ANNOTATIONS INCLUDE VOL. 197

NORTH CAROLINA REPORTS

VOL. 97

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1887

REPORTED BY

THEODORE F. DAVIDSON

ANNOTATED BY

WALTER CLARK, 1912

(FURTHER ANNOTATIONS ADDED, 1930)

(2D EDITION, ANNO.)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1887

R. M. NIMOCKS v. JOHN D. WOODY ET AL.

Jurisdiction—Contract and Tort—Bills of Exchange—Acceptance—Equitable Assignment.

1. Where a commission merchant wrote to his customer that a certain amount was due him and that he might draw for it, which letter the customer showed to the plaintiff who took the drafts on its credit, but the commission merchants afterwards refused to accept it, when the plaintiff sued both the drawer and the commission merchants; *It was held*, that the liability of both was *ex contractu*, and if the amount was under two hundred dollars a justice had jurisdiction.
2. Where such letter was written on 29 March, and draft was drawn on 4 April, it is not such delay as will discharge the drawees, it not appearing that any harm had come to them by the delay.
3. A letter written to the drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even although there be no funds in his hands belonging to the drawer, if the bill be drawn payable at a fixed time, and not at or after sight.
4. If in such case, the bill be drawn payable at or after sight, and is for the entire amount named in the letter, the payee can maintain an action against the drawee as the equitable assignee of the fund; as *it seems* in such case the drawee would not be liable as acceptor, unless the draft was drawn in precise accordance with the terms of the letter.

(2) CIVIL ACTION, tried on appeal from a justice of the peace, before *Gilmer, J.*, and a jury, at Fall Term, 1886, of CUMBERLAND Superior Court.

This action, tried before a justice of the peace of Cumberland County, and carried into the Superior Court by the defendants' appeal, is for the recovery of one hundred dollars, the unpaid residue of a draft drawn by the defendant Byrd upon the other defendants. The essential facts of the case, which seem not to have been disputed, are these:

The defendants Woody & Currie, on 29 March, 1885, at Wilmington, addressed to their codefendants the following letter:

C. M. BYRD, Esq., *Bunn's Level, N. C.*

DEAR SIR: Enclosed find account sales raft timber. We got all we could for your timber, and concluded it was not worth while to hold any longer. If you have not drawn a $50 draft, you can draw for the net proceeds, $223.03, at sight. If you have drawn $50, draw on us for $173.03. Timber still dull and low, $2.00 to $10.00.

Yours, etc., WOODY & CURRIE.

In pursuance of this authority, was drawn a draft, as follows:

$172.53. FAYETTEVILLE, N. C., 4 April, 1885.

At sight, pay to the order of R. M. Nimocks, one hundred seventy-two and 53-100 dollars, balance on timber sales, value received, and charge the same to account of C. M. BYRD.

To Messrs. Woody & Currie, Wilmington, N. C.

(3) The letter was shown to the plaintiff a day or two before the date of the draft, and then a draft was drawn by and on the parties for $50.50, and the other on the day of its date, soon after, for the residue of the sum mentioned in the letter, and received by the plaintiff upon the faith of what is therein stated.

The plaintiff endorsed the draft to the Fayetteville National Bank, by whom it was presented, and went to protest for nonacceptance, and thereupon the plaintiff took it up and brought suit on 25 May, 1885.

After its dishonor, the drawee paid to the plaintiff $72.03, and refused to pay more, saying that a mistake of $100.00 had been made in Byrd's account when the letter was written, which had since been discovered.

No defense was made by Byrd, and no evidence offered by the resisting defendants.

These moved to dismiss the action for want of jurisdiction in the justice who tried the cause:

I. Because it was an action not founded on contract.

II. Because two separate causes of action, one against the defendant Byrd, *ex contractu,* and one against Woody & Currie, *ex delicto,* had been joined in the same suit. His Honor being of opinion that there was no improper joinder, and that the justice had jurisdiction, refused defendants' motion, and they excepted. The defendants Woody & Currie asked for the following special instructions, which were refused:

I. That the defendants Woody & Currie not being parties to the draft, were not liable thereon.

II. That the letter, not being intended as a letter of credit, but a simple letter from a commission merchant to his customer as to the state of his account with them, that the plaintiff had no right to treat it as a contract, or basis for a contract, with him.

III. That the plaintiff, being a stranger to said letter, could (4) take no advantage of any promise therein to Byrd, expressed or implied.

IV. That the time between the date of the letter and the date of draft was too long for the plaintiff to have treated it as a promise or contract expressed or implied.

V. That upon the whole testimony, taking the same as true, the plaintiff was not entitled to recover.

His Honor charged the jury, that if they believed the evidence, they should find a verdict in favor of the plaintiff, and the defendants Woody & Currie excepted. Verdict and judgment for the plaintiff against the defendants Woody & Currie, and they appealed.

No counsel for plaintiff.
E. R. Stamps for defendants.

SMITH, C. J., after stating the facts:

I. The jurisdiction was in the justice, for the action is founded upon contract, and is not in tort as misconceived by the appellants.

II. The objection that the appellants are not parties to the draft, nor the plaintiff to the letter, and that its admission as evidence was an erroneous ruling