distance."* The statute so expressly provides. "Equal distance" clearly means an "equal distance" any where in the same direction over the same road, without reference to the greater distance than the "equal distance" the freight of one of two shippers may be carried. It would certainly be most unreasonable, and trifling with a serious matter, to conclude that the Legislature intended simply to make it unlawful and penal for railroad corporations to charge in the case provided for, and against one shipper of freight, a greater compensation for transporting the same than another, only where both ship from and to the same points. Neither the terms nor the reason of the statute warrant, much less do they require, so narrow an interpretation. Thus construed it would be a ridiculous mockery!

4. In the nature of the business of transporting freights, railroad corporations must classify such freights, and the charges for carrying the same, and such classifications, when established, are observed in the course of business, until for some reason, they are changed or modified. Besides, the statute, (*The Code,* §1965), which is a part of that now under consideration, requires each of such corporations to "keep
(444) a list of its charges for carrying freight, specifying name of place, class of freight, and charge for carrying same," posted in a conspicuous place in the depots or places where freights are received for such shipment, and such charges cannot be increased without giving fifteen days notice. The presumption is, that such corporations obey the law, and make and observe the list of charges thus required to be made, while they continue current and unchanged.

The clause, "shall at the *same time* be charged," &c., must be construed in connection with the usage and statutory provision just mentioned, and so interpreted, it embraces the period of time while such lists continue unchanged and current. The words *"same time"* are used in the sense of the same period—same occasion—while the lists continue current. If they be taken literally, in their narrowest sense, as they appear in the statute, its operation would be confined within a very narrow compass. It would be very seldom indeed, that two shippers of freight would ship precisely equal quantities of the same class, in the same direction, over the same road at the very same time. In view of the other provisions of the statute, and its purpose, and to give it practical effect, the interpretation thus given must be the necessary and true one.

5. As we have already seen, the clause, "an equal quantity of the same class of freight," &c., is intended to designate the quantity that fixes the equality and uniformity of compensation that may be charged. Thus, if one ships ten bales of cotton, and another five bales, although the former ships more than the latter, the compensation charged to each for transporting five bales must be equal, whether that be much or little, and the shipper who has more than five bales must, as to the excess, be charged the same rate of compensation as that charged each for the equal quantities. This is necessary to preserve the equality of charges.

6. The words, "transported in the same direction," &c., plainly (445) imply in the direction the freights are carried over the railroad from the depot, or the place where the shipments were made, and this embraces branches of the same road in that direction, if these are used in connection with, and as part of, the same road. If the corporation should use two or more distinct railroads, not in connection, it may be that it could have a different and distinct class of charges for each of its roads.

7. The clause "over any portion of same railroad," &c., is likewise, as already explained, intended to secure equality and uniformity of charges, and to exclude the conclusion, that "equal distance," implies the same distance.

The exception in the Statute, allowing railroad companies to make *"special contracts"* with shippers "of large quantities of freight, to be of not less in quantity or bulk than one car load," tends strongly to show the correctness of the construction we have given it. If the words and clauses are to be taken in the literal and very narrow sense contended for by the counsel for the defendant, then of what use is the exception? Accepting their interpretation the defendant could, as to all shipments, discriminate at its pleasure in its charges of compensation, except where two or more shippers happen to ship precisely equal quantities of the same class of freight, going precisely equal distances in the same direction, and from and to the same places. Such cases would seldom, if ever, occur, and the Statute so construed, would be practically inoperative. It would suppress no evil. The obvious purpose of the exception is to except large shipments of freights from the stringency of the statute. It can have no other practical meaning.

In aid of the general purpose of the statute, above indicated, the Legislature passed a subsequent statute (Acts 1879, ch. 237; *The Code*, §1968), forbidding railroad companies "to pool freights, or to allow rebates on freights," the object being, to prevent unreasonable competition between two or more railroad companies at "com- (446)

peting points," and to prevent discrimination as to compensation for carrying freights by means of "rebates."

The title of the statute harmonizes with its terms and constituent parts, and plainly designates its purpose, and this strengthens the interpretation given above. In Acts of 1874-'75, chap. 240, it is entitled "an Act to prevent *discrimination in freight tariffs* by railroad companies operating in this State"; and as brought forward in *The Code,* chap. 49, entitled "Railroads," §1966, it is placed immediately under the title, *"Discrimination in freight unlawful,"* &c.

"Discrimination in freight tariff by railroad companies," "discrimination in freights," and like expressions, as applied to such companies, are terms and phrases well understood in the nomenclature of transportation over railroads. They may have a wider signification, but for the present purpose they certainly imply to charge shippers of freight, as compensation for carrying the same over railroads, unequal sums of money for the same quantity of freight, for equal distances, more for a shorter than a longer distance, more in proportion of distance for a shorter than a longer distance; more for freights called "local freights," than those designated "through freights;" more for the former, in proportion of the distance such freights may be carried, than the latter, the railroad companies being prompted to make such unequal charges by unreasonable competition between two or more of them at competing points, more or less important, and to make unreasonably high charges at other places where there is the absence of competition, because they have power to make them, and exact payment in order to make unjust gain, and, as well, to help pay the cost of such unnatural competition.

Nor, in this connection, is it improper to notice the public fact, that at the time the statute under consideration was enacted, there was (447) a general complaint as to the alleged grievance that such unequal and oppressive charges were made by railroad companies in this State, greatly to the public prejudice. The statute—its terms and various parts, including its title—alike point to such evil, and provides for its suppression.

The purpose thus attributed to the statute, clearly appears from its terms, its constituent parts, their bearing upon each other, and the whole taken together. If there could be any doubt as to its true meaning, its title may be resorted to, to strengthen the conclusion reached, especially as it does not in any respect contravene, but on the contrary, harmonizes with the provisions of the statute, and points in broad and comprehensive terms to the mischief to be remedied. *State* v. *Matthews,* 48 N. C., 452; *United States* v. *Fisher,* 2 Cr., 386; *Hadden* v. *Collector,* 5 Wall., 107; Potter's Dwar. on Stats., 102 and n. 4; *United States* v. *Railroad,* 91 U. S., 72; *Platt* v. *Railroad,* 99 U. S., 48.

On the argument, one of the counsel for the appellant, pointed out with much force the possible evil consequences of such an interpretation of the statute to the defendant, shippers of freight, and the public generally. This argument would have force if the legislative intent were doubtful, but when this unmistakably appears, as it certainly does here, it must prevail.

Such an argument might well be addressed to the Legislature. If the statute is too severe and impracticable, the remedy lies in legislative action. It is not the province of the courts to determine the wisdom and expediency of statutes, and what they should or should not be, but what they are, and to apply them as occasion may require.

It appears, that according to its current list of charges for carrying freight, the defendant charged for carrying fertilizers from Wilmington in this State, to Rocky Mount in this State, over its railroad, a distance of one hundred and thirty-seven miles, two dollars and fifty cents *per ton,* and at the same time, the same amount, for carrying a (448) ton of the same class of freight, from the same place, in the same direction, over the same part of its railroad, an equal distance, and thence over its branch road to Tarboro in this State, the greater distance of eighteen miles; and that it carried for the plaintiffs from Wilmington to Rocky Mount, ten tons of fertilizers, and charged them for carrying the same, twenty-five dollars, and at the same time, it carried for R. H. Battle, from the same place, over its same railroad, in the same direction, to Tarboro, the greater distance of eighteen miles, seventeen tons of fertilizers, of the same class of freight, and charged him forty-two dollars and fifty cents. To simplify this statement: the defendant charged the plaintiffs two dollars and fifty cents, for carrying a ton of fertilizers one hundred and thirty-seven miles, over its road, and at the same time, charged R. H. Battle but the same amount, as compensation for carrying a like ton of fertilizers, in the same direction, over its same railroad, a greater distance, to-wit, one hundred and fifty-five miles. In the orderly course of business, this latter charge was for the whole distance, and not simply for a part of it ending at Rocky Mount. The presumption is, nothing to the contrary appearing, that the charge was for the whole distance. Hence it must be, that the defendant charged the plaintiff a greater amount as compensation for carrying their ton of fertilizers, for the distance of one hundred and thirty-seven miles of its railroad, than it did at the same time charge R. H. Battle, for carrying an equal quantity of the same class of freight in the same direction and equal, in this case the same distance, over its same railroad; and so, also, the defendant charged the plaintiff for carrying ten tons of fertilizers one hundred and thirty-seven miles over its railroad, twenty-five

dollars as compensation, and at the same time charged another shipper, R. H. Battle, an amount for carrying an equal quantity of the same class of freight, an equal distance, and in this case, the same
(449) distance, in the same direction, over its same railroad. We have already seen that the fact that the defendant carried for one of these two shippers, at the same time, more than ten tons, cannot affect the result. They had equal quantities to the extent of ten tons, and for these equal quantities, it charged one of them a greater amount as compensation than the other for an equal distance, and this is the material fact in this respect and connection. The defendant therefore, incurred the penalty sued for in this action, unless another defence relied on by it must be sustained as good and available.

The defendant contends secondly, that its charter embodies a contract, founded in several material respects upon valuable considerations, between it and the State of North Carolina, and that among the stipulations contained in it, is that allowing the defendant to make by-laws and regulations for its government, not inconsistent with the laws of this State and the United States, and also the following: "and they (the defendants), shall be entitled to receive and demand the following rates, to-wit: not exceeding four cents a mile for toll, and nine cents a mile for transportation per ton of 2000 pounds; and for the transportation of passengers, not exceeding six cents per mile for each passenger."

It further insists, that if the statute under consideration is intended to embrace it, then, as to it, the statute is inoperative and void, because it impairs the obligation of the contract, the material clause of which is set forth above.

It is not necessary to decide whether or not the clause of the charter of the defendant, just quoted, is, and must be treated as such a contract on the part of the State, as prevents it, in the exercise of legislative power and authority, from regulating and establishing the charges of compensation of the defendant for carrying freights and passengers over its railroad, because the statute under consideration does not
(450) undertake to abridge or interfere with the rights of the defendant to charge any amount as such compensation it may see fit, within the maximum of charges prescribed and allowed in its charter. As said above, that statute does not provide a maximum or minimum, or any charge, or schedule of charges as compensation for carrying freights. It simply requires equality and uniformity in such charges and forbids the contrary under a penalty.

The charter of the defendant does not in terms or by necessary or just implication, provide that it may charge one shipper for carrying his freight of a particular class, one price, and another shipper a differ-

ent and greater price, for the like and equal service, with or without regard to the quantity of freight, or the distance it may be carried. On the contrary, the reasonable implication is, that its charge shall be equal, in proportion, against all shippers alike, as to quantity and distance. The defendant is authorized in terms, to charge as compensation for carrying freights, not exceeding a fixed price per ton per mile. This seems to contemplate uniformity and equality per ton per mile, extended to all shippers of freight, whatever may be the price fixed by the defendant. This is just, and comports with equal fairness to all shippers, although it may not always suit the better convenience and advantage of the defendant. Moreover, the defendant exercises franchises and privileges granted by the Legislature for the common public good. Besides, the purpose of the State to abandon or part with its right and power to require the defendant to make its charges for carrying freights equal and uniform as to quantity and distance to all shippers alike, is not to be presumed, nor can it appear from mere inference. Such purpose must be deliberate, and appear clearly from positive terms, express grant, or necessary implication.

It is difficult to understand how, upon principle, the Legislature can, by contract or otherwise, effectually grant, sell, or part with, to any extent, any part of an essential power of government. If (451) this can be done at all, it can only be done by a clearly expressed purpose to do so. The presumption is against such purpose. This rule of interpretation is elementary and important, and should always be strictly observed.

The Legislature, for public considerations, granted to the defendant the right to fix within a maximum, its compensation for carrying freights, but this is a very different thing from the right to *discriminate* for any purpose or consideration, in any way, or in any respect, as to compensation for carrying freight. There is no provision in the defendant's charter, that in terms or by necessary implication, declares the purpose on the part of the Legislature to conclude the State against its exercise of the right and power to forbid and prevent such discrimination.

The defendant assigned as error, the refusal of the Court to grant its motion to dismiss the action, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The Court properly refused to grant the motion. The material facts were agreed upon in writing and submitted to the Court for its judgment, and thus they passed into the record, and the judgment was founded upon these. Moreover, it was agreed by the parties that the Court should make an order allowing the plaintiffs to amend their complaint, so as to make it conform to the facts agreed upon.

The amendment, it seems, was not made. This may be done here, for the sake of uniformity and order.

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

SMITH, C. J. While I concur in the construction of the statute which covers the facts presented in this case, and subjects the defendant to the penalty imposed, I am not prepared to assent that all that is said about its operation, in the wide, elaborate and discursive range
(452) taken in the discussion in the opinion, upon an assumed state of facts not before the Court. Our office is to construe and apply the statute to the case made in the complaint, and thus far our ruling becomes a decision, having the force and effect of a precedent.

It is prudent and safe in most cases, not to go further; nor to indulge in the utterance of opinions hypothetical and speculative only, which, though not authoritative adjudications, may embarrass in the impartial and free examination of cases that may thereafter come before the Court, and require a direct judgment. Especially, in my opinion, ought this rule to be observed in the interpretation of a legislative act, not very clear in its terms, or the expression of its purposes.

Literally and rigorously interpreted, the inhibition is confined to unequal and discriminating charges for compensation, in carrying "an equal quantity of the same class of freight, transported in the same direction, on any portion of the same railroad of equal distance," and the penalty is incurred when these conditions co-exist in the corporate act.

If this absolute strictness of construction is to be put upon the act, obviously a case would seldom occur, in which its provisions would be violated, for its force could be expended in preventing personal discrimination among freighters or shippers. This is too narrow an interpretation, and would not only fail to express and give effect to the legislative will in remedying a felt evil, detrimental to its citizens, but be to practically annul and render the act inoperative for any useful purpose.

The first duty of the Court is to ascertain the intent of the Act, as deducible from the terms in which it is expressed, and the evil it was designed to remedy and remove.

I agree in the opinion of the Court, that it embraces the facts of the case before us, and the mandate is disregarded in requiring the
(453) same compensation for the carriage over the longer and the shorter route. The fact that there is no increased charge for the additional transportation, beyond that part of the road traversed in common, lessens *pro tanto,* the compensation or toll exacted from him whose freight is carried further, and discriminates unequally between

the parties. The charge is not the same to each for transportation over an equal—the same—distance on the road.

But I go no further, reserving to myself the right to examine, with full freedom, cases that may hereafter arise, and come before the Court, and decide upon the applicability of the statute to them.

No error. Affirmed.

Cited: S. v. Giersch, 98 N. C., 725; *Sutton v. Phillips,* 116 N. C., 505; *Early v. Early,* 134 N. C., 260; *S. v. Patterson, ibid.,* 614; *S. v. Lewis,* 142 N. C., 653; *Skinner v. Thomas,* 171 N. C., 102; *In re Chisholm's Will,* 176 N. C., 212; *S. v. Bell,* 184 N. C., 716; *Cameron v. Highway Com.,* 188 N. C., 91; *S. v. Heath,* 199 N. C., 138; *Dunn v. Dunn,* 199 N. C., 536.

ALLEN TATOM et al. v. WILLIAM H. WHITE and JAMES M. WHITE.

Attorney and Client—Evidence—Execution of Deed—Fraud—Officer—Registration—Witness—Deputy Clerks—Estoppel—Curative Statutes.

1. Proof that a person acted and was recognized as a public officer, is *prima facie* evidence that he was duly qualified. This rule is applicable alike to criminal and civil actions, and to actions in which the officer is himself a party. If, however, the title to the office, or the legality of the appointment is put in issue by the pleadings, the proof must support the allegation.

2. Deputy clerks cannot take proofs of the execution, or make orders concerning the registration of instruments required to be registered.

3. Section 1260 of *The Code,* rendered valid all probates of deeds, &c., made before the officers therein named, prior to the twelfth day of February, 1872; and registrations made in pursuance of such probates, are embraced within the operation of the statutes, although made after that date, but before the enactment of *The Code.* Such legislation does not disturb vested rights.

4. A person who cannot write, but who makes his mark, or uses any other device by which he, or others, may identify himself with the transaction, is a competent attesting witness to the execution of written instruments.

5. The registration of a deed, or other instrument requiring registration, made upon proof of execution by a witness who could not write, but who in fact witnessed the signing, and directed his name to be subscribed as a witness, is not void, though irregular; and on a trial, upon proof of the execution by such witness or other competent testimony, the deed will be admitted in evidence without further registration.

6. If a party to an action introduced a certified copy of a deed, stating at the time that he did so for the purpose of showing that both parties claimed under the same person, "and for the purpose of attacking it for fraud," he waives all defects and irregularities of probate and registration.

7. No presumption of fraud arises from the fact that an attorney at law purchased valuable property from an infirm old man, unless it be further shown that the relation of attorney and client existed between them in relation to that matter, or there was undue influence, advantage, or some other evidence of actual fraud.

(*Swindell* v. *Warden*, 52 N. C., 575; *Tabor* v. *Ward*, 83 N. C., 291; *Alexander* v. *Commissioners*, 70 N. C., 208; *King* v. *Foscue*, 91 N. C., 116; *Holmes* v. *Marshall*, 72 N. C., 37; *Young* v. *Jackson*, 92 N. C., 144; *State* v. *Byrd*, 93 N. C., 624; *McKinnon* v. *McLean*, 19 N. C., 79; cited and approved).

(454) This was a CIVIL ACTION for the recovery of land, tried before *MacRae, Judge,* at Fall Term, 1886, of BLADEN Superior Court.

The plaintiffs claim title to the land described in the complaint under the will of Malcolm McInnis, who died in 1870 or 1871. His will was executed on the 18th of March, 1858, and proven on the 30th of August, 1882.

The defendants claim title to the same land by virtue of a deed executed to them and John A. Richardson and B. F. Rinaldi, by Malcolm McInnis, the testator above named, on the 15th of October,
(455) 1870. This deed was proven on the 22d of the same month, before one Hall, the deputy clerk of the Superior Court of the county of Bladen, and by him ordered to be registered on the 5th of April, 1878.

On the trial, the plaintiffs put in evidence the will above mentioned, claiming that by it the land in question was devised to Catharine Tatom, their mother, who died intestate on the 21st of September, 1881. They claim as her heirs at law. They also put in evidence the deed above mentioned, stating that they did so "for the purpose of showing that the defendants also claimed title under M. McInnis, and for the purpose of attacking it for fraud."

In the further progress of the trial, the plaintiffs having then introduced the deed, insisted and asked the Court to so hold, that it was not proven and registered according to law, because the deputy clerk was not such deputy, and if he was, he had no authority to take proof of deeds and order the same to be registered; and because the subscribing witness to the deed could not write and did not write his name, but it was written for him by one of the defendants. The Court declined to so hold, but decided, "that the plaintiffs having offered this deed in evidence without objection, could not now object to it on account of a defect in the probate." The plaintiffs excepted.

The deputy clerk testified that he was such officer at the time the deed was proven before him. It seems that his testimony was not questioned.

It appeared that one of the vendees, John A. Richardson, was an attorney at law, and prepared the deed, but there was no evidence that the relation of client and attorney ever existed between him and the vendor. The defendant, W. H. White, another of the vendees, was present when the deed was executed, and asked one Hammond, who was also present, to witness it, and being informed that Hammond could not write, at his (Hammond's) request, subscribed his name as an attesting witness. (456)

It was further proven that the vendor was at the time of the execution of the deed an old and infirm man; and there was much and conflicting testimony as to his capacity and the influences operating on him at the time.

Among other issues submitted to the jury were these:

"5. Was McInnis competent or capable of making a deed on the 15th of October, 1870?

"6. Was said deed procured by fraud, undue influence or misrepresentation?"

The plaintiffs requested the Court to instruct the jury:

"1. That if they believed that John A. Richardson, one of the grantees in the deed to the defendants in this action, was the attorney of the grantor, M. McInnis, and that said deed is in the handwriting of John A. Richardson, then said deed is void without other evidence of fraud, and the jury should find for the plaintiffs.

"2. That if the jury believed that the deed of October 15th, 1870, from McInnis to defendants in this action, was drawn by W. H. White, one of the grantees in said deed, and that said grantor, McInnis, was a very old man, and trusted said grantee, White, to prepare said deed for him, McInnis, then for the purpose of making said deed the said W. H. White was the attorney for said McInnis for preparing aforesaid deed, and whenever the relationship of attorney and client exist, and the attorney accepts a personal benefit in a transaction with his client, then the law presumes that the personal benefit was obtained by fraud, unless this presumption is rebutted, and the burden of proof is on the defendants to show the *bona fides* of the transaction."

The Court declined to give these instructions, and charged the jury upon that point as follows:

"There is no proof of such relation of attorney and client existing between the grantor, McInnis, and the grantee, Richardson, as would raise a presumption of fraud from the fact that Richard- (457)

son prepared the deed. But if you have been satisfied that McInnis was old and of feeble intellect, and that Richardson was a lawyer and prepared the deed, and procured it to be executed by his own acts, or through any one else, and obtained an advantage by such deed as that he became the grantee of an interest in said land, at an inadequate price, the presumption of law would be that this advantage was procured by fraud, and that the deed is void, and the burden would be upon the defendants to satisfy you that it was a fair transaction. And so if you are satisfied that McInnis was old and feeble in mind and body, and that the deed was prepared by W. H. White, and its execution procured by him, or, whether he prepared it not, if he procured it to be executed, and that he derived an advantage therefrom, as by obtaining an interest in the land at an inadequate price, the presumption of law would be that it was obtained by fraud or undue influence, and it would rest upon the defendants to satisfy you it was a fair transaction, for if bad on account of fraud or undue influence as to one grantee, it is bad as to all. But there has not been proven any such confidential relations between them as would in the first instance raise a presumption of law that the deed is fraudulent." Plaintiffs excepted.

There was a verdict and judgment for defendants, and plaintiffs appealed.

Messrs. Thos. H. Sutton and *N. W. Ray,* for the plaintiffs.
Mr. C. C. Lyon, for the defendants.

MERRIMON, J. (after stating the case). That Hall was a deputy, might be proven by himself, or other witnesses who knew the fact that he was recognized and acted as deputy, and as nothing to the contrary appeared, the presumption was that he was duly appointed and sworn, and had authority as a deputy clerk. Evidence that a person
(458) acted as a public officer, and that he was known as such, is *prima facie* evidence of his official character, without producing his commission or appointment. All who have acted and act as such officers are presumed to have been duly appointed to the offices each professes to hold until the contrary appears, and it is not material how the question as to official character arises, whether in a civil or criminal action, nor whether the officer is or is not a party to the action, unless being plaintiff he unnecessarily avers his title to the office, or the mode of his appointment, thus putting directly in question his title or his appointment. In that case the proof must support the allegation.

Such evidence is competent, and comes within a well-settled exception to the general rule that the best evidence must be produced. This exception is founded in general practical convenience. *Swindell* v. *War-*

den, 52 N. C., 575; *Cotton* v. *Beardsley,* 38 Barb., 29; *Rex* v. *Murphy,* 8 C. & P., 297; *McCoy* v. *Curtice,* 9 Wend., 17; 1 Greenleaf on Ev. §§83, 92, and numerous cases cited in the notes.

It is true, that at the time the deed in question was proven regularly, deputy clerks could not, nor can they now, take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they and the Judges of the Courts had authority to do so, and in many instances they undertook to exercise such authority. This was attributable to confused legislation on the subject of the probate of deeds and other instruments, and the fact that such officers were invested with such power before the present statutes on that subject were enacted. To cure errors in this respect, and render effectual many official acts done by honest misapprehension of the law, the Legislature enacted *The Code,* §1260; Acts 1871-'72, ch. 20, §1), that "Whenever the Judges of the Supreme or Superior Court, or the Deputy Clerks of the Superior Court, mistaking their powers, have essayed previously to the twelfth day of (459) February, one thousand eight hundred and seventy-two, to take the probate of deeds and the privy examination of *femes covert,* whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations so taken and had, shall be as valid and binding to all intents and purposes, as if the same had been taken before, or ordered by, the Clerk of the Superior Court, or other officer having jurisdiction thereof."

This statutory provision is remedial in its nature and purpose, and plainly embraces such probates and registrations as that now under consideration. The certificate of proof of the deed and the order of registration, were made before the day specified in the statute, and in pursuance of the order, it was registered before the enactment of *The Code,* which embraced the re-enactment of the original act mentioned. As we have said, the statute is remedial, and it must receive such interpretation as will effectuate the remedial purpose. It does not, therefore, imply that the registration must have been before the day specified. The scope of the purpose embraces any registration done in such cases before the enactment of *The Code.*

The Legislature has power to pass, repeal or modify registration laws from time to time. Over the subject of registration it has complete control, and the exercise of its power cannot be deemed an interference with vested rights. The statute set forth above, simply renders effectual, acts purporting to be official, and which served the purpose of the law in giving notice of the deed and the transaction it was intended it

should be evidence of. *Tabor* v. *Ward,* 83 N. C., 291; *Alexander* v. *Commissioners,* 70 N. C., 208; *King* v. *Foscue,* 91 N. C., 116; *Holmes* v. *Marshall,* 72 N. C., 37; *Young* v. *Jackson,* 92 N. C., 144.

(460) The witness who purported to attest the execution of the deed, testified on the trial, that he "witnessed the signing of the deed," but "did not sign his name a subscribing witness thereto,"—one of the defendants subscribed his name as witness for him. He further testified that he "don't write—can read writing a little."

An attesting witness by his written signature identifies himself with the deed, or other instrument as the case may be, as such witness, and he thereby declares that he knew and saw the party making it execute it, or that such party acknowledged before him that he had done so. He does an important act. He ought to be able to write his name—to know his handwriting, and sufficiently intelligent to understand why he writes his name as such witness. But a person who cannot write is not necessarily ineligible—unfit—to be a witness. He might be able to make a mark or device that he would know and recognize himself easily, and that others might know, just as they might know the handwriting of any person. Most assuredly such a person would be a good or sufficient attesting witness. *State* v. *Byrd,* 93 N. C., 624.

But granting, in this case, that the attesting witness was objectionable and insufficient, the registration made upon the certificate of probate, and the order of registration, was not therefore void. The deputy clerk recognized and examined him as the attesting witness, and made the order of registration. This order, though not regular, was not void, and it warranted the registration. Such registration was good—it served the purpose of the law, and gave notice of the deed, just as if the witness had written his name. As the witness was not properly an attesting witness, it was competent and proper—necessary if required, to prove the deed on the trial by any competent evidence as by the witness who purported to be the attesting witness. This was done, and this was sufficient. *McKinnon* v. *McLean,* 19 N. C., 79. Thus it

(461) appears that the deed was sufficiently registered.

We think, also, that the Court properly held that the plaintiffs could not be allowed to question the registration of the deed on the trial. They introduced and took benefit by it, without at first intimating any defect in or objection to the probate. They were justly treated, as having waived any objection in that respect, and as concluded by such waiver.

Very clearly the plaintiffs were not entitled to have the special instructions prayed for by them. We have examined the evidence sent up with care, and are satisfied there was none that the relation of attorney and client ever existed between John A. Richardson and Mal-

colm McInnis, the maker of the deed in question; nor was there evidence of such relation between the latter and the defendant William H. White.

While the law scrutinizes transactions between attorney and client as to the former, such relation must exist before the presumption of fraud arises as against the attorney, in respect to transactions between him and another person. The mere fact that an attorney purchases a piece of property from an old man with whom he is on friendly and intimate terms, raises no presumption adverse to him in respect to such transaction. He may buy and sell just as other persons may do. And so also, he like others, may obtain property or valuable advantage from an old and infirm man by fraud and fraudulent practices, for which he may be called to answer in courts of justice, but he will stand on the same footing and be treated as other ordinary litigants.

It is alleged that the maker of the deed mentioned was a very old and infirm man—that he was a lunatic and had not mental capacity to make a deed, and that the bargainees procured its execution by fraud. There was much evidence tending to prove these allegations produced on the trial by the plaintiffs, while on the other hand there was much of the defendants', tending to prove the reverse. The issues in these respects, it seems, were the ones most strongly (462) controverted. Indeed, the merits of the case turned upon them and the principal questions were those of fact for the decision of the jury. The Court in its instructions to the jury stated the law applicable with clearness and fairness. The plaintiffs "excepted," but specified no particular grounds of exception, nor did they assign errors. We discover none, certainly none of which they can justly complain.

No error. Affirmed.

Cited: Sellers v. Sellers, 98 N. C., 20; *Devereux v. McMahon,* 102 N. C., 286; *S. v. McMahon,* 103 N. C., 382; *Walker v. Scott,* 104 N. C., 483; *White v. Connelly,* 105 N. C., 71; *Gordon v. Collett,* 107 N. C., 364; *Devereux v. McMahon,* 108 N. C., 145; *Lowe v. Harris,* 112 N. C., 491; *Piland v. Taylor,* 113 N. C., 3; *Barrett v. Barrett,* 120 N. C., 131; *Cochran v. Improvement Co.,* 127 N. C., 399; *Vanderbilt v. Johnson,* 141 N. C., 372; *Powers v. Baker,* 152 N. C., 719; *Vaught v. Williams,* 177 N. C., 81; *Fibre Co. v. Cozad,* 183 N. C., 612; *Booth v. Hairston,* 193 N. C., 287.

JOHN ARRINGTON & SONS and JOSEPH BEAVANS v. JOSEPH W. JENKINS and JOHN GOODRICH and wife.

Costs—Exceptions—Mortgage—Interest—Reference—Usury—Contract.

1. In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury.
2. An agreement, entered into with full knowledge, and with the intent to pay and receive a greater rate of interest than is allowed by law, whereby it is stipulated that the party advancing the money shall receive a commission as a consideration therefor, in addition to the legitimate interest, is usurious, and forfeits the interest. *The Code*, §3836.
3. The mortgagor covenanted, in addition to the stipulation to repay the sums advanced with 8 per cent. interest, that he would ship to the mortgagee for sale, "double the quantity of cotton necessary to pay the amount advanced, and in case of failure so to ship, to pay to the mortgagee two and one-half per cent. on the amount failed to be shipped as liquidated damages for the breach of this covenant." Whether such agreement is usurious upon its face, *Quœre.*
4. Exceptions must clearly point out the alleged errors. Otherwise, they will not be considered.
5. It is not erroneous to tax the losing party with the costs of a reference.

(*Manning* v. *Elliott*, 92 N. C., 48; cited and commented upon).

(463) This was a CIVIL ACTION, tried before *Shepherd, Judge,* at Spring Term, 1886, of HALIFAX Superior Court.

The defendants, John Goodrich and wife Elizabeth, on the 31st day of January, 1873, by mortgage deed conveyed certain lands and personal property therein specified, to the plaintiff, John Beavans, to secure a loan of money, not exceeding $3,200 in amount, and to be advanced during the month of February, with condition to be void if the said sum, with interest at eight per cent. per annum, was paid on or before the 1st day of February of the next year. The note of the mortgagor for that amount, with the specified rate of interest, was taken on the next day after the execution of the mortgage, and during the month of its date the full amount of the loan was paid to him. The other plaintiffs, Arrington & Sons, recovered several judgments against the defendant Goodrich, whose aggregate principals are $358.66, besides interests and costs, before a justice of the peace, and on the 19th day of March, 1879, caused them to be docketed in the Superior Court of Halifax.

On April 14th, 1880, the defendant Goodrich, to obtain needed supplies for his farming operations during the year, executed a deed to the defendant Jenkins, whereby, to secure the repayment of advances not

exceeding $600, and to be made in equal parts in moneys and goods, he gave a lien upon the crops raised on the land to be cultivated, stock and farming implements.

He also conveyed therein a tract of land on which he was then residing, and other personal property, with condition, (applicable also to the crops, stock and farming implements), to be void if the advances, with interest, commissions and liquidated damages, as provided (464) in a preceding section of the deed, were paid on or before the first day of December following. The section referred to, and intermediate between the operative conveying words, is in these words:

"And the said John Goodrich, for and in consideration of the matters aforesaid, does covenant and agree to ship to the said Joseph W. Jenkins & Co., for sale as commission merchants, double the quantity of cotton necessary to pay the advances aforesaid, with interest at the rate of eight per cent. per annum, and commissions 2½ per cent., and in case of failure so to ship, to pay Joseph W. Jenkins & Co., 2½ per cent. on the value of the amount failed to be shipped as aforesaid as liquidated damages for breach of this covenant."

Two successive deeds were executed by the said Goodrich to Jenkins, one on May 10th, 1881, and the other on February 17th, 1882, to which latter his wife was a party, with the same general provisions, and conveying liens on the crops of the respective years, as well as other personal and real estate, to secure further advances and the unpaid residue of the indebtedness claimed for each antecedent year, and with power of sale in all, if the secured debts and advances were not paid by or before the 1st day of December of the several years.

The present action is for the ascertainment of the remaining indebtedness of the said Goodrich to the several creditors, secured under the mortgages and judgment lien upon the conveyed real estate, and for a sale thereof, and distribution of the proceeds in payment, according to their priorities.

Answers were put in by the defendants, and thereupon the cause was referred to W. A. Dunn and Gavin L. Hyman, commissioners, with directions "to ascertain and report the amounts due by the defendant John Goodrich" to the plaintiff Beavans, and to the defendant Jenkins.

The report was accordingly made at Fall Term, 1885, with the evidence taken before the commissioners, and their separate (465) findings of fact and law therefrom. From the report it appeared that $2,465$^{0}/_{100}$ was due said Beavans on November 16th, 1885, with interest thence on $1,588$^{76}/_{100}$ principal money, at the rate of eight per cent. per annum, and that there was due said Jenkins on August 31st, 1883, the sum of 216^{23}/_{100}$, with like interest thereafter to accrue.

To the commissioners' report, the defendant Jenkins filed many ex-

ceptions, twenty-three to their findings of fact, and six to their findings of law. Upon the hearing before the Court, it was conceded by all parties that the plaintiffs were entitled to the amounts ascertained and reported to be due them respectively, and to judgment therefor, the defendant Goodrich only objecting to a decree for the sale of the land until the indebtedness to Jenkins was also fixed. Thereupon the Court proceeded to try the whole case. The same defendant excepted to the finding, in including in the note given in March, 1881, a balance from the year 1879, which he insisted had been paid, and if not paid, was not embraced in the note for which the last mortgage was given.

The said Jenkins, waiving all his exceptions to the findings of fact, in regard to the rulings of the commissioner upon matters of law, except to their having considered any evidence tending to show the consideration or to impeach the legality of the notes.

The Court overruled the exception and said defendant excepted.

4. Said defendant also excepted to the finding of the referees as to usury, for that there was no sufficient evidence of usurious intent.

The Court overruled the exception and said defendant excepted.

The Court sustained the conclusion of the referees except that (466) interest should be allowed only from the date of the judgment.

To this ruling the defendant Jenkins excepted.

The bond was fixed at seventy-five dollars.

The defendant Jenkins excepted to that part of the judgment which taxed him and defendant Goodrich with the referee's fees and court costs.

Mr. Spier Whitaker, for the plaintiffs.

Mr. John Devereux, Jr., (Messrs. Thos. N. Hill and *Jos. B. Batchelor,* were with him), for the defendant Jenkins.

No counsel for the defendants Goodrich and wife.

SMITH, C. J. (after stating the case.) The exceptions of Jenkins will be first considered.

Exception I. It was competent for the debtor to show that usurious interest entered into the consideration, and constitutes part of the amount for which the notes were given. It was to an inquiry made to ascertain the tainting presence of this illegality in the security, to which we understand the objection is directed. It cannot be necessary to cite authority in support of this proposition.

Exception II. The commissioners report that for money loaned in the form of advances, in most of the items a charge of 2½ per cent. is added to the sum advanced, and interest on the whole amount at the rate of 8 per cent.; that the sum due on preceding transactions on July 16th,

1880, $383^{94}/_{100}$, was also increased by superadding a charge for commissions, as in the case of moneys first advanced, and then the same rate of interest computed on the whole sum, thence until January 28th, 1881; that an account was rendered by Jenkins for the years 1879 and 1880, on March 3d, 1881, which is made up of the amounts due, with interest and commissions, as stated, and of a further charge of like commissions on the value of the cotton which was agreed to be sent and consigned to him for sale, and was not so sent; that Goodrich gave his note for the entire amount, and the mortgage therefor; (467) that interest was charged thereon from its date, February 10th, 1881, and on successive advances from March 5th to July 30th, inclusive, after adding commissions, interest is also computed, from their several dates, and the same course, with advances from August 6th to September 2nd, inclusive, while from October 10th to February 14th, 1882, payments were made by Goodrich in a sum of $130 in excess of the amount credited in the account rendered to him; that subsequent dealings were put in the form of an account similarly made up; that the said Goodrich fully understood the provisions of the mortgages when made up, and when he executed his note for $313^{2}/_{100}$, on March 10th, 1881, and that for $468^{57}/_{100}$, on February, 1882, he knew that the amounts of each were made up of interest, commissions, and commissions on cotton not shipped as stated in the report; that there was no consideration for the agreement to pay the commissions charged on the advances to be made under the mortgages, nor for that to pay commissions on unshipped cotton other than for the use of the moneys advanced, and that the agreements were all made with intent to receive and charge a greater rate of interest than 8 per cent; and there was no other consideration for the charges of 2½ per cent. on balances carried over from one account to another, and that the same were made with a similar usurious intent.

The facts thus ascertained do furnish evidence of a usurious purpose carried out in action, and warrant the commissioners in eliminating these items from the note into which they enter with their infectious influence and effect. The many improper charges which would be stricken out, if the accounts were to be restated as an unadjusted matter, must remain, however erroneous, as not being the result of any prearrangement or agreement, and voluntarily assumed in executing the note. If the *purpose* of the parties, as is found as a fact in the report, (and the finding, if resting upon any evidence, is not (468) brought up for review), was, as well as the method pursued, a contrivance to effectuate the purpose, to obtain a greater interest than is allowed upon a loan of money, it was, under the statute, a forfeiture of all interest. *The Code,* §3836.

The effect of the provision in the mortgage deeds, which contain the mortgagor's stipulation to consign to the mortgagee more cotton than is required to discharge the debt, and to allow a charge of the same commissions on such as is not, as on such as is sent, and upon which in making sale, labor and skill are bestowed, and for which they become a consideration, has not been passed on, though incidentally before this Court in *Manning* v. *Elliott,* 92 N. C., 48.

In this case, the money had not been paid, and the defendant abandoned his claim to such commissions on the hearing.

But our attention has been called to several adjudications elsewhere, where a like provision is found in mortgages to secure loans and advances in money.

In *Matthews* v. *Cole,* 70 N. Y., 239, decided in 1877, it is said, that such an arrangement was not necessarily usurious, to be so adjudged upon the face of the contract, but the intent must be shown to secure a larger interest on the loan, and this a device resorted to, to give it effect. In the absence of any such evidence *alieunde,* the contract must be declared legal and valid.

A very similar case was before the Supreme Court of the United States in 1876, *Cockle* v. *Flack,* 93 U. S., 344; in which upon the trial in the Circuit Court, it was left to the jury to pass upon the imputed usurious intent in the framing of such a clause in the loaning contract, and this was upheld. In the opinion, Mr. Justice MILLER says: "But counsel for plaintiffs argue that as to these commissions which defendant never earned by sale of the property, or by handling it, and as to which they were put to no cost or inconvenience, there can be no
(469) other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive, that the Court ought to have held, *'as matter of law, that it was usury.'*

We are not required, in determining this appeal to pass upon the legal consequences of an insertion in the contract of such a clause, which certainly secures material advantages to the lender, in addition to the highest legal interest as the consideration of the loan, and those advantages founded upon no other consideration."

But, assuming the rulings to be correct, the series of gratuitous enlargements of the sums to be paid, and among them the charge of full interest on the note given for advances to be made, in part, and then interest on the advances when made with the superadded charge of commissions on each, certainly indicate an intent to augment the fruits of the loan in excess of lawful interest, and this the commissioners find

to be the result of a preconcerted arrangement between the parties, and this finding receives the sanction of the Court.

Our case is thus distinguished in being surrounded with numerous *indicia* of the unlawful purpose developed and carried out in action.

We approve also in the ruling that the interest should only begin to run in favor of the appellant's claim from the date of the judgment, and also in the taxation of the costs.

The defendants, Goodrich, filed six exceptions to the commissioners' report, of which two, numbered 4 and 5, are to their findings of fact, and the others to their conclusions of law. Upon the hearing before the Judge, all the exceptions to the findings of fact were waived except two, which were sustained and modified to the effect that while no objection was made to the execution of the notes, it was understood that any error afterwards discovered might be corrected.

These two were then also withdrawn. His exception "to the (470) finding in including in the amount for which the note of March, 1881, was given a balance from the year 1879," which it was contended had been paid, and if not, was not embraced in the note for which the last mortgage was given, was overruled, and to this the said defendants excepted and appealed.

This objection is so obscurely stated, and in terms so general, that we find some difficulty in passing upon it. If the balance due on the account of 1879 has been paid, it ought not to have been incorporated in the note, with the stipulated advances, executed in March, 1881. But it seems the balance of the successive years was incorporated in the successive notes, with other charges, and if the item complained of was not embraced in the last secured note it must have been in some way eliminated from the account which constitutes the consideration of the note, and works no harm. This, we cannot suppose, is the meaning intended to be conveyed in the form of the exception, but its indefiniteness, and the absence of all the details necessary to a proper understanding of the complaint, compels us to leave the ruling undisturbed, because we cannot see that it is erroneous.

The objection that a decree of foreclosure and sale should await the determination of the amount due Jenkins, if possessed of force, is removed by the actual ascertainment of the extent of that indebtedness of the action of the Court below, and sustained here before such decree was made.

Nor do we see any error in taxing the respective appellants in the Court below with the costs of the action.

It must be declared there is no error, and the cause is remanded for further proceedings in the Court below.

No error. Affirmed.

Cited: Kitchen v. Grandy, 101 N. C., 98; *Gore v. Lewis,* 109 N. C., 540; *Greensboro v. McAdoo,* 110 N. C., 430; *Moore v. Beaman,* 111 N. C., 332; *S. c.,* 112 N. C., 560; *Elliott v. Sugg,* 115 N. C., 241; *Turner v. Boger,* 126 N. C., 302; *Riley v. Sears,* 154 N. C., 462; *Owens v. Wright,* 161 N. C., 141; *Bank v. Wysong & Miles Co.,* 177 N. C., 291; *Lumber Co. v. Trust Co.,* 179 N. C., 214.

(471)

W. G. N. STRICKLAND et al. v. C. M. J. STRICKLAND, Adm'r of F. W. STRICKLAND.

Amendment—Judgment—Record.

If by the inadvertence of the Court, or of any one acting for it, the judgment entered, or record made, is not in conformity to that pronounced or ordered, the Court may at any time, upon the application of any person in interest, or *ex mero motu,* correct it so that it shall truly express the action of the Court. This jurisdiction is distinct from that conferred by §274 of *The Code,* which provides a remedy for relief against excusable mistake, &c., of *parties* to the action.

(*Leak* v. *Covington,* 83 N. C., 144, cited and approved; and *Ruffin* v. *Harrison,* 91 N. C., 398, distinguished).

MOTION to correct a judgment, heard before *Philips, Judge,* at Chambers, in Greenville, PITT county, on the 17th of June, 1886.

This was a special proceeding, brought by the plaintiffs as next of kin, of F. K. W. Strickland, deceased, to obtain an account and settlement of his estate in the hands of the defendant, his administrator.

Proper pleadings were filed, and an account was taken and stated by the Clerk, from which it appeared that a note for $525, due January 3d, 1858, against the plaintiff, W. G. N. Strickland, passed into the hands of the defendant as part of the effects of his intestate—that the latter had never duly accounted for same, and was properly chargeable therewith, and he was so charged in the account.

In rendering the final judgment of distribution, although the said W. G. N. Strickland had not paid and discharged his indebtedness on account of the note mentioned, and he still owed the same, and his indebtedness was much larger than his distributive share, by inadvertence of counsel in preparing the judgment for entry, it was directed that the defendant pay to him his distributive share, $302.82, when it was
(472) really intended by the Court that no such judgment as to him should be entered.

After the lapse of more than a year next after its entry, the plaintiffs, other than W. G. N. Strickland and the defendant, moved, upon proper notice, before the Clerk of the Court, to correct the error thus existing, by modifying the judgment so as to strike out so much thereof as directed the defendant to pay to the said W. G. N. Strickland, the said sum of $302.82, and thus make it what the Court intended it should be, and what it appeared it ought to be.

The plaintiff, W. G. N. Strickland, contended that the judgment could not be thus corrected. The clerk, however, allowed the motion and made the correction, and W. G. N. Strickland appealed to the Judge at Chambers.

At Chambers, the Judge filed a brief opinion, whereof the following is a copy, and gave judgment reversing the order and correction made by the clerk, from which the plaintiffs other than W. G. N. Strickland and the defendant, appealed to this Court:

"The Court is of opinion that the judgment entered in the Probate Court on the 7th October, 1884, between the same parties, was final.

"That the relief sought by these proceedings is provided for in section 274 of *The Code,* and that not having been begun within a year after the entry of said judgment, it is now too late. Any other relief save that provided in the section named, must be sought in an independent action, and not by motion in the cause as is adopted here. *Ruffin* v. *Harrison,* 91 at 399."

Mr. Jacob Battle, for the appellants.

No counsel for the appellees.

MERRIMON, J., (after stating the case). It seems to us clear, that the Judge misapprehended the nature and purpose of the motion. It was not a motion to "relieve a party from a judgment, order (473) or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect," nor to correct an erroneous judgment properly so denominated, nor to correct or set aside a judgment for irregularity in the course of the action, commonly called an irregular judgment, but to correct a mistake of the Court made by its inadvertence, occasioned by the inadvertence of counsel in preparing the judgment for entry. There was no mistake of law or fact in the proceedings leading to and upon which it rested—the grounds of it had been properly settled as to the law and fact, as appeared in and by the record—there was simply a mistake in the entry—the Court did not enter the judgment it intended to enter, nor that authorized by what appeared in the record.

Such errors may be corrected at any time, and after a long while, upon motion, or the Court may and ought to correct them *ex mero motu* as soon as it sees them. This is necessary and proper, to the end the record shall speak the truth. The object is to make the record show what the Court, in fact, resolved, intended, and in contemplation of law, did.

This in no wise conflicts with the case of *Ruffin* v. *Harrison,* 91 N. C., 398, cited by the Judge. The motion in that case was practically and in effect to obtain a *rehearing* of a matter that had been settled in the action by the Court. In it he said, "This, of course, does not imply that the Court has not power to correct the entry of its orders, judgments and decrees, so as to make them conform to the truth of what the Court did in granting them, or to set aside an irregular judgment in a proper case." The exercise of such power is essential, and it is warranted by the practice in all Courts. *Leak v. Covington,* 83 N. C., 144.

There is error. The judgment of the Judge must be reversed, with instructions to affirm that of the Clerk. To that end, let this
(474) opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Cook v. Moore, 100 N. C., 296; *Wynne v. Small,* 102 N. C., 136.

H. M. BROOKS et al. v. J. L. AUSTIN et al.

Husband and Wife—Marriage Contract—Partition—Tenants in Common.

1. An executory agreement made between persons competent to contract, in contemplation of marriage, wherein it is stipulated by the wife, that she shall take an equal share with the heirs at law and distributees of the husband "in lieu of dower and any other provision made and provided by law for widows of deceased persons," will be enforced by the Courts in the exercise of their equitable jurisdiction.

2. Tenants in common of an undivided interest in lands, are not entitled to have either actual partition, or a sale for partition of such interest, unless the owners of the remaining interests are made parties to the proceeding, the Statute—§1904 of *The Code*—requiring that the *whole*

tract shall be partitioned or sold—though shares may be allotted to some of the tenants, while a sale may be decreed as to others.

(*Cauley* v. *Lawson*, 58 N. C., 132; *Simpson* v. *Wallace*, 83 N. C., 477, cited and approved.)

SPECIAL PROCEEDINGS for partition, heard by *Shipp, Judge,* at Fall Term, 1885, of UNION Superior Court.

(The same case is reported in 94 N. C., 222.)

This was a petition for partition of land among the tenants in common and heirs at law of B. D. Austin, commenced before the Clerk of the Superior Court.

Catharine Helms, one of the defendants, was the widow of B. D. Austin, and is now the wife of A. M. Helms. Said Catharine and B. D. Austin entered into an antenuptial contract in October, (475) 1883, whereby it was agreed that she should become entitled to a child's part of his estate.

The petitioners ask that the land be sold and the proceeds divided according to their respective interests.

The answer of the defendants, raises the question of the right of said Catharine to dower, and in their answer, among other things, they allege that by virtue of said contract, she lost her right of dower and her right to a year's support, and is only entitled to share equally with the heirs at law of said B. D. Austin in the property on hand and owned by him at the time of his death.

The answer of A. M. Helms and wife Catharine, among other things, sets up a claim to dower, and asks that the same be laid off.

The antenuptial agreement set up in the pleadings is in these words:

"Know all men by these presents, that I, B. D. Austin, of Union county, and State aforesaid, of the first part, and Catharine Green, of the same county and State, of the second part, doth covenant and agree to the following contract, to-wit: Provided Catharine Green hereafter becomes to be the wife of B. D. Austin, I, B. D. Austin, doth agree for the kind love and affection I have for her, Catharine Green, to make her an equal and lawful heir, with all my other lawful heirs, of all the real and personal property I possess at the time of my death, in lieu and instead of dower or any other provision made and provided by law for widows of deceased husbands. I, Catharine Green, doth covenant and agree to take the distributive share with the other heirs of B. D. Austin, provided I hereafter become the wife of B. D. Austin, in place of dower or any provision made and provided by law for widows of deceased husbands. Signed and sealed in the presence of us, October 16th, 1884."

(476) The lands described in the petition consist of a tract whereon the intestate from whom they descend in his lifetime resided, reduced from its original dimensions by parcels advanced to children, to 123 acres, and of a three-tenth interest in a tract known as the "Dismuke Gold Mine Tract," containing about 30 acres.

The Clerk ruled that the *feme* defendant, Catharine, was bound by her contract, and could only take her one-twelfth part with the other heirs at law, of said land, and adjudged a sale thereof for partition. Upon an appeal to the Judge, this ruling was affirmed, and thence the cause is removed by Helms and wife to this Court.

Mr. D. A. Covington, for the plaintiffs.
Mr. I. T. Strayhorn, for the defendants Helms and wife.

SMITH, C. J., (after stating the facts). We find no just grounds of exception to the validity and efficacy of the agreement as to the estate and interest which the *feme* shall have in her husband's property after their contemplated marriage and his death. The contract relates to *his* property, leaving her, under the general law, to retain all her own. The marriage is the essential consideration of the agreement to be content with the share which would fall to a child, in the event of his intestacy.

The contract does not enable him to cut her off by executing a will which disposes of the estate to outside parties, but secures, in any event, to her that which would be the share of a child in the absence of any testamentary disposition. So it is understood by the heirs, and they open the door for her to enter and share with them the inherited lands.

Whatever may have been the action of a court of law in the enforcement of technical rules, a court of equity will enforce an executory agreement between parties about to enter the marriage relation and carry out its provisions. "In the court of equity," remarks Mr.
(477) Bishop, quoting from Bell on Husband and Wife, 326, "if, upon marriage, the husband, by agreement between him and the wife, she being adult, had made any provision for her which she accepted in lieu of dower, equity, acting upon the jurisdiction which it has at all times exercised of enforcing agreements between parties competent to enter into them, would have enforced the agreement as a bar to dower upon the footing of preventing a double satisfaction, namely, the enjoyment of the provision, and likewise of dower. 1 Bishop's Law of Married Women, §363. In *Cauley* v. *Lawson,* 58 N. C., 132, there was an antenuptial contract by which it was convenanted, on the death of the other, each was to resume his and her own property, as held at the

marriage, and take no interest in, nor set up any claim to anything belonging to the decedent. On a bill filed by the distributees and next-of-kin of the husband, against the surviving widow, who became administratrix, for an account of his estate, the claim was sustained, and MANLY, J., delivering the opinion, says: "The covenants extend to every claim of every sort, which the defendant can set up to the real or personal estate of her husband, as his widow. *She is precluded, therefore, as we think, in this Court, from dower, distributive share, or year's provision in her husband's estate.*"

Here the covenant is explicit, to accept a child's share in the real and personal estate of her husband, and he covenants that she shall have such in place of dower and a year's provisions; and we are clearly of the opinion that she must abide by this mutual agreement.

We have considered only the question presented in the record in determining the appeal. But to avoid any inference from silence, we advert to the fact that a three-tenths interest in the thirty acre tract is proposed to be sold also for division, the tenant or tenants of the other seven-tenths not being before the Court, nor could they rightfully be, since they have no property in common in the larger tract. *Simpson* v. *Wallace*, 83 N. C., 477. (478)

We have met with no case in which such an undivided interest has been the subject of partition and sale at the instance of those owning it, when the other tenants are not present in the action.

The statute requires actual partition among tenants in common of the whole tract, though shares may be united and apportioned to several, or a single share may be allotted to one, the residue of the land being still held in common by the other tenants, but however done, the partition must be of the whole. The sale as a mode of partition can only be resorted to when otherwise it would be to "the injury of some or all of the parties interested." *The Code*, §1904.

The actual divisibility of the land into parts as an inquiry to be made before an order of sale, can only be legally made when all the tenants are before the Court. Should this be practicable, and the three-tenths parts be converted into an estate in severalty, in the portion assigned to such owners, this separate land, divested of all other claims, might properly be included in the petition for partition and sale of the larger tract that belongs exclusively to the parties to the suit. Or, if a sale becomes necessary, the proceeds could be appropriated among the common owners, and petition be made without further action.

These suggestions are made for the consideration of parties, and more especially in view of the fact that the tenants, all of full age as the

petition alleges, and by their own united action, sell this undivided interest and divide the proceeds upon the basis of our ruling as to their several and respective rights.

There is no error.

No error. Affirmed.

Cited: Perkins v. Brinkley, 133 N. C., 88; *Luther v. Luther,* 157 N. C., 501; *Patillo v. Lytle,* 158 N. C., 95.

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(479)

D. M. MORRISON v. JOHN G. WATSON.

Appeal—Homestead—Judgment—Record—Verdict.

1. The Supreme Court examines the whole record transmitted to it upon appeal, and pronounces such judgment as shall appear to it ought to be rendered thereon. *The Code,* §957.
2. If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded.
3. A *general* verdict is a finding in favor of one of the parties to an action; a *special* verdict finds the facts but is not in favor of either party, until the Court declares the law arising thereon. *The Code,* §§408, 409 and 410.
4. If the defendant, in an action to recover land, sets up the defence that he is entitled to a homestead therein, such defence is embraced, and should be considered, under the issue raised as to the plaintiff's ownership and right to the possession of the land.

(*Mitchell* v. *Brown,* 88 N. C., 156; *Turrentine* v. *Railroad,* 92 N. C., 638; *Hilliard* v. *Outlaw,* 92 N. C., 266, cited and approved.)

This was a CIVIL ACTION, tried before *Boykin, Judge,* at October Term, 1886, of RICHMOND Superior Court.

The plaintiff alleged that he was the owner and entitled to the possession of four tracts of land described in his complaint, which the defendant wrongfully withholds, and to these averments the defendant opposed a simple denial. Three issues were submitted to the jury, to which another was added during the trial, and these, with the responses to each, were as follows:

1. Is the plaintiff the owner of and entitled to the immediate possession of the land described in the complaint? Answer: Yes.

2. Did the defendant, at the time of bringing this suit, unlawfully and wrongfully withhold the possession thereof? Answer: Yes.

3. What damage is the plaintiff entitled to recover? Answer: (480) One hundred and sixty-two dollars.

4. What was the value of the land sold by the sheriff under execution on June 9th, 1879? Answer: Eleven hundred dollars.

Thereupon, judgment was rendered that the plaintiff take nothing by his action, and that the defendant go without day and recover his costs. From this judgment the plaintiff appealed.

Messrs. J. D. Shaw and *Frank McNeill,* for the plaintiff.
Mr. Platt D. Walker, for the defendant.

SMITH, C. J., (after stating the facts). Such was the condition of the record when the transcript was first filed in this Court. On plaintiff's application a *certiorari* was awarded looking to a perfection of the record in the Court below, and a transmission of it when corrected, in order to an understanding of the matter intended to be reviewed. In answer to the writ, we have the amended judgment with the finding by the Judge who tried the cause, of the facts that occurred while it was in progress, not material to be set out in detail, which judgment, reciting the issues and jury findings, proceeds thus:

"And it being admitted by the plaintiff that the execution under which the land was sold on the 9th June, 1879, was issued upon a judgment recovered on a debt contracted prior to 1868, and that the amount of said execution debt, principal, interest and costs was about eighty dollars, and that at the time of such sale the homestead of the defendant had not been assigned to him in the said land, and that the defendant was then in the possession thereof, and it appearing from the verdict and the said admitted fact that the land was of sufficient value to constitute defendant a homestead as well as satisfy the said execution.

The defendant now moving for judgment upon the fourth issue (481) notwithstanding the verdict on the other issues:

It is ordered and adjudged by the Court, that the plaintiff take nothing by this action and that the defendant go hence without day, and recover his costs."

The return with this modification, in no way removes the difficulty intrinsic in the record in showing a judgment for the defendant, which, with the finding upon the fourth issue unexplained, should have been for the plaintiff. Even with the explanation, to say the least, the findings are in conflict, and leave us no other course to pursue but to set aside the verdict, and direct a *venire de novo,* as was done in *Mitchell* v. *Brown,* 88 N. C., 156; and in *Turrentine* v. *Railroad,* 92 N. C., 638.

The matter contained in the last issue, if the ruling be conceded to be right, was a defence available under the first issue as to title, and the separate finding as to value, would then have required a negative answer to that issue, and thus put an end to the cause. But it is impossible to sustain a judgment, which must in this Court be rendered "on inspection of the whole record," *The Code,* §957, and which is in direct conflict with the verdict. Nor has the course taken any sanction in the practice of rendering judgment *non obstante veredicto.*

It was pressed in argument, that the finding upon the last issue is *special,* and controls the *general* findings upon the others under §410 of *The Code.* But this is a misconstruction of the statute, which will be readily seen by recurring to sections 408 and 409 preceding, where general and special verdicts are defined and distinguished. A *general verdict* is one in which the finding is in favor of one of the parties to the action; a special verdict finds the facts, but is not for or against either party, and becomes such only when the Court declares the law arising on the facts. *Hilliard* v. *Outlaw,* 72 N. C., 266. As we have said, upon such repugnant findings, without giving the certainty (482) required to make the finding on the fourth issue a defence, there is no alternative but to direct the verdict to be set aside and award a *venire de novo.* And it is so adjudged.

Error. *Venire de novo.*

Cited: Porter v. R. R., 97 N. C., 71, 74; *McCanless v. Flinchum,* 98 N. C., 362, 366; *Morrison v. Watson,* 101 N. C., 339, 340; *S. v. Watkins, ibid.,* 704; *Allen v. Sallinger,* 105 N. C., 339; *Puffer v. Lucas,* 107 N. C., 325; *S. v. Corporation,* 111 N. C., 664; *McCaskill v. Currie,* 113 N. C., 316; *Roberts v. Roberts,* 122 N. C., 783; *Davis v. Lumber Co.,* 130 N. C., 177; *Stern v. Benbow,* 151 N. C., 463; *Frick Co. v. Shelton,* 201 N. C., 74.

J. A. HINES, Adm'r of M. W. HINES, v. J. M. HINES, Ex'r of JOSEPH HINES.

Devise—Legacy—Election—Executor.

The testator bequeathed to his son M, "four hundred dollars, to be paid him as follows: Upon the death of my wife, he shall recover forty dollars, and forty dollars annually thereafter, till the payments amount to four hundred dollars. The payments shall be made by my son J. and daughter E., each paying twenty dollars annually, and the property bequeathed

to them shall be chargeable with said payments." J. was appointed and qualified as executor. The property devised to E. was delivered to her, and that devised to J. was accepted by him. *Held*,

That the devise to E. and J. was of specific property, encumbered by the legacy to M., and upon the delivery to E. of her share, and the election of J. to take his, the executor was discharged of all liability in his fiduciary and representative character, and each became separately liable for a moiety of the legacy to be paid as directed.

(*Biddle* v. *Carraway*, 59 N. C., 95; *Bray* v. *Lamb*, 17 N. C., 372, distinguished, and *Phillips* v. *Humphrey*, 42 N. C., 206; cited and approved).

CIVIL ACTION, tried before *Boykin, Judge,* at February Term, 1886, of RICHMOND Superior Court.

Joseph M. Hines died in the year 1865, leaving a will, which was soon after admitted to probate, and therein appointing the defendant John W. Hines one of his executors, who alone accepted the trust, and entered upon the discharge of its obligations. The third item in the will is as follows: "I bequeath to my son, M. W. Hines, four hundred dollars, to be paid to him as follows: Upon the death (483) of my wife, he shall receive forty dollars, and forty dollars annually thereafter till the payments amount to four hundred dollars. The payments shall be made by said son John M. Hines, and daughter S. Elizabeth, each paying twenty dollars annually, and the property bequeathed to them shall be chargeable with said payment. I make the above bequest to my son M. W. Hines, and no more."

The legatee, M. W. Hines, on September 26th, 1867, died intestate, and letters of administration issued on his estate in May, 1883.

The testator's widow, Sarah C., died on or about October 12th, 1868.

The defendant, John M., the sole acting executor, as a legatee and devisee under the will, received property of the value of several thousand dollars which he still possesses and enjoys.

The legatee, S. Elizabeth, only received, under her father's will, "two beds and furniture, and one mule—all not exceeding in value the sum of one hundred dollars," which property is now worthless, and she herself insolvent.

The issues arising upon the pleadings were confined to the ascertaining how much of the annuity had been paid, and to the fixing of the date upon which the defence, under the statute of limitations, depends, and were not considered. There was judgment for the defendant, and the plaintiff appealed.

Mr. Frank McNeill, for the plaintiff.

Messrs. J. D. Shaw and *P. D. Walker,* for the defendant.

SMITH, C. J. (after stating the case). We think it clear upon the face of the complaint that no cause of action exists against the defendant in his representative character.

(484) The delivery over to the legatee S. Elizabeth, of the property given her in the will, and her acceptance of it, were on the terms and conditions specified, and imposed upon her a direct personal obligation to pay her moiety of the annuities, without regard to the value of the estate received.

In like manner, the election of the devisee and legatee, John M., to take the estate given him, is a personal assumption of liability, and an undertaking on his part to provide for the payment of the other moiety of the annuities. This was a discharge of his trust under that clause of the will, and he was not required to take any indemnity or security for these money payments before delivering to the legatee, or an election to hold as such himself, the property charged with them.

The testator does not direct the payment "out of his estate," so as to constitute a charge upon all of it, to be carried into effect in the administration by the executor; *Biddle* v. *Carraway,* 59 N. C., 95; following *Bray* v. *Lamb,* 17 N. C., 372; but he disposes of encumbered property, and affixes an inseparable condition to its acceptance, that the recipients shall pay their several parts of the legacy to his son, M. W. Hines.

The case falls directly within the ruling in *Phillips* v. *Humphrey,* 42 N. C., 206, in which it is held that a testamentary gift of a large amount of real and personal estate to five children, subject to the payment of one hundred dollars by each to Julianna Littleton on her arrival at age, imposed the obligation to see to this payment, not upon the executor, but upon the children.

The defendant who is sued in his representative capacity, is not liable as such, for his trust was discharged upon the change of proprietary right, and the action could be maintainable against him individually, for the recovery of the one half part. The action in its present form is misconceived, as it is against the defendant, as executor,

(485) and seeks to make him responsible for the whole legacy and not his share of it.

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

No error. Affirmed.

Cited: Rice v. Rice, 115 N. C., 44.

A. T. & J. C. OLIVE v. H. C. OLIVE.

Discretion—Re-opening Evidence—Witness—Tort—Contract—Conversion.

1. The Court may in its discretion, after the close of the testimony, permit the case to be re-opened and further evidence to be introduced; and the exercise of such discretion is not reviewable upon appeal.
2. It is not error to refuse to allow a party, on the cross-examination of a witness, to call out new and substantive matters, when the Court announces that the party desiring such testimony, may recall the witness and examine him at a subsequent and more appropriate stage of the trial.
3. If a party to an action introduce and examine his adversary as a witness, the credibility of the latter is not open to attack, and it makes no difference in that respect by which side he may be subsequently recalled.
4. The rule that when one person takes and sells the personal property of another, the latter may waive the tort and recover the money, embraces the case where the person sued received the money in consequence of the action of a Court whose jurisdiction and process he invoked for that purpose.

(*Pain* v. *Pain*, 80 N. C., 322; *State* v. *Lee*, Ibid., 483; *State* v. *King*, 84 N. C., 737; *Wall* v. *Williams*, 91 N. C., 477; *Jones* v. *Baird*, 52 N. C., 152; cited and approved.)

CIVIL ACTION tried before *Clark, Judge,* at February Civil Term, 1886, of WAKE Superior Court.

The defendant appealed.

The facts are stated in the opinion.

Mr. A. M. Lewis, for the plaintiff.

Mr. D. G. Fowle, for the defendant.

SMITH, C. J. This action was commenced in a justice's court, (486) (and removed by defendant's appeal to the Superior Court), to recover the sum of $\$148\frac{85}{100}$, claimed to be due from the defendant.

The single issue submitted to the jury was: "Is the defendant indebted to the plaintiff; and if so, in what amount?"

The answer returned was: One hundred dollars, with interest from 22d November, 1881.

Judgment being rendered against the defendant he appealed.

To support their contention, the plaintiffs read in evidence a mortgage in the usual form of crop liens, executed by one E. Ferrall, conveying the crops to be raised on the lands "known as Kendrick John-

son's land, now owned by Pennina Mills," and proved that they furnished provisions to him to the amount of $\$150\frac{15}{100}$ under the deed, and that in the Fall of the same year, they took into their possession, of the crops raised by Ferrall, 3,248 pounds of seed cotton. This cotton was subsequently seized under an attachment issued at defendant's instance, and sold, and the proceeds paid over to him. The plaintiffs' mortgage was dated and registered on the 17th day of January, 1881, while Rand & Barbee had a lien upon the entire crops of an earlier date, and the defendant said he claimed under a lien created by Pennina Mills. The plaintiffs here rested, and defendant asked the Court to direct the jury to render a negative response to the issue. At the same time, the plaintiffs asked permission to re-open their case for the introduction of further testimony. This the Court allowed, and denied the defendant's motion. To this ruling the first exception is taken.

I. The exception is untenable, and the action of the Court was but an exercise of that discretion reposed in him by law, in order to a fair trial and the attainment of the ends of administering justice. *Pain* v. *Pain,* 80 N. C., 322.

(487) The examination of witnesses may be allowed in the discretion of the presiding Judge at any stage of the trial in furtherance of justice. *State* v. *Lee,* 80 N. C., 483; *State* v. *King,* 84 N. C., 737.

The plaintiffs thereupon put the defendant on the stand, and proved by him that he had received $100 of the proceeds of sale of that cotton, besides $25 from Rand & Barbee, the excess received by them over the amount due on their mortgage. On his cross-examination his counsel offered in evidence a mortgage dated March 24th, 1881, made by Pennina Mills and said Ferrall to him, and stated that he proposed to show that it covered the crops grown on the same land and now claimed by the plaintiffs.

The Court refused to receive the evidence at this stage of the case, as the plaintiffs had not closed, but that it would be admitted, and the witness recalled for that purpose, when the defendant put in his proofs.

II. The defendant's second exception is to this action of the Court. We find no error in the refusal to allow this substantive evidence in defence, to be interjected in the course of the examination of the plaintiffs' witnesses, and no just right was denied to him.

In practice, it is common to prove handwriting, and thus the execution of an instrument in writing by a subscribing witness, or witness acquainted with the handwriting, upon cross-examination, to the end that it may be read to the jury, or proved, at the proper time for its introduction as affirmative evidence of the party. And it is not in evidence until read or accepted, though by such preliminary examination put in condition to be read. But this is rather a convenience than

right, since a controversy may spring up as to the authenticity of the instrument, and at an inopportune time. There is no error in the course pursued by the Court, and no just cause of complaint afforded the appellant.

III. The defendant then offered the record of a trial of an (488) action brought before a justice of the peace by himself, against said Ferrall and Mills, in which it was adjudged that the $100 now claimed, be paid over to the defendant, and it was so received by him. The evidence was not received, as we understand, because offered before the plaintiffs' testimony was concluded, as was the other. But both the mortgage and record of the trial were subsequently received and heard by the jury, so that no detriment could come to the defendant from the ruling of the Court, had it been, as we hold it was not, erroneous to exclude it when an opportunity offered.

IV. The next exception is to the refusal of the Court to allow the defendant's counsel to recall him and examine him as the plaintiffs' witness. We do not feel the force and pertinency of the proposition.

The defendant had been made a witness for the plaintiffs, and his credibility was not open to an attack of those introducing him. His testimony would come before the jury with the same claims to their confidence, whether called in the second examination the witness of one or the other party. It does not appear he was recalled, and if he was, that any exigency occurred in which the discretion became important. As we cannot see what harm could come from calling the defendant his own or the plaintiffs' witness, the exception is overruled.

V. The evidence in defence consisted in—

1. A mortgage made by Ferrall to Rand & Barbee on October 15th, 1880, covering the same crops on which $25 was advanced after October 17th, 1881, the mortgage being for advances to the amount of $400 to be made.

2. A mortgage on same crops made by Ferrall and Mills to himself, registered on March 24th, 1881, to secure advances to the amount of $100.

3. The proceedings before the justice of the peace to enforce the lien under the last mortgage, a judgment rendered for that sum, the seizure of the crops under process, its sale, and the payment on (489) November 22, 1881, of $100 to the defendant in satisfaction of his claim.

4. Proceedings in a justice's court instituted by one Taylor Ellis, to enforce a laborer's lien on said crops on October 17, 1881, under a contract made on the day of renting, previous in time to the plaintiffs' lien, to satisfy which only part of the crops was required, and this debt was paid out of other moneys than that received by the defendant.

The defendant further offered testimony to show that at the trial of the defendant's action under his mortgage, judgment was consented to by Pennina Mills, and that the plaintiffs were then present and preferred their present claim, which was disallowed. There was other evidence tending to show that the land was rented by Ferrall, and the crop grown thereon was raised by him, and some evidence tending to prove the renting to other persons than Ferrall, to-wit, the said Pennina Mills.

The defendant asked the Court, among other things, to charge:

"1. That if the jury believed from the evidence that Pennina Mills rented the land, or that her son rented it for her, the plaintiffs cannot recover for the $100 received under the judgment of the justice of the peace. This instruction the Court gave.

"2. That if the jury believed the evidence, the plaintiffs are not entitled to recover. This instruction was not given by the Court.

"3. That if the $100 was received from the justice of the peace, the defendant did not wrongfully receive it, and as no express contract with plaintiffs was proved, the defendant is entitled to a verdict. This was not given by the Court.

"4. That it being in proof that the mortgage to Rand & Barbee Bros. upon the same crop was for $400, and there being no proof that the same was paid, the plaintiffs are not entitled to recover. This (490) was refused, there being evidence tending to show the contrary.

"5. That if the jury believe that the plaintiffs were present before the justice in 1884, and presented their lien for his consideration, and the justice considered their claim and decided against them, and the plaintiffs did not at the time further prosecute their demand, the plaintiffs cannot recover in this action. This was given by the Court.

"6. That if they believed from the evidence that Pennina Mills was the landlady of E. Ferrall, and executed the mortgage to H. C. Olive, the plaintiffs cannot recover. This was given by the Court."

Of the six requested instructions, those numbered 1, 5 and 6 were given, and those numbered 2, 3 and 4 were refused, and the last three, reversing their order, we proceed to consider.

(4). There was evidence tending to show that the mortgage to Rand & Barbee was satisfied, and the fund received by the defendant was not required therefor. The defendant showed by a witness that $25 was advanced by these mortgagees after October 17th, 1881, and by his own testimony, that he had received besides the $100 under his judgment, also $25 more from Rand & Barbee, the overplus, "after payment of the sum due under their mortgage." So this precedent lien was put out of the way.

(3 and 2). These embody in substance but a single proposition, and that is, that the money sued for was paid over to the defendant by the order of the justice, and this repels any implied promise to warrant the present action, which, unless there be a contract, is a tort not within his cognizance.

Now it is a well settled principle of law, that when the personal property of another is tortiously taken and sold, the owner may waive the wrong, and affirming the sale, recover the moneys received therefor as received to his use. *Wall* v. *Williams,* 91 N. C., 477, and cases therein cited; *Jones* v. *Baird,* 52 N. C., 152. The defendant, not controverting the rule in the case of *tort-feazors* seizing and (491) selling the goods of the owner and receiving the price, insists that it does not extend to a seizure and sale by an officer acting under process of a Court competent to issue it, and where money has been paid over to a party claiming it. We shall not undertake to say that the action would lie directly against the officer, when the money has passed out of his hands, for money received to the plaintiff's use under an implied contract, but we think it can be maintained against the party who invokes the agency of the Court and its officers in doing the wrong to the true owner, and who receives the proceeds of the sale. The officer is but his instrument, and he cannot exempt himself from a rule applicable to other wrongdoers who act without judicial aid. We are unable to distinguish this case from the case of others who take, and by sale convert property not belonging to them, to their own use. In both cases, the owner has an election to sue for the trespass, or waiving it and ratifying the sale, to demand and recover the moneys paid him by the vendee, in law to his use.

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

No error. Affirmed.

Cited: Sutton v. Walters, 118 N. C., 500; *S. v. Groves,* 119 N. C., 823; *Worth v. Ferguson,* 122 N. C., 383; *Andrews v. Jones, ibid.,* 667; *Weeks v. McPhail,* 128 N. C., 134; *Sain v. Baker, ibid.,* 257; *In re Abee,* 146 N. C., 274; *S. v. Fogleman,* 164 N. C., 461; *McDonald v. McLendon,* 173 N. C., 174; *S. v. Roberts,* 188 N. C., 462.

WILLIAM CAMPBELL v. B. F. WHITE.

Constitution—Homestead.

1. The constitutional provision for a Homestead, and the Statutes enacted in pursuance thereof, require a specific allotment of the Homestead in severalty, and does not permit any community of interest between the homesteader and the purchaser of the excess.
2. *Therefore*, where it was found as a fact, that the land and buildings thereon in which the homestead was claimed, were of the value of $1,200, but were incapable of division, it was erroneous to direct that the interest therein, proportionate to the excess, should be sold and applied to the payment of the claims of the execution creditors.
3. Although the land belonging to and claimed by the judgment debtor is indivisible, he is not entitled to have the whole of it allotted to him as a homestead, if it exceeds in value one thousand dollars.
4. The propriety of necessary legislation to meet the difficulty is suggested.

(492) Issues raised upon the ALLOTMENT AND APPRAISEMENT OF HOMESTEAD, tried before *Clark, Judge,* at October Term, 1886, of NEW HANOVER Superior Court.

The facts are stated in the opinion.

Mr. Thomas W. Strange, for the plaintiff.
Mr. John D. Bellamy, for the defendant.

SMITH, C. J. The facts upon which this appeal, taken by the plaintiff, rests, are the same as those presented in the case disposed of in reference to the personal property of the debtor, reported in this volume, differing only in the fact that this relates to the homestead or land exemption. The creditor plaintiff, as we understand the very loose and imperfect record sent up, being dissatisfied with the valuation of the appraisers, and the ruling of the clerk, removed the same by appeal to the Superior Court, and from the judgment rendered in that Court the defendant appeals to this Court.

The case stated by the presiding Judge is as follows:

"This action having been brought to trial upon appeal from the Clerk of the Superior Court, and from the valuation made by the three assessors appointed to lay off the homestead and personal property exemption of defendant, and a jury having been impaneled to try the issues of fact as to the valuation of the real estate, and the jury having found said issues in favor of the plaintiff, appraising the value of (493) the real estate owned by the defendant at $1,200, and it appear-

ing by agreement of counsel that the said real estate consists of property which is indivisible, and the parties in open court waiving the appointment of commissioners as provided by chapter 347, Acts 1885, and agreeing that said premises are indivisible, so that the excess, as found by the jury, cannot be set off by metes and bounds, or by alloting a part of the house, the premises being a lot covered by a four-room house; and it being found by the Court as a fact from such admissions of parties that the one-sixth of the premises in excess of the $1,000 is indivisible, and that the commissioners, if appointed, would of necessity so report; it is now, on motion of plaintiff's counsel, adjudged, that the personal property collected by the receiver appointed in this cause shall be held by the Court subject to the application of the defendant to have so much thereof laid off to him as a personal property exemption as will make his exemption up to $500; and that the surplus thereof shall be paid by said receiver to the plaintiff, to be applied to the satisfaction of plaintiff's execution.

And it is further ordered and adjudged, that the sheriff of New Hanover county shall levy upon and sell at public auction one-sixth undivided interest in and to the real estate of defendant, and from the proceeds thereof to satisfy so much of the execution issued in this action as shall remain unsatisfied, together with the costs of this action."

From so much of this judgment as directs the sale of an undivided one-sixth part of said land, and the application of the proceeds of sale to the plaintiff's execution, the defendant appeals to this Court.

The constitution exempts from sale, and protects for the use of his debtor and his family "any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and *not exceeding* the value of one thousand dollars," and the statute requires its assignment by metes and bounds according to the applicant's direction, not to exceed one thousand dollars (494) in value. *The Code,* §571.

This statutory requirement contemplates the allotment of a specific and defined part of the land in severalty, involving no community of interest between the ownership of that constituting the excess, which at a sale the purchaser may acquire. A sale of the entirety with a view to an apportionment of the funds would defeat the primary object of the law, which seeks to reserve a home and shelter for the insolvent debtor and his family. The method pursued by the Judge to solve the perplexing problem as to the respective rights of creditor and debtor in a case like this, has no warrant in the provisions of the law, and the order must be reversed as erroneous. This seems so plain that we do not follow up and consider the anomalous relations which might be created between the tenants of the respective shares, and their rights to

enjoy the common property—results manifestly repugnant to the sole and full use of the homestead by those for whom it is intended.

This view disposes of the question of the ruling below and the subject matter of the appeal. But it is not improper for us to say that we do not see why a portion of the house, containing rooms of sufficient value, may not be set apart, as in an allotment of dower. There are inconveniences readily anticipated in such a subdivision, but they are unavoidable in giving effect to the law and preserving the rights of both debtor and creditor. It gives the former all the constitution allows—it exposes all beyond to the creditor's demand.

A case was called to our attention, decided in a sister State, where the Court held that if the land was indivisible, the exemption should be allowed of the whole lot, though of value in excess of that fixed and limited by law, thus ignoring the creditor's rights altogether. We are not disposed to follow this ruling, for it would be just as reasonable to deny any homestead because none could be assigned of the (495) value specified, and this would be to ignore the provisions made for the debtor. The right to the homestead and the right to subject the excess of the land to the payment of debts, are equally secured, and both must be recognized in making an apportionment.

The course suggested would seem alone to be open, in consistency with the statute, until some legislation shall solve the problem, which the constitution will allow.

There is error.

Error. Reversed.

Cited: Oakley v. Van Noppen, 96 N. C., 248; *Caudle v. Caudle,* 176 N. C., 538.

THE PEOPLE'S NATIONAL BANK OF FAYETTEVILLE v. THOS. S. LUTTERLOH et al.

Negotiable Instrument—Draft—Presentation—Protest—Evidence.

1. A draft payable at no particular place in a city or town, must be presented at the maker's residence or place of business, if he has such, and if he has not, then the presence of the instrument in the place is a sufficient presentation.

2. Protest of an inland bill or domestic draft, operating entirely within the State, is not necessary, and presentation and notice of non-payment are sufficient to charge the drawee and endorsers.

3. Under the provisions of *The Code*, §49, a protest which sets out that a demand was made, and notice given, and the manner in which it was done, is *prima facie* evidence, even in the case of a domestic draft on which no protest was necessary, of the facts thus stated, but this may be rebutted by other evidence.

4. Where a draft was drawn on a party having a place of business in a town, but was not made payable at any particular place, and the holder protested it and notified the drawer without having presented it to the acceptor, who had funds in his hands of the drawer sufficient to have paid the draft; *It was held*, that the drawer was discharged from liability by the failure of the holder to present the draft to the acceptor.

(*Wittkowski* v. *Smith*, 84 N. C., 671; *Brown* v. *Teague*, 52 N. C., 573; cited and approved).

CIVIL ACTION, tried before *Boykin, Judge,* and a jury, at May (496) Term, 1886, of CUMBERLAND Superior Court.

This action is against T. J. Jones, the drawee and acceptor, and the drawer of a check or draft in favor of B. & T. C. Fuller, and by them endorsed to the plaintiff, which is in these words:

"$720.00. FAYETTEVILLE, N. C.,

January 2nd, 1879.

Thirty days after date, pay to the order of Messrs. B. & T. C. Fuller, seven hundred and twenty dollars, value received, and charge the same to account of

T. S. LUTTERLOH.

To MR. T. J. JONES."

The draft was presented to the drawee and accepted by him, by writing his name across its face, on the same day.

The complaint, among other allegations necessary to constitute a cause of action against the defendant, alleges that the draft was presented to the acceptor Jones, on February 4th, 1879, and payment demanded, and payment not being made, due notice of the default was given to the drawee Lutterloh; and that the latter had no funds in the hands of said Jones to meet the draft. No answer was put in by the defendant Jones, and judgment by default was entered against him.

The defendant Lutterloh answered and denied the allegations contained in the 5th, 6th and 9th articles of the complaint, which allege a presentation for payment and giving notice of non-payment to the defendant, and that there were not funds in the drawee's hands provided by the defendant to meet the demand.

The issues passed on by the jury were as follows:

(497) 1. Was the draft sued on presented to Thomas J. Jones, acceptor, for payment on the 4th day of February, 1879? The jury answer, No.

2. Did the defendant, Thomas S. Lutterloh, have notice served on him of the non-payment by the said Jones of said draft? Answer: Yes.

3. Did the defendant, at the time of drawing said draft on said Jones, have funds or effects in his hands sufficient to pay the draft, and reasonably expect that it would be paid by him? Answer: Yes.

The evidence offered by the plaintiff to sustain the affirmative of the inquiry made in the first issue, was a notice of protest, with a copy of the draft annexed in these words:

"On this, the 4th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, at the request of the cashier of the People's National Bank, the holder, I, Charles T. McGary, notary public, duly commissioned and sworn, residing in the town of Fayetteville, State aforesaid, do hereby certify that the original note, which is hereunto attached, was duly presented at The People's National Bank, and payment thereof was then and there demanded, which was refused. Whereupon I, the said notary, at the request aforesaid, have protested, and by these presents do publicly and solemnly protest as well against the maker and endorsers of said note, as against all others whom it doth or may concern, for exchange, re-exchange, and all cost, damages and interest already incurred, or to be hereafter incurred for want of payment of the same. On the 4th day of February aforesaid, I notified the endorsers of the said note of its non-payment, addressed to T. S. Lutterloh, B. & T. C. Fuller.

"In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year above written."

There was evidence before the jury, that the drawee had, at the time of the maturity of the draft, both a residence and place of business in the town of Fayetteville; and from the reproduced testimony of

(498) the notary, now deceased, given on a former trial, that he did not see Jones when he made the protest, and that it was done at the corner (counter doubtless intended) of the bank. The Court charged the jury that the certificate of the notary made out a *prima facie* case for the plaintiff, but that the same might be rebutted by other proof, and in that connection they might consider the fact of the defendant, Jones, having both a residence and place of business in Fayetteville, as tending to rebut the *prima facie* case and disprove the presentment to Jones of the draft. His Honor further charged the jury, that if they believed the defendant, Jones, had a place of business and also a residence, then the plaintiff must show that the presentment

was made upon the defendant, Jones, at one or the other places before the draft could be protested for non-payment; and further, that as the draft in controversy was dated at Fayetteville and payable generally, the plaintiff must show that the same was presented and payment asked for at the place of business of the acceptor, if he has one; and if he has no place of business, then at his place of residence.

And if he has neither place of business nor residence, then if the holder of the draft had it at the place where it is generally made payable, on the day of payment, it is sufficient to constitute a presentment and demand.

Upon the verdict, both the plaintiff and defendant moved for judgment, the plaintiff insisting that notice to Lutterloh of Jones' default was all he was entitled to, especially as he had funds in his hands, and reasonably expected him, Jones, to pay the draft, and as the jury, by their verdict, say he had notice, and that, too, on the very day of the maturity of the draft, he had ample opportunity to protect himself, which is all he was entitled to, and he is liable to plaintiff in this action.

His Honor refused to give judgment for the plaintiff, and gave judgment for the defendant. There was a rule for new trial, and errors alleged in his Honor's charge as given, and for his refusal (499) to give judgment for the plaintiff upon the verdict of the jury, and for errors in giving judgment for the defendant upon the verdict. Rule discharged. Judgment, and appeal by the plaintiff.

Mr. R. T. Gray, for the plaintiff.
Mr. W. A. Guthrie, for the defendant.

SMITH, C. J., (after stating the facts). We think the law was correctly laid down by the Court, and the appellant has no just grounds of complaint. The ruling is in accord with that made by this Court in *Wittkowski* v. *Smith,* 84 N. C., 671, in its approving quotation from 1 Dan. Neg. Ins., §640, that a draft payable at no definite place in a city or town, must be presented at the maker's residence or place of business, if he has such, at its maturity, and if he has none, then the presence of the instrument in the place is a sufficient presentation.

While protest of a domestic draft or inland bill, operating alone within the limits of the State, under the commercial law, is not required, and presentation and notice of non-payment are sufficient to charge the drawee and endorsers, we have a statutory provision, *The Code,* §49, declaring that a protest, wherein it is set out that demand was made, in cases where demand is necessary, and notice given, and

the manner in which it was done, shall, as in case of foreign bills, be *prima facie* evidence of the fact thus stated.

But this is open to disproof, and here it is shown upon the notary's own testimony that he did not see the drawee on the occasion, and of course could make no demand on him; and that the protest was at the counter of the bank.

We think that notice of the draft's not having been paid, when no demand had been made on the party primarily liable, and who had funds in his hands provided by the drawee to take up the draft (500) at its maturity, of which his acceptance would seem to be a full acknowledgment, is not sufficient to charge the drawee, and convert his contingent into an absolute and unconditional liability. *Brown* v. *Teague,* 52 N. C., 573; and numerous cases cited in 2 U. S. Dig., Title Bills and Notes, §2003.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Adrian v. McCaskill, 103 N. C., 188; *Bank v. Bradley,* 117 N. C., 530.

A. S. HERREN v. A. W. RICH.

Specific Performance—Evidence—Parol to Vary Sealed Instrument.

1. The specific performance of the vendor's agreement to convey land is not a strict right to be enforced at the will of the vendee, but it rests in the sound discretion of the Judge. This is not an arbitrary discretion, but is to be governed by the rules laid down by the Courts of Equity to grant or withhold the relief, as in the particular case may seem equitable and just.

2. In an action for the specific performance of a contract, although the contract is under seal, parol evidence is admissible to show any good reason why the equitable relief demanded should be withheld.

(*Prater* v. *Miller,* 10 N. C., 628; *Falls* v. *Carpenter,* 21 N. C., 237; *Faw* v. *Whittington,* 72 N. C., 321; cited and approved.)

CIVIL ACTION, tried before *Avery, Judge,* and a jury, at Fall Term, 1886, of HAYWOOD Superior Court.

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

The facts appear in the opinion.

Mr. John Devereux, Jr., for the plaintiff.
Mr. George A. Shuford, for the defendant.

SMITH, C. J. The plaintiff's action is to enforce the specific (501) performance of the following sealed contract:

"I have sold to A. L. Herren the lot adjoining his, in the town of Waynesville, on the west, lying between the lot whereon the said A. L. Herren now lives and Academy street, to run with the lines of the lot whereon A. L. Herren lives, and to be of the same width of said A. L. Herren's lot, to Academy street, for the sum of $300, $100 to be paid by the first day of January next, and the remaining $200 to be paid in one and two years, with interest from date. I bind myself and my heirs to the fulfillment of this obligation, and this obligation on the part of A. L. Herren is void on his failure to comply with his part of it."

The plaintiff alleges that he has paid a great portion of the purchase money, and has tendered and is still ready to pay the residue, upon the defendant's conveying the title to the land according to his undertaking in said bond.

The defendant in his answer, not denying the contract, but in opposition to its specific execution, sets up the following facts: averring that $100 only of the purchase money had been paid, when the parties entered into a parol agreement to rescind the contract, the plaintiff returning the money received, and the defendant surrendering his rights under the title bond; that the defendant afterwards procured and offered to return the portion of the purchase money he had received, whereupon the plaintiff refused to accept it, giving as his reason for refusing, that he had changed his mind, but he did not pay or propose to pay what was still due; nor has he ever so proposed before bringing this suit; that the lot has been all the time in possession of the defendant; and that since the making the rescinding arrangement, the lot has greatly increased in value, during which the plaintiff has remained inactive, awaiting results of which he now seeks to take advantage, by repudiating the last, and falling back upon the original contract.

The plaintiff's replication controverts the allegations in (502) defence.

The only issues passed on by the jury are as to the execution of the title bond—the part of the purchase money paid by the defendant—when paid—and the period during which the defendant has held possession. The Court deemed the defence set up under the subsequent parol contract of rescission and the increased value of the land, inadmissible, and hence as we understand, no issue involving those facts was sent to the jury.

Without passing upon the force of the several other exceptions, we are of opinion that these matters were proper for the consideration of the Court in determining whether the plaintiff, under the circumstances, was entitled to relief in this form.

The specific enforcement of the vendor's agreement to convey land, is not a strict right to be asserted at the will of the vendee. It rests in the sound discretion of the Judge, a discretion not arbitrary, but governed by rules to be found in adjudged cases, to grant or withhold the remedy as in the case may be just and equitable.

"This Court is not obliged," it is said in *Prater* v. *Miller,* 10 N. C., 628 (634), "to decree a specific performance, although damages might be recovered at law; but will judge from all the circumstances, whether it is such an agreement as ought to be carried into effect."

The principle that forbids the modification by parol of the provisions of a sealed instrument, and upon which we suppose the proffered testimony of a recission was refused to be heard, has no application to a case like the present, for any good and sufficient reason may be shown why the invoked equitable assistance should not be given, and for this purpose parol evidence is admissible for the resisting party. "Thus, for instance," in the words of Dr. Story, "courts of equity will allow the defendant to show that by fraud, accident or mistake, the (503) thing bought is different from what he intended; or that material terms have been omitted in the written agreement; or that there *has been a variation of it by parol; or that there has been a parol discharge of a written contract.*" 2 Story Eq., Jur. 770; with numerous references in support of the text in a note.

In *Falls* v. *Carpenter,* 21 N. C., 237, where the subject both by counsel and by the Court is most carefully and exhaustively considered, RUFFIN, C. J., referring to one of the defences, (page 272), uses this language: "The first objection on the part of the defendant would be fatal if founded in fact. It is that the contract was expressly rescinded by a subsequent parol agreement," of which, he adds, "there was no evidence in the case."

In *Faw* v. *Whittington,* 72 N. C., 321, BYNUM, J., for the Court, referring to the ruling in the case just cited says: "Such a renunciation, however, would seem to operate, not as passing an estate or interest in the land, which cannot be done strictly under the act without writing, but to operate as an equitable estoppel on the vendee to assert a claim to specific performance, when his conduct has misled the vendor intentionally. Assuming the law to be that the vendor can abandon, by matter *in pais,* his contract of purchase, it is clear that the acts and conduct, constituting such abandonment, must be positive, unequivocal and inconsistent with the contract."

The testimony offered in our case was to show an express and absolute parol agreement to arrest the contract of sale, and restore the purchase money paid by the defendant to him, and the jury find the plaintiff's resumption of possession on April 1, 1884, nearly twenty months after the last installment of the purchase money fell due, and more than sixteen months before the commencement of the suit; 3 Pom. Eq. Jur., §405.

Moreover, the answer states that the defendant took no written obligation from the plaintiff to pay for the land, the evidence of which rests in parol, or is found in the defendant's bond. (504)

Nor do we advert to the effect of the vague words of the concluding clause of the bond, which, if susceptible of any reasonable interpretation, would seem to require a strict observance on the part of the plaintiff of his obligation of punctual payment. It cannot mean that the defendant's contract is to become void by his non-compliance with its provisions, and if it has any operation, must mean a release of the defendant upon the plaintiff's non-compliance with his own undertakings.

Without deciding the point, for reasons already given, there must be a new trial for the error specified.

To this end let this be certified.

Error. Reversed.

Cited: Love v. Welch, 97 N. C., 206; *Ramsey v. Gheen,* 99 N. C., 218; *Burnap v. Sidberry,* 108 N. C., 309; *Leach v. Johnson,* 114 N. C., 89; *Gorrell v. Alspaugh,* 120 N. C., 368; *Jones v. Rhea,* 122 N. C., 726; *Tillery v. Land,* 136 N. C., 549; *Thompson v. Clapp,* 180 N. C., 248.

HARPER WILLIAMS v. ANARCHY JONES.

Registration—Mortgage—Widow's Year's Support—Bankruptcy.

1. Mortgages are good *inter partes* without registration.
2. A mortgage both of land and personal property may be registered after the death of the mortgagor.
3. The registration of a mortgage after a commission in bankruptcy, is good against the assignee.
4. A widow is entitled to her year's allowance out of the personal estate of her husband, in preference to all general creditors, and also, by virtue

of *The Code*, §2116, in preference to the special lien acquired by an execution bearing *teste* prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner in which the husband held it.

5. Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support; *It was held*, that the widow took the property subject to the mortgage lien.

(*Leggett* v. *Bullock*, 44 N. C., 283, cited and approved; *Grant* v. *Hughes*, 82 N. C., 216, commented on.)

(505) This was a CIVIL ACTION, tried at February Term, 1886, of the Superior Court of DUPLIN county, before *Gilmer, Judge.*

A jury trial was waived, and the Court found the following facts: "On March 30th, 1878, one Squire Jones, executed to the plaintiff a chattel mortgage, conveying a certain horse, the property in dispute. On the ..... day of ....., 188 , Squire Jones died intestate, and the defendant is his widow. That after the death of Squire Jones, to-wit: on the 27th day of September, 1883, said property was duly assigned to the defendant as the widow of Jones, as a part of her year's allowance. That the mortgage executed by Squire Jones to the plaintiff, was not registered until December 11th, 1883, and is still unsatisfied. That the plaintiff took possession of said property on the ..... day of December, 1883, and has disposed of the same. That said property was worth sixty dollars at the time it was taken into possession by the plaintiff."

Upon these facts his Honor gave judgment in favor of the defendant, to which plaintiff excepted and appealed.

Mr. A. W. Haywood, for the plaintiff.
Mr. W. R. Allen, for the defendant.

ASHE, J., (after stating the facts). By §1254 of *The Code,* it is declared that "no deed of trust or mortgage for real or personal estate, shall be valid at law to pass any property as against creditors and purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage," &c.

Prior to the passage of this act, a mortgage was valid even against creditors and purchasers, and it was required to be registered
(506) for their benefit. But as between the parties, their rights were undisturbed by the act, and they are left as they existed before its passage.

There is no principle better settled, than that as between the parties, a mortgage is valid without registration; *Leggett* v. *Bullock,* 44 N. C., 283; and it is so laid down in Jones on Mortgages. "Of course," says that author, "the recording of a mortgage is not necessary as against the mortgagor, and even in those States where it is provided by statute that a mortgage shall be recorded within a specified time, it is still valid between the parties until registered," §107, and it is maintained by the same author, in §545, that a mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it. His general creditors cannot, for that reason, claim that the mortgage was inoperative as against them. Such a mortgage is good and binding upon the heir in like manner as upon the mortgagor, and the same principle applies to chattel mortgages. Neither the heir in the one case, nor the administrator in the other, is a third person, but represents the intestate, and has no better title than he had. Jones on Chattel Mortgages, §239. The same principle applies to assignees in bankruptcy. Though they are held to be trustees for the creditors, yet they stand in the place of the bankrupt, and they can take in no better manner than he could. They take subject to whatever equity the bankrupt was liable to.

The same principle must apply to a widow claiming her "year's allowance." It is allotted to her from the crops, stock, and provisions of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value, and if there is a deficiency it shall be made up by the personal representative from the personal estate of the deceased, *The Code,* §2117, and "if there be no crop, &c., on hand, or a deficiency, the commissioners may allot to the widow any article of personal property of the deceased." *The Code,* §2122. Her allowance in any way is to be allotted out of personal estate of the deceased. She does not take under the administrator, for she (507) may have her "year's support" assigned to her before any administration on her husband's estate. *The Code,* §2127. She takes the allowance, under and by virtue of the statute, out of the personal estate of her husband. The statute, it is true, gives her a right to her "year's support," against all general creditors, but no better title to the property assigned her than her husband had. She takes it precisely in same plight and manner in which he held it—subject to all the liens and equities that he had attached to it in his hands, except to the lien of a judgment or an execution, bearing *teste* before the death of her husband, *The Code,* §2116. Prior to that act, the right of a widow to her "year's allowance" was subordinate to the lien of a judgment and an execution bearing *teste* prior to the death of her husband, *Grant* v. *Hughes,* 82 N. C., 216. But the act extended to no other liens or equities to which

the property of the husband was subject in his lifetime. The act made these liens a special exception, and *"exceptio probat regulam."*

Our opinion is, there was error, and the judgment of the Superior Court is reversed.

This must be certified to the Superior Court of Duplin county, that a *venire de novo* may be awarded.

Error. Reversed.

Cited: Denton v. Tyson, 118 N. C., 544; *Hinkle v. Greene,* 125 N. C., 490; *McBrayer v. Harrill,* 152 N. C., 713; *Broadnax v. Broadnax,* 160 N. C., 433; *Motor Co. v. Jackson,* 184 N. C., 331.

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(508)

ELI GRAYBEAL and wife EMILA v. A. C. DAVIS et al.

Action to Recover Land—Deed—Estoppel—Evidence—Presumption—Title.

1. In an action to recover land the plaintiff must recover upon the strength of his own title; and it is incumbent on him to show a grant from the State, or possession sufficiently long to presume a grant, or that the defendant is estopped to deny his title.

2. The mere declarations of one, under whom the defendant in an action to recover land claims, will not work an estoppel, no matter how specific, or whether written or oral, if the person making them was not at the time in possession; to produce such a result it must be shown that the party making such declaration, at that time, claimed title or interest in the land, however defective, under deed, bond or contract under the alleged superior title.

3. While *it seems* that the declarations of one *in possession at the time*, may operate as an estoppel, to give them such effect they must constitute a clear and definite recognition of the alleged superior title.

4. The fact that the husband of a woman who claimed title to a tract of land, sold and conveyed it to another person, does not, *per se*, raise a presumption that he claimed under his wife.

5. A deed conveying to B a tract of land, &c., "together with every right, title, privilege and emolument to said land belonging * * * and he (the vendor) doth hereby bind himself, his heirs, executors or administrators well and truly to defend the said premises * * * to the said B, his heirs and assigns forever, and clear from all incumbrances and claims whatsoever," passes an absolute estate in fee.

(*Ryan* v. *McGehee*, 83 N. C., 500; *Ryan* v. *Martin*, 91 N. C., 464; *Ricks* v. *Pulliam*, 94 N. C., 225; *King* v. *Scoggin*, 92 N. C., 99; *Lawrence* v. *Pitt*, 46 N. C., 344, cited and approved.)

This was a CIVIL ACTION to recover a tract of land, tried at the Fall Term, 1886, of ASHE Superior Court, before *Montgomery, Judge.*

In support of their title the plaintiffs offered in evidence a deed from John Bower to George Bower, dated 25th of August, 1808, a deed from George Bower to David Earnest, dated November 19th, 1810, and a deed from David Earnest to Andrew Shearer, dated 7th of March, 1812.

The plaintiffs insisted that the deed from John Bower to George Bower passed the absolute estate, the operative words of which are: (509) "That he, the said John Bower, * * * hath bargained and sold unto him, the said George Bower, a tract of land containing 100 acres, lying, &c., &c., together with every right, title, privilege and emolument, to the said lands belonging, or in anywise appertaining; and he, the said John Bower, doth hereby bind himself, his heirs, executors or administrators, well and truly to warrant and defend the aforesaid premises, with all their appurtenances, to the said George Bower, his heirs and assigns forever, and clear from all incumbrances and claims whatsoever."

Plaintiffs also offered evidence tending to show that Andrew Shearer lived upon said land up to the time of his death, which took place in 1817. There was no evidence of any possession of the land prior to the possession of Shearer; that the said Shearer left him surviving his wife Elizabeth, and one daughter by said marriage, and that the daughter died about one year after the death of her father; and said Elizabeth survived her husband and died on the 13th of November, 1866; that on the..... day of....., 1819, said Elizabeth conveyed six and one-quarter acres of said land to George Bower.

The said Elizabeth Shearer afterwards intermarried with one Andrew Shown, and moved with him to the State of Tennessee, where they resided up to the time of their death.

Plaintiffs also introduced evidence of the declaration of one Peyton Colvard that he claimed the land in controversy under the said Andrew Shown, and also the declaration of one William Wyatt that he had purchased a part of said land (that part now occupied by defendant Neal) from the said Colvard; and the plaintiff also introduced evidence tending to show that George Bower, Jr., under whom the defendant Davis claimed, purchased the other part of said land from the said Colvard.

Plaintiffs also introduced evidence that defendant Neal claimed (510) that portion of the land of which he was in possession, through conveyance from the said William Wyatt, and that the defendant Davis claimed that portion of which she was in possession under the will of George Bower. This evidence was offered to show that the defendants claim from Andrew Shearer.

Plaintiffs also showed that said Andrew Shearer left him surviving no heir except the daughter above mentioned, and at the time of his death he left him surviving five brothers and sisters his collateral relations; that one of his sisters, Susan, had married the said William Wyatt; that she, the said Susan Wyatt, died in 1865, leaving the plaintiff Emila and one Alexander Wyatt, her only children, heirs at law; and that William Wyatt, her husband, died in 1859; that the plaintiff Emila married in 1840 and continued under coverture to the beginning of this action.

There was no evidence of any possession of the land by plaintiff or those under whom plaintiff claims, after the death of Andrew Shearer, and no evidence as to how long Andrew Shearer lived or was in possession of said land. There is no evidence that Shown was ever in possession of said land, or that he claimed in right of his wife.

The defendant Neal introduced in evidence a deed conveying in fee with general warranty, all that portion of the land in controversy, of which he is in possession, from the said Susan Wyatt, plaintiff's mother and one of the sisters of Andrew Shearer, to her son Alexander Wyatt, which deed was executed after the death of William Wyatt; and a deed from Alexander Wyatt conveying the same to one James Eller, and a deed from Eller to himself. Defendant also introduced a will of William Wyatt, the father of the plaintiff, in which will the land in controversy is devised to said Alexander Wyatt in fee; and other land owned by said William Wyatt, in the same will, is devised to the plaintiff,

(511) and it was proved and admitted that the *feme* plaintiff accepted said land so devised to her, and has continued to occupy the same since the death of her said father, under this title and no other.

The defendant Davis offered evidence to show that George Bower, Sr., was the man to whom the deeds from John Bower and Elizabeth Shearer, before mentioned, were made, and not her husband, who was a younger man than the other; that George Bower, Sr., died about 1845 or 1850; that George Bower, Jr., under whom defendant Davis claimed, was a son and heir-at-law of John Bower, who executed the deed of the 25th of August, 1808, to George Bower, Jr., and she claimed the same under the will of her husband.

The plaintiff insisted that there was some evidence to go to the jury that the defendants claimed the land in controversy under Andrew Shearer, under whom the *feme* plaintiff claimed, and her only ground for recovery was that the defendants were estopped to deny plaintiff's title.

The defendant Neal insisted that the plaintiff had shown no title to said land; and further, that by the deed of plaintiff's mother to Alex-

ander Wyatt, the plaintiff was estopped from claiming the said land; and that by the will of William Wyatt, her father, and her election to claim under the same, she is also estopped, and cannot recover.

The defendant Davis insisted that the deed from John Bower conveyed only a life estate to George Bower, of date 1808, the remainder after the death of George in 1845 or 1850, descended to the husband of this defendant, and that she took the same under the will.

And both defendants insisted that as there was no evidence that either Colvard, Wyatt or Shearer claimed the land under Andrew Shearer, the plaintiff could not recover.

The Court intimated an opinion that if the evidence was believed by the jury, the plaintiff could not recover, and thereupon the plaintiff submitted to a judgment of nonsuit and appealed.

Mr. D. G. Fowle, for the plaintiffs. (512)
Messrs. G. N. Folk and *Theo. F. Davidson,* for the defendants.

ASHE, J., (after stating the facts). In this case the learned counsel for the plaintiffs went into an elaborate and ingenious argument before us, upon the question of the descent of the title to the plaintiffs, relying on the principle enunciated in the cases of *Lawrence* v. *Pitt,* 46 N. C., 344; *King* v. *Scoggin,* 92 N. C., 99, and that class of cases, to show that the plaintiff did not derive her title to the land from her mother, Susan Wyatt, and was therefore not barred by the deed made by her mother to her brother, Alexander Wyatt.

But it is immaterial from whom the plaintiff claimed to derive title to the land by descent, whether from her mother, Andrew Shearer, or the child of Andrew Shearer, or *quaqunque via data.* The plaintiff could only recover upon the strength of her title, by showing a grant from the State, a long possession from which a grant could be presumed, or an estoppel upon the defendants. Neither of these have been shown by the plaintiff. No grant from the State was offered in evidence, nor any possession by any one from whom she claimed title, except that held by Andrew Shearer from the time of his purchase in 1812 to his death in 1817. But she contended that it was not necessary to show any title out of the State, for the defendants both claim title to the land from Andrew Shearer, and are therefore estopped to deny his title, and as she has derived the better title from him, she is entitled to recover.

To establish the estoppel of the defendants, the plaintiff offered evidence of the declaration of one Peyton Colvard that he claimed the land in controversy under the said Andrew Shown, the second husband of Elizabeth, the widow of Andrew Shearer, and also the declarations of William Wyatt that he had purchased a part of said land (that part

now occupied by defendant Neal) from the said Colvard; and
(513) the plaintiff also introduced evidence tending to show that George Bower, Jr., under whom the defendant Davis claimed, purchased the other part of said land from the said Colvard. Conceding that an estoppel like that here attempted to be set up by the plaintiff upon the defendants, can be established by mere declarations, those offered in this case are too uncertain and indefinite to be relied upon for such a purpose. There is nothing to show when, or under what circumstances they were made, nor when Colvard derived his alleged title from Shown, whether before or after his marriage with the widow of Shearer, and it is not stated when they were married; nor that Shown claimed in right of his wife. For aught that appears, he may have derived his claim from Shown before his marriage, for there is no presumption that Shown claimed under his wife. But the declarations of a person not in possession, no matter how clear and specific are insufficient to establish an estoppel of this character. Estoppel of this kind, presupposes the existence of a deed in proper form from some one under whom the defendant claims; and admissions, written or oral, which, in this respect are of equivalent import, cannot be substituted as evidence so as to dispense with the production of the deed itself after registration, or a copy or an explanation of its absence. To allow this, would be to render titles insecure, and judicial proceedings dependent upon the uncertain memory of witnesses. In *Ryan* v. *McGehee,* 83 N. C., 500; and again in *Ryan* v. *Martin,* 91 N. C., 464, it was held, that although "it is not necessary to show that the defendant has a complete title to the land, if there is no title paramount to it, it is sufficient to show that under a *valid contract* he claims to hold and has possession of the property derived from the common source. If the defendant has a bond for title, or other *contract* of purchase, or an unregistered deed for the land, and is in possession thereof, this will be sufficient evidence of a claim under the common source."

(514) From these authorities it will be seen, that to work an estoppel upon a defendant in an action to recover land, there must be something more than the mere declarations of a party, and it must be shown that he claims a title or interest in the land, however defective, evidenced by a deed, bond or written contract.

In this case, to connect the defendant with the common source of title, the plaintiff has shown nothing more than the bare declarations of Colvard, that he claimed the land under Andrew Shown, nor was it shown that Colvard was ever in possession of the land.

The plaintiff thus having failed to show title to the land, she cannot recover from the defendants who are in possession, and are *prima facie* the owners of the land, and are therefore not called upon to show any

title to the same. It is therefore needless to go into the inquiry whether the plaintiff is concluded by her election to take the land devised to her by the will of her father, William Wyatt.

The plaintiff has, in our opinion, failed to establish her title to the land occupied by Neal, and also to that occupied by Mr. Davis, notwithstanding she offered evidence to show that her husband, George Bower, Jr., under whom she claimed the land, was the son and heir of John Bower, and that the deed from John Bower to George Bower only carried a life estate. But she was evidently not advised of the decision in *Ricks* v. *Pulliam,* 94 N. C., 225. But that could not operate as an estoppel upon them, because her husband never claimed the land as heir of John Bower, and as evidence that he did not do so, he purchased the land from Peyton Colvard.

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

No error. Affirmed.

Cited: Winborne v. Downing, 105 N. C., 23; *Anderson v. Logan, ibid.,* 271; *Allen v. R. R.,* 106 N. C., 525; *Saunders v. Saunders,* 108 N. C., 332; *Bryan v. Spivey,* 109 N. C., 71; *Alexander v. Gibbon,* 118 N. C., 800; *Real Estate Co. v. Bland,* 152 N. C., 230; *Moore v. Miller,* 179 N. C., 398.

(515)

J. J. COLVARD v. THE BOARD OF COMMISSIONERS OF GRAHAM COUNTY.

Bonds, official—Officer—Sheriff—Mandamus.

1. A former sheriff must exhibit to the board of commissioners *the receipts in full* of the proper officers, for all public funds which he received, or ought to have received during his preceding official term, before he will be permitted to re-enter upon a new term. *The Code,* §2068.

2. The fact that he was able, ready and willing at the time of tendering his bond, to make settlement and payment of any liability on account of funds so received, does not dispense with the requirement that he shall produce receipts in full.

3. A sheriff-elect is not entitled to be inducted into office until he tenders the *three bonds* required by §2073 of *The Code,* notwithstanding the fact that at the beginning of his term there is a tax collector in that county.

4. If the term of the office into which the plaintiff, in mandamus, demands to be inducted, expires before final judgment, the Court can do nothing but dismiss the action.

This was a CIVIL ACTION, tried before *Gudger, Judge,* at Fall Term, 1886, of the Superior Court of GRAHAM County.

This was an action to compel the defendants, by mandamus, to induct the plaintiff into the office of sheriff of said county.

The following issues were submitted to the jury:

I. Was the plaintiff elected sheriff of Graham County, November, 1884?

II. Did the plaintiff offer bond with sufficient security to the Board of Commissioners of Graham County on the first Monday in December, 1884?

III. Was the said plaintiff ready, willing and able to settle in full for taxes heretofore due by him as sheriff with the authorities of the county, and did he offer to settle on said first Monday of December, 1884?

(516) These issues were, by direction of the Court, found in favor of the plaintiff. The defendant objected to the second issue being submitted by the Court, on the grounds that the same was not responsive to the pleadings and the law, and asked that the following issues be submitted, to-wit:

I. Did the plaintiff present three several bonds as required by Statute, §2073 of *The Code,* and if so, were the bonds justified by the sureties thereto?

II. Did the plaintiff produce receipts in full for all the taxes due the county at or before the offer of his bond as sheriff elect?

These issues, by direction of the Court, were answered in the negative.

It was admitted that the plaintiff was former sheriff of said county for the two years next preceding his election in November, 1884, and that one W. F. Cooper was tax collector for said county for the year 1884, and was tax collector on the first Monday in December, 1884. It was further admitted by the plaintiff that he did not produce receipts in full before the board of commissioners, nor offer but the one bond described in his complaint, on the first Monday in December, 1884, on demand to be inducted into office. On the trial, the plaintiff offered himself as witness in his own behalf, and testified that he was ready and able and willing to settle and pay all the arrears of taxes due the county from him as former sheriff and tax collector for said county, and that he demanded settlement, tendered the bond as described in the complaint, and demanded to be inducted into office as sheriff of said county on the first Monday in December, 1884. And the plaintiff offered other witnesses to corroborate his own testimony. He also offered two receipts marked as exhibit "A" and "B," for the arrears of taxes due from him to said county, dated on January 5th, 1885, and rested his case.

The defendant offered several witnesses to disprove the testimony of the plaintiff, and also offered the records of a suit in said Court by the board of county commissioners of said county against the (517) plaintiff and his securities on his bond for the collection of the taxes for the year 1883, in which suit was claimed the sum of $1,500, and the records of a judgment in said action at Spring Term, 1885, against the defendant and his securities in that action for the costs.

On the argument of the case, the defendant's counsel moved the Court to dismiss the plaintiff's action, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it did not allege the offer of but the one bond as described in the complaint, and that it did not allege the production of receipts in full from the county treasurer, and others for the arrears of taxes due from the plaintiff as former sheriff and tax collector of said county, on his demand to be inducted into office.

The Court declined the motion, and the defendant excepted.

The defendant then asked the Court to instruct the jury, among other things:

"1. That if they shall find from the pleadings or the testimony, that the plaintiff only offered one bond, as set out in his complaint, that it was not a compliance with the Statute,—*The Code,* §2773,—and that it would not be the duty of defendants to induct him into office.

"2. That should they find that he offered but one bond, or the three bonds required by law, and that he had been sheriff and tax collector of said county, and failed to produce receipts in full from the county treasurer, and other persons, of all moneys by him collected, or which ought to have been collected for the use of said county, then, in that event, it would not be their duty to receive such bond or bonds and induct him into office as sheriff of said county."

These instructions the Court declined to give.

The Court further instructed the jury to find the second issue submitted by the Court from the admission in the answer, there being no testimony other than the pleadings upon the solvency (518) of the bond.

Upon the issues found, the defendants moved the Court for judgment.

Defendants then moved for new trial. Motion overruled; judgment for plaintiff. Appeal by defendants.

No counsel for the plaintiff.

Mr. F. H. Busbee and *J. W. Cooper,* for the defendants.

ASHE, J., (after stating the facts). We think there was error in the refusal of the Court to give the instructions asked by the defendant.

The plaintiff offered but one bond, and did not show the receipts required by law. *The Code,* §2068, declares, that "no person shall be eligible to the office of sheriff, who theretofore has been sheriff and hath failed to settle with and fully pay up to every officer the taxes which were due from him, nor shall any Board permit such former sheriff to give bond for or enter upon the duties of the office, until he has produced before the board the *receipt in full* of every officer for such taxes."

And it is required by §2073 of *The Code,* that the sheriff shall give three bonds, such as are prescribed in the section.

The plaintiff here had not complied with the requirements of either of these sections, and it was not, therefore, the duty of the defendants to induct him into office, and it was error in the Judge to refuse to give instructions to that effect when asked.

But aside from all this, suppose there was no error, how could judgment in this case avail the plaintiff? He seeks to be inducted into office by virtue of the writ of mandamus, but what office? Why, that of sheriff for the term ending December the 4th, 1886. But that time has expired, and a new sheriff has been regularly elected for the term of two years from the 4th of December, 1886. A judgment, then, in favor of the plaintiff could not be followed by any practical results.

(519) If he ever had a right to the remedy he invokes, he has been so unfortunate as to lose it by the *law's delay.*

We are of the opinion for the last reason given, that the action should be dismissed, and it is so ordered.

Dismissed.

Cited: Somers v. Comrs., 123 N. C., 584; *Comrs. v. Gill,* 126 N. C., 87; *Taylor v. Vann,* 127 N. C., 244, 247; *Lenoir County v. Taylor,* 190 N. C., 341.

EMMA FITZGERALD et al. v. S. J. SHELTON.

Action to Recover Land—Deed—Evidence—Insanity—Pleading.

1. New matter set up in the answer, not relating to a counter claim, is taken to be controverted without further pleading—*The Code,* §268. The Court however may require a formal reply to such new matter. *The Code,* §248.

2. In an action to recover land, it is competent for one party to show that a deed offered by the other, in support of his title, is void for want of capacity in the vendor, although such deed may have been specially set

up in the pleadings and relied upon, and no formal reply thereto or notice of attack given before the trial.

3. Where evidence was offered tending to show that the vendor was of unsound mind, and had executed the deed under an insane impulse and without consideration; *It was held*, that it was competent for those who claimed under the assailed deed to show letters, declarations and other acts of the vendor explanatory of his motives, and of the consideration which moved him.

(*Jones* v. *Cohen*, 82 N. C., 75; *Wood* v. *Sawyer*, 61, N. C., 251, approved, and *Riggan* v. *Green*, 80 N. C., 237, distinguished.)

CIVIL ACTION, tried at July (special) Term, 1885, of HAYWOOD Superior Court, before *Graves, Judge*.

The plaintiffs, the heirs at law of J. A. B. Fitzgerald, bring this action to recover the land described in the complaint. They simply allege title thereto in themselves, that the defendant is in possession thereof, and unlawfully withholds the same from them. (520)

The defendant denies that the plaintiffs have such title, and that he unlawfully withholds possession of the land from them, and for further defence he alleges:

"I. That in the lifetime of plaintiffs' ancestor, J. A. B. Fitzgerald, he conveyed the land in controversy to William and Margaret Swanger.

"II. That said William and Margaret Swanger are now residents of the State of Tennessee, and are minors.

"III. That said William and Margaret, as defendant is informed and believes, are the owners of said land.

"That the defendant is the tenant of said William and Margaret, and he is informed and believes that they are necessary parties to this action."

Issues were submitted to the jury, and there was a verdict in favor of the plaintiffs. The Court gave judgment for them, and the defendant appealed.

The following is a copy of so much of the case settled upon appeal as it is necessary to set forth here:

"The plaintiffs showed apparent title to the land described in the complaint in J. A. B. Fitzgerald, their ancestor. It was admitted that the defendant was in the possession of the land described in the complaint. The plaintiffs offered testimony to show the value of the rents and profits of the land.

"The plaintiffs then rested.

"The defendant then offered in evidence a deed duly proven and registered in Haywood county, from the said J. A. B. Fitzgerald to William and Margaret Swanger.

"To this evidence plaintiffs objected, because, as they alleged, the grantor did not at the date of the alleged deed, have sufficient mental capacity to make a deed. The Court overruled the objection, and allowed the deed to be read in evidence, subject to the proof of the want of capacity. The deed was sufficient in form, and bore date....., 1870.

"The defendant closed his case.

(521) "The plaintiffs then offered to show that at the time of executing the alleged deed read in evidence by the defendant, J. A. B. Fitzgerald, the grantor, did not at the time of the alleged execution thereof, have sufficient mental capacity to make a deed.

"The defendant objected that such evidence ought not to be received, for the defendant had set out in his answer that he held under the deed of the said J. A. B. Fitzgrald, and could not be dispossessed while he held under it, and that the plaintiffs could not be heard to prove want of mental capacity in their ancestor so as to avoid his deed, without allegation and notice to the defendant. The Court overruled the objection and the defendant excepted.

"The plaintiffs then offered evidence tending to show a want of capacity, and S. L. Love, a physician of thirty years' practice, testified that in his opinion J. A. B. Fitzgerald was a monomaniac, especially on the subject of religion, under the delusion that it was his religious duty to give away all his property. That he first knew him as a lawyer, afterwards as a preacher. That about 1860 he retired from the public, and lived a secluded life. He educated his children under his own tuition. Other witnesses expressed the opinion that J. A. B. Fitzgerald was of unsound mind, and especially on religion and matters of that kind. That he gave away all his property, and left his children destitute. There was much evidence on the question of capacity, but it is not deemed material to set out any more of the evidence for plaintiffs.

"It appeared in evidence, that at the date of the said deed, William and Margaret Swanger were infant children of one William Swanger, who died in the war, and that S. Fitzgerald was administrator on the estate of said Swanger, and as such had sold his land, and that at the sale J. A. B. Fitzgerald became the purchaser, and that plaintiffs still held the land so purchased. This was not the land in suit, but another tract known as mountain land.

(522) "The defendant was allowed to show the value of this tract sold by S. Fitzgerald and bought by J. A. B. Fitzgerald, and there was evidence tending to show that its present value is about five hundred dollars.

"The defendant also offered a letter shown to be in the handwriting of J. A. B. Fitzgerald to E. P. Jones, grandfather of William and

Margaret Swanger, in which he explained his reasons for making the alleged deed to said William and Margaret.

"The defendant then offered to read in evidence the deed from S. Fitzgerald, administrator, conveying the mountain land, or Swanger land, to J. A. B. Fitzgerald, for the purpose of showing what price had been paid for it. The deed bore date 1867, and recited the land was sold in 1864 for $200.00. The plaintiffs objected, and the defendant added that he also offered the deed to show 'that J. A. B. Fitzgerald was competent to purchase land, take a deed and make a good bargain. That he got the land greatly under its value, and that the deed of 1870 was not the result of a religious hallucination and disordered mind, but was the result of a well balanced mind to recompense the said children for the advantage he gained in the purchase.' "

The Court being of the opinion that the deed was incompetent, sustained the plaintiffs' objection, and the defendant again excepted.

Mr. M. E. Carter, for the plaintiff.

Mr. Theo. F. Davidson, (and *Mr. G. S. Ferguson* also filed a brief), for the defendant.

MERRIMON, J., (after stating the case). The defendant did not plead a counter claim, and the new matter of defence alleged by him in his answer was properly taken as denied by the plaintiff. *The Code,* §268. They were to be treated by the Court and the defendant, as having denied that their ancestor had executed such deed as that alleged in the answer, and the defendant had notice to be prepared to (523) establish it against any attack that they could make upon it. The defendant might have moved that the plaintiff be required to make reply to the new matter alleged in the answer, as allowed by the statute, (*The Code,* §248), but he did not do so.

Ordinarily, a party can anticipate the objection to a deed or other instrument to be produced by him on the trial in a case like this, but if in some cases he could not, the Court might, in a proper case, require the opposing party to give notice of the grounds of attack, or if a party should be surprised on the trial, the Court might, for just cause, direct a mistrial, or after the verdict, grant a new trial. It is not required in actions to recover land that the pleadings shall allege or set forth a summary of the evidence of title, or particularly how it is proposed to establish it. Each party is expected to go to trial prepared to prove his case, and to have the evidence produced by him thoroughly scrutinized, tested and resisted, just as in other actions. In actions generally, each party produces his evidence without any notice to the opposing

party of its nature. In this case the defendant did not need to allege the deed in question. He might have put it in evidence on the trial without notice of it to the plaintiffs. So that the first exception cannot be sustained. *Jones* v. *Cohen,* 82 N. C., 75.

The defendant's counsel relied upon *Riggan* v. *Green,* 80 N. C., 237. That case is not pertinent here. In it the parties relied upon equities alleged in the pleadings. This is simply a case at law. No equity is alleged or relied upon.

A very great variety of facts oftentimes make evidence tending to prove the insanity of a person alleged to be insane. If his general course of conduct, his methods of business, his particular business transactions, his conversation, his declarations made from time to time, his ordinary speech, his speech and his actions on particular occasions, his manners, his habits, are very eccentric, foolish, unnatural, absurd
(524) and shocking to reasonable people, what he so says and does is evidence going to prove that he is insane. Such evidence would be stronger or weaker in proportion to the degree of absurdity, unreasonableness, and unnaturalness of what such person so did and said—it might be very strong—it might be so slight as not to be sufficient to go to the jury at all. Merely immoral, vicious and criminal acts would not of themselves be evidence of insanity—they might be, in connection with other facts. In an inquiry in such respect, it becomes necessary and pertinent to scrutinize the transactions, declarations and conduct of the party whose sanity is in question, with a view to ascertain whether or not the same are indeed absurd, unreasonable and unnatural. It is not every act that seems to be thus that is so in fact; it frequently turns out that what so appears is just the reverse, and tends to prove the intelligence and wisdom of the person doing the act in question.

Hence, explanatory evidence as to the reasonableness, naturalness, justice and wisdom of the particular acts or transactions relied upon as evidence of insanity, is competent. In the case before us, no particular facts or evidence were relied upon to prove the insanity of the person whose sanity is in question. His general conduct, his business transactions, some of them, and the opinion of a physician constituted the evidence relied upon.

We think, therefore, that the Court erred in rejecting the evidence—the letter and the deed offered by the defendant explanatory of the motives and considerations that prompted the maker of the deed in question to execute it. The letter written by himself, at the time he executed the deed, states why he did so, and it was proper that what he said in that connection should go to the jury to help them to determine the condition of his mind at that time. And the deed offered in evi-

dence also, was some evidence of what he paid for the land he purchased at the sale of the administrator, and the character of (525) the transaction as reasonable or otherwise. *Wood* v. *Sawyer*, 61 N. C., 251.

The defendant is entitled to a *venire de novo*.

Error. Reversed.

Cited: Richards v. Smith, 98 N. C., 511; *Speight v. Jenkins*, 99 N. C., 145; *Helms v. Green*, 105 N. C., 259; *Bryan v. Spivey*, 106 N. C., 100; *Buffkin v. Eason*, 110 N. C., 266; *McQueen v. Bank*, 111 N. C., 515; *James v. R. R.*, 121 N. C., 531; *Bank v. Loughran*, 122 N. C., 674; *White v. Carroll*, 146 N. C., 233; *Ricks v. Brooks*, 179 N. C., 209.

W. C. OXFORD v. JAMES A. WHITE.

Deed—Description.

1. If the description in a deed, however indefinite, is sufficient to allow of an identification by an actual survey, it will be upheld. *Id certum est, quod certum reddi potest.*

2. The following description was held not so vague and indefinite as to render the deed void: "One-half—one hundred and fifty acres—of a three hundred acre tract granted to R. in 1872, (describing the three hundred acre tract), and lying on the north side or end of said grant, beginning at the three black oaks of the old grant as aforesaid and running 127 ft. w. to a stake thence southward in slightly diverging lines from aforesaid black oaks and stake to points along the respective lines, where a line east and west parallel with the south (east and west line) of the old grant aforesaid shall contain, within the lines and distances aforesaid, one hundred and fifty acres."

(*Stewart* v. *Salmonds*, 74 N. C., 518, cited and approved).

CIVIL ACTION, tried before *Avery, Judge,* at June Term, 1886, of ALEXANDER Superior Court, upon complaint and demurrer.

The plaintiff brought this action to recover the land described in the complaint, the parts of which, material to be set forth here, are as follows:

The plaintiffs allege:

1. That they are owners in fee simple, and entitled to the immediate possession of the following tract of land in Alexander county, to-wit:

(526) one-half of a three hundred acre tract granted by the State to Henry Reid in 1872—that is to say, the one-half of said tract, to-wit: one hundred and fifty acres, embracing the home place of the late Samuel Reid, and lying on the north side or end of the aforesaid grant, said grant being bounded as follows: a tract of three hundred acres, lying on the north fork of Middle Little River, beginning on three black oaks and runs south 20° east 120 poles to the river, crossing the same course 64 poles to a post oak along Henry and James Reid's line, thence 51 poles east to a post oak, thence south 80 poles to the river, crossing the same 6 poles to a post oak, thence west 237 poles to a post oak, thence north 261 poles to a stake, thence east 127 poles to the beginning.

2. That said one hundred and fifty acres claimed by plaintiffs is embraced as nearly as can now be stated, by beginning at the three black oaks of the old grant as aforesaid, and running 127 poles west to a stake, thence southward, in slightly diverging lines from the aforesaid black oak and stakes to points along the respective lines where a line east and west parallel with the south (east and west line) of the old grant aforesaid—shall contain within the lines and distances aforesaid one hundred and fifty acres.

The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, the plaintiff having declared in the second section of the complaint for the recovery of a tract of land, and the description therein set forth being void for uncertainty, and such as would render a conveyance containing it void.

The Court sustained the demurrer, and plaintiff appealed.

Mr. M. L. McCorkle, for the plaintiff.
No counsel, for the defendant.

MERRIMON, J. It must be conceded that the description of the land in the complaint is very indefinite and uncertain in its terms, (527) but we think it may be rendered certain by an accurate survey, and that the plaintiffs are entitled to the benefit of the maxim, *id certum est, quod certum reddi potest.* If the *data* or *indicia* specified, however indefinite, are sufficient to enable the surveyor to ascertain the particular land referred to, that is sufficient.

The three hundred acres of land granted to Henry Reid in 1872 are sufficiently described and located, and this is important. The land in question is one-half of that tract, or "one hundred and fifty acres (of it), embracing the home place of the late Samuel Reid, and lying on the

north side or end of the aforesaid grant," and its lines begin "at the three black oaks (these are the beginning corner of the grant named) of the old grant as aforesaid, and runs one hundred and twenty-seven poles west to a stake, (this is with the north line of the grant), thence southward in slightly diverging lines from the aforesaid black oaks and stake to *points* along the respective line, (that is with the lines of the grant north and south in the east and west side of the land granted), *then a line east and west, parallel* with the south, (east and west line), of the old grant aforesaid, so as to give and embrace within the lines thus described and to be ascertained, one hundred and fifty acres." That is, to state it differently, the north line of the grant named, is the north line of the plaintiff's land, the east and west lines of the grant running south from its north line, are the lines of the plaintiff's land to the points intersected by the plaintiff's south line, which is parallel with the north line, lying far enough south to embrace one hundred and fifty acres in his tract, situate on the "north side or end of the aforesaid grant." The *data* given, though not very intelligently expressed, will enable an expert surveyor to locate the south line of the plaintiff's land and ascertain its exact boundary.

There is, in fact, certainty in the description of the land given, though not clearly seen.

The law, however, sees and upholds that certainty, and will (528) make it manifest by a proper survey to be made under the order of the Court.

This case is much like that of *Stewart* v. *Salmonds,* 74 N. C., 518; in which this Court held that "twenty-nine acres to be cut off the north side of a tract of land designated, could be ascertained with mathematical precision, and decreed a specific performance of an award."

There is error. The judgment sustaining the demurrer must be reversed, and further proceedings had in the action according to law. To that end, let this opinion be certified to the Superior Court.

It is so ordered.

M. D. DEMING v. HOLLY GAINEY.

Evidence—Action to recover land—Comments of Counsel—Judge's Charge—Possession.

1. In an action to recover land, where the question is as to its location, a witness who is acquainted with the land, and also with an adjoining tract, may be allowed to testify where such adjoining tract is located.

2. It is not error to admit irrelevant testimony, when it does not tend to mislead the jury.

3. Where a party objects to a portion of an answer made by a witness because it is not responsive, he should ask the Court to require its withdrawal, or to tell the jury to disregard it.

4. Evidence of a collateral matter, which has no material bearing on the controversy, but which tends to influence the jury, is not competent.

5. Where counsel in their argument to the jury, commented on the fact that a witness for the opposite party whose evidence tended to locate the land in suit, had participated in running the lines of a grant to himself, which lines constituted a part of the boundary of the land in suit; *It was held*, not a fit subject for comment, to attack the witness, and that counsel were properly stopped by the Court, the grant to the witness not having been attacked.

6. Where there is no actual possession, the superior title draws to it the possession.

7. It is the duty of the appellant to show error, and if the Court cannot see from the record that a charge given to the jury is erroneous, it will not grant a new trial.

8. When there are no natural object or adjacent lands called for in description in a deed, the course and distance must determine the line.

9. Where the question for the jury is the location of a corner, the call in junior grants is competent evidence for its location.

(*McRae* v. *Malloy*, 93 N. C., 154; *State* v. *Arnold*, 35 N. C., 184; *State* v. *Gaitor*, 71 N. C., 88; *Sasser* v. *Herring*, 14 N. C., 340; *Fry* v. *Currie*, 91 N. C., 436; cited and approved).

(529) CIVIL ACTION to recover land, tried before *Boykin, Judge*, and a jury, at May Term, 1886, of CUMBERLAND Superior Court.

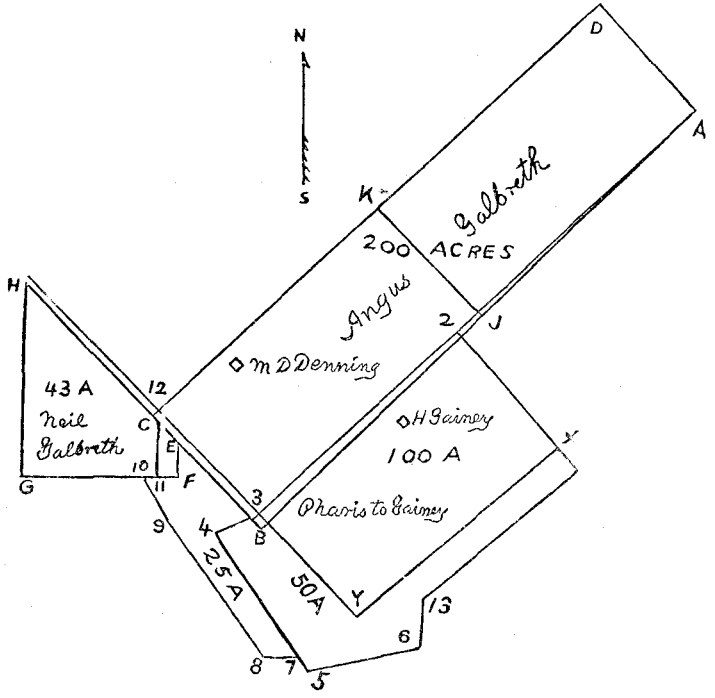
The controversy in this action, is in respect to the plaintiff's title and right of possession to the lands described in his complaint, and their wrongful withholding by the defendant. In response to the usual issue submitted to the jury, they say that the plaintiff does own and is entitled to the possession of said lands, but not of that portion which is outside of A, 3, 12, 11, on the plat made out by John Deming, and bearing date December 7th, 1885, that is, as understood, outside of lines running between these thus designated terminal points on the plat; that the defendant was not in possession of the claimed lands when the suit was begun; and that no damages have been sustained.

[See diagram and explanation on next page.]

(530) Thereupon judgment was rendered for the defendant, and the plaintiff appealed.

Mr. W. A. Guthrie, for the plaintiff.
Messrs. N. W. Ray and *Thos. H. Sutton,* for the defendant.

SMITH, C. J., (after stating the facts). The case before us so indistinctly sets out the facts and the exceptions to the ruling of the Court, that we may fail properly to understand and decide them. (531) Many of the exceptions have been abandoned on the hearing before this Court, and we shall consider only such as were pressed in the argument.



[Martin D. Deming claims the southern half of two hundred acres granted to Angus Galbreth—A, B, C & D. Deming claims the part lettered J, B, C and K; he also claims a forty-three acre tract granted to Neil Galbreth lettered E, F, G, H. The defendant, Holly Gainey, claims a 100 acre tract, 3, Y, X and 2; he also claims a 50 acre tract, 3, 4, 5, 6, 13, 1, X, Y; also a 25 acre tract, 3, 4, 7, 8, 9, 10, 11, 12].

1*st Exception.* The plaintiff introduced and examined as a witness one Robert Bain, who, in answer to an inquiry as to the location of the line A, B, stated that he knew the Robert Daughtery land, a contiguous

tract, having cut timber on it in 1846, and that he had cut a marked tree on the line.

Upon his cross-examination, he said he was well acquainted with this tract of land, and understood the plats. He was then asked where the Daughtery land was. It was in evidence that this tract adjoined that in controversy, and it had been referred to in the documentary proofs relating to the plaintiff's title.

The testimony was objected to by the plaintiff, on three several grounds:

1. That no deed describing the Daughtery land had been introduced.

2. That so much of the witness' statement as relates to his knowledge of the land and cutting timber on it in 1846, was not responsive to the interrogatory put to him, but outside of it, and

3. It was irrelevant testimony.

The objection was disallowed, and exception taken to the ruling.

We concur with the Judge, that the objection is untenable, and for reasons given by him. It was but a fuller development and practical application of the fact brought out. The witness had testified to his personal knowledge of the tract. The defendant, to have the benefit of the witness' knowledge, asked where does it lie? The one is the obvious supplement of the other answered interrogatory, assuming it to have been put, or the natural sequence of the information given.

(532) The second ground is equally without force, and without further comment we need only to refer to the ruling of a similar exception, in *McRae* v. *Malloy,* 93 N. C., 154. It is there said, that "the plaintiff, if opposed to the giving in of the testimony, should have interposed and arrested the examination; or if this could not be done in time, should have asked the Judge to require its withdrawal, or to direct the jury to disregard it, so that it would become harmless."

The asserted irrelevancy is not apparent, and if it did appear, unless the testimony tended to mislead or prejudice the jury, it could not be assigned for error. *State* v. *Arnold,* 35 N. C., 184; *State* v. *Gailor,* 71 N. C., 88.

2*d Exception.* The next exception arises out of the following facts:

The defendant, in his testimony, spoke of a negotiation between the plaintiff and himself before this suit, and of the plaintiff becoming angry because witness would not sell him certain land. In reply, plaintiff proposed to show that the value of the land which he conveyed to the defendant in his deed of May 25th, 1869, for a recited consideration of $87, was in reality worth $1,000. The avowed purpose, as we understand, was to disprove the alleged ill feeling, and to impeach by contradicting the statements the credit of the defendant.

We can see no legitimate use to be made of the proposed inquiry, and it was calculated to prejudice the minds of the jury by an exhibition of the plaintiff's generosity toward the defendant. There is no error in refusing to admit the evidence.

3d Exception. The plaintiff's third exception rests upon these facts: The defendant introduced a deed from W. J. Pharris to himself, made December 21st, 1854, and conveying the same lands as those described in the plaintiff's deed to him of May 25th, 1869, and the dispute was as to the boundary. Pharris testified that he was present, and acted as one of the chain-bearers when the twenty-five acre tract, granted to himself on October 16th, 1849, was located by the surveyor, (533) McCormick; that they measured the lines run to 12 and 11. During the argument of plaintiff's counsel to the jury, he commented on the fact that Pharris participated in the running the lines of his own grant, avowing his purpose to be to attack his veracity as a witness.

Upon defendant's objection to this line of argument, the Court remarked that there was no attack upon the validity of the grant itself, which had been received in evidence as valid; that the plaintiff was estopped to deny this by the recital of the same calls in his own subsequent deed for the same land to the defendant; and that it was therefore improper in him to argue that there had been no location of the grant. The plaintiff's counsel thereupon desisted and excepted. The exception needs no further development, and the reasons assigned for interrupting the course of hostile comment, are fully sufficient to sustain the action of the Court.

The remaining exceptions relate to the instructions given to the jury, or refused to be given when asked.

The plaintiff asked the Court to charge the jury, that there is a break in the continuity of the defendant's alleged adverse possession, during the time when the plaintiff held the title under the deed of the assignee in bankruptcy, which was refused, for this deed had not been exhibited in evidence, being excluded after objection by the Court.

That, as neither shows an actual possession long enough to ripen into title, the possession is drawn to the title, and that if the jury believe the superior title to be in the plaintiff, they must find the first issue in his favor. This, in the very words was declined, but the law of possession was explained and applied to the facts in evidence. The refusal was made as involving the determination by the Court of a fact, to-wit, the length of the possession, while the evidence was conflicting as to the possession of the contestant parties upon the (534) disputed boundary. But the Court gave the instruction that in

the absence of actual possession, the superior and oldest title drew to it a constructive possession.

There is not seen any just ground of complaint in this, furnished by the testimony.

The other instructions asked for the plaintiff, were given.

We now proceed to the consideration of the instructions requested by the defendant and given, to which the plaintiff excepts, of which, besides those abandoned, there are but two.

1. The Court charged that if the plaintiff cannot go to B with his first line, then B C is not the second line of the second tract, and the location of the forty-three acre grant, as claimed, from E to F, G and H, is not correct.

In the absence of the boundary calls of this grant, we are unable to see whether the instruction was proper, and as the appellant must show error, we cannot sustain his exception. The general rule is, that when there are no material objects or adjacent lands called for, the course and distance must determine the line, and if this terminates at 3, the consequences about the location follow.

2. The second exception is to the instruction that the jury might, in determining whether the stumps in the end of the lane at 3, are a corner of the Galbreth two hundred acre tract, consider the subsequent grant to John Galbreth, Torquil Galbreth and W. J. Pharris, if they begin at that point, as evidence by reputation of it as a corner. The cases cited for the appellee, *Sasser* v. *Herring,* 14 N. C., 340; and *Fry* v. *Currie,* 91 N. C., 436; sustain the ruling of the Court, and the subject needs no further elaboration.

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

No error. Affirmed.

Cited: Simmons v. Ballard, 102 N. C., 111; *Hines v. Moye,* 125 N. C., 12; *Jeffries v. R. R.,* 129 N. C., 237; *Woodlief v. Wester,* 136 N. C., 166; *Hodges v. Wilson,* 165 N. C., 327; *Shepherd v. Lumber Co.,* 166 N. C., 134; *State v. Fowler,* 172 N. C., 910; *State v. Freeman,* 183 N. C., 746; *Godfrey v. Power Co.,* 190 N. C., 33.

(535)

SHAW BROTHERS v. NEILL McNEILL.

Issues—Draft—Waiver—Protest.

1. Where a material issue is raised by the answer, although the matter is not alleged in the complaint, it is not error to submit an issue on it.
2. A promise or a partial payment by an endorser of a bill of exchange after he has been released from liability by the neglect of the holder to notify him of its dishonor, to pay the whole, or even a part, of the sum named in the bill, if made with a full knowledge that he has been released by such neglect, will operate as a waiver, and bind him to the payment of the whole sum named in the bill.
3. Protest is not necessary to fix the drawee and endorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills.
4. Even in foreign bills, the protest may be waived, and when this is done, it also waives presentment and notice.
5. Although protest is not necessary on an inland bill, yet its waiver in such case, is construed to signify as much as when applied to foreign bills.
6. So, where protest was waived on an inland bill, and no notice was given of its non-acceptance and non-payment to the endorsers; *It was held*, that such notice was waived by the waiver of protest, and the endorsers were liable.

(*Hubbard* v. *Troy*, 24 N. C., 134, cited and approved.)

This was a CIVIL ACTION, tried before *Boykin, Judge,* and a jury, at January Term, 1886, of the Superior Court of ROBESON County, on an appeal from a justice of the peace.

The complaint of plaintiff was as follows, to-wit:

That the defendant is indebted to him in the sum of $90.00, due by the defendant's endorsement of a draft by E. L. McCormac to N. McNeill, which is in the following words and figures, viz:

$90.00 SHOE HEEL, N. C., Dec. 16, 1884.

At sight, pay to the order of Neil McNeill, Esq., ninety dollars, value received, and charge the same to account of

E. L. McCORMAC.

No Protest.

To Messrs. Kerchner & Calder Bros., Wilmington, N. C.

(536) With the endorsement:

"Pay to the order of Shaw Bros. NEILL MCNEILL."

The defendant denies that he was indebted to the plaintiffs as claimed; denies that payment was demanded of and refused by the drawee; and pleaded further, that if said draft was not paid, that reasonable notice of its non-acceptance and non-payment was not given to him by the drawees, the present plaintiffs, or their agents.

The plaintiffs offer evidence to show that they were purchasers of the draft from McNeill, the payee, for value; that he endorsed the same to them; that the draft was presented to Kerchner & Calder Bros., about the 2d or 3d of January, 1885, and payment was refused; that about the same time in 1885, verbal notice was given to McNeill of the fact of the non-payment of the draft by Kerchner & Calder Bros., at which time the defendant said to plaintiff that he would lose some money on account of the transaction, and asked him what he would take for it. Plaintiff replied that rather than go into a lawsuit, he would take sixty dollars, which the defendant agreed to give, but did not do it.

There were several issues submitted to the jury, and one the series numbered 3, was: "Did the plaintiffs exercise ordinary care in the collection of said draft?"

The defendant asked his Honor to charge the jury, that on the whole evidence the plaintiffs were not entitled to recover, for if payment of the draft was refused, they had not notified defendant of it in a reasonable time. This instruction his Honor declined to give, and charged the jury as follows: "That it was incumbent on plaintiffs to notify defendant that the draft had been presented and payment refused, but that if the defendant had waived this right, they need not consider it. That in determining whether or not the defendant had waived it, they might consider the words 'no protest' on the margin of draft, his language and conduct when Shaw informed him about the non-payment in February, and also his offer to pay $60.00. That if defendant had
(537) offered to pay $60.00, as alleged by Shaw, it amounted to a waiver."

The jury found all the issues for the plaintiffs. Defendant moved for a new trial, alleging as error:

1. The submission of the third issue, which was not raised by the pleadings, was irrelevant and improper.

2. Refusal to charge the jury as requested by defendant.

3. For error in the charge as given as to waiver of notice, in charging the jury that they might consider the words "No protest" on the draft; the language and conduct of defendant in February, and his offer to pay $60.00, when there was no evidence that he ever waived or

intended to waive notice, and that the evidence only tended to prove that the offer of $60.00 was an offer of compromise, accepted by plaintiffs, and their action, if any they had, should have been for the $60.00.

There was a judgment for the plaintiffs, and the defendant appealed.

Mr. Thos. H. Sutton, for the plaintiffs.
Mr. C. C. Lyon, for the defendant.

ASHE, J., (after stating the facts). The defendant took three exceptions on the trial of this case, none of which are tenable.

First. For that the third issue submitted to the jury was not raised by the pleading.

But it will be seen by reference to the answer of the defendant, that the question of diligence involved in the issue, was expressly raised in the answer, by pleading that reasonable notice of the acceptance and non-payment of the draft had not been given by the plaintiffs to the defendant.

Secondly. For that his Honor refused to give the charges as requested by the defendant, which was in substance, that the plaintiffs had not notified the defendant in a reasonable time that the drawee had refused the payment of the draft. There was no (538) error in this, for the reason, as we will hereafter show, that the defendant had waived the necessity of notice.

Thirdly. For that his Honor charged the jury that they might consider the words "No protest" on the draft, and the language and conduct of defendant when he was informed by the plaintiff of the non-payment, and the offer to pay $60.00; and that if the defendant had offered to pay $60.00 as alleged by Shaw, it amounts to a waiver.

We find no such error in the charge as entitles the defendant to a new trial. There is some fluctuation in the decisions of the courts upon the question, how far a promise to pay a part of a draft is a waiver of demand and notice of non-payment. For instance, it has been held by some of the authorities, that when the promise is only as to part of the sum, it is only a waiver *pro tanto,* and the plaintiff could only recover that amount. *Fletcher* v. *Froggart,* 2 Car. & P., 569, (12 E. C. L. R.). On the other hand, it has been held, that "a promise to pay generally, or a *promise to pay a part,* or a part payment made, with a full knowledge that he has been fully released from liability on the bill by the neglect of the holder, will operate as a waiver, and bind the party who makes it for the payment of the whole bill." *Dixon* v. *Elliot,* 5 Car. & P., 437; *Margetson* v. *Aitkin,* 3 Car. & P., 388; Harvey v. *Troupe,* 23 Miss., 538. So it would seem, that the weight of the authorities supported the charge of the Judge in this particular.

But aside from this, his Honor, in his charge to the jury, told them they might consider the words "No protest," written on the margin of the draft, as evidence of a waiver of notice of presentment and non-payment. The words "No protest" written on the margin of this draft, must have been put there with an object, and we can conceive of none other than to dispense with the notice of presentment and refusal to pay, otherwise it is unmeaning.

(539) It is well settled, that protest being a part of the custom of merchants which is essential in foreign bills to fix the drawee and indorsers with liability, is not necessary for such a purpose in inland bills. *Hubbard* v. *Troy,* 24 N. C., 134; 1 Parson's on Notes and Bills, 643. But even in foreign bills the protest may be waived. There the words, "I waive protest," or "waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, was universally regarded as expressly waiving presentment and notice, the protest being, according to the law-merchant, the formal and necessary evidence of the dishonor of such an instrument. In waiving "protest," the party is considered not only as dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal, though necessary, proof of what the law required. 2 Daniel on Neg. Ins., §1095. But when the waiver of protest is applied to inland bills, the protest having no application to such instruments, there is a diversity of opinion in the Courts and text books, whether such a waiver would have the effect of dispensing with notice in an action upon an inland bill. But the better opinion is, that as the word "protest" has by general usage a well known signification, and wherever it is used, it is supposed to mean something more than the formal declarations of a notary. Hence, Mr. Daniel, who is very high authority on the subject, says, "the weight, as well as the number of authorities, predominates in favor of construing a waiver of 'protest' to signify as much when applied to inland bills and notes, as when used in respect to a foreign bill."

"Inland bills and promissory notes may be protested, by statutory enactments, in many States, and the protest is accorded the same effect as to them, when it is made, though it is not necessary to make it, and the weight, as well as the number of authorities, predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes, as when used in respect to a foreign

(540) bill." Ibid., and the cases cited in Note 2.

The doctrine there laid down, must then apply to this bill, for we have a statute which provides that when it may be necessary to prove a demand upon, or notice to the drawer or indorser of a bill of exchange, or a promissory note, or other negotiable security, the protest

taken before a proper officer shall be *prima facie* evidence that such demand was made, or notice given, in the manner set forth in the protest. *The Code,* §49.

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

No error. Affirmed.

Cited: Bank v. Bradley, 117 N. C., 530; *Main v. Field,* 144 N. C., 308; *Rasberry v. West,* 205 N. C., 408; *Pearson v. Westbrook,* 206 N. C., 911.

H. C. ECCLES v. STEPHEN TIMMONS, et als.

Judicial Sale—Purchaser at.

Where, in a proceeding to sell land by decree of a Court, the pleadings and proceedings purport to sell a perfect title, a purchaser at such sale will not be required to pay the money and take the land, if it turns out that the title is imperfect; but where the true state of the title is set out in the pleadings, he will not be released from his bid, if the title is not good.

(*Smith* v. *Brittain,* 38 N. C., 347; cited and approved).

Appeal from an order made by the clerk in a special proceeding pending in the Superior Court of MECKLENBURG County, heard by *Shipp, Judge,* at Chambers.

The plaintiff alleges that he, as owner of an undivided moiety of the land in his petition described, consisting of several parts, and lying in the city of Charlotte, is a tenant in common with the defendant, to whom the other moiety belongs, and demands a partition thereof, which cannot be effected, except by sale, without injury to the (541) interest of the tenants. The petition avers that the defendant's title is derived under a deed made by S. M. Timmons, a previous proprietor, on May 5th, 1886, of which a copy is annexed, conveying said moiety to the use of the defendant, S. F. Timmons, for life, and afterwards to the use of the infant defendants, her children. The adult defendants, Stephen and wife, file their answers, as do the infant defendants by their guardian *ad litem,* not controverting the material allegations of the plaintiff. The decree of sale was accordingly made, and commissioners appointed for that purpose, who were directed to sell on a credit of six months for four-fifths of the purchase money, and to

require a cash payment of one-fifth, the deferred payments being secured by notes, bearing interest at the rate of eight per cent. per annum.

The sale was made, with a report thereof, of the premises in three parts, and they say the purchasers have complied with the conditions and terms of sale, and that the parcels brought a fair and reasonable price, and they recommend confirmation. The report of the sale of that portion from which the appellant seeks to be relieved, is in these words: "And at the same time and place, T. M. Hargett became the highest and last bidder, in the sum of six hundred and five ($605) dollars for that lot of land and premises in said square No. 69, beginning at a stake, the corner of the first named lot on Second street, and runs with the line of said first named lot purchased by H. C. Eccles, to a stake on Haltom's line; thence with Haltom's line northwest 66½ feet to a stake in said line; thence parallel with Church street 78½ feet to Second street; thence with Second street to the beginning."

The report of the sale was confirmed, there having been no exceptions entered thereto.

On July 14th, 1886, the commissioners issued a notice to T. M. Hargett, the purchaser of lot No. 2, of an intended motion for
(542) judgment against him for $1,105, less a credit of $221, the same being the unpaid purchase money, with interest from June 1st, 1885. To this motion, an answer was put in as follows:

"T. M. Hargett, responding to the motion for a summary judgment against him upon the notes given for the unpaid purchase money for lots No. 2 and 3, purchased by him as set forth in report of commissioners, says:

"That this respondent is ready and willing to perform said contract on his part, and pay the balance of said purchase money due upon the notes he gave therefor, if a good and sufficient title to the property he purchased could be made to him by this Court. That in said proceeding and decree thereon, this Court, as respondent is advised and believes, undertook to convey to the purchasers of said lands the whole right, title and interest in said lands, and it was averred that the whole interest in same was in the parties then before the Court. Respondent is advised and believes, that under his said purchase and the deed which the commissioners propose to execute to him, he will not get a good title to the one undivided half interest of the said property, and he attaches to this answer a copy of the deed from S. M. Timmons to his wife S. F. Timmons, and the other defendants, his children, now living.

"Respondent avers, as he is advised and believes, that under the provisions of said deed, children yet to be born to the said S. M. and S. F. Timmons, may become the owners of the said undivided half interest in said property, and cannot be made parties to said proceedings, and can-

not be represented in this Court by any class now before the Court, or be bound by any decree of this Court.

"Wherefore, respondent prays that judgment shall not be entered against him on said notes, but that the sale made shall not be confirmed, but same shall be set aside, and respondent be released from all further liability for the purchase money of said land or any part thereof."

The deed referred to in the complaint, and upon the pro- (543) visions of which resistance is offered to the proposed enforced payment, contains a covenant of seizin made to the two infant defendants, William C. and Charles M. Timmons, with the following declared trusts: "For the uses, interest and purposes hereinafter mentioned, that is to say, to permit the said Sallie, during the term of her natural life, or during the time that she continues my wife or widow, to collect the rents or profits of the said property, and to apply the same towards the maintenance of herself, and the education and maintenance of my children above mentioned, and such as may be hereafter born to me by her, such application of the rents and profits to continue until the youngest child is under (arrives at, is probably meant) the age of twenty-one years; and then to the use of my said wife and children, now born, or to be born, share and share alike, during the life and widowhood of my said wife; or upon her death or second marriage, then to the use and behoof of my children then living, and to the issue of such as may be dead, to them and their heirs forever, share and share alike, representatives to take *per stirpes.*"

The deed is executed by the defendant, Stephen Timmons, and bears date May 6th, 1876.

Before the clerk, the motion for judgment was denied upon the facts set out in the respondent's answer and found to be true, and on appeal to the Judge, the ruling was reversed, and judgment rendered against said Hargett, from which he appeals to this Court.

Mr. Armisted Burwell, for the plaintiff.
Mr. D. G. Fowle, for the defendant.

SMITH, C. J. (after stating the facts). It will be observed, that the title of the defendant-tenants is set out in the petition and a copy of the deed under which they derive it, annexed thereto. (544)

With the information thus furnished or of easy access, the purchaser bids for the lot, pays part of the purchase money, and secures the residue by a note with the allowed credit. This credit expired on December 1st, 1885; and seven months thereafter, when served with a

notice of a demand for judgment, for the first time the defence is set up of an imperfect title to the lot.

It is not a case when, upon the face of the pleadings, a perfect title purports to be sold that is afterwards discovered to be defective, when the Court will relieve and not compel the purchaser to pay for what he does not get. But the true state of the title appears in the averments in the petition itself, so that every bidder may know by examination what estate he will acquire in the land, and his bid must therefore be regarded as his own estimate of the value of what he may buy and the Court may direct thereafter to be conveyed.

"A sale by the Master in a case of this kind, (for partition)," says RUFFIN, C. J., in *Smith* v. *Brittain,* 38 N. C., 347, (351); "is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum,* of such interest as the party has or may have in which the rule is, *caveat emptor,* but professes to be a *sale of a particular estate,* stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Thereupon, if there be *no such title,* the purchaser has the same equity against being compelled to go on with his purchase, as if the contract had been made without the intervention of the Court; for in truth, the title has never been judicially passed on between persons contesting it."

So, if a purchaser neglects to look into the title, it will be considered his own folly, and he can have no relief. Sugden on Vendors, 347.

(545) The petition in the present case truly represents the interests of the parties to the proceeding, and the purchasers, presumed to know the law, buy such as they possess, and therefore ought to pay his bid. We have not laid stress upon the provisions of the deed out of which the difficulty arises, nor to the numerous cases which have been before the Court and are pressed in the argument of appellant's counsel; nor to a possible construction, which puts the legal estate in the covenantees and invests it with the trust declared in the concluding clause of the deed, so that these are represented by the trustees, since it is not material to decide whether a full and perfect title can be transmitted to the appellant, inasmuch as he gets what he bought, and there are no equitable circumstances which entitle him to the relief asked.

There is no error, and this will be certified that the cause may proceed according to law.

No error. Affirmed.

JOHN F. SPENCE et al. v. JACOB CLAPP.

Judge's charge—Assignment of Error.

1. Where the evidence presents the case in two aspects, it is proper for the trial Judge to charge the jury upon the law as it arises upon both aspects, and then leave the question of fact to be passed on by the jury.
2. It cannot be assigned as error on appeal, that the jury did not give due consideration to the evidence, considered in one aspect of the case. This is addressed to the discretion of the trial Judge on an application to set aside the verdict.

CIVIL ACTION, tried before *Gilmer, Judge,* and a jury, at December Term, 1885, of GUILFORD Superior Court.

This action, begun before a justice of the peace on May 23d, (546) 1884, and after judgment, removed by defendant's appeal to the Superior Court, is upon two notes under seal, each in the sum of $85, and dated and bearing interest from July 8th, 1882, executed to W. H. McDaniel or bearer, and due at nine and twelve months respectively. The complaint alleges that the notes belong to the plaintiff, while they bear no indorsement. The answer sets up many defences, and among them that a contemporaneous agreement was entered into between the parties, of which the execution of the notes was part, by the provisions of which, upon a contingency which has occurred, the said notes were to be surrendered to the defendant; and, if the plaintiffs are verbal assignees, they took the notes subject to all defences that could be made in an action by the assignor.

The agreement has reference to a sale of a patented right, designated as "L. J. Dicht's improvement in bee-hives, patented December 16th, 1873," for the county of Onslow in this State, with certain enumerated privileges elsewhere to be exercised, and contains these provisions: "And it is agreed, that the party of the second part, (the defendant), is to use due diligence in the manufacture and sale of said bee-hives, with the right of use for the same, and the territory for the same, and on failure to make two hundred and fifty-five dollars by the sale of said patent, by the time said notes become due, the contract is null and void; and the deed of said territory, with all other papers, with what has been made by selling said patent, are to be delivered to the party of the first part, and said notes, or two hundred and fifty-five dollars in cash, shall be delivered to the party of the second part."

Upon issues submitted to the jury, they find that the contract set up in the answer was a part of the contract, of which the notes in suit were the other part; that the plaintiffs are not purchasers for value, and

without notice of the defendant's equities against the assignor; (547) and that the defendant has performed his part of the contract.

The matter in controversy presented in the record, was whether the defendant had made the effort and used the diligence required in his stipulation for the manufacture and sale of the patented article, within the defined territory; and upon this issue, the defendant's testimony, which is all the evidence offered, was as follows: "That in the Fall of the year 1882, after the contract was made in July of that year, and also in 1883, after July of that year, he went to Onslow county; that his trip lasted thirty days or more; that he never made a sale of a right to territory under the patent as authorized by the contract, nor of a hive; that he did not find any one in Onslow who wanted one of the hives, although he tried all he could to recommend and introduce them; that he did not manufacture the hives, because he could buy them cheaper at High Point; that he went to High Point to take up the notes in the summer of 1884; that he did not get them, because McDaniel was gone, and witness had never seen him since."

Upon the cross-examination, the defendant said that he had been in the habit of going to Onslow county for several years before making the contract in question; that he drove across the country from his home in Guilford county, a distance of about two hundred and fifty miles, driving a wagon loaded with flour, and that it was his custom to exchange the flour for fish and oysters, which he took back with him on his home trip, and that these trips were generally made in the Fall of the year; that in the autumn of 1882, after the contract was made in July, he went to Onslow county with a load of flour, partly to pay expenses and to exchange the same for fish and oysters; that it generally took thirty days to make the trip to Onslow, nine or ten days to go and eight or nine days to return; that he bought two of the hives from Rufe Summers on the day he made the contract, and took them home and put into them swarms of bees; that afterwards he bought (548) other hives of the same kind, to the number of fifteen at High Point, from one Snow, and had seven of them now; that they were good hives, and he made honey with them, thirty-two pounds in one year, and had no fault to find with them; that when he went to Onslow in the Fall of 1882, he did not take any hive with him to exhibit; that the reason was, he was afraid he would break it to pieces in his wagon; that he did not take the specifications of the patent, nor any plates nor pictures of the hive for exhibition to aid the sale, but took a printed paper with a bee on it, which set forth the advantages of the hive, and how people had made money on it, and explained to the citizens the working and structure of the hive with such aid, and did all he could to make sales, and thinks the people understood the hive

from his descriptions and explanations; that he spent two weeks on the first trip canvassing bee men and those interested in raising bees and honey; that the picture of the bee spoken of might have been on an envelope.

The Court charged the jury, that if they found as claimed by the defendant, that the defendant thoroughly canvassed the territory purchased by him, called the attention of persons there interested in bee culture to the nature and structure of the hive he offered to sell, made two trips to the county of Onslow, in which he spent two weeks thus engaged, but failed to make a sale of either hive or right, then they should find that he exercised due diligence, and that they should find the fourth issue in the affirmative. But on the other hand, that if, as it was claimed by the plaintiffs, the defendant only undertook the sale as a mere incident to his regular trips to Onslow county for other purposes, and took nothing with him to enable him to attract attention to the merits of his hive, neither a model, nor a design, nor any drawings or illustrations, and made no real effort to sell, except when it came in his way, while engaged in his other business, to speak of it to others, then they must answer the fourth issue in the negative. (549)

At the special request of plaintiffs, the Judge instructed the jury, that they were not to consider the alleged effort of the defendant to sell on his second trip, but were confined to the trip in the Fall of 1882, in answering the fourth issue.

The plaintiffs except to the charge on the ground:

1. That the whole evidence of the defendant must be taken together, and that as a whole, the facts presented do not constitute due diligence; and that it was error to instruct the jury that they could in any contingency, under the evidence, find the fourth issue in the affirmative.

2. That the jury did not properly respond to the instructions of the Judge given in the second part of his charge, in which he says the jury might find the fourth issue in the negative, because the evidence did show, without contradiction from any source, as recited in said charge, that the defendant did not take with him the proper appliances to enable possible purchasers to understand the nature of the invention, and if believed by the jury, this state of facts would establish a want of due diligence, and would require the jury to find the fourth issue in the negative.

Mr. Levi M. Scott, for the plaintiffs.

No counsel for the defendant.

SMITH, C. J., (after stating the facts). We are unable to see any just ground for exceptions to the charge as to what constitutes due dili-

gence under the circumstances, and what falls short of it. How more explicit could it be than in the enumeration of the facts testified to, and upon which the measure of defendant's duty was dependent? The expression, "thoroughly canvassed," in the instructions, comprehends a series of active and energetic efforts to make sale of the hives, and must necessarily be general. It cannot be expected that it should men-
(550) tion them in detail, when the evidence was before the jury, of the acts in which the canvassing consists. The Court does declare the law upon the hypothesis of the acceptance of the facts, in one and another aspect of the evidence, and in our opinion quite as favorably to the plaintiffs as they could ask. It is not always practicable to so separate the facts as to raise a question of law for the Court, for they are often blended, and must be passed on by the jury under appropriate directions of the Court.

Taking the alternative instructions, which upon one statement of the facts, show the exercise of due diligence, and upon the other, want of it, and leaving to the jury to determine what, upon the evidence, were those facts to which the instruction is applicable, the Court has done all required for the rendering of an intelligent verdict.

The second exception to the charge, that the jury did not properly respond to the second part of the instructions, or, in other words, to give due weight to the evidence tending to show the absence of due diligence, is addressed to the discretion of the Judge in an application to set the verdict aside, and cannot be entertained in this Court.

We discover no error in the charge, nor in admitting the contract out of which the defence arises, in evidence. Indeed, this last exception was not urged in the argument, and we suppose was not relied on by the appellants.

The judgment must be affirmed.

No error. Affirmed.

Cited: Spence v. Smith, 101 N. C., 238; *S. v. Melton,* 120 N. C., 597.

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(551)

W. B. FERRALL et al. v. E. S. BROADWAY.

Marriage—New Trial—Equity Practice—Judge's Charge—Evidence—Province of the Jury.

1. Where, under the former practice, a Court of Equity sent an issue to be tried by a Court of Law, it never granted a new trial, but this might be had in a proper case, by an application to the latter Court.

2. The effect to be given to testimony is exclusively for the jury, and it is error for the trial Judge, in his charge, to instruct them that in finding a fact, they must be guided by the rules which Chancellors have laid down for their guidance, where they were required to pass on the facts.

3. So, while a Chancellor would require very strong evidence to rebut the fact of marriage where the parties have lived together as man and wife, and have generally been so reputed to be, after the death of one of them, it is error for the Judge to charge the jury that they must be governed by this rule.

4. Where a man and woman have lived together in adultery, the burden of proof is on those who allege a subsequent marriage to prove it, and the fact that there was a general reputation in the community that they were afterwards married, and the declarations of the man that such was the case, does not require strong and convincing evidence to rebut it, but it must be left to the jury to decide the fact of marriage upon a preponderance of evidence.

5. In cases where the character of the evidence is suspicious, the trial Judge may call the fact to the attention of the jury, as in the case of accomplices, or near relatives of the accused, or of fellow-servants, or of a witness who has sworn falsely in a part of his testimony, but these matters of discredit are for the jury to consider, and the Judge can only caution the jury, so as to induce them to make a careful scrutiny of such evidence.

(*Peebles* v. *Peebles*, 63 N. C., 656; *Rogers* v. *Goodwin*, 64 N. C., 278; *State* v. *Haney*, 19 N. C., 390; *State* v. *Hardin*, Ibid., 407; *State* v. *Jim*, 12 N. C., 508; *State* v. *Williams*, 47 N. C., 257; *State* v. *Nash*, 30 N. C., 35; *State* v. *Nat*, 51 N. C., 114; *State* v. *Smith*, 53 N. C., 132; *State* v. *Noblett*, 47 N. C., 418; *Wiseman* v. *Cornish*, 53 N. C., 218; *Flynt* v. *Bodenhamer*, 80 N. C., 205; approved. *Jackson* v. *Rhem*, 59 N. C., 141; distinguished.)

SPECIAL PROCEEDING for partition, heard on issues joined (552) before the Clerk, before *Clark, Judge,* and a jury, at August Term, 1886, of the Superior Court of LENOIR County.

The defendant appealed.

The facts appear in the opinion.

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

Mr. Geo. Rountree, (*Mr. A. J. Loftin* was with him on the brief), for the defendant.

SMITH, C. J. In this proceeding for partition, the petitioners allege that by the death and intestacy of Jesse W. Broadway, the lands described in the petition descended to them and the defendant, his children and heirs at law, as tenants in common. The defendant in her answer, claiming to be sole heir at law of the intestate by his deceased wife, alleges that the petitioners, other than W. B. Ferrall, are the illegiti-

mate offspring of an illicit intercourse kept up after her mother's death between the intestate and one Elizabeth Oxley, during which they were born, and as such are not entitled to any part of his estate.

The sole issue submitted to the jury was:

Are the plaintiffs, or any of them, co-heirs with the defendant of the late Jesse W. Broadway; if so, which of them? And to this, the response is: "Yes, as to Meade, Alice and Willie."

Upon this finding, remitted to the Clerk before whom the proceedings originated, for his further action, and the denial of a motion for a new trial, the defendant appeals, assigning errors alleged to have been committed during the trial before the jury.

The sole inquiry upon which evidence was offered, was whether any marriage had ever taken place between the parents of the petitioners, and if so, at what time, and the verdict fixes it at a time antecedent to the birth of the youngest children, so that while they are legiti-
(553) mate, the others are found to be bastards. The testimony fully establishes the illicit origin of the sexual intercourse, maintained during many years between the parties, and the illegitimate birth of three children, after which, if at all, the relation was rendered lawful by their intermarriage. Such is the finding of the jury. There was no direct evidence of an actual marriage, no witness being produced who was present when the ceremony was performed, and no evidence found of the issue of a marriage license authorizing it. The nearest approximation to such proof, is the intestate's declaration one Sunday evening that he was going off to be married, and his going off and returning with the said Elizabeth, but he did not then say he had been married, and there was evidence of his having been seen going in a different direction from that leading to the county to which he had said he was going.

The evidence consisted in declarations of the intestate, wholly irreconcilable, as to his marriage—his recognition of the paternity of the children—the internal domestic management of affairs, as if the parties were husband and wife, and general reputation, was in conflict. There was produced an entry in the family Bible, written by the intestate, of the births of the three younger children, each of whom is described as the child "of J. W. Broadway and Elizabeth his wife," and the date of their respective births given.

The witnesses to the general reputation and to the declaration of the intestate, were numerous, and their testimony entirely different, except as to the earlier period of the intercourse, when there is a general concurrence as to its unlawfulness.

We do not find it needful to reproduce in detail the evidence, as this general statement of its kind and character will suffice to render in-

telligible the instructions, the examination and disposal of which will dispose of the appeal.

The plaintiff asked several instructions as follows: (554)

"1. When a man and woman have lived together for many years, treating each other as man and wife, and have been so reputed to be in the neighborhood where they lived, during all the time in which they thus cohabited; and when they have had children, which were treated by the parents as legitimate up to the time of the death of the latter, the testimony which should induce a Court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. Given—subject to the second instruction given for defendant.

"2. When a man and woman have lived together for many years, treating each other as man and wife, and have been so reputed to be in the neighborhood where they lived, up to the time of their deaths, and when they have had children which were treated by the parents as legitimate, up to the time of the death of the latter, the testimony which should induce a Court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. Given—subject to second instruction given for defendant.

"3. Where a man and woman lived together for many years, treating each other as man and wife; and where they have had children which were treated by their parents as legitimate, up to the time of the death of the latter, the testimony which should induce a Court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. Given—subject to second instruction given for defendant.

"4. The principle that the validity of a marriage ought not to be questioned after the parties, or either of them, have by death been deprived of the opportunity of supporting it by proof, may well influence the jury in deciding upon the existence of the marriage (555) after the death of both, or either of the parents. Given after being modified as follows: 'But the fact of marriage or no marriage is entirely a question for the jury to ascertain upon all the evidence in the case.'

"5. The cohabitation of a man and woman as man and wife, is presumed to be lawful until the contrary appears, and the burden of proving such cohabitation unlawful, is upon him who asserts it, in this case, the defendant. Given, subject to second instruction given for defendant.

"6. A marriage is valid, if solemnized by one having authority to do

so, although no license was obtained, no bond given and no certificate returned by the person solemnizing the marriage." Given.

The several instructions given at the request of the defendant, incorporated in those numbered 1, 2, 3 and 4, as a qualifying condition of each, is this:

"2. That if the jury should believe that the intercourse between J. W. Broadway and Elizabeth Oxley began meretriciously, or that it was even illicit, then there is no presumption of marriage from reputation, but the inference is that the unlawful commerce continued to exist, and plaintiffs must show a change in their intercourse, or the jury must find against a marriage." Given.

This charge is supposed to be sanctioned by the words used by BATTLE, Judge, delivering the opinion in *Jackson* v. *Rhem,* 59 N. C., 141, who says: "We are of opinion, that when a man and woman have lived together for many years, treating each other as man and wife, and have been so reported to be in the neighborhood where they lived, during all the time in which they thus cohabited, and when they have had children, which were treated by the parents as legitimate up to the time of the death of the latter, we think that the testimony which should induce a Court to declare against the marriage of the parties, and thereby bastardize their issue after their death, *ought to be*
(556) *so overwhelming as not to leave a doubt about the facts thus declared.*"

In this case, issues had been sent to a Court of law, to obtain the responses of a jury to an inquiry as to the marriage of the parents of certain of the plaintiffs and their birth in wedlock, to which an affirmative response was returned, and the language quoted was in answer to a motion made in the Supreme Court, exercising its functions as a court of equity, for the dismissal of the bill notwithstanding the verdict, or to order another trial of the issue, on the ground that the verdict was against the weight of evidence.

The case states, that testimony in the form of depositions to be used on the hearing, and on the removal of the case transmitted with it to this Court, as we understand the record, taken on both sides, made it apparent that the father and mother of the *feme* plaintiff lived together for twenty years as man and wife, and were reputed as such in the neighborhood, but there was no evidence that they had been actually married. A copy of a marriage bond was produced, which recited that these parties had obtained license to intermarry. The adversary evidence was of declarations made by the man, both before and after the death of his reputed wife, that he had never married her.

It may be remarked in reference to the motion, that a court of equity, in sending out an issue to be tried before a jury in a court of law,

never grants a new trial, for reasons set out in the later cases of *Peebles* v. *Peebles,* 63 N. C., 656, and *Rogers* v. *Goodwin,* 64 N. C., 278, while in a proper case it might be had in the Court where the issue was tried. With the proofs before the Court, fortified by the verdict of the jury, the dismissal of the bill was wholly inadmissible.

But whatever proofs the Judge, passing upon the facts, may prescribe for his own action as needful to overcome the presumption of the legality of the intercourse continued for so long a time, and sustained by reputation, when by death it has ceased to exist, we (557) know of no rule of law which permits the Court to give so rigorous and unusual an instruction to guide and control the jury. While it would not be improper in the Judge to caution the jury in considering and acting upon the evidence, in view of its consequences, they are alone to determine the facts, upon evidence permitted to be heard, and producing conviction upon their own minds. What effect is to be given to testimony competent in law to establish a fact, belongs exclusively to the jury to determine, as also the credibility of witnesses who give the testimony. This is so universally recognized and acted on in the administration of the law in tribunals constituted of a judge and jury, and exercising their separate functions, as to need no support from references. The error committed in the charge, is in imposing upon a jury the rule which a Judge, passing upon facts without a jury, prescribed for his own action, as one which the jury is bound to obey.

Thus, it was once supposed that the unsupported testimony of an accomplice in crime was insufficient to convict the accused, but it has been decided that no such stubborn rule prevails, and that such testimony "if it produces undoubting belief of the prisoner's guilt, is sufficient to warrant a verdict affirming his guilt." *State* v. *Haney,* 19 N. C., 390; *State* v. *Hardin,* Ibid, 407.

So it was once held (*State* v. *Jim,* 12 N. C., 508), that when a jury find a witness swearing corruptly false in a material matter before them, they are bound to discard his testimony altogether upon the maxim *falsum in uno, falsum in omnibus,* but upon a very thorough examination of the ruling and of the authorities bearing upon the subject, a different conclusion was reached and announced in *State* v. *Williams,* 47 N. C., 257, in the opinion delivered, in which PEARSON, J., thus speaks: "It is the exclusive province of the jury to decide issues of fact, and to pass upon the credit of witnesses. When the credit of a witness is to be passed on, each juror is called on to say whether he believes him or not. This belief is personal—indi- (558) vidual—and depends upon an infinite number of circumstances; and any attempt to regulate or control it by a fixed rule is impracticable,

worse than useless, inconsistent and repugnant to the nature of a trial by jury, and calculated to take from it its chief excellence, on account of which it is preferred by the common law to any other mode of trial, and to adopt in its place, the chief objection to a fixed tribunal."

The proof seems to have been deemed by the jury amply sufficient to prove the illegitimacy of the three first born children, from whom the verdict separates the three of later birth, so that the illicit intercourse in defiance of law was kept up for a series of years, and the charge, more appropriate, given at the defendant's instance that the presumption is that the same unlawful intercourse was continued and needed rebuttal, by showing a marriage, by which its character was changed from an unlawful to a lawful sexual commerce. It is not a case of consistent reputation, accepted by the public, and the maintenance of the intercourse appropriate to the marriage relation, attempted to be subverted after death with the results to the offspring, but a case of questionable reputation and of contradicting declarations of the intestate, leaving to the jury to find upon the preponderance of evidence, if any marriage had taken place in removal of the inference to the contrary. But if this were otherwise, to direct the jury to find the fact of marriage, unless the testimony in disproof was *"so overwhelming"* as not to leave a doubt about the fact, is not sanctioned by any rule known to us, and is an unwarrantable interference with the jury as the triers of controverted facts.

The charge is not corrected, and its objectional features removed, by the reference to the second instruction to which it is subjected; for while the latter is appropriate and proper, its efficacy is neutral-
(559) ized by the part of the instruction to which we have adverted preceding it. If cautionary words have been used in calling the attention of the jury to the possible consequence of a verdict declaring the illegitimacy of the plaintiffs, to induce a careful scrutiny of the evidence, it might not have overstepped the limits of judicial right, as in regard to the testimony of an accomplice; *State* v. *Hardin,* 19 N. C., 407; or the discredit attaching to the testimony of near relations; *State* v. *Nash,* 30 N. C., 35; or to that of fellow-servants; *State* v. *Nat,* 51 N. C., 114; or the detection of a witness in a false statement upon his sworn examination; *State* v. *Smith,* 53 N. C., 132; but these matters of discredit are for the jury to weigh and consider, and are not rules of law to control the jury; *State* v. *Noblett,* 47 N. C., 418; *Wiseman* v. *Cornish,* 53 N. C., 218; *Flynt* v. *Bodenhamer,* 80 N. C., 205.

For the error in the instruction pointed out, the defendant is entitled to have the verdict set aside, and an order for a *venire de novo,* and it is so adjudged. Let this be certified.

Error. Reversed.

Cited: S. v. Byers, 100 N. C., 518; *Berry v. Hall,* 105 N. C., 164, 165; *Osborne v. Wilkes,* 108 N. C., 672; *Bonner v. Hodges,* 111 N. C., 68; *Hopkins v. Bowers, ibid.,* 179; *Bank v. Gilmer,* 116 N. C., 703; *Cobb v. Edwards,* 117 N. C., 252; *Kelly v. McNeill,* 118 N. C., 354; *Edwards v. Phifer,* 120 N. C., 406; *Austin v. Stewart,* 126 N. C., 528; *Lehew v. Hewett,* 138 N. C., 10; *Fraley v. Fraley,* 150 N. C., 504; *Ellett v. Ellett,* 157 N. C., 163; *Ferebee v. R. R.,* 167 N. C., 299; *Goodman v. Goodman,* 201 N. C., 810.

A. C. BENTON et al. v. SARAH BENTON et al.

Landlord and tenant—Estoppel—Evidence.

1. Under the present system, a judgment in an action to recover land is as complete an estoppel as in any other action.
2. A tenant is estopped to deny his landlord's title, but when the plaintiff fails to show any title in himself, and relies entirely on this estoppel, the judgment should only be that he recover the possession, and the defendant should be left free to assert any title he may have in another action.
3. Where the plaintiff sued for two tracts of land, and the defendant denied there was any contract of renting as to one of them, and the plaintiff testified that he intended to rent all the land he had title to, and that the defendant had the right to cultivate both tracts, but that he did not expressly mention the one in dispute; *It was held,* sufficient evidence to extend the estoppel to both tracts.

(*Riley* v. *Jordan,* 75 N. C., 180; *Pate* v. *Turner,* 94 N. C., 47; cited and approved).

CIVIL ACTION, tried before *MacRae, Judge,* and a jury, at Fall (560) Term, 1885, of ANSON Superior Court.

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

Mr. J. A. Lockhart, for the plaintiffs.

Messrs. Payne and *Vann* filed a brief for the defendants.

SMITH, C. J. The action is to recover possession of two tracts of land, described separately in the complaint, upon an averment of title in the plaintiffs, which is controverted in the answer. In support of the claim, the plaintiffs introduced in evidence a deed executed on June

29th, 1850, by W. B. McCorkle to Stephen W. Cole, Edmond J. Waddell and Hampton B. Harman, alleged to convey the larger of the disputed tracts, in trust to secure a large indebtedness and liability then resting on him.

II. A deed for the same, made December 18th, 1852, by the trustees, to William A. Benton and Archibald C. Benton.

III. A deed from Archibald C. Benton and James C. Carraway, assuming to act as trustee, under a conveyance from the former, for the undivided moiety of the tract, to the other tenant in common, William A. Benton.

IV. The will of the last named, dated May 1st, 1862, and proved in April, 1864, devising all the testator's lands to his brother, Archibald C., and sister Elizabeth, constituting the former trustee, to secure the separate estate of the latter.

(561) The evidence to sustain the plaintiff's claim to the second or smaller tract, consists in a deed from William Hasker and others, to said Archibald C., and from the latter to the testator, William A. Benton. The Court ruled that these were insufficient to divert title out of the State and put it in the plaintiffs, and the issue was thus made to depend on an estoppel, arising out of a contract of renting. It was shown that W. Henry Benton, husband of the defendant Sarah, was employed to oversee on the plantation when carried on by W. B. McCorkle, and moved upon it with his family about the year 1847 or 1848, and died in 1858. Since this, she has continued to occupy the premises.

In March, 1865, she executed a note, payable to the heirs of W. A. Benton on the first day of January following, for the sum of one hundred dollars, of the currency in use when due, "for the rent of the land whereon I now live, belonging to the heirs of said W. A. Benton."

It was further in proof, that in 1850, the defendant B. H. Benton gave a note to A. C. Benton, promising to pay "800 pounds of cotton for the rent of the Benton plantation for that year," and this was supplemented with parol evidence of the relation of tenants and landlord.

The Court instructed the jury, that if the defendants leased the premises and occupied the land as tenants, they were not permitted under the rules of law, while continuing in possession, to dispute the lessor's title, and in such case, the jury should return an affirmative response to the first issue. This is sustained by the case of *Riley* v. *Jordan,* 75 N. C., 180. The defendant insisted, that these rentings were of the *larger* tract, and did not embrace the smaller tract of forty-three acres, which was not parcel of the other. This inquiry was left to the jury, and it is now contended, upon no evidence tending to establish the

fact. The testimony of the plaintiff A. C. Benton, relating to this point, (and this is all offered), was as follows: "When I rented the land to defendant, I included the Benton or McCorkle tract, and this forty or forty-three acres. *I rented all the land* that I (562) considered I had title to, and included all the lands I had up there. She, (the defendant), had the right to cultivate any portion of the forty-three acres. I did not tell her specially about the forty-three acres."

While it is true that a contract consists in the agreement of the minds of the parties to it, and is not what one alone intended, the testimony, unassailed by the defendant, purports to represent the renting as in fact made for all the land, and though not very precise in terms, was in effect sufficient to warrant the extension of the estoppel to both tracts.

But an estoppel may also arise out of the entry of the husband with his wife and family upon the premises as overseer for the party then in possession, which abided on her, she continuing the occupation, as the right to make use of it was transmitted with the successive conveyances, terminating with the plaintiffs. Inasmuch, however, as the plaintiffs failed to prove *title in themselves,* and establish their right to recover possession by the technical rule growing out of the tenancy, the verdict should not have been altogether in the affirmative upon the first issue, but in favor of the plaintiffs, so far as involves the regaining of possession. The subject was considered in a recent case, and this language was used: "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 conclude all further inquiry into the title, when the result is produced by an estoppel which only prevents a retaining of the defendant's possession." *Pate* v. *Turner,* 94 N. C., 47.

Under our former system, no such consequences follow, for a recovery in ejectment was merely of the possession, the title being undisturbed; but now the effect in an action respecting land is as conclusive as it is in an action for personal property. But no complaint is made on this score in the record, nor is any exception taken to the charge in this particular. We do not feel at liberty, therefore, (563) to disturb the verdict, but in the rendition of judgment, as is said in the case referred to, it should be "without finally determining the title," only for recovering "possession and damages," "declaring the defendants free hereafter to assert and maintain their title," if such they have.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Freeman v. Ramsey, 189 N. C., 798.

J. H. MaGEE v. M. E. BLANKENSHIP et als.

Evidence—Declarations—Statute of Frauds.

1. The declarations of the owner of land, made while in possession, in derogation of his title, are evidence both against him and one claiming title under him.
2. *It seems*, that declarations made after the execution of a deed, but while the grantor remains in possession and exercising proprietary rights are admissible in evidence against the vendee.
3. In an action for specific performance, where the defendant sets up a claim for compensation for improvements put on the land, evidence is admissible to show the enhanced value of the lot, by reason of improvements put on it by the defendant.
4. Evidence in writing, when the writing contains all the stipulations assumed by the person to be charged, and authenticated by his signature, is a compliance with the statute of frauds.
5. So, where parties agreed by parol to exchange lands, and afterwards one of them executed a deed to carry it out; *It was held*, that the deed was a sufficient writing within the statute.
6. A parol contract to convey land is not void if not reduced to writing, and if it is afterwards reduced to writing, it removes the statutory impediment and imparts to the contract an original efficacy.

(*Guy* v. *Hall*, 7 N. C., 150; *Johnson* v. *Patterson*, 9 N. C., 183; *Satterwhite* v. *Hicks*, 44 N. C., 105; *Headen* v. *Womack*, 88 N. C., 468; *Hilliard* v. *Phillips*, 81 N. C., 99; *Blacknall* v. *Parish*, 59 N. C., 70; *Bonham* v. *Craig*, 80 N. C., 224; *Foust* v. *Shoffner*, 62 N. C., 242; *Green* v. *The Railroad*, 77 N. C., 95; *Mizell* v. *Burnett*, 49 N. C., 249, cited and approved).

(564) CIVIL ACTION, tried before *Graves, Judge,* and a jury, at Spring Term, 1885, of the Superior Court of HALIFAX county.

The action, commenced against P. E. Blankenship, is to recover possession of a lot in the town of Weldon, in his occupation, which formerly belonged to N. M. Long, who conveyed it to Annie T., wife of Lawrence F. Larkin, and the two last named, on December 1st, 1880, made a deed therefor to the plaintiff. The said Blankenship died before answering, and Mary E., his widow, and William Blankenship, his son, and sole heir at law, an infant, are made parties defendant in his stead.

The said William, by his guardian *ad litem,* puts in an answer denying the plaintiff's claim, and setting up an equitable defence of the following import:

He alleges that his deceased father owned another lot in Weldon, described in the answer as bounded by Second street, North street, and the lands of L. J. Pair, which, under an agreement with said Lawrence F. Larkin, was to be exchanged for that now in suit, and each party to secure and pass a good title to the lot to be conveyed; and the deed of conveyance from Blankenship to be made to the wife of the said Lawrence F., the latter contracting in equalizing values, to furnish the lumber needed to erect buildings on the lot in suit, and to obtain title thereto from said Long; that in pursuance of said agreement, the said Blankenship delivered possession of his lot to said Annie T., and received possession of the other from Larkin, and with the materials furnished by him, put up buildings thereon, which, in his estimation, have enhanced the value thereof more than one thousand dollars; that Long, consenting to the occupation, soon after executed a (565) deed for the premises to said Lawrence F. at his instance and direction, and the latter made a deed therefor to said Blankenship, which was left with his wife, and by her destroyed; that said Lawrence, at his wife's instigation, then surrendered Long's deed to him, and procured the execution of another for the lot to said Annie T., and this is alleged to have been done to defraud the said Blankenship, who remained in possession of the lot so improved up to the time of his death, while Larkin also continued in possession of the lot taken in the exchange, and as if owner, conveyed the same by mortgage on March 10th, 1879, to William H. Day, to secure liabilities therein recited and set out; that the said Annie T. was well aware of the agreement for exchange and the action of the parties in furtherance of it, as was the plaintiff, to whom the deed was made as a mere cover and device to complicate the controversy and embarrass the said Blankenship, and that Larkin and wife have moved from the State, and their residence is unknown. The plaintiff in his replication controverts all the allegations of fact out of which the defendants asserted equity arises.

Issues were submitted to the jury, which with the responses, are set out in the judgment, as follows:

"1. Did L. F. Larkin agree in writing to convey the land in controversy to P. E. Blankenship? Answer: Yes.

"2. Did L. F. Larkin pay N. M. Long the purchase money for the *locus in quo?* Answer: Yes.

"3. Did L. F. Larkin sign and execute a deed to the *locus in quo* to P. E. Blankenship? Answer: Signed, but did not execute.

"4. Was such paper writing from L. F. Larkin to Blankenship destroyed by Annie T. Larkin? Answer: Yes.

"5. Did Annie T. Larkin join with her husband in executing Exhibit 'A'? Answer: Yes.

"6. Has Annie T. Larkin received the rents from the place
(566) on Second street from March, 1877, till January, 1882, claiming the said property as her own? Answer: Yes.

"7. Did J. H. MaGee have notice of the claim of the defendants at the time of his purchase? Answer: Yes.

"8. Has P. E. Blankenship made permanent and valuable improvements on the *locus in quo* by which the value of said lot is enhanced? Answer: Yes.

"9. How much, if any, is the value of said lot enhanced by permanent improvements put on it by the defendant? Answer: $1,066.

"10. What was the annual rental value of Blankenship place? Answer: $120 per annum.

"11. Did L. F. Larkin procure the deed from N. M. Long to be made to his wife with the intent to defraud P. E. Blankenship? Answer: It does not appear in evidence.

"12. Is the plaintiff the owner in fee simple of the land described in the complaint? Answer: Yes.

"13. Do the defendants wrongfully detain possession of said land from the plaintiff? Answer: No.

"14. What damages has the plaintiff sustained by reason of such detention of possession? Answer: $120 per annum.

"The three last issues submitted by the plaintiff."

On this verdict, the Court gave the following judgment:

"It is ordered, adjudged and decreed that the plaintiff, Jas. H. MaGee, holds the real estate in the complaint specified and described, as a trustee for L. F. Larkin; and it is further ordered and decreed that the said Jas. H. MaGee execute and deliver to the defendants a deed in fee simple for the real estate in the complaint described. It is further ordered and decreed that the defendant Mary E. Blankenship and the defendant Jno. T. Gregory, guardian *ad litem* to the infant defendant, William Blankenship, execute to L. F. Larkin a deed in fee simple to the real estate on Second street, in the town of Weldon, North Carolina, which is fully described in the defendants' answer, and that said deeds be recorded in the office of register of deeds for Halifax county,
(567) North Carolina; and it is further adjudged that the defendants recover of the plaintiff and his prosecution bond the costs of this action, to be taxed by the clerk."

From this judgment the plaintiff appealed.

Mr. R. O. Burton, for the plaintiff.

Mr. W. H. Day, for the defendants.

SMITH, C. J., (after stating the facts). These recitals prepare the way for our entering upon an examination of the plaintiff's exceptions to the ruling of the Court.

1*st Exception.* All the issues offered for the plaintiff were submitted to the jury, accompanied with a remark from the Court in regard to the second of the series, that the response would so much depend upon the findings upon the series presented by the defendants, that it might be that the jury would not have to pass upon them at all, and to that extent the plaintiff's issues were reserved. This exception is not intelligible in view of the fact that the plaintiff's issues were, each of them, submitted to and answered by the jury. There is, then, some inadvertence, through which an exception, proper at the time, finds its way into the case, after the grounds of it are removed.

2*d Exception.* Several witnesses were allowed, after objection from the plaintiff, to testify to declarations of said Annie T., to the effect that her husband had prepared a deed conveying the lot to Blankenship, the ancestor, signed by himself, and handed to her for her signature, with a view to its execution, and that she had burned it up. One witness says this declaration was made soon after her husband left the county in November, 1879; while another heard a similar remark from her about December, 1880, and before she left. As their deed to the plaintiff was made on December 1st, 1880, (and there seems to be some uncertainty about these dates, for Larkin must have been here to unite with said Annie T. in making that deed, and could not (568) have permanently departed, as the case states, more than a year before), the conversations deposed to must have been made at or before the making of that deed, and while, under Long's deed, the legal title had been put in her. In such case, the evidence would fall under the rule declared in *Guy* v. *Hall,* 7 N. C., 150; in the opinion in which case, HENDERSON, J., speaking of the persons who make the statement, says: "It is therefore evidence *against him,* and his subsequent purchaser stands in his situation; for he cannot better his title by transferring it to another, or *thereby affect the rights of those who have an interest in his confessions.*" To the same effect, see *Johnson* v. *Patterson,* 9 N. C., 183; *Satterwhite* v. *Hicks,* 44 N. C., 105; *Headen* v. *Womack,* 88 N. C., 468.

The declaration, if made after the execution of the deed to the plaintiffs, the said grantors remaining in undisturbed possession, and exercising the same proprietary rights over the property as before, may perhaps be admissible under the decision in *Hilliard* v. *Phillips,* 81 N. C., 99; but we propose to put the competency upon the other ground.

3*d Exception.* The plaintiff objected to the hearing of any testimony as to the enhanced value imparted to the lot by improvements put upon

it during the defendants' occupancy. We think this was proper in measuring the extent of the defendants' equitable claim to compensation, in the event of the Court's refusal to recognize the contract and the right to a specific performance of it, and this is directly called for in defendants' 8th, 9th and 10th issues.

4th Exception. The remaining exception is based upon the fact that the exchange was not under a written contract, and moreover, if the destroyed deed could constitute a memorandum within its requirements, its execution in November, 1879, could not relate back and effect the title vesting in said Annie T., in 1877. We are of opinion that this deed, which was drawn in executing the contract, and therefore (569) must have embodied all of Larkin's part of the agreement, was a satisfaction of the demands of the statute, and so in substance it is held in *Blacknall* v. *Parish,* 59 N. C., 70.

Evidence in writing, when the writing contains all the stipulations assumed by the person to be charged, and authenticated by his signature, is a compliance with the law. In *Barry* v. *Coambe,* 1 Peters, 640, in an account stated, were these words: "By my purchase of your ½ E. B. wharf and premises, this day agreed on between us," the credit being carried out in figures, $7,578.63, and deducted from the amount charged to Barry, followed by a memorandum thus: "Balance due G. Coambe, fifteen hundred dollars, payable in one, two and three years, with interest," with his signature, "G. Coambe." This was held a compliance with the statute, because all the essential elements were found in the entry. "It is written evidence," says the Court, "which the statute requires, and a note or letter, and even in one case a letter the object of which was to annul the contract, on a ground really not unreasonable (3 Atk., 12; 1 Sch. & Lef., 22), has been held to bring a case within the provisions of the statute." "There have been cases," remarks Lord Chancellor Hardwick, in *Welford* v. *Beaseley,* 3 Atk., 12, "where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute and agreeable to the provisions of it."

So, in pursuance of the ruling in this case, it has been held, that a writing in terms intending to be a conveyance of lands, but which, not being by deed, cannot operate as such, is and may be considered an agreement. *Rex* v. *Redgewell,* 6 B. & C., 665.

The next inquiry is, as to the rights of said Annie T. to retain the property under her deed. The jury say that her husband's money (570) paid for the land, and that she destroyed her husband's deed to Blankenship therefor. Her title was subsequent to this, and therefore taken with notice of the terms of the exchange. Moreover, they undertake to dispose of the lot of Blankenship in recognition of

the exchange. The contract is not void, *ipso facto,* because not in writing, the statute relating to the mode of procedure and the evidence required in proof, and a reduction of it to writing afterwards removes the statutory impediment, and, if explicit, imparts to the contract an original efficacy.

Thus, if a contract be made in a foreign country, not required by its law to be in writing, but so required in this, it cannot be enforced in our Courts, because proof only in writing is competent to establish it. *Lenoux* v. *Brown,* 12 C. B., 801; *Bonham* v. *Craig,* 80 N. C., 224; *Foust* v. *Shoffner,* 62 N. C., 242; *Green* v. *N. C. R. R. Co.,* 77 N. C., 95; *Mizell* v. *Burnett,* 49 N. C., 249.

We think it plain that the wife cannot retain the property conveyed to her under such circumstances in derogation of the contract rights of Blankenship.

There is no error, and the judgment must be affirmed, except that the plaintiff be required not to convey to the defendants generally, but to the defendant Mary E. a life estate in one-third of said lot, and the other two thirds, and remainder in the one third after her death, to the defendant William.

No error. Affirmed.

Cited: Ellis v. Harris, 106 N. C., 399; *Winslow v. White,* 163 N. C., 31; *Flowe v. Hartwick,* 167 N. C., 452; *Boyden v. Hagaman,* 169 N. C., 203; *Byrd v. Spruce Co.,* 170 N. C., 434; *Vinson v. Pugh,* 173 N. C., 192; *Pope v. McPhail,* 173 N. C., 239; *McCall v. Lee,* 182 N. C., 118; *Oxendine v. Stephenson,* 195 N. C., 239; *Insurance Co. v. R. R.,* 195 N. C., 969.

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N. W. RAY et al. v. A. G. THORNTON et als.

Homestead—Personal Property Exemption.

1. In laying off the homestead, it is not necessary for the appraisers to run it off by course and distance, and any description by which the land can be located, is a compliance with the provisions of the statute.

2. Where the land laid off as a homestead is subject to a mortgage, no question affecting the rights and priorities of the mortgagee can be raised unless he is a party to the action.

3. In alloting the homestead, the value of the buildings erected on the land must be considered by the appraisers, for the homesteader is not entitled to $1,000 worth of land, and also the buildings which may be on it.

4. A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the statute requires.

5. An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader.

This was an APPEAL from the appraisers alloting a homestead, taken under §520 of *The Code,* tried at the Spring Term, 1885, of the Superior Court of CUMBERLAND county, before *Avery, Judge.*

The sheriff of Cumberland county had in his hands two executions, one in favor of the People's National Bank, to the use of N. W. Ray, and the other in favor of A. A. McKethan and others, both against A. G. Thornton. The sheriff appointed appraisers to lay off and assign to A. G. Thornton his homestead and personal property exemption. He owned a lot in the town of Fayetteville on which he resided, containing about one and a half acres of land. There were situated upon the lot a dwelling-house, several other buildings, a well, and a garden, planted at the time of laying off the homestead. It was admitted that the lot with the buildings, &c., was worth more than a thousand dollars, and the land without the buildings not more than six hundred dollars.

(572) The appraisers made the following return: "We have viewed and appraised the homestead of the said A. G. Thornton, and the dwelling and buildings thereon owned and occupied by said A. G. Thornton as a homestead, to be set apart to him as a homestead, to be worth one thousand dollars and that the tract is bounded as follows: The dwelling-house on north of Laman street, Fayetteville, occupied by the defendant, fronting on Laman street, and running a straight line with the yard fence separating the house yard from the garden, and extending the line of the fence northward in a straight line, as it now runs, say northward to Jas. Tucker's line, exempting all of said lot that lies on the western side of the above described line, and it is therefore exempted from sale under execution according to law.

"This leaves all east of said line, including the garden and stables, as not included in the exemption.

"At the same time and place, we viewed and appraised at the values annexed, the following articles of personal property selected by said A. G. Thornton:

The household and kitchen furniture, bedding, tableware, garden utensils, silverware, &c.	$315.00
Three head of cattle	20.00
	$335.00

Four chattel mortgages:	B. Jernigan	$10.00	
	J. C. Blocker	50.00	
	John Cooper	25.00	
	T. A. Hodges	10.00	
			95.00
Total			$430.00

which we declare to be a fair valuation, and that the said articles are exempt under said execution."

The defendant's well from which he gets water, is outside of the homestead allotted, and so is the stable and garden, which was then planted. The line extending from the garden fence runs (573) through the defendant's smokehouse, which is twelve feet wide by eighteen feet long, so as to cut off one foot and a half at the side, leaving nearly the whole of the smokehouse on the excess, and the same line runs through an outhouse, one room of which was occupied by the defendant's cook, and the other by a tenant, so as to leave one foot and a half of the buildings on the homestead.

The defendant, A. G. Thornton, objects to the allotment of the homestead and personal property exemptions laid off to him under the foregoing executions, and assigns the following grounds therefor.

"1. *As to the homestead.*—The lot of land is in one tract or lot of about one and one-half acres under one enclosure, was valued at six hundred dollars, and the dwelling and buildings used therewith were valued at eleven hundred dollars, making a total valuation of seventeen hundred dollars, and the lot was so cut up and apportioned to the defendant, as to leave him only about one-half an acre of land, with the dwelling and a part of the buildings used therewith, which was valued at one thousand dollars, as a homestead.

"The defendant objects and contends that he is entitled to a homestead *in land* of the value of one thousand dollars, and 'the dwellings and buildings used therewith' belong and are incident to, the homestead *in land,* and are not to have additional value in the valuation of the homestead under the Constitution and laws of North Carolina.

"2. That the smoke house, stable and outhouse on the premises are 'buildings used therewith,' and that they, together with his garden, which was planted, his cow lot, and well from which he and his family were supplied with water, were cut off by the assessors, and under the allotment which they have made in their return, form a part of the excess proposed to be sold under the executions aforesaid.

"3. That the smokehouse, stable and outhouse, together with the garden, well, and cow lot, ought to be a part of the homestead,

(574) and are but incidents of the same, and should have been included in the allotment thereof, regardless of the additional value of the same.

"4. That seeing that his lot was to be cut up in portions, the defendant notified the assessors that he claimed the right to make his selection, which was not allowed him.

"5. That as the land upon which the 'dwelling and buildings used therewith' were erected is worth only six hundred dollars, there was no excess upon which a levy could legally be made to satisfy the foregoing or any other executions.

"6. That said homestead as laid off by the assessors was not fixed and described by metes and bounds, as required by the laws of North Carolina.

"7. That at the time of said assessment, the defendant exhibited to the assessors two certain mortgages on the entire lot of land, one in favor of Thos. C. Whitfield, and the other in favor of A. G. Brady, upon the latter of which the defendant, while denying that the debt the mortgage was given to secure was due in full, admitted that a part of the same was due, and the entire amount of the Whitfield mortgage was and is yet due, and the Brady debt and mortgage was in litigation; and while claiming that the valuation of the lot of *land* was only to be made and the 'dwelling and buildings used therewith' were incidents of and belonged to the homestead, yet he insisted that if the assessors should divide the land and find what they call an excess, that the excess aforesaid was liable to the satisfaction of the mortgage debts *first,* in exoneration of his homestead, and now insists that such is the plain interpretation of the Constitution of North Carolina, Art. X. §2.

"*As to the personal property exemption.*—The defendant objects that the said appraisers failed to make or return a descriptive list of the same or the value of the articles exempted as required by law."

The Court held that it was not necessary to describe the land allotted by giving the course and distance of each of the boundary lines (575) in the return, it being admitted that the lot on which the defendant lived was divided into two lots by said line. The defendant contended that the returns should set forth the metes and bounds, giving the course and length of each of the boundary lines, and excepted to the ruling of the Court.

The Court also held, that the mortgagees, T. C. Whitfield and A. G. Brady, not being parties to this proceeding, it was not material to ascertain whether either had a lien prior to that of the plaintiff in either of the executions. That the question raised by counsel would only arise

when the proper parties should appear before the Court, and ask a ruling as to the disposition of the fund arising from the sale of the excess.

To this ruling the defendant excepted. The Court overruled all the objections of the defendant to the returns of the appraisers, and confirmed their report, from which judgment the defendant appealed.

Mr. N. W. Ray, for the plaintiffs.
Mr. T. H. Sutton, for the defendants.

ASHE, J., (after stating the facts). The objection made by defendant that the homestead was not laid off by metes and bounds, we do not think is sustainable. The act does require that the homestead shall be laid off by metes and bounds, but metes and bounds do not mean that it shall be laid off by course and distance. The metes and bounds of a tract of land may be designated by the course of a stream, the line of another tract, by a wall, and even by a fence, and if the fence should be moved it would be competent to prove where it had stood. We think the boundaries of the homestead stated in this return, sufficiently come up to the requirements of the statute, for there can be no doubt as to the boundary of the homestead. It is described as the dwelling-house on the north of Laman street, in Fayetteville, and running a straight line with the yard fence separating the house yard from the (576) garden, and extending the line of the fence northward in a straight line as it now runs, say northward to James Tucker's line, exempting all of said lot that lies on the northern side of the above described line. This defines the boundary with as much definiteness as if it had been described by course and distance.

His Honor very properly held that in this proceeding, the mortgagees not being parties, no adjudication upon their relative rights with those of the execution creditors could be of any binding force. Any such adjudication as that insisted upon by the defendant, would have been extrajudicial. It is a postponed question to be decided between the mortgagees and those creditors.

As to the objection that the defendant was not allowed by the appraisers to make his selection, we do not find in the record, nor in the statement of the case, any mention of such a claim having been set up by the defendant. It only appears in the objection filed by the counsel with the clerk, and can only be regarded as the suggestion of counsel and cannot be entertained.

The objection, that the value of the buildings upon the land were taken into consideration by the appraisers in estimating the value of the homestead, cannot be sustained. The defendant's counsel contended

that the defendant was entitled to a homestead *in land* of the value of one thousand dollars, and the dwelling and buildings used therewith belong and are incident to the homestead in land, and are not to have additional value in the valuation of the homestead, and that as the land upon which the "dwelling and buildings used therewith," were erected, is worth only six hundred dollars, there was no excess upon which a levy could be made.

The contention of the defendant's counsel, is founded upon a misconception of the Constitution and the act of the legislature. It
(577) seems as plain to us as language can make it, that the value of the buildings on the land is to be taken into account in estimating the value of the homestead. The Constitution, Art. X, §2, reads: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars," &c. There is no ambiguity in this language; it leaves no room for doubt that it means in ascertaining the homestead, which is not to exceed one thousand dollars, the value of the dwellings and buildings is to be taken into the estimate with that of the land upon which they are situated. The language of *The Code*, §503, is not less unambiguous. It provides that "the appraisers shall thereupon proceed to value the homestead with its dwellings and buildings thereon, and lay off," &c. This evidently means that the land and buildings thereon shall be valued together in making up the estimate of a thousand dollars.

The construction contended for by the defendant, would open the door to the grossest injustice and dishonesty. If such a doctrine should be established by the decision of this Court, then a debtor owing thousands of dollars, and owning a small piece of land not worth more than one hundred dollars, might invest his whole estate in the erection of an edifice thereon—a hotel, for instance, at the cost of ten thousand dollars—and then bid his creditors defiance. It is impossible to believe that the framers of the Constitution ever contemplated that the adoption of this beneficent provision should lead to consequences so unjust and absurd.

There is nothing in the remaining objection to the report, that the appraisers failed to make or return a descriptive list of the personal property and assess the value of the articles exempted as required by law. The list, we think, is sufficiently descriptive. It sets out all the household and kitchen furniture, all the bedding, all the table ware,
all the garden utensils, all the silver ware, estimated in the
(578) aggregate and assessed to be worth $315. The other articles are specifically enumerated and the value attached to each.

The homestead might have been allotted with more convenience to the defendant in respect to the out-buildings on the lot, but we do not

think that that is sufficient ground for setting aside the report of the appraisers.

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

No error. Affirmed.

Cited: Thornton v. VanStory, 107 N. C., 333; *Crouch v. Crouch,* 160 N. C., 449; *Kelly v. McLeod,* 165 N. C., 385.

HENRY FARRIOR v. GEO. E. HOUSTON et als.

Issue—Evidence—Pleading.

1. Where an issue is raised by the pleadings and submitted to the jury, it is error for the Court to exclude any evidence pertinent thereto.
2. Mere matters of evidence should never be pleaded, as they do not raise issues, and when they are pleaded, they should be disregarded.
3. Where the defendant in his answer denied a material allegation in the complaint, but went on to state evidential facts; *It was held,* that the bad plea did not vitiate the good one, and it should be treated as surplusage.
4. So, where in an action to recover land, the answer denied the plaintiff's right of possession, and also set up title in the defendants, by reason of seven years' possession with color of title, which was however, improperly pleaded; *It was held,* error to refuse to allow the defendant to introduce evidence to show his color and possession.

(*Keathley* v. *Branch,* 88 N. C., 379, cited and approved).

This was a CIVIL ACTION to recover land, tried before *Boykin, Judge,* and a jury, at November Term, 1885, of DUPLIN Superior Court.

The plaintiff in his complaint alleged that he was the owner (579) in fee simple of the land described in the complaint, and entitled to the immediate possession of the same, and that the defendant wrongfully withheld the possession from him.

The defendant, George E. Houston, answered the complaint, and stated that the said Lewis C. Houston, his co-defendant, is the owner in fee and has the possession of the land described in the complaint, and has had the possession of the same under color of title for more than seven years prior to the bringing of this action; that the said Lewis C. Houston had held possession of said land in person and by tenants to whom he rented the same, for more than seven years prior to

the bringing of this action; and denies *that plaintiff has title to said land.* He admits the possession, but insisted that it is rightfully withheld from the plaintiff.

Lewis C. Houston also answered, and stated that the first article of the complaint is not true, that the title to the land described in the first article of the complaint is not in the plaintiff; that the title is in Lewis C. Houston, and that he has been in the adverse possession of said land, in person and through his tenants, for more than seven years before the bringing of this action, under color of title, and denied that he wrongfully withheld the possession from the plaintiff. The following issues were submitted to the jury:

"1. Is the plaintiff the owner and entitled to the possession of the land described in the first paragraph of the plaintiff's amended complaint? Ans: Yes.

"2. Are the defendants, or either of them, in the possession of the said land, and do they wrongfully withhold the same from the plaintiff? Ans: Yes."

On the trial the plaintiff offered evidence tending to establish his title to the land.

The defendants offered to show that they had seven years adverse possession of the land with color of title before the commence-
(580) ment of the action; but his Honor refused to admit the evidence because the defendants having undertaken to prove possession under color of title in his answer, and the plea had been adjudged to be insufficient and not according to the terms and provisions of the statute. To this ruling the defendant excepted.

The defendants then offered to produce the same evidence under the general denial in the answer, of the plaintiff's title to the land. This was also refused by his Honor, and the defendants excepted.

There was a judgment for the plaintiff upon the finding of the jury, and the defendants appealed.

Mr. W. R. Allen, for the plaintiff.
Mr. J. H. Kornegay, for the defendants.

ASHE, J., (after stating the facts). We are of the opinion there was error in the ruling of the Court in excluding the evidence offered by the defendants. The plaintiff alleged in his complaint that he was the owner in fee simple, and entitled to the possession of the land. The defendants denied that he was the owner, and this presents the only issuable fact raised by the pleadings, which was in fact directly submitted to the jury in the issue: "Is the plaintiff the owner, and entitled

to the possession of the land described in the first paragraph of plaintiff's complaint?"

His Honor fell into the inconsistency of submitting to the jury the issue, and the only issue actually raised by the pleading, and yet refused to permit the defendants to introduce evidence pertinent to the issue and tending to sustain his denial of the title in the plaintiff. He was evidently led into the erroneous ruling by a misconception of the legal import of the answer. The plea denying the title of the plaintiff was certainly a good plea, but it was disregarded by his Honor, because the defendant had superadded the unnecessary specific allegation of facts, that was held to be insufficient to constitute a plea, (581) because it was not according to the terms and provisions of the statute.

The good plea, which was a general denial, was disregarded because there was a special plea which was bad. Then the reasonableness of the matter would seem to have required the bad plea to be disregarded, and the good one sustained, and this we think was the proper course to be taken in the case, *Keathley* v. *Branch,* 88 N. C., 379. The denial of the plaintiff's title was the only issuable fact raised by the pleading; what follows in the answer about the seven years' possession, with title, &c., was a mere evidential fact, which in a court of law were never tolerated as good pleading, but were set aside on motion, or disregarded as surplusage. Judge BLISS in his Code Pleading, §206, says: "Issuable facts are those upon which a material issue may be taken, they may be called ultimate facts; they are called in the Missouri Code substantiate facts, and we may call the facts by which they are established, probative or evidential facts. It would be folly to take issue upon the latter, for the material ultimate facts may be true, although sustained by other evidence than that anticipated by the pleader." To illustrate, he says, "In trespass *de bonis* the ultimate facts are the plaintiff's title, the dispossession, conversion and damage, statements pertaining to the manner of the seizure and the circumstances attending it, or as to what was done with the property, would be pleading evidence, and they will be stricken out as irrelevant and redundant, or if not stricken out, the defendant is not bound to answer them." It is true this was said with reference to the complaint, but he was treating of pleading, and applied the same principle to the answer.

The specific statement in the answer of the seven years' possession with title, was matter of evidence merely, and it should not have been pleaded. It was mere surplusage, and in no way affected the part of the answer which was well pleaded, *"Utile per inutile non* (582) *viatur."* Stephen on Pleading, 423.

The judgment of the Superior Court must be reversed, and this opinion must be certified to the Court that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. c., 100 N. C., 369; *Mfg. Co. v. Brooks,* 106 N. C., 113; *Cheatham v. Young,* 113 N. C., 167; *Whitaker v. Jenkins,* 138 N. C., 478; *Fleming v. Sexton,* 172 N. C., 253.

STATE v. LEWIS R. LONG.

Constitution—Drummer—Rebates—Taxation.

1. The license tax imposed upon drummers by sec. 28, ch. 175 (Revenue Act), Laws 1885, does not conflict with the Constitution of the United States.
2. The rebate allowed from the drummers' license tax to merchants paying a purchase tax, by sec. 25 of said Act, does not discriminate against non-residents, since *all persons*, irrespective of their residence, engaged in the business therein designated, are entitled to its benefits.

(*State* v. *Miller*, 93 N. C., 511, cited and approved).

This was a CRIMINAL ACTION, tried before *MacRae, Judge,* at May Term, 1886, of ROWAN Superior Court.

The defendant was charged with violating section 28 of chapter 175 of the Acts of 1885, entitled "An act to raise Revenue," and upon his trial the jury rendered a special verdict in these terms:

"That Lewis R. Long, the defendant, is a resident of the city of Baltimore, State of Maryland, and is a drummer, salesman and agent of and for Smith, Haneway & Co., a mercantile and manufacturing firm doing business in said city; that on the 5th day of April, (583) 1886, the defendant being a travelling salesman, agent and drummer, as aforesaid, in the town of Salisbury, and county aforesaid, (Rowan), did sell, and attempt to sell, to George Achenback, goods, wares and merchandise, to-wit: baking powders by wholesale, with samples, not having then and there before soliciting orders for said goods and making sale thereof, paid to the State Treasurer a tax of one hundred dollars, and obtained a license so to do, and not having then and there such license in his possession, contrary to said enactment, and with intent to defeat its provisions. Now, if upon the aforesaid facts, it shall appear to the Court that the defendant is guilty, then the

jurors find him guilty; and if otherwise, the Court shall adjudge the defendant not guilty, the jurors find him not guilty."

The Court being of opinion that the facts contained in the special verdict do constitute a criminal offence, directed a verdict of guilty to be entered, and adjudged that he pay a fine of two hundred dollars, from which sentence the defendant appealed.

The *Attorney General* and *Mr. Charles M. Busbee,* for the State.
Mr. John Devereux, Jr., for the defendant.

SMITH, C. J. We have had occasion recently to consider the section on which the present indictment is founded, and to define the class of persons intended to be taxed as drummers, a word which seems to have come into general use, in *State* v. *Miller,* 93 N. C., 511, and we do not propose to renew the discussion.

While to this enactment, separately considered, no objection is made for its want of uniformity to, or its inconsistency with the Federal Constitution, it is insisted that this conflict is brought about by a rebate authorized in §25 preceding. This section imposes upon merchants, and other dealers in goods, wares and merchandize, besides an *ad valorem* tax on stock, a further license tax of one tenth of one (584) per centum on the total amount of purchases, estimated semi-annually upon the aggregate of such for the preceding six months, and contains this clause: "Dealers paying a drummer's tax, prescribed in section twenty-eight of this act, shall be allowed a rebate of that amount on his [their] purchase tax for the same time."

As merchants residing out of the State and sending their travelling agents into the State, can have no rebate unless they have here a business liable to the purchase tax, it is insisted that this is a discrimination against non-resident merchants unwarranted by the Constitution of the United States, and is the same as if the drummers tax was put upon one class and not upon the other.

There is no feature in the statute that distinguishes between resident and non-resident itinerant salesmen or between their employes. Both must pay the same privilege tax and enjoy equal advantages under the license issued. Nor is any difference made in respect to the place of product or manufacture of the goods to be sold. The rebating provision applies to all who pay the purchase tax from which the deduction is to be made. The non-resident may have a stationary mercantile business in the State, conducted by himself or an agent, and he is equally entitled to the rebate upon the same tax. Under the law, he stands upon the same footing, with equal right to the same exemption, as the home merchant. If the benefit does not come to him, it is because he

has not the tax to pay from which the reduction comes. As was forcibly argued for the State, he possesses all the immunities and privileges that belong to a citizen, and such are protected by the fundamental national law against an invasion by state legislation, and no more can be claimed.

In truth, the disadvantage is with the resident dealer, who is compelled to pay a tax from which the principal of the non-resident drummer or himself, non-resident, is exempt.

(585) The refunding puts them more on equal ground. Certainly there is no forbidden discrimination in the legislation itself, and hence it is sought to be found in the practical operation of the law. This is not always, however, a test of the validity of a statute.

A discriminating license tax on commission merchants dealing in cotton or cane sugar, levied in a northern State, would operate injuriously upon those States where these articles were raised, but this would not render the tax obnoxious to constitutional objections, since in the terms the discrimination is not seen. Undoubtedly a State, where permitted by its own Constitution, may levy taxes upon professions and privileges, and when uniform in assessment, and in authorized rebates, the legislation cannot be deemed discriminating against citizens of other States or their property introduced for the purpose of sale, when precisely the same burden rests upon our own.

The cases to which we have been referred in the argument of defendant's counsel—*The Passenger Cases,* 7 Howard (U. S.), 283; *Woodruff* v. *Parham,* 8 Wall, 123; *Ward* v. *Maryland,* 12 Wall, 418—are not hostile to the views expressed. The first two relate to attempts to impose taxes upon imports from foreign States and from a State in the Union, which are held to interefere with the exclusive right given to Congress "to regulate commerce with foreign nations and among the several States," and denying to a State the right to "levy any imports or duties on imports or exports" without the consent of Congress, except in the enforcement of its inspection laws, art. 1, §§8 and 9.

The Maryland enactment was declared void, because it imposed a *higher license* tax upon agents or drummers not permanently residing in the State, than upon its own residents embarking in the same business, and also discriminated against their selling, unless they paid the increased tax, any goods, wares or merchandise other than agricultural products and articles manufactured in that State.

(586) Delivering the opinion, Mr. Justice CLIFFORD, conceding the power of a State to impose taxes on all sales made within its limits, whether the goods sold are the produce of that or some other State, provided the tax is uniform, proceeds to say: "That a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal

Constitution, and that the law imposing such a tax would be unconstitutional and invalid."

In *Machine Co.* v. *Gage,* 100 U. S., 676, cited in the brief of counsel representing the State, Mr. Justice SWAYNE collects and discusses numerous cases in which State legislation has been decided to invade the exclusive power vested in Congress to regulate interstate commerce, by discriminating between citizens of that and of other States, or in goods of their growth and manufacture introduced in the legislating State.

In this case, the act, whose validity was called in question, imposed a tax of ten dollars, subsequently raised to fifteen, upon "all peddlers of sewing machines and selling by sample." The sewing machines charged with the tax, were made in Connecticut, and the Supreme Court of Tennessee gave an authoritative construction of the act as "taxing the peddlers of such machines without regard to the place of growth or of manufacture." Accepting this as the correct construction of the act, the Court, Mr. Justice SWAYNE delivering the opinion, after a full review of the adjudications, declares that "the statute in question, as construed by the Supreme Court of the State, makes no such discrimination," (referring to a discrimination in favor of the State or of the citizens of the State which enacted the law mentioned in a preceding clause). "It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing as to the tax complained of, had an unquestionable right to im- (587) pose the burden."

The ruling in the recent case of *Walling* v. *Michigan,* 116 U. S., 446, indirectly recognizes the principle upon which the preceding adjudication rests in declaring void a statute of Michigan, set out in full in the case, but which, in effect, imposed a tax upon persons who, not residing or having their principal place of business within the State, engage there in the business of selling or soliciting the sale of intoxicating liquors, *to be shipped into the State from places without it,* but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State. This is deemed a restraint upon commerce, and the obnoxious features were not removed by a subsequent act, imposing a greater tax upon all persons in the State engaged in manufacturing or selling such liquors therein.

The Court declares this to be "a discriminating tax, leveled against persons for selling goods brought into the State from other States or countries," and to be clearly within the ruling in *Welton* v. *Missouri,* 91 U. S., 275. No such vitiating element is to be found in our enactment, nor can we perceive wherein consists the alleged repugnancy to

the Federal Constitution, or any discrimination unfavorable to the non-resident, or any advantage secured to the home dealer and denied to the other.

The General Assembly seems to have aimed to eliminate from the Revenue law the objectionable and discriminating provisions that were present in its earlier enactments, in order to conform its legislation to the requirements of the paramount law of the United States Constitution as authoritatively interpreted by its highest Court. But if such inconsistency, discoverable not in form of the enactment, but from its unequal operation, find a reasonable support in argument, which we do not concede, it is not so apparent as to warrant us in declaring it inoperative and void.

(588) There is no error, and this will be certified for further action in the Court below.

No error. Affirmed.

STATE v. FRED JONES.

Assault and Battery—Parent and Child.

The law will not interfere in the domestic government of families by punishing a parent for the correction of his child, however severe or unmerited it may be, unless it produces permanent injury, or is inflicted from malicious motives, and not from an honest purpose.

(*State* v. *Alford*, 68 N. C., 322; *State* v. *Rhodes*, 61 N. C., 453; and *State* v. *Pendergrass*, 19 N. C., 365; cited and approved).

The defendant was tried and convicted at July Term, 1886, of the Criminal Court of NEW HANOVER, before *Meares, Judge,* for an assault and battery, and from the judgment thereon pronounced against him, he appealed.

The defendant is charged, in the ordinary form of an indictment, with an assault and battery committed upon the person of Mary C. Jones, who, though not so designated, is his daughter, and was then sixteen years of age. Upon the trial, she testified that the defendant was a man of bad temper and frequently whipped her without any cause; that on one occasion he whipped her at the gate in front of his house, giving her about twenty-five blows with a switch, or small limb, about the size of one's thumb or forefinger, with such force as to raise welts upon her back, and then going into the house, he soon returned and gave her five blows more with the same switch, choked her, and

threw her violently to the ground, causing a dislocation of her thumb joint; that she had given him no offence; that she did not know for what she was beaten, nor did he give her any reason for it (589) during the time. No permanent injury was inflicted upon her person. There was other corroborative testimony, and one witness saw her tongue hanging out of her mouth while being choked. The defendant and his wife, stepmother of the girl, swore that she was habitually disobedient, had several times stolen money, and was chastised at the time spoken of for stealing some cents from her father; that he never whipped her except for correction, and this he was often compelled to do for that purpose, and had never administered punishment under the impulse of high temper or from malice.

The defendant's counsel requested an instruction that in order to a conviction, it was incumbent on the State to show that some permanent injury had been inflicted.

This was refused, and the jury was charged that "a parent had the right to inflict punishment on his child for the purpose of correction, but the punishment must not be 'excessive and cruel,' nor must it be 'to gratify malicious motives;' that if the whipping was such as described by the daughter, there would arise a question as to the severity and extent of the punishment; that if the jury were convinced that it was cruel and excessive, the defendant would be guilty; that it was not necessary that it should result in a permanent injury to her, and if it was *excessive and cruel* it would be sufficient to make the defendant guilty."

The *Attorney General,* for the State.
Mr. John D. Bellamy for defendant.

SMITH, C. J. (after stating the case). It will be observed that the test of the defendant's criminal liability is the infliction of a punishment *"cruel and excessive,"* and thus it is left to the jury without the aid of any rule of law for their guidance to determine.

It is quite obvious that this would subject every exercise of (590) parental authority in the correction and discipline of children—in other words, domestic government—to the supervision and control of jurors, who might, in a given case, deem the punishment disproportionate to the offence and unreasonable and excessive. It seems to us, that such a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children. If, whenever parental authority is used in chastising them, it could be a subject of judicial inquiry whether the punishment was cruel and excessive—that is, beyond the demerits of the disobedience or mis-

conduct, and the father himself exposed to a criminal prosecution at the instance of the child, in defending himself from which he would be compelled to lift the curtain from the scenes of home life, and exhibit a long series of acts of insubordination, disobedience and ill-doing—it would open the door to a flood of irreparable evils far transcending that to be remedied by a public prosecution. Is it consistent with the best interest of society, that an appeal should thus lie to the Court from an act of parental discipline, severe though it may be, and unmerited by the particular offence itself, perhaps, but one of a series evincing stubbornness and incorrigibility in the child, and the father punished because the jurors think it cruel and immoderate?

While the ruling of the Court is not without support in some of the adjudication, to which reference is made in 2 Whar. Cr. Law, §1259, we prefer to abide by the rule by which the limits to the exercise of the right of family government are to be ascertained, laid down after a lucid exposition of the subject by that humane and just man, so long a member of this Court, Judge GASTON, in *State* v. *Pendergrass,* 19 N. C., 365. This was a case where a school-mistress, whose use of the rod upon a pupil left marks upon her person, which, after a few days, disappeared. We quote extracts from the opinion: "Within the (591) sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and, like all others intrusted with discretion, he cannot be made penally responsible for errors of judgment, but only for wickedness of purpose. * * His judgment must be *presumed* correct, because he is the *judge,* and also because of the difficulty of proving the offence, or accumulation of offences, that called for correction; of showing the peculiar temperament, disposition and habits of the individual corrected, and of exhibiting the various milder means that may have been ineffectually used before correction was resorted to. * * If he use his authority as a cover for malice, and under pretence of administering correction, gratifies his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power." "We think also," he summarily concludes the discussion, "that the jury should have been further instructed, that however severe the pain inflicted, and however, *in their judgment, it might seem disproportionate to the alleged negligence or offence* of so young and tender a child" (she was six or seven years old), "yet, if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act *honestly* in the performance of duty, according to her sense of right, but, under pretext, was gratifying malice."

While acts of indiscreet severity are not criminally punishable, unless under the conditions set out, their check for the good and welfare of society must be found in the promptings of parental affection and a wholesome public opinion, and if these are insufficient, they must be tolerated as an incident to the relation, which human laws cannot wholly remove or redress.

Such are the concluding sentiments, and almost in the words of the Judge.

So remarks READE, J., in *State* v. *Rhodes,* 61 N. C., 453: (592) "The Courts have been loath to take cognizance of trivial complaints arising out of the domestic relations, such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because these relations are not subject to law, but because the evils of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government." He adds: "Our conclusion is, that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it in favor of either husband or wife," (the case then before the Court), "unless in cases where *permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.*"

The principle was extended to one living with the mother of the child, though not married, in *State* v. *Alford,* 68 N. C., 322, and BOYDEN, J., quotes with approval what was said by GASTON, J., in the *State* v. *Pendergrass, supra,* declaring that "punishment, therefore, which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent injury, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously effect its future welfare."

The test, then, of criminal responsibility is the infliction of permanent injury by means of the administered punishment, or that it proceeded from malice, and was not in the exercise of a corrective authority. It would be a dangerous innovation, fruitful in mischief, if, in disregard of an established rule assigning limits to parental power, it were to be left to a jury to determine in each case whether a chastisement was excessive and cruel, and to convict when such was their (593) opinion.

We do not propose to palliate or excuse the conduct of the defendant in the present case. The punishment seems to have been needlessly

severe, but we refuse to take cognizance of it as a criminal act, because it belongs to the domestic rather than legal power, to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity.

There is error. Let this be certified to the end that the verdict be set aside and a *venire de novo* ordered.

Error. Reversed.

Cited: S. v. Dickerson, 98 N. C., 711; *S. v. Thornton,* 136 N. C., 616; *State v. Vaughan,* 186 N. C., 760.

STATE v. FRANK CARSON.

Declarations—Evidence.

It is competent for a witness to give the declarations—or the substance of them—made by a party to an action in the course of a conversation, although he did not hear the entire conversation, if the portion heard embraced a distinct fact, pertinent to the issue.

(*State* v. *Lawhorn,* 88 N. C., 634; *State* v. *Pratt,* Ibid., 639; *Davis* v. *Smith,* 75 N. C., 115; and *State* v. *Swink,* 19 N. C., 14, cited and approved).

INDICTMENT for larceny, tried before *Boykin, Judge,* at August Term, 1886, of IREDELL Superior Court.

The following is the material part of the case stated on appeal:

There was evidence tending to prove that the defendant had stolen certain tobacco, the property of one Kennedy, and had sold it to one Combs. The wife of the said Combs was introduced by the State as a witness, and testified: "My husband has been buying tobacco (594) from the defendant for about two years. He bought from him last about the 11th of March, 1886. Soon thereafter, the tobacco factory of the said Kennedy was reported to have been broken into about the time," (to-wit: 11th of March). "About the same time the defendant came to our house one night, about two o'clock in the morning. I heard him and my husband engaged in conversation. Defendant said, 'Lee got me to come up and ask you (Combs) not to say anything to Kennedy about buying tobacco from us.' "

Defendant's counsel inquired of the witness if she could give the substance of the entire conversation. She replied that she did not hear the entire conversation; that she only heard that part which she had

recited, and that she could give the substance of that part of the conversation that she did hear.

Defendant objected, because witness did not hear and could not give the substance of the entire conversation. Objection overruled and defendant excepted.

There was a verdict of guilty, and judgment thereupon, from which the defendant appealed.

The *Attorney General,* for the State.
Mr. John Devereux, Jr., for the defendant.

MERRIMON, J., (after stating the case). The evidence was properly received. Although the witness did not hear the entire conversation, she heard so much of it on the part of the defendant as stated a distinct and intelligible fact, embracing the substance and scope of the conversation, that was pertinent and competent as evidence going to prove the guilt of the defendant. She did not know what so much of the conversation as she did not hear referred to.

That this part bore on the part she heard does not appear. It may not, from aught that we can see, have had any connection with it. What she heard was in its nature substantially complete. It (595) was simply a request that the husband of the witness would not say anything to the prosecutor about buying tobacco from the defendant and another.

A rule of law that would exclude leading and distinctive declarations and admissions of a party, because the witness did not hear the whole of the conversation in which they were made, would have the effect to destroy to a large extent, a very important source of evidence in the administration of public justice.

It oftentimes happens that a witness has heard an important and leading part of a conversation, in which a party to it made distinctive declarations and admissions, and the witness can state the substance of all that he heard. Is such evidence, in a proper case, of such a witness, not to be received because he did not hear the whole of the conversation? Is such evidence worth nothing, and wholly to be rejected? Surely this cannot be.

The fact that the witness did not hear all the conversation, would certainly affect the weight of such evidence, and this would be determined by the jury. If the declarations or admissions were such as other parts of the conversation would probably affect or modify, then the evidence would have less weight, while on the other hand if they were probably or obviously made, without qualification or modification, the evidence would bear greater weight.

Hence, Judge GASTON said in *State* v. *Swink,* 19 N. C., 14, "But we find no authority and no dictum, to warrant the supposed qualifications of the general principle which makes a man's conduct and declaration, when voluntary, admissible against him, so as to exclude evidence of his acts or declarations because not as complete as he intended that they should be. It seems to us, what he has said and what he has done, however unfinished and imperfect, is competent testimony, and its proper effect is to be judged of under all the accompanying cir-
(596) cumstances by those whose duty it is to weight the evidence."

And in *State* v. *Pratt,* 88 N. C., 639, Justice RUFFIN, after stating that such evidence is competent, adds: "It is easy, it is true, to imagine cases in which mischief might result from taking fragments of a conversation, as gathered from an imperfect hearing, and applying them to matters foreign to the party's intention. But such things are not likely to occur in actual experience, and the correction may be safely left to the good sense of the jury." *Davis* v. *Smith,* 75 N. C., 115; *State* v. *Lawhorn,* 88 N. C., 634.

Of course, if the witness can state the whole conversation, or the substance of it, in which the declarations or admissions were made, he must do so. This the party to be affected adversely is entitled to have, and besides it would tend to strengthen the evidence.

There is no error.

No error. Affirmed.

STATE v. RICHARD THOMPSON.

Larceny—Evidence—Indictment—Nol pros—Verdict.

1. After the jury is empaneled in a criminal action, the State cannot enter a *nol pros,* without the consent of the accused.
2. If upon the trial of an indictment, containing several counts, the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from the consideration of the jury.
3. The defendant purchased a horse, but upon the condition that the title was not to pass until the price was paid; failing to pay, the vendor recovered possession, and thereupon the defendant, in the night, secretly took the horse from the vendor's stable and carried it away in a manner indicating a felonious purpose. *Held,* that a charge to the jury that the defendant would be guilty of larceny if the taking was not under a *bona fide* belief that he had the *property,* or an *interest* in the horse, was not erroneous.

(*State* v. *Long*, 52 N. C., 24; *State* v. *Leak*, 80 N. C., 403; *State* v. *Taylor*, 84 N. C., 773; *State* v. *Johnson*, 75 N. C., 123; *State* v. *Lawrence*, 81 N. C., 523; *State* v. *Weaver*, 35 N. C., 203, cited and approved).

This was a CRIMINAL ACTION, tried before *Philips, Judge,* at (597) July Term, 1886, of WAYNE Superior Court.

The indictment contained three counts, charging, in the first, the larceny of a mule belonging to Hiram Ginn; in the second, the wilful and felonious taking and carrying away the mule with intent to use it for a special and temporary purpose; in the third, with the unlawful receiving of the stolen mule, with knowledge thereof, under §§1066, 1067, and 1075 of *The Code.* The defendant, upon his arraignment, pleaded not guilty, and upon his trial the jury rendered a general verdict, declaring the defendant to be guilty "in manner and form as charged in the bill of indictment." It was thereupon adjudged that the defendant be confined in the State prison for the term of ten years, and he appealed. Following this record of the trial, appears this memorandum, bearing the signature of the presiding Judge: "The record herein as amended, by stating that the Court withdrew from the consideration of the jury all the counts in the bill except the first, and instructed them that they were not to consider the count for stealing the mule for a temporary purpose, and for receiving. The only issue submitted was as to the question of the guilt or innocence of defendant of the larceny as charged in the first count. After verdict, the solicitor entered a *nol pros* as to all but the first count in the bill of indictment."

The testimony in support of the charge of larceny, was to this effect: The mule belonged to Hiram Ginn, who, in 1884, sold her to one Henry Griffin, on condition that if paid for she should be his, and took the purchaser's note, to which the defendant became a surety for the price. Part of the purchase money was afterwards paid, and (598) Griffin being unable to pay the residue, surrendered the mule to Ginn, and the latter on his books entered a charge for the use of the mule, and a credit for the sum received. Ginn afterwards sold the mule to the defendant, on the terms that she was to become his property, if paid for in the Fall; and if not, he was to be accountable for her work. No part of the purchase money was paid, and in the following Spring the defendant, without Ginn's consent, exchanged the mule with one Exum for a horse. In the Fall of 1885, the defendant removed from the farm of Ginn to Pamlico county, whereupon the latter, in an action of claim and delivery, in which he alleged title to the horse exchanged for the mule, recovered possession from the defendant. Ginn, having the horse in possession, brought a similar action against Exum for the

mule, pending which a re-exchange was made, and Ginn, delivering up the horse, received back the mule, which was afterwards, in the night, secretly taken from his stable and carried away by the defendant.

The defendant, examined on his own behalf, testified that he bought the mule from Ginn, on whose land he was a tenant, and paid for her; that Ginn consented to the trade with Exum; that returning from Pamlico he went to Ginn's lot and took the mule and carried her off, no person being present; that he carried her some distance through the woods before reaching the Pamlico road; that he knew he had no claim to the mule, but thought after Ginn had given up the horse to Exum, and taken back the mule, he had a right to take her, and did take her under this claim of right.

There was other evidence of prevarication, of denials of having taken possession, and of efforts to escape from the custody of the sheriff after his arrest, by the defendant.

A series of instructions, condensed but in substance as follows, was asked by defendant to be given to the jury:

(599) I. If the defendant was the owner of the mule, or so believed, and took her under a *bona fide* claim of right; or

II. If the defendant had any interest in the mule, or so thought, and took possession accordingly; or

III. If the horse surrendered for the mule was the property of the defendant, the property in the mule would vest in the defendant, upon his assent to the transfer, and his taking her is evidence of such assent; or

IV. If in consequence of Ginn's sale to the defendant any delivering of possession, an interest therein passed, or the defendant believing he had such interest, took the mule in the *bona fide* assertion of such supposed interest; or

V. If Ginn, on taking back the mule from Griffin, placed her in defendant's possession, agreeing that he might keep her on paying the balance of the purchase money due from Griffin, an interest would vest in the defendant; or if so believing, the latter took the mule under a *bona fide* claim; in each of these aspects presented by the evidence, notwithstanding the *indicia* of guilt shown in the manner of taking, the jury must find a verdict of not guilty.

These instructions were not given, and instead, the jury were charged in substance thus:

A man cannot be convicted of larceny in taking his own property, and if the defendant had such property he cannot be convicted. It is in evidence that he parted with all his property in the mule to Exum, and the defendant himself testifies that he had no claim upon her. If the jury believe this evidence, the mule when taken from the lot of

Ginn was in his possession and was his property, and was properly so charged in the indictment. Now, did the defendant take the mule, believing at the time that she was his property? He swears that he did, and if he honestly so believed, this would take from the act an element essential to the constitution of the crime—the felonious intent. This intent must co-exist with the act of taking to create the larceny, and its presence distinguishes a larceny from a trespass. The clandestine taking and attempts to conceal the mule, furnish (600) evidence of the criminal intent. The State insists, that the defendant's statement of his belief as to the vesting of any interest in him, has been proved to be false by his secret taking at night, his passing through the woods, his denials to the sheriff, and his changing his name on removing to Pamlico. All this evidence the jury may consider, with such further evidence as has been heard, in ascertaining the defendant's intent. The defendant's counsel contended that he acted in the *bona fide* belief of his possessing an interest in the mule of which the taking was an assertion, and should not be convicted. This the jury must consider and determine upon evidence.

The jury found the defendant guilty, and on his motion for a new trial, errors are assigned in the refusal to give the instructions asked, and in those given in substitution therefor, which it is needless to specify in detail. The motion being overruled and sentence pronounced, the defendant appealed.

The *Attorney General,* for the State.
No counsel for the defendant.

SMITH, C. J., (after stating the facts). If the directions given to the jury to confine their verdict to the charge made in the first count of the indictment, and to disregard the others, are to be considered as qualifying the general verdict and restricting it to the first count, (and this is expressly sanctioned as proper in the case of *State* v. *Long,* 52 N. C., 24; and *State* v. *Leak,* 80 N. C., 403;) the legal result is an acquittal as to the counts not passed on; *State* v. *Taylor,* 84 N. C., 773. After the empanelling of the jury, and before verdict, the prosecuting officer cannot enter a *nolle prosequi* without the consent of the accused, as he has a right to a response from the jury to all the charges, and if such is done, it is deemed to be in effect an (601) acquittal. We do not, of course, mean to question the right of the Judge in proper cases to cause a mistrial; *State* v. *Weaver,* 35 N. C., 203, and subsequent cases; but this right cannot be exercised at the will of the solicitor. The entry of the *nol pros* after verdict was therefore superfluous and inoperative.

The objection to the rendition of judgment upon the general jury finding upon the indictment in its entirety, and with its incongruous union of counts, which would be fatal, under the ruling in *State* v. *Johnson,* 75 N. C., 123, and which is not modified in *State* v. *Lawrence,* 81 N. C., 523, for reasons therein stated, is thus removed, and we are at liberty to consider the appeal upon its merits.

During the argument, it occurred to us that perhaps too much stress had been laid upon the question of the defendant's having property or an interest in the mule, or in his acting upon the honest belief that he had such, and the attention of the jury had not been called to the inquiry whether, without reference to property, strictly speaking, the taking had or had not been under a *bona fide* belief of the defendant that under the circumstances he had a right to regain possession, which unexplained, the jury might not consider as property or an interest within the meaning of the charge. The facts were not presented in this aspect to the jury. But no direction of this kind was asked, and the omission is not assigned for error.

In our examination of the case, unaided by argument for the appellant, we discover none of the errors mentioned in connection with the motion for a new trial, and none in the charge, which covers all the material matters to which the accused was entitled in the instructions requested.

The jury find against him upon the alleged *bona fides* of the taking, and this is exclusively within their province.

(602) There is no error, and this will be certified for further action in the Court below.

No error. Affirmed.

Cited: S. v. Sorrell, 98 N. C., 739; *S. v. Cross,* 101 N. C., 789; *S. v. Gilchrist,* 113 N. C., 676; *S. v. May,* 132 N. C., 1021; *S. v. Gregory,* 153 N. C., 647; *S. v. Andrews,* 166 N. C., 351; *S. v. Snipes,* 185 N. C., 746.

STATE v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Buncombe Turnpike Company—Corporations—Evidence—Highway.

1. A plea of not guilty to an indictment against a corporation is an admission of its corporate existence.

2. As against a corporation, it is competent to establish its organization and existence, to prove that it had officers, exercised corporate functions, and held itself out to the world as such.

3. The act incorporating the Buncombe Turnpike Company (Rev. Stat., 2 Vol., p. 418,) established the road constructed under its provisions "a public highway forever thereafter," and its officers and stockholders cannot relieve themselves of their duties and liabilities to the public by an attempted surrender of their franchises to the Board of County Commissioners. To make such surrender effectual, it must be made to the State in some way authorized by law.

4. Nor will an abandonment by the corporation of its franchises work a discontinuance of the highway.

5. An incorporated railroad company is liable criminally for an obstruction of a public highway, if it permits its engines, cars, &c., to remain thereon for a period longer than is reasonably necessary for their safe crossing.

(*State* v. *McDowell*, 84 N. C., 799, cited and approved).

This was a CRIMINAL ACTION, tried at the October Term, 1885, of the Inferior Court of BUNCOMBE County.

From the judgment upon a verdict of guilty, the defendant appealed to the Superior Court, whence the judgment in the Inferior Court being affirmed, he appealed to the Supreme Court.

The defendant was charged with obstructing a public road (603) and common highway leading from the city of Asheville in Buncombe County towards and into Arden in said county.

The State proved, with a view to show that the defendant had been duly organized as a corporation under the Act of 1880, as charged in the indictment, that it was professing to carry out the requirements of said Act; that there was a railroad known as the Western North Carolina Railroad; that it had agents who issued tickets, received freights and signed receipts in the name of the Western North Carolina Railroad Company. Defendant objected to the introduction of this testimony and the Court overruled the objection. That often there were five or six wagons at a time stopped by the cars from one half hour to three hours and a half, standing across the said highway, which is much traveled. The public road is fifty or sixty yards from the depot at which there is a sidetrack. There is a steep grade beyond the depot, but there is room for cars to stand on the sidetrack without stopping the road. The Buncombe Turnpike Company had control of the road until about three years ago, when the county took charge and appointed an overseer and hands who have worked it since; that the Buncombe Turnpike Company was chartered in 1824, (Rev. Stat. vol. II, p. 418,) by the State. The charter was attempted to be surrendered by the directors, who had a meeting and agreed to surrender it to the commissioners of Henderson and Buncombe, and authorized the President to carry out this purpose. There was no meeting of the stockholders.

The defendant objected to the introduction of all this testimony, but the Court overruled the objection, and the defendant excepted.

J. R. Patterson, who is the clerk of the Board of Commissioners of Buncombe county, was introduced and testified as follows: That there is the following record of the surrender of the charter of the Turnpike Company: "That the surrender of the charter and road of the
(604) Buncombe Turnpike Company be accepted. Notice to be issued the supervisors of roads of Asheville and Limestone townships."

The defendant objected to the introduction of this record. Objection overruled, and defendant excepted.

The defendant asked the Court to charge the jury:

1. That there was no evidence that there was a public road and common highway, such as it is indictable to obstruct, leading from the city of Asheville towards and into Arden, as charged in the indictment, and that they should return a verdict of not guilty.

2. That there was no evidence of the surrender by the Buncombe Turnpike Company of its charter and property to the county commissioners; that the testimony that three of the directors had met and authorized the president to surrender the charter and property of the company to the county commissioners was no evidence of its surrender, and they could not consider the same in making up their verdict.

3. That the record or memorandum made by the clerk of the Board of Commissioners of Buncombe county was no evidence of the surrender of the charter and property of the corporation, and that they could not consider the same.

4. That there are but two ways in which a public road and common highway, such as it is indictable to obstruct, can be established in North Carolina, to-wit: 1. By an adjudication that such be established, on petition and notice, &c., by the proper tribunal vested with the jurisdiction to make such an adjudication. 2. By a dedication of the road to the public, which may be actual, or presumed by user by the public for twenty years; and that as there was no proof of an adjudication establishing this road as the statute directs, nor any dedication, either actual or presumed, the defendant is not guilty, and they will return a verdict to that effect.

5. That the Buncombe Turnpike Company having been duly chartered and organized under an act of the General Assembly, could
(605) not surrender its charter and property to the commissioners, for said commissioners have no authority to accept such surrender nor to compel it, and any attempted surrender which may have been made, and any acceptance thereof, and appointment of overseers, &c., by said commissioners are a nullity and not evidence for the jury to consider. That the directors had no authority or power to surrender

the charter and property of the corporation; that the only ways in which the charter of the Buncombe Turnpike Company could be annulled would be by a judgment for that purpose of the proper judicial tribunal, the repeal of the charter by the legislature, forfeiture for non-user or other cause; and there being no evidence of such judgment by any tribunal of competent jurisdiction, nor any evidence that the legislature has repealed the charter, the jury will acquit the defendant, it being admitted that the Buncombe Turnpike Company was chartered and organized as stated.

6. That there would be no dedication of this road to the public in such a sense as to make it a public road and common highway, by a user of it by the public, the appointment of an overseer, working it with hands, &c., for three years.

7. That there is no evidence of an actual dedication of this road to the public.

The Court refused to give any of the special instructions, and defendant excepted.

The Court charged the jury as follows:

That to convict the defendant the jury must be satisfied that the road was a public road and common highway, as charged in the indictment, and that such public road and common highway must be established in one of three ways:

1. By actual dedication by the owners of the soil.

2. By an adjudication of the proper Court.

3. By user by the public by overseers and hands working it without any dedications or adjudications, for the space of twenty years at least.

That if the jury shall find that up to three years ago this road was owned and worked by the Buncombe Turnpike Company, a (606) corporation chartered by the Legislature, then the Court charges them that this is not a public road and common highway, unless it has been actually dedicated by said corporation to the public.

There being no evidence of this road ever having been laid out and adjudged to be a public road and common highway by any court having jurisdiction to make such adjudication, it then becomes the duty of the jury to find whether there has been any actual dedications of the road to the public.

The Court charged the jury, that the meeting of the directors, if they shall find there was such meeting, and the authorizing by them of the surrender of the charter to the county commissioners, is evidence which they can consider in determining whether there was such surrender by the president.

The record which was kept by the clerk of the board of commissioners, and which was introduced in evidence, can also be considered by the

jury in determining whether the turnpike company ever made such surrender. If the jury shall believe from such evidence that the Buncombe Turnpike Company made such surrender to the commissioners of Buncombe county, then the Court charged the jury that the county commissioners were the proper tribunal to whom to make such surrender, and the same was an actual dedication of said road to the public, and the same would be from the time of such surrender a public road and common highway, such as it would be indictable to obstruct. That if the jury find that this road is a public road and common highway, then it will be their duty to find whether the defendant has obstructed the same or not.

The Court charged the jury that the defendant has the right to occupy the public roads and common highways of the country which it crosses, so long as may be necessary for it to do so in crossing the same, but it has no right to obstruct them with its cars for any
(607) longer time than is actually necessary for the purpose of allowing it to use the franchise given by its charter.

The Court charged the jury that if they shall find that the defendant obstructed or occupied said road with its cars for thirty minutes, it is guilty of obstructing a public highway. The defendant excepted.

The *Attorney-General,* for the State.
Mr. Chas. A. Moore, for the defendant.

MERRIMON, J., (after stating the facts). The grounds of defence insisted upon are technical and unfounded. The defendant is indicted for obstructing "a certain public road and common highway." Having pleaded not guilty, its counsel insisted on the trial that the State had not proven that it was a corporation. This was unnecessary, because by its plea of not guilty it admitted its corporate existence and identity by the name specified in the indictment. But if this were not so, there was abundant evidence of its corporate existence. The charter authorizing such a company was put in evidence, and there was other evidence that went to prove that such a company was organized under this charter—that it had officers, a place of business, a railroad, transported persons and freight over its road and held itself out to the world as a corporation by the name specified. Such evidence was competent, certainly, as against the defendant, and sufficient, if believed by the jury.

It was further contended that there was no evidence of such a public road and common highway as that described in the indictment. The State put in evidence the charter of "The Buncombe Turnpike Company," granted at the session of the General Assembly of 1824, (2 Rev.

Stats., p. 418). That charter authorized the organization of a corporation by that name, with power to construct and establish a public turnpike road, and the ninth section thereof provides: "That (608) the said road, with the improvements which shall be made thereon in pursuance of this act, *shall be forever thereafter* taken and considered as a *public highway,* free for the passage of all persons and animals, and carriages of every description, on the payment of tolls imposed by this act," &c. It further provided, "That all hands liable to work on roads in the county of Buncombe, residing within two miles on either side of the road, from the Tennessee line to the top of the Saluda mountain, shall be liable to do six days work in each and every year on the said turnpike road, under the direction of," &c.

The company was authorized to collect tolls as allowed for only thirty-nine years, but it was not contemplated that the road should, at the end of that time, cease to be a public highway; on the contrary, it was intended and provided that it should thereafter "forever" be such a highway, to be kept in repair by the hands so liable to work on it, and as might be otherwise, in the course of time, provided by legislative authority. It was in evidence that such a company was organized, that it constructed the highway intended by the charter, that this road had been in constant use a great number of years, was still in use, and that the road specified and described in the indictment was a section or part of that road. This part of the road has never been abolished or discontinued as such a highway by statute or otherwise.

The Statute (Acts 1850-'51, chap. 147), incorporated the "Asheville & Greenville Plankroad Company," and this company was authorized to occupy and use the turnpike road mentioned above in the way and on the terms prescribed, but this statute did not, nor did it purport to, discontinue the road as a public highway. Indeed, it expressly provided that the road should be "a public highway," and that the corporation should continue for fifty years. The statute last (609) cited provides, that it "shall be regarded as a public act," and the courts must therefore take judicial notice of it.

But the statute (Pr. Acts, 1866, chap. 52), abolished "The Asheville & Greenville Plankroad Company," and restores "The Buncombe Turnpike Company," in name and authority, and this company has ever since then been recognized and treated as such company, by the courts and the legislature. *State* v. *McDowell,* 84 N. C., 799; Acts 1866-'7, ch. 114; Acts 1869-'70, ch. 126.

It appeared on the trial, that "The Buncombe Turnpike Company," or certain of its officers, undertook three or four years ago, to surrender its road and franchises to the commissioners of the county of Buncombe.

The defendant contended that the company thus abandoned its road, and the county commissioners could not treat and make it a public highway, because it had not been established as such, after it had been abandoned, &c. "The Buncombe Turnpike Company" had no authority to thus abandon its road and surrender its corporate franchises. Such act on its part, in any view of it, was nugatory and void. It could only surrender its franchises to the State, in some way authorized by law. It remains a company, and answerable according to law. If it failed to keep the road in repair, this did not render the road less a public highway, and any attempt to abandon it could not have such effect. The road is made a highway "forever," and this implies that it is and must be such, until the Legislature shall otherwise direct and provide. The road was established, has continuously remained, and still remains a highway, and it so appeared on the trial.

So that the numerous points raised, and instructions asked for and refused by the Court in respect to the character of the highway obstructed, were unnecessary, groundless and outside of any proper view of the case before the Court. It did appear that there was a
(610) highway as charged, constituted and established by legislative authority.

It is too plain to admit of serious debate, that the defendant had not the shadow of authority or right to keep its cars standing across the highway mentioned, for from fifteen minutes to three and a half hours, as some of the witnesses testified it did do, and until in the course of such business it could unload its cars of freight at its depot near the highway, and thus prevent the passage of persons traveling on the highway. There is nothing in its charter that in terms or by the remotest implication gives such right, nor is it conferred by any general principle of law. Railroad companies have no right to obstruct public highways over which their roadway passes. They must cross them as promptly as the nature of their trains will, in the orderly course of passage, allow. There is nothing in the nature of their business that renders a different rule necessary or tolerable. What the defendant did was unlawful, a criminal violation of the law, and an arbitrary exercise of power, not applying harsher terms.

The defendant was indictable for the offence as charged. While railroad corporations, and corporations generally, are not capable of committing offences, a necessary quality or ingredient in which is the criminal intent, still they are indictable for such acts of misfeasance, as constitute nuisances, without regard to the intent. *Ang. & Ames. on Corp.*, §§394-396; *Mor. on Pr. Cor.*, §94; 1 *Bish. on Cr. Law*, §505.

We have not adverted to several of the alleged errors assigned, because they have reference to immaterial matters. What we have said

disposes of all that were in effect material. It is unnecessary and useless to go further.

We are of opinion that the judgment should be affirmed, and to that end let this opinion be certified to the Superior Court.

No error. Affirmed.

Cited: S. v. Grant, 104 N. C., 910; *S. v. Turner,* 119 N. C., 849.

(611)

STATE v. JOHN E. GREEN.

Challenges—Jurors.

1. Upon a challenge to the favor, the Court is the judge of the qualifications of the juror, and its determination is not reviewable.
2. The Court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is empaneled.
3. A juror who, on his *voir dire,* states that he has formed and expressed an opinion upon the guilt of the defendant based upon rumors, but that his mind is not so far prejudiced thereby that he could not render a fair and impartial verdict, is a competent juror.

(*State* v. *Kilgore,* 93 N. C., 533; *State* v. *Collins,* 70 N. C., 241; *State* v. *Ellington,* 29 N. C., 61; *State* v. *Bone,* 52 N. C., 121; *State* v. *Cockman,* 60 N. C., 484; *State* v. *Adair,* 66 N. C., 298; *State* v. *Jones,* 80 N. C., 415; *State* v. *Boon,* Ibid., 461; *State* v. *Cunningham,* 72 N. C., 469, cited and approved).

This is an indictment for BURGLARY WITH INTENT TO COMMIT RAPE, tried before *Clark, Judge,* at the August Term, 1886, of JONES Superior Court.

The only exceptions taken in the case were those taken upon the challenges of jurors.

Thomas Stilley, a juror of the special venire, on his *"voir dire,"* said that he had formed and expressed the opinion that the prisoner was guilty. On his cross-examination, he said this opinion was based upon general rumor, and that he had not heard the evidence or talked to any of the witnesses. He was then asked by the Court: "Is your mind so fair and unbiased that you can hear the evidence and render a verdict without being in *any degree* influenced by what you have heard or said?" the Court emphasizing the words *in any degree.* The juror replied "that it was," and on further examination by counsel, stated that he

would not be biased in any manner by the opinion he had heretofore expressed. The Court disallowed the challenge for cause, and (612) the prisoner excepted, and challenged the juror peremptorily.

Two other jurors on being challenged and cross-examined in same manner, made the same responses, and the challenges for cause were disallowed and prisoner excepted. The first of the two was then challenged peremptorily, as to the latter, the peremptory challenges of the prisoner being exhausted, the juror was sworn and served.

A juror by the name of Benjamin Brown was passed by the State, and when challenged by the prisoner for cause, replied that he had not formed and expressed the opinion that the prisoner was guilty, but "had formed and expressed the opinion that the prisoner was not guilty." The prisoner said, "tender him." The State then immediately asked the Court in its discretion to allow it to challenge him for cause. After considerable examination by the State and by defendant, the Court asked the juror: "Is your mind so fair and unbiased that you can hear the evidence and render a verdict without being in any degree influenced by what you have heard?" The juror replied that it was. The Court thereupon in its discretion, (the jury not yet being complete nor empaneled), allowed the State's challenge for cause, and the juror was stood aside. The prisoner excepted. There was a verdict of guilty. The sentence of the law was pronounced, and the prisoner appealed.

The *Attorney-General,* for the State.
No counsel, for the defendant.

ASHE, J., (after stating the case as above). We find no errors in the rulings of his Honor in the matters excepted to by the defendant. The ground of the exceptions to the ruling with regard to the challenge of the juror Stilley, has been time and again held by this Court not to be sufficient ground of challenge. In *State* v. *Kilgore,* 93 N. C., 533, it was held, that when a juror, challenged by the defendant, says (613) he has formed and expressed the opinion that the prisoner is guilty, but states further that his mind was fair and unbiased, and that he could hear the evidence and render a verdict without being in any degree influenced by what he had heard or said, he was competent to serve as a juryman, and the challenge was properly disallowed. To the same effect is *State* v. *Collins,* 70 N. C., 241; *State* v. *Ellington,* 29 N. C., 61; *State* v. *Bone,* 52 N. C., 121; *State v. Cockman,* 60 N. C., 484.

Two other jurors challenged for like cause as the first, who gave the same response upon the examination, were tendered, the one was per-

emptorily challenged by the prisoner, and the other after the prisoner's challenges were exhausted, was sworn and put on the jury. The same principle applies to these as to the first juror challenged.

The last exception was to the ruling of the Court in overruling the challenge of the prisoner to the juror Benjamin Brown. This juror had been passed by the State and was tendered to the prisoner, and upon his *voir dire* having stated that he had formed and expressed the opinion that the prisoner was not guilty, the prisoner said "tender him." The State immediately moved the Court to allow it then to challenge the juror, which was resisted by the prisoner, who insisted that the challenge of the State came too late after the juror had been passed by the State to the prisoner, but the Court allowed the challenge, after the juror had stated, in response to a question asked him by the Court, that his mind was not so biased but that he could hear the evidence and render a verdict without being in any degree influenced by what he had heard.

Whether the juror was competent, or in other words a proper person to sit on a jury and render an impartial verdict on the issue between the State and prisoner, was a question of fact to be tried by the Court, after the juror was tendered, and within his discretion whether he would allow the challenge. In the case of *State* v. *Adair,* 66 N. C., 298, "after twelve jurors were tendered and accepted by (614) the prisoner and sworn, but before they were empaneled, the Court was informed that one of the jurors was related by affinity to two of the prisoners, which appeared upon inquiry to be so, but this fact was not known to the counsel on either side, or to the Court when the juror was sworn. The juror was discharged, and the prisoner excepted." PEARSON, C. J., speaking for the Court, said: "As the jury was not empaneled and charged with the case, it was within the discretion of his Honor to allow the State the benefit of a challenge for cause, so as to secure a jury indifferent as between the State and the prisoner." The same rule of practice has since been maintained in the case of *State* v. *Jones,* 80 N. C., 415; *State* v. *Boon,* 80 N. C., 461, and *State* v. *Cunningham,* 72 N. C., 469. We are aware there seems to be an inconsistency in overruling the exception in the case of the juror Stilley, and that of Brown, for both, in their examination, stated that they were not so biased but that they could give an impartial verdict after hearing the evidence, without being influenced by what they had heard about the case. But the challenge in these cases was not strictly a challenge for cause, but a challenge to the favor, when the party has no particular cause of challenge, but objects that the juror is not indifferent on account of some suspicion of partiality, prejudice, or the like. In such cases, the validity of the objection was left at common

law to the determination of triers, whose office was to try whether the juror was favorable or unfavorable. The method of which proceeding was, if the first man called be challenged, two indifferent persons named by the Court constituted the triers, and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next, and when another is found indifferent and sworn, the two triers shall be superseded and the two sworn on the jury shall try the next. 3 Blackstone Com., 363. Their finding was conclusive.
(615) But by statute in this State the Court is constituted the trier. *The Code,* §§405 and 1199. And where the challenge, as in this, is to the favor, its determination is not reviewable. *State* v. *Kilgore, supra.*

There is no error.

No error. Affirmed.

Cited: S. v. Fuller, 114 N. C., 891; *S. v. Vick,* 132 N. C., 997; *S. v. Register,* 133 N. C., 751; *S. v. Banner,* 149 N. C., 522; *S. v. Peterson,* 149 N. C., 534; *S. v. Vann,* 162 N. C., 538; *S. v. Foster,* 172 N. C., 962; *S. v. Hicks,* 174 N. C., 802.

STATE v. WILLIAM E. WORTH.

Penalty—Ordinances of Cities and Towns.

An ordinance of a city or town prescribing a penalty to be fixed in the discretion of the Court, is uncertain and void.

(*State* v. *Crenshaw,* 94 N. C., 877; and *State* v. *Cainan,* Ibid., 883, cited and approved).

This was a CRIMINAL ACTION, tried in the Criminal Court of NEW HANOVER county, before *Meares, Judge,* at May Term, 1886.

The facts are stated in the opinion.

The *Attorney-General,* (*Mr. DuBrutz Cutlar* also filed a brief), for the State.

Mr. J. D. Bellamy, for the defendant.

MERRIMON, J. The defendant was charged criminally before the Mayor of the city of Wilmington with having violated an ordinance of that city, whereof the following is a copy:

"SEC. 24. That any person refusing or neglecting to pay the license tax assessed against him for the privilege of doing business, for the space of ten days, shall be subject to criminal prosecution, (616) and *upon conviction,* shall be fined not more than *twenty-five dollars,* or imprisoned not exceeding thirty days."

The mayor found the defendant guilty, and gave judgment against him, from which he appealed to the Criminal Court. In the latter court there was a verdict of guilty, and judgment against him. Having excepted, he appealed to this Court.

The city ordinance, for a violation of which the defendant was convicted, prescribes, that upon conviction, a party "shall be fined *not more* than twenty-five dollars, or imprisoned not exceeding thirty days." The punishment thus authorized is in the discretion of the mayor, and uncertain. It may be any sum not exceeding twenty-five dollars. It is settled that ordinances thus uncertain are inoperative and void in this State. Like ordinances have been repeatedly and uniformly held to be void. *State* v. *Crenshaw,* 94 N. C., 877; *State* v. *Cainan,* Ibid 883.

There was, therefore, error.

Error. Reversed.

STATE v. JOHN REYNOLDS et als.

Injuries to Houses—Possession—Trespass.

1. One who peacably enters upon land, believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under §1062 of *The Code.*

2. Possession, actual or constructive, is essential to the maintenance of an action for trespass.

(*State* v. *Williams,* 44 N. C., 197; *State* v. *Watson,* 86 N. C., 626; *Tredwell* v. *Reddick,* 23 N. C., 56; *Myrick* v. *Bishop,* 8 N. C., 485; *McCormick* v. *Monroe,* 46 N. C., 13; *Dobbs* v. *Gullidge,* 20 N. C., 197; cited and approved).

This was an INDICTMENT against the defendant for tearing (617) down and demolishing a certain house alleged to be the property of one F. T. Baldwin, tried before *Boykin, Judge,* at the February Term, 1886, of RICHMOND Superior Court.

The facts were, substantially, that the land upon which the houses in question were situated, was a lappage upon land which the prosecutor

had purchased from one W. F. Roper, and that claimed by the defendants, which John Reynolds, one of them, had bought from one Usry, and had first obtained a bond for title, and subsequently a deed for the same, delivered after the institution of the prosecution.

Neither Baldwin nor Roper had ever had possession of the land; but the defendants had built the houses and had been in possession of the same for eleven years, and at the time of the alleged trespass were in possession of a tobacco patch on said land.

The prosecutor testified that the defendant John Reynolds, had proposed to buy the land from him both before and after the survey, but Reynolds testified that he proposed to buy the land from the prosecutor if he had the better title. Some time before the commencement of the prosecution, there was a survey of the land and the houses were embraced within the boundaries of the deed from Roper to Baldwin. The defendant John Reynolds was at the survey, and soon thereafter tore down and moved the houses across the line, upon the land of Usry. He stated in his examination that he tore down and carried off the houses because the land was in dispute. The houses were very near the disputed line, and were only moved a short distance. Baldwin received his deed from Roper while Reynolds was in possession of the land and houses, and claims them as his own.

(618) Upon this state of facts his Honor instructed the jury: "That if the defendants moved the house under a *bona fide* claim of right, they were not guilty; if they did not move the house under a *bona fide* claim of right, they were guilty."

The jury found the defendant guilty, and there was judgment, from which the defendant appealed.

The case on appeal did not show that any exception was made to the charge below.

The *Attorney-General,* for the State.
Mr. Frank McNeill, for the defendants.

ASHE, J., (after stating the facts). We are of opinion there was error in the charge given by his Honor to the jury. His Honor should have charged them that upon the evidence they should find the defendants not guilty. In the case of *State* v. *Williams,* 44 N. C., 197, which was an indictment under the same statute, it was held that, "to subject a person to the penalties of the act, he must be guilty of trespass." And again, in *State* v. *Watson,* 86 N. C., 626, which was an indictment preferred for a violation of the same statute, this Court, speaking through RUFFIN, J., refer to the case of *State* v. *Williams* with approval, and say, "the construction given to the Act by the Court is, that it was

not intended to embrace a case of destruction of property by the owner thereof; but that to bring a case within it, the party accused must be shown to have been guilty of an actual trespass upon the property of another." Trespass to realty consists in a wrongful and unwarrantable entry upon the land of another, which the law entitles a trespass by "breaking his close," (Brown on Real Property, 777), and possession is necessary to the maintenance of the action. Ibid., 778. It cannot be maintained without possession. *Tredwell* v. *Reddick,* 23 N. C., 56.

The possession must be either actual or constructive. Possession alone when it is actual, is sufficient to maintain the action (619) against a wrong-doer; *Myrick* v. *Bishop,* 8 N. C., 485. So, also, an action may be maintained for an injury to a constructive possession, which is a possession that is in legal contemplation attached to the title, and when a party sues for a trespass upon his land, of which he has only a constructive possession, he must show title. *McCormick* v. *Monroe,* 46 N. C., 13. But this possession has no existence when there is another in adverse possession. *Dobbs* v. *Gullidge,* 20 N. C., 197.

In the case before us, the prosecutor had neither the actual nor constructive possession of the houses demolished and carried off, for he admits he never had actual possession, and according to the facts adduced in evidence he had no constructive possession, for he failed to show, even if it were admissible in a criminal action, any title to the land within himself or Roper, under whom he claimed.

The judgment of the Superior Court must be reversed, and a *venire de novo* awarded.

Error. Reversed.

Cited: Thornton v. Brady, 100 N. C., 40; *S. v. McCracken,* 118 N. C., 1242; *S. v. Jones,* 129 N. C., 510; *Gordner v. Lumber Co.,* 144 N. C., 111.

STATE v. G. W. CRANE.

Homicide—Evidence.

The prisoner and deceased quarreled, and both evinced a willingness to fight, but were prevented by other persons—the prisoner went off, but came back, when the deceased presented a loaded gun and commanded him to stand—the prisoner went into a house near by, but out of sight of the deceased, and procured his gun and returned to the deceased, who immediately fired upon and slightly wounded the prisoner, and then sat his gun down—the prisoner then shot and killed deceased. *Held,*

1. That the prisoner was at least guilty of manslaughter.
2. That it was not error in the Court to charge the jury that under the circumstances of this case, if they believed the evidence, the prisoner was guilty of manslaughter.

(*State* v. *Kennedy*, 91 N. C., 572; *State* v. *McNeill*, 92 N. C., 812; *State* v. *Vines*, 93 N. C., 493, cited and approved).

(620) This was an INDICTMENT FOR MANSLAUGHTER, tried before *Montgomery, Judge,* and a jury, at Fall Term, 1886, of YANCEY Superior Court.

One McAlister, witness for the State, testified that he was at Franklin McCorny's with Wiley Riddle, the deceased, the defendant, and several other parties; the deceased was very drunk and had a gun shaking it around; the prisoner was also drunk; one Brackins told the deceased to put up his gun as he was too drunk, that he might shoot himself or some of his friends; they then took the gun from him and locked it up in a room; presently the deceased had a knife; they took the knife away from him also; he complained that they had hurt his hand, and blamed the defendant for it; the deceased and the defendant passed the lie and got up to fight, but were prevented by those present. This was in the porch of the house. Dinner was announced; McCorny and wife, Brackins and wife, went to dinner; Crane, the defendant, went off about the same time; the deceased got a hammer and broke into the room where the gun had been put; he came out on the ground, then back on the porch with his gun; about this time Crane, the defendant, came in sight; the deceased pointed his gun at him and said: "Damn you, stand!" Crane went behind the house in the direction of the kitchen and "holloed"—"I have got as good a shot gun as any man," or "as many shot guns as any man," and came back directly with his gun around towards the porch where the deceased was; the deceased said—"stand, damn you!" and fired and hit the defendant; the deceased stepped towards the room a little from Crane and set his gun down; did not see him make any effort to reload his gun; Crane stepped
(621) so he could see the deceased and said—"Damn you, I will show you how to shoot me," and fired; the deceased turned and went into the room, and said—"I am shot—am killed," and fell on the bed; Crane and myself went in; the prisoner got to him first and hit him one lick with his fist, and I prevented him from striking him again; told him he had killed him; he told me—"no, he was not killed," but that he, prisoner, "was killed," and showed me his breast; there was a shot hole in his shirt, and some blood; he took his gun and went off.

The deceased lived two or three minutes after he was shot. The witness described the kitchen as being behind the house and twenty-five

or thirty yards distant; the character of the deceased was that of a dangerous man; deceased would have weighed one hundred and twenty-five pounds; the prisoner was a larger man and some twenty odd years old.

Wm. McCorny testified: The deceased was killed at my house; the deceased had a gun; the prisoner and one Brackins helped me to take the gun away from him, and I locked it up. I went to the kitchen; in a little while I saw the deceased have the gun on the porch; don't think the prisoner was in the kitchen. In a little while Crane, the prisoner, came in the kitchen and got his gun down out of the rack. I spoke to him and said: "Wash, what are you going to do with that gun? put it down;" he said, "no man should snap a gun at him," or "shove a gun in his breast;" in a minute saw smoke, or flash of a gun, towards defendant; the prisoner was sorter getting up and he fired; I went around the house and the deceased was holding to the bed dying; there was about two seconds between the fires; the deceased had his gun in a shooting position when I saw him in the porch; the prisoner had a skinned place on his breast, looked like two shot; there was nothing that hemmed the prisoner in the kitchen; he could have gotten away from the kitchen without exposing himself to the deceased on the porch; the deceased had the character of being (622) a dangerous man.

There was evidence on the part of the defence that the prisoner had three small shot holes in his left breast the next day after the difficulty, and that the deceased had the character of being a dangerous man when drinking, and that the prisoner was a man of good character. The Court instructed the jury that if they believed the evidence to be true, they should find the prisoner guilty. The defendant excepted.

Verdict of guilty, and judgment, from which the prisoner appealed.

The *Attorney-General* for the State.
No counsel for the defendant.

MERRIMON, J. The evidence was plain and direct. It seems that it was not questioned, and obviously the jury believed it. Accepting it as true, and taking the most favorable view of it for the prisoner, he was certainly, at the least, guilty of voluntary manslaughter. The deceased had given him legal provocation; but he slew him—not of necessity—not to save his own life or himself from enormous bodily harm, but unnecessarily in the heat of blood, if not of deliberate purpose. At the time the prisoner fired his gun at and slew the deceased, he was

free from present danger, and might easily have abandoned further conflict without exposing himself to danger, and this he must have seen, but he showed no disposition to desist from the fight. On the contrary, he manifested a passionate, if not a deliberate and wicked purpose, to kill.

No man is justified in taking the life of his adversary, if he can avoid it, if he can escape without exposing his own life to serious peril, or exposing himself to great bodily harm. He cannot kill of choice
(623) —he can only be justified when he kills of necessity. *State* v. *Kennedy,* 91 N. C., 572; *State* v. *McNeill,* 92 N. C., 812.

The evidence was simple and direct—there was no conflict in it—no alternative aspects of it to be submitted. It was the province of the jury to believe or disbelieve it, and the Court might, as it did, tell them that if they believed it to be true, the prisoner was guilty. If the evidence was true, the law drew the conclusion as to the offence. *State* v. *Vines,* 93 N. C., 493.

There is no error.

No error. Affirmed.

Cited: S. v. Quick, 150 N. C., 824.

STATE v. DUNCAN HAZELL.

Judgment—Verdict, Special.

1. In criminal actions there is no appeal, except from *final* judgments.
2. A recital in the record, upon the return of a special verdict, "that the Court being of opinion that upon this state of facts the defendant is not guilty, the verdict is so entered," is not such a judgment as will support an appeal.

(*State* v. *Saunders,* 90 N. C., 651; *State* v. *Bailey,* 65 N. C., 426; *State* v. *Wiseman,* 68 N. C., 203, cited and approved).

This was a CRIMINAL ACTION, tried before *Clark, Judge,* at Spring Term, 1886, of ALAMANCE Superior Court.

The facts upon which the opinion proceeded are stated therein.

The *Attorney-General,* for the State.

Mr. Jas. E. Boyd, for the defendant.

ASHE, J. The defendant was charged with selling spirituous (624) liquors by the measure less than a gallon, to-wit: by the quart, to one John A. Warren, on the first day of January, 1885, the said Hazell not having then and there a license to retail spiritous liquor by the measure as aforesaid. The defendant pleaded not guilty, and the case was submitted to a jury who returned a special verdict finding the facts of the case which it is needless to set forth. Immediately following the verdict in the case on appeal it is stated: "The Court being of the opinion that upon this state of facts the defendant is not guilty, the verdict is so entered and thereupon the State appealed to this Court."

The opinion of the Court upon the finding of the jury is the only semblance of a judgment that appears in the case. The record does not show that any judgment was rendered in the case upon the findings of the jury, and this statement, in the case on appeal of the Judge, that "upon this state of facts the defendant is not guilty and that the verdict is so entered," cannot be taken as a judgment. In a criminal action there is no appeal save from a final judgment. And when the record does not show a final judgment the appeal will be dismissed. *State* v. *Saunders,* 90 N. C., 651; *State* v. *Bailey,* 65 N. C., 426; *State* v. *Wiseman,* 68 N. C., 203.

This appeal must therefore be dismissed.

No error. Dismissed.

Cited: S. v. Lockyear, post, 641; *S. v. Kirby,* 108 N. C., 774; *Cameron v. Bennett,* 110 N. C., 278; *Milling Co. v. Finlay,* 110 N. C., 412; *S. v. Crook,* 132 N. C., 1058; *Hospital v. Florence Mills,* 186 N. C., 554.

STATE v. ROBERT HEDRICK.

Arrest—Assault.

The prosecutor, who was not an officer, had been deputed to execute a warrant in a bastardy proceeding, and had executed it by arresting the defendant therein; on the hearing, the said person arrested was committed to the custody of the prosecutor and attempted to escape. The prosecutor pursued him, and the defendant, without warning, or the employment of any other means to stop him, threw out his foot and tripped him causing him to fall. ***Held,***

1. That the defendant was guilty of an assault.
2. Whether the arrest and commitment of the defendant in the bastardy proceeding was lawful, *quœre?*

(625) This was a CRIMINAL ACTION, tried at May Term, 1886, of the Superior Court of CATAWBA county, before *Avery, Judge.*

The facts as admitted were, that one Symon, a justice of the peace, had issued a warrant for the arrest of one Monroe Null, on a charge of bastardy, which was placed in the hands of one Philo Lail. The Court held that the justice did not have a right to depute Lail, who was not an officer, to execute it. Lail did execute the warrant, and Monroe Null was tried and ordered by the justice into the custody of Lail. While Monroe Null was so in the custody of Lail, his cousin, Jacob Null, caught hold of Lail, drew a pistol on him, and told Monroe to run. Monroe did run, and Lail extricated himself from the grasp of Jacob, and started to pursue him. The defendant, Hedrick, being in the path, stepped aside and put out his right foot and purposely tripped Lail, and threw him on the ground by so tripping him. Hedrick was a cousin of Monroe Null.

Counsel for defendant insisted that Lail was attempting to commit an assault by making an arrest without authority to do so, and that Hedrick had the right to use the force necessary to trip him up in order to prevent the arrest, and asked the Court to so instruct the jury. The Court instructed the jury that upon the facts proved and admitted, the defendant was guilty. Defendant excepted, and from the judgment appealed.

Attorney-General, for the State.
Mr. L. M. McCorkle, for the defendant.

(626) MERRIMON, J., (after stating the facts). It seems that the facts were not questioned, and accepting them as true, the defendant was properly convicted. He on purpose, tripped the prosecuting witness, causing him to fall violently to the ground, without giving him any caution or notice to desist from the pursuit of the fleeing party. If it be granted that he had the right to prevent the re-arrest, as contended by his counsel in the argument—and this is not certain under the circumstances—he had no right to do so in such a violent way as that he adopted. If his purpose was lawful and sincere, he should have first notified the pursuing party to desist, and then at once, if need be, have laid hold of him firmly, but gently, and so as to show a peaceful and not a hostile purpose. He had no right to do what might be a lawful act in an unlawful and violent manner. By so doing he made himself

a criminal offender. It is clear that he intended to prevent the re-arrest, perhaps not warranted, by such violence as in law made him guilty of an assault.

There is no error.

No error. Affirmed.

Cited: S. v. Armistead, 106 N. C., 643; *S. v. Black,* 109 N. C., 858.

STATE v. JOHN L. STROUD.

Accomplice—Evidence—Indictment—Larceny—Receiving—Verdict.

1. It is settled law in this State, that a person may be convicted upon the unsupported evidence of an accomplice, if such evidence satisfies the minds of the jurors of the guilt of the accused.
2. A general verdict of guilty upon an indictment containing two counts—one for Larceny and the other for Receiving—will be sustained, if the evidence justifies either.
3. There are no accessories before the fact in larceny; all who aid, abet, advise or procure the crime, are principals.
4. To constitute the crime of Receiving it is not necessary that the stolen goods should be traced to the actual personal possession of the person charged; it is sufficient if it be shown that they were received by his agent or servant, or at his instigation deposited in some place directed by him, he knowing that they were stolen.

(*State* v. *Tyler*, 85 N. C., 569; *State* v. *Fox*, 94 N. C., 928; *State* v. *Long*, 52 N. C., 24; *State* v. *Beatty*, 61 N. C., 52; *State* v. *Weir*, 12 N. C., 363; *State* v. *Barden*, Ibid., 518; *State* v. *Hardin*, 19 N. C., 407, cited and approved).

This was a CRIMINAL ACTION, tried before *Clark, Judge,* at the (627) August Term, 1886, of the Superior Court of LENOIR county.

The indictment contained two counts, one for stealing a hog, and the other for receiving the same, knowing it to be stolen. The defendant was indicted with one Howard. They were both convicted, the verdict being general, and after sentence, the defendant Stroud only appealed.

There was no evidence offered on the part of the defendants. That introduced by the State was as follows: Timothy Spence testified, that Stroud told him to get Howard and go on a certain night and get the hogs out of Uzzel's pen; that he did so, and reported the fact the same

night to Stroud, who said—"kill them and put them in my smoke-house"; then he (Stroud) said—"there would be a search warrant out, and to put the meat under a hogshead in an old still-house," which was back of Stroud's house and near the line of Stroud's land, but there was conflicting evidence as to which side of the line the still-house was situated; that he carried the meat, in company with Pat Stewart, and put it in the still-house, as directed by Stroud; that since this indictment, Stroud told him that he had heard that he (witness) would turn state's evidence, and to keep his mouth shut.

Pat Stewart testified, that he saw the hogs knocked down and stuck; it was at night, and they were carried to the field back of Stroud's; the next night Spence met him there coming from the direction of Stroud's house, and told him to carry the meat to the still-house,
(628) and he carried in there in a cart.

Charles Holland testified, that a week or two after that, Stroud was complaining that some meat he had at the still-house was gone, and wanted to know if he knew what had become of it; that Spence said the meat was gone, and he would give one hundred dollars to know what had become of it.

James Hardy testified, that Stroud came to his house after the indictment was found, and said that he understood that Spence had turned State's evidence about Uzzel's hogs, and if he had, he would ruin him, because Spence knew all about it. Afterwards, in same conversation, Stroud said he would not mind it if Spence would tell the truth.

Bryant Rouse testified, that he heard Stroud say that he knew the barrel at the still-house that the meat was in. Stroud then charged that Charles Holland had stolen the meat out of the still-house.

Walter Spence testified, that he went with his father the night the hogs were stolen, and saw Howard and Stewart kill them; the next night he went with his father to Stroud's, and in going met Richard Rouse on the road. Stroud first told his father to carry the meat to Charles Holland's, but after studying awhile, he told him to carry it to the old still place. They went to the place where the hogs were, and told Pat Stewart what Stroud said, and together they carried the meat in a cart to the still-house as directed by Stroud. The hogs were stolen and cleaned on Tuesday night, and on the next night they were carried as directed by Stroud to the still-house.

Richard Rouse testified, that he met Timothy Spence and Walter Spence going towards Stroud's at night, and the next day, attracted by the flight of some buzzards, he saw where some hogs had been cleaned, at the place described by the other State's witnesses as the place where the hogs had been cleaned, and he also saw a cart track going
(629) thence towards the still-house.

There was also evidence that the general character of James Hardy was good.

The defendant's counsel asked for several special instructions to the jury, to-wit:

1. That to convict the defendant of larceny, the jury must be satisfied that he was present at the time of the commission of the offence, or so near by that he could give aid and comfort to the party actually doing the stealing; that the jury cannot convict the defendant under this bill of indictment, unless they find as a fact that he was present at the commission of the offence.

The Court declined to give this instruction, and instead, charged that all persons aiding, counseling and abetting a larceny, whether present at the commission of the offence or not, are principals, and equally guilty with the party actually committing the larceny, and if the jury believe beyond a reasonable doubt, that Stroud counseled and procured the hogs to be stolen, he was as guilty, though not immediately present.

To this charge and refusal to give the charge as requested, the prisoner excepted.

2. At the request of the prisoner the Court charged: That to convict him of receiving stolen goods, he must actually have received the goods, and known at the moment of receiving them that they were stolen. But the Court added, that "if the prisoner Stroud directed the meat to be carried to a certain place near his home, knowing that it was stolen meat, and it was so carried and put there by his orders, it was a receiving in law." To this modification the prisoner excepted.

3. The prisoner asked the further instruction, that the jury ought not to convict upon the unsupported testimony of an accomplice.

This the Court refused to give, and charged instead: "That (630) the jury ought to be cautious and careful about convicting upon the unsupported evidence of accomplices; but they were the sole judges of the testimony; they were to say whether the testimony offered by the State to corroborate the testimony of Timothy Spence and his son, and Pat Stewart was to be believed, or any part of it, and how far it corroborated them. Thus while a jury should be slow to convict upon the unsupported testimony of accomplices, yet it would justify a verdict, if it was sufficient in their minds to produce an entire conviction of the prisoner's guilt beyond a reasonable doubt." To the charge as given, and the refusal to give that prayed, the prisoner excepted.

The *Attorney-General,* for the State.

Mr. George Rountree, for the defendant.

ASHE, J., (after stating the facts as above). We are unable to find error in any of the rulings of the Judge in the Court below, which have been excepted to by the prisoner.

There is none in the first exception. It has been so often held by this Court, that in petty larceny there are no accessories, that we did not suppose that question would be brought again before us. But we find it here presented in this record and gravely insisted upon. It is familiar learning that in treason and petty larceny there are no accessories. The distinction between grand, and petty larceny was abolished by the act of 1856, Rev. Code, ch. 34, sec. 36, *The Code,* §1075; and in *State* v. *Tyler,* 85 N. C., 569, it was held that the effect of this statute was to reduce all felonious stealing to the grade of petty larceny, and in *State* v. *Fox,* 94 N. C., 928, it was decided, that there are no accessories before the fact in petty larceny, for not only those who did the act, but all who advise, counsel or procure the act to be done, are principals. So in *State* v. *Barden,* 12 N. C., 518; it was decided,
(631) "that whoever procures a felony to be done, although it be by the instigation of a third person, is an accessory before the fact, and that which in felony makes a person an accessory before the fact, in petty larceny and misdemeanors makes him a principal."

The second exception is equally untenable as the first. The Court charged in substance, that if the meat after being stolen, was directed by the defendant to be carried to a certain place, he at the time knowing that it had been stolen, it was a receiving in the eye of the law. To constitute the criminal offence of *receiving,* it is not necessary that the goods should be traced to the actual personal possession of the person charged with receiving. It would certainly make him a *receiver* in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen, for *qui facit per alium facit per se.* It is the same as if he had done it himself. The defendant, if the witnesses were to be believed, was the instigator, prime mover and manager of the nefarious transaction from beginning to end. Those who took the hogs from the pen, killed and cleaned them and carried them to the still-house, were his pliant tools, acting all the while under his orders. For at every stage of the transaction they went to him to know what was next to be done. After they were taken from the pen, they went to him to know what was to be done with them. He said, "kill them." They were killed. The next night they went to him again for directions as to what was to be done with the meat, and he told them to put it in the still-house, to which place it was accordingly carried, and a few days afterwards he told Holland that some one had taken some meat he had at the still-house. This was an admission of his having

possession of the meat. But it is needless to pursue this point further, for the jury rendered a general verdict, and when that is the case on a trial of a criminal action where there are several (632) counts in the indictment, and testimony is offered with respect to one only, it will be presumed to have been given on that count to which it was applicable, *State* v. *Long,* 52 N. C., 24, and when one or two counts in an indictment is bad, a general verdict will be supported by that which is good; *State* v. *Beatty,* 61 N. C., 52. So that there being a general verdict in this case, when the punishment is the same, it is immaterial whether the evidence is applicable to the one count or the other.

The last exception is as devoid of merit as the others. It was directed to the refusal of the Judge, to charge that the jury ought not to convict upon the unsupported testimony of an accomplice. His Honor could not have given such a charge, for it is settled law in this State, that a person may be convicted upon the unsupported testimony of an accomplice, if the testimony produce conviction of its truth upon the mind of the jury, and as the Judge told the jury in his charge upon the point, "they were the sole judges of the testimony." In *State* v. *Weir,* 12 N. C., 363; when one of the questions under consideration was whether an accomplice was a competent witness, TAYLOR, C. J., speaking for the Court, said: "It is now settled that his evidence may be left to the jury, who, if they believe him, may convict the prisoner." To the same effect is *State* v. *Hardin,* 19 N. C., 407.

If a prisoner may be convicted upon the unsupported testimony of an accomplice, certainly he may be when the testimony is corroborated, as it was in the case by Rouse, who testified to seeing the cart tracks going from the old field, where he saw signs of hogs having been recently cleaned, to the still-house; and by Holland, who stated what the defendant said to him about this meat having been taken from the still-house.

There is no error.

No error. Affirmed.

Cited: S. v. Cross, 106 N. C., 651; *S. v. Toole, ibid.,* 741, 742; *S. v. Barber,* 113 N. C., 713; *S. v. Register,* 133 N. C., 753; *S. v. Martin,* 141 N. C., 840; *S. v. Lee,* 164 N. C., 536; *S. v. Newell,* 172 N. C., 938; *S. v. Wilson,* 176 N. C., 754; *S. v. Overcash,* 182 N. C., 891; *S. v. Snipes,* 185 N. C., 746; *S. v. Whitehurst,* 202 N. C., 632.

(633)

STATE v. FRED T. LOCKYEAR.

Liquors—Local Option—Prohibition—Sale.

A number of persons in the city of Raleigh, in 1885, organized a club, for social and literary purposes, and became duly incorporated under the general law. Incidental to the main purposes of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. In 1886, an election was held in Raleigh township, under the Local Option Act, at which a majority of the votes were cast for prohibition. *Held*,

1. That the furnishing liquors to the members of the club under these circumstances was a sale.

2. That such sale was in violation of the Local Option Act, and the defendant was guilty of a misdemeanor.

(*McBryde* v. *Patterson*, 78 N. C., 412; *State* v. *Tyler*, 85 N. C., 569; *State* v. *Hazell*, 95 N. C., 623, cited and approved).

INDICTMENT, tried before *Philips, Judge,* at July Criminal Term, 1886, of WAKE Superior Court.

The facts fully appear in the opinion.

The defendant appealed.

Messrs. Geo. V. Strong and *J. H. Fleming,* for the State.

Messrs. Charles M. Busbee and *R. H. Battle,* for the defendant.

SMITH, C. J. The defendant is indicted for selling spirituous liquor in the township of Raleigh, in violation of §3116 of *The Code,* and upon the trial of his plea of not guilty, the jury in a special verdict find as follows:

That at an election regularly called and held in Raleigh Township, Wake county, on the first Monday in June, 1886, under the provisions of chapter 32, volume 2, of *The Code,* to ascertain whether spirituous liquors might be sold in said township, a majority of the quali-

(634) fied voters of said township cast votes on which was written the word "Prohibition," and the result of said election was in favor of prohibition, and the same was duly declared on the second day after said election by the authorities duly empowered so to do; and that no election has since been held reversing said election.

2. That the defendant is an employé and steward of an organization existing in the city of Raleigh called "The Capital Club," and in that

name duly incorporated under the general law, in 1885, for literary and social purposes.

3. That the said organization has nearly one hundred resident members, the full membership being limited to one hundred and twenty-five, and a few non-resident members. Under the constitution and laws of said Capital Club, no person can gain admittance to the rooms of said club, except the members thereof, or such friends of the members as live outside of Raleigh township, and are especially invited and introduced in the club; and that the leading magazines and papers are kept in the reading room of said club; and while there are no lodging rooms in the club except for its servants, some of its members spend a large portion of their time there daily.

4. That among other things, and incidental to the main purpose of the organization, the club furnishes refreshments to its members, such as liquors, cigars and meals, for their convenience and accommodation, and a small stock of spirituous liquors, wines and beer, is kept on hand and furnished to the members at a price fixed by the house committee of the same, and intended to be just sufficient to cover the cost; that the object of this is not to make profit upon the liquors, wines and beer so furnished, and the price at which they are dispensed does not cover their cost and the expenses attendant upon keeping and serving the same, and part of the initiation fees and monthly dues of the members have to be applied to that purpose—to pay the said costs and expenses.

5. That it is one of the objects of the club to entertain strangers who may visit the city of Raleigh. (635)

6. That no person other than members, can obtain any liquor, wine or beer or other beverage or refreshments in or from the club.

7. That the defendant, as steward of the club, furnishes spirituous liquors, wine and beer to the members of the club, in quantities less than a quart, for which he receives prices fixed by the house committee.

8. That on the 10th day of July, 1886, the defendant, as such steward, delivered spirituous liquors to a member of the club, being a person to the jurors unknown, and received the price fixed therefor from said member, and that the said delivery and payment were in the club house.

Upon the said facts, if the Court be of opinion that the defendant is guilty, the jury find him guilty; but if the Court be of the opinion that the defendant is not guilty, the jury find him not guilty.

The Court adjudged the defendant not guilty, and the State appealed.

The section under which the indictment is framed, is very positive and peremptory in its terms. It declares when such is the result of the popular vote, favoring prohibition, that "then and in that case it shall not be lawful for the Board of Commissioners to license the sale of spirituous liquors, or for any person to sell any spirituous liquors within

such county, town or township" until another and reversing election shall be held, "and if any person shall sell any spirituous liquor within such territory as specified," such person offending shall be guilty of a misdemeanor.

There can be no question that in a strict legal sense, the transaction described in the verdict is a sale of spirituous liquors. All the elements of an executed contract are present. The corporate body, a legal entity, and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call, and receives a fixed compensation (636) in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for and becomes the property of the club. Can there be any doubt that a corporation may make contracts and deal with a corporator, precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties?

And is not this dealing with the prohibited subject directly within the terms of the statute, and does it not open the door to the mischiefs intended to be suppressed? It is not necessary that the vendor should be authorized to sell to any applicant, as an ordinary retailer. He is not allowed to sell to any one, and the fact that customers must be members of the association, does not relieve him of criminal responsibility under the mandatory statute.

This interpretation of our own enactment, finds support in adjudications upon the force and effect of similar enactments in other States, to which our attention has been called in the carefully prepared argument of counsel representing the State.

In the *State* v. *Mercer,* 32 Iowa, 405; decided in 1871, there was an organization known by the name of the "Winterset Social Club," whose object was to supply its members with intoxicating liquors as a beverage. The defendant had possession of the liquors used—sold tickets to members and these were received in payment from them of liquors delivered and drank in defendant's house. The Court, BECK, J., delivering the opinion in reference to an error assigned in ruling out the articles of association which were offered in evidence in the Court below, says, "that if they were of the purport as claimed by the defendant's counsel in their argument, we must conclude that they were correctly excluded by the District court. They appear by the statement of counsel, to have been nothing more than the foundations of an organization, (637) the object and intent of which was to evade the law for the suppression of intemperance, a rather clumsy device by which the defendant and the members of the 'social club' hoped to defeat that law, and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. * * * If the liquors did not belong

to the defendant, but to the 'club,' they were kept by him for the purpose of unlawful sale as the agent or employé of the club. The sale of the tickets was in fact the sale of the liquors which was for the purpose of their unlawful use."

In *Marmont* v. *State,* 48 Ind., 21; determined in 1874, a German club consisting of about forty persons, had been formed in Indianapolis for social Sunday meetings, to which each contributed a small sum on entering, and paid small monthly dues afterwards. With this fund the treasurer would purchase a keg of beer on Saturday for the association, pay for it with its moneys, and deal it out in glasses on Sunday to members at five cents, which was covered into the treasury. Chief Justice BUSKIRK, in the opinion, says: "As the keg of beer, when purchased, belonged to the society, the question arises whether the society by its agent could make a valid sale of such beer to the persons composing the society. We know of no principle of law which forbids it." It was accordingly held that the transaction amounted to a sale within the meaning of the prohibitory statute.

But the case of *Martin* v. *The State,* 59 Ala. 34; before the Supreme Court of that State in 1877, is more directly in point. The indictment was for retailing liquor without license. An association had been formed in Montgomery, and incorporated under the general law for literary and social purposes. It was governed by a constitution and by-laws, and under them only the members or persons specially invited could enter the rooms of the club. In one of the rooms was kept a bar at which spirituous liquors, bought with the funds of the club, were sold only to members. The money paid for the liquor went (638) into the common fund, and was used only to replenish the stock of liquors. None but members could buy or pay for liquors at the bar, and it was sold to them in quantities less than a quart, and was drank upon the premises. The Court before which the trial took place, charged the jury that if the defendant sold spirituous liquors to members of the club without license, he would be guilty; and that this would be so, although he may have sold to none others than members of the club.

In the Supreme Court, the instruction was approved, and STONE, J., for the Court, after defining the constituent elements of a sale as given in Benjamin on Sales, says: "Whenever the ownership is changed, this essential of the contract is complied with. In the present case there can be no question that the ownership was changed. The spirituous or vinous liquors were the property of the corporation. By the sale they become the property of an individual for a valuable consideration paid by the individual member to the corporation aggregate."

These rulings are confronted with others apparently looking in an opposite direction; in which, according to defendant's contention, the true principle is to be sought, the most of them having pertinency to the present inquiry we are now to consider.

In *Seim* v. *The State,* 55 Md., 565; reported in 1880, the defendants, who were the president, secretary and treasurer of a club known as the "Concordia," an association incorporated under the general law, and formed upon the basis and for purposes essentially similar to ours, were prosecuted for selling beer to a member on Sunday in violation of the statute. The Court held that "the transaction was not a sale of the beer to Springer within the intent and meaning of the act of 1866." The act mentions among the forbidden articles, besides spirituous liquors, cordials, larger beer, wine, &c., "or any other goods, (639) wares or merchandise whatever," and in arriving at the meaning of the enactment, the Court says it does not embrace such organizations, for if it did, a meal could not be furnished "to a member on Sunday without violating the law," inasmuch as a meal would be equally included in its prohibitory words. This case is disposed of on a construction of the statute.

In *Tennessee Club of Memphis* v. *Dwyer,* 11 Tenn., (Lea.) 452; decided in 1883, the club was formed and incorporated upon the same principles and for similar general purposes, having 200 members, and liquors of the club are furnished by an officer and servants to members who might apply for it: The defendant, clerk of the county court, issued a distress warrant against the corporation to enforce payment of a sum claimed to be due from it as a retail liquor dealer. The suit in equity was instituted to restrain the collection of the alleged debt. The sole question passed on at the hearing, was whether the complainant was under the law a liquor dealer, and liable as such to the tax. The opinion delivered by COOKE, J., reviews the cases from Alabama, Indiana and Maryland, and that of *Recard* v. *The People,* 79 Ill., 85; where the ruling was similar to that in the two first mentioned, and arrives at the same conclusion as the Court of Maryland, that the disposition of liquors among members, although upon payment of a price, is not within the purview of the statute. It declares the transaction is not a selling in itself, but a distribution of common property among its owners. The tax is put upon retail liquor dealers, as upon "other merchants," indicating, in the opinion of the Court, a legislative purpose "to impose this tax upon those who engage in the retailing of liquors as a business."

In *Commonwealth* v. *Smith,* 102 Mass., 144; the issuing of checks to the contributing members, according to the sum advanced by each, with a right to a proportionate quantity of the liquor bought with the

common fund, was declared not to be a sale, but a distribution of common property among the several owners of it. (640)

Similar ruling is made in *Groff* v. *Evans,* 8 Queen's Bench, Div. 373, in 1881. FIELD, J., says: "I think the true construction of the rule is, that the members were the joint owners of the general property in all the goods, and that the trustees, (in whom the property was vested,) were their agents with respect to the general property in the goods, although they had other agents with respect to special property in some of the goods. A sale involves the element of a bargain. There was no bargain here. There was no contract between two persons, because Foster was vendor as well as vendee."

We do not undertake to reconcile the conflicting views taken by the different Courts in regard to the character of these transactions among the members of the club within their walls, and will say that in our opinion, the case before us involves all the requisites of a legal sale, and as it is within the words of our prohibitory act, so it is within the mischief which it is intended to suppress. Without going into the refinements which are apparent in some of the opinions, we are not able to exempt the act imputed to the defendant from the denunciation conveyed in the broad and comprehensive words, which forbid "any person to sell any spirituous liquors" within the designated locality. Nor need we revert to the facilities which a contrary construction would afford for an evasion of the law, by the formation of such associations, which if they did not obstruct the statute in its obvious purposes, would admit of discriminations in the community, equally adverse to its intended general operation.

We have thus given our opinion of the proper construction of the enactment in its application to cases like the present, and departed from our usual practice, to refrain from passing upon the merits of the case on appeal when not properly constituted in court, for the similar reason given in the disposition of the case of *McBryde* v. *Patterson,* 78 N. C., 412, where the same impediment was met, that it was "the wish of the parties" that the controversy should be settled and the law (641) declared, so that it may be observed in its integrity. *State* v. *Tyler,* 85 N. C., 569.

But the appeal must be dismissed, because no judgment discharging the defendant has been rendered so far as the record shows, and it has been too often decided, and again at this term in *State* v. *Hazell,* to need a reference, that an appeal cannot under such circumstances be entertained. The adjudication upon the special verdict is but to render it complete and perfect.

Dismissed.

Cited: S. v. Smith, post, 681; *S. v. Nash,* 97 N. C., 516; *S. v. Neis,* 108 N. C., 788, 792; *Guilford v. Georgia Co.,* 109 N. C., 313; *Milling Co. v. Finlay,* 110 N. C., 413; *Farthing v. Carrington,* 116 N. C., 336, 338; *Carter v. Elmore,* 119 N. C., 297; *S. v. Colonial Club,* 154 N. C., 184.

STATE v. LUCY MORGAN.

Bastard, Concealing birth of—Evidence—Homicide—Former Conviction—Arrest of Judgment.

1. Upon the trial of an indictment for infanticide, where it appeared there were no marks of violence upon the deceased, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving upon the body any evidence of the means employed.
2. A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. *The Code,* §1004.
3. Former conviction, or acquittal, to be available as a defence, must be pleaded; it cannot be considered on a motion to arrest the judgment.

This was an INDICTMENT for infanticide, tried before *Boykin, Judge,* at August Term, 1886, of ROWAN Superior Court.

The case is stated in the opinion.

(642) *Attorney-General,* for the State.

No counsel for the defendant.

SMITH, C. J. The prisoner is charged with the murder of her own infant child, born a bastard, committed soon after birth. Evidence was introduced for the State, tending to prove that the prisoner gave birth to a living child in a barn in the town of Salisbury, and buried it head downward in a small hole in the ground, covering the body with hay and straw. There were no marks of violence upon its person.

The solicitor, after objection from the prisoner, was allowed to show by the testimony of an expert, that there were divers ways by which the mother could have murdered it without producing any external evidences thereof, as by suffocating it, burying it in the manner in which it was found, and in other ways. To the introduction of this testimony is taken the only exception shown in the record, during the trial before the jury. While we do not approve of the use of the word "murdered"

instead of "killed," as tending to more injuriously affect the minds of the jurors, in connection with the absence of indications of violence upon the body, we do not deem the exception tenable. In substance, the information imparted in the expert's opinion is, that to produce death, it did not necessarily require the employment of force sufficient to leave marks on the body; and that the absence of these signs was not inconsistent with the homicidal act, in the case of a new born and non-resisting babe.

II. After the trial and motion to set aside the verdict for error alleged in admitting the evidence, which was denied, defendant's counsel moved for an arrest of judgment, on the ground that the prisoner had been before found guilty and undergone punishment for the offence of concealing the birth of the same bastard child.

This motion was also properly refused.

If the previous prosecution and punishment for the misde- (643) meanor were a legal defence against the present charge, it should have been pleaded at the arraignment, and cannot be made available in the manner now proposed. The fact does not appear in the record, and judgment can be arrested only when the reasons for it are found in the record.

But had the matter been properly brought forward as a bar to the indictment for murder, it would not have availed, for the misdemeanor imputed is a distinct offence from the crime now charged. Whar. Cr. Law, §565. Moreover, the statute distinguishes the offences, and after declaring the constituents of the misdemeanor, expressly provides, "that nothing in this section shall be construed to prevent the mother who may be guilty of the homicide of her child from being prosecuted and punished for the same, according to the principles of the common law." *The Code,* §1004.

There is no error, and this will be certified to the end that the Court below may proceed to judgment upon the verdict.

No error. Affirmed.

Cited: S. v. Robinson, 116 N. C., 1048; *Shaw v. Handle Co.,* 188 N. C., 232; *Graham v. Power Co.,* 189 N. C., 388.

STATE v. JOHN CARDWELL.

Escape—Capital Punishment—Respite—Sentence—Jurisdiction.

1. If a prisoner, under sentence of death, is respited and escapes, and is not recaptured before the day fixed for the execution, the Judge of the Superior Court may, at a subsequent term, direct the sentence to be carried into effect.

2. The effect of a respite is only to postpone the day for the execution of the sentence by the Court.

(*State* v. *Speaks*, 95 N. C., 689; and *State* v. *Cockerham*, 24 N. C., 204, cited and approved).

(644) This was an APPEAL from the judgment of *MacRae, Judge,* at Fall Term, 1886, of WILKES Superior Court.

The prisoner was charged with and convicted of having committed rape upon his daughter, Louisa Cardwell, at April Term, 1886, of Wilkes Superior Court, and sentenced to death. The judgment pronounced directed the sheriff to confine the prisoner in the common jail until Thursday, the 17th of June next thereafter, and on that day, between the hours of ten in the morning and two in the afternoon, to remove him thence to the place of execution provided by law, and there to hang him by the neck until he was dead. An appeal was entered from said judgment to this Court but was not prosecuted. Pending the period of imprisonment, the Governor granted a respite and deferred execution until July 2d, and again before the arrival of that day, granted a second respite, postponing it until the 30th day of the same month. Pending the suspension of the judgment and before the last mentioned day, as appeared from an affidavit of the sheriff, the prisoner was forcibly taken from the jail by men in the nighttime and set at liberty, so that after diligent search he could not be recaptured until after the day appointed for the infliction of the penalty, since which he has been recaptured and again committed to prison. Upon this evidence, laid before the Judge presiding at Fall Term of the Court in support of the solicitor's motion that the prisoner be resentenced, he was asked what, if anything, he had to say, why the Court should not proceed to direct execution, his counsel on his behalf asked for the prisoner's discharge upon the following grounds:

I. The Court had no power to re-pronounce sentence of death on the prisoner, because of the intervening respite coming from the executive, and the day fixed by him for the execution having passed, none other than himself can now assign a day therefor.

II. Because the same Judge who presided at and held the preceding March Term was incompetent to preside at and hold the term at which the indictment was found and the trial took place, (645) under the provisions of Section 11 of Article IV of the Constitution; and further that

III. The Judge then about to pass upon the motion of the solicitor, held the Fall Term, 1884, of Wilkes Superior Court, and, four years not having since elapsed, was, under the same section, disqualified to hold the present term. The motion being overruled, the Judge again pronounced sentence of death upon the prisoner and directed it to be carried into effect on the 6th day of November thereafter, by the sheriff.

The prisoner thereupon appealed.

Attorney-General, for the State.

No counsel for the defendant.

SMITH, C. J. (after stating the case). We have not had the benefit of an argument for the prisoner in support of his claim to a discharge, nor does any reason suggest itself to us why it should be allowed, or why the judgment, frustrated by his escape and being at large when it should have been enforced, should not be again pronounced.

The effect of the executive interposition was only to substitute a later day for the execution than that appointed by the Judge. Had the prisoner been in the hands of the sheriff, and hung on the 30th day of July, the act would be by virtue of the sentence of the law pronounced by the Judge acting in his judicial capacity.

The case is, then, precisely in the same condition as if the original judgment had fixed the later day, and its enforcement had been evaded by the prisoner's escape. But the administration of the criminal law admits of no such escape from its demands. The penalty incurred must be submitted to, and this is accomplished by the appointment of another date for its enforcement. We are not without authority, if any were needed, to sustain this proposition.

In *State* v. *Cockerham,* 24 N. C., 204, the defendant was ad- (646) judged to be imprisoned two calendar months, "from and after the first of November next," to appear at which time he entered into a recognizance and forfeited it. At a subsequent Term, the solicitor moved that he be taken into custody and the sentence of the preceding Term carried into effect. This was ordered, and thereupon the defendant appealed. Upon the hearing, GASTON, J., sustained the action of the Court below, and said: "Upon the defendant appearing in Court, and his identity not being denied, and it being admitted that the sentence of the Court had not been executed, it was proper to make the

necessary order for carrying the sentence into execution." So in the present case, it was the duty of the Judge, not so much again to sentence to death, but recognizing in force the judgment before rendered, to direct that it be carried into effect on some designated day. This is in substance what was done, and conforms to that repronounced in the case referred to.

The other objections have already been considered and overruled in *State* v. *Speaks,* decided at this Term.

There is no error, and this will be certified to the Superior Court of Wilkes, to the end that further proceeding in the case be taken according to law as declared in this opinion.

No error. Affirmed.

Cited: S. v. Vickers, 184 N. C., 678; *S. v. McAfee,* 198 N. C., 509.

STATE v. W. H. KEEN.

Judge's Charge—Indictment—Wilful Burning.

1. An inadvertent, erroneous instruction to the jury, accompanied by an explanation, or modification, which in effect corrects the error, will not be considered sufficient to award a new trial, unless it clearly appears that the jury was thereby misled and the appellant suffered wrong.

2. The statutory offence of wilful burning of a gin-house is a misdemeanor; and an averment in the indictment that it was done *feloniously*—the necessary descriptive terms being employed—will be treated as mere surplusage.

(*State* v. *Thorne,* 81 N. C., 555; *State* v. *Edwards,* 90 N. C., 710; *State* v. *Watts,* 82 N. C., 656, and *State* v. *Slagle,* 82 N. C., 653, cited and approved).

(647) INDICTMENT, tried before *Gudger, Judge,* at Spring Term, 1885, of HERTFORD Superior Court.

The facts are fully stated in the opinion of the Court.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The defendant and one Butler were charged with the offence of burning a gin-house, and both were convicted. On motion of the defendants a new trial was awarded to Butler, but denied to the defendant Keen, who appealed to this Court.

The charge in the indictment was that the defendants, in Hertford county, on the 1st day of March, A. D. 1885, "a certain gin-house, the property of John F. Newsom, *unlawfully, maliciously, wilfully and feloniously,* did set fire to and burn."

The only exception taken by the defendant, as disclosed by the record and bill of exceptions, is to the charge of the Judge, which was as follows, to-wit: "If you are satisfied that these defendants, or either of them, burnt the gin-house named in the bill of indictment, then you shall find them guilty—that is, if you are satisfied that only one of them burnt the gin-house, as is alleged in the bill of indictment, you will return a verdict of guilty as to him, and not guilty as to the other defendant. But, before you can find either of them guilty, you must be satisfied from the evidence, of his guilt beyond a reasonable doubt."

We are unable to discover an error in the charge of the Court.

If the Court, after charging, "if you are satisfied that these de- (648) fendants, or either of them, burnt the gin-house named in the bill of indictment, then you shall find *them* guilty," had stopped there, the objection to the charge might have been sustained, but the Court relieved the charge of the objection by proceeding to qualify and explain what it had said, by adding: "that is, if you are satisfied that only one of them burnt the gin-house, *as is alleged in the bill of indictment,* you will return a verdict of guilty as to him, and not guilty as to the other defendant." With this qualification, the jury could not have been misled, or left in any confusion as to the import of the charge.

The charge is certainly not very happily expressed, but we think the jury could not have had any doubt that the meaning of the charge was, that if both the defendants burned the gin-house, as alleged in the indictment, then they are both guilty, but if only one burned it, he only should be found guilty.

As the grounds of exception to the charge are not specifically stated, it may be, that the exception was to that feature of the charge, which stated that "if you are satisfied that the defendants, or either of them, burnt the gin-house, *as alleged in the bill of indictment,* you will return a verdict of guilty," &c. If that be the ground of the exception, it must be predicated upon the fact that the act of burning is charged to have been done feloniously, when the offence is but a misdemeanor, and the statute only uses the word *wilful.* That would be no ground of exception. The use of the words *malicious* and *felonious,* as held in the case of *State* v. *Thorne,* 81 N. C., 555, is mere harmless surplusage. *State* v. *Edwards,* 90 N. C., 710. And it has been repeatedly held that calling an offence a felony does not make it one, when it is only a misdemeanor. *State* v. *Watts,* 82 N. C., 656; *State* v. *Slagle,* 82 N. C., 653.

(649) There is no error. Let this be certified to the Superior Court of Hertford county, that the case may be proceeded with according to law.

No error. Affirmed.

Cited: S. v. Wilson, 106 N. C., 721; *Everett v. Spencer,* 122 N. C., 1011; *S. v. R. R., ibid.,* 1062; *Westbrook v. Wilson,* 135 N. C., 402; *S. v. Dewey,* 139 N. C., 562; *Speight v. R. R.,* 161 N. C., 85; *S. v. Lane,* 166 N. C., 336.

STATE v. ALFRED WINSLOW.

Indictment before Justice of the Peace—Wilful Trespass on Land.

1. A warrant will not be quashed because it does not contain the necessary descriptive words of the alleged offence, when it refers to an "annexed affidavit" in which all the essential averments are made.
2. One who, after being forbidden, enters upon land of another under a *bona fide* claim of right, is not guilty of the offence of wilful trespass. *The Code,* §1120.
3. One who enters upon the land of another, after being forbidden, as the servant, and at the command of a *bona fide* claimant, is not guilty of any criminal offence.

(*State* v. *Jones,* 88 N. C., 671; *State* v. *Crosset,* 81 N. C., 579; *State* v. *Bryson,* Ibid., 595; *State* v. *Hanks,* 66 N. C., 612; and *State* v. *Ellen,* 68 N. C., 281, cited and approved).

This was a CRIMINAL ACTION, tried before *Gudger, Judge,* at Spring Term, 1886, of the Superior Court of PERQUIMANS county.

The facts are fully stated in the opinion.

Attorney-General, for the State.

Mr. E. F. Aydlett, for the defendant.

ASHE, J. This was a criminal action begun before a Justice of the Peace in the county of Perquimans, and after conviction in that Court, carried by appeal of the defendant to the Superior Court of that (650) county, where it was tried before GUDGER, Judge, and the defendant again convicted, and from the judgment then rendered, he appealed to this Court.

In this Court the defendant's counsel took exception to the warrant, because it did not state that the defendant entered upon the land of the prosecutor wilfully and unlawfully, after being forbidden to do so, and did not state that it was done without the license of the owner of the land. The warrant did not make these averments, but the affidavit upon which it was founded does state all the necessary facts to bring the case within the Act of 1866, ch. 60, *The Code,* §1120. The warrant states, that "for the causes in the annexed affidavit, we command you to apprehend," &c., and the warrant is held in such cases before a justice to be the complaint or indictment, and all the facts necessary to constitute the offence, must be set forth therein, *State* v. *Jones,* 88 N. C., 671. Yet when the warrant expressly refers, as in this case, to the affidavit, it makes its statements a part of the "indictment," as much so as if they had been stated in the warrant.

The defendant is indicted under §1120 of *The Code,* which reads, "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars, or imprisonment not more than thirty days." This is the act of 1866, omitting the larceny provision in that act, but in other respects is identical in its provisions with that act.

The defendant justified the act of removing the fence of the prosecutrix, Mrs. Ivey, under an order given him by one Godfrey, in whose employment he was at the time, and who claimed the land upon which the fence removed was situated. It was competent for him to make this defence, *State* v. *Crosset,* 81 N. C., 579.

The facts proved and admitted were as follows: Godfrey and (651) the prosecutrix owned the adjacent tracts of land. There had been a lane along or near the boundary of the two tracts, which had been used by the public for thirty years or more. That some ten years before the commencement of this prosecution, Mrs. Ivey, the prosecutrix, fenced her land, which before had been turned out, and joined to Godfrey's fence, a portion of which had been standing for more than fifty years, and that to which she joined her fence had been standing for ten or twelve years. That afterwards she gave him notice, and tore her fence from his and left it so for two or three years, and then joined her fence to his again and erected a gate on the lane. In October, 1885, Godfrey gave her notice to tear her fence away from his, which she did not do. Mrs. Ivey had had her land surveyed before the trespass, and the line claimed by her took a portion of his fence and ran a small distance into his field. Godfrey also had his land surveyed by his deeds and plats, and it took the whole of the lane outside his

fence for the one third of the way, and one half of the remainder, while the fence of Mrs. Ivey where it joined Godfrey's was on his land.

The defendant was hired as a laborer by Godfrey, and on the 15th of February, 1886, after being forbidden by Mrs. Ivey, tore away her fence where it joined Godfrey's, by his command.

The defendant asked his Honor to charge the jury, that if the defendant, acting as the servant of Godfrey, tore away the fence from Godfrey's, after the notice, and if Godfrey had a *bona fide* claim to the land which would have justified him in tearing the fence away, then the defendant could justify under Godfrey, and is not guilty.

His Honor refused to give this instruction to the jury, and charged them, "that if the defendant went upon the land and tore away the fence after being forbidden, he was guilty."

(652) We think the instruction asked, and refused by the Court, is in accord with the decisions of this Court giving a construction to the Act of 1866, and it was error in the Court below to refuse the instruction.

In the case of *State* v. *Hanks,* 66 N. C., 612; the defendant Hanks having made an entry and obtained a warrant of survey, went with the surveyor and others to survey the entry, and in doing so passed through a small piece of enclosed ground, which had been cleared and cultivated by the son of the prosecutor, after being forbidden to do so. This Court held that the object of the Act of 1866 was to keep off *interlopers,* and to subject them to indictment if they invaded the possession after being forbidden. And as the defendants no doubt honestly believed that the warrant of survey gave them a license to enter the land of the prosecutor, they were liable to a civil action for the trespass, but not to an indictment. And in the case of *State* v. *Ellen,* 68 N. C., 281; where the defendants entered upon the land of the prosecutrix, under a contract of purchase from one Waugh, after being forbidden to do so, this Court held, as the defendants set up a *bona fide* claim of title to the land, the case was not within the meaning of the act, though it may be within its words. In this case the Court cited with approval, and as supporting its construction, the case of *State* v. *Dodson,* 6 Caldwell's (Tenn.) Rep., under a statute of that State similar to our Act of 1866, in which the Court says: "We will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction." This construction of our Act of 1866 (*The Code,* §1120,) is fully sustained by the more recent case of *State* v. *Crosset, supra,* where it is held, "one who enters upon the land of another under a *bona fide* claim of right, is guilty of no criminal offence; there-

fore where an employé of a railroad company was ordered to (653) fell trees upon land adjacent to its track, which had been conveyed by the owner for right of way, &c., held, not to be indictable for a wilful trespass."

In our case, Godfrey, before committing the trespass, had taken the precaution to have the land surveyed by his deeds and plats, and the jury should have been instructed, that if from this survey he had reason to believe, and did *bona fide* believe, that the land was his, the defendant, as his servant, would not be guilty of a criminal violation of the statute, for tearing away the fence under his command. *State* v. *Bryson,* 81 N. C., 595.

There is error. Let this be certified to the Superior Court of Perquimans that a *venire de novo* may be awarded.

Error. Reversed.

Cited: S. v. Crawley, 103 N. C., 355; *S. v. Mills,* 104 N. C., 908; *S. v. Boyce,* 109 N. C., 744; *S. v. Norman,* 110 N. C., 487; *S. v. Wells,* 142 N. C., 595; *S. v. Yellowday,* 152 N. C., 796; *S. v. Faggart,* 170 N. C., 740; *S. v. Poythress,* 174 N. C., 811.

STATE v. WILLIAM D. NIPPER.

Assignment of Error—Indictment—Larceny.

1. A general statement that the appellant "excepted to the whole of the charge of the Court," is too vague, and will not be considered on appeal.
2. An indictment for larceny should describe the property alleged to be stolen with such particularity as will enable the Court to see that it is the subject of larceny; that will enable the accused to prepare any defence he may have, and protect him against a subsequent prosecution for the same act.
3. The charge that the defendant stole "three bushels of corn," is supported by proof that he stole three bushels of corn "in the ear."

(*State* v. *Harris,* 64 N. C., 127; *State* v. *Campbell,* 76 N. C., 261; and *State* v. *Martin,* 82 N. C., 672; cited and approved).

At July Criminal Term, 1886, of the Superior Court of WAKE, *Philips, Judge,* presiding, the defendant was tried upon an indictment for BURGLARY, containing two counts—the first (654) charging him with feloniously breaking and entering the dwell-

ing-house of one Jackson, with the intent the goods and chattels of the said Jackson feloniously and burglariously to steal, &c.; and the second, that he did break and enter into said house, with the intent the goods and chattels of said Jackson feloniously and burglariously to steal, &c., "and then and there in said dwelling-house, three bushels of corn, the property of said Jackson, feloniously and burglariously did steal," &c.

Upon the first count there was a verdict of not guilty, but upon the second, the defendant was convicted of the larceny of the corn.

From the judgment thereupon he appealed.

Attorney-General, for the State.
Mr. J. H. Fleming, for the defendant.

MERRIMON, J. The indictment charges the defendant with stealing three bushels of corn, the property of the prosecutor. The appellant contends that this implies shelled corn, and that as the evidence on the trial went to prove that the corn stolen was in the ear, there was a substantial variance between the charge in the indictment and the proof, and therefore he was improperly convicted.

The charge in an indictment in respect to the things stolen, must be made with such reasonable certainty as that the Court can see and understand what is its nature and its identity, and as will enable the accused to make his defence, and to show, in case of a subsequent prosecution for the same charge, that he had been convicted or acquitted thereof.

Applying this rule of law, we think the indictment is sufficiently certain. In this country, the term corn applies mainly to maize or Indian corn, and it does not necessarily imply shelled corn. In a general sense—one in common use—it implies corn either shelled
(655) or in the ear. Thus it is said of a farmer, that he produced on his farm a thousand bushels of corn, without reference to whether it is shelled or not. And so it is said, there is stored in a house a thousand bushels of corn—this implies that quantity shelled or unshelled. To say that a quantity of corn is shelled, or that it is unshelled, is to describe its condition in a certain respect; to say it is red, or white, or speckled is to describe it in another respect and give it greater particularity.

The term is used in the indictment in the general sense mentioned above, and therefore, when the State proved that the defendant stole the corn of the prosecutor, shelled or unshelled, it proved the charge as laid. If the charge had been three bushels of shelled corn, or three bushels in the ear, or three bushels of red corn in the ear, it would have had greater particularity, and there would be more force in the

appellant's contention. But it was not necessary to so describe the corn; it was sufficient to lay the charge as made, and proof that he stole corn in the ear supported the charge. *State* v. *Harris,* 64 N. C., 127; *State* v. *Campbell,* 76 N. C., 261; *State* v. *Martin,* 82 N. C., 672.

There is no exception specified in the record, nor any question presented other than that we have adverted to above. It is said vaguely in the case settled upon appeal, that "the defendant excepted to the whole charge" of the Court to the jury. This is no assignment of error at all; it raises no question for our decision. Upon an examination of the record, we find that the charge of the Court was fair and just, indeed, generous towards the defendant.

There is no error. Therefore, let this opinion be certified to the Superior Court, to the end that further proceedings may be had there in the action according to law.

No error. Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 362; *S. v. Brabham,* 108 N. C., 798; *S. v. Moore,* 120 N. C., 571; *S. v. Caylor,* 178 N. C., 808; *S. v. Hauser,* 183 N. C., 770.

(656)

STATE v. WILLIAM MOODY.

License—Liquor—Statute.

1. The commissioners of Dare county, under the Act of 1876-'77, ch. 260, as amended by ch. 38, Laws Special Session of 1880, have no power to grant licenses to sell spirituous liquors except "at Nag's Head Hotel during the months of June, July, August and September."

2. The words "at Nag's Head Hotel" mean the locality of the premises forming part of or used with the building generally known by that name at the time of the enactment of the statute.

This was an INDICTMENT for retailing spirituous liquors, tried at Spring Term, 1886, of DARE Superior Court, before *Shepherd, Judge.*

The jury returned a special verdict in which the following facts were found:

An act was passed by the General Assembly at its session in 1876-'77, (ch. 260), prohibiting the sale of spirituous liquors in the county of Dare; at the special session of 1880, (ch. 38), the act of 1876-'77 was amended to permit the sale of such liquors at Nag's Head Hotel, during

the months of June, July, August, and September. On the .... day of ....., 1885, the defendant was granted by the commissioners of Dare county, a license to sell liquors "at Nag's Head" during the said months. Nag's Head comprises a territory two or three miles in length and about a mile in width. The Nag's Head Hotel is situated on the Sound side of the territory known as Nag's Head. Under the license issued to him as aforesaid, the defendant occupied a house with seven or eight rooms, some 250 or 300 yards from the Nag's Head Hotel, and opened a hotel, and retailed liquors there during the month of June, July, August, and September of 1885. He placed a sign upon this building with these words upon it, "Nag's Head Hotel."

The Court being of opinion that the defendant was guilty upon
(657) the special verdict, so adjudged, from which the defendant appealed.

Attorney-General, for the State.
Mr. Aydlett, for the defendant.

MERRIMON, J. The statute (Acts 1876-'77, ch. 260) provides: "That it shall be unlawful for any person or persons to sell, or directly or indirectly to receive any compensation for any spirituous liquors, bitters or intoxicating drinks * * * * * within the county of Dare," and makes any such sale a misdemeanor. This statute was modified by a subsequent one, (Acts Special Session 1881, ch. 38, §1), by adding after the word "Dare," the additional words, "except at Nag's Head Hotel during the months of June, July, August and September." It will be observed that at first this statute, both in its terms and scope, was broad, definite and positive; it forbade absolutely the sale of intoxicating beverages within the county named. The amendment of it above set forth, is exceptive and restrictive; its terms are plain and positive and leaves nothing to interpretation. It permits a sale of such liquors and drinks, not continuously and generally throughout the county, but only for a specified period in each year, not at or within an indefinite locality, but at a particular specified place. There is a manifest intent to guard carefully the exception provided—to allow such sales only at one place plainly designated by name, where they would most conveniently serve the purpose of supplying people who might resort thither during the period prescribed, with spirituous liquors, and where such sales would most likely be under careful supervision and control. Otherwise the language employed would have been broader and more indefinite in its meaning and application, as "except at Nag's Head," a well known locality, or "at Hotels at Nag's Head." The restrictive purpose is too plain to be mistaken, and to allow the latitudinous interpretation

of the language employed, contended for by the counsel of the (658) appellant.

The plain meaning of the statute as amended is to allow such sales to be made by one or more persons within the period prescribed, "at Nag's Head Hotel," the house known by that name at the time the statute was passed, the person or persons selling, first having obtained a license to sell, as required by the general statutes of the State on the subject of selling spirituous liquors. "At Nag's Head Hotel" does not mean, as contended, "at Nag's Head," or thereabouts, or about or near to the hotel named. It means on the premises connected with, and forming part of that hotel. One or more persons might have a license to sell there.

The county commissioners of the county named had no authority to grant a license to the appellant, or any other person, to sell spirituous liquors at Nag's Head as a locality, or at any other place in the county of Dare, except at "Nag's Head Hotel." The appellant had no license to sell at the latter place. His supposed license to sell at "Nag's Head" was inoperative and void, and therefore could not avail him as a defence. The license did not profess to allow such sales "at Nag's Head Hotel"; the sales were not made on the premises of the latter hotel, and the fact that the appellant called his hotel by its name was only a puerile subterfuge, without the slightest legal effect. It appears that the appellant sold spirituous liquors in the county of Dare at a place other than "at Nag's Head Hotel," within the county named. He was therefore properly convicted.

Let this opinion be certified to the Superior Court, to the end that further proceedings may be had in the action according to law.

No error. Affirmed.

Cited: S. v. Eaves, 106 N. C., 756.

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(659)

STATE v. WHIT. LAURENCE.

Incest—Indictment—Parent and Child—Variance.

1. Carnal intercourse with an illegitimate child is a felony.
2. Where the indictment charged the defendant with carnal intercourse with his "daughter," and the proof was that the person alleged to be the daughter was an illegitimate child of the defendant; *Held,* there was no variance.

(*State* v. *Keesler,* 78 N. C., 469, cited).

INDICTMENT for incest, tried before *Shepherd, Judge,* at Spring Term, 1886, of EDGECOMBE Superior Court.

The facts presented upon the appeal are fully stated in the opinion of the Court.

Attorney-General, for the State.
Mr. John L. Bridgers, for the defendant.

SMITH, C. J. The defendant is charged with the offence specified in the act of February 14th, 1879, which, as brought forward in *The Code,* §1060, is in these words: "In all cases of carnal intercourse between grandparent and grandchild, parent and child, brother and sister, of the half or whole blood, the parties shall be guilty of felony, and punished for every such offence by imprisonment in the county jail or penitentiary for a term not exceeding five years, in the discretion of the Court."

The indictment alleges that the defendant "wilfully, unlawfully and feloniously did have carnal intercourse with one Hasty Laurence, the daughter of him, said Whit. Laurence, and commit the crime of incest with his daughter, the said Laurence, contrary," &c.

Upon the trial of the plea of not guilty before the jury, evidence was introduced to show that sexual intercourse had taken place be-
(660) tween the parties, and that the woman on whose body the offence was committed, was the natural and not legitimate daughter of the defendant, who, however, intermarried with her mother some six months after the daughter's birth, and that the latter was recognized by defendant as his daughter.

The defendant's counsel requested the Court to instruct the jury that the evidence did not sustain the allegations in the indictment, and the variance being essential, they must acquit. This was refused, and a verdict being rendered against the defendant and judgment pronounced thereon, he appealed to this Court.

The contention is that the statute does not extend to illegitimate offspring, and if it did, the indictment must be construed as charging the forbidden intercourse between persons who sustain a lawful relation to each other. The act in question was passed soon after, and we suppose in consequence of, the ruling in *State* v. *Keesler,* 78 N. C., 469; that incest was not a crime at common law, and its operation must have been intended to be coextensive with the evil to be suppressed, sexual intercourse between those of the relation specified. Its object is to preserve the purity of the domestic circle, and prevent alike the physical and moral consequences of the abhorrent and unnatural act inhibited.

It is obvious that the legitimacy of birth in one of the offending parties is not, and ought not to be, an essential ingredient in the crime.

The act prohibits the intercourse between those who are *in fact,* with or without marriage, related in those degrees by consanguinity; and this relationship being proved, the penalty attaches.

In *Baker* v. *State,* 30 Ala., 321; where the statute in this feature is not unlike our own, it is held to apply equally to persons not born or begotten in wedlock, and this ruling has been approved by an eminent text writer, Bishop Stat. Crim., §729; Code of Ala., 1852, §3284. The later Code of 1877, §2671, in express terms, following the adjudication, extends the prohibition to illegitimates. (661)

As thus construed, it was unnecessary to aver the status of the woman, as born in or out of wedlock, since the statute applies to both, and the indictment, in pursuing the words used in it, is sufficient.

There is no error, and this will be certified to the end that the Court below proceed to judgment.

No error. Affirmed.

STATE v. JOHN MANLY AND MARGARET MITCHELL.

Evidence—Adultery—Punishment.

1. Upon the trial of an indictment for adultery, it is competent to prove that the defendant had a wife living at the time of the commission of offence; and it is not error to admit proof of this fact, though it is not denied by the defendant.

2. Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the Court. *The Code,* §§1041 and 1097.

3. The Court has power, during the Term, to correct or modify an unexecuted judgment in criminal as well as in civil actions.

(*State* v. *Eliason,* 91 N. C., 564; *State* v. *Case,* 93 N. C., 545; *State* v. *McNeill,* 75 N. C., 15; *State* v. *Jackson,* 82 N. C., 565; *In re Brittain,* 93 N. C., 587, cited and approved).

INDICTMENT for fornication and adultery, tried before *Shepherd, Judge,* at May Term, 1886, of HALIFAX Superior Court.

The facts are stated in the opinion.

Attorney-General, for the State.

No counsel, for the defendant.

MERRIMON, J. The defendants are indicted for the offence of (662) fornication and adultery. On the trial, it was admitted that they

were not married to each other. The State offered evidence to prove that the male defendant had a living wife and the *feme* defendant had a living husband at the time of the offence. The defendants objected to this evidence, but the Court admitted it, and the defendants thereupon excepted.

A motion for a new trial was overruled, and there was judgment that the defendants each be imprisoned in the common jail of the county four months. They insisted that this judgment was not authorized by law, excepted and appealed to this Court.

The evidence objected to was relevant and competent, because it tended to prove the important material facts to be proved by the State, that the defendants were not married to each other. If the male defendant, at the time of the offence charged, had a living wife other than the *feme* defendant, and she then had a living husband, then they could not be married to each other. The facts might thus be proved. *State* v. *Eliason,* 91 N. C., 564; *State* v. *Case,* 93 N. C., 545. It would seem to have been unnecessary to receive it, as a fact that the defendants were not married to each other was admitted. But as it was such as might be admitted, it was not error to receive it on the trial—it had only a cumulative effect.

The judgment is unobjectionable. The statute (*The Code,* §1041,) defining the offence of fornication and adultery, declares that it shall be a misdemeanor, but it prescribes no particular punishment. The statute (*The Code,* §1097,) provides that in case of misdemeanor, or where no special punishment is prescribed, the offence shall be punishable as misdemeanors at common law; hence punishment by imprisonment in the common jail for a period in the discretion of the Court is allowable. *State* v. *McNeill,* 75 N. C., 15; *State* v. *Jackson,* 82 N. C., 565.

(663) It appears in the record, that at first the Court imposed the punishment of seven months in the common jail. Afterwards during the term, the measure of time was reduced to four months. It was competent to thus modify the judgment; *In re Brittain,* 93 N. C., 587.

There is no error. Let this opinion be certified to the Superior Court, according to law.

No error. Affirmed.

Cited: S. v. Yarboro, 194 N. C., 511.

STATE v. JOHN SHERRILL.

False Pretense—Indictment.

An averment in an indictment that the defendant did "unlawfully, &c., and intending to cheat and defraud * * * falsely pretend * * * that a certain mare which he * * * was proposing to trade * * * was sound in limb and body, and always had been sound in limb and body, whereas the said mare was broken down in her loins, and had been broken down in her loins," and that he knew these representations to be false, &c., sufficiently charges the crime of false pretence.

(*State* v. *Hefner*, 84 N. C., 751; *State* v. *Phifer*, 65 N. C., 321; *State* v. *Munday*, 78 N. C., 460; *State* v. *Eason*, 86 N. C., 674, cited and approved).

The defendant was tried at Spring Term, 1886, of CALDWELL Superior Court, before *Graves, Judge,* and a verdict of guilty being returned, he moved an arrest of the judgment, which motion was granted, and from a judgment against the State, the Solicitor appealed.

The indictment was in these words:

"The jurors for the State upon their oath, present, That John Sherrill, late of the county of Caldwell, on the first day of August, in the year of our Lord one thousand eight hundred and eighty-five, at and in the county of Caldwell, unlawfully and knowingly devis- (664) ing and intending to cheat and defraud one Joanna Wilson of his goods, moneys, chattels, and property, did then and there unlawfully, knowingly and designedly, falsely pretend to the said Joanna Wilson, that a certain mare, which he, the said John Sherrill, was then and there proposing to trade to the said Joanna Wilson, was then and there sound in limb and body, and had always been sound in limb and body, whereas, in truth and fact, the said mare had been broken down in her loins, and was then and there broken down in her loins; which said false representation, he, the said John Sherrill, then and there well knew to be false, by color and means of which said false and fraudulent pretences, he, the said John Sherrill, did then and there unlawfully, knowingly and designedly obtain from the said Joanna Wilson one horse of the value of one hundred and twenty-five dollars, being then and there the property of the said Joanna Wilson, with the intent to cheat and defraud the said Joanna Wilson, to the great damage of the said Joanna Wilson; contrary to the form of statute in such case made and provided, and against the peace and dignity of the State."

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J. The Court arrested the judgment upon the ground that the indictment does not charge an offence with sufficient certainty to enable it to proceed to judgment upon the verdict of guilty. In this there was error.

The charge of the purpose of the defendant to cheat and defraud a particular person named, and that he obtained the property of that person by means and color of the false pretence charged, is made substantially in the words of the statute, and is sufficient.

(665) The false pretence charged consists in the false representation that the mare of the defendant which he "proposed to trade" to the prosecutor, "was then and there sound in limb and body, and had always been sound in limb and body, whereas in truth and fact the said mare had been broken down in her loins, which false representation he, the said John Sherrill, then and there well knew to be false, by color," &c.

This does not simply charge an expression of opinion, or a naked falsehood of the defendant, but that he falsely represented as a subsisting fact, that the mare—a piece of property which he was "proposing to trade"—had, during her whole life, been sound in limb and body, when he knew, on the contrary, that she had theretofore been, and then was broken down in her loins, and by this false pretence he obtained the horse of the prosecutor. The false statement and representation was made in connection with and about the property he proposed to sell. This is material and distinguishes it from a simple falsehood. It is the knowingly false statement or representation of a subsisting material fact, or one that has existed, that tends and is intended to deceive, to a person, with intent to cheat and defraud him, and by means and color of such false statement, obtain his property, and thus obtaining his property, indictable under the statute (*The Code,* §1025). Such a false representation is a "false pretence" in the sense of the statute.

The principal fact falsely stated was material. The mare was represented as sound and as having been sound all her life. This was a leading inducing fact—the principal consideration. But she was not sound; she "had been broken down in her loins, and was then," and this fact the defendant knew. In the nature of the animal, if she were "broken down" in her loins, she was of little value. The disease or injury thus described is not so vague or uncertain as that it cannot be recognized or understood. The loins of the horse are parts well

(666) known; that they shall be normal and strong, is essential to his value. When it is said that he is "broken down" in his loins, it is plainly meant that he is so enfeebled in the rear parts of his back as that his usefulness and value are greatly impaired. In such case he can

neither carry nor draw such burdens as sound horses ordinarily do; indeed, he is not desirable at all.

This case is not unlike that of *State* v. *Hefner,* 84 N. C., 751, in which the defendant was charged with having falsely represented that a mare in question had always been sound, and that her eyes had never been diseased, whereas in fact, she had been subject to a disease of the eyes called "hooks," was "wind-broken" and "wind-sucking." There was a verdict of guilty, and upon motion the judgment was arrested in the Superior Court upon the ground that no offence was charged, but this Court held that an offence was charged and that the judgment must be reversed. *State* v. *Phifer,* 65 N. C., 321; *State* v. *Munday,* 78 N. C., 460; *State* v. *Eason,* 86 N. C., 674.

Let this opinion be certified to the Superior Court to the end that further proceedings in the actions may be had there according to law.

Error. Reversed.

Cited: S. v. Dixon, 101 N. C., 744; *S. v. Burke,* 108 N. C., 751.

STATE v. MOLLIE CONRAD.

Evidence—Criminal Procedure—Preliminary Examination.

Where the magistrate, before whom a prisoner charged with a crime was brought, but before the warrant was returned, or any of the witnesses had been sworn, and before the prisoner was informed of the charge against him, asked the prisoner if he was ready to proceed, and the latter replied that he was not, because of the absence of certain witnesses by whom he expected to prove a state of facts relied upon as a defence; *Held,*

1. That the "examination" contemplated by §§1144, 1145 and 1146 of *The Code,* had not then commenced, and any declaration pertinent to the charge, then made by the prisoner, was competent evidence against him, though he was not "cautioned."

2. That it was competent to prove that the matters of defence set up on the preliminary examination were contradictory of those relied upon at the trial.

(*State* v. *Matthews,* 66 N. C., 106; *State* v. *Rorie,* 74 N. C., 148; *State* v. *Spier,* 86 N. C., 600, cited and approved).

The defendant was tried and convicted for larceny, at Spring (667) Term, 1886, of RICHMOND Superior Court, before *Boykin, Judge,* and from the judgment pronounced against him he appealed.

The State proposed to prove that when the prisoner was brought before the Justice of the Peace for the preliminary investigation, the Justice asked her if she was ready for trial, to which she replied that she was not, because of the absence of certain witnesses by whom she expected to prove that the watch, for the larceny of which she was indicted, had been given to her by one Wright. The State had previously offered evidence that the prisoner, on another occasion, declared she had found the watch in the road. Her defence on the trial in the Superior Court was that one Yates had delivered the watch to her as a pledge to secure a debt. The Justice had called the Court to order, but the warrant had not been returned, none of the witnesses had been examined, nor had the prisoner been notified by the Court of the charge against her. The prisoner objected to this evidence upon the ground that she had not been informed by the Justice that she was at liberty to refuse to answer any question put to her, and that such refusal should not be prejudicial to her. Objection overruled, and prisoner excepted.

Attorney-General and *Mr. Platt D. Walker,* for the State.
No counsel for the defendant.

(668) MERRIMON, J. It is very clear, that generally, the State may prove the pertinent voluntary declaration of the defendant in respect to the *corpus* of the offence charged in the indictment. And such declarations were competent evidence against the defendant although made to or in the presence of the officer who arrested her at the time the arrest was made, or while she was in his custody. Indeed, her declarations thus made to any person were competent against her unless they were made before the magistrate on the preliminary examination, in respect to the offence with which she was charged, and he failed, at the commencement of the examination to give her the caution as required by the statute; (*The Code,* §1146).

The defendant contends that she was not so cautioned, and that her declarations in question were made on her preliminary examination before the magistrate in respect to the offence with which she was charged, and therefore they were not competent evidence against her on the trial. It is found as a fact that her declarations referred to were voluntary, and we are of opinion that they were not made on her preliminary examination before the magistrate, as she contends. This will appear from a brief reference to the statute in respect to such examinations, and the material facts of the case bearing upon it.

The statute (*The Code,* §§1144 and 1145), requires the magistrate before whom a person arrested for a criminal offence shall be taken, to

examine the complainant and the witnesses produced in support of the prosecution, on oath, in the presence of the party accused, in regard to the offence charged, and also in regard to other matters connected with the charge, if he shall deem it pertinent to do so. The magistrate shall then proceed to examine the prisoner or party charged, in relation to the offence. This examination is not to be on oath, and before it is commenced, the accused party shall be informed of the charge against him, and he shall have reasonable time to send for and obtain counsel, and if he so desire, his counsel shall be present during the exami- (669) nation of the complainant, of the witnesses for the prosecution, and of the party accused, and he shall have the right to cross-examine the witnesses.

The statute (*The Code,* §1146), further provides in this connection that, at the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any questions that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings. It is not said in terms that without the caution thus required to be given, the declarations, statements and confessions of the accused, made on the examination, shall not be competent as evidence against him, but this seems to be implied, and it has been so decided in numerous cases. *State* v. *Matthews,* 66 N. C., 106; *State* v. *Rorie,* 74 N. C., 148; *State* v. *Spier,* 86 N. C., 600.

The commencement of the examination is properly, when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally. It is then the caution to the accused is due, and ought to be given, because, then, the magistrate has taken official notice of the charge and the accused, and what he does and says, and then the latter must take notice of the magistrate and be under his jurisdiction and control; then he is before the Court and his examination is begun. The accused cannot properly be required to answer the charge at all, until the magistrate shall have examined the complaint, the witnesses produced to support the prosecution, and such other matters connected with the charge as he deems pertinent. Having thus heard the examination, he must then answer or refuse to answer.

The purpose of the statute is, that he shall be advised by the (670) magistrate of his right to refuse to answer all questions that may be put to him as to the charge made against him, without prejudice, during the whole examination, and not simply so much of it as applies

to him personally. There is as much reason for the caution at one stage of the examination as another, and, besides, the language of the statute is, that he shall be informed of his right to refuse to answer any question put to him "at the commencement of the examination."

The reason of this provision is that the accused, without the caution, might, before the magistrate, feel compelled to answer questions put to him, and such answers as he might make, might not be voluntary.

It appears from the record, that the warrant had not been returned; that the defendant had not been informed of the charge against her, and that the witnesses for the prosecution had not been sworn. The magistrate was personally ready to proceed with the examination, and asked the accused if she was "ready for trial," to which inquiry she replied that she was not, and made the declarations in question.

The inquiry was made before the magistrate was ready to proceed with the examination and before it commenced. What he said was unofficial, and the defendant was in nowise bound to answer the question put to her. She was not then under control or jurisdiction of the magistrate, and under no judicial constraint to answer; certainly she was not under the constraint provided against by the statute. The declarations made were as competent evidence against the defendant on the trial as if they had been made to or in the hearing of the officer who arrested her, or any person other than the magistrate. They were competent evidence because they were pertinent and voluntary. They were not made on the examination before the magistrate.

There is no error. Let this opinion be certified to the Supe-
(671) rior Court to the end that judgment may be entered there according to law.

No error. Affirmed.

Cited: S. v. Rowe, 98 N. C., 633; *S. v. Grier,* 203 N. C., 588.

STATE v. E. H. GARLAND.

Evidence—Seduction.

1. It is not competent to prove particular acts of immorality for the purpose of showing the bad character of a witness whose truthfulness is impeached.

2. It is competent to show that the contradictory statement, offered with a view to impeach a witness, was made to one who was an official in a religious organization, while in the discharge of his duties as such.

(*Barton* v. *Morphes*, 13 N. C., 520; *State* v. *Boswell*, Ibid., 209; *Downey* v. *Murphey*, 18 N. C., 82, cited and approved).

The defendant was tried and convicted at Spring Term, 1886, of GUILFORD Superior Court, before *Clark, Judge,* for the crime of SEDUCTION.

The facts are stated in the opinion of the Court.

Attorney-General and *Mr. J. A. Long,* for the State.
Messrs. J. T. Morehead and *John A. Barringer,* for the defendant.

SMITH, C. J. The defendant was indicted under the Act of March 6th, 1885, chap. 248, which enacts as follows: "That any man who shall seduce an innocent and virtuous woman under promise of marriage, shall be guilty of a crime, and upon conviction thereof, shall be fined or imprisoned at the discretion of the Court, and may be imprisoned in the penitentiary not exceeding the term of five years; *provided, however,* that the unsupported testimony of the woman shall not (672) be sufficient to convict; *provided further,* that marriage between the parties shall be a bar to further prosecution under this act."

The indictment contains the averment that the defendant, under a promise of marriage, did wilfully and unlawfully seduce one Nannie E. Jones, she being "an innocent and virtuous woman," &c., pursuing the general terms of the statute.

The testimony of the prosecutrix was direct and positive as to the act of seduction, followed by the birth of a child, and to her own previous chastity. Other testimony was in corroboration.

The defendant, examined on his own behalf, explicitly denied any promise of marriage or sexual intercourse with the woman, adding that he was pastor of a colored religious congregation of which she was a member.

Testimony was also introduced to show his good character and her bad reputation for drunkenness and virtue.

The defendant proposed to prove, but was not allowed to do so, that the prosecutrix was seen, on one occasion before the alleged seduction, to be intoxicated.

The exception to this ruling is untenable because her character in this regard had before been permitted to be given in evidence, and proof of a single act was both unnecessary and inadmissible. *Barton* v. *Morphes,*

13 N. C., 520; *State* v. *Boswell,* Ibid., 209; *Downey* v. *Murphey,* 18 N. C., 82.

One Nelson Donnel, a witness for the defendant, testified to his having had an interview with the prosecutrix soon after the birth of her child, and to statements made by her repugnant to her present testimony, and counsel proposed to show that the witness, an elder in the church, made the visit in his official capacity to investigate the charge against his pastor, and that he gave to her the reasons for his visit.

This was ruled out and defendant excepted.

(673) We think in this ruling there is error and that the inquiry ought to have been allowed.

Aside from the fact that the excluded evidence was part of the conversation to which the witness deposed, it was a material element as showing the solemnity of the occasion and its tendency to elicit a more careful and truthful statement. Had it been under the administration of an oath, a response would undoubtedly receive more credit from the jury than would be given to declarations hastily made and less apt to be remembered. The value of the conflicting declarations is the more apparent in the present case, where from the nature of the charge, the only direct testimony to the overt act must generally come from the parties to it, and their testimony is in irreconcilable conflict. Then, too, the statute does not permit a conviction upon the unaided testimony of the woman. Given under the statutory discredit, as well as antagonizing the defendant's own oath, certainly the defendant was entitled to evidence of the circumstances attending her admission to an officer of her own church seeking to ascertain the truth of the serious accusation against their common pastor. We do not put our ruling upon the ground that the witness, as an officer in the church, is entitled to any more credit than any other of equally good character.

The inquiry had not the purpose of securing greater confidence in the truthfulness of his statement for such reason, but of adding weight to her declarations in disproof of her present oath because made under such circumstances.

For this ruling there must be a *venire de novo.*

Error. Reversed.

Cited: S. v. Jordan, 110 N. C., 495; *S. v. Brodie,* 190 N. C., 557.

(674)

STATE v. J. R. WARREN.

Amendment of Record—Recognizance

Courts have the power at any time in their discretion, to amend and correct their records *nunc pro tunc*, so that they shall speak the truth; and neither the findings of fact by them, nor the exercise of their discretion, are reviewable upon appeal.

(*Parsons* v. *McBride*, 49 N. C., 99; *State* v. *McAlpin*, 26 N. C., 140; *Ashe* v. *Streator*, 53 N. C., 256; *State* v. *King*, 27 N. C., 203; *Murrill* v. *Humphrey*, 76 N. C., 414; *Wade* v. *Odeneal*, 14 N. C., 423; *Pendleton* v. *Pendleton*, 47 N. C., 135; *Peterson* v. *Vann*, 83 N. C., 119; *Bagley* v. *Wood*, 34 N. C., 90; *Lippard* v. *Roseman*, 72 N. C., 427; cited and approved).

MOTION for judgment upon forfeited recognizance and to amend record, heard before *Philips, Judge*, at October Criminal Term, 1886, of WAKE Superior Court.

This was a *scire facias* issued by the State against the defendant as bail of one Keith to show cause why the State should not have judgment against him for one hundred dollars, due by a recognizance entered into by said Keith at July Term, 1886, of Wake Superior Court, in which he had made default.

The defendant resisted a judgment upon a *scire facias* upon the grounds hereinafter set forth in affidavits, of himself and others, and His Honor found the following facts: At the September Term of the Superior Court of Wake one Keith was put on trial of indictment then pending against him which resulted in a mistrial; the said Keith was then recognized with the defendant as his surety to appear on the ensuing Thursday, which was in the first week of the term; on Friday the solicitor obtained leave to send a new bill, which was done, and returned a true bill. On the next day—being Saturday of the first week of the term—Keith was called, and failing to answer, a judgment *nisi* was entered against him and his surety, the defendant. On Friday of the second week the case was again called for trial and Keith, (675) failing again to answer, a capias was ordered to be issued against him, which was returned to the October Term of said Court, "Not to be found." The clerk took the recognizance of Keith and the defendant Warren in the usual form, "That the said Keith should appear on Thursday and not depart the Court without leave." The defendant having insisted and offered affidavits of himself and others to the effect that the recognizance was not that Keith should not depart the Court without leave, but that he should not depart the Court on Thursday

without leave of the Court first had and obtained, and the said Keith complied with the recognizance by remaining in Court all that day, and the minutes of the said July Term, 1886, read: "Defendant and J. R. Warren recognized in the sum of $100 to appear on Thursday, July 15th, 1886." Thereupon, on motion of the Solicitor, it was ordered by the Court that the record of the July Term of the Court be amended *nunc pro tunc,* by adding to the entry already made, which set forth the recognizance already taken, the words, "and that he do not depart the Court without leave of the same first had and obtained."

On motion of the Solicitor, judgment absolute was rendered against the defendant, from which he appealed.

Attorney-General, for the State.
Mr. J. C. L. Harris, for the defendant.

ASHE, J. (after stating the facts as above). We find no error in the judgment of the Superior Court. There are no exceptions taken below to the amendment of the record as ordered by the Court, and if there had been, it would not have availed the defendant. The Court in ordering the amendment exercised a power which is incident to every court of record. Every court has power to amend its own records so (676) as to make them speak the truth; *Parsons* v. *McBride,* 49 N. C., 99; *State* v. *McAlpin,* 26 N. C., 140; *Ashe* v. *Streator,* 53 N. C., 256; and this power may be exercised at any subsequent term of the Court. And when exercised, the record stands as if it never had been defective. In *State* v. *King,* 27 N. C., 203; this Court held that a Court had the right to amend the records of any preceding term by inserting what has been omitted, either by the act of the Clerk or of the Court; and a record so amended stands as if it had never been defective, or as if the entry had been made at the proper time. The recognizance taken by the Clerk in this case, as was found by his Honor, was in the usual form, that the defendant should appear on Thursday and not depart the Court without leave, and we must take this to be the true record, for in a matter of this nature when a motion is made to amend the records, the facts found by his Honor are conclusive upon this Court; *Murrill* v. *Humphrey,* 76 N. C., 414; and if the entry on the docket was different it was perfectly competent for his Honor to order the minutes to be so amended as to make them conform to the truth, and when so amended the entry stands as if it had been so originally recorded; it is made the record which imports absolute verity and cannot be explained by parol testimony; *Wade* v. *Odeneal,* 14 N. C., 423. In this view of the case, there was no error. But where, as the entries of the Clerk upon the minutes are loose and imperfect, it is in the discre-

tionary power of the Court to order an amendment by drawing them up and entering them in proper form, and when the Court acts in such discretion, its discretion cannot be reviewed in this Court. *Pendleton* v. *Pendleton,* 47 N. C., 135; *Peterson v. Vann,* 83 N. C., 119. The power to amend lies entirely in the discretion of the Court; *Bagley* v. *Wood,* 34 N. C., 90; and when an amendment lies within the discretion of the presiding Judge of the Superior Court, this Court will not review the exercise of this discretion. *Lippard* v. *Roseman,* 72 N. C., 427.

There is no error, and the judgment of the Superior Court is affirmed. (677)

No error. Affirmed.

STATE v. E. G. GLENN.

Evidence—Witness.

Evidence elicited from a witness on cross-examination calculated and intended to discredit him, may be explained, notwithstanding such explanatory testimony would have been incompetent on the examination in chief.

This was an INDICTMENT for selling intoxicating liquor on Sunday, tried before *Philips, Judge,* at July Criminal Term, 1886, of the Superior Court of WAKE county.

Dr. J. A. Penny, a State's witness, on cross-examination, stated that he had not instigated any prosecution against the defendant for illegal sales of liquor; that he was attending this term of the Court in a burglary case, in which he and the defendant were witnesses for the State, and having heard that Fowler said that he had bought liquor from the defendant on that Sunday, he (witness) called the attention of the Solicitor to it; that after the prosecution began, he employed counsel to assist in prosecuting the defendant.

On being asked by the defendant's counsel if he had not declared that he intended to "break up" the defendant, he answered as follows: "I tried to break up the selling of liquor at Tipper's Cross-Roads by the defendant, and did all I honorably could do to do so. I intended to do all I honorably could to break it up. I, and others, opposed the granting of license to the defendant to sell liquor there. I am not on bad terms with the defendant; have not had any trouble with him about land." Question by defendant: "Don't you know that (678) petitions were presented to the Board of Commissioners of Wake county, in which he was recommended as a man of good character, and a suitable person to be granted license to sell spirituous liquor?" The

witness answered: "I know that such petitions were presented, but there were counter-petitions; license was granted him."

On re-direct examination, the witness was asked this question: "You have stated that you declared your intention to do all you honorably could to break up the selling of whiskey by Glenn at his store. Why did you make that declaration?"

Question objected to by the defendant. The Court ruled that an impeaching question having been asked the witness and answered as stated, he had a right to explain his reason, and overruled the defendant's objection, whereupon the defendant excepted.

The witness answered: "I made the assertion because I thought the grog-shop was an injury to the community. My children and my neighbors' boys would be induced to form bad habits there, and it was detrimental to the community. I know a good many of my neighbors opposed it, and I was willing to assist them in suppressing it, and the reason I did it was because I believed Glenn to be an improper person to sell liquor in any community, and especially in that one."

The defendant objected to this answer as well as to the said question, on the ground, as he contended, that the witness could only state facts, and the reason given by him was irrelevant; and that the answer was objectionable because it put the character of the defendant's house, as well as of the defendant himself, before the jury.

Objection to the answer overruled. Exception by defendant to question and answer.

The witness was then asked by the solicitor, "Were your reasons based upon what you saw yourself?" Objected to by defendant, on the grounds given for the preceding objections. Objection over-
(679) ruled. Exception by defendant. He answered, "From what I saw myself."

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General, for the State.
Mr. E. C. Smith, for the defendant.

MERRIMON, J. Neither of the appellant's exceptions can be sustained. It was obviously his purpose to impeach the prosecuting witness by the cross-examination. He sought to show that this witness had instigated and set the prosecution on foot, prompted by motives of ill will towards the defendant, and a wicked purpose to destroy his business, and thus destroy the weight of witness' testimony. The State then, certainly had the right to have him explain his conduct brought in question and the motives that prompted his action, so that he might stand in a fair and

just light before the jury. A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.

There is no error.

No error. Affirmed.

(680)

STATE v. J. W. SMITH.

Appeal—Judgment—Verdict, Special.

If the jury return a special verdict, it is the duty of the Court to declare the law thereon, and cause a verdict to be entered in accordance therewith; then it should proceed to render judgment; and no appeal will lie until such judgment is pronounced.

INDICTMENT, tried before *Graves, Judge,* at Spring Term, 1886, of WATAUGA Superior Court.

The facts appear in the opinion.

Attorney-General, for the State.

No counsel for the defendant.

SMITH, C. J. The indictment against the defendant, found by the grand jury at the Spring Term, 1886, of Watauga Superior Court, charges him with the statutory misdemeanor of selling spirituous liquors within the limits of Cove Creek township in said county, after a popular vote taken therein and the casting of a majority of the votes in favor of prohibition within the township, at an election held under the provisions of *The Code,* §§3110 to 3118.

On the trial the jury rendered a special verdict, concluding in the usual form: "If upon the foregoing facts the defendant is guilty in law, we find him guilty; if upon the facts found, in law he is not guilty, then we find him not guilty."

Then follows this record: "Upon the facts found in the above special verdict the Judge being of opinion that the defendant is not guilty, *so adjudged, and from this verdict the Solicitor for the State appealed.*"

Upon the rendition of the verdict, then follows the judgment, sentencing the accused, if convicted, or discharging him if acquitted. The appeal is from the judgment, and cannot be taken before it has been pronounced.

(681) A special verdict like the present, is contingent upon the judicial determination of the inquiry presented by the jury. If the facts found constitute a criminal offence, the Judge so declares, and causes the verdict to become a verdict of guilty; and so if he be of a contrary opinion, a verdict of not guilty is entered. Hence his preliminary action is essential to making the finding complete and the verdict positive and final.

Then in either case comes the sentence of the law, pronounced by the Judge, punishing or discharging, and then the appeal lies, but not sooner. A special verdict is in some of its aspects like the indictment. The question of law is raised in one case upon the averments in the indictment, and in the other, upon the facts found in its support. The motion to arrest the judgment proceeds upon the idea that the charges do not show a crime; the inquiry in the other case is, do the facts constitute a crime? Both defences may co-exist in the same proceeding. But as a refusal to arrest judgment must be followed by a sentence, in order to an appeal, so must it follow the perfecting the verdict from a conditional to an absolute one.

We have at the present term, in a similar case, *State* v. *Fred Lockyear*, refused to entertain an appeal by the State from a similar ruling, because prematurely taken before the final disposition of the cause, and this appeal must take the same course.

The appeal is dismissed, and this will be certified to the Superior Court of Watauga for its further action in the premises.

Appeal dismissed.

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(682)

STATE v. DAVID HARE.

Evidence—Idem Sonans—Larceny—Perjury—Variance.

1. The defendant was indicted for perjury, charged to have been committed upon the trial of one *Willis Fain* for larceny; the record introduced as evidence in support of the indictment, described the person charged with the larceny as *Willie Fanes: Held*, that it is within the rule *idem sonans*, and there is no variance.

2. Where a witness testified on the trial of an indictment for larceny that an officer took from the possession of the defendant therein certain coins,

marked, by which he, witness, was enabled to identify them as his property: *Held*, that the testimony was material, and if wilfully false, constituted the crime of perjury.

(*State* v. *Patterson*, 24 N. C., 346; *State* v. *Johnson*, 67 N. C., 55; *State* v. *Houser*, 44 N. C., 410, cited and approved).

CRIMINAL ACTION, tried before *Connor, Judge,* at February Criminal Term, 1886, of WAKE Superior court.

The defendant was convicted, and from the judgment thereon pronounced against him, appealed.

The facts necessary to an understanding of the questions raised upon the appeal, are stated in the opinion.

The Court, declining to give the special instructions which are set out in the opinion, among other things, charged the jury that "if the defendant swore that the money taken from Fain's trunk was marked, and that by such marks he could identify it as his, such testimony was material to the issue."

Attorney-General, for the State.
Mr. J. H. Fleming, for the defendant.

SMITH, C. J. The defendant was charged with perjury, alleged to have been committed when examined as a witness for the State on the trial of an indictment against one Willis Fain for the larceny of certain money of the defendant. The false oath consisted in (683) his testifying that one C. H. Pleasants, while engaged as an officer in making search, took from the trunk of the person accused of the larceny, certain marked silver coins, thus identified, as his own property, and delivered the same to him, the witness; whereas, no such marked coin was taken from the trunk and handed to him.

The Solicitor, in support of the charge, exhibited in evidence the record of proceedings in which the false oath is alleged to have been taken, and in which the person accused of the theft was designated by the name of Willie Fanes.

To the introduction of this evidence, upon the ground of a variance, in the name as given in the present indictment and as found in the record produced, the defendant excepted. The Court, on inspection, overruled the objection, and permitted the evidence to be read to the jury. To this ruling the defendant's first exception is taken.

The slight difference in the spelling and in the sound of the name, as found in the indictment and the record produced to support it, may fairly come under the rule *idem sonans.* Thus "Deadena" and "Diddena," *State* v. *Patterson,* 24 N. C., 346; "Susan" and "Susana,"

State v. *Johnson,* 67 N. C., 55; are held not to be variant names. So, in an indictment for selling liquor to a slave, the property of William Michaels, is sustained by proof that the owner's true name is William Michal. *State* v. *Houser,* 44 N. C., 410.

Numerous cases on the subject are referred to in 1 Whar. Crim. Law, §597, but those of this Court are sufficient to sustain the ruling of the Court below. There is no suggestion to the contrary, and the identity of the party is shown.

The instructions asked on behalf of the defendant to be given to the jury, as understood, are, that the State must prove, beyond a reasonable doubt, in order to a conviction:

1. That no marked coins were taken from the trunk and delivered to the defendant.

(684) 2. That it was not material to show on the trial of indictment for larceny, that all the money found in the trunk was marked or stolen, and incumbent on the State to prove that the defendant did not receive any of such marked and stolen money.

3. It was not material to the issue in the larceny trial to prove that all the money given to the defendant was marked and stolen, but the State must prove that it was not the property of the defendant.

These substantially involve the proposition that the presence of marks on the coin is not a material element in the imputed crime, but the essence of the charge to be proved is, that the money did not belong to the defendant. It is true that the ownership of the coin, as charged in the indictment, was a fact necessary to be established in order to a conviction of the larceny, and whether marked or unmarked, the crime was the same; but the mark would furnish the means of identifying the money as that stolen from the defendant, and hence the testimony was material in the cause. The imputed falsehood is in the defendant's swearing "that the officer, while in search, took from the trunk of Willis Fain some marked silver coins, amounting to one dollar, and delivered them to me; that the silver coins were mine."

The proof is, that none of the coins had marks, and this establishes the falsehood of the testimony. The charge, in our opinion, meets every just claim of the defendant, and warranted the verdict.

No ground for the motion in arrest of judgment is assigned in the record, or pointed out in the argument, and we discover none.

There is no error. Affirmed.

Cited: S. v. Collins, 115 N. C., 719; *S. v. Hester,* 122 N. C., 1048.

(685)

STATE v. CHARLES H. BROWN.

Attempt—Embracery—Indictment.

1. An indictable attempt to commit a crime is such an intentional preliminary guilty act as will apparently result in a deliberate crime.
2. The acts constituting the alleged attempt should be set forth in the indictment.
3. Embracery consists in such practices as tend to unduly influence the administration of justice by improperly working upon the minds of the jurors. To constitute the offence, there must be an *attempt* to carry into effect the corrupt purpose—to form the purpose and give it expression merely in words, is not sufficient.
4. Several indictments, preferred at different times, but alleging the same facts in different forms, will be treated as separate counts of one indictment.

(*State* v. *Johnson*, 50 N. C., 221; and *State* v. *Watts*, 82 N. C., 656; cited and approved).

The defendant was tried and convicted at August Term, 1886, of the Superior Court of LENOIR county, before *Clark, Judge,* of the crime of EMBRACERY, and from the judgment thereon, appealed to the Supreme Court.

The case is stated in the opinion.

Attorney-General, for the State.
Mr. George V. Strong, for the defendant.

SMITH, C. J. The defendant is charged with the offence known in the criminal law as embracery, committed in a wilful and corrupt attempt to influence the deliberations and verdict of a petty jury empaneled to pass upon the guilt of J. L. Stroud and Samuel Howard, accused of and tried for larceny, after their retirement. The indictments, three in number, found by the grand jury at the same term and treated as separate counts in a single bill, under the ruling in *State* v. *Johnson,* 50 N. C., 221, and *State* v. *Watts,* 82 N. C., (686) 656, vary the form of the charge in slight particulars only, and aver in substance the following overt acts, in which the offence consists:

The first count, after imputing the corrupt purpose, alleges that the defendant approached the officer in charge of the jury, who had retired to their room to make up their verdict, and inquired as to the opinion

of the jurors, saying that he "had come to give them instructions," and asked the officer if any such were needed, to let him know and he would give them. The second count imputes the same criminal attempt, through "promises, persuasions, entreaties and the like," setting out the same general act as in that preceding. The third count contains similar averments as to what transpired with the officer at or near the jury room, and alleges that the persons on trial were clients for whom the defendant had appeared in the prosecution, and reiterates the conversation had with the officer.

The offence imputed is thus described by Serjeant Hawkins, in his Pleas of the Crown, vol. 1, ch. 85: "Any attempt to corrupt or influence or instruct a jury, or any way to incline them to be more favorable to the one side than to the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the agreements of counsel in open Court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made, give any verdict or not, or whether the verdict given be true or false." In illustration, he remarks: "It hath been adjudged that the bare giving money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not."

In fewer words, it is defined by another eminent author as a "species of maintenance," and he adds, "consists in such practices as tend to affect the administration of justice by improperly working upon
(687) the minds of jurors." 1 Russ. Cr. 183. "It is an indictable offence," remarks Mr. Wharton, "to approach jurymen for the purpose of intimidating or influencing them." 3 Wharton, Cr. Law, §3447.

It is manifest that more is required to constitute the crime than the formation of a corrupt purpose in the mind and giving it utterance in words. The attempt must be made to carry it into effect, by some direct or indirect approach to and communication with the jury, or, as in the case supposed, the delivery of money or something of value to some one, to be used in operating upon the minds of the jurors. The attempt is as truly a criminal act as its full consummation would be. Assuming the averred charges to be fully sustained by the proofs, does the indictment impute a punishable offence? We think it does not. No communication with the jurors is alleged, nor any attempt to have it; what the defendant said and did was to the officer, and an expression of his readiness then and there to give instructions (in its unfavorable sense for the defendant's advice) to the jury, or thereafter, if the jury should need instructions or advice in regard to the case.

It is true the indictment alleges an approach to the jury, and to the officer, with the criminal intent, but the acts done, are, as they should be, set out, and in them is the imputed offence made to consist.

It is not averred that what was said reached the ears of the jury, or was intended to be heard by them, since the words were addressed to the officer, and at the most were a suggestion of a readiness then, or thereafter, if the jury should want further advice to give it himself. It was not to corrupt the officer in his discharge of duty—itself a highly criminal act—or through him to act upon the minds of the jury, but at most a communication to him of what he, the defendant, was present prepared to do, or would thereafter do, if the wishes of the jurors were conveyed to him.

Highly improper as was the conduct of the defendant, more (688) so from his relation to the cause as counsel to the parties on trial, and foolish and absurd as was the *suggestion* of his *giving instructions,* which, being authoritative, could proceed only from the presiding Judge, we think the conduct of the defendant stops short of what is required to constitute the corrupt and unlawful *attempt,* which makes the crime. "An indictable attempt to commit a crime is such an intentional preliminary guilty act," in the defining words of Mr. Wharton, "as will apparently result, in the usual course of natural events, if not hindered by causes outside of the active will, in a deliberate crime." 2 Whar. C. L., §2686.

But embracery, like a solicitation to commit crime, is independently criminal, and the subject of a public prosecution. Yet the ultimate purpose must be developed and find expression in some act looking to an interference with the due course of judicial administration, and this as well when failing as when successful. The conversation with the officer, censurable and unprofessional as it was, does not in our view contain the necessary elements of an indictable offence in itself, nor was it a solicitation to induce his interference with the jury consultations, nor was any tampering with that body alleged; but the misconduct is in an inquiry as to how the jurors stood, with an offer to the *officer,* not requested to be conveyed to the jury, then or thereafter, to advise them as to their duty in the premises.

"Attempt," (we quote from §2703 of the same work,) "is a term peculiarly indefinite," and consequently the facts which develop the attempt, should be set out so as to show that the attempt is itself criminal. This has been done in the present case, and we think they fail to show the crime charged.

We have not examined, in order to dispose of the exceptions taken during the trial, since the defects in the indictment require us

(689) to arrest the judgment, as moved by the counsel of the defendant. Let this be certified for this end to the Superior Court.

Error. Reversed.

Cited: S. v. Toole, 106 N. C., 740; *S. v. Lee,* 114 N. C., 845; *S. v. Hefner,* 129 N. C., 549.

STATE v. ALLISON SPEAKS.

Constitution—Judgment—Jurisdiction—Officer—Res adjudicata—Ridings of Judges.

The prisoner was indicted at August Term, 1885, and tried and convicted of murder at the succeeding Term of the Superior Court of Iredell county—both Terms being held by the same Judge. He moved for a new trial and in arrest of judgment, which being refused, and the death penalty pronounced, he appealed to the Supreme Court, where the judgment was affirmed. When brought to the bar of the Superior Court for re-sentence, he again moved in arrest of the judgment upon the ground that the Judge who presided at the trial also presided at the preceding Term when the bill was found, in violation of §11, Art. IV of the Constitution. *Held,*

1. The judgment of the Supreme Court was conclusive of all ground which was or might have been insisted upon to arrest the judgment of the Superior Court.
2. If, however, the prisoner should be entitled to relief upon the ground of an absence of jurisdiction in the Court which tried him, his remedy would not be by motion to arrest the judgment, but by a proper application for a discharge.
3. The prohibition contained in the Constitution does not apply to the several terms of the Court in any one county embraced in a "circuit" or "riding," but only to the series of Courts held in the various counties constituting such "circuit" or "riding" as a whole.
4. One wrongfully in the possession of an office and exercising its functions with public acquiescence, is an officer *de facto,* and so far as third parties are concerned, his acts are as binding as if he were an officer *de jure.*
5. *It seems,* that the judgment of the Superior Court, presided over by a Judge of general jurisdiction, though not the Judge designated by the Constitution, is not null and void.

(*Norfleet* v. *Staton,* 73 N. C., 546; *State* v. *Bowman,* 80 N. C., 433; *State* v. *Monroe,* Ibid., 373; *Mabry* v. *Henry,* 83 N. C., 298, cited and approved).

(690) MOTION for judgment of death against the prisoner, heard before *Boykin, Judge,* at August Term, 1886, of IREDELL Superior Court.

STATE *v.* SPEAKS.

The prisoner was charged with the crime of murder in a bill of indictment found by the grand jury at the Term of Iredell Superior Court, held on the fourth Monday before the first Monday in September, 1885, was put on trial, found guilty and sentenced to death at the succeeding term, held on the ninth Monday after the said first Monday in September. He appealed to the Supreme Court, and after a careful examination of the numerous exceptions taken to the rulings of the Judge, among which was the denial of a motion in arrest of judgment, no error was found in the record, and the Superior Court was directed to proceed to final judgment. The prisoner was again brought to the bar of the Superior Court at the term held in August last, and upon being asked if he had anything to say why sentence of death should not again be passed upon him, he interposed again a motion in arrest of judgment, assigning as the ground thereof that the Judge who presided at the trial had also presided at the previous term when the grand jury acted on the bill, in violation of the Constitution, and that the trial and conviction were illegal and void. This motion was overruled and the death penalty adjudged, from which the prisoner again appealed. Accompanying the record was the following finding of facts by the Court:

"The Honorable William J. Montgomery, as Judge, held both the said terms, and the trial at the prisoner's instance was deferred from the former to the latter term for the absence of his witnesses. No special commission was issued by the Governor to the Judge to hold either of the terms, nor did the Governor require this of him.
After the rendering of the verdict, the motion in arrest was (691) made for the cause stated, and refused, and judgment being again pronounced, he appeals."

Attorney-General, for the State.
Messrs. R. F. Armfield and *Jno. Devereux, Jr.,* for the defendant.

SMITH, C. J. (after stating the case). It is too plain a proposition to require support from argument or precedent, that whatever defences were set up, or could have been set up, upon the hearing of the former appeal, are conclusively determined in that adjudication, and are not reviewable in the present appeal. Controversies would never be settled if this practice were allowed, and successive appeals, but successive experiments, none finally disposing of the cause: *Mabry* v. *Henry,* 83 N. C., 298. As the defence now sought to be set up could as well have been made available when the first appeal was taken, it has passed into the domain of *res adjudicata,* and cannot now be pressed into service. If a series of appeals were allowable under such circumstances, they

might be the means of an indefinite postponement of the execution of the judgment, and perhaps defeat it altogether. We do not say that a judgment not authorized by law and unlike that upheld may not be reviewed and reversed by appeal.

Undoubtedly such new error introduced into the proceeding, and not within the compass of the ruling in the appellate Court, could be thus corrected. But where the second is in strict conformity with the judgment before rendered, and whose validity has been sustained, there is no ground for a second appeal, and it cannot be entertained. It is, in fact, an attempt to evade or defeat the mandate of the higher Court, whether so intended or not.

(692) If, however, the prisoner was unlawfully convicted, and entitled to relief on the ground of an absolute want of jurisdiction in the Court to try him, he misconceives the remedy in seeking it through a motion in arrest. This motion is based upon a defect shown in the record of proceedings, and not upon matters extrinsic and not thus appearing.

If the case were, as contended, one of *coram non judice,* and the proceedings a nullity, the prisoner might demand his discharge and obtain it, unless detained for another trial upon the same indictment, or one to be substituted in its place.

But we are not disposed to pass over unnoticed the objection to the exercised jurisdiction, based upon the clause in the Constitution which declares, that "no Judge (of the Superior Courts) shall hold the Courts in the same district oftener than once in four years," Const. Art. IV. §11. This provision has received a construction in the case of the *State* v. *Monroe,* 80 N. C., 373; where it is held to apply to the series of Courts forming a district over which a Judge, in his riding, is to preside, and has no reference to the Courts separately considered. To the same effect, *State* v. *Bowman,* Ibid, 433.

These two Courts, moreover, are of the same county, and constitute a part of one and the same riding, the two being required for the public business, and the latter a supplement to the former. The Constitution does not reach the case. But even if all these considerations were out of the way, and the trial Court was held in disregard of the constitutional mandate, we are by no means prepared to concede that a Court held by a Judge of general jurisdiction, though not the Judge designated to hold it, is absolutely without authority, and all its acts null and void. If this were so, could a failure to take the preliminary and prescribed oath of office have the same annulling effect upon every official act? Such a doctrine would lead to most mischievous consequences, and tend to unsettle rights of property and produce universal distrust among all who have business with the officer. Such is

not the law, and hence, as affecting third persons, one in posses- (693) sion of office and exercising its functions, with a silent public acquiescence, though wrongfully in possession, the acts of an officer *de facto* are as binding as if he were an officer *de jure; Norfleet* v. *Staton,* 73 N. C., 546. How much more so must be the acts of a Judge in office, both *de facto* and *de jure,* and exercising only functions that belong to him as such.

But, for reasons already stated, the appeal was improvidently taken, and must be dismissed, and the Court below left to proceed in the execution of the mandate of this Court.

No error. Dismissed.

Cited: S. v. Cardwell, ante, 646; *S. v. Miller,* 97 N. C., 451; *S. v. Penley,* 107 N. C., 810; *S. v. Lewis, ibid.,* 972, 4, 6; *S. v. Turner,* 119 N. C., 845; *S. v. Perry,* 122 N. C., 1019; *S. v. Hall,* 142 N. C., 715; *S. v. Harden,* 177 N. C., 584; *S. v. Graham,* 194 N. C., 466.

STATE v. J. T. EDENS.

Assault—Husband and Wife—Indictment—Slander.

1. A husband is not indictable for slandering his wife.
2. A husband is not indictable for an assault upon his wife unless it put life or limb in peril, or other permanent injury to the person is inflicted, or where it is prompted by a malicious and revengeful spirit.
3. *It seems,* that in an indictment for slander, under §1113 of *The Code,* it is not necessary to set forth the words spoken with the same particularity as is required in complaints in civil actions. It is only necessary to allege that they, "in substance," charged the female with incontinency.

(*State* v. *McDaniel,* 84 N. C., 803; *State* v. *Aldridge,* 86 N. C., 680; *Manning* v. *Manning,* 79 N. C., 293, cited and approved).

INDICTMENT, tried before *Meares, Judge,* and a jury, at September Term, 1886, of NEW HANOVER Criminal Court.

The defendant was tried at the September Term, 1886, of the Criminal Court of New Hanover county, upon the charge of slandering the character of an innocent woman in violation of §1113 of *The Code.* The indictment was in the following form:

"The jurors for the State, upon their oath, present that J. T. (694) Edens, on the first day of April, 1886, at and in the county

aforesaid, attempting wantonly and maliciously to injure and destroy the reputation of one Addie Edens, being an innocent and virtuous woman, did, by words spoken, declare, in substance, that the said Addie Edens was an incontinent woman, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The State proved that the defendant used language of the most vulgar and indecent character, which, in substance, was a direct and unmistakable charge of incontinency against the woman in question, who was his wife, from whom he had separated.

The defendant admitted that he had used language amounting to a charge of incontinency against his wife, but attempted to justify upon the ground that she was not an innocent woman, and that before their marriage she had had sexual intercourse with other men.

The defendant and his wife were married in July, 1886, and he separated from her in a few days thereafter.

The defendant requested the Court to instruct the jury that as a matter of law, a husband cannot slander the reputation of his wife.

This instruction was refused, and the Court charged the jury that, if they were satisfied beyond a reasonable doubt that the prosecutrix was a virtuous or innocent woman, inasmuch as the language had been admitted by the defendant, that they ought to convict him. The defendant excepted.

After verdict of guilty, the defendant submitted a motion in arrest of judgment, upon the ground that the bill of indictment does not set forth the language nor the substance of the language alleged to have been used by the defendant, and upon which the charge is based. This motion was overruled, and judgment being pronounced, the defendant appealed.

(695) *Attorney-General,* for the State.
Mr. John D. Bellamy, for the defendant.

SMITH, C. J. (after stating the facts). We do not find it necessary to pass upon the form of the indictment and the effect of its omission to state slanderous language imputed, or to aver that it was uttered in the hearing and presence of any one, both of which are required to be averred in a complaint in a civil action, since we propose to dispose of the appeal upon the ruling to which the first exception is taken, with the remark that similar forms of indictment have been heretofore before the Court and acted on without objection for these alleged defects. *State* v. *McDaniel,* 84 N. C., 803; *State* v. *Aldridge,* 86 N. C., 680.

Can an indictment be sustained against the husband for charging the wife with incontinency? At common law verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of a want of virtue in an innocent woman made in a wanton and malicious attempt to destroy her reputation.

Does the enactment embrace those sustaining marital relation, or is its operation confined to those not thus related?

The changes made in the Constitution of 1868, and the enactments in pursuance of its provisions in reference to married women, are directed to the preservation and disposal of property, as separate estate, but do not materially affect the personal relations of the parties except as incidental to property and its use. This right she may assert against her husband as well as against a stranger, now in an action at law, as is decided in *Manning* v. *Manning,* 79 N. C., 293. But we think it manifest that she cannot maintain an action against him and recover damages for an injury to her person or good name, for these are inconsistent with the legal status resulting from marriage. In New York, under a statute authorizing any married woman to sue in her own name and recover damages against any person or body (696) corporate for an injury to her person or character, and that money so recovered should be her separate estate, it was held that she could not sue her husband for an assault and battery or slander. "These words," says Mr. Bishop, in the second volume of his work on the Law of Married Women, §377, "it was admitted, are broad enough to cover these actions; but on the other hand, the policy and general purpose of the statutes extending the rights of married women are opposed, and they must prevail over general words plainly introduced for another purpose. It has been deemed, however, that the policy of the law is against extending the authority of wives to sue their husbands."

This reasoning applies with equal force to the construction of our own law, and excepting those of marital relations from its comprehensive scope, including all others. It may be suggested that an indictment might lie, while an action for damages would not, as in case of the assault and battery of the wife by the husband. But it is not correct to say that such an indictment may in all cases be maintained. It is only where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted, or where it is prompted by a malicious and wrongful spirit, and not within reasonable bounds, that the law interposes to punish. In other cases, short of these extremes, it drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution. It presumes that acts of wrong committed in passion will be followed by contrition

and atonement in a cooler moment, and forgiveness will blot it out of memory. So, too, the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression, again restored. The unnumbered mischiefs that might flow from making (697) an unguarded and false imputation upon the wife's chastity the subject of a public criminal proceeding, are so obvious that we cannot think the General Assembly intended such a possible result. Not only might this destroy the freedom and cordiality of marital intercourse, but it would tend to make a perpetual estrangement and severance, and cut off the reconciliation that may be expected to succeed a temporary difference and the atonement of a full repentance. Our law regards the marriage relation sacred and permanent life-long in its duration, and it leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection, in cases where they admit this remedy. We are not disposed, in carrying out the policy of separate properties, to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law, by extending the act beyond all the beneficent purposes it was intended to subserve, to cover cases of slander.

The judgment cannot be arrested, because the woman is not described in the indictment as wife of the defendant, but the jury ought to have been instructed, upon the evidence, to acquit.

The verdict must be set aside and a *venire de novo* awarded.

Error. Reversed.

Cited: S. v. Lewis, 107 N. C., 972; *S. v. Haddock,* 109 N. C., 875; *S. v. Mitchell,* 132 N. C., 1034.

Overruled: S. v. Fulton, 149 N. C., 486, 497, 505; *Price v. Electric Co.,* 160 N. C., 455; *Crowell v. Crowell,* 180 N. C., 518.

STATE AND N. BRASWELL v. P. A. DUNN.

Costs—Prosecutor—Solicitor's Fees.

1. The judgment of the trial Judge that a prosecution was frivolous or malicious, and that the prosecutor pay the costs, is final and conclusive.

2. A prosecutor may be adjudged to pay the cost, if the trial Judge shall find that the prosecution was either frivolous or malicious.

3. Where a defendant was acquitted of the charge against him, and the prosecutor was adjudged to pay the costs, a Solicitor's fee cannot be charged in the bill of costs.

(*State* v. *Adams*, 85 N. C., 560; *State* v. *Owens*, 87 N. C., 565; *State* v. *Norwood*, 84 N. C., 794, cited and affirmed; *State* v. *Cannady*, 78 N. C., 539, cited, explained and affirmed).

INDICTMENT, tried before *Clark, Judge,* at the November (698) Special Criminal Term, 1885, of WAKE Superior Court.

The indictment charges the defendant, Dunn, with the wilful and unlawful removal of the gates and fence enclosing a pasture field of Norfleet Braswell and others, wherein livestock was confined, within territory over which the stock law prevailed, in violation of §§1062 and 2820 of *The Code.*

On the trial before the jury upon the plea of not guilty, under instructions from the Court, a verdict of acquittal was rendered. Thereupon, on motion, the said Braswell, being in Court, was declared to be marked as prosecutor, and the Judge, finding as a fact that the prosecution was frivolous, adjudged that he pay the costs, and stand committed until they were paid, to the county prison, or be confined in such place as the county commissioners may direct.

To this the said Braswell excepted, as also to the taxation of so large a number of witnesses, and especially to the charge of a Solicitor's fee.

The Judge, upon certificate of counsel, found the witnesses objected to material and necessary, and denied the application to have any of the taxed costs stricken out. From these rulings the prosecutor appeals.

Attorney-General, for the State.
Mr. Jacob H. Fleming, for the prosecutor.
Mr. E. C. Smith, for the defendant.

SMITH, C. J. (after stating the facts). It is provided in §737 (699) of *The Code,* that in all criminal prosecutions, if the defendant be acquitted, *nolle prosequi* entered, or judgment against him arrested, the costs, including the fees of all witnesses summoned for the accused, whom the Judge, Court, or justice of the peace before whom the trial took place, shall certify to have been proper for the defence, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the Judge, Court or justice shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest.

The succeeding section declares, that "every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for

the non-payment thereof, when the Judge, Court or justice of the peace, before whom the case was tried, shall adjudge that the prosecution was frivolous or malicious."

It will thus be seen that the opinion of the presiding Judge, based upon what transpires before him, determines the party's penal liabilities, and his adjudication is final and conclusive. So it is ruled in *State* v. *Adams,* 85 N. C., 560; and *State* v. *Owens,* 87 N. C., 565.

Again, the conditions upon which the exercise of this judicial power is predicated, are in the disjunctive, and the imprisonment may be ordered when the prosecution is either "malicious or frivolous"; *State* v. *Norwood,* 84 N. C., 794.

The only remaining question presented in the appeal, is as to the taxation of a Solicitor's fee in the bill of costs, and in the ruling upon this there is error.

Fees are given to Solicitors, in addition to their general compensation, and none other: "for every *conviction upon an indictment* which they prosecute," &c., *The Code,* §3737; and under the Constitution, Art. I., §§ 12 and 13, no one can be "put to answer any criminal charge, * * * but by indictment, presentment or impeachment," except such as provided for the trial of petty misdemeanors, as the Legis-
(700) lature may direct, and the conviction upon an indictment must be upon an unanimous verdict, rendered in open Court.

Here, there has been no conviction, and no liability incurred by any one for this fee, and hence it cannot be taxed as costs.

It is urged that the opinion in *State* v. *Cannady,* 78 N. C., 539, countenances, if it does not distinctly recognize, the correctness of this charge. We do not so interpret the language there used, nor does it admit of such inference. The decision is, that costs put upon a prosecutor do not constitute a debt in the sense of the Constitution, imprisonment for which is prohibited, but are essentially punitory, for a false and unfounded clamor, and he who prosecutes such a criminal charge ought to bear the pecuniary consequences; and further, that the General Assembly has the right so to enact. The Solicitor's fee becomes due only on conviction under an indictment, and in this case has become due from no one.

There is error in sustaining this charge, and it must be stricken from the bill. To this end, and for further proceedings in the Court below, this will be certified.

Error. Reversed.

Cited: S. v. Hamilton, 106 N. C., 661; *S. v. King,* 143 N. C., 680; *S. v. Bailey,* 162 N. C., 584; *S. v. Trull,* 169 N. C., 370; *S. v. Jackson,* 199 N. C., 326.

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ACCESSORIES:

There are no accessories before the fact in larceny; all who aid, abet, advise or procure the crime are principals. *State* v. *Stroud*, 626.

ACCOMPLICE:

It is settled law in this State that a person may be convicted upon the unsupported evidence of an accomplice, if such evidence satisfies the minds of the jurors of the guilt of the accused. *State* v. *Stroud*, 626.

ACCOUNT:

1. Where an action is brought for an account and the answer pleads matter in bar of the account, and a trial is had of the issues raised by the plea in bar, an appeal lies by the defendant from a judgment ordering an account before the account is taken. *Clements* v. *Rogers*, 248.
2. Where claims due a partnership were placed in the hands of an attorney for collection, he is not liable to be called to an account in an action by one of the partners, unless it appears that the other partner is dead. *Wiley* v. *Logan*, 358.
3. Where notes were put in an attorney's hands for collection, and when sued for an account, he neither produces the notes, nor gives any explanation of their non-production; *It was held*, that he was chargeable with them. *Ibid.*
4. A demand previous to bringing suit in an action for money collected by an agent, is to enable the agent to pay it over without incurring the costs of a suit, but a demand is not necessary where the agency is denied, or where a claim is set up exceeding the amount collected, or where the agent's liability is disputed in the answer. *Ibid.*
5. An agent or other person who is entitled by contract, or under the law, to compensation measured by a *per centum* of the amount collected, is authorized to at once deduct the amount of his commissions, and is only accountable for the residue. *Ibid.*
6. In such case, in an action for an account, if the agent is charged with the entire amount collected, with interest, he is entitled to be allowed interest on his commissions from the date of the receipt of the money. *Ibid.*

ACQUITTAL:

If upon the trial of an indictment, containing several counts, the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from the consideration of the jury. *State* v. *Thompson*, 596.

ACTION:

All causes of action founded upon contract, debt or other duty survive against the personal representative of the person chargeable therewith. *Miller* v. *Leach*, 229.

ACTION TO RECOVER LAND:

1. Where, after a recovery by the plaintiff, in ejectment, the defendant, in apt time, applied to the Court to have the value of the betterments allowed him, and the Court directed that execution be stayed till such value could be ascertained, upon the defendant giving bond, conditioned to pay all damages, &c., which might be assessed against him, and the defendant failing to give such bond, a writ of possession issued, and was executed, *It was held,*

(1.) That the failure to give the bond did not discontinue the action in respect to the claim for betterments. *Johnston* v. *Pate*, 68.

(2.) The Court has no power to refuse to institute an inquiry as to the defendant's right to betterments, when application has been properly made. *Ibid.*

(3.) The Court has discretion to direct the issuing or suspension of the execution of the judgment pending such inquiry. *Ibid.*

2. Where husband and wife are jointly sued for the wife's land, the plaintiff is not entitled to a judgment for the husband's interest upon his failure to answer. *Walton* v. *Parish*, 259.

3. If the defendant, in an action to recover land, sets up the defence that he is entitled to a homestead therein, such defence is embraced, and should be considered, under the issue raised as to the plaintiff's ownership and right to the possession of the land. *Morrison* v. *Watson*, 479.

4. In an action to recover land the plaintiff must recover upon the strength of his own title; and it is incumbent on him to show a grant from the State, or possession sufficiently long to presume a grant, or that the defendant is estopped to deny his title. *Graybeal* v. *Davis*, 508.

5. The mere declarations of one, under whom the defendant in an action to recover land claims, will not work an estoppel, no matter how specific, or whether written or oral, if the person making them was not at the time in possession; to produce such a result it must be shown that the party making such declaration, at that time, claimed title or interest in the land, however defective, under deed, bond or contract under the alleged superior title. *Ibid.*

6. While *it seems* that the declarations of one *in possession at the time*, may operate as an estoppel, to give them such effect they must constitute a clear and definite recognition of the alleged superior title. *Ibid.*

7. The fact that the husband of a woman who claimed title to a tract of land, sold and conveyed it to another person, does not, *per se*, raise a presumption that he claimed under his wife. *Ibid.*

8. A deed conveying to B a tract of land, &c., "together with every right, title, privilege and emolument to said land belonging * * * and he (the vendor) doth hereby bind himself, his heirs, executors or administrators well and truly to defend the said premises * * * to the said B, his heirs and assigns forever, and clear from all incumbrances and claims whatsoever," passes an absolute estate in fee. *Ibid.*

ACTION TO RECOVER LAND—*Continued:*

9. In an action to recover land, it is competent for one party to show that a deed offered by the other, is void for want of capacity in the vendor, although such deed may have been set out in the pleadings and relied on, and no reply filed and no notice of attack given before trial. *Fitzgerald* v. *Shelton*, 519.

10. In an action to recover land, where the question is as to its location, a witness who is acquainted with the land, and also with an adjoining tract may be allowed to testify where such adjoining tract is located. *Deming* v. *Gainey*, 528.

11. When there are no materials or adjacent lands called for in description in a deed, the course and distance must determine the line. *Ibid.*

12. Where the question for the jury is the location of a corner, the call in junior grants is competent evidence for its location. *Ibid.*

13. Under the present system, a judgment in an action to recover land is as complete an estoppel as in any other action. *Benton* v. *Benton*, 559.

14. A tenant is estopped to deny his landlord's title, but when the plaintiff fails to show any title in himself, and relies entirely on this estoppel, the judgment should only be that he recover the possession, and the defendant should be left free to assert any title he may have in another action. *Ibid.*

15. Where the plaintiff sued for two tracts of land, and the defendant denied there was any contract of renting as to one of them, and the plaintiff testified that he intended to rent all the land he had title to, and that the defendant had the right to cultivate both tracts, but that he did not expressly mention the one in dispute; *It was held*, sufficient evidence to extend the estoppel to both tracts. *Ibid.*

16. Where the defendant in his answer denied a material allegation in the complaint, but went on to state evidential facts; *It was held*, that the bad plea did not vitiate the good one, and it should be treated as surplusage. *Farrior* v. *Houston*, 578.

17. So, where in an action to recover land, the answer denied the plaintiff's right of possession, and also set up title in the defendants, by reason of seven years' possession with color of title, which was, however, improperly pleaded; *It was held*, error to refuse to allow the defendant to introduce evidence to show his color and possession. *Ibid.*

ADMINISTRATOR:

(See EXECUTOR).

ADMISSIONS:

Every presumption is made in favor of the correctness of the judgment in the Court below. So, where it appears from the record, that the judgment was rendered on the verdict and the admissions of the parties, but no admissions appeared in the record, *It was held*, that it would be presumed that the admissions would warrant the judgment, and it would be affirmed. *Rencher* v. *Anderson*, 208.

ADVANCEMENT:

1. One who is induced to enter upon and improve land by a parole promise that it shall be settled upon him, as an advancement or gratuity, will

ADVANCEMENT—*Continued:*

not be evicted until compensation has been made him for betterments which he may have made to the property. *Hedgepeth* v. *Rose*, 41.

2. Nor is he liable for damages for withholding the possession or for the use and occupation of the land until after a notice to surrender. *Ibid.*

AGENT:

1. Where notes were put in an attorney's hands for collection, and when sued for an account, he neither produces the notes, nor gives any explanation of their non-production; *It was held*, that he was chargeable with them. *Wiley* v. *Logan*, 358.
2. A demand previous to bringing suit in an action for money collected by an agent, is to enable the agent to pay it over without incurring the costs of a suit, but a demand is not necessary where the agency is denied, or where a claim is set up exceeding the amount collected, or where the agent's liability is disputed in the answer. *Ibid.*
3. An agent or other person who is entitled by contract, or under the law, to compensation measured by a *per centum* of the amount collected, is authorized to at once deduct the amount of his commissions, and is only accountable for the residue. *Ibid.*
4. In such case, in an action for an account, if the agent is charged with the entire amount collected, with interest, he is entitled to be allowed interest on his commissions from the date of the receipt of the money. *Ibid.*

AGRICULTURAL LIEN:

1. In order to constitute an agricultural lien, under the statute, the advances must have been made in order to raise the crop to which the lien attaches. *Woodlief* v. *Harris*, 211.
2. It is not necessary for its validity, that a mortgage on crops then growing or to be planted, should contain a provision that the mortgagee should have the right to take possession on default. *Ibid.*
3. Where a mortgage of a crop to be thereafter produced, described it as follows: "gives to M. W. a lien on all crops raised on lands owned or rented by me during the present year," and it was found by the jury that the mortgagor owned a farm on which the cotton in dispute was raised; *It was held*, that the description was sufficient, and the mortgage valid. *Ibid.*

AMENDMENT:

1. The Justice of the Peace, or the Superior Court on appeal, has power to make such amendments to the record of an action that will bring it within the jurisdiction of the Court where it originated. *Singer Mfg. Co.* v. *Barrett*, 36.
2. Power to amend process and pleading, as allowed by The Code, discussed. *Ibid.*
3. The Clerk of the Superior Court cannot set aside a judgment in a special proceeding, for excusable negligence, under the provisions of §274 of The Code, but he can allow an amendment under the provisions of §273. *Maxwell* v. *Blair*, 317.

AMENDMENT—*Continued:*

4. Where the trial Judge allowed an amendment after verdict, but stated to opposing counsel that if they would show by affidavit that the defendant had any evidence to offer to the complaint as amended, which had not been already offered, that he would either refuse to allow the amendment, or would set aside the verdict; *It was held*, to cure any possible error. It is intimated that allowing amendments after, as well as before verdict, is discretionary with the trial Judge. *Morgan* v. *Smith*, 396.

5. Where it is agreed in the Court below, that a complaint may be amended so as to supply necessary averments, but it is not done, the Supreme Court will allow the amendment to be filed in that Court. *Hines* v. *R. R. Co.*, 434.

6. If by the inadvertence of the Court, or of any one acting for it, the judgment entered, or record made, is not in conformity to that pronounced or ordered, the Court may at any time, upon the application of any person in interest, or *ex mero motu*, correct it so that it shall truly express the action of the Court. This jurisdiction is distinct from that conferred by §274 of *The Code*, which provides a remedy for relief against excusable mistake, &c., of *parties* to the action. *Strickland* v. *Strickland*, 471.

7. Courts have power to amend their records so that they will speak the truth at any time, and their action is not reviewable on appeal. *State* v. *Warren*, 674.

APPEAL:

1. What is mistake, inadvertence, surprise or excusable mistake is a question of law, and this Court will, upon appeal, review an erroneous judgment thereon. *Winborne* v. *Johnson*, 46.

2. Where the Court has ascertained the facts, and exercised the discretion conferred by the statute—*The Code*, §274—by granting or refusing the relief sought, the Supreme Court will not review its action. *Ibid.*

3. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the Court upon that specific point. The order, or judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the Court below. *Green* v. *Griffin*, 50.

4. It is where the judgment is final and disposes of the entire controversy that the appeal, when properly perfected, vacates the judgment and the whole cause is transferred to the appellate court. Even then it may, for some purposes, be proceeded with in the lower court. *Ibid.*

5. A decree, or order granting or dissolving an injunction, is not vacated by an appeal. *Ibid.*

6. The Legislature has the power to provide that neither party shall appeal from the award of commissioners appointed under the charter to assess the damage to land for the right of way, and if the charter does provide for an appeal, it must be taken within the time and in the manner therein provided. *R. R. Co.* v. *Ely*, 77.

APPEAL—*Continued:*

7. Where a charter provided that the award of the commissioners should be final, unless appealed from within ten days; *It was held*, to mean ten days from the filing of the report, and not its confirmation by the Clerk. *Ibid.*

8. Upon appeals, the Supreme Court will enter such judgment or decree, as upon inspection of the whole record, it shall appear, ought to be rendered. *Bush* v. *Hall*, 82.

9. An appeal from an order granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right and as a matter of law. *Braid* v. *Lukins*, 123.

10. Where an appeal is taken from such an order, the facts and considerations which induced the trial Judge to grant or refuse a new trial, should be stated on the record, in order that the appellate Court may see that the judgment is subject to review. *Ibid.*

11. Where the record only shows that the trial Judge set the verdict aside, and granted a new trial, without specifying the facts or reasons which induced him to do so, and these do not appear, with certainty, in the record, it will be presumed that the new trial was granted in the exercise of the discretionary powers vested in the trial Judge, and the appeal will be dismissed. *Ibid.*

12. Where the judgment was rendered in the Superior Court against three defendants, only one of whom appealed, the Supreme Court, upon affirming the judgment, will remand the case, in order that the judgment may be enforced against all of the defendants. *Baxter* v. *Wilson*, 137.

13. Where the trial Judge intimates an opinion that upon the plaintiff's own evidence he cannot recover; upon the appeal, the Supreme Court will consider all the evidence offered by the plaintiff as true, and in the most favorable light for him. *Gibbs* v. *Lyon*, 146.

14. Where in such case, the appellee founds his objection to the right to recover on the inadmissibility of the appellant's evidence, it must appear of record that he objected thereto, otherwise the Supreme Court will consider such evidence as admissible and competent. *Ibid.*

15. So, where the plaintiff offered evidence tending to show title to the *locus in quo* in the defendant, and then offered an assignment in bankruptcy, and a deed for the *locus in quo* from the assignee in bankruptcy, but there was no evidence to show that the defendant had been duly declared a bankrupt; *It was held*, in the absence of any objection by the defendant to the evidence, error in the trial Judge to intimate that upon no view of the evidence could the plaintiff recover. *Ibid.*

16. An appeal from an interlocutory order only lies when it affects some substantial right and will work injury to the appellant if not corrected before an appeal from the final judgment. *Leak* v. *Covington*, 193.

APPEAL—*Continued:*

17. Where an action was submitted to referees, and exceptions filed to their report, some of which the Court overruled, and returned the case in order to try the other issues raised by the pleadings, *It was held*, not to be an appealable order. *Ibid.*

18. Every presumption is made in favor of the correctness of the judgment in the Court below. So, where it appeared from the record, that the judgment was rendered on the verdict and the admissions of the parties, but no admissions appeared in the record, *It was held*, that it would be presumed that the admissions would warrant the judgment, and it would be affirmed. *Rencher* v. *Anderson*, 208.

19. A new trial will not be granted where the action of the trial Judge, even if erroneous, could by no possibility injure the appellant. *Butts* v. *Screws*, 215.

20. Where an action is brought for an account and the answer pleads matter in bar of the account, and a trial is had of the issues raised by the plea in bar, an appeal lies by the defendant from a judgment ordering an account before the account is taken. *Clements* v. *Rogers*, 248.

21. Whenever an order or judgment puts an end to the action or proceeding, or an interlocutory order will deprive a party of a substantial right, if the alleged error shall not be corrected before the final judgment, an appeal lies. *Ex parte Spencer*, 271.

22. In appeals from the Clerk, in that class of cases of which he has jurisdiction, not as and for the Court, as in special proceedings, but in his capacity as Clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the Judge any statement of the case on appeal. *Ibid.*

23. In appeals in such cases, it is the duty of the Judge to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The Judge can decide the questions of fact in such cases himself, or if he sees fit, he can submit issues for his better information to the jury. *Ibid.*

24. When both parties appeal, and the judgment on the plaintiffs' appeal disposes of the questions presented by both, the defendants' appeal will be dismissed, as having been improvidently taken. *Burgess* v. *Kirby*, 276.

25. Where, by inadvertence, a judgment is entered in this Court for a new trial, when it should have been one remanding the case, it will be corrected on motion. *Scott* v. *Queen*, 340.

26. Where the relief sought in an action was the reformation of a deed and for damages and a partition, and the Court below rendered judgment on the verdict in favor of the defendant, which was reversed on the appeal; *It was held*, that *venire de novo* should not be granted, but the case should be remanded to be proceeded with as if no erroneous ruling had been made. *Ibid.*

27. The Supreme Court examines the whole record transmitted to it upon appeal, and pronounces such judgment as shall appear to it ought to be rendered thereon. *The Code*, §957. *Morrison* v. *Watson*, 479.

APPEAL—*Continued:*

28. In criminal actions there is no appeal, except from *final* judgments. *State* v. *Hazell*, 623.

29. A recital in the record, upon the return of a special verdict, "that the Court being of opinion that upon this state of facts the defendant is not guilty, the verdict is so entered," is not such a judgment as will support an appeal. *Ibid.*

30. Courts have the power to amend and correct their records at any time *nunc pro tunc*, so that they shall speak the truth, and their action is not reviewable on appeal. *State* v. *Warren*, 674.

31. If the jury return a special verdict, it is the duty of the Court to declare the law thereon, and cause a verdict to be entered in accordance therewith; then it should proceed to render judgment; and no appeal will lie until such judgment is pronounced. *State* v. *Smith*, 680.

APPEAL—ASSIGNMENT OF ERRORS:

1. It is the duty of a party to an action to tender such issues as he conceives are necessary, to try the case upon the merits; and an exception made after the trial, that issues, which might properly have been submitted, were not, comes too late. *Oakley* v. *Van Noppen*, 60.

2. A want of jurisdiction apparent on the record, will be taken notice of by the Supreme Court, although not pointed out by a demurrer. *Smaw* v. *Cohen*, 85.

3. An exception, "that the verdict is contrary to the law and the evidence," will not be considered, on appeal, as the jury is the sole judge of the effect of the evidence, and the exception, that the verdict is contrary to law, is too vague to be entertained by the Court. *Snowden* v. *R. R. Co.*, 93.

4. Where the record only shows that the trial Judge set the verdict aside, and granted a new trial, without specifying the facts or reasons which induced him to do so, and these do not appear, with certainty, in the record, it will be presumed that the new trial was granted in the exercise of the discretionary powers vested in the trial Judge, and the appeal will be dismissed. *Braid* v. *Lukins*, 123.

5. A challenge to a juror must be made before the jury is empaneled, and if not made in apt time, it is a matter in the discretion of the trial Judge whether he will set aside the verdict. *Baxter* v. *Wilson*, 137.

6. So where one of the jurors was related to the plaintiff, but no objection was made on this ground until after verdict, the refusal of the trial Judge to set aside the verdict cannot be assigned as error on the appeal. *Ibid.*

7. Where no errors are assigned in the case stated on appeal, and nothing appears in the record, either in terms or by implication, which shows that the appellant was not satisfied with the judgment, it will be affirmed. *Pleasants* v. *R. R. Co.*, 195.

8. The Code, §412, par. 3, does not allow errors to be assigned for the first time on the hearing of the appeal. *Ibid.*

APPEAL—ASSIGNMENT OF ERRORS—*Continued:*

9. By MERRIMON, J. This section of The Code (412) provides for the entries to be made on the record in the course of the trial, and motions subsequent thereto, in order that appellant may properly present his case to the appellate Court, and has no reference to the assignment of error in the Supreme Court for the first time. *Ibid.*

10. No particular assignment of error is necessary, when the appeal is taken from a judgment pronounced on an agreed statement of facts. *Davenport* v. *Leary*, 203.

11. Where no case on appeal accompanies the transcript of the record on appeal, and no error is apparent on the face of the record, the judgment will be affirmed. *Rencher* v. *Anderson*, 208.

12. Every presumption is made in favor of the correctness of the judgment in the Court below. So, where it appeared from the record, that the judgment was rendered on the verdict and the admissions of the parties, but no admissions appeared in the record, *It was held*, that it would be presumed that the admissions would warrant the judgment, and it would be affirmed. *Ibid.*

13. The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. *Clements* v. *Rogers*, 248.

14. An exception to the report of a referee will not be considered, when it is vague and indefinite, and imposes on the Court the necessity of an examination of the entire record to find out its meaning. *Young* v. *Kennedy*, 265.

15. The trial Judge is not required, in the absence of a prayer for special instructions, to present the evidence in his charge in every possible aspect. If the parties desire more specific instructions, they must ask for them at the proper time. *Morgan* v. *Lewis*, 296.

16. The admission of immaterial evidence is no ground for a new trial, unless it appears that its admission probably worked injury to the appellant. *Waggoner* v. *Ball*, 323.

17. Where exceptions are vague and indefinite, or where they are based upon an alleged want of evidence, but do not point to the evidence itself, but compel the appellate court to search for it in the entire evidence sent up, they will not be considered. *Wiley* v. *Logan*, 358.

18. Where a party to an action prepares issues which are submitted, and then objects to another issue submitted by the Court, he cannot be heard to assign an error that the Court did not submit an issue on a particular question, upon which he did not ask an issue. *McDonald* v. *Carson*, 377.

19. In petitions to rehear, the petitioner will not be allowed to assign other grounds for an alleged error than those presented at the first hearing. *Ibid.*

20. Whether the jury, having retired under instructions to which there was no exception, shall be recalled for further directions, is within the discretion of the Court, and not reviewable. *Lafoon* v. *Shearin*, 391.

APPEAL—ASSIGNMENT OF ERRORS—*Continued:*

21. In assigning error for the exclusion of evidence, the record should disclose what the evidence would have been, if the witness had been allowed to answer, otherwise the exception will not be considered. *McGowan* v. *R. R. Co.*, 417.

22. Where evidence is admitted, after objection, which brings out nothing material, and nothing to the prejudice of the objecting party, it cannot be assigned as error, and is no ground for a new trial. *Ibid.*

23. Exceptions must clearly point out the alleged errors. Otherwise they will not be considered. *Arrington* v. *Goodrich*, 462.

24. The Court may in its discretion, after the close of the testimony permit the case to be re-opened and further evidence to be introduced; and the exercise of such discretion is not reviewable upon appeal. *Olive* v. *Olive*, 485.

25. It is the duty of the appellant to show error, and if the Court cannot see from the record that a charge given to the jury is erroneous, it will not grant a new trial. *Deming* v. *Gainey*, 528.

26. It is not error to admit immaterial evidence when it cannot influence the jury. *Ibid.*

27. It cannot be assigned as error on appeal, that the jury did not give due consideration to the evidence, considered in one aspect of the case. This is addressed to the discretion of the trial Judge on an application to set aside the verdict. *Spence* v. *Clapp*, 545.

28. Upon a challenge to the favor, the Court is the judge of the qualifications of the juror, and its determination is not reviewable. *State* v. *Green*, 611.

29. An inadvertent, erroneous instruction to the jury, accompanied by an explanation, or modification, which in effect corrects the error, will not be considered sufficient to award a new trial, unless it clearly appears that the jury was thereby misled and the appellant suffered wrong. *State* v. *Keen*, 646.

30. A general statement that the appellant "excepted to the whole of the charge of the Court," is too vague, and will not be considered on appeal. *State* v. *Nipper*, 653.

APPEAL—CASE ON APPEAL:

1. The object of the "case on appeal" is to set forth the alleged errors appealed from, and if it sufficiently discloses these the appeal will not be dismissed though the record does not show formal exceptions. *Singer Mfg. Co.* v. *Barrett*, 36.

2. No case on appeal is necessary, when the case is tried in the Court below upon a case agreed, or on a demurrer. *Chamblee* v. *Baker*, 98.

3. Where no errors are assigned in the case stated on appeal, and nothing appears in the record, either in terms or by implication, which shows that the appellant was not satisfied with the judgment, it will be affirmed. *Pleasants* v. *R. R. Co.*, 195.

4. The Code, §412, par. 3, does not allow errors to be assigned for the first time on the hearing of the appeal. *Ibid.*

APPEAL—CASE ON APPEAL—*Continued:*

5. No particular assignment of error is necessary, when the appeal is taken from a judgment pronounced on an agreed statement of facts. *Davenport* v. *Leary*, 203.

6. Where no case on appeal accompanies the transcript of the record on appeal, and no error is apparent on the face of the record, the judgment will be affirmed. *Rencher* v. *Anderson*, 208.

APPEALS—FROM THE CLERK:

1. In appeals from the Clerk, in that class of cases of which he has jurisdiction, not as and for the Court, as in special proceedings, but in his capacity as Clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the Judge any statement of the case on appeal. *Ex parte Spencer*, 271.

2. In appeals in such cases, it is the duty of the Judge to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The Judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury. *Ibid.*

APPEAL—TRANSCRIPT:

Where the transcript of the record upon appeal does not show any process, or pleading, but only contains a statement of the facts agreed upon, a judgment and an undertaking on appeal, the case will be remanded, in order that the record may be perfected. *Daniel* v. *Rogers*, 134.

APPEAL—UNDERTAKING ON:

1. The Clerk has no authority to accept any substitute for the undertaking on appeal, or deposit of money in *lieu* thereof, provided by the statute. *Eshon* v. *Com'rs*, 75.

2. *Quœre*, whether an appellant can execute a mortgage on real property in *lieu* of a justified undertaking on appeal, under the provisions of The Code, §117; but even if this be so, the statute must be strictly followed. *Ibid.*

3. Where the appellant deposited with the Clerk, a bond due to himself, and secured by a mortgage, as a substitute for the undertaking on appeal, *It was held*, not to be a compliance with the statute, and the appeal would be dismissed. *Ibid.*

4. Where it appears that the undertaking on appeal was taken by the Judge, it cures any irregularity in the justification. *Moring* v. *Little*, 87.

5. So, where the case on appeal stated, "Bond fixed at $50. Bond filed," which was signed by the trial Judge, *it was held*, to cure any defect in the justification. *Ibid.*

6. The ten days within which the undertaking on appeal must be filed, are not counted from the day on which the judgment is rendered, but from that on which the Court adjourned. *Chamblee* v. *Baker*, 98.

APPEAL—UNDERTAKING ON—*Continued:*

7. Where the justification to the undertaking on appeal was taken before a person purporting to be a Justice of the Peace, and who signed the *jurat* as such, it will be presumed that the person signing the *jurat* was a Justice, in the absence of evidence that he was not so in fact. *Ibid.*

8. An undertaking on appeal is sufficient, although it does not recite which party appealed. *Ibid.*

APPEARANCE:

1. A general appearance by counsel cures all antecedent irregularity in the service of process, and puts the defendant in Court, just as if he had been personally served with process. *Penniman* v. *Daniel*, 341.

2. Where it is desired to take advantage of any defect in the service of process, a special appearance should be entered for that purpose. *Ibid.*

3. So, where a defendant demurred because he had not been properly served, but a general appearance was entered by his counsel; *It was held*, that the appearance waived any irregularity in the service, and the demurrer was properly overruled. *Ibid.*

ARBITRATION:

1. An agreement to submit a controversy to arbitration will be presumed to embrace every issue of law and fact necessary to its final determination. *Robbins* v. *Killebrew*, 19.

2. It is the policy of the law to encourage and uphold the settlement of disputes by arbitrators—they are not bound to decide according to law, being a law unto themselves. *Ibid.*

3. An award against the sureties upon an undertaking for the redelivery of property in "Claim and Delivery" upon failure of their principal to pay a sum ascertained to be due will be enforced by summary judgment against them. *Ibid.*

4. It is too late, after submission to arbitration, to object that a counterclaim has been improperly pleaded; the objection should have been taken by demurrer or otherwise in apt time. *Ibid.*

5. Where the statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration, until an action has been brought. *Middleton* v. *R. R. Co.*, 167.

ARREST:

1. The prosecutor, who was not an officer, had been deputed to execute a warrant in a bastardy proceeding, and had executed it by arresting the defendant therein; on the hearing the said person arrested was committed to the custody of the prosecutor and attempted to escape. The prosecutor pursued him, and the defendant, without warning, or the employment of any other means to stop him, threw out his foot and tripped him causing him to fall. *Held,*

(1). That the defendant was guilty of an assault.

ARREST—*Continued:*

(2). Whether the arrest and commitment of the defendant in the bastardy proceeding was lawful, *quœre? State* v. *Hedrick*, 624.

ARREST OF JUDGMENT:

1. The judgment of the Supreme Court is conclusive on a second appeal, on all matters which might have been insisted on in arrest of judgment on the first appeal. *State* v. *Speaks*, 689.

2. Former conviction, or acquittal, to be available as a defence, must be pleaded; it cannot be considered on a motion to arrest the judgment. *State* v. *Morgan*, 641.

ARSON:

1. The statutory offence of wilful burning of a gin-house is a misdemeanor; and an averment in the indictment that it was done *feloniously*—the necessary descriptive terms being employed—will be treated as mere surplusage. *State* v. *Keen*, 646.

ASSAULT AND BATTERY:

1. The law will not interfere in the domestic government of families by punishing a parent for the correction of his child, however severe or unmerited it may be, unless it produces permanent injury, or is inflicted from malicious motives, and not from an honest purpose. *State* v. *Jones*, 588.

2. The prosecutor, who was not an officer, had been deputed to execute a warrant in a bastardy proceeding, and had executed it by arresting the defendant therein; on the hearing the said person arrested was committed to the custody of the prosecutor and attempted to escape. The prosecutor pursued him, and the defendant, without warning, or the employment of any other means to stop him, threw out his foot and tripped him causing him to fall. *Held,*

(1.) That the defendant was guilty of an assault.

(2.) Whether the arrest and commitment of the defendant in the bastardy proceeding was lawful, *quœre? State* v. *Hedrick*, 624.

3. A husband is not indictable for an assault upon his wife unless it put life or limb in peril, or other permanent injury to the person is inflicted, or where it is prompted by a malicious and revengeful spirit. *State* v. *Edens*, 693.

ASSIGNMENT:

The *status* of the mortgage relations, after the transfer of any interest by the mortgagor to a third party, cannot be changed to the detriment of the latter, without his consent. *Ballard* v. *Williams*, 126.

ATTACHMENT:

1. No cause of action for wrongfully suing out a warrant of attachment can arise until there has been a legal determination of the proceedings thereunder. *Kramer* v. *Light Co.*, 277.

2. The facts constituting a counter-claim must arise out of the same transaction that is the subject of the complaint, and they must exist at the time of the commencement of the action. *Ibid.*

ATTEMPT TO COMMIT CRIME:

1. An indictable attempt to commit a crime, is such an intentional preliminary guilty act, as will apparently result in a crime. *State* v. *Brown*, 685.

2. The acts constituting the alleged attempt should be set forth in the indictment. *Ibid.*

ATTESTING WITNESS:

A person who cannot write, but who makes his mark, or uses any other device by which he, or others, may identify himself with the transaction, is a competent attesting witness to the execution of written instruments. *Tatom* v. *White*, 453.

ATTORNEY:

1. Executors and administrators are allowed reasonable attorney's fees for advice and assistance in managing the trust estate, and this even when they are employed to defend a suit for a settlement by the *cestuis qui* trust, if such services are proper and necessary. *Young* v. *Kennedy*, 265.

2. So where services were rendered by an attorney, which were paid for out of the trust money by an administrator who was afterwards judicially declared to be insane at the time the services were rendered, the disbursement will be allowed, in the absence of any allegation that the services of the attorney were not necessary. *Ibid.*

3. Where notes were put in an attorney's hands for collection, and when sued for an account, he neither produces the notes, nor gives any explanation of their non-production; *It was held*, that he was chargeable with them. *Wiley* v. *Logan*, 358.

4. The rule that a defendant in an action, who employs an attorney to appear and defend—but who fails to do so—is entitled to have a judgment, by default, set aside upon the ground of excusable neglect, does not absolve the client from all attention to the cause. It is still his duty to furnish the information necessary for the preparation of the answer and for the trial. *Whitson* v. *R. R. Co.*, 385.

5. Where the attorney entered an appearance at the return term, but did nothing else then, nor at the succeeding term, when judgment by default was rendered; *Held*, not to be such excusable neglect as entitled the defendant to relief. *Ibid.*

6. No presumption of fraud arises from the fact that an attorney at law purchased valuable property from an infirm old man, unless it be further shown that the relation of attorney and client existed between them in relation to that matter, or there was undue influence, advantage, or some other evidence of actual fraud. *Tatom* v. *White*, 453.

BANKRUPTCY:

1. Where the plaintiff offered evidence tending to show title to the *locus in quo* in the defendant, and then offered an assignment in bankruptcy, and a deed for the *locus in quo* from the assignee in bankruptcy, but there was no evidence to show that the defendant had been duly declared a bankrupt; *It was held*, in the absence of any

BANKRUPTCY—*Continued:*

objection by the defendant to the evidence, error in the trial Judge to intimate that upon no view of the evidence could the plaintiff recover. *Gibbs* v. *Lyon*, 146.

2. The registration of a mortgage after a commission in bankruptcy is good against the assignee. *Williams* v. *Jones*, 504.

BASTARD:

1. Carnal intercourse with an illegitimate child is a felony. *State* v. *Laurence*, 659.

2. Where the indictment charged the defendant with carnal intercourse with his "daughter," and the proof was that the person alleged to be the daughter was an illegitimate child of the defendant; *Held*, there was no variance. *Ibid.*

BETTERMENTS:

1. One who is induced to enter upon and improve land by a parole promise that it shall be settled upon him, as an advancement or gratuity, will not be evicted until compensation has been made him for betterments which he may have made to the property. *Hedgepeth* v. *Rose*, 41.

2. Where, after a recovery by the plaintiff, in ejectment, the defendant, in apt time, applied to the Court to have the value of the betterments allowed him, and the Court directed that execution be stayed till such value could be ascertained, upon the defendant giving bond, conditioned to pay all damages, &c., which might be assessed against him, and the defendant failing to give such bond, a writ of possession issued, and was executed, *It was held*,

(1.) That the failure to give the bond did not discontinue the action in respect to the claim for betterments. *Johnston* v. *Pate*, 68.

(2.) The Court has no power to refuse to institute an inquiry as to the defendant's right to betterments, when application has been properly made. *Ibid.*

(3.) The Court has discretion to direct the issuing or suspension of the execution of the judgment pending such inquiry. *Ibid.*

3. In an action for specific performance, where the defendant sets up a claim for compensation for improvements put on the land, evidence is admissible to show the enhanced value of the lot, by reason of improvements put on it by the defendant. *MaGee* v. *Blankenship*, 563.

BILL OF EXCHANGE:

(See NEGOTIABLE INSTRUMENTS).

BILL OF LADING:

Where a bill of lading provided that the corporations should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered, or imperfectly marked; *It was held*, not to cover a failure to duly forward goods only marked with an initial. *McGowan* v. *R. R. Co.*, 417.

BONDS:

If the accommodation paper is a bond, which the obligee refuses to accept, it is void in the hands of a third person, for want of delivery, although he is a purchaser for value. *Parker* v. *McDowell*, 219.

BOUNDARY:

1. The declarations of deceased persons, who were disinterested at the time the declarations were made, in respect to the location of boundary lines and corners of land, are competent evidence to prove their location, if the deceased person had opportunity to be informed in respect thereto. *Bethea* v. *Byrd*, 309.

2. Such declarations are not evidence if the person making them is still alive, whether living in this State or not, nor if made by a person interested at the time of making them, nor if made *post litem motam*. *Ibid.*

3. The mere fact that the witness whose declarations it is sought to give in evidence, owned a tract of land adjoining that whose corners he pointed out, does not make him incompetent. *Ibid.*

4. Where the contention was whether the disputed land was embraced within the boundaries of another and larger tract, and there was conflicting evidence, it was proper to submit the facts to the jury. *Lafoon* v. *Shearin*, 391.

BURNING GIN-HOUSE:

The statutory offence of wilful burning of a gin-house is a misdemeanor; and an averment in the indictment that it was done *feloniously*—the necessary descriptive terms being employed—will be treated as mere surplusage. *State* v. *Keen*, 646.

CHARTER:

1. Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed. *R. R. Co.* v. *Ely*, 77.

2. The Legislature has the power to provide that neither party shall appeal from the award of commissioners appointed under the charter to assess the damage to land for the right of way, and if the charter does provide for an appeal, it must be taken within the time and in the manner therein provided. *Ibid.*

3. Where a charter provided that the award of the commissioners should be final, unless appealed from within ten days, *It was held*, to mean ten days from the filing of the report, and not its confirmation by the Clerk. *Ibid.*

4. Where the charter and by-laws of a railroad corporation provided that the Chief Engineer could only be appointed by the President and Directors, but the Vice-President and Superintendent were the officers who had the management of the affairs of the corporation, *It was held*, that they had implied authority to employ an engineer, especially when there was no Chief Engineer, and the services of an engineer were necessary for the proper conduct of corporation. *Lewis* v. *The Railroad*, 179.

CHARTER—*Continued:*

5. If in such case, the President and Directors are notified of such appointment, and receive the work of the Engineer without objection, they are held to have ratified the appointment. *Ibid.*

6. This Statute embraces all railroads doing business in this State, whether incorporated by the laws of this State or not, the object of the Statute being to secure uniformity in charges for transporting freight by all railroads doing business in this State. *Hines* v. *R. R. Co.*, 434.

7. Where a railroad corporation chartered by another State, leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. *Ibid.*

8. Where a railroad corporation is chartered by the laws of this State, and also of another State, it is completely subject to the laws of this State, except as otherwise expressly provided by its charter. *Ibid.*

9. *Quære*, whether the provision in the charter of a railroad, fixing a maximum rate for freights and fares, must be treated as such a contract with it on the part of the State as to prevent the Legislature from passing a law regulating such freights and fares. *Ibid.*

10. A statute which only requires uniformity in the charges to be made for transportation, does not provide a maximum for such charges, and therefore does not profess to interfere with the power conferred by the charter on a railroad corporation to fix the freights it will charge, inside of a certain maximum charge allowed by the charter. *Ibid.*

11. The purpose of the Legislature to part with the right to require a corporation to make its charges for transportation equal and uniform, must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference. *Ibid.*

12. *Quære*, whether the Legislature has the power, by contract or otherwise, to part with any of the essential powers of government; but if this can be done, it can only be done by a clearly expressed purpose to do so. *Ibid.*

13. The act incorporating the Buncombe Turnpike Company (Rev. Stat., 2 Vol., p. 418,) established the road constructed under its provisions "a public highway forever thereafter," and its officers and stockholders cannot relieve themselves of their duties and liabilities to the public by an attempted surrender of their franchises to the Board of County Commissioners. To make such surrender effectual, it must be made to the State in some way authorized by law. *State* v. *R. R. Co.*, 602.

14. Nor will an abandonment by the corporation of its franchises work a discontinuance of the highway. *Ibid.*

CHATTEL MORTGAGE:

1. The distinction between a pledge and a mortgage of personal property is, (1) that in the former the *title* is retained by the pledger, while in the latter, it passes to the mortgagee, and (2) that, the delivery of the possession of the property to the pledgee, is absolutely essential to a pledge, while, *between the parties, but not against creditors or purchasers*, such delivery is not necessary to the validity of mortgage. *McCoy* v. *Lassiter*, 88.

CHATTEL MORTGAGE—*Continued:*

2. At common law, delivery and retention of the custody of the property, was necessary to the validity of a mortgage, as against creditors and purchasers, but now, by statute, registration is substituted therefor. *Ibid.*

3. A mortgage of chattels, in parol, is good, between the parties. No particular form of words is necessary to the constitution of such a mortgage. It is sufficient if it appear that the parties intended it to operate as such. *Ibid.*

4. No particular words of conveyance are necessary to make a mortgage of personal property. *Frick* v. *Hilliard*, 117.

5. In order to constitute an agricultural lien, under the statute, the advances must have been made in order to raise the crop to which the lien attaches. *Woodlief* v. *Harris*, 211.

6. It is not necessary for its validity, that a mortgage on crops then growing or to be planted, should contain a provision that the mortgagee should have the right to take possession on default. *Ibid.*

7. Where a mortgage of a crop to be thereafter produced, described it as follows: "gives to M. W. a lien on all crops raised on lands owned or rented by me during the present year," and it was found by the jury that the mortgagor owned a farm on which the cotton in dispute was raised; *It was held*, that the description was sufficient, and the mortgage valid. *Ibid.*

8. At common law, mortgages of personal property were not required to be reduced to writing, and our statute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value. *Butts* v. *Screws*, 215.

CITIES AND TOWNS:

An ordinance of a city or town prescribing a penalty to be fixed in the discretion of the Court, is uncertain and void. *State* v. *Worth*, 615.

CLAIM AND DELIVERY:

1. An award against the sureties upon an undertaking for the redelivery of property in "Claim and Delivery" upon failure of their principal to pay a sum ascertained to be due will be enforced by summary judgment against them. *Robbins* v. *Killebrew*, 19.

2. In an action before a Justice of the Peace for the recovery of the value or return of property under Sec. 267 of The Code, it must be averred in the summons that the value thereof does not exceed fifty dollars. *Singer Mfg. Co.* v. *Barrett*, 36.

3. The affidavit filed preliminary to obtaining requisition for the seizure and delivery of property will not be treated as a complaint, and its averments cannot cure a defect in the summons, or complaint. *Ibid.*

4. Where an order to seize property in an action for claim and delivery was signed by an unsworn deputy clerk, who had never been formally inducted into office, but the objection was not made until after an answer to the merits had been filed, *It was held*, too late. *Butts* v. *Screws*, 215.

CLERK:

1. Although the *office* of "Probate Judge" is abolished, the powers and jurisdiction of that officer are now exercised by the Clerks of the Superior Court—not as the servant or ministerial officer of or acting as and for the Superior Court, but as an independent tribunal of original jurisdiction. *Edwards* v. *Cobb*, 4.

2. The Clerks of Superior Courts have jurisdiction of proceedings for the removal of executors and administrators. *Ibid.*

3. So, where an order to seize property in an action for claim and delivery was signed by an unsworn deputy clerk, who had never been formally inducted into office, but the objection was not made until after an answer to the merits had been filed, *It was held*, too late. *Butts* v. *Screws*, 215.

4. Moneys paid into the office of the Clerk of the Superior Court by executors, administrators and collectors, under the provisions of The Code, §§1543 and 1544, do not pass into the jurisdiction of the Superior Court, but the Clerk receives and is responsible for them, officially, as a public depository. *Ex parte Cassidey*, 225.

5. It is the duty of the Clerk on demand promptly to pay over such moneys to those who were entitled to receive them from the executor, administrator, or collector; and should he fail to do so the same remedies are available as against him as are provided by sections 1510 and 1511 of The Code, against executors, administrators and collectors. *Ibid.*

6. The Superior Court has no jurisdiction upon petition, motion or summary orders to direct the disposition of such moneys. *Ibid.*

7. Where a Clerk has gone out of office, it is not proper to order him to file with the Court the evidence offered and admissions made in a proceeding pending before him while he was Clerk. *Ex parte Spencer*, 271.

8. In appeals from the Clerk, in cases where he has original and independent jurisdiction, such as in auditing the accounts of executors, &c., it is not necessary for him to transmit to the Judge any statement of the case on appeal. *Ibid.*

9. In such case, the Judge can determine the questions of fact himself, or he can submit them to a jury. *Ibid.*

10. The Clerk of the Superior Court cannot set aside a judgment in a special proceeding, for excusable negligence, under the provisions of §274 of The Code, but he can allow an amendment under the provisions of §273. *Maxwell* v. *Blair*, 317.

11. So, where in a proceeding to sell land for assets, the decree for sale embraced some land which was the property of one of the defendants, and which did not belong to the ancestor, but by a mistake the defendant did not discover it until after the sale, and when the notice to confirm the sale was made, *it was held*, that the Clerk had the power, and that he committed no error in amending the order of sale, so as to omit the defendant's land therefrom. *Ibid.*

12. In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk, and others of his sureties,

CLERK—*Continued:*

in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. *Morgan* v. *Smith*, 396.

13. Where money is paid into the clerk's office, the obligations to hold and pay it over to the party entitled, when called on, is incurred when the money is received, and the bond then in force is responsible. If the clerk was elected to another term of office, and became his own successor, the burden is on the sureties on the bond in force when the money was received by the clerk, to show that he has paid it over to himself as his own successor. *Ibid.*

14. Deputy clerks cannot take proofs of the execution, or make orders concerning the registration of instruments required to be registered. *Tatom* v. *White*, 453.

CLOUD UPON TITLE:

1. The jurisdiction of a Court of Equity to remove a cloud upon title, is founded on the inadequacy of the remedy at law, and it does not arise when the plaintiff has a remedy by an action at law. *Byerly* v. *Humphrey*, 151.

2. Where it appeared that the defendant had a registered mortgage on the land of the plaintiff, purporting to be signed by the plaintiff, but it was admitted that said mortgage was a forgery, and that the plaintiff had never executed it, a Court of Equity will entertain a suit to remove the cloud upon the plaintiff's title, although he is still in possession of the land. *Ibid.*

3. Where, in an action to have an alleged forged mortgage cancelled as a cloud upon title, the defendant sets up as a defence, that the money advanced upon such forged mortgage was used to pay off a prior genuine mortgage, and asks to be subrogated to the rights of the first mortgagee; *It was held*, that these facts could not be pleaded either as a defence or counter-claim in this action, but the defendant must set them up in a new action. *Ibid.*

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CODE PRACTICE:

1. Under the former practice, in actions on a special contract to pay for services to be rendered, and which were rendered, no evidence in defence, or to reduce the recovery, was admissible to prove any misconduct on the part of the plaintiff, or dereliction in the service, but since The Code, this defence may be set up, and the entire controversy settled in one action. *Chamblee* v. *Baker*, 98.

2. Since the adoption of the Constitution of 1868, the Superior Courts administer both legal and equitable rights, and when necessary both are administered in the same action. *Vegelahn* v. *Smith*, 254.

3. The provisions of The Code in regard to the joinder of causes of action, have not made any substantial change from the rules of equity practice in regard to multifarious bills, except to enlarge the right to unite in one action different causes of action. *Heggie* v. *Hill*, 303.

COMMENTS OF COUNSEL:

Where counsel in their argument to the jury, commented on the fact that a witness for the opposite party whose evidence tended to locate the land in suit, had participated in running the lines of a grant to himself, which lines constituted a part of the boundary of the land in suit; *It was held*, not a fit subject for comment, to attack the witness, and that counsel were properly stopped by the Court, the grant to the witness not having been attacked. *Deming* v. *Gainey*, 528.

COMMON CARRIER:

(See RAILROAD.)

COMPLAINT:

1. The affidavit filed preliminary to obtaining requisition for the seizure and delivery of property will not be treated as a complaint, and its averments cannot cure a defect in the summons, or complaint. *Singer Mfg. Co.* v. *Barrett*, 36.

2. Where the complaint alleges that the plaintiff sold to the defendant certain goods, wares and merchandise, for which he promised to pay a sum certain, and the complaint is verified, the plaintiff is entitled to a judgment by default final upon a failure to answer, or upon the filing of an unverified answer. *Hartman* v. *Farrior*, 177.

COMPLAINT—*Continued:*

3. Where the complaint only alleges the value of the goods sold, without also alleging a promise to pay, or where the complaint is not verified, upon a failure to answer, the judgment should be by default and inquiry. *Ibid.*

4. Where the complaint alleged that the plaintiff was employed as the engineer of the defendant, and rendered services to the defendant, *It was held*, that he could recover either on the special contract, or on the common count. *Lewis* v. *R. R. Co.*, 179.

5. A motion to dismiss because the complaint does not state facts sufficient to constitute a cause of action, will not be entertained, when the cause is tried upon an agreed statement of facts, which supply the omissions in the complaint. *Hines* v. *R. R. Co.*, 434.

COMPROMISE:

Where a debtor of an estate attempts to compromise his debt, but the executor refuses, on the ground that he has no power to do so, and does not ascertain even what the debtor will give, and afterwards sells the claim for an inconsiderable sum, at a sale of the debts due to the estate made under an order of Court; *It was held*, that the executor was liable for the amount which the debtor afterwards pays to the party who purchased the claim. *Summers* v. *Reynolds*, 404.

CONCEALING BIRTH OF BASTARD:

A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. *The Code*, §1004. *State* v. *Morgan*, 641.

CONDEMNATION OF LAND BY A RAILROAD:

1. Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed. *R. R. Co.* v. *Ely*, 77.

2. The Legislature has the power to provide that neither party shall appeal from the award of commissioners appointed under the charter to assess the damage to land for the right of way, and if the charter does provide for an appeal, it must be taken within the time and in the manner therein provided. *Ibid.*

3. Where a charter provided that the award of the commissioners should be final, unless appealed from within ten days, *It was held*, to mean ten days from the filing of the report, and not its confirmation by the Clerk. *Ibid.*

CONDITIONAL SALE:

1. In order to constitute a conditional sale, it is essential that the title to the property should remain in the vendor, for there can be no conditional sale, if the title is transferred to the vendee. *Frick* v. *Hilliard*, 117.

2. Where a note given for the purchase of an engine and boiler, provided that it should be a lien upon the property sold for which it was given, until it was paid in full at maturity, at which time the engine

CONDITIONAL SALE—*Continued:*

and boiler should be at the disposal of the vendors, which note was never registered, *It was held*, not to be a conditional sale, and that a party who had purchased the engine and boiler from the vendee before the note was paid, without notice, took it discharged of any claim of the original vendors. *Ibid.*

3. As between the parties, a conditional sale is binding, although not reduced to writing or registered. The Code, §1275, only requires them to be reduced to writing and registered, as against creditors and purchasers for value. *Butts* v. *Screws*, 215.

CONFEDERATE MONEY:

(See SCALE).

CONFESSION OF JUDGMENT:

A judgment confessed under Section 571 of The Code must contain a verified statement of the facts and transactions out of which the indebtedness arose. Where the affidavit of the debtor set out that he was justly indebted to the judgment creditor in a certain amount, but did not embrace the account which was filed, *It was held*, not a compliance with the statute, and that the judgment was void. *Davenport* v. *Leary*, 203.

CONSTITUTIONAL LAW:

1. The Statute—ch. 30, vol. 1 of The Code—authorizing the condemnation of private property for the purpose of draining lowlands is the exercise by the State of its power for police regulation, and is constitutional. *Winslow* v. *Winslow*, 24.

2. The Legislature has power to create new counties, out of territory theretofore embraced in existing counties, and it can provide that the inhabitants of such territory shall still be taxed to pay a proportionate part of the debts of the county from which it has been severed, or it may exonerate them from such debts. *Dare Co.* v. *Currituck Co.*, 189.

3. Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed, and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884. *Walton* v. *Parish*, 259.

4. Where land is allotted to a person as a homestead upon his own petition, it is a dedication of it by him, to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired. *Castlebury* v. *Maynard*, 281.

5. Without the joinder of the wife, the deed of the husband for the homestead is a nullity, since the Constitution of 1868. *Ibid.*

6. The Legislature has power to compel railroad corporations, and common carriers of a like kind, to discharge the obligations which they owe to the public, by reasonable statutory regulations, because of their *quasi* public nature, and because they exercise and enjoy rights and franchises, granted by the public. *McGowan* v. *R. R. Co.*, 417.

CONSTITUTIONAL LAW—*Continued:*

7. The Legislature may regulate the methods of business of such corporations, in a general way, so as to promote the public good, and to the extent that the exercise of the powers conferred on them, affect the public, it has the right, through the Legislature, to have a voice in their exercise. *Ibid.*

8. A clause in the charter of a railroad corporation, which confers upon its officers the power to fix its charges for the transportation of freight, is not infringed by a statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation. *Ibid.*

9. *It seems*, that the Legislature cannot part with any essential power of government, but if it can do so, it must be by positive grant, or by words so plain in their meaning, as to leave no doubt as to the purpose. *Ibid. Hines* v. *R. R. Co.*, 434.

10. Where a statute is capable of two constructions, that one will be adopted by the Courts, which will render the statute constitutional and valid, rather than one which would render it unconstitutional and void. *McGwigan* v. *R. R. Co.*, 428.

11. The Courts will not declare an act of the Legislature unconstitutional and void, unless its unconstitutionality is beyond a reasonable doubt, and every reasonable doubt must be solved in favor of its constitutionality. *Ibid.*

12. An act of the Legislature of a State which undertakes to regulate the charges made by railroads for transportation of freight to be carried from one State to another is unconstitutional and void. *Ibid.*

13. State interference with inter-State Commerce is absolutely forbidden by the Constitution of the United States, and the failure of Congress to take any action in the premises does not give the States power to pass any law in relation thereto. *Ibid.*

14. The Statute in this State (*The Code*, §1966), imposing a penalty on any railroad which shall charge for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States, and the penalty imposed by the Act is not incurred by a violation of its provisions in transporting this class of freight. *Ibid.*

15. If this Statute had in terms been made to apply to freight to be transported from one State to another, it would have been in conflict with Art. I, §8, of the Constitution of the United States, and consequently void. *Ibid.*

16. Section 1260 of *The Code*, rendered valid all probates of deeds, &c., made before the officers therein named, prior to the twelfth day of February, 1872; and registrations made in pursuance of such probates are embraced within the operation of the statutes, although made after that date, but before the enactment of *The Code*. Such legislation does not disturb vested rights. *Tatom* v. *White*, 453.

CONSTITUTIONAL LAW—*Continued:*

17. The license tax imposed upon drummers by sec. 28, ch. 175 (Revenue Act), Laws 1885, does not conflict with the Constitution of the United States. *State* v. *Long*, 582.

18. The rebate allowed from the drummers' license tax to merchants paying a purchase tax, by sec. 25 of said Act, does not discriminate against non-residents, since *all persons*, irrespective of their residence, engaged in the business therein designated, are entitled to its benefits. *Ibid.*

19. The Court has power, during the Term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. *State* v. *Manly*, 661.

20. The prohibition contained in the Constitution in regard to the ridings of the Judges does not apply to any one county, but only to the series of counties constituting a circuit. *State* v. *Speaks*, 689.

21. *It seems* that the judgment of the Superior Court presided over by a Judge of general jurisdiction, though not the Judge designated by the Constitution, is not null and void. *Ibid.*

CONSTRUCTION OF STATUTES:

1. When a statute directs the performance of an act for the promotion of justice or the public good, if it is necessary to secure these objects, the word "*may*" will be construed as mandatory—equivalent to the word *shall*. *Johnston* v. *Pate*, 68.

2. Where a statute is capable of two constructions, that one will be adopted by the Courts which will render the Statute constitutional and valid, rather than one which would render it unconstitutional and void. *McGwigan* v. *R. R. Co.*, 428.

3. The Courts will not declare an act of the Legislature unconstitutional and void, unless its unconstitutionality is beyond a reasonable doubt, and every reasonable doubt must be solved in favor of its constitutionality. *Ibid.*

4. The rule that a penal statute must be strictly construed, means no more than that the Court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed, in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the Court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. *Hines* v. *R. R. Co.*, 434.

5. This rule is, however, never to be applied so strictly as to defeat the clear intention of the Legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. *Ibid.*

6. Where the meaning of a statute is doubtful, the title may be resorted to to aid in its construction. *Ibid.*

7. The evil consequences to the public which will arise from a statute, will be considered when its meaning is doubtful, in order to give it a more beneficial construction, but when the Legislative intent is clearly expressed, it cannot be considered. *Ibid.*

CONTEMPT:

A party who intentionally violates an interlocutory judgment of the Court is guilty of contempt although he may have acted in good faith upon professional advice honestly given. *Green* v. *Griffin*, 50.

CONTRACT:

1. Where the plaintiff contracted to work for the defendant for a year, and was to be paid by the month, but broke his contract and stopped work without excuse, before the year expired, *It was held*, that he could recover for the time he did work, at the contract rate per month. *Chamblee* v. *Baker*, 98.

2. When, in such case, the contract is entire and indivisible and by the nature of the agreement, or by the express provisions of the contract, nothing is to be paid until all is performed, the plaintiff cannot recover, unless he aver and prove compliance with the contract on his part. *Ibid.*

3. Under the former practice, in actions on a special contract to pay for services to be rendered, and which were rendered, no evidence in defence, or to reduce the recovery, was admissible to prove any misconduct on the part of the plaintiff, or dereliction in the service, but since The Code, this defence may be set up, and the entire controversy settled in one action. *Ibid.*

4. Where a person is employed to work for another for an indefinite time, if he is ready and willing to do the work required, he is entitled to recover for the entire time, although employment is not furnished him regularly; but if the employment is to do a particular thing, or there were intervals when he was at liberty to make other contracts for his services, then he could only recover for the time during which he was actually employed. *Lewis* v. *R. R. Co.*, 179.

5. Where the charter and by-laws of a railroad corporation provided that the Chief Engineer could only be appointed by the President and Directors, but the Vice-President and Superintendent were the officers who had the management of the affairs of the corporation, *It was held*, that they had implied authority to employ an engineer, especially when there was no Chief Engineer, and the services of an engineer were necessary for the proper conduct of corporation. *Ibid.*

6. Where a bond or other instrument for the payment of money, does not specify on its face that interest is to be paid, interest is in the nature of damages, and the payment of the principal money will bar an action for the interest; but where interest is stipulated for in the contract itself, it becomes a part of the debt, and may be recovered, although the principal sum has been paid. *King* v. *Phillips*, 245.

7. Where the plaintiff contracted with a committee of citizens to build a school-house on the lands of corporation, and to pay the expenses a subscription list was made, and it was agreed that the plaintiff should get payment for his work from the parties whose names were on the subscription list, *it was held*, that the corporation was not liable for the work done by the plaintiff, and much less so was a new corporation, created long after the work was done, for the same purposes as the old one. *Clayton* v. *Trustees*, 298.

CONTRACT—*Continued:*

8. Where freight is delivered by a shipper to a common carrier for transportation, in the absence of an express contract to the contrary, there is an implied agreement that it shall be forwarded in a reasonable time, and the Statute (*The Code*, §1907) fixes five days as such reasonable time. *McGowan* v. *R. R. Co.*, 417.

9. *Quœre*, whether the provision in the charter of a railroad, fixing a maximum rate for freights and fares, must be treated as such a contract with it on the part of the State as to prevent the Legislature from passing a law regulating such freights and fares. *Hines* v. *R. R. Co.*, 434.

10. A statute which only requires uniformity in the charges to be made for transportation, does not provide a maximum for such charges, and therefore does not profess to interfere with the power conferred by the charter on a railroad corporation to fix the freights it will charge, inside of a certain maximum charge allowed by the charter. *Ibid.*

11. The purpose of the Legislature to part with the right to require a corporation to make its charges for transportation equal and uniform, must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference. *Ibid.*

12. *Quœre*, whether the Legislature has the power, by contract or otherwise, to part with any of the essential powers of government; but if this can be done, it can only be done by a clearly expressed purpose to do so. *Ibid.*

CONTRIBUTORY NEGLIGENCE:

1. A master is bound to furnish to his servant, tools and appliances reasonably good and proper for the work the servant is to do, and to do everything essential to the proper prosecution of the work, without exposing the servant to any unnecessary danger, but his is not a guaranty of his safety, nor is he bound to protect him against his own neglect. *Pleasants* v. *The Railroad*, 195.

2. Where a section-master on a railroad was injured by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car, *It was held*, that the injury was the result of his own carelessness, and that he could not recover. *Ibid.*

3. If, in such case, both the master and servant had known of the dangerous condition of the car, and the servant had continued to use it and been injured in consequence, he could not recover; but it would be otherwise, if the servant had reported the condition of the car to the master, and he had promised to have it repaired promptly, and the servant had used it for a reasonable time while waiting for the repairs to be made. *Ibid.*

4. What constitutes negligence, or contributory negligence, is a question of law to be decided by the Court, and should not be left to the jury. *Ibid.*

CONVERSION:

1. The failure of the clerk to pay over the money when it is demanded, is strong evidence of a conversion at some previous stage, and the burden of proof is on the defendants to show that the conversion was not made when the money was received. *Morgan* v. *Smith*, 396.

2. If an executor or administrator place funds of the estate in bank to his individual credit, it is an appropriation of them to his individual use, and he becomes liable for them, upon the failure of the bank; and this is so although he has no money of his own on deposit in the bank. *Summers* v. *Reynolds*, 404.

3. *It seems*, in such case, that the *cestui que trust* may either follow the fund, when he can identify it, or he may elect to hold the trustee personally, when the fund has been lost. *Ibid.*

4. *It seems*, that if the executor, acting in good faith, thinks that, under the will, the fund is his individual property, he will not be held accountable for converting it into securities payable to himself individually, which afterwards become valueless. *Ibid.*

5. The rule that when one person takes and sells the personal property of another, the latter may waive the tort and recover the money, embraces the case where the person sued received the money in consequence of the action of a Court whose jurisdiction and process he invoked for that purpose. *Olive* v. *Olive*, 485.

CORPORATION:

1. Where the plaintiff contracted with a committee of citizens to build a school-house on the lands of corporation, and to pay the expenses a subscription list was made, and it was agreed that the plaintiff should get payment for his work from the parties whose names were on the subscription list, *It was held* that the corporation was not liable for the work done by the plaintiff, and much less so was a new corporation, created long after the work was done, for the same purposes as the old one. *Clayton* v. *Trustees*, 298.

2. The Legislature has power to compel railroad corporations, and common carriers of a like kind, to discharge the obligations which they owe to the public, by reasonable statutory regulations, because of their *quasi* public nature, and because they exercise and enjoy rights and franchises, granted by the public. *McGowan* v. *R. R. Co.*, 417.

3. The Legislature may regulate the methods of business of such corporations, in a general way, so as to promote the public good, and to the extent that the exercise of the powers conferred on them, affect the public, it has the right, through the Legislature, to have a voice in their exercise. *Ibid.*

4. A clause in the charter of a railroad corporation, which confers upon its officers the power to fix its charges for the transportation of freight, is not infringed by a Statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation. *Ibid.*

5. Where a railroad corporation is chartered by the laws of this State, and also by the laws of some other State, it is completely subject to the laws of this State. *Hines* v. *R. R. Co.*, 434.

CORPORATION—*Continued:*

6. Where a foreign corporation leases a railroad chartered by this State, it is bound to obey all laws of this State regulating the business of transportation. *Ibid.*

7. A plea of not guilty to an indictment against a corporation is an admission of its corporate existence. *State* v. *R. R. Co.*, 602.

8. As against a corporation it is competent, to establish its organization and existence, to prove that it had officers, exercised corporate functions, and held itself out to the world as such. *Ibid.*

9. The act incorporating the Buncombe Turnpike Company (Rev. Stat., 2 Vol., p. 418,) established the road constructed under its provisions "a public highway forever thereafter," and its officers and stockholders cannot relieve themselves of their duties and liabilities to the public by an attempted surrender of their franchises to the Board of County Commissioners. To make such surrender effectual, it must be made to the State in some way authorized by law. *Ibid.*

10. Nor will an abandonment by the corporation of its franchises work a discontinuance of the highway. *Ibid.*

11. An incorporated railroad company is liable criminally for an obstruction of a public highway if it permits its engines, cars, &c., to remain thereon for a period longer than is reasonably necessary for their safe crossing. *Ibid.*

12. A corporation can make a contract of sale with one of the members of such corporation. *State* v. *Lockyear*, 633.

COSTS:

1. Where a portion of the plaintiffs have been compelled to withdraw from the action upon their refusal to file a prosecution bond, it is not erroneous to enter judgment against them for costs. *Lafoon* v. *Shearin*, 391.

2. It is not erroneous to tax the losing party with the costs of a reference. *Arrington* v. *Goodrich*, 462.

3. The judgment of the trial Judge that a prosecution was frivolous or malicious, and that the prosecutor pay the costs, is final and conconclusive. *State* v. *Dunn*, 697.

4. A prosecutor may be adjudged to pay the cost, if the trial Judge shall find that the prosecution was either frivolous or malicious. *Ibid.*

5. Where a defendant was acquitted of the charge against him, and the prosecutor was adjudged to pay the costs, a Solicitor's fee cannot be charged in the bill of costs. *Ibid.*

COUNTER-CLAIM:

1. It is too late, after submission to arbitration, to object that a counter-claim has been improperly pleaded; the objection should have been taken by demurrer or otherwise in apt time. *Robbins* v. *Killebrew*, 19.

2. Where plaintiff sues on a note, and the defendant admits the cause of action, but pleads a counter-claim sounding in damages, which is the only matter tried before the jury, who find a verdict in the defend-

COUNTER-CLAIM—*Continued:*

ant's favor, the amount of the note sued on by the plaintiff must be deducted from the damages given by the jury, and judgment only entered for the balance. *Bush* v. *Hall*, 82.

3. A defendant cannot set up as a defence or counter-claim any and every cause of action he may have against the plaintiff. *Byerly* v. *Humphrey*, 151.

4. Where, in an action to have an alleged forged mortgage cancelled as a cloud upon title, the defendant sets up as a defence, that the money advanced upon such forged mortgage was used to pay off a prior genuine mortgage, and asks to be subrogated to the rights of the first mortgagee; *It was held*, that these facts could not be pleaded either as a defence or counter-claim in this action, but the defendant must set them up in a new action. *Ibid.*

5. *It is intimated*, that where irrelevant facts, which should be the ground of a new action, are set up as a defence or counter-claim, and the Court proceeds to pass upon it, instead of striking it from the record, that the judgment will be *res judicata*, and an estoppel upon the defendant, if he should afterwards bring a new action upon the same facts. *Ibid.*

6. No cause of action for wrongfully suing out a warrant of attachment can arise until there has been a legal determination of the proceedings thereunder. *Kramer* v. *Light Co.*, 277.

7. The facts constituting a counter-claim must arise out of the same transaction that is the subject of the complaint, and they must exist at the time of the commencement of the action. *Ibid.*

8. New matter set up in the answer, not relating to a counter-claim, is taken to be denied without further pleading. The Court may, however, require a reply to be filed. *Fitzgerald* v. *Shelton*, 519.

COUNTIES:

1. The Legislature has power to create new counties, out of territory theretofore embraced in existing counties, and it can provide that the inhabitants of such territory shall still be taxed to pay a proportionate part of the debts of the county from which it has been severed, or it may exonerate them from such debts. *Dare Co.* v. *Currituck Co.*, 189.

2. In the creation of new counties, the tax-payers thereof are exonerated from any tax to pay any portion of the debt of the county from which they have been taken, unless the act creating the new county shall provide differently. *Ibid.*

3. Counties are created for the purposes of the State government at large, and not entirely for the convenience of the people who inhabit them. *Ibid.*

4. Counties are the creatures of the Legislature, and it has power to abolish them or to alter and control their corporate powers in any manner. *Ibid.*

5. The people inhabiting a county have no right to its property, as corporators, but it belongs to the county as an organization. *Ibid.*

COUNTIES—*Continued:*

6. Where the act creating a new county provided that such new county should pay its *pro rata* of the debt of the county to which its territory formerly belonged, but the act contained no provision giving it any interest in the property of the old county; *It was held*, that the new county could not recover its *pro rata* of the proceeds of the sale of certain stock owned by the old county, although the debt of the old county was in fact to pay for this stock. *Ibid.*

CREDITOR'S BILL:

Where, upon the pretended organization of a bank, a person allowed himself to hold out as President, and after the failure of the bank, he was sued by one of the depositors of the pretended bank, for the amount of his deposit, and a recovery had against him, which he paid, such depositor cannot afterwards come in and prove his entire debt against the bank, in a proceeding instituted by its creditors for the purpose of distributing its assets in payment of its debts. *Dobson* v. *Simonton*, 312.

CURRITUCK SOUND:

Navigation on Currituck Sound is inland navigation. *Woodhouse* v. *Cain*, 113.

CURTESY:

1. At common law, to entitle a husband to curtesy in his wife's land, either the wife, or the husband in right of his wife, must have had a seizin in deed, which is the actual possession of the land. *Nixon* v. *Williams*, 103.

2. Where the wife of the plaintiff, now dead, was entitled to the land in dispute as heir-at-law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land, *Held*, that she had such seizin as entitled her husband to an estate by the curtesy. *Ibid.*

DAMAGES:

1. One who is induced to enter upon and improve land under a formal agreement that it shall be settled upon him, is not liable for damages for withholding possession, or for the use and occupation, until after a notice to surrender. *Hedgepeth* v. *Rose*, 41.

2. In an action for damages for making slanderous charges against the plaintiff, evidence is competent, in mitigation of damages, to show the mental distress of the defendant at the time the words were spoken, caused as he believed, by the act of the defendant. *McDougald* v. *Coward*, 368.

3. In an action of slander in charging a female with incontinence, the defendant offered evidence to show his mental condition when the slanderous words were spoken, caused by his belief that the plaintiff had enticed his son, with whom he charged that she had had connexion, to leave his home and go off with her, and, *It was held*, that such evidence was admissible to rebut malice, and in mitigation of damages. *Ibid.*

4. Where, in such action, the plaintiff, as a witness in her own behalf, testifies that she is of untarnished virtue, evidence is admissible

DAMAGES—*Continued:*

that she has allowed men to take liberties with her, not reaching to sexual intercourse, although such acts are not charged in the pleadings. Such evidence is irrelevant if originally offered, but is competent to contradict. *Ibid.*

DECLARATIONS:

1. To establish a parol trust in one who has acquired the title to land, something more than the simple declaration of the person sought to be charged is required; there must be proof of acts in connection therewith, inconsistent with a purpose on his part to purchase or hold the land for himself absolutely. *Williams* v. *Hodges*, 32.

2. In an action by a principal against his agent for an account and settlement, it is error to admit the declarations of a partner of the agent, that a firm, of which the agent was a member, had paid a debt to him as agent of the plaintiff. Such evidence is hearsay, and as it manifestly tends to the injury of the defendant, it is error to let it go to the jury. *Clements* v. *Rogers*, 248.

3. Where, in such case, the agent pleads a settlement and discharge, a witness cannot testify to such declarations of a partner of the agent, to explain why he advised the plaintiff not to sign a discharge of the agent, the debt from the partnership not being embraced in the statement rendered by the agent at that time. *Ibid.*

4. The declarations of deceased persons, who were disinterested at the time the declarations were made, in respect to the location of boundary lines and corners of land, are competent evidence to prove their location, if the deceased person had opportunity to be informed in respect thereto. *Bethea* v. *Byrd*, 309.

5. Such declarations are not evidence if the person making them is still alive, whether living in this State or not, nor if made by a person interested at the time of making them, nor if made *post litem motam*. *Ibid.*

6. The mere fact that the witness whose declarations it is sought to give in evidence, owned a tract of land adjoining that whose corners he pointed out, does not make him incompetent. *Ibid.*

7. Any and all declarations pertinent to the subject matter, and bearing upon the issue, coming from parties to the action, or any of them, are competent against the party making them, and are also competent against all, when their interests are joint. *McDonald* v. *Carson*, 377.

8. The mere declarations of one, under whom the defendant in an action to recover land claims, will not work an estoppel, no matter how specific, or whether written or oral, if the person making them was not at the time in possession; to produce such a result it must be shown that the party making such declaration, at that time, claimed title or interest in the land, however defective, under deed, bond or contract under the alleged superior title. *Graybeal* v. *Davis*, 508.

9. While *it seems* that the declarations of one *in possession at the time*, may operate as an estoppel, to give them such effect they must constitute a clear and definite recognition of the alleged superior title. *Ibid.*

DECLARATIONS—*Continued:*

10. Where a man and woman have lived together in adultery, the burden of proof is on those who allege a subsequent marriage to prove it, and the fact that there was a general reputation in the community that they were afterwards married, and the declarations of the man that such was the case, does not require strong and convincing evidence to rebut it, but it must be left to the jury to decide the fact of marriage upon a preponderance of evidence. *Ferrall* v. *Broadway*, 551.

11. The declarations of the owner of land, made while in possession in derogation of his title, are evidence both against him and one claiming title under him. *MaGee* v. *Blankenship*, 563.

12. *It seems that* declarations made after the execution of a deed, but while the grantor remains in possession and exercising proprietary rights are admissible in evidence against the vendee. *Ibid.*

13. It is competent for a witness to give the declarations—or the substance of them—made by a party to an action in the course of a conversation, although he did not hear the entire conversation, if the portion heard embraced a distinct fact, pertinent to the issue. *State* v. *Carson*, 593.

14. Where the magistrate, before whom a prisoner charged with a crime was brought, but before the warrant was returned, or any of the witnesses had been sworn, and before the prisoner was informed of the charge against him, asked the prisoner if he was ready to proceed, and the latter replied that he was not, because of the absence of certain witnesses by whom he expected to prove a state of facts relied upon as a defence; *Held*,

(1.) That the "examination" contemplated by §§1144, 1145 and 1146 of *The Code*, had not then commenced, and any declaration pertinent to the charge, then made by the prisoner, was competent evidence against him, though he was not "cautioned." *State* v. *Conrad*, 666.

(2.) That it was competent to prove that the matters of defence set up on the preliminary examination were contradictory of those relied upon at the trial. *Ibid.*

DEED:

1. Parol evidence may be admitted to fit the description to the thing intended to be conveyed in a deed, but not to add to or enlarge its scope. *Harrison* v. *Hahn*, 28.

2. Where the descriptive words in a deed are so indefinite that in order to give it effect something must be added, the conveyance is inoperative. *Ibid.*

3. These rules are applicable to the assessment, levy, notice, &c., as well as the deeds, made in selling lands for taxes; and these defects being in essential matters will not be cured by a second conveyance in which an accurate description of the land is made. *Ibid.*

4. Where a deed described the land, as "a certain tract in N. Township, adjoining the lands H. S. and others, said to contain 37½ acres," *It*

DEED—*Continued:*

was held, a sufficient description to admit parol evidence to fit the description to the thing, and identify the land. *Hinton* v. *Roach*, 106.

5. As a general rule, natural objects called for in a deed will govern course and distance, but there are exceptions to the rule, one of which is, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object, not reached by such line. *Baxter* v. *Wilson*, 137.

6. Ordinarily, the number of acres contained in a deed constitutes no part of the description, but where the description is doubtful, it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, it may have a controlling effect. *Ibid.*

7. Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed, and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884. *Watton* v. *Parish*, 259.

8. Before the Constitution of 1868, a deed directly from the husband to the wife was void at law, but it would be upheld in equity as a defective conveyance, if the wife could show herself to be meritorious; that is, was the intention of the husband to divest the estate from himself, and to create a separate estate for her, which she should have the immediate power to dispose of; and that the estate thus intended for her, was a reasonable provision. *Ibid.*

9. A deed conveying to B a tract of land, &c., "together with every right, title, privilege and emolument to said land belonging * * * and he (the vendor) doth hereby bind himself, his heirs, executors or administrators well and truly to defend the said premises * * * to the said B, his heirs and assigns forever, and clear from all encumbrances and claims whatsoever," passes an absolute estate in fee. *Graybeal* v. *Davis*, 508.

10. If the description in a deed, however indefinite, is sufficient to allow of an identification by an actual survey, it will be upheld. *Id certum est quod certum reddi potest. Oxford* v. *White*, 525.

11. The following description was held not so vague and indefinite as to render the deed void: "One-half—one hundred and fifty acres—of a three hundred acre tract granted to R. in 1872 (describing the three hundred acre tract), and lying on the north side or end of said grant, beginning at the three black oaks of the old grant as aforesaid and running 127 ft. w. to a stake thence southward in slightly diverging lines from aforesaid black oaks and stake to points along the respective lines, where a line east and west parallel with the south (east and west line) of the old grant aforesaid shall contain, within the lines and distances aforesaid, one hundred and fifty acres." *Ibid.*

DEMAND:

A demand previous to bringing suit in an action for money collected by an agent, is to enable the agent to pay it over without incurring the costs of a suit, but a demand is not necessary where the agency is denied or where a claim is set up exceeding the amount collected, or where the agent's liability is disputed in the answer. *Wiley* v. *Logan*, 358.

DEPOSITION:

It is not error to refuse to allow a deposition read upon the trial, to be taken into the jury room, upon the request of only one of the jurors. *Lafoon* v. *Shearin*, 391.

DEPUTY CLERK:

1. So, where an order to seize property in an action for claim and delivery was signed by an unsworn deputy clerk, who had never been formally inducted into office, but the objection was not made until after an answer to the merits had been filed, *It was held*, too late. *Butts* v. *Screws*, 215.

2. A deputy clerk cannot take proof of a deed or other instrument, or make orders concerning their registration. *Tatom* v. *White*, 453.

DESCRIPTION OF LAND IN A DEED:

1. Parol evidence may be admitted to fit the description to the thing intended to be conveyed in a deed, but not to add to or enlarge its scope. *Harrison* v. *Hahn*, 28.

2. Where the descriptive words in a deed are so indefinite that in order to give it effect something must be added, the conveyance is inoperative. *Ibid.*

3. These rules are applicable to the assessment, levy, notice, &c., as well as the deeds, made in selling lands for taxes; and these defects being in essential matters will not be cured by a second conveyance in which an accurate description of the land is made. *Ibid.*

4. Where a deed described the land, as "a certain tract in N. Township, adjoining the lands H. S. and others, said to contain 37½ acres," *It was held*, a sufficient description to admit parol evidence to fit the description to the thing and identify the land. *Hinton* v. *Roach*, 106.

5. As a general rule, natural objects called for in a deed will govern course and distance, but there are exceptions to the rule, one of which is, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object, not reached by such line. *Baxter* v. *Wilson*, 137.

6. Ordinarily, the number of acres contained in a deed constitutes no part of the description, but where the description is doubtful, it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, it may have a controlling effect. *Ibid.*

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9. In an action to recover land, where the question is as to its location, a witness who is acquainted with the land, and also with an adjoining tract, may testify where such tract is located. *Deming* v. *Gainey*, 528.

10. When there are no materials or adjacent lands called for in description in a deed, the course and distance must determine the line. *Ibid.*

11. Where the question for the jury is the location of a corner, the call in junior grants is competent evidence for its location. *Ibid.*

DEVASTAVIT:

(See EXECUTOR.)

DISCONTINUANCE:

Where, after a recovery by the plaintiff, in ejectment, the defendant, in apt time, applied to the Court to have the value of the betterments allowed him, and the Court directed that execution be stayed till such value could be ascertained, upon the defendant giving bond, conditioned to pay all damages, &c., which might be assessed against him, and the defendant failing to give such bond, a writ of possession issued, and was executed, *It was held*, that the failure to give the bond did not discontinue the action in respect to the claim for betterments. *Johnston* v. *Pate*, 68.

DISCRIMINATION:

(See FREIGHT DISCRIMINATION.)

DIVORCE:

A divorce *a mensa et thoro* does not change the property right of either the husband or wife. *Castlebury* v. *Maynard*, 281.

DOWER:

1. The possession of a widow to whom no dower has been assigned, is not adverse to the heirs-at-law of her deceased husband. *Nixon* v. *Williams*, 103.

2. Where land was acquired and a marriage took place prior to the adoption of the Constitution of 1868, the husband can make a good title without the joinder of the wife, but if the land was acquired, or the marriage took place after date, the wife must join in the deed. *Castlebury* v. *Maynard*, 281.

DOWER—*Continued:*

3. An executory agreement made between persons competent to contract, in contemplation of marriage, wherein it is stipulated by the wife, that she shall take an equal share with the heirs at-law and distributees of the husband "in lieu of dower and any other provision made and provided by law for widows of deceased persons," will be enforced by the Courts in the exercise of their equitable jurisdiction. *Brooks* v. *Austin*, 474.

DRAINING LOW LANDS:

1. The Statute—ch. 30, vol. 1 of The Code—authorizing the condemnation of private property for the purpose of draining lowlands is the exercise by the State of its power for police regulation, and is constitutional. *Winslow* v. *Winslow*, 24.

2. Where upon an appeal from the report of commissioners acting under that act, the jury found that the amount of land condemned by them for the purpose of the protection and reparation of the ditches was unnecessary, it was proper for the Court to remand the cause, with directions to constitute another commission. *Ibid.*

DRUMMERS:

1. The license tax imposed upon drummers by sec. 28, ch. 175 (Revenue Act), Laws 1885, does not conflict with the Constitution of the United States. *State* v. *Long*, 582.

2. The rebate allowed from the drummers' license tax to merchants paying a purchase tax, by sec. 25 of said Act, does not discriminate against non-residents, since *all persons*, irrespective of their residence, engaged in the business therein designated, are entitled to its benefits. *Ibid.*

EJECTMENT:

(See ACTION TO RECOVER LAND.)

EMBRACERY:

Embracery consists in such practices as tend to unduly influence the administration of justice by improperly working upon the minds of the jurors. To constitute the offence, there must be an *attempt* to carry into effect the corrupt purpose—to form the purpose and give it expression merely in words, is not sufficient. *State* v. *Brown*, 685.

EMINENT DOMAIN:

The Statute—ch. 30, vol. 1 of The Code—authorizing the condemnation of private property for the purpose of draining lowlands is the exercise by the State of its power for police regulation, and is constitutional. *Winslow* v. *Winslow*, 24.

ENTRY:

1. Where a party entitled to the possession of land, enters thereon, he is presumed in law to enter under, and in pursuance of his right, no matter what may have been the motive for the entry, and he is at once clothed with every right he can have by virtue of his title which could be asserted by entry. *Nixon* v. *Williams*, 103.

ENTRY—*Continued:*

2. Land covered by navigable water is not the subject of entry and grant. *Hodges* v. *Williams*, 331.

3. The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ*, if the State has granted the bed of the stream to another. *Ibid.*

EQUITY PRACTICE:

1. Where, under the former practice, a Court of Equity sent an issue to be tried by a Court of Law, it never granted a new trial, but this might be had in a proper case, by an application to the latter Court. *Ferrall* v. *Broadway*, 551.

2. The effect to be given to testimony is exclusively for the jury, and it is error for the trial Judge, in his charge, to instruct them that in finding a fact, they must be guided by the rules which the Chancellor has laid down for their guidance, where they were required to pass on the facts. *Ibid.*

3. So, while a Chancellor would require very strong evidence to rebut the fact of marriage where the parties have lived together as man and wife, and have generally been so reputed to be, after the death of one of them, it is error for the Judge to charge the jury that they must be governed by this rule. *Ibid.*

ESCAPE:

If a prisoner, under sentence of death, is respited and escapes, and is not recaptured before the day fixed for the execution, the Judge of the Superior Court may, at a subsequent term, direct the sentence to be carried into effect. *State* v. *Cardwell*, 643.

ESTOPPEL:

1. One who is induced to enter upon and improve land by a parol promise that it shall be settled upon him, as an advancement or gratuity, will not be evicted until compensation has been made him for betterments which he may have made to the property. *Hedgepeth* v. *Rose*, 41.

2. Nor is he liable for damages for withholding the possession or for the use and occupation of the land until after a notice to surrender. *Ibid.*

3. The mere declarations of one, under whom the defendant in an action to recover land claims, will not work an estoppel, no matter how specific, or whether written or oral, if the person making them was not at the time in possession; to produce such a result it must be shown that the party making such declaration, at that time, claimed title or interest in the land, however defective, under deed, bond or contract under the alleged superior title. *Graybeal* v. *Davis*, 508.

4. While *it seems* that the declarations of one *in possession at the time*, may operate as an estoppel, to give them such effect they must constitute a clear and definite recognition of the alleged superior title. *Ibid.*

5. The fact that the husband of a woman who claimed title to a tract of land, sold and conveyed it to another person, does not, *per se*, raise a presumption that he claimed under his wife. *Ibid.*

ESTOPPEL—*Continued:*

6. Under the present system, a judgment in an action to recover land is as complete an estoppel as in any other action. *Benton* v. *Benton*, 559.

7. A tenant is estopped to deny his landlord's title, but when the plaintiff fails to show any title in himself, and relies entirely on this estoppel, the judgment should only be that he recover the possession, and the defendant should be left free to assert any title he may have in another action. *Ibid.*

8. Where the plaintiff sued for two tracts of land, and the defendant denied there was any contract of renting as to one of them, and the plaintiff testified that he intended to rent all the land he had title to, and that the defendant had the right to cultivate both tracts, but that he did not expressly mention the one in dispute; *It was held*, sufficient evidence to extend the estoppel to both tracts. *Ibid.*

EVIDENCE:

1. Parol evidence may be admitted to fit the description to the thing intended to be conveyed in a deed, but not to add to or enlarge its scope. *Harrison* v. *Hahn*, 28.

2. Where the descriptive words in a deed are so indefinite that in order to give it effect something must be added, the conveyance is inoperative. *Ibid.*

3. These rules are applicable to the assessment, levy, notice, &c., as well as the deeds, made in selling lands for taxes; and these defects being in essential matters will not be cured by a second conveyance in which an accurate description of the land is made. *Ibid.*

4. To establish a parol trust in one who has acquired the title to land, something more than the simple declaration of the person sought to be charged is required; there must be proof of acts in connection therewith, inconsistent with a purpose on his part to purchase or hold the land for himself absolutely. *Williams* v. *Hodges*, 32.

5. While a plaintiff in an action may be competent to testify to the *handwriting* of a deceased person to a paper writing—the subject of the action—it is clear that he is incompetent to testify to the *contents* of that writing. *Hussey* v. *Kirkman*, 63.

6. Where the allotment of a year's support contained the following item, "labor for 3½ years, $173," *It was held*, void for uncertainty, and it was not competent for the widow to show, by parol evidence, that the commissioners intended, by this, to allot to her a claim which the deceased husband had against the defendant for labor done for him. *Kiff* v. *Kiff*, 71.

7. In an application to revive a dormant judgment, the affidavit of the judgment creditor is not the only evidence upon which the Clerk may proceed, and when the judgment debtor is present, and makes no objection to the order, it is sufficient evidence to warrant the revival of the judgment, although the judgment creditor does not make an affidavit at all. *Hinton* v. *Roach*, 106.

8. Where a deed described the land, as "a certain tract in N. Township, adjoining the lands H. S. and others, said to contain 37½ acres," *It*

EVIDENCE—*Continued:*

was held, a sufficient description to admit parol evidence to fit the description to the thing, and identify the land. *Ibid.*

9. Where the trial Judge intimates an opinion that upon the plaintiff's own evidence he cannot recover; upon the appeal, the Supreme Court will consider all the evidence offered by the plaintiff as true, and in the most favorable light for him. *Gibbs* v. *Lyon*, 146.

10. Where in such case, the appellee founds his objection to the right to recover on the inadmissibility of the appellant's evidence, it must appear of record that he objected thereto, otherwise the Supreme Court will consider such evidence as admissible and competent. *Ibid.*

11. So, where the plaintiff offered evidence tending to show title to the *locus in quo* in the defendant, and then offered an assignment in bankruptcy, and a deed for the *locus in quo* from the assignee in bankruptcy, but there was no evidence to show that the defendant had been duly declared a bankrupt; *It was held*, in the absence of any objection by the defendant to the evidence, error in the trial Judge to intimate that upon no view of the evidence could the plaintiff recover. *Ibid.*

12. Where there is a conflict between the recollection of the trial judge and counsel as to what a certain witness testified, it is not error for the judge to leave the matter to the jury as to what the evidence is. *Spence* v. *Baxter*, 170.

13. In such case it is not error for the trial judge to refuse to tell the jury that the witness had testified to certain facts, when his notes do not show any such testimony, and he has no recollection of it. It is entirely proper for him to leave the matter to the jury to remember what the evidence was. *Ibid.*

14. By virtue of the Constitution of the United States, and Acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the Court. *Miller* v. *Leach*, 229.

15. Where the record of a judgment of the Court of another State is sued upon in this State, it is not necessary to allege in the complaint, or to prove that it was warranted by the law of the State in which it was pronounced. The record is the highest and conclusive evidence of that fact. *Ibid.*

16. In the construction of wills the intention of the testator is to be ascertained from the document itself in the light of surrounding circumstances, and no evidence, *dehors* of his intention is competent. *Worth* v. *Worth*, 239.

17. In an action by a principal against his agent for an account and settlement, it is error to admit the declarations of a partner of the agent that a firm, of which the agent was a member, had paid a debt to him as agent of the plaintiff. Such evidence is hearsay, and as it manifestly tends to the injury of the defendant, it is error to let it go to the jury. *Clements* v. *Rogers*, 248.

EVIDENCE—*Continued:*

18. Where, in such case, the agent pleads a settlement and discharge, a witness cannot testify to such declarations of a partner of the agent, to explain why he advised the plaintiff not to sign a discharge of the agent, the debt from the partnership not being embraced in the statement rendered by the agent at that time. *Ibid.*

19. In an action against the executrix of an agent for an account and settlement, evidence of the character of the testator, whether good or bad, is incompetent. *Ibid.*

20. Where a deed was made from husband to wife in 1862, for her support which it was alleged was lost until 1884, when it was registered, and in the meantime, the husband lived on the land, and no efforts were made to set up the lost deed; *It was held*, strong evidence of fraud, as against subsequent creditors of the husband. *Walton* v. *Parish*, 259.

21. The answer of a witness, who is also a party to the action, to a question put with a view to disparage him by showing his interest in or relation to the controversy cannot be contradicted—it being not only collateral, but irrelevant. *Kramer* v. *Electric Light Co.*, 277.

22. Where a party asks the Court to charge the jury that if the other party has not satisfied them by a preponderance of evidence, they should find a certain way, it is an admission that there is some evidence to go to the jury to prove the fact. *Owens* v. *Phelps*, 286.

23. It is too late to ask an instruction that there was no evidence to sustain a verdict on a certain issue after the verdict has been rendered. *Ibid.*

24. Where there is some evidence, it is entirely within the discretion of the trial Judge to say whether he will allow the verdict to stand. *Ibid.*

25. Where it is sought to show that an infant has ratified a contract in regard to his property, made while he was an infant, evidence is admissible to show that the money received in pursuance of such contract was used for the infant's advantage, with his knowledge. This evidence does not of itself show a ratification, but is admissible as explanatory of what occurred. *Ibid.*

26. The declarations of deceased persons, who were disinterested at the time the declarations were made, in respect to the location of boundary lines and corners of land, are competent evidence to prove their location, if the deceased person had opportunity to be informed in respect thereto. *Bethea* v. *Byrd*, 309.

27. Such declarations are not evidence if the person making them is still alive, whether living in this State or not, nor if made by a person interested at the time of making them, nor if made *post litem motam*. *Ibid.*

28. The mere fact that the witness whose declarations it is sought to give in evidence, owned a tract of land adjoining that whose corners he pointed out, does not make him incompetent. *Ibid.*

29. It is not error to rule out evidence which could not aid the jury in passing on the issues to be tried. So, where the issue was, whether a certain tract of land in dispute, was intended by a testator to pass

EVIDENCE—*Continued:*

under a devise of his "home place," evidence that he had given parcels of land to certain of his sons, before his death, is irrelevant. *Waggoner* v. *Ball*, 323.

30. The admission of immaterial evidence is no ground for a new trial, unless it appears that its admission probably worked injury to the appellant. *Ibid.*

31. In an action for damages for making slanderous charges against the plaintiff, evidence is competent, in mitigation of damages, to show the mental distress of the defendant at the time the words were spoken, caused as he believed, by the act of the defendant. *McDougald* v. *Coward*, 368.

32. Objections to evidence are to the answer and not to the question, and where the answer is not calculated to prejudice the objecting party, it becomes immaterial. *Ibid.*

33. The Court can receive evidence, although not strictly proper when offered when counsel undertake to make it relevant by evidence to be thereafter introduced. *Ibid.*

34. In an action of slander in charging a female with incontinence, the defendant offered evidence to show his mental condition when the slanderous words were spoken, caused by his belief that the plaintiff had enticed his son, with whom he charged that she had had connexion, to leave his home and go off with her, and *It was held*, that such evidence was admissible to rebut malice, and in mitigation of damages. *Ibid.*

35. Where, in such action, the plaintiff, as a witness in her own behalf, testifies that she is of untarnished virtue, evidence is admissible that she has allowed men to take liberties with her, not reaching to sexual intercourse, although such acts are not charged in the pleadings. Such evidence is irrelevant if originally offered, but is competent to contradict. *Ibid.*

36. Any and all declarations pertinent to the subject matter, and bearing upon the issue, coming from parties to the action, or any of them, are competent against the party making them, and are also competent against all, when their interests are joint. *McDonald* v. *Carson*, 377.

37. The testimony of a juror will not be received in support of a motion to set aside a verdict in which he has joined. *Lafoon* v. *Shearin*, 391.

38. In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk, and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. *Morgan* v. *Smith*, 396.

39. Where money is paid into the clerk's office, the obligations to hold and pay it over to the party entitled, when called on, is incurred when the money is received, and the bond then in force is responsible. If the clerk was elected to another term of office, and became his own successor, the burden is on the sureties on the bond in force when

EVIDENCE—*Continued:*

the money was received by the clerk, to show that he has paid it over to himself as his own successor. *Ibid.*

40. The failure of the clerk to pay over the money when it is demanded, is strong evidence of a conversion at some previous stage, and the burden of proof is on the defendants to show that the conversion was not made when the money was received. *Ibid.*

41. In assigning error for the exclusion of evidence, the record should disclose what the evidence would have been, if the witness had been allowed to answer, otherwise the exception will not be considered. *McGowan* v. *R. R. Co.*, 417.

42. In an action against a railroad for the penalty imposed by the Statute for failing to ship freight delivered to it for transportation, within five days after the delivery, evidence which goes to show that other freight was delivered by agents of the plaintiff, who gave instructions to the agent of the corporation in regard to its shipment, is immaterial, and it is not error to exclude it. *Ibid.*

43. Where evidence is admitted, after objection, which brings out nothing material, and nothing to the prejudice of the objecting party, it cannot be assigned as error, and is no ground for a new trial. *Ibid.*

44. Proof that a person acted, and was recognized, as a public officer, is *prima facie* evidence that he was duly qualified. This rule is applicable alike to criminal and civil actions, and to actions in which the officer is himself a party. If, however, the title to the office, or the legality of the appointment is put in issue by the pleadings, the proof must support the allegation. *Tatom* v. *White*, 453.

45. If a party to an action introduced a certified copy of a deed, stating at the time he did so, for the purpose of showing that both parties claimed under the same person, "and for the purpose of attacking it for fraud," he waives all defects and irregularities of probate and registration. *Ibid.*

46. The registration of a deed, or other instrument requiring registration, made upon proof of execution by a witness who could not write, but who in fact witnessed the signing, and directed his name to be subscribed as a witness, is not void, though irregular; and on a trial, upon proof of the execution by such witness or other competent testimony, the deed will be admitted in evidence without further registration. *Ibid.*

47. The Court may in its discretion, after the close of the testimony, permit the case to be re-opened and further evidence to be introduced; and the exercise of such discretion is not reviewable upon appeal. *Olive* v. *Olive*, 485.

48. It is not error to refuse to allow a party, on the cross-examination of a witness, to call out new and substantive matters, when the Court announces that the party desiring such testimony, may recall the witness and examine him at a subsequent and more appropriate stage of the trial. *Ibid.*

49. If a party to an action introduce and examine his adversary as a witness, the credibility of the latter is not open to attack, and it makes

EVIDENCE—*Continued:*

no difference in that respect by which side he may be subsequently recalled. *Ibid.*

50. Under the provisions of *The Code,* §49, a protest which sets out that a demand was made, and notice given, and the manner in which it was done, is *prima facie* evidence, even in the case of a domestic draft on which no protest was necessary, of the facts thus stated, but this may be rebutted by other evidence. *Bank* v. *Lutterloh,* 495.

51. In an action for the specific performance of a contract, although the contract is under seal, parol evidence is admissible to show any good reason why the equitable relief demanded should be withheld. *Herren* v. *Rich,* 500.

52. While it seems that the declarations of one in possession may operate as an estoppel, to give them such effect, they must constitute a clear and definite recognition of the alleged superior title. *Graybeal* v. *Davis,* 508.

53. In an action to recover land, it is competent for one party to show that a deed offered by the other, in support of his title, is void for want of capacity in the vendor, although such deed may have been specially set up in the pleadings and relied upon, and no formal reply thereto or notice of attack given before the trial. *Fitzgerald* v. *Shelton,* 519.

54. Where evidence was offered tending to show that the vendor was of unsound mind, and had executed the deed under an insane impulse and without consideration; *It was held,* that it was competent for those who claimed under the assailed deed to show letters, declarations and other acts of the vendor explanatory of his motives, and of the consideration which moved him. *Ibid.*

55. In an action to recover land, where the question is as to its location, a witness who is acquainted with the land, and also with an adjoining tract, may be allowed to testify where such adjoining tract is located. *Deming* v. *Gainey,* 528.

56. It is not error to admit irrelevant testimony, when it does not tend to mislead the jury. *Ibid.*

57. Where a party objects to a portion of an answer made by a witness because it is not responsive, he should ask the Court to require its withdrawal, or to tell the jury to disregard it. *Ibid.*

58. Evidence of a collateral matter, which has no material bearing on the controversy, but which tends to influence the jury, is not competent. *Ibid.*

59. When there are no materials or adjacent lands called for in description in a deed, the course and distance must determine the line. *Ibid.*

60. Where the question for the jury is the location of a corner, the call in junior grants is competent evidence for its location. *Ibid.*

61. The effect to be given to testimony is exclusively for the jury, and it is error for the trial Judge, in his charge, to instruct them that in finding a fact, they must be guided by the rules which the Chancellor has laid down for their guidance, where they were required to pass on the facts. *Ferrall* v. *Broadway,* 551.

EVIDENCE—*Continued:*

62. Where a man and woman have lived together in adultery, the burden of proof is on those who allege a subsequent marriage to prove it, and the fact that there was a general reputation in the community that they were afterwards married, and the declarations of the man that such was the case, does not require strong and convincing evidence to rebut it, but it must be left to the jury to decide the fact of marriage upon a preponderance of evidence. *Ibid.*

63. In cases where the character of the evidence is suspicious, the trial Judge may call the fact to the attention of the jury, as in the case of accomplices, or near relatives of the accused, or of fellow-servants, or of a witness who has sworn falsely in a part of his testimony, but these matters of discredit are for the jury to consider, and the Judge can only caution the jury, so as to induce them to make a careful scrutiny of such evidence. *Ibid.*

64. The declarations of the owner of land, made while in possession in derogation of his title, are evidence both against him and one claiming title under him. *MaGee* v. *Blankenship*, 563.

65. *It seems that* declarations made after the execution of a deed, but while the grantor remains in possession and exercising proprietary rights are admissible in evidence against the vendee. *Ibid.*

66. In an action for specific performance, where the defendant sets up a claim for compensation for improvements put on the land, evidence is admissible to show the enhanced value of the lot, by reason of improvements put on it by the defendant. *Ibid.*

67. Evidence in writing, when the writing contains all the stipulations assumed by the person to be charged, and authenticated by his signature, is a compliance with the statute of frauds. *Ibid.*

68. Where an issue is raised by the pleadings and submitted to the jury, it is error for the Court to exclude any evidence pertinent thereto. *Farrior* v. *Houston*, 578.

69. So, where in an action to recover land, the answer denied the plaintiff's right of possession, and also set up title in the defendants, by reason of seven years' possession with color of title, which was, however, improperly pleaded; *It was held*, error to refuse to allow the defendant to introduce evidence to show his color and possession. *Ibid.*

70. It is competent for a witness to give the declarations—or the substance of them—made by a party to an action in the course of a conversation, although he did not hear the entire conversation, if the portion heard embraced a distinct fact, pertinent to the issue. *State* v. *Carson*, 593.

71. A plea of not guilty to an indictment against a corporation is an admission of its corporate existence. *State* v. *R. R. Co.*, 602.

72. As against a corporation it is competent, to establish its organization and existence, to prove that it had officers, exercised corporate functions, and held itself out to the world as such. *Ibid.*

73. It is settled law in this State that a person may be convicted upon the unsupported evidence of an accomplice, if such evidence satisfies the minds of the jurors of the guilt of the accused. *State* v. *Stroud*, 626.

EVIDENCE—*Continued:*

74. Upon the trial of an indictment for infanticide, where it appeared there were no marks of violence upon the deceased, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving upon the body any evidence of the means employed. *State* v. *Morgan*, 641.

75. Upon the trial of an indictment for adultery, it is competent to prove that the defendant had a wife living at the time of the commission of offence; and it is not error to admit proof of this fact, though it is not denied by the defendant. *State* v. *Manly*, 661.

76. Where the magistrate, before whom a prisoner charged with a crime was brought, but before the warrant was returned, or any of the witnesses had been sworn, and before the prisoner was informed of the charge against him, asked the prisoner if he was ready to proceed, and the latter replied that he was not, because of the absence of certain witnesses by whom he expected to prove a state of facts relied upon as a defence; *Held*,

(1) That the "examination" contemplated by §§1144, 1145 and 1146 of *The Code*, had not then commenced, and any declaration pertinent to the charge, then made by the prisoner, was competent evidence against him, though he was not "cautioned." *State* v. *Conrad*, 666.

(2) That it was competent to prove that the matters of defence set up on the preliminary examination were contradictory of those relied upon at the trial. *Ibid.*

77. It is not competent to prove particular acts of immorality for the purpose of showing the bad character of a witness whose truthfulness is impeached. *State* v. *Garland*, 671.

78. It is competent to show that the contradictory statement, offered with a view to impeach a witness, was made to one who was an official in a religious organization, while in the discharge of his duties as such. *Ibid.*

79. Evidence elicited from a witness on cross-examination calculated and intended to discredit him, may be explained, notwithstanding such explanatory testimony would have been incompetent on the examination in chief. *State* v. *Glenn*, 677.

80. Where the witness testified on the trial of an indictment for larceny that an officer took from the possession of the defendant therein certain coins, marked, by which the witness was enabled to identify them, *Held*, that the testimony was material, and if false, constituted perjury. *State* v. *Hare*, 682.

EVIDENCE—§590:

Upon the trial of an issue as to the existence of a partnership between the plaintiff and the intestate of defendant, the former is not a competent witness to prove the fact of the partnership, nor the fact that his property went into the possession of the intestate as a portion of the partnership stock, unless it affirmatively appears that his knowledge of such facts was not derived from conversations and transactions with the deceased. *Sikes* v. *Parker*, 232.

EXCUSABLE NEGLIGENCE:

1. Upon an application to set aside a judgment for mistake, inadvertence, surprise or excusable neglect, the Court should specifically find the essential facts. *Winborne* v. *Johnson*, 46.

2. What is mistake, inadvertence, surprise or excusable mistake is a question of law, and this Court will, upon appeal, review an erroneous judgment thereon. *Ibid.*

3. Where the Court has ascertained the facts, and exercised the discretion conferred by the statute—*The Code*, §274—by granting or refusing the relief sought, the Supreme Court will not review its action. *Ibid.*

4. The Clerk of the Superior Court cannot set aside a judgment in a special proceeding, for excusable negligence, under the provisions of §274 of The Code, but he can allow an amendment under the provisions of §273. *Maxwell* v. *Blair*, 317.

5. The rule that a defendant in an action, who employs an attorney to appear and defend—but who fails to do so—is entitled to have a judgment, by default, set aside upon the ground of excusable neglect, does not absolve the client from all attention to the cause. It is still his duty to furnish the information necessary for the preparation of the answer and for the trial. *Whitson* v. *R. R. Co.*, 385.

6. Where the attorney entered an appearance at the return term, but did nothing else then, nor at the succeeding term, when judgment by default was rendered; *Held*, not to be such excusable neglect as entitled the defendant to relief. *Ibid.*

EXECUTION:

1. A variance between the execution and the judgment, in regard to the sum due, does not vitiate a scale made under the execution. *Hinton* v. *Roach*, 106.

2. A stranger purchasing at a sale under an execution issued on an irregular judgment, gets a good title, and even the plaintiff in the judgment gets a good title, unless the judgment is afterwards set aside, upon a motion by a party to the judgment who is prejudiced by the irregularity. *Ibid.*

3. Proceedings supplemental to the execution are chiefly equitable in their nature, and are in the nature of an equitable execution. *Vegelahn* v. *Smith*, 254.

4. The fact that the sheriff has an *alias* execution in his hands unreturned, which was issued on the same judgment on which supplementary proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. *Ibid.*

5. An execution can issue on a judgment pending supplementary proceedings which have been taken out on the same judgment. *Ibid.*

EXECUTORS AND ADMINISTRATORS:

1. The Clerks of the Superior Court have jurisdiction of proceedings for the removal of executors and administrators. *Edwards* v. *Cobb*, 4.

2. Whether the Superior Courts have such original jurisdiction, *Quœre*. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued:*

3. The practice upon application to remove executors and administrators, discussed. *Ibid.*

4. The administration of estates, granted prior to the first day of July, 1869, must be conducted according to the law as it existed before that date. *The Code*, §1433. *Glover* v. *Flowers*, 57.

5. An executor or administrator could not avail himself of the limitations prescribed in §§11 and 12 of Rev. Code, unless he showed that he had disposed of the assets and made the advertisement required by §§24 and 27, Rev. Code. *Ibid.*

6. An administrator, *cum testamento annexo*, can execute any power conferred by the will on the executor therein named. *Council* v. *Averett*, 131.

7. As a general rule, where a will directs lands to be sold for division among devisees, and no person is designated to make the sale, neither an executor, nor an administrator with the will annexed, can execute the power, but such power may be conferred upon them, either by express words, or by reasonable implication from the provisions of the will. *Ibid.*

8. Where the fund to be divided is to be raised by a sale of both real and personal property, or where the fund to be raised by the sale is to pay debts, or discharge legacies, or is to pass into the hands of the executor, to be applied by him by virtue of his office, the executor can execute the power of sale, as to the realty, although the will does not confer it on him in direct terms. *Ibid.*

9. So, where a testator gives all of his property of every description, to his wife for life, and at her death, to be sold and divided among his children, *It was held*, that by necessary implication, the will conferred the power of sale on the executor, and a sale, by an administrator with the will annexed, of the realty, made after the death of the life tenant, passed a good title. *Ibid.*

10. Moneys paid into the office of the Clerk of the Superior Court by executors, administrators and collectors, under the provisions of The Code, §§1543 and 1544, do not pass into the jurisdiction of the Superior Court, but the Clerk receives and is responsible for them, officially, as a public depository. *Ex parte Cassidey*, 225.

11. It is the duty of the Clerk on demand promptly to pay over such moneys to those who were entitled to receive them from the executor, administrator, or collector; and should he fail to do so the same remedies are available as against him as are provided by Sections 1510 and 1511 of The Code, against executors, administrators and collectors. *Ibid.*

12. The Superior Court has no jurisdiction upon petition, motion or summary orders to direct the disposition of such moneys. *Ibid.*

13. Executors and administrators are allowed reasonable attorney's fees for advice and assistance in managing the trust estate, and this even when they are employed to defend a suit for a settlement by the *cestuis que trust* if such services are proper and necessary. *Young* v. *Kennedy*, 265.

EXECUTORS AND ADMINISTRATORS—*Continued:*

14. So where services were rendered by an attorney, which were paid for out of the trust money by an administrator who was afterwards judicially declared to be insane at the time the services were rendered, the disbursement will be allowed, in the absence of any allegation that the services of the attorney were not necessary. *Ibid.*

15. An administrator will not be allowed, on the settlement of his administration account, with taxes which he has paid on the lands which descended to the heirs. *Ibid.*

16. Where collections were made by an administrator in 1862 and 1863, and afterwards paid out, the scale must be applied to the receipts at the time the money was received, and to the payments when they were made. *Ibid.*

17. Where one of the distributees dies before a settlement, and the administrator pays a portion of the fund for the support of one of the next of kin of the dead distributee, he is entitled in equity to a credit for this amount in an action by the administrator of the deceased distributee, if there are no creditors. *Ibid.*

18. Where certain land lying in another State was sold to pay debts by an administrator in that State, and there was a surplus, as to which the Court finds as a fact that it was not received by the administrator in this State nor by any authorized agent of his, it does not constitute assets with which the administrator should be charged. *Ibid.*

19. The appointment as administrator of a person other than the one designated by the statute, although such person has not renounced, is not void, but such appointment may be set aside in favor of the person entitled, provided such person has not waived his right to administer, or otherwise concluded himself. *Garrison* v. *Cox*, 353.

20. In such case, the only person who can complain of such appointment, is the person who is entitled to administer under the statute. *Ibid.*

21. Where there are several persons entitled in equal degree to administer, the clerk may select such one of them as in his discretion is most fit, and issue letters to him. *Ibid.*

22. Where persons entitled to administer do not apply for letters within six months of the death of the intestate, they are presumed to have waived their right to do so, and if the public administrator do not apply for such letters, as it is his duty to do, the clerk may appoint any fit person as administrator. *Ibid.*

23. The appointment of an administrator is not void because his bond is not justified, but if he fails to file a good bond, upon proper notice, he may be removed for this cause. *Ibid.*

24. Where an executor sold land during the war, under the power given him by the will to sell, and divide the proceeds among certain legatees, but the executor would not say in what currency he would take payment, and by this conduct prevented certain parties, who wished to purchase, from bidding at the sale, and said executor, unknown to the parties in interest, procured his partner to purchase the property on their joint account, and accepted payment of the bid in Confederate

EXECUTORS AND ADMINISTRATORS—*Continued:*

money; *It was held*, that the executor was chargeable with the value of the property in good money. *Summers* v. *Reynolds*, 404.

25. Where, in such case, the legatees accepted the Confederate money in payment, the executor is entitled to credit for the scaled value of such payments, in his accounts with the legatees. *Ibid.*

26. Where a debtor of an estate attempts to compromise his debt, but the executor refuses, on the ground that he has no power to do so, and does not ascertain even what the debtor will give, and afterwards sells the claim for an inconsiderable sum, at a sale of the debts due to the estate made under an order of Court; *It was held*, that the executor was liable for the amount which the debtor afterwards pays to the party who purchased the claim. *Ibid.*

27. If an executor or administrator place funds of the estate in bank to his individual credit, it is an appropriation of them to his individual use, and he becomes liable for them, upon the failure of the bank; and this is so although he has no money of his own on deposit in the bank. *Ibid.*

28. *It seems*, in such case, that the *cestui que trust* may either follow the fund, when he can identify it, or he may elect to hold the trustee personally, when the fund has been lost. *Ibid.*

29. *It seems*, that if the executor, acting in good faith, thinks that, under the will, the fund is his individual property, he will not be held accountable for converting it into securities payable to himself individually, which afterwards become valueless. *Ibid.*

30. The testator bequeathed to his son M, "four hundred dollars, to be paid him as follows: Upon the death of my wife, he shall recover forty dollars, and forty dollars annually thereafter, till the payments amount to four hundred dollars. The payments shall be made by my son J. and daughter E., each paying twenty dollars annually, and the property bequeathed to them shall be chargeable with said payments." J. was appointed and qualified as executor. The property devised to E. was delivered to her, and that devised to J. was accepted by him. *Held*, That the devise to E. and J. was of specific property, encumbered by the legacy to M., and upon the delivery of E. of her share, and the election of J. to take his, the executor was discharged of all liability in his fiduciary and representative character, and each became separately liable for a moiety of the legacy to be paid as directed. *Hines* v. *Hines*, 482.

EXEMPTIONS:

(See Personal Property Exemptions.)

EXPERT:

Upon the trial of an indictment for infanticide, where it appeared there were no marks of violence upon the deceased, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving upon the body any evidence of the means employed. *State* v. *Morgan*, 641.

FALSE PRETENSE:

An averment in an indictment that the defendant did "unlawfully, &c., and intending to cheat and defraud * * * falsely pretend * * * that a certain mare which he * * * was proposing to trade * * * was sound in limb and body, and always had been sound in limb and body, whereas the said mare was broken down in her loins, and had been broken down in her loins," and that he knew these representations to be false, &c., sufficiently charges the crime of false pretense. *State* v. *Sherrill*, 663.

FEE:

A deed conveying to B a tract of land, &c., "together with every right, title, privilege and emolument to said land belonging * * * and he (the vendor) doth hereby bind himself, his heirs, executors or administrators well and truly to defend the said premises * * * to the said B, his heirs and assigns forever, and clear from all encumbrances and claims whatsoever," passes an absolute estate in fee. *Graybeal* v. *Davis*, 508.

FORCIBLE TRESPASS:

1. One who peacably enters upon land, believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under §1062 of *The Code*. *State* v. *Reynolds*, 616.

2. Possession, actual or constructive, is essential to the maintenance of an action for trespass. *Ibid.*

3. One who, after being forbidden, enters upon land of another under a *bona fide* claim of right, is not guilty of the offence of wilful trespass. *The Code*, §1120. *State* v. *Winslow*, 649.

4. One who enters upon the land of another, after being forbidden, as the servant, and at the command of a *bona fide* claimant, is not guilty of any criminal offence. *Ibid.*

FORMER CONVICTION:

1. A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. *The Code*, §1004. *State* v. *Morgan*, 641.

2. Former conviction, or acquittal, to be available as a defence, must be pleaded; it cannot be considered on a motion to arrest the judgment. *Ibid.*

FORNICATION AND ADULTERY:

1. Upon the trial of an indictment for adultery, it is competent to prove that the defendant had a wife living at the time of the commission of offence; and it is not error to admit proof of this fact, though it is not denied by the defendant. *State* v. *Manly*, 661.

2. Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the Court. *The Code*, §§1041 and 1097. *Ibid.*

FRAUD:

No presumption of fraud arises from the fact that an attorney at law purchased valuable property from an infirm old man, unless it be further shown that the relation of attorney and client existed between them in relation to that matter, or there was undue influence, advantage, or some other evidence of actual fraud. *Tatom* v. *White*, 453.

FRAUDULENT CONVEYANCES:

1. All gifts from a husband to his wife, will be upheld *inter sese*, and as against all persons claiming under them, and such gifts are good against existing creditors, if the husband retain property sufficient to pay his debts, and are only void if made with a fraudulent intent. *Walton* v. *Parish*, 259.

2. Where, in 1862, a husband was about to enter military service, made a deed to his wife of certain land, for her support, but retained sufficient property to pay all of his existing debts; *It was held*, that the consideration was a meritorious one. *Ibid.*

3. Where a deed was made from husband to wife in 1862, for her support which it was alleged was lost until 1884, when it was registered, and in the meantime, the husband lived on the land, and no efforts were made to set up the lost deed; *It was held*, strong evidence of fraud, as against subsequent creditors of the husband. *Ibid.*

FREIGHT DISCRIMINATION:

1. An act of the Legislature of a State, which undertakes to regulate the charges made by railroads for transportation on freight to be carried from one State to another, is unconstitutional and void. *McGwigan* v. *R. R. Co.*, 428.

2. State interference with interstate commerce, is absolutely forbidden by the Constitution of the United States, and the failure of Congress to take any action in the premises, does not give the States power to pass any law in relation thereto. *Ibid.*

3. The Statute in this State (*The Code*, §1966), imposing a penalty on any railroad which shall charge for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States, and the penalty imposed by the Act is not incurred by a violation of its provisions in transporting this class of freight. *Ibid.*

4. If this Statute had in terms been made to apply to freight to be transported from one State to another, it would have been in conflict with Art. I, §8, of the Constitution of the United States, and consequently void. *Ibid.*

5. The Statute of this State (*The Code*, §1966) which imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, is to be construed to mean, that the compensation charged shippers for carrying an equal quantity of the same class of freight,

FREIGHT DISCRIMINATION—*Continued:*

going in the same direction, must be equal in amount for equal distances no matter on what part of the road, at any time while its list of charges for carrying freight remains unchanged. *Hines* v. *R. R.*, 434.

6. This Statute embraces all railroads doing business in this State, whether incorporated by the laws of this State or not, the object of the Statute being to secure uniformity in charges for transporting freight by all railroads doing business in this State. *Ibid.*

7. Where a railroad corporation chartered by another State, leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. *Ibid.*

8. Where a railroad corporation is chartered by the laws of this State, and also of another State, it is completely subject to the laws of this State, except as otherwise expressly provided by its charter. *Ibid.*

9. The penalty imposed by §1966 of *The Code*, is incurred when the prohibited charge is made. It is not necessary that the illegal charge should have been paid. *Ibid.*

10. The words in this Statute, "transported in the same direction," etc., mean the direction in which the freight is carried from the depot where the shipment is made, and embraces branches of the same road in that direction, which are used in connection with, and as a part of the same road. If the corporation uses two or more distinct roads, not in connection, *it may be, that it could have a different class of* charges for each of its roads. *Ibid.*

11. Discrimination in freight tariffs by railroad companies, means to charge shippers of freight, unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. *Ibid.*

12. *Quœre*, whether the provision in the charter of a railroad, fixing a maximum rate for freights and fares, must be treated as such a contract with it on the part of the State as to prevent the Legislature from passing a law regulating such freights and fares. *Ibid.*

13. A statute which only requires uniformity in the charges to be made for transportation, does not provide a maximum for such charges, and therefore does not profess to interfere with the power conferred by the charter on a railroad corporation to fix the freights it will charge, inside of a certain maximum charge allowed by the charter. *Ibid.*

14. The purpose of the Legislature to part with the right to require a corporation to make its charges for transportation equal and uniform, must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference. *Ibid.*

GRANT:

1. Land covered by navigable water is not the subject of entry and grant. *Hodges* v. *Williams*, 331.

2. The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ*, if the State has granted the bed of a stream to another. *Ibid.*

HOMESTEAD:

1. A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even although no homestead was allotted to him during his life. *Smith* v. *McDonald*, 163.

2. Where land is allotted to a person as a homestead upon his own petition, it is a dedication of it by him, to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired. *Castlebury* v. *Maynard*, 281.

3. Without the joinder of the wife, the deed of the husband for the homestead is a nullity, since the Constitution of 1868. *Ibid.*

4. A divorce *a mensa et thoro*, does not change the property rights of either the husband or wife. *Ibid.*

5. If the defendant, in an action to recover land, sets up the defence that he is entitled to a homestead therein, such defence is embraced, and should be considered, under the issue raised as to the plaintiff's ownership and right to the possession of the land. *Morrison* v. *Watson*, 479.

6. The constitutional provision for a Homestead, and the Statutes enacted in pursuance thereof, requires a specific allotment of the Homestead in severalty, and does not permit any community of interest between the homesteader and the purchaser of the excess. *Campbell* v. *White*, 491.

7. *Therefore*, where it was found as a fact, that the land and buildings thereon in which the homestead was claimed, were of the value of $1,200, but were incapable of division, it was erroneous to direct that the interest therein, proportionate to the excess, should be sold and applied to the payment of the claims of the execution creditors. *Ibid.*

8. Although the land belonging to and claimed by the judgment debtor is indivisable, he is not entitled to have the whole of it allotted to him as a homestead, if it exceeds in value one thousand dollars. *Ibid.*

9. In laying off the homestead, it is not necessary for the appraisers to run it off by course and distance, and any description by which the land can be located, is a compliance with the provisions of the statute. *Ray* v. *Thornton*, 571.

10. Where the land laid off as a homestead is subject to a mortgage, no question affecting the rights and priorities of the mortgagee can be raised unless he is a party to the action. *Ibid.*

11. In allotting the homestead, the value of the buildings erected on the land must be considered by the appraisers, for the homesteader is not entitled to $1,000 worth of land, and also the buildings which may be on it. *Ibid.*

12. A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the statute requires. *Ibid.*

13. An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader. *Ibid.*

HUSBAND AND WIFE:

1. A proceeding under the statute (The Code, §1790), to establish a claim against a *feme covert*, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a Justice of the Peace, if the amount claimed is under two hundred dollars. *Smaw* v. *Cohen*, 85.

2. Where the proceeding is not under the statute, but a civil action, to coerce payment out of the separate estate of a *feme covert*, for her contracts, the Superior Court alone has jurisdiction, although the amount be less than two hundred dollars. *Ibid.*

3. The provisions of The Code, allowing a *feme covert* to sue alone regarding her separate property, does not remove the disability of coverture, so as to allow the statute of limitations to bar her right of action. *Campbell* v. *Crater*, 156.

4. Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed, and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884. *Walton* v. *Parish*, 259.

5. Before the Constitution of 1868, a deed directly from the husband to the wife was void at law, but it would be upheld in equity as a defective conveyance, if the wife could show herself to be meritorious; that is, was the intention of the husband to divest the estate from himself, and to create a separate estate for her, which she should have the immediate power to dispose of; and that the estate thus intended for her, was a reasonable provision. *Ibid.*

6. All gifts from a husband to his wife, will be upheld *inter sese*, and as against all persons claiming under them, and such gifts are good against existing creditors, if the husband retain property sufficient to pay his debts, and are only void if made with a fraudulent intent. *Ibid.*

7. Where, in 1862, a husband was about to enter military service, made a deed to his wife of certain land, for her support, but retained sufficient property to pay all of his existing debts; *It was held*, that the consideration was a meritorious one. *Ibid.*

8. Where a deed was made from husband to wife in 1862, for her support which it was alleged was lost until 1884, when it was registered, and in the meantime, the husband lived on the land, and no efforts were made to set up the lost deed; *It was held*, strong evidence of fraud, as against subsequent creditors of the husband. *Ibid.*

9. Such deed relates back after registration to its date, and is not a marriage settlement, which is only valid from its registration. *Ibid.*

10. Where husband and wife are jointly sued for the wife's land, the plaintiff is not entitled to a judgment for the husband's interest upon his failure to answer. *Ibid.*

11. Where land was acquired and a marriage took place prior to the adoption of the Constitution of 1868, the husband can make a good title without the joinder of the wife, but if the land was acquired, or the

HUSBAND AND WIFE—*Continued:*

marriage took place after date, the wife must join in the deed. *Castlebury* v. *Maynard*, 281.

12. Where land is allotted to a person as a homestead upon his own petition, it is a dedication of it by him, to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired. *Ibid.*

13. Without the joinder of the wife, the deed of the husband for the homestead is a nullity, since the Constitution of 1868. *Ibid.*

14. A divorce *a mensa et thoro*, does not change the property rights of either the husband or wife. *Ibid.*

15. A *feme covert* may be sued in the court of a Justice of the Peace, for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free-trader. *Neville* v. *Pope*, 346.

16. Where a *feme covert* was sued with her husband, whom she instructed to make a proper defence to the action, which he failed to do; *It was held*, no ground for an injunction to restrain the collection of the judgment, in the absence of fraud. *Ibid.*

17. The defence of coverture must be made in apt time in order to be available. *Ibid.*

18. An executory agreement made between persons competent to contract, in contemplation of marriage, wherein it is stipulated by the wife, that she shall take an equal share with the heirs-at-law and distributees of the husband "in lieu of dower and any other provision made and provided by law for widows of deceased persons," will be enforced by the Courts in the exercise of their equitable jurisdiction. *Brooks* v. *Austin*, 474.

19. The fact that the husband of a woman who claimed title to a tract of land, sold and conveyed it to another person, does not, *per se*, raise a presumption that he claimed under his wife. *Graybeal* v. *Davis*, 508.

20. A husband is not indictable for slandering his wife. *State* v. *Edens*, 693.

21. A husband is not indictable for an assault on his wife, unless it puts life or limb in peril, or other permanent injury to the person is inflicted, or where it is prompted by a malicious or revengeful spirit. *Ibid.*

IDEM SONANS:

Where the defendant was indicted for perjury charged to have been committed upon the trial of one *Willis Fain*, and the record introduced as evidence described the party as *Willie Fanes; Held*, that the maxim, *idem sonans* governed, and there was no variance. *State v. Hare*, 682.

ILLEGITIMATE CHILD:

1. Carnal intercourse with an illegitimate child is a felony. *State* v. *Laurence*, 659.

ILLEGITIMATE CHILD—*Continued:*

2. Where the indictment charged the defendant with carnal intercourse with his "daughter," and the proof was that the person alleged to be the daughter was an illegitimate child of the defendant; *Held*, there was no variance. *Ibid.*

INCEST:

Carnal intercourse with an illegitimate child is a felony. *State* v. *Laurence*, 659.

INDICTMENT:

1. After the jury is empanelled in a criminal action the State cannot enter a *nol pros* without the consent of the accused. *State* v. *Thompson*, 596.

2. If upon the trial of an indictment, containing several counts, the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from the consideration of the jury. *Ibid.*

3. A plea of not guilty by a corporation is an admission of its corporate existence. *State* v. *R. R. Co.*, 602.

4. A general verdict of guilty upon an indictment containing two counts—one for Larceny and the other for Receiving—will be sustained, if the evidence justifies either. *State* v. *Stroud*, 626.

5. The statutory offence of wilful burning of a gin-house is a misdemeanor; and an averment in the indictment that it was done *feloniously*—the necessary descriptive terms being employed—will be treated as mere surplusage. *State* v. *Keen*, 646.

6. An indictment for larceny should describe the property alleged to be stolen with such particularity as will enable the Court to see that it is the subject of larceny; that will enable the accused to prepare any defence he may have, and protect him against a subsequent prosecution for the same act. *State* v. *Nipper*, 653.

7. The charge that the defendant stole "three bushels of corn," is supported by proof that he stole three bushels of corn "in the ear." *Ibid.*

8. Where the indictment charged the defendant with carnal intercourse with his "daughter," and the proof was that the person alleged to be the daughter was an illegitimate child of the defendant; *Held*, there was no variance. *State* v. *Laurence*, 659.

9. An averment in an indictment that the defendant did "unlawfully, &c., and intending to cheat and defraud * * * falsely pretend * * * that a certain mare which he * * * was proposing to trade * * * was sound in limb and body, and always had been sound in limb and body, whereas the said mare was broken down in her loins, and had been broken down in her loins," and that he knew these representations to be false, &c., sufficiently charges the crime of false pretense. *State* v. *Sherrill*, 663.

10. An indictable attempt to commit a crime is such an intentional preliminary guilty act as will apparently result in a deliberate crime. *State* v. *Brown*, 685.

INDICTMENT—*Continued:*

11. The acts constituting the alleged attempt should be set forth in the indictment. *Ibid.*

12. Several indictments, preferred at different times, but alleging the same facts in different forms, will be treated as separate counts of one indictment. *Ibid.*

13. *It seems*, that in an indictment for slander, under §1113 of *The Code*, it is not necessary to set forth the words spoken with the same particularity as is required in complaints in civil actions. It is only necessary to allege that they, "in substance," charged the female with incontinency. *State* v. *Edens*, 693.

INFANT:

Where it is sought to show that an infant has ratified a contract in regard to his property, made while he was an infant, evidence is admissible to show that the money received in pursuance of such contract was used for the infant's advantage, with his knowledge. This evidence does not of itself show a ratification, but is admissible as explanatory of what occurred. *Owens* v. *Phelps*, 286.

INJUNCTION:

1. A decree or order granting or dissolving an injunction is not vacated by an appeal. *Green* v. *Griffin*, 50.

2. A party who intentionally violates an interlocutory order, is guilty of contempt, although he acted in good faith upon professional advice honestly given, that the appeal had vacated the injunction. *Ibid.*

3. In an action to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, a transcript of the record should be set out, so that the court can see from the record itself, whether or not there was a fatal lack of jurisdiction. *Neville* v. *Pope*, 346.

4. Where the court has jurisdiction, errors in the judgment cannot be corrected by an injunction, but only by appeal, except where fraud is alleged. *Ibid.*

5. Where it is sought to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, every presumption is in favor of the jurisdiction, and it must be made to appear affirmatively from the record, that the court had no jurisdiction. *Ibid.*

6. Where a *feme covert* was sued with her husband, whom she instructed to make a proper defence to the action, which he failed to do; *It was held*, no ground for an injunction to restrain the collection of the judgment, in the absence of fraud. *Ibid.*

INJURIES TO HOUSES:

1. One who peaceably enters upon land, believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under §1062 of *The Code*. *State* v. *Reynolds*, 616.

INJURIES TO HOUSES—*Continued:*

2. Possession, actual or constructive, is essential to the maintenance of an action for trespass. *Ibid.*

INJURY TO STOCK:

1. Where a horse was feeding within three feet of a railroad track, in plain view of the engineer, who did not slacken the speed of the train, or take other precautions, until the train was within close proximity to the horse, and he had gotten upon the track, *It was held*, negligence. *Snowden* v. *R. R. Co.*, 93.

2. There is no requirement at common law, and no statute in the State, obliging railroad companies to fence their tracks. So, where in constructing a railroad, a portion of the plaintiff's pasture fence was removed, and a cut about eight feet deep was made where the fence had been, into which the plaintiff's horse fell and was killed; *It was held*, that the railroad company was not liable. *Jones* v. *R. R. Co.*, 328.

INLAND NAVIGATION:

1. Navigation upon a sound of limited area, lying entirely within a State, is inland navigation, and is not embraced in the provisions of the Act of Congress. Rev. Stats. of the U. S., §§4282, 4289. *Woodhouse* v. *Cain*, 113.

2. Navigation on Currituck Sound, in this State, is inland navigation. *Ibid.*

INSANITY:

1. So where services were rendered by an attorney, which were paid for out of the trust money by an administrator who was afterwards judicially declared to be insane at the time the services were rendered, the disbursement will be allowed in the absence of any allegation that the services of the attorney were not necessary. *Young* v. *Kennedy*, 265.

2. Where evidence was offered tending to show that the vendor was of unsound mind, and had executed the deed under an insane impulse and without consideration; *It was held*, that it was competent for those who claimed under the assailed deed to show letters, declarations and other acts of the vendor explanatory of his motives, and of the consideration which moved him. *Fitzgerald* v. *Shelton*, 519.

INTEREST:

1. So, the parties to a mortgage cannot stipulate for a higher rate of interest than that reserved by the mortgage, nor can they incorporate any additional debt into the mortgage, nor can they agree that arrears of interest should be converted into principal money, and bear interest, as against *puisne* encumbrances, or other assignee of the equity of redemption. *Ballard* v. *Williams*, 126.

2. In applying these rules, a vendor and vendee, when the purchase money, or a portion thereof, remains unpaid, will be regarded in the same light as a mortgagor and mortgagee. *Ibid.*

3. Where a bond or other instrument for the payment of money, does not specify on its face that interest is to be paid, interest is in the nature of damages, and the payment of the principal money will bar an

INTEREST—*Continued:*

action for the interest, but where interest is stipulated for in the contract itself, it becomes a part of the debt, and may be recovered, although the principal sum has been paid. *King* v. *Phillips*, 245.

4. An agent or other person who is entitled by contract, or under the law, to compensation measured by a *per centum* of the amount collected, is authorized to at once deduct the amount of his commissions, and is only accountable for the residue. *Wiley* v. *Logan*, 358.

5. In such case, in an action for an account, if the agent is charged with the entire amount collected, with interest, he is entitled to be allowed interest on his commissions from the date of the receipt of the money. *Ibid.*

6. In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury. *Arrington* v. *Goodrich*, 462.

7. An agreement, entered into with full knowledge, and with the intent to pay and receive a greater rate of interest than is allowed by law, whereby it is stipulated that the party advancing the money shall receive a commission as a consideration therefor, in addition to the legitimate interest, is usurious, and forfeits the interest. *The Code*, §3836. *Ibid.*

8. The mortgagor covenanted, in addition to the stipulation to repay the sums advanced with 8 per cent. interest, that he would ship to the mortgagee for sale, "double the quantity of cotton necessary to pay the amount advanced, and in case of failure so to ship, to pay to the mortgagee two and one-half per cent. on the amount failed to be shipped as liquidated damages for the breach of this covenant." Whether such agreement is usurious upon its face, *Quœre*. *Ibid.*

INTERLOCUTORY ORDERS:

1. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the Court upon that specific point. The order, or judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the Court below. *Green* v. *Griffin*, 50.

2. A party who intentionally violates an interlocutory judgment of the Court is guilty of contempt although he may have acted in good faith upon professional advice honestly given. *Ibid.*

3. An appeal from an interlocutory order only lies when it affects some substantial right and will work injury to the appellant if not corrected before an appeal from the final judgment. *Leak* v. *Covington*, 193.

4. Where an action was submitted to referees, and exceptions filed to their report, some of which the Court overruled, and returned the case in order to try the other issues raised by the pleadings, *It was held*, not to be an appealable order. *Ibid.*

5. Whenever an order or judgment puts an end to the action or proceeding, or an interlocutory order will deprive a party of a substantial right, if the alleged error shall not be corrected before the final judgment, an appeal lies. *Ex parte Spencer*, 271.

INTERLOCUTORY ORDERS—*Continued:*

6. Interlocutory orders are under the control of the Court, and upon good cause shown, they can be amended, modified, changed or rescinded, as the Court may think proper. *Maxwell* v. *Blair*, 317.

INTERSTATE COMMERCE:

1. An act of the Legislature of a State, which undertakes to regulate the charges made by railroads for transportation on freight to be carried from one State to another, is unconstitutional and void. *McGwigan* v. *R. R.*, 428.

2. State interference with interstate commerce, is absolutely forbidden by the constitution of the United States, and the failure of Congress to take any action in the premises, does not give the States power to pass any law in relation thereto. *Ibid.*

ISSUES:

1. It is the duty of a party to an action to tender such issues as he conceives are necessary, to try the case upon the merits; and an exception made after the trial, that issues, which might properly have been submitted were not, comes too late. *Oakley* v. *Van Noppen*, 60.

2. The Court ought not to render judgment upon an aspect of the case not presented by the pleadings, or verdict upon the issues submitted to the jury. *Ibid.*

3. It is not error for the Court to refuse to submit an issue not raised by the pleadings. *Lewis* v. *R. R. Co.*, 179.

4. A new trial will not be granted because of the submission of alleged improper issues, when they were submitted after argument and without objection, and substantially cover the merits of the case. *Clements* v. *Rogers*, 248.

5. When a material defence is pleaded, it is proper for the Court to submit an issue on it. *Owens* v. *Phelps*, 286.

6. So where an action was brought by the heirs-at-law of a deceased vendee of land, asking that the vendor be forced to make title to them, and he pleaded that the administrator had agreed with him to rescind the contract, which was ratified by the heirs-at-law, an issue as to such ratification was properly submitted to the jury. *Ibid.*

7. The verdict must be taken in connection with, and interpreted by the issue, and when by necessary implication the answer to the issue disposes of the matter in controversy, it will not be set aside, although not so full as might be desirable. *R. R. Co.* v. *Purifoy*, 302.

8. So, where in an action to set up a lost deed, the jury found that the defendant had not executed a deed for any part of the land, but did not specifically find that no deed was ever executed, *it was held*, that the verdict was sufficiently responsive. *Ibid.*

9. Where a party to an action prepares issues which are submitted, and then objects to another issue submitted by the Court, he cannot be heard to assign as error that the Court did not submit an issue on a particular question, upon which he did not ask an issue. *McDonald* v. *Carson*, 377.

ISSUES—*Continued:*

10. It is too late, after the trial, to complain that certain issues were not submitted to the jury, if they were not asked for in apt time. *Ibid.*

11. Where, in the opinion of the Court, additional findings are necessary in order to do justice between the parties, the case may be sent back for the trial of additional issues. *Ibid.*

12. Where, under the Judge's charge, the appellant gets the substantial benefit of an issue raised by the pleadings, he cannot object, on appeal, that the issue was not submitted more formally, when he does not ask for such issue on the trial. *Ibid.*

13. If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. *Morrison* v. *Watson*, 479.

14. If the defendant, in an action to recover land, sets up the defence that he is entitled to a homestead therein, such defence is embraced, and should be considered, under the issue raised as to the plaintiff's ownership and right to the possession of the land. *Ibid.*

15. Where a material issue is raised by the answer, although the matter is not alleged in the complaint, it is not error to submit an issue on it. *Shaw* v. *McNeill*, 535.

16. Where an issue is raised by the pleadings and submitted to the jury, it is error for the Court to exclude any evidence pertinent thereto. *Farrior* v. *Houston*, 578.

17. Mere matters of evidence should never be pleaded, as they do not raise issues, and when they are pleaded, they should be disregarded. *Ibid.*

18. Where the defendant in his answer denied a material allegation in the complaint; but went on to state evidential facts; *It was held*, that the bad plea did not vitiate the good one, and it should be treated as surplusage. *Ibid.*

JOINDER OF CAUSES OF ACTION:

1. The provisions of The Code in regard to the joinder of causes of action, have not made any substantial change from the rules of equity practice in regard to multifarious bills, except to enlarge the right to unite in one action different causes of action. *Heggie* v. *Hill*, 303.

2. Under the former equity practice, the bill was not multifarious, when there was a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct. *Ibid.*

3. Where there were two mortgages on a tract of land, and it was sold first under the second mortgage, and afterwards under the first, and then the interest of the purchaser at the sale under the first mortgage was sold under execution, an action by the purchaser at the sale under the second mortgage, against the purchaser at the execution sale, the purchaser at the sale under the first mortgage, and the first mortgagee alleging that the first mortgage debt was paid, or nearly so, at the time of the sale under that mortgage, and asking judgment, 1st. For the possession of the land if the debt had been paid, and if not; 2d. For an account of the amount due on the first mortgage, and for the payment to him of the excess of the purchase money after paying the

JOINDER OF CAUSES OF ACTION—*Continued:*

debt; *It was held*, that the complaint was not multifarious, and a demurrer for misjoinder of causes of cation would be overruled. *Ibid.*

JUDGE'S CHARGE:

1. Where there is a conflict between the recollection of the trial judge and counsel as to what a certain witness testified, it is not error for the judge to leave the matter to the jury as to what the evidence is. *Spence* v. *Baxter*, 170.

2. In such case it is not error for the trial judge to refuse to tell the jury that the witness had testified to certain facts, when his notes do not show any such testimony, and he has no recollection of it. It is entirely proper for him to leave the matter to the jury to remember what the evidence was. *Ibid.*

3. It is not error for the Court to refuse to charge the jury upon a point not raised by the pleadings, and upon which there is no controversy. *Lewis* v. *R. R. Co.*, 179.

4. While the charge to the jury may be incorrect in part, a new trial will not be granted if the trial judge in a subsequent part of the charge corrects it and leaves the matters in controversy fairly to the jury. *Ibid.*

5. If a special instruction asked for is substantially given it is all that is required. A party has no right to have his prayers for instruction, even if proper, given to the jury in the very words in which they are asked. *Clements* v. *Rogers*, 248.

6. The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. *Ibid.*

7. Where a party asks the Court to charge the jury that if the other party has not satisfied them by a preponderance of evidence, they should find a certain way, it is an admission that there is some evidence to go to the jury to prove the fact. *Owens* v. *Phelps*, 286.

8. It is too late to ask an instruction that there was no evidence to sustain a verdict on a certain issue after the verdict has been rendered. *Ibid.*

9. When the evidence on a question at issue is conflicting, the losing party cannot complain when the trial judge leaves the question to the jury, with an impartial charge as to the law. *Morgan* v. *Lewis*, 296.

10. The trial judge is not required, in the absence of a prayer for special instructions, to present the evidence in his charge in every possible aspect. If the parties desire more specific instructions, they must ask for them at the proper time. *Ibid.*

11. Whether the jury, having retired under instructions to which there was no exception, shall be recalled for further directions, is within the discretion of the Court, and not reviewable. *Lafoon* v. *Shearin*, 391.

12. Where a party objects to a portion of an answer made by a witness because it is not responsive, he should ask the Court to require its withdrawal, or to tell the jury to disregard it. *Deming* v. *Gainey*, 528.

JUDGE'S CHARGE—*Continued:*

13. It is the duty of the appellant to show error, and if the Court cannot see from the record that a charge given to the jury is erroneous, it will not grant a new trial. *Ibid.*

14. Where the evidence presents the case in two aspects, it is proper for the trial Judge to charge the jury upon the law as it arises upon both aspects, and then leave the question of fact to be passed on by the jury. *Spence* v. *Clapp*, 545.

15. The effect to be given to testimony is exclusively for the jury, and it is error for the trial Judge, in his charge, to instruct them that in finding a fact, they must be guided by the rules which the Chancellor has laid down for their guidance, where they were required to pass on the facts. *Ferrall* v. *Broadway*, 551.

16. So, while a Chancellor would require very strong evidence to rebut the fact of marriage where the parties have lived together as man and wife, and have generally been so reputed to be, after the death of one of them, it is error for the Judge to charge the jury that they must be governed by this rule. *Ibid.*

17. In cases where the character of the evidence is suspicious, the trial Judge may call the fact to the attention of the jury, as in the case of accomplices, or near relatives of the accused, or of fellow-servants, or of a witness who has sworn falsely in a part of his testimony, but these matters of discredit are for the jury to consider, and the Judge can only caution the jury, so as to induce them to make a careful scrutiny of such evidence. *Ibid.*

18. An inadvertent, erroneous instruction to the jury, accompanied by an explanation, or modification, which in effect corrects the error, will not be considered sufficient to award a new trial, unless it clearly appears that the jury was thereby misled and the appellant suffered wrong. *State* v. *Keen*, 646.

19. A general statement that the appellant "excepted to the whole of the charge of the Court," is too vague, and will not be considered on appeal. *State* v. *Nipper*, 653.

JUDGMENT:

1. The Court ought not to render judgment upon an aspect of the case not presented by the pleadings, or verdict upon the issues submitted to the jury. *Oakley* v. *Van Noppen*, 60.

2. In an action to recover for work and labor upon the construction of a house, the Court may, in a judgment for the amount due, decree a lien on the premises therefor. *Ibid.*

3. Where plaintiff sues on a note, and the defendant admits the cause of action, but pleads a counter-claim sounding in damages, which is the only matter tried before the jury, who find a verdict in the defendant's favor, the amount of the note sued on by the plaintiff must be deducted from the damages given by the jury, and judgment only entered for the balance. *Bush* v. *Hall*, 82.

4. Upon appeals, the Supreme Court will enter such judgment or decree, as upon inspection of the whole record, it shall appear, ought to be rendered. *Ibid.*

JUDGMENT—*Continued:*

5. A judgment by default final cannot be rendered unless the complaint is verified. *Hammerslaugh* v. *Farrior*, 135.

6. Where the judgment was rendered in the Superior Court against three defendants, only one of whom appealed, the Supreme Court, upon affirming the judgment, will remand the case, in order that the judgment may be enforced against all of the defendants. *Baxter* v. *Wilson*, 137.

7. Where a judgment was rendered on the 20th of October, 1873, and an action was brought on the judgment on the 20th of October, 1883, *it was held* that the statute barring actions on judgment in ten years, was a defence to the action. *Cook* v. *Moore*, 1.

8. A judgment by default final cannot be entered when the complaint is unverified. *Hartman* v. *Farrior*, 177.

9. Where the complaint only alleges the value of the goods sold, but does not allege a promise to pay, a judgment by default final cannot be rendered. *Ibid.*

10. A judgment confessed under Section 571 of The Code, must contain a verified statement of the facts and transactions out of which the indebtedness arose. Where the affidavit of the debtor set out that he was justly indebted to the judgment creditor in a certain amount, but did not embrace the account which was filed, *It was held*, not a compliance with the statute, and that the judgment was void. *Davenport* v. *Leary*, 203.

11. By virtue of the Constitution of the United States, and Acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the Court. *Miller* v. *Leach*, 229.

12. Where husband and wife are jointly sued for the wife's land, the plaintiff is not entitled to a judgment for the husband's interest upon his failure to answer. *Walton* v. *Parish*, 259.

13. Where the court has jurisdiction, errors in the judgment cannot be corrected by an injunction, but only by appeal, except where fraud is alleged. *Neville* v. *Pope*, 346.

14. Where it is sought to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, every presumption is in favor of the jurisdiction, and it must be made to appear affirmatively from the record, that the court had no jurisdiction. *Ibid.*

15. A motion in the cause is the proper remedy for setting aside an irregular judgment. *Ibid.*

16. If by the inadvertence of the Court, or of any one acting for it, the judgment entered, or record made, is not in conformity to that pronounced or ordered, the Court may at any time, upon the application of any person in interest, or *ex mero motu*, correct it so that it shall truly express the action of the Court. This jurisdiction is distinct

JUDGMENT—*Continued:*

from that conferred by §274 of *The Code*, which provides a remedy for relief against excusable mistake, &c., of *parties* to the action. *Strickland* v. *Strickland*, 471.

17. The Supreme Court examines the whole record on appeal, and pronounces such judgment as shall appear ought to be rendered thereon. *Morrison* v. *Watson*, 479.

18. Under the present system, a judgment in an action to recover land is as complete an estoppel as in any other action. *Benton* v. *Benton*, 559.

19. If a prisoner, under sentence of death, is respited and escapes, and is not recaptured before the day fixed for the execution, the Judge of the Superior Court may, at a subsequent term, direct the sentence to be carried into effect. *State* v. *Cardwell*, 643.

20. The Court has power during the term to correct or modify an unexecuted judgment in criminal as well as civil matters. *State* v. *Manly*, 661.

JUDGMENT—DORMANT:

In an application to revive a dormant judgment, the affidavit of the judgment creditor is not the only evidence upon which the Clerk may proceed, and when the judgment debtor is present, and makes no objection to the order, it is sufficient evidence to warrant the revival of the judgment, although the judgment creditor does not make an affidavit at all. *Hinton* v. *Roach*, 106.

JUDGMENT—IRREGULAR:

1. A stranger purchasing at a sale under an execution issued on an irregular judgment, gets a good title, and even the plaintiff in the judgment gets a good title, unless the judgment is afterwards set aside, upon a motion by a party to the judgment who is prejudiced by the irregularity. *Hinton* v. *Roach*, 106.

2. A motion in the cause is the proper remedy for setting aside an irregular judgment. *Neville* v. *Pope*, 346.

JUDICIAL SALE:

Where, in a proceeding to sell land by decree of a Court, the pleadings and proceedings purport to sell a perfect title, a purchaser at such sale will not be required to pay the money and take the land, if it turns out that the title is imperfect; but where the true state of the title is set out in the pleadings, he will not be released from his bid, if the title is not good. *Eccles* v. *Timmons*, 540.

JURISDICTION:

1. A want of jurisdiction apparent on the record will be taken notice of by the Supreme Court, although not pointed out by demurrer. *Smaw* v. *Cohen*, 85.

2. The jurisdiction of a Court of Equity to remove a cloud upon title, is founded on the inadequacy of the remedy at law, and it does not arise when the plaintiff has a remedy by an action at law. *Byerly* v. *Humphrey*, 151.

JURISDICTION—*Continued:*

3. A *feme covert* may be sued in the court of a justice of the peace, for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free-trader. *Neville* v. *Pope*, 346.

4. In an action to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, a transcript of the record should be set out, so that the court can see from the record itself, whether or not there was a fatal lack of jurisdiction. *Ibid.*

5. Where the court has jurisdiction, errors in the judgment cannot be corrected by an injunction, but only by appeal, except where fraud is alleged. *Ibid.*

6. Where it is sought to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, every presumption is in favor of the jurisdiction, and it must be made to appear affirmatively from the record, that the court had no jurisdiction. *Ibid.*

7. A motion in the cause is the proper remedy for setting aside an irregular judgment, and not an injunction. *Ibid.*

8. Where a *feme covert* was sued with her husband, whom she instructed to make a proper defence to the action, which he failed to do; *It was held*, no ground for an injunction to restrain the collection of the judgment, in the absence of fraud. *Ibid.*

9. The defence of coverture must be made in apt time in order to be available. *Ibid.*

JURISDICTION—CLERKS OF THE SUPERIOR COURT:

1. Although the *office* of "Probate Judge" is abolished, the powers and jurisdiction of that officer are now exercised by the Clerks of the Superior Court—not as the servant or ministerial officer of or acting as and for the Superior Court, but as an independent tribunal of original jurisdiction. *Edwards* v. *Cobb*, 4.

2. The Clerks of Superior Courts have jurisdiction of proceedings for the removal of executors and administrators. *Ibid.*

3. Whether the Superior Courts have such original jurisdiction, *Quœre.* *Ibid.*

4. The practice upon application to remove executors and administrators, discussed by *Merrimon, J.* *Ibid.*

5. In appeals from the Clerk, in that class of cases of which he has jurisdiction, not as and for the Court, as in special proceedings, but in his capacity as Clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the Judge any statement of the case on appeal. *Ex Parte Spencer.* 271.

JURISDICTION—JUSTICE OF THE PEACE:

1. In an action before a Justice of the Peace in which two causes of action were alleged, the first sufficiently but the second defectively, for want of proper averment of jurisdictional facts, the Justice may proceed to judgment upon the first. *Singer Mfg. Co.* v. *Barrett*, 36.

JURISDICTION—JUSTICE OF THE PEACE—*Continued:*

2. In an action before a Justice of the Peace for the recovery of the value or return of property under Section 267 of The Code, it must be averred in the summons that the value thereof does not exceed fifty dollars. *Ibid.*

3. The Justice of the Peace, or the Superior Court on appeal, has power to make such amendments to the record of an action that will bring it within the jurisdiction of the Court where it originated. *Ibid.*

4. A proceeding under the statute (The Code, §1790), to establish a claim against a *feme covert*, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a Justice of the Peace, if the amount claimed is under two hundred dollars. *Smaw* v. *Cohen*, 85.

5. Where the proceeding is not under the statute, but a civil action, to coerce payment out of the separate estate of a *feme covert*, for her contracts, the Superior Court alone has jurisdiction, although the amount be less than two hundred dollars. *Ibid.*

6. A *feme covert* may be sued in the court of a Justice of the Peace, for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free-trader. *Neville* v. *Pope*, 346.

JURISDICTION—SUPERIOR COURT:

1. Whether the Superior Courts have jurisdiction of proceedings to remove executors and administrators, *Quœre*. *Edwards* v. *Cobb*, 4.

2. A want of jurisdiction apparent on the record, will be taken notice of by the Supreme Court, although not pointed out by a demurrer. *Smaw* v. *Cohen*, 85.

3. A proceeding under the statute (The Code, §1790), to establish a claim against a *feme covert*, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a Justice of the Peace, if the amount claimed is under two hundred dollars. *Ibid.*

4. Where the proceeding is not under the statute, but a civil action, to coerce payment out of the separate estate of a *feme covert*, for her contracts, the Superior Court alone has jurisdiction, although the amount be less than two hundred dollars. *Ibid.*

5. Moneys paid into the office of the Clerk of the Superior Court by executors, administrators and collectors, under the provisions of The Code, §§1543 and 1544, do not pass into the jurisdiction of the Superior Court, but the Clerk receives and is responsible for them, officially, as a public depository. *Ex Parte Cassidey*, 225.

6. It is the duty of the Clerk on demand promptly to pay over such moneys to those who were entitled to receive them from the executor, administrator, or collector; and should he fail to do so the same remedies are available as against him as are provided by Sections 1510 and 1511 of The Code, against executors, administrators and collectors. *Ibid.*

7. The Superior Court has no jurisdiction upon petition, motion or summary orders to direct the disposition of such moneys. *Ibid.*

JURISDICTION—SUPERIOR COURT—*Continued:*

8. Since the adoption of the Constitution of 1868, the Superior Court administers both legal and equitable rights, and when necessary both are administered in the same action. *Vegelahn* v. *Smith*, 254.

9. In appeals from the Clerk acting not as and for the Court, but in his capacity as Clerk, the Judge can either find the facts himself, or he can submit them to a jury. *Ex Parte Spencer*, 271.

10. The Court has power, during the term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. *State* v. *Manly*, 661.

JURISDICTION—SUPREME COURT:

1. Where there is any evidence to support the finding of fact by a reference, the jurisdiction of the Supreme Court is limited to correcting any errors of law, and the findings of fact are conclusive. *Wiley* v. *Logan*, 358.

2. The Supreme Court examines the whole record transmitted to it upon appeal, and pronounces such judgment as shall appear to it ought to be rendered thereon. *The Code*, §957. *Morrison* v. *Watson*, 479.

JURY:

1. A challenge to a juror must be made before the jury is empaneled, and if not made in apt time, it is a matter in the discretion of the trial Judge whether he will set aside the verdict. *Baxter* v. *Wilson*, 137.

2. So where one of the jurors was related to the plaintiff, but no objection was made on this ground until after verdict, the refusal of the trial Judge to set aside the verdict cannot be assigned as error on the appeal. *Ibid.*

3. The testimony of a juror will not be received in support of a motion to set aside a verdict in which he has joined. *Lafoon* v. *Shearin*, 391.

4. Upon a challenge to the favor, the Court is the judge of the qualifications of the juror, and its determination is not reviewable. *State* v. *Green*, 611.

5. The Court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is empaneled. *Ibid.*

6. A juror who, on his *voir dire*, states that he has formed and expressed an opinion upon the guilt of the defendant based upon rumors, but that his mind is not so far prejudiced thereby that he could not render a fair and impartial verdict, is a competent juror. *Ibid.*

JUSTICE OF THE PEACE:

1. In an action before a Justice of the Peace in which two causes of action were alleged, the first sufficiently but the second defectively, for want of proper averment of jurisdictional facts, the Justice may proceed to judgment upon the first. *Singer Mfg. Co.* v. *Barrett*, 36.

2. In an action before a Justice of the Peace for the recovery of the value or return of property under Sec. 267 of The Code, it must be averred in the summons that the value thereof does not exceed fifty dollars. *Ibid.*

JUSTICE OF THE PEACE—*Continued:*

3. The Justice of the Peace, or the Superior Court on appeal, has power to make such amendments to the record of an action that will bring it within the jurisdiction of the Court where it originated. *Ibid.*

LANDLORD AND TENANT:

1. A tenant is estopped to deny his landlord's title, but when the plaintiff fails to show any title in himself, and relies entirely on this estoppel, the judgment should only be that he recover the possession, and the defendant should be left free to assert any title he may have in another action. *Benton* v. *Benton*, 559.

2. Where the plaintiff sued for two tracts of land, and the defendant denied there was any contract of renting as to one of them, and the plaintiff testified that he intended to rent all the land he had title to, and that the defendant had the right to cultivate both tracts, but that he did not expressly mention the one in dispute, *It was held*, sufficient evidence to extend the estoppel to both tracts. *Ibid.*

LARCENY:

1. The defendant purchased a horse, but upon the condition that the title was not to pass until the price was paid; failing to pay, the vendor recovered possession, and thereupon the defendant, in the night, secretly took the horse from the vendor's stable and carried it away in a manner indicating a felonious purpose. *Held*, that a charge to the jury that the defendant would be guilty of larceny if the taking was not under a *bona fide* belief that he had the *property*, or an *interest* in the horse, was not erroneous. *State* v. *Thompson*, 596.

2. A general verdict of guilty upon an indictment containing two counts—one for larceny and the other for receiving—will be sustained, if the evidence justifies either. *State* v. *Stroud*, 626.

3. There are no accessories before the fact in larceny; all who aid, abet, advise or procure the crime are principals. *Ibid.*

4. To constitute the crime of receiving it is not necessary that the stolen goods should be traced to the actual personal possession of the person charged; it is sufficient if it be shown that they were received by his agent or servant, or at his instigation deposited in some place directed by him, he knowing that they were stolen. *Ibid.*

5. An indictment for larceny should describe the property alleged to be stolen with such particularity as will enable the Court to see that it is the subject of larceny; that will enable the accused to prepare any defence he may have, and protect him against a subsequent prosecution for the same act. *State* v. *Nipper*, 653.

6. The charge that the defendant stole "three bushels of corn," is supported by proof that he stole three bushels of corn "in the ear." *Ibid.*

LEGACY:

1. A bequest of a pecuniary legacy "out of the estate," or "to be paid," or "to be raised out of my estate," is a charge first upon the personal, and after its exhaustion, upon the real estate of the testator, unless it can be seen from the context, or other parts of the will, that these terms were used in a more restricted sense, and included only the personal estate. *Worth* v. *Worth*, 239.

LEGACY—*Continued:*

2. The testator having, in the first clause of his will, given a pecuniary legacy to his wife to be paid to her in cash or bonds at her option, out "of my estate," and in subsequent clauses made specific devises of the greater part of his "*real* estate," but in disposing of his personal property used the terms "my estate." *Held*, that the real estate specifically devised was not chargeable with the payment of the pecuniary legacy to the wife. *Ibid.*

3. The testator bequeathed to his son M., "four hundred dollars, to be paid him as follows: Upon the death of my wife, he shall recover forty dollars, and forty dollars annually thereafter, till the payments amount to four hundred dollars. The payments shall be made by my son J. and daughter E., each paying twenty dollars annually, and the property bequeathed to them shall be chargeable with said payments." J. was appointed and qualified as executor. The property devised to E. was delivered to her, and that devised to J. was accepted by him. *Held*, That the devise to E. and J. was of specific property, encumbered by the legacy to M., and upon the delivery to E. of her share, and the election of J. to take his, the executor was discharged of all liability in his fiduciary and representative character, and each became separately liable for a moiety of the legacy to be paid as directed. *Hines* v. *Hines*, 482.

LIEN:

1. In an action to recover for work and labor upon the construction of a house, the Court may, in a judgment for the amount due, decree a lien on the premises, therefor. *Oakley* v. *Van Noppen*, 60.

2. A proceeding under the statute (*The Code*, §1790), to establish a claim against a married woman and to have a lien declared for materials furnished and work and labor done in erecting a house on her land, must be brought before a Justice of the Peace, if the amount claimed is under two hundred dollars. *Smaw* v. *Cohen*, 85.

3. A lien is a right by which a person has the right to obtain satisfaction of a debt out of property belonging to the debtor. *Frick* v. *Hilliard*, 117.

4. In the absence of a special contract, one partner has no lien on his co-partner's interest in the partnership property for individual debts due him from the co-partner. *Evans* v. *Bryan*, 174.

5. In order to constitute an agricultural lien, under the statute, the advances must have been made in order to raise the crop to which the lien attaches. *Woodlief* v. *Harris*, 211.

6. It is not necessary for its validity, that a mortgage on crops then growing or to be planted, should contain a provision that the mortgagee should have the right to take possession on default. *Ibid.*

7. Where a mortgage of a crop to be thereafter produced, described it as follows: "gives to M. W. a lien on all crops raised on lands owned or rented by me during the present year," and it was found by the jury that the mortgagor owned a farm on which the cotton in dispute was raised; *It was held*, that the description was sufficient, and the mortgage valid. *Ibid.*

LIEN—*Continued:*

8. Possession of the chattel on which a lien is claimed for work done at common law, is absolutely necessary for the existence of the lien, and by the surrender of the possession, the lien is lost. *McDougall* v. *Crapon*, 292.

9. Under the statute in regard to the liens of laborers and artisans, if the laborer has possession of the chattel on which he claims a lien, he can enforce it by a sale, but if he surrenders it, he loses his lien both at common law and under the statute. *Ibid.*

10. If the laborer has never had possession of chattel on which the lien is claimed, or in cases when he cannot get possession, as in cases of repairs to houses, he can enforce his lien in the manner provided by the statute. *Ibid.*

11. So, where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, *it was held*, that the laborer had no lien on the wagon, either at common law or under the statute for his work done and materials furnished in making the repairs. *Ibid.*

LIQUOR:

1. A number of persons in the city of Raleigh, in 1885, organized a club, for social and literary purposes, and became duly incorporated under the general law. Incidental to the main purposes of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. In 1886, an election was in Raleigh township, under the Local Option Act, at which a majority of the votes were cast for prohibition. *Held*,

(1.) That the furnishing liquors to the members of the club under these circumstances was a sale.

(2.) That such sale was in violation of the Local Option Act, and the defendant was guilty of a misdemeanor. *State* v. *Lockyear*, 633.

2. The commissioners of Dare county, under the Act of 1876-'77, ch. 260, as amended by ch. 38, Laws Special Session of 1880, have no power to grant licenses to sell spirituous liquors except "at Nag's Head Hotel during the months of June, July, August and September." *State* v. *Moody*, 656.

3. The words "at Nag's Head Hotel" mean the locality of the premises forming part of or used with the buildings generally known by that name at the time of the enactment of the statute. *Ibid.*

LOCAL OPTION:

1. A number of persons in the city of Raleigh, in 1885, organized a club, for social and literary purposes, and became duly incorporated under the general law. Incidental to the main purposes of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. In 1886, an election was in Raleigh township, under the Local Option Act, at which a majority of the votes were cast for prohibition. *Held*,

LOCAL OPTION—*Continued:*

(1.) That the furnishing liquors to the members of the club under these circumstances was a sale.

(2.) That such sale was in violation of the Local Option Act, and the defendant was guilty of a misdemeanor. *State* v. *Lockyear*, 633.

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3. The words "at Nag's Head Hotel" mean the locality of the premises forming part of or used with the building generally known by that name at the time of the enactment of the statute. *Ibid.*

MANDAMUS:

If the term of the office into which the plaintiff, in mandamus, demands to be inducted, expires before final judgment, the Court can do nothing but dismiss the action. *Colvard* v. *Commissioners*, 515.

MANSLAUGHTER:

The prisoner and deceased quarreled, and both evinced a willingness to fight, but were prevented by other persons—the prisoner went off, but came back, when the deceased presented a loaded gun and commanded him to stand—the prisoner went into a house near by, but out of sight of deceased, and procured his gun and returned to the deceased, who immediately fired upon and slightly wounded the prisoner, and then sat his gun down—the prisoner then shot and killed deceased. *Held,*

(1.) That the prisoner was at least guilty of manslaughter.

(2.) That it was not error in the Court to charge the jury that under the circumstances of this case, if they believed the evidence, the prisoner was guilty of manslaughter. *State* v. *Crane*, 619.

MARRIAGE:

1. While a Chancellor would require very strong evidence to rebut the fact of marriage where the parties have lived together as man and wife, and have generally been so reputed to be, after the death of one of them, it is error for the Judge to charge the jury that they must be governed by this rule. *Ferrall* v. *Broadway*, 551.

2. Where a man and woman have lived together in adultery, the burden of proof is on those who allege a subsequent marriage to prove it, and the fact that there was a general reputation in the community that they were afterwards married, and the declarations of the man that such was the case, does not require strong and convincing evidence to rebut it, but it must be left to the jury to decide the fact of marriage upon a preponderance of evidence. *Ibid.*

MARRIAGE SETTLEMENT:

1. Where, in 1862, a husband was about to enter military service, made a deed to his wife of certain land, for her support, but retained sufficient property to pay all of his existing debts; *It was held*, that the consideration was a meritorious one. *Walton* v. *Parish*, 259.

MARRIAGE SETTLEMENT—*Continued:*

2. Such deed relates back after registration to its date, and is not a marriage settlement, which is only valid from its registration. *Ibid.*

3. An executory agreement made between persons competent to contract, in contemplation of marriage, wherein it is stipulated by the wife, that she shall take an equal share with the heirs-at-law and distributees of the husband "in lieu of dower and any other provision made and provided by law for widows of deceased persons," will be enforced by the Courts in the exercise of their equitable jurisdiction. *Brooks* v. *Austin*, 474.

MARRIED WOMEN:

(See HUSBAND AND WIFE.)

MASTER AND SERVANT:

1. A master is bound to furnish to his servant, tools and appliances reasonably good and proper for the work the servant is to do, and to do everything essential to the proper prosecution of the work, without exposing the servant to any unnecessary danger, but his is not a guaranty of his safety, nor is he bound to protect him against his own neglect. *Pleasants* v. *R. R. Co.*, 195.

2. One who enters upon the land of another, after being forbidden, as the servant, and at the command of a *bona fide* claimant, is not guilty of any criminal offence. *State* v. *Winslow*, 649.

MONEY HAD AND RECEIVED:

The rule that when one person takes and sells the personal property of another, the latter may waive the tort and recover the money, embraces the case where the person sued received the money in consequence of the action of a Court whose jurisdiction and process he invoked for that purpose. *Olive* v. *Olive*, 485.

MORTGAGE:

1. The distinction between a pledge and a mortgage of personal property is, (1) that in the former the *title* is retained by the pledger, while in the latter, it passes to the mortgagee, and (2) that, the delivery of the possession of the property to the pledgee, is absolutely essential to a pledge, while, *between the parties, but not against creditors or purchasers*, such delivery is not necessary to the validity of mortgage. *McCoy* v. *Lassiter*, 88.

2. At common law, delivery and retention of the custody of the property, was necessary to the validity of a mortgage, as against creditors and purchasers, but now, by statute, registration is substituted therefor. *Ibid.*

3. A mortgage of chattels, in parol, is good, between the parties. No particular form of words is necessary to the constitution of such a mortgage. It is sufficient if it appear that the parties intended it to operate as such. *Ibid.*

4. No particular words of conveyance are necessary to make a mortgage of personal property. *Frick* v. *Hilliard*, 117.

MORTGAGE—*Continued:*

5. The *status* of the mortgage relations, after the transfer of any interest by the mortgagor to a third party, cannot be changed to the detriment of the latter, without his consent. *Ballard* v. *Williams*, 126.

6. So, the parties to a mortgage cannot stipulate for a higher rate of interest than that reserved by the mortgage, nor can they incorporate any additional debt into the mortgage, nor can they agree that arrears of interest should be converted into principal money and bear interest as against *puisne* encumbrancers, or other assignee of the equity of redemption. *Ibid.*

7. In applying these rules, a vendor and vendee, when the purchase money, or a portion thereof, remains unpaid, will be regarded in the same light as a mortgagor and mortgagee. *Ibid.*

8. Where it appeared that the defendant had a registered mortgage on the land of the plaintiff, purporting to be signed by the plaintiff, but it was admitted that said mortgage was a forgery, and that the plaintiff had never executed it, a Court of Equity will entertain a suit to remove the cloud upon the plaintiff's title, although he is still in possession of the land. *Byerly* v. *Humphrey*, 151.

9. Where, in an action to have an alleged forged mortgage cancelled as a cloud upon title, the defendant sets up as a defence, that the money advanced upon such forged mortgage was used to pay off a prior genuine mortgage, and asks to be subrogated to the rights of the first mortgagee; *It was held*, that these facts could not be pleaded either as a defence or counter-claim in this action, but the defendant must set them up in a new action. *Ibid.*

10. In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury. *Arrington* v. *Goodrich*, 462.

11. The mortgagor covenanted, in addition to the stipulation to repay the sums advanced with 8 per cent. interest, that he would ship to the mortgagee for sale, "double the quantity of cotton necessary to pay the amount advanced, and in case of failure so to ship, to pay to the mortgagee two and one-half per cent. on the amount failed to be shipped as liquidated damages for the breach of this covenant." Whether such agreement is usurious upon its face, *Quœre*. *Ibid.*

12. Mortgages are good *inter partes* without registration. *Williams* v. *Jones*, 504.

13. A mortgage both of land and personal property may be registered after the death of the mortgagor. *Ibid.*

14. The registration of a mortgage after a commission in bankruptcy, is good against the assignee. *Ibid.*

15. Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support; *It was held*, that the widow took the property subject to the mortgage lien. *Ibid.*

16. Where the land laid off as a homestead is subject to a mortgage, no question affecting the rights and priorities of the mortgagee can be raised unless he is a party to the action. *Ray* v. *Thornton*, 571.

MOTION IN THE CAUSE:

A motion in the cause is the proper remedy to set aside an irregular judgment. *Neville* v. *Pope*, 346.

MULTIFARIOUSNESS:

1. The provisions of The Code in regard to the joinder of causes of action, have not made any substantial change from the rules of equity practice in regard to multifarious bills, except to enlarge the right to unite in one action different causes of action. *Heggie* v. *Hill*, 303.

2. Under the former equity practice, the bill was not multifarious, when there was a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct. *Ibid.*

3. Where there were two mortgages on a tract of land, and it was sold first under the second mortgage, and afterwards under the first, and then the interest of the purchaser at the sale under the first mortgage was sold under execution, an action by the purchaser at the sale under the second mortgage, against the purchaser at the execution sale, the purchaser at the sale under the first mortgage, and the first mortgagee alleging that the first mortgage debt was paid, or nearly so, at the time of the sale under that mortgage, and asking judgment, 1st. For the possession of the land if the debt had been paid, and if not; 2d. For an account of the amount due on the first mortgage, and for the payment to him of the excess of the purchase money after paying the debt; *It was held*, that the complaint was not multifarious, and a demurrer for misjoinder of causes of action would be overruled. *Ibid.*

MURDER:

The prisoner and deceased quarreled, and both evinced a willingness to fight, but were prevented by other persons—the prisoner went off, but came back, when the deceased presented a loaded gun and commanded him to stand—the prisoner went into a house near by, but out of sight of deceased, and procured his gun and returned to the deceased, who immediately fired upon and slightly wounded the prisoner, and then sat his gun down—the prisoner then shot and killed deceased. *Held*,

(1.) That the prisoner was at least guilty of manslaughter.

(2.) That it was not error in the Court to charge the jury that under the circumstances of this case, if they believed the evidence, the prisoner was guilty of manslaughter. *State* v. *Crane*, 619.

2. Upon the trial of an indictment for infanticide, where it appeared there were no marks of violence upon the deceased, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving upon the body any evidence of the means employed. *State* v. *Morgan*, 641.

3. A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. *The Code*, §1004. *Ibid.*

NAG'S HEAD:

1. The Commissioners of Dare county, under the Act of 1876-'77, ch. 260, as amended by ch. 38, Laws Special Session of 1880, have no power to

NAG'S HEAD—*Continued:*

grant licenses to sell spirituous liquors except "at Nag's Head Hotel during the months of June, July, August and September." *State* v. *Moody*, 656.

2. The words "at Nag's Head Hotel" mean the locality of the premises forming part of or used with the building generally known by that name at the time of the enactment of the statute. *Ibid.*

NAVIGABLE STREAMS:

1. Land covered by navigable water is not the subject of entry and grant. *Hodges* v. *Williams*, 331.
2. By the common law the criterion whether a water was navigable was the ebb and flow of the tide, but this test has no application to the waters of this State, where the test is, whether or not the water is navigable for sea vessels. *Ibid.*
3. A water way lying wholly within a State, and not connected with other waters leading to the sea, is not navigable under the laws of the United States. *Ibid.*
4. The riparian owner of land bordering on a river which is technically not navigable, but which is used as a highway of commerce, owns the land in the bed of the river, subject to an easement in the public to use the river for the purposes of transportation. *Ibid.*
5. A lake fifteen miles long and eight miles wide, which is three and one-half feet deep, and which has no important inlet, and does not form a link in a chain of water communication, is not navigable. *Ibid.*
6. The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ*, if the State has granted the bed of a stream to another. *Ibid.*
7. Where the bed of an unnavigable stream has been granted, a riparian proprietor is not entitled to land made by a withdrawal of the waters. *Ibid.*
8. Where land is relicted by a sudden withdrawal of navigable waters it belongs to the sovereign, but where the withdrawal is gradual it belongs to the riparian proprietor. *Ibid.*

NAVIGATION:

1. The statute of the United States, (Rev. Stats., §4282), does not relieve the owner of a vessel from the consequences of his own negligence, but only from that of his employees and servants. *Woodhouse* v. *Cain*, 113.
2. Navigation upon a sound of limited area, lying entirely within a State, is inland navigation, and is not embraced in the provisions of the Act of Congress. Rev. Stats. of the U. S., §§4282, 4289. *Ibid.*
3. Navigation on Currituck Sound, in this State, is inland navigation. *Ibid.*

NEGLIGENCE:

1. Where a horse was feeding within three feet of a railroad track, in plain view of the engineer, who did not slacken the speed of the train, or take other precautions, until the train was in close proximity

NEGLIGENCE—*Continued:*

to the horse, and he had gotten upon the track, *It was held*, negligence. *Snowden* v. *R. R. Co.*, 93.

2. The statute of the United States, (Rev. Stats., §4282), does not relieve the owner of a vessel from the consequences of his own negligence, but only from that of his employees and servants. *Woodhouse* v. *Cain*, 113.

3. Where a section-master on a railroad was injured by using a dump-car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another, *It was held*, that the injury was the result of his own carelessness, and that he could not recover. *Pleasants* v. *R. R. Co.*, 195.

4. If, in such case, both the master and servant had known of the dangerous condition of the car, and the servant had continued to use it and been injured in consequence, he could not recover; but it would be otherwise, if the servant had reported the condition of the car to the master, and he had promised to have it repaired promptly, and the servant had used it for a reasonable time, while waiting for the repairs to be made. *Ibid.*

5. What constitutes negligence, or contributory negligence, is a question of law to be decided by the Court, and should not be left to the jury. *Ibid.*

6. There is no requirement at common law, and no statute in the State, obliging railroad companies to fence their tracks. So, where in constructing a railroad, a portion of the plaintiff's pasture fence was removed, and a cut about eight feet deep was made where the fence had been, into which the plaintiff's horse fell and was killed, *It was held*, that the railroad company was not liable. *Jones* v. *R. R. Co.*, 328.

NEGOTIABLE INSTRUMENTS:

1. Where an accommodation note was made payable to the accommodation endorser, to be discounted at a particular bank, but it was not discounted at this bank, but sold to a private individual; *It was held*, that the endorsers were liable, although the sale was made without their knowledge. *Parker* v. *McDowell*, 219.

2. Where a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is not a fraudulent misapplication of the note, if it is discounted at another bank, or used in the payment of a debt, or in any other way for the credit of the maker. *Ibid.*

3. Where in such case, the note is made payable to the order of the cashier of a particular bank, to be discounted at that bank, but the bank refuses to discount it, and never acquires any right to the note, and it is afterwards discounted by a third party; *It was held*, that the note was void, although the cashier endorsed it "without recourse." *Ibid.*

4. If the accommodation paper is a bond, which the obligee refuses to accept, it is void in the hands of a third person, for want of delivery, although he is a purchaser for value. *Ibid.*

NEGOTIABLE INSTRUMENTS—*Continued:*

5. A draft payable at no particular place in a city or town, must be presented at the maker's residence or place of business, if he has such, and if he has not, then the presence of the instrument in the place is a sufficient presentation. *Bank* v. *Lutterloh*, 495.

6. Protest of an inland bill or domestic draft, operating entirely within the State, is not necessary, and presentation and notice of non-payment are sufficient to charge the drawee and endorsers. *Ibid.*

7. Under the provisions of *The Code*, §49, a protest which sets out that a demand was made, and notice given, and the manner in which it was done, is *prima facie* evidence, even in the case of a domestic draft on which no protest was necessary, of the facts thus stated, but this may be rebutted by other evidence. *Ibid.*

8. Where a draft was drawn on a party having a place of business in a town, but was not made payable at any particular place, and the holder protested it and notified the drawer without having presented it to the acceptor, who had funds in his hands of the drawer sufficient to have paid the draft; *It was held*, that the drawer was discharged from liability by the failure of the holder to present the draft to the acceptor. *Ibid.*

9. A promise or a partial payment by an endorser of a bill of exchange, after he has been released from liability by the neglect of the holder to notify him of its dishonor, to pay the whole, or even a part, of the sum named in the bill, if made with a full knowledge that he has been released by such neglect, will operate as a waiver, and bind him to the payment of the whole sum named in the bill. *Shaw* v. *McNeill*, 535.

10. Protest is not necessary to fix the drawee and endorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills. *Ibid.*

11. Even in foreign bills, the protest may be waived, and when this is done, it also waives presentment and notice. *Ibid.*

12. Although protest is not necessary on an inland bill, yet its waiver in such case, is construed to signify as much as when applied to foreign bills. *Ibid.*

13. So, where protest was waived on an inland bill, and no notice was given of its non-acceptance and non-payment to the endorsers; *It was held*, that such notice was waived by the waiver of protest, and the endorsers were liable. *Ibid.*

NEW PROMISE:

1. A new promise, to repel the plea of the statute of limitations, must be in writing. *The Code*, §51. *Bates* v. *Herren*, 388.

2. An acknowledgment that the contract sued upon was correct, and a promise by the obligor that it should be paid as soon as he could sell some stock and make collections, is a conditional promise, and will not obstruct the running of the statute. *Ibid.*

3. A promise by an obligor that he will pay, if he is not put to trouble, unaccompanied by a request for an indulgence, or an agreement for forbearance, will not avoid the operation of the statute. *Ibid.*

NEW PROMISE—*Continued:*

4. A promise or a partial payment by an endorser of a bill of exchange, after he has been released from liability by the neglect of the holder to notify him of its dishonor, to pay the whole, or even a part, of the sum named in the bill, if made with a full knowledge that he has been released by such neglect, will operate as a waiver, and bind him to the payment of the whole sum named in the bill. *Shaw* v. *McNeill*, 535.

NEW TRIAL:

1. A new trial will not be granted where the action of the trial Judge, even if erroneous, could by no possibility injure the appellant. *Butts* v. *Screws*, 215.
2. A new trial for newly discovered testimony will not be granted in the Supreme Court, unless it clearly appears that the applicant therefor used all reasonable diligence to procure it on the former trial; that it is not merely cumulative or corroborative, and that it is necessary to prevent gross injustice, and that another trial will produce a different result. *Sikes* v. *Parker*, 232.
3. It is not sufficient in an application for a new trial for applicant to state generally that he exercised diligence in his attempts to secure the evidence; he must set out the particulars of his efforts, so that the Court may see and judge of his diligence. *Ibid.*
4. A new trial will not be granted because of the submission of alleged improper issues, when they were submitted after argument and without objection, and substantially cover the merits of the case. *Clements* v. *Rogers*, 248.
5. The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. *Ibid.*
6. It is not error to rule out evidence which could not aid the jury in passing on the issues to be tried. So, where the issue was, whether a certain tract of land in dispute, was intended by a testator to pass under a devise of his "home place," evidence that he had given parcels of land to certain of his sons, before his death, is irrelevant. *Waggoner* v. *Ball*, 323.
7. The admission of immaterial evidence is no ground for a new trial, unless it appears that its admission probably worked injury to the appellant. *Ibid.*
8. Where, by inadvertence, a judgment is entered in this Court for a new trial, when it should have been one remanding the case, it will be corrected on motion. *Scott* v. *Queen*, 340.
9. Where the relief sought in an action was the reformation of a deed, and for damages and a partition, and the Court below rendered judgment on the verdict in favor of the defendant, which was reversed on the appeal; *It was held*, that *venire de novo* should not be granted, but the case should be remanded to be proceeded with as if no erroneous ruling had been made. *Ibid.*
10. The testimony of one of the jury will not be received on a motion to set aside the verdict. *Lafoon* v. *Shearin*, 391.

NEW TRIAL—*Continued:*

11. If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. *Morrison* v. *Watson*, 479.

12. Where, under the former practice, a Court of Equity sent an issue to be tried by a Court of Law, it never granted a new trial, but this might be had in a proper case, by an application to the latter Court. *Ferrall* v. *Broadway*, 551.

13. An inadvertent, erroneous instruction to the jury, accompanied by an explanation, or modification, which in effect corrects the error, will not be considered sufficient to award a new trial, unless it clearly appears that the jury was thereby misled and the appellant suffered wrong. *State* v. *Keen*, 646.

NEWLY DISCOVERED EVIDENCE:

1. A new trial for newly discovered testimony will not be granted in the Supreme Court, unless it clearly appears that the applicant therefor used all reasonable diligence to procure it on the former trial; that it is not merely cumulative or corroborative, and that it is necessary to prevent gross injustice, and that another trial will produce a different result. *Sikes* v. *Parker*, 232.

2. It is not sufficient in an application for a new trial for applicant to state generally that he exercised diligence in his attempts to secure the evidence; he must set out the particulars of his efforts, so that the Court may see and judge of his diligence. *Ibid.*

NOL PROS:

After the jury is empaneled in a criminal action the State cannot enter a *nol pros* without the consent of the accused. *State* v. *Thompson*, 596.

NON-SUIT:

1. Where the trial Judge intimates an opinion that upon the plaintiff's own evidence he cannot recover; upon the appeal, the Supreme Court will consider all the evidence offered by the plaintiff as true, and in the most favorable light for him. *Gibbs* v. *Lyon*, 146.

2. Where in such case, the appellee founds his objection to the right to recover on the inadmissibility of the appellant's evidence, it must appear of record that he objected thereto, otherwise the Supreme Court will consider such evidence as admissible and competent. *Ibid.*

3. A judgment of non-suit against a portion of the plaintiffs, terminates the action as to all. *Lafoon* v. *Shearin*, 391.

4. Where it is desirable or necessary to continue the action as to some, and discontinue it as to the other plaintiffs, the proper course is to permit or order a withdrawal of those who go out. *Ibid.*

NOTICE:

A purchaser of land is conclusively presumed to have notice of all equities of persons—other than his vendor—in possession of the premises. He should be diligent in informing himself of the condition of the title, and any loss incurred in consequence of his failure to do so, as between him and the occupant, must be borne by the former. *Staton* v. *Davenport*, 11.

OBSTRUCTING HIGHWAY:

An incorporated railroad company is liable criminally for an obstruction of a public highway if it permits its engines, cars, &c., to remain thereon for a period longer than is reasonably necessary for their safe crossing. *State* v. *R. R. Co.*, 602.

OFFICIAL BOND:

1. In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk, and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. *Morgan* v. *Smith*, 396.

2. Where money is paid into the clerk's office, the obligations to hold and pay it over to the party entitled, when called on, is incurred when the money is received, and the bond then in force is responsible. If the clerk was elected to another term of office, and became his own successor, the burden is on the sureties on the bond in force when the money was received by the clerk, to show that he has paid it over to himself as his own successor. *Ibid.*

3. The failure of the clerk to pay over the money when it is demanded, is strong evidence of a conversion at some previous stage, and the burden of proof is on the defendants to show that the conversion was not made when the money was received. *Ibid.*

4. A former sheriff must exhibit to the board of commissioners *the receipts in full* of the proper officers, for all public funds which he received, or ought to have received during his preceding official terms, before he will be permitted to re-enter upon a new term. *The Code*, §2068. *Colvard* v. *Com'rs*, 515.

5. The fact that he was able, ready and willing at the time of tendering his bond, to make settlement and payment of any liability on account of funds so received, does not dispense with the requirement that he shall produce receipts in full. *Ibid.*

6. A sheriff elect is not entitled to be inducted into office until he tenders the *three bonds* required by §2073 of *The Code*, notwithstanding the fact that at the beginning of his term there is a tax collector in that county. *Ibid.*

ORDINANCE:

An ordinance of a city or town prescribing a penalty to be fixed in the discretion of the Court, is uncertain and void. *State* v. *Worth*, 615.

PARENT AND CHILD:

The law will not interfere in the domestic government of families by punishing a parent for the correction of his child, however severe or unmerited it may be, unless it produces permanent injury, or is inflicted from malicious motives, and not from an honest purpose. *State* v. *Jones*, 588.

PAROL TRUST:

To establish a parol trust in one who has acquired the title to land, something more than the simple declaration of the person sought to be

PAROL TRUST—*Continued:*

charged is required; there must be proof of acts in connection therewith, inconsistent with a purpose on his part to purchase or hold the land for himself absolutely. *Williams* v. *Hodges*, 32.

PARTIAL PAYMENT:

A promise or a partial payment by an endorser of a bill of exchange, after he has been released from liability by the neglect of the holder to notify him of its dishonor, to pay the whole, or even a part, of the sum named in the bill, if made with a full knowledge that he has been released by such neglect, will operate as a waiver, and bind him to the payment of the whole sum named in the bill. *Shaw* v. *McNeill*, 535.

PARTIES:

1. Where the statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration, until an action has been brought. *Middleton* v. *R. R. Co.*, 167.

2. The person claiming the penalty, and not the State, is the proper party plaintiff in an action for the penalty imposed on railroads by §1967 of The Code. *Ibid.*

3. Where claims due a partnership were placed in the hands of an attorney for collection, he is not liable to be called to an account in an action by one of the partners, unless it appears that the other partner is dead. *Wiley* v. *Logan*, 358.

4. Tenants in common of an undivided interest in lands, are not entitled to have either actual partition, or a sale for partition of such interest, unless the owners of the remaining interests are made parties to the proceeding, the Statute—§1904 of *The Code*—requiring that the *whole* tract shall be partitioned or sold—though shares may be allotted to some of the tenants, while a sale may be decreed as to others. *Brooks* v. *Austin*, 474.

5. If a party to an action introduce and examine his adversary as a witness, the credibility of the latter is not open to attack, and it makes no difference in that respect by which side he may be subsequently recalled. *Olive* v. *Olive*, 485.

6. Where the land laid off as a homestead is subject to a mortgage, no question affecting the rights and priorities of the mortgagee can be raised unless he is a party to the action. *Ray* v. *Thornton*, 571.

PARTITION:

Tenants in common of an undivided interest in lands, are not entitled to have either actual partition, or a sale for partition of such interest unless the owners of the remaining interests are made parties to the proceedings, the Statute—§1904 of *The Code*—requiring that the *whole* tract shall be partitioned or sold—though shares may be allotted to some of the tenants, while a sale may be decreed as to others. *Brooks v. Austin*, 474.

PARTNERSHIP:

1. In the absence of a special contract, one partner has no lien on his co-partner's interest in the partnership property for individual debts due him from the co-partner. *Evans* v. *Bryan*, 174.
2. A partner is entitled to his personal property exemption out of the partnership property before a debt due by him individually to his co-partner can be deducted therefrom, on a settlement of the partnership. *Ibid.*
3. Partners stand in the relation of trustees for each other, and something must be done to render that relation adversary, before the Statute of Limitations will begin to run. *Rencher* v. *Anderson*, 208.
4. Upon the trial of an issue as to the existence of a partnership between the plaintiff and the intestate of defendant, the former is not a competent witness to prove the fact of the partnership, nor the fact that his property went into the possession of the intestate as a portion of the partnership stock, unless it affirmatively appears that his knowledge of such facts was not derived from conversations and transactions with the deceased. *Sikes* v. *Parker*, 232.
5. Where claims due a partnership were placed in the hands of an attorney for collection, he is not liable to be called to an account in an action by one of the partners, unless it appears that the other partner is dead. *Wiley* v. *Logan*, 358.

PENAL STATUTE:

1. The rule that a penal statute must be strictly construed, means no more than that the Court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed, in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the Court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. *Hines* v. *R. R. Co.*, 434.
2. This rule is, however, never to be applied so strictly as to defeat the clear intention of the Legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. *Ibid.*

PENALTY:

1. Where the statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration, until an action has been brought. *Middleton* v. *R. R. Co.*, 167.
2. The person claiming the penalty, and not the State, is the proper party plaintiff in an action for the penalty imposed on railroads by §1967 of The Code. *Ibid.*

PERJURY:

Where a witness testified on the trial of an indictment for larceny that an officer took from the possession of the defendant therein certain coins, marked, by which he, witness, was enabled to identify them as his property: *Held*, that the testimony was material, and if wilfully false, constituted the crime of perjury. *State* v. *Hare*, 682.

PERSONAL PROPERTY EXEMPTION:

1. The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. *Smith* v. *McDonald*, 163.

2. A partner is entitled to his personal property exemption out of the partnership property before a debt due by him individually to his copartner can be deducted therefrom, on a settlement of the partnership. *Evans* v. *Bryan*, 174.

3. A debtor is entitled to $500 of personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other personal property he may have exempted, up to the prescribed limit. *Campbell* v. *White*, 344.

4. A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the statute requires. *Ray* v. *Thornton*, 571.

5. An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader. *Ibid.*

PETITION TO REHEAR:

In petitions to rehear, the petitioner will not be allowed to assign other grounds for an alleged error than those presented at the first hearing. *McDonald* v. *Carson*, 377.

PLEADING:

1. It is too late, after submission to arbitration, to object that a counterclaim has been improperly pleaded; the objection should have been taken by demurrer or otherwise in apt time. *Robbins* v. *Killebrew*, 19.

2. The affidavit filed preliminary to obtaining requisition for the seizure and delivery of property will not be treated as a complaint, and its averments cannot cure a defect in the summons, or complaint. *Singer Mfg. Co.* v. *Barrett*, 36.

3. The Court ought not to render judgment upon an aspect of the case not presented by the pleadings, or verdict upon the issues submitted to the jury. *Oakley* v. *Van Noppen*, 60.

4. The Statute in regard to the verification of pleadings contemplates only two cases, in which the affidavit may be made by the attorney: One, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. *Hammerslaugh* v. *Farrior*, 135.

5. Where a verification to a complaint stated that it was made by the attorney because the plaintiffs were non-residents, and that his means of knowledge were derived from an affidavit of the plaintiff, and from admissions made to him by the defendant, but did not state that the material allegations were within his personal knowledge; *It was held*, to be insufficient, and the defendant had the right to file an unverified answer. *Ibid.*

6. A judgment by default final cannot be rendered unless the complaint is verified. *Ibid.*

PLEADING—*Continued:*

7. Where the complaint alleges that the plaintiff sold to the defendant certain goods, wares and merchandise, for which he promised to pay a sum certain, and the complaint is verified, the plaintiff is entitled to a judgment by default final upon a failure to answer, or upon the filing of an unverified answer. *Hartman* v. *Farrior*, 177.

8. Where the complaint only alleges the value of the goods sold, without also alleging a promise to pay, or where the complaint is not verified, upon a failure to answer, the judgment should be by default and inquiry. *Ibid.*

9. Where the complaint alleged that the plaintiff was employed as the engineer of the defendant, and rendered services to the defendant, *It was held*, that he could recover either on the special contract, or on the common count. *Lewis* v. *R. R. Co.*, 179.

10. It is not error to refuse to submit an issue which is not raised by the pleadings. *Ibid.*

11. After a party has pleaded, it is too late to take any objection to the process by which he was brought into Court. *Butts* v. *Screws*, 215.

12. Where the record of a judgment of the Court of another State is sued upon in this State, it is not necessary to allege in the complaint, or to prove that it was warranted by the law of the State in which it was pronounced. The record is the highest and conclusive evidence of that fact. *Miller* v. *Leach*, 229.

13. In an action to enjoin the collection of a judgment on the ground of want of jurisdiction in the court which rendered it, a transcript of the record should be set out, so that the court can see from the record itself, whether or not there was a fatal lack of jurisdiction. *Neville* v. *Pope*, 346.

14. The defence of coverture must be pleaded in order to be available. *Ibid.*

15. New matter set up in the answer, not relating to a counter-claim, is taken to be controverted without further pleading—*The Code*, §268. The Court however may require a formal reply to such new matter. *The Code*, §248. *Fitzgerald* v. *Shelton*, 519.

16. In an action to recover land, it is competent for one party to show that a deed offered by the other, in support of his title, is void for want of capacity in the vendor, although such deed may have been specially set up in the pleadings and relied upon, and no formal reply thereto or notice of attack given before the trial. *Ibid.*

17. Mere matters of evidence should never be pleaded, as they do not raise issues, and when they are pleaded, they should be disregarded. *Farrior* v. *Houston*, 578.

18. Where the defendant in his answer denied a material allegation in the complaint, but went on to state evidential facts; *It was held*, that the bad plea did not vitiate the good one, and it should be treated as surplusage. *Ibid.*

19. A plea of not guilty by a corporation to an indictment, is an admission of its corporate existence. *State* v. *R. R. Co.*, 602.

PLEDGE:

The distinction between a pledge and a mortgage of personal property is, (1), that in the former the *title* is retained by the pledgor, while in the latter, it passes to the mortgagee, and (2), that the delivery of the possession of the property to the pledgee, is absolutely essential to a pledge, while, *between the parties, but not against creditors or purchasers*, such delivery is not necessary to the validity of mortgage. *McCoy* v. *Lassiter*, 88.

POLICE POWER:

The statute authorizing the condemnation of private property for the purpose of draining lowlands, is the exercise by the State of its power for police regulations, and is constitutional. *Winslow* v. *Winslow*, 24.

POSSESSION:

1. A purchaser of land is conclusively presumed to have notice of all equities of persons—other than his vendor—in possession of the premises. He should be diligent in informing himself of the condition of the title, and any loss incurred in consequence of his failure to do so, as between him and the occupant, must be borne by the former. *Staton* v. *Davenport*, 11.

2. Where a party entitled to the possession of land, enters thereon, he is presumed in law to enter under, and in pursuance of his right, no matter what may have been the motive for the entry, and he is at once clothed with every right he can have by virtue of his title which could be asserted by entry. *Nixon* v. *Williams*, 103.

3. The possession of a widow, to whom no dower has been assigned, is not adverse to the heirs-at-law of her deceased husband. *Ibid.*

4. Where the wife of the plaintiff, now dead, was entitled to the land in dispute as heir-at-law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land, *Held*, that she had such seizin as entitled her husband to an estate by the curtesy. *Ibid.*

5. Where it appeared that the defendant had a registered mortgage on the land of the plaintiff, purporting to be signed by the plaintiff, but it was admitted that said mortgage was a forgery, and that the plaintiff had never executed it, a Court of Equity will entertain a suit to remove the cloud upon the plaintiff's title, although he is still in possession of the land. *Byerly* v. *Humphrey*, 151.

6. While it seems that the declarations of one in possession at the time may operate as an estoppel, to give them such effect, they must constitute a clear and definite recognition of the alleged superior title. *Graybeal* v. *Davis*, 508.

7. The declarations of one under whom a defendant in ejectment claims, will not work an estoppel, if the person making them is not in possession. *Ibid.*

8. Where there is no actual possession, the superior title draws to it the possession. *Deming* v. *Gainey*, 528.

9. The declarations of the owner of land, made while in possession in derogation of his title, are evidence both against him and one claiming title under him. *MaGee* v. *Blankenship*, 563.

POSSESSION—*Continued:*

10. *It seems that* declarations made after the execution of a deed, but while the grantor remains in possession and exercising proprietary rights are admissible in evidence against the vendee. *Ibid.*

11. One who peaceably enters upon land, believing at the time that he had the right to do so, and erects houses thereon, but, being still in possion, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under §1062 of *The Code. State* v. *Reynolds*, 616.

12. Possession, actual or constructive, is essential to the maintenance of an action for trespass. *Ibid.*

POWERS:

1. An administrator, *cum testamento annexo*, can execute any power conferred by the will on the executor therein named. *Council* v. *Averett*, 131.

2. As a general rule, where a will directs lands to be sold for division among devisees, and no person is designated to make the sale, neither an executor, nor an administrator with the will annexed, can execute the power, but such power may be conferred upon them, either by express words, or by reasonable implication from the provisions of the will. *Ibid.*

3. Where the fund to be divided is to be raised by a sale of both real and personal property, or where the fund to be raised by the sale is to pay debts, or discharge legacies, or is to pass into the hands of the executor, to be applied by him by virtue of his office, the executor can execute the power of sale, as to the realty, although the will does not confer it on him in direct terms. *Ibid.*

4. So, where a testator gives all of his property of every description, to his wife for life, and at her death, to be sold and divided among his children, *It was held*, that by necessary implication, the will conferred the power of sale on the executor, and a sale, by an administrator with the will annexed, of the realty, made after the death of the life tenant, passed a good title. *Ibid.*

PRELIMINARY EXAMINATION:

Where the magistrate, before whom a prisoner charged with a crime was brought, but before the warrant was returned, or any of the witnesses had been sworn, and before the prisoner was informed of the charge against him, asked the prisoner if he was ready to proceed, and the latter replied that he was not, because of the absence of certain witnesses by whom he expected to prove a state of facts relied upon as a defence, *Held*,

(1.) That the "examination" contemplated by §§1144, 1145 and 1146 of *The Code*, had not then commenced, and any declaration pertinent to the charge, then made by the prisoner, was competent evidence against him, though he was not "cautioned." *State* v. *Conrad*, 666.

(2.) That it was competent to prove that the matters of defence set up on the preliminary examination were contradictory of those relied upon at the trial. *Ibid.*

PROBATE:

1. A Deputy Clerk cannot take proof of the execution of a deed or other instrument, or make any order in regard to their registration. *Tatom* v. *White*, 453.
2. Section 1260 of *The Code*, rendered valid all probates of deeds, &c., made before the officers therein named, prior to the twelfth day of February, 1872; and registrations made in pursuance of such probates are embraced within the operation of the statutes, although made after that date, but before the enactment of *The Code*. Such legislation does not disturb vested rights. *Ibid.*
3. A person who cannot write, but who makes his mark, or uses any other device by which he, or others, may identify himself with the transaction, is a competent attesting witness to the execution of written instruments. *Ibid.*
4. The registration of a deed, or other instrument requiring registration, made upon proof of execution by a witness who could not write, but who in fact witnessed the signing, and directed his name to be subscribed as a witness, is not void, though irregular; and on a trial, upon proof of the execution by such witness or other competent testimony, the deed will be admitted in evidence without further registration. *Ibid.*

PROBATE JUDGE:

1. Although the *office* of "Probate Judge" is abolished, the powers and jurisdiction of that officer are now exercised by the Clerks of the Superior Court—not as the servant or ministerial officer of or acting as and for the Superior Court, but as an independent tribunal of original jurisdiction. *Edwards* v. *Cobb*, 4.
2. The Clerk of the Superior Court, as the successor of the Probate Judge, has jurisdiction of the proceeding for the removal of an executor or administrator. *Ibid.*

PROCESS:

1. A general appearance by counsel cures all antecedent irregularity in the service of process, and puts the defendant in Court, just as if he had been personally served with process. *Penniman* v. *Daniel*, 341.
2. Where it is desired to take advantage of any defect in the service of process, a special appearance should be entered for that purpose. *Ibid.*
3. So, where a defendant demurred because he had not been properly served, but a general appearance was entered by his counsel; *It was held*, that the appearance waived any irregularity in the service, and the demurrer was properly overruled. *Ibid.*

PRODUCTION OF PAPERS:

1. Under the present statute (*The Code*, §1373), no affidavit is necessary in order to get an order for the production of papers in the possession of the adverse party, but the Court now has power, on motion and due notice, to require the production of papers or books which contain evidence pertinent to the issue. *McDonald* v. *Carson*, 377.
2. Due notice is sufficient notice to enable the party to have the document present when called for. *Ibid.*

PROMISSORY NOTES:

1. Where an accommodation note was made payable to the accommodation endorser, to be discounted at a particular bank, but it was not discounted at this bank, but sold to a private individual; *It was held*, that the endorsers were liable, although the sale was made without their knowledge. *Parker* v. *McDowell*, 219.

2. Where a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is not a fraudulent misapplication of the note, if it is discounted at another bank, or used in the payment of a debt, or in any other way for the credit of the maker. *Ibid.*

3. Where in such case, the note is made payable to the order of the cashier of a particular bank, to be discounted at that bank, but the bank refuses to discount it, and never acquires any right to the note, and it is afterwards discounted by a third party; *It was held*, that the note was void, although the cashier endorsed it "without recourse." *Ibid.*

4. If the accommodation paper is a bond, which the obligee refuses to accept, it is void in the hands of a third person, for want of delivery, although he is a purchaser for value. *Ibid.*

PROTEST:

1. A draft payable at no particular place in a city or town, must be presented at the maker's residence or place of business, if he has such, and if he has not, then the presence of the instrument in the place is a sufficient presentation. *Bank* v. *Lutterloh*, 495.

2. Protest of an inland bill or domestic draft, operating entirely within the State, is not necessary, and presentation and notice of non-payment are sufficient to charge the drawee and endorsers. *Ibid.*

3. Under the provisions of *The Code*, §49, a protest which sets out that a demand was made, and notice given, and the manner in which it was done, is *prima facie* evidence, even in the case of a domestic draft on which no protest was necessary, of the facts thus stated, but this may be rebutted by other evidence. *Ibid.*

4. Where a draft was drawn on a party having a place of business in a town, but was not made payable at any particular place, and the holder protested it and notified the drawer without having presented it to the acceptor, who had funds in his hands of the drawer sufficient to have paid the draft, *It was held*, that the drawer was discharged from liability by the failure of the holder to present the draft to the acceptor. *Ibid.*

5. Protest is not necessary to fix the drawee and endorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills. *Shaw* v. *McNeill*, 535.

6. Even in foreign bills, the protest may be waived, and when this is done, it also waives presentment and notice. *Ibid.*

7. Although protest is not necessary on an inland bill, yet its waiver in such case, is construed to signify as much as when applied to foreign bills. *Ibid.*

PROTEST—*Continued:*

8. So, where protest was waived on an inland bill, and no notice was given of its non-acceptance and non-payment to the endorsers, *It was held*, that such notice was waived by the waiver of protest, and the endorsers were liable. *Ibid.*

PUBLIC OFFICER:

1. Proof that a person acted, and was recognized, as a public officer, is *prima facie* evidence that he was duly qualified. This rule is applicable alike to criminal and civil actions, and to actions in which the officer is himself a party. If, however, the title to the office, or the legality of the appointment is put in issue by the pleadings, the proof must support the allegation. *Tatom* v. *White*, 453.

2. One wrongfully in the possession of an office and exercising its functions with public acquiescence, is an officer *de facto*, and so far as third parties are concerned, his acts are as binding as if he were an officer *de jure*. *State* v. *Speaks*, 689.

PUNISHMENT:

1. Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the Court. *The Code*, §§1041 and 1097. *State* v. *Manly*, 661.

2. The Court has power, during the Term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. *Ibid.*

QUASHING:

A warrant will not be quashed because it does not contain the necessary descriptive words of the alleged offence, when it refers to an "annexed affidavit" in which all the essential averments are made. *State* v. *Winslow*, 649.

RAILROADS:

1. Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed. *R. R. Co. v. Ely*, 77.

2. Where a horse was feeding within three feet of a railroad track, in plain view of the engineer, who did not slacken the speed of the train, or take other precautions, until the train was in close proximity to the horse, and he had gotten upon the track, *It was held*, negligence. *Snowden* v. *R. R. Co.*, 93.

3. The person claiming the penalty, and not the State, is the proper party plaintiff in an action for the penalty imposed on railroads by §1967 of The Code. *Middleton* v. *Railroad*, 167.

4. Where the charter and by-laws of a railroad corporation provided that the Chief Engineer could only be appointed by the President and Directors, but the Vice-President and Superintendent were the officers who had the management of the affairs of the corporation, *It was held*, that they had implied authority to employ an engineer, especially when there was no Chief Engineer, and the services of an engineer were necessary for the proper conduct of corporation. *Lewis* v. *The Railroad*, 179.

RAILROADS—*Continued:*

5. If in such case, the President and Directors are notified of such appointment, and receive the work of the engineer without objection, they are held to have ratified the appointment. *Ibid.*

6. A master is bound to furnish to his servant tools and appliances reasonably good and proper for the work the servant is to do, and to do everything essential to the proper prosecution of the work, without exposing the servant to any unnecessary danger, but his is not a guaranty of his safety, nor is he bound to protect him against his own neglect. *Pleasants* v. *R. R. Co.*, 195.

7. Where a section-master on a railroad was injured by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car, *It was held,* that the injury was the result of his own carelessness, and that he could not recover. *Ibid.*

8. If, in such case, both the master and servant had known of the dangerous condition of the car, and the servant had continued to use it and been injured in consequence, he could not recover; but it would be otherwise, if the servant had reported the condition of the car to the master, and he had promised to have it repaired promptly, and the servant had used it for a reasonable time, while waiting for the repairs to be made. *Ibid.*

9. There is no requirement at common law, and no statute in the State, obliging railroad companies to fence their tracks. So, where in constructing a railroad, a portion of the plaintiff's pasture fence was removed, and a cut about eight feet deep was made where the fence had been, into which the plaintiff's horse fell and was killed; *It was held,* that the railroad company was not liable. *Jones* v. *R. R. Co.*, 328.

10. In an action against a railroad for the penalty imposed by the Statute for failing to ship freight delivered to it for transportation, within five days after the delivery, evidence which goes to show that other freight was delivered by agents of the plaintiff, who gave instructions to the agent of the corporation in regard to its shipment, is immaterial, and it is not error to exclude it. *McGowan* v. *R. R. Co.*, 417.

11. Where freight is delivered by a shipper to a common carrier for transportation, in the absence of an express contract to the contrary, there is an implied agreement that it shall be forwarded in a reasonable time, and the Statute (*The Code*, §1907), fixes five days as such reasonable time. *Ibid.*

12. Where a bill of lading provided that the corporation should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered, or imperfectly marked; *It was held,* not to cover a failure to duly forward goods only marked with an initial. *Ibid.*

13. The Legislature has power to compel railroad corporations, and common carriers of a like kind, to discharge the obligations which they owe to the public, by reasonable statutory regulations, because of their *quasi* public nature, and because they exercise and enjoy rights and franchises, granted by the public. *Ibid.*

RAILROADS—*Continued:*

14. The Legislature may regulate the methods of business of such corporations, in a general way, so as to promote the public good, and to the extent that the exercise of the powers conferred on them, affect the public, it has the right, through the Legislature, to have a voice in their exercise. *Ibid.*

15. A clause in the charter of a railroad corporation, which confers upon its officers the power to fix its charges for the transportation of freight, is not infringed by a Statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation. *Ibid.*

16. The Statute in this State (*The Code*, §1966), imposing a penalty on any railroad which shall charge for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States, and the penalty imposed by the Act is not incurred by a violation of its provisions in transporting this class of freight. *McGwigan* v. *R. R.*, 428.

17. If this Statute had in terms been made to apply to freight to be transported from one State to another, it would have been in conflict with Art. I, §8, of the Constitution of the United States, and consequently void. *Ibid.*

18. The statute of this State (*The Code*, §1966), which imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, is to be construed to mean, that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, at any time while its list of charges for carrying freight remains unchanged. *Hines* v. *R. R.*, 434.

19. The Statute embraces all railroads doing business in this State, whether incorporated by the laws of this State or not, the object of the Statute being to secure uniformity in charges for transporting freight by all railroads doing business in this State. *Ibid.*

20. Where a railroad corporation chartered by another State, leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. *Ibid.*

21. Where a railroad corporation is chartered by the laws of this State, and also of another State, it is completely subject to the laws of this State, except as otherwise expressly provided by its charter. *Ibid.*

22. The penalty imposed by §1966 of *The Code*, is incurred when the prohibited charge is made. It is not necessary that the illegal charge should have been paid. *Ibid.*

RAILROADS—*Continued:*

23. The words in this Statute, "transported in the same direction," etc., mean the direction in which the freight is carried from the depot where the shipment is made, and embraces branches of the same road in that direction, which are used in connection with, and as a part of the same road. If the corporation uses two or more distinct roads, not in connection, *it may be*, that it could have a different class of charges for each of its roads. *Ibid.*

24. Discrimination in freight tariffs by railroad companies, means to charge shippers of freight, unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. *Ibid.*

25. An incorporated railroad company is liable criminally for an obstruction of a public highway if it permits its engines, cars, &c., to remain thereon for a period longer than is reasonably necessary for their safe crossing. *State* v. *R. R. Co.*, 602.

RATIFICATION:

1. Where the charter and by-laws of a corporation provided that the chief engineer could only be appointed by the president and directors, but the vice-president and superintendent were the officers who had the management of the affairs of the corporation; *It was held*, that they had implied authority to employ an engineer, when his services were necessary. *Lewis* v. *R. R. Co.*, 179.

2. If in such case, the president and directors are notified of such appointment, and receive the work of the engineer without objection, they are held to have ratified the appointment. *Ibid.*

3. Where it is sought to show that an infant has ratified a contract in regard to his property, made while he was an infant, evidence is admissible to show that the money received in pursuance of such contract was used for the infant's advantage, with his knowledge. This evidence does not of itself show a ratification, but is admissible as explanatory of what occurred. *Owens* v. *Phelps*, 286.

RECORD:

1. By virtue of the Constitution of the United States, and Acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the Court. *Miller* v. *Leach*, 229.

2. Where the record of a judgment of the Court of another State is sued upon in this State, it is not necessary to allege in the complaint, or to prove that it was warranted by the law of the State in which it was pronounced. The record is the highest and conclusive evidence of that fact. *Ibid.*

3. If by the inadvertence of the Court, or of any one acting for it, the judgment entered, or record made, is not in conformity to that pronounced or ordered, the Court may at any time, upon the application of any person in interest, or *ex mero motu*, correct it so that it shall truly

RECORD—*Continued:*

express the action of the Court. This jurisdiction is distinct from that conferred by §274 of *The Code*, which provides a remedy for relief against excusable mistake, &c., of *parties* to the action. *Strickland* v. *Strickland*, 471.

4. Courts have the power at any time in their discretion, to amend and correct their records *nunc pro tunc*, so that they shall speak the truth; and neither the findings of fact by them, nor the exercise of their discretion, are reviewable upon appeal. *State* v. *Warren*, 674.

REGISTRATION:

1. At common law, delivery and retention of the custody of the property, was necessary to the validity of a mortgage, as against creditors and purchasers, but now, by statute, registration is substituted therefor. *McCoy* v. *Lassiter*, 88.

2. A mortgage of chattels, in parol, is good, between the parties. No particular form of words is necessary to the constitution of such a mortgage. It is sufficient if it appear that the parties intended it to operate as such. *Ibid.*

3. Where a note given for the purchase of an engine and boiler, provided that it should be a lien upon the property sold for which it was given, until it was paid in full at maturity, at which time the engine and boiler should be at the disposal of the vendors, which note was never registered, *It was held*, not to be a conditional sale, and that a party who had purchased the engine and boiler from the vendee before the note was paid, without notice, took it discharged of any claim of the original vendors. *Frick* v. *Hilliard*, 117.

4. As between the parties, a conditional sale is binding, although not reduced to writing or registered. The Code, §1275, only requires them to be reduced to writing and registered, as against creditors and purchasers for value. *Butts* v. *Screws*, 215.

5. At common law, mortgages of personal property were not required to be reduced to writing, and our statute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value. *Ibid.*

6. Where a deed was made from a husband directly to his wife for her support, in 1862, but which was lost and was not registered until 1884, *It was held*, that it was not a marriage settlement, and after registration it related back to its date. *Walton* v. *Parish*, 259.

7. Deputy clerks cannot take proofs of the execution, or make orders concerning the registration of instruments required to be registered. *Tatom* v. *White*, 453.

8. Section 1260 of *The Code*, rendered valid all probates of deeds, &c., made before the officers therein named, prior to the twelfth day of February, 1872; and registrations made in pursuance of such probates are embraced within the operation of the statutes, although made after that date, but before the enactment of *The Code*. Such legislation does not disturb vested rights. *Ibid.*

REGISTRATION—*Continued:*

9. A person who cannot write, but who makes his mark, or uses any other device by which he, or others, may identify himself with the transaction, is a competent attesting witness to the execution of written instruments. *Ibid.*

10. The registration of a deed, or other instrument requiring registration, made upon proof of execution by a witness who could not write, but who in fact witnessed the signing, and directed his name to be subscribed as a witness, is not void, though irregular; and on a trial, upon proof of the execution by such witness or other competent testimony, the deed will be admitted in evidence without further registration. *Ibid.*

11. Mortgages are good *inter partes* without registration. *Williams* v. *Jones*, 504.

12. A mortgage both of land and personal property may be registered after the death of the mortgagor. *Ibid.*

13. The registration of a mortgage after a commission in bankruptcy, is good against the assignee. *Ibid.*

14. Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support; *It was held*, that the widow took the property subject to the mortgage lien. *Ibid.*

RELICTED LAND:

Where land is relicted by a sudden withdrawal of navigable waters it belongs to the sovereign, but where the withdrawal is gradual it belongs to the riparian proprietor. *Hodges* v. *Williams*, 331.

REMOVAL OF EXECUTORS AND ADMINISTRATORS:

1. The Clerks of Superior Courts have jurisdiction of proceedings for the removal of executors and administrators. *Edwards* v. *Cobb*, 4.

2. Whether the Superior Courts have such original jurisdiction, *Quœre*. *Ibid.*

3. The practice upon application to remove executors and administrators, discussed by *Merrimon, J.* *Ibid.*

REPLY:

New matter set up in the answer, not amounting to a counter-claim, is taken to be denied without further pleading. The Court, however, may require a reply to be filed. *Fitzgerald* v. *Shelton*, 519.

RES JUDICATA:

It is intimated, that where irrelevant facts, which should be the ground of a new action, are set up as a defence or counter-claim, and the Court proceeds to pass upon it, instead of striking it from the record, that the judgment will be *res judicata*, and an estoppel upon the defendant, if he should afterwards bring a new action upon the same facts. *Byerly* v. *Humphrey*, 151.

RESPITE:

The effect of a respite is only to postpone the day for the execution of the sentence by the Court. *State* v. *Cardwell*, 643.

RIDING OF JUDGES:

1. The prisoner was indicted at August Term, 1885, and tried and convicted of murder at the succeeding Term of the Superior Court of Iredell county—both Terms being held by the same Judge. He moved for a new trial and in arrest of judgment, which being refused, and the death penalty pronounced, he appealed to the Supreme Court, where the judgment was affirmed. When brought to the bar of the Superior Court for re-sentence, he again moved in arrest of the judgment upon the ground that the Judge who presided at the trial also presided at the preceding Term when the bill was found, in violation of §11, Art. IV, of the Constitution. *Held*,

(1.) The judgment of the Supreme Court was conclusive of all ground which was or might have been insisted upon to arrest the judgment of the Superior Court. *State* v. *Speaks*, 689.

(2.) If, however, the prisoner should be entitled to relief upon the ground of an absence of jurisdiction in the Court which tried him, his remedy would not be by motion to arrest the judgment, but by a proper application for a discharge. *Ibid.*

(3.) The prohibition contained in the Constitution does not apply to the several terms of the Court in any one county embraced in a "circuit" or "riding," but only to the series of Courts held in the various counties constituting such "circuit" or "riding" as a whole. *Ibid.*

2. *It seems*, that the judgment of the Superior Court, presided over by a Judge of general jurisdiction, though not the Judge designated by the Constitution, is not null and void. *Ibid.*

RIPARIAN OWNER:

1. The riparian owner of land bordering on a river which is technically not navigable, but which is used as a highway of commerce, owns the land in the bed of the river, subject to an easement in the public to use the river for the purposes of transportation. *Hodges* v. *Williams*, 331.

2. A lake fifteen miles long and eight miles wide, which is three and one-half feet deep, and which has no important inlet, and does not form a link in a chain of water communication, is not navigable. *Ibid.*

3. The riparian owner of land on the bank of an unnavigable stream has no title *ad filum acquæ*, if the State has granted the bed of a stream to another. *Ibid.*

4. Where the bed of an unnavigable stream has been granted, a riparian proprietor is not entitled to land made by a withdrawal of the waters. *Ibid.*

5. Where land is relicted by a sudden withdrawal of navigable waters it belongs to the sovereign, but where the withdrawal is gradual it belongs to the riparian proprietor. *Ibid.*

RULE IN SHELLY'S CASE:

1. *Quœre*, whether the rule in Shelly's Case has been abrogated in this State by statute. *Mills* v. *Thorne*, 362.

2. In this State, when an estate is settled on the ancestor, with remainder to his heirs, "equally to be divided among them," or "share and share alike," the addition of these words prevents the application of the rule in Shelly's case, and the heirs take as purchasers. *Ibid.*

3. Since the act of 1784, words in a will which would give the absolute property, if bequeathing chattels, will give a fee if used in a devise of lands, the effect of the statute being to put chattels on the same footing as land, and to make the same rule applicable to both. *Ibid.*

4. A bequest of chattels to A for life, and at his death to be equally divided between his heirs, vests only a life estate in A in the chattels, with a remainder to his heirs, as tenants in common. *Ibid.*

5. Where land is devised to the ancestor for life, with a limitation that the remainder is to be equally divided among his heirs, or the heirs of his body, or his issue, the remainder men take as tenants in common, *per capita*, and not *per stirpes*, and they take as purchasers. *Ibid.*

SALE:

A number of persons in the city of Raleigh, in 1885, organized a club for social and literary purposes, and became duly incorporated under the general law. Incidental to the main purposes of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. In 1886, an election was in Raleigh township, under the Local Option Act, at which a majority of the votes were cast for prohibition. *Held*,

(1.) That the furnishing liquors to the members of the club under these circumstances was a sale.

(2.) That such sale was in violation of the Local Option Act, and the defendant was guilty of a misdemeanor. *State* v. *Lockyear*, 633.

SALE OF LAND FOR ASSETS:

1. Where certain land lying in another State was sold to pay debts by an administrator in that State, and there was a surplus, as to which the Court finds as a fact that it was not received by the administrator in this State nor by any authorized agent of his, it does not constitute assets with which the administrator should be charged. *Young* v. *Kennedy*, 265.

2. Interlocutory orders are under the control of the Court, and upon good cause shown, they can be amended, modified, changed or rescinded, as the Court may think proper. *Maxwell* v. *Blair*, 317.

3. So, where in a proceeding to sell land for assets, the decree for sale embraced some land which was the property of one of the defendants, and which did not belong to the ancestor, but by a mistake the defendant did not discover it until after the sale, and when the notice

SALE OF LAND FOR ASSETS—*Continued:*

to confirm the sale was made, *it was held*, that the Clerk had the power, and that he committed no error in amending the order of sale, so as to omit the defendant's land therefrom. *Ibid.*

SALE UNDER EXECUTION:

1. A variance between the execution and the judgment, in regard to the sum due, does not vitiate a sale made under the execution. *Hinton* v. *Roach*, 106.
2. A stranger purchasing at a sale under an execution issued on an irregular judgment, gets a good title, and even the plaintiff in the judgment gets a good title, unless the judgment is afterwards set aside, upon a motion by a party to the judgment who is prejudiced by the irregularity. *Ibid.*

SCALE:

1. Where collections were made by an administrator in 1862 and 1863, and afterwards paid out, the scale must be applied to the receipts at the time the money was received, and to the payments when they were made. *Young* v. *Kennedy*, 265.
2. Where an executor sold land during the war, under the power given him by the will to sell, and divide the proceeds among certain legatees, but the executor would not say in what currency he would take payment, and by this conduct prevented certain parties, who wished to purchase, from bidding at the sale, and said executor, unknown to the parties in interest, procured his partner to purchase the property on their joint account, and accepted payment of the bid in Confederate money, *It was held*, that the executor was chargeable with the value of the property in good money. *Summers* v. *Reynolds*, 404.
3. Where, in such case, the legatees accepted the Confederate money in payment, the executor is entitled to credit for the scaled value of such payments, in his accounts with the legatees. *Ibid.*

SEDUCTION:

1. It is not competent to prove particular acts of immorality for the purpose of showing the bad character of a witness whose truthfulness is impeached. *State* v. *Garland*, 671.
2. It is competent to show that the contradictory statement, offered with a view to impeach a witness, was made to one who was an official in a religious organization, while in the discharge of his duties as such. *Ibid.*

SEIZIN:

1. Seizin implies the possession of an estate of freehold, and seizin in law means the right to have such possession. *Nixon* v. *Williams*, 103.
2. Where the deceased wife of the plaintiff was entitled to land as an heir-at-law, and her husband rented such land as a tenant of the ancestor's widow, but the wife lived on the land; *Held*, that she had such a seizin as entitled him to an estate by the curtesy. *Ibid.*

SENTENCE:

If a prisoner, under sentence of death, is respited and escapes, and is not recaptured before the day fixed for the execution, the Judge of the Superior Court may, at a subsequent term, direct the sentence to be carried into effect. *State* v. *Cardwell*, 643.

SERVICES:

1. Where the plaintiff contracted to work for the defendant for a year, and was to be paid by the month, but broke his contract and stopped work without excuse, before the year expired, *It was held*, that he could recover for the time he did work, at the contract rate per month. *Chamblee* v. *Baker*, 98.
2. When, in such case, the contract is entire and indivisible and by the nature of the agreement, or by the express provisions of the contract, nothing is to be paid until all is performed, the plaintiff cannot recover, unless he aver and prove compliance with the contract on his part. *Ibid.*
3. Under the former practice, in actions on a special contract to pay for services to be rendered, and which were rendered, no evidence in defence, or to reduce the recovery, was admissible to prove any misconduct on the part of the plaintiff, or dereliction in the service, but since The Code, this defence may be set up, and the entire controversy settled in one action. *Ibid.*
4. Where a person is employed to work for another for an indefinite time, if he is ready and willing to do the work required, he is entitled to recover for the entire time, although employment is not furnished him regularly; but if the employment is to do a particular thing, or there were intervals when he was at liberty to make other contracts for his services, then he could only recover for the time during which he was actually employed. *Lewis* v. *R. R. Co.*, 179.

SHERIFF:

1. A former sheriff must exhibit to the board of commissioners *the receipts in full* of the proper officers, for all public funds which he received, or ought to have received during his preceding official terms, before he will be permitted to re-enter upon a new term. *The Code*, §2068. *Colvard* v. *Com'rs*, 515.
2. The fact that he was able, ready and willing at the time of tendering his bond, to make settlement and payment of any liability on account of funds so received, does not dispense with the requirement that he shall produce receipts in full. *Ibid.*
3. A sheriff elect is not entitled to be inducted into office until he tenders the *three bonds* required by §2073 of *The Code*, notwithstanding the fact that at the beginning of his term there is a tax collector in that county. *Ibid.*
4. If the term of the office into which the plaintiff, in mandamus, demands to be inducted, expires before final judgment, the Court can do nothing but dismiss the action. *Ibid.*

SLANDER:

1. In an action for damages for making slanderous charges against the plaintiff, evidence is competent, in mitigation of damages, to show the mental distress of the defendant at the time the words were spoken, caused as he believed, by the act of the defendant. *McDougald* v. *Coward*, 368.

2. In an action of slander in charging a female with incontinence, the defendant offered evidence to show his mental condition when the slanderous words were spoken, caused by his belief that the plaintiff had enticed his son, with whom he charged that she had had connexion, to leave his home and go off with her, and *It was held*, that such evidence was admissible to rebut malice, and in mitigation of damages. *Ibid.*

3. Where, in such action, the plaintiff, as a witness in her own behalf, testifies that she is of untarnished virtue, evidence is admissible that she has allowed men to take liberties with her, not reaching to sexual intercourse, although such acts are not charged in the pleadings. Such evidence is irrelevant if originally offered, but is competent to contradict. *Ibid.*

4. A husband is not indictable for slandering his wife. *State* v. *Edens*, 693.

5. It is not necessary to set out the words in indictments for slander under §1113 of *The Code*, with the same particularity required in civil actions for slander. *Ibid.*

SOLICITOR'S FEE:

Where a defendant was acquitted, and the prosecutor adjudged to pay costs, a Solicitor's fee cannot be taxed. *State* v. *Dunn*, 697.

SPECIAL VERDICT:

1. In criminal actions there is no appeal, except from *final* judgments. *State* v. *Hazell*, 623.

2. A recital in the record, upon the return of a special verdict, "that the Court being of opinion that upon this state of facts the defendant is not guilty, the verdict is so entered," is not such a judgment as will support an appeal. *Ibid.* *State* v. *Smith*, 680.

SPECIAL PERFORMANCE:

1. Where a marriage took place in 1844, and in 1869 the husband had a tract of land allotted to him as his homestead upon his own petition which he afterwards sold, taking a note for the purchase money, and he was then divorced *a mensa et thoro* from his wife; *It was held* in an action on the note given for the purchase money, that he could not make a good title to the land, without the joinder of his wife in the deed, and that the vendee would not be compelled to take the title and pay the purchase money unless the wife joined in the deed. *Castlebury* v. *Maynard*, 281.

2. A purchaser of land is never required to accept a doubtful title, and the inability of the vendor to make a good title, is a defence to an action for the purchase money. *Ibid.*

SPECIAL PERFORMANCE—*Continued:*

3. When a material defence is pleaded, it is proper for the Court to submit an issue on it. *Owens* v. *Phelps*, 286.
4. So where an action was brought by the heirs-at-law of a deceased vendee of land, asking that the vendor be forced to make title to them, and he pleaded that the administrator had agreed with him to rescind the contract, which was ratified by the heirs-at-law, an issue as to such ratification was properly submitted to the jury. *Ibid.*
5. The specific performance of the vendor's agreement to convey land is not a strict right to be enforced at the will of the vendee, but it rests in the sound discretion of the Judge. This is not an arbitrary discretion, but is to be governed by the rules laid down by the Courts of Equity, to grant or withhold the relief, as in the particular case may seem equitable and just. *Herren* v. *Rich*, 500.
6. In an action for the specific performance of a contract, although the contract is under seal, parol evidence is admissible to show any good reason why the equitable relief demanded should be withheld. *Ibid.*
7. In an action for specific performance, where the defendant sets up a claim for compensation for improvements put on the land, evidence is admissible to show the enhanced value of the lot, by reason of improvements put on it by the defendant. *MaGee* v. *Blankenship*, 563.
8. Evidence in writing, when the writing contains all the stipulations assumed by the person to be charged, and authenticated by his signature, is a compliance with the statute of frauds. *Ibid.*
9. So, where parties agreed by parol to exchange lands, and afterwards one of them executed a deed to carry it out; *It was held*, that the deed was a sufficient writing within the statute. *Ibid.*
10. A parol contract to convey land is not void if not reduced to writing, and if it is afterwards reduced to writing, it removes the statutory impediment and imparts to the contract an original efficacy. *Ibid.*

STATUTE OF FRAUDS:

1. One who is induced to enter upon land by a parol agreement that it shall be settled upon him as an advancement, will not be evicted until compensation has been made him for betterments which he may have made upon the land. *Hedgepeth* v. *Rose*, 41.
2. Nor is he liable for damages for withholding the possession or for the use and occupation of the land until after a notice to surrender. *Ibid.*
3. Evidence in writing, when the writing contains all the stipulations assumed by the person to be charged, and authenticated by his signature, is a compliance with the statute of frauds. *MaGee* v. *Blankenship*, 563.
4. So, where parties agreed by parol to exchange lands, and afterwards one of them executed a deed to carry it out, *It was held*, that the deed was a sufficient writing within the statute. *Ibid.*
5. A parol contract to convey land is not void if not reduced to writing, and if it is afterwards reduced to writing, it removes the statutory impediment and imparts to the contract an original efficacy. *Ibid.*

STATUTE OF LIMITATIONS:

1. Where a judgment was rendered on the 20th of October, 1873, and an action was brought on the judgment on the 20th of October, 1883, *it was held* that the statute barring actions on judgment in ten years, was a defence to the action. *Cook* v. *Moore*, 1.

2. There was no statute of limitations barring actions upon notes under seal executed, or judgments rendered, prior to 1868. A *presumption* of payment arose after ten years. *Glover* v. *Flowers*, 57.

3. An executor or administrator could not avail himself of the limitations prescribed in §§11 and 12 of Rev. Code, unless he showed that he had disposed of the assets and made the advertisement required by §§24 and 27, Rev. Code. *Ibid.*

4. When the Statute of Limitations is pleaded, it devolves upon the plaintiff to show that his cause of action accrued within the time limited by law for beginning it. *Hussey* v. *Kirkman*, 63.

5. A new promise, to repel the bar of the Statute of Limitations must be clear, positive and distinctly refer to the debt sued upon. It must be made to the party, his agent, or attorney. A promise to a third party will not be recognized. Upon causes of action accruing since the adoption of the Code of Civil Procedure, the new promise must be in writing. *Ibid.*

6. The provisions of The Code, allowing a *feme covert* to sue alone regarding her separate property, does not remove the disability of coverture, so as to allow the statute of limitations to bar her right of action. *Campbell* v. *Crater*, 156.

7. When two or more disabilities co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought shall not begin to run until the expiration of the latest disability. *Ibid.*

8. Partners stand in the relation of trustees for each other, and something must be done to render that relation adversary, before the Statute of Limitations will begin to run. *Rencher* v. *Anderson*, 208.

9. A new promise, to repel the plea of the statute of limitations, must be in writing. *The Code*, §51. *Bates* v. *Herren*, 388.

10. An acknowledgment that the contract sued upon was correct, and a promise by the obligor that it should be paid as soon as he could sell some stock and make collections, is a conditional promise, and will not obstruct the running of the statute. *Ibid.*

11. A promise by an obligor that he will pay, if he is not put to trouble, unaccompanied by a request for an indulgence, or an agreement for forbearance, will not avoid the operation of the statute. *Ibid.*

SUMMONS:

1. In an action before a justice for the recovery of the value, or return of the property under §267 of *The Code*, it must be averred in the summons that the value thereof does not exceed fifty dollars. *Singer Mfg. Co.* v. *Barrett*, 36.

2. Power to allow an amendment to process and pleading under *The Code*, discussed. *Ibid.*

SUMMONS—*Continued:*

3. After a party has pleaded, it is too late to take any objection to the process by which he was brought into Court. *Butts* v. *Screws*, 215.

4. A general appearance by counsel cures all antecedent irregularity in the service of process, and puts the defendant in Court, just as if he had been personally served with process. *Penniman* v. *Daniel*, 341.

5. Where it is desired to take advantage of any defect in the service of process, a special appearance should be entered for that purpose *Ibid.*

6. So, where a defendant demurred because he had not been properly served, but a general appearance was entered by his counsel; *It was held*, that the appearance waived any irregularity in the service, and the demurrer was properly overruled. *Ibid.*

SUPPLEMENTARY PROCEEDINGS:

1. Proceedings supplemental to the execution are chiefly equitable in their nature, and are in the nature of an equitable execution. *Vegelahn* v. *Smith*, 254.

2. The fact that the sheriff has an *alias* execution in his hands unreturned, which was issued on the same judgment on which supplementary proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. *Ibid.*

3. An execution can issue on a judgment pending supplementary proceedings which have been taken out on the same judgment. *Ibid.*

4. Since the adoption of the Constitution of 1868, the Superior Courts administer both legal and equitable rights, and when necessary both are administered in the same action. *Ibid.*

SURVIVAL OF ACTIONS:

All causes of action founded upon contract, debt or other duty survive against the personal representative of the person chargeable therewith. *Miller* v. *Leach*, 229.

TAX:

1. The rules of evidence applicable to allowing parol evidence to fit the description to the thing in ordinary deeds, apply to the assessment, levy, notice, &c., as well as to the deeds made in selling land for taxes, and these defects being essential matters, will not be cured by a second conveyance in which an accurate description of the land is given. *Harrison* v. *Hahn*, 28.

2. The Legislature has power to create new counties, out of territory theretofore embraced in existing counties, and it can provide that the inhabitants of such territory shall still be taxed to pay a proportionate part of the debts of the county from which it has been severed, or it may exonerate them from such debts. *Dare Co.* v. *Currituck Co.*, 189.

3. In the creation of new counties, the tax-payers thereof are exonerated from any tax to pay any portion of the debt of the county from which they have been taken, unless the act creating the new county shall provide differently. *Ibid.*

TAX—*Continued:*

4. Where the act creating a new county provided that such new county should pay its *pro rata* of the debt of the county to which its territory formerly belonged, but the act contained no provision giving it any interest in the property of the old county; *It was held*, that the new county could not recover its *pro rata* of the proceeds of the sale of certain stock owned by the old county, although the debt of the old county was in fact to pay for this stock. *Ibid.*

5. An administrator will not be allowed, on the settlement of his administration account, with taxes which he has paid on the lands which descended to the heirs. *Young* v. *Kennedy*, 265.

6. The license tax imposed upon drummers by sec. 28, ch. 175 (Revenue Act), Laws 1885, does not conflict with the Constitution of the United States. *State* v. *Long*, 582.

7. The rebate allowed from the drummers' license tax to merchants paying a purchase tax, by sec. 25 of said Act, does not discriminate against non-residents, since *all persons*, irrespective of their residence, engaged in the business therein designated, are entitled to its benefits. *Ibid.*

TENANTS IN COMMON:

Tenants in common of an undivided interest in lands, are not entitled to have either actual partition, or a sale for partition of such interest, unless the owners of the remaining interests are made parties to the proceeding, the Statute—§1904 of *The Code*—requiring that the *whole* tract shall be partitioned or sold—though shares may be allotted to some of the tenants, while a sale may be decreed as to others. *Brooks* v. *Austin*, 474.

TORT:

The rule that when one person takes and sells the personal property of another, the latter may waive the tort and recover the money, embraces the case where the person sued received the money in consequence of the action of a Court whose jurisdiction and process he invoked for that purpose. *Olive* v. *Olive*, 485.

TOWN ORDINANCE:

An ordinance of a city or town prescribing a penalty to be fixed in the discretion of the Court, is uncertain and void. *State* v. *Worth*, 615.

USURY:

1. In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury. *Arrington* v. *Goodrich*, 462.

2. An agreement, entered into with full knowledge, and with the intent to pay and receive a greater rate of interest than is allowed by law, whereby it is stipulated that the party advancing the money shall receive a commission as a consideration therefor, in addition to the legitimate interest, is usurious, and forfeits the interest. *The Code*, §3836. *Ibid.*

3. The mortgagor covenanted, in addition to the stipulation to repay the sums advanced with 8 per cent. interest, that he would ship to the

USURY—*Continued:*

mortgagee for sale, "double the quantity of cotton necessary to pay the amount advanced, and in case of failure so to ship, to pay to the mortgagee two and one-half per cent. on the amount failed to be shipped as liquidated damages for the breach of this covenant." Whether such agreement is usurious upon its face, *Quœre. Ibid.*

VACATING JUDGMENT:

1. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the Court upon that specific point. The order, or judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the Court below. *Green* v. *Griffin*, 50.

2. It is where the judgment is final and disposes of the entire controversy that the appeal, when properly perfected, vacates the judgment and the whole cause is transferred to the appellate court. Even then it may, for some purposes, be proceeded with in the lower Court. *Ibid.*

3. A decree, or order granting or dissolving an injunction, is not vacated by an appeal. *Ibid.*

4. A party who intentionally violates an interlocutory judgment of the Court is guilty of contempt, although he may have acted in good faith upon professional advice honestly given. *Ibid.*

VARIANCE:

1. A variance between the execution and the judgment, in regard to the sum due, does not vitiate a sale made under the execution. *Hinton* v. *Roach*, 106.

2. Where the indictment charged the defendant with carnal intercourse with his "daughter," and the proof was that the person was his illegitimate child; *Held*, no variance. *State* v. *Laurence*, 659.

3. The defendant was indicted for perjury, charged to have been committed upon the trial of one *Willis Fain* for larceny; the record introduced as evidence in support of the indictment, described the person charged with the larceny as *Willie Fanes: Held*, that it is within the rule *idem sonans*, and there is no variance. *State* v. *Hare*, 682.

VENDOR AND VENDEE:

1. The *status* of the mortgage relations, after the transfer of any interest by the mortgagor to a third party, cannot be changed to the detriment of the latter, without his consent. *Ballard* v. *Williams*, 126.

2. So, the parties to a mortgage cannot stipulate for a higher rate of interest than that reserved by the mortgage, nor can they incorporate any additional debt into the mortgage, nor can they agree that arrears of interest should be converted into principal money, and bear interest, as against *puisne* encumbrancers, or other assignee of the equity of redemption. *Ibid.*

3. In applying these rules, a vendor and vendee, when the purchase money, or a portion thereof, remains unpaid, will be regarded in the same light as a mortgagor and mortgagee. *Ibid.*

VENDOR AND VENDEE—*Continued:*

4. A purchaser of land is never required to accept a doubtful title, and the inability of the vendor to make a good title, is a defence to an action for the purchase money. *Castlebury* v. *Maynard*, 281.

5. When a material defence is pleaded, it is proper for the Court to submit an issue on it. *Owens* v. *Phelps*, 286.

6. So where an action was brought by the heirs-at-law of a deceased vendee of land, asking that the vendor be forced to make title to them, and he pleaded that the administrator had agreed with him to rescind the contract, which was ratified by the heirs-at-law, an issue as to such ratification was properly submitted to the jury. *Ibid.*

7. The specific performance of the vendor's agreement to convey land is not a strict right to be enforced at the will of the vendee, but it rests in the sound discretion of the Judge. This is not an arbitrary discretion, but is to be governed by the rules laid down by the Courts of Equity, to grant or withhold the relief, as in the particular case may seem equitable and just. *Herren* v. *Rich*, 500.

VERDICT:

1. The verdict must be taken in connection with, and interpreted by the issue, and when by necessary implication the answer to the issue disposes of the matter in controversy, it will not be set aside, although not so full as might be desirable. *R. R. Co.* v. *Purifoy*, 302.

2. So, where in an action to set up a lost deed, the jury found that the defendant had not executed a deed for any part of the land, but did not specifically find that no deed was ever executed, *it was held*, that the verdict was sufficiently responsive. *Ibid.*

3. If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. *Morrison* v. *Watson*, 479.

4. A *general* verdict is a finding in favor of one of the parties to an action; a *special* verdict finds the facts but is not in favor of either party, until the Court declares the law arising thereon. *The Code*, §§408, 409 and 410. *Ibid.*

5. If upon the trial of an indictment, containing several counts, the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from the consideration of the jury. *State* v. *Thompson*, 596.

6. A general verdict of guilty upon an indictment containing two counts—one for Larceny and the other for Receiving—will be sustained, if the evidence justifies either. *State* v. *Stroud*, 626.

VERIFICATION:

1. The Statute in regard to the verification of pleadings contemplates only two cases, in which the affidavit may be made by the attorney: One, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. *Hammerslaugh* v. *Farrior*, 135.

VERIFICATION—*Continued:*

2. Where a verification to a complaint stated that it was made by the attorney because the plaintiffs were non-residents, and that his means of knowledge were derived from an affidavit of the plaintiff, and from admissions made to him by the defendant, but did not state that the material allegations were within his personal knowledge; *It was held*, to be insufficient, and the defendant had the right to file an unverified answer. *Ibid.*

3. A judgment by default final cannot be rendered unless the complaint is verified. *Ibid.*

4. Where the complaint only alleges the value of the goods sold, without also alleging a promise to pay, or where the complaint is not verified, upon a failure to answer, the judgment should be by default and inquiry. *Hartman* v. *Farrior*, 177.

WARRANT:

A warrant will not be quashed because it does not contain the necessary descriptive words of the alleged offence, when it refers to an "annexed affidavit" in which all the essential averments are made. *State* v. *Winslow*, 649.

WIDOW:

1. The filing and recording of the list of articles allotted to the widow, as her year's support, as required by the statute, is essential to its validity, and to the vesting of the property or debt allotted to the widow in her. *Kiff* v. *Kiff*, 71.

2. In such case, the allotment must be made with such reasonable certainty as to the thing allotted, as to indicate what property was intended by the commissioners, otherwise, the allotment will be void. *Ibid.*

3. So, where the allotment of a year's support contained the following item, "labor for 3½ years, $173," *It was held*, void for uncertainty, and it was not competent for the widow to show, by parol evidence, that the commissioners intended, by this, to allot to her a claim which the deceased husband had against the defendant for labor done for him. *Ibid.*

4. *It is intimated*, that in such case, the widow could have the list corrected by a proper proceeding. *Ibid.*

5. The possession of the widow, before dower has been assigned, is not adverse to the heirs-at-law. *Nixon* v. *Williams*, 103.

6. The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. *Smith* v. *McDonald*, 163.

7. A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even although no homestead was allotted to him during his life. *Ibid.*

8. A widow is entitled to her year's allowance out of the personal estate of her husband, in preference to all general creditors, and also, by virtue of *The Code*, §2116, in preference to the special lien acquired by an execution bearing *teste* prior to the husband's death. In regard to

WIDOW—*Continued:*

other liens and equities, she takes the property in the same manner in which the husband held it. *Williams* v. *Jones*, 504.

WILLS:

1. An administrator, with the will annexed, can execute any power conferred by the will on an executor. *Council* v. *Averett*, 131.

2. As a general rule, where a will directs land to be sold for division among devisees, and no person is named to make the sale, neither an executor, nor an administrator *c. t. a.*, can execute the power, but such power may be conferred either by direct words, or by necessary implication. *Ibid.*

3. In the construction of wills, the meaning of the testator is to be gathered both from the text and context of the will. *Campbell* v. *Crater*, 156.

4. Where the words of a will were, "I leave to my son, W. R. C., a tract of land (describing it) and certain negroes (naming them), that to his heirs, but the said W. R. C. to have jurisdiction over said land and slaves;" *It was held*, that no estate whatever passed to W. R. C., when it appeared from the other portions of the will that it was the intention of the testator to leave his property to his grandchildren, and not to his children. *Ibid.*

5. In the construction of wills the intention of the testator is to be ascertained from the document itself in the light of surrounding circumstances, and no evidence, *dehors*, of his intention is competent. *Worth* v. *Worth*, 239.

6. A bequest of pecuniary legacy "out of the estate," or "to be paid," or "to be raised out of my estate," is a charge first upon the personal, and after its exhaustion, upon the real estate of the testator, unless it can be seen from the context, or other parts of the will, that these terms were used in a more restricted sense, and included only the personal estate. *Ibid.*

7. The testator having, in the first clause of his will given a pecuniary legacy to his wife to be paid to her in cash or bonds at her option out "of my estate," and in subsequent clauses made specific devises of the greater part of his "*real* estate," but in disposing of his personal property used the terms "my estate." *Held*, that the real estate specifically devised was not chargeable with the payment of the pecuniary legacy to the wife. *Ibid.*

8. It is not error to rule out evidence which could not aid the jury in passing on the issues to be tried. So, where the issue was, whether a certain tract of land in dispute, was intended by a testator to pass under a devise of his "home place," evidence that he had given parcels of land to certain of his sons, before his death, is irrelevant. *Waggoner* v. *Ball*, 323.

9. *Quære*, whether the rule in Shelley's Case has been abrogated in this State by statute. *Mills* v. *Thorne*, 362.

10. In this State, when an estate is settled on the ancestor, with remainder to his heirs, "equally to be divided among them," or "share and share alike," the addition of these words prevents the application of the rule in Shelley's Case; and the heirs take as purchasers. *Ibid.*

WILLS—*Continued:*

11. Since the act of 1784, words in a will which would give the absolute property, if bequeathing chattels, will give a fee if used in a devise of lands, the effect of the statute being to put chattels on the same footing as land, and to make the same rule applicable to both. *Ibid.*

12. A bequest of chattels to A for life, and at his death to be equally divided between his heirs, vests only a life estate in A in the chattels, with a remainder to his heirs, as tenants in common. *Ibid.*

13. Where land is devised to the ancestor for life, with a limitation that the remainder is to be equally divided among his heirs, or the heirs of his body, or his issue, the remaindermen take as tenants in common, *per capita* and not *per stirpes*, and they take as purchasers. *Ibid.*

14. The testator bequeathed to his son M., "four hundred dollars, to be paid him as follows: Upon the death of my wife, he shall recover forty dollars, and forty dollars annually thereafter, till the payments amount to four hundred dollars. The payments shall be made by my son J., and daughter E., each paying twenty dollars annually, and the property bequeathed to them shall be chargeable with said payments." J. was appointed and qualified as executor. The property devised to E. was delivered to her, and that devised to J. was accepted by him. *Held*,

That the devise to E. and J. was of specific property, encumbered by the legacy to M., and upon the delivery to E. of her share, and the election of J. to take his, the executor was discharged of all liability in his fiduciary and representative character, and each became separately liable for a moiety of the legacy to be paid as directed. *Hines* v. *Hines*, 482.

WILFUL TRESPASS:

1. One who, after being forbidden, enters upon land of another under a *bona fide* claim of right, is not guilty of the offence of wilful trespass. *The Code*, §1120. *State* v. *Winslow*, 649.

2. One who enters upon the land of another, after being forbidden, as the servant, and at the command of a *bona fide* claimant, is not guilty of any criminal offence. *Ibid.*

YEAR'S SUPPORT:

1. The filing and recording of the list of articles allotted to the widow, as her year's support, as required by the statute, is essential to its validity, and to the vesting of the property or debt allotted to the widow in her. *Kiff* v. *Kiff*, 71.

2. In such case, the allotment must be made with such reasonable certainty as to the thing allotted, as to indicate what property was intended by the commissioners, otherwise, the allotment will be void. *Ibid.*

3. So, where the allotment of a year's support contained the following item, "labor for 3½ years, $173," *It was held*, void for uncertainty, and it was not competent for the widow to show, by parol evidence, that the commissioners intended, by this, to allot to her a claim which the deceased husband had against the defendant for labor done for him. *Ibid.*

YEAR'S SUPPORT—*Continued:*

4. *It is intimated,* that in such case, the widow could have the list corrected by a proper proceeding. *Ibid.*

5. A widow is entitled to her year's allowance out of the personal estate of her husband, in preference to all general creditors, and also, by virtue of *The Code,* §2116, in preference to the special lien acquired by an execution bearing *teste* prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner in which the husband held it. *Williams* v. *Jones,* 504.

6. Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support; *It was held,* that the widow took the property subject to the mortgage lien. *Ibid.*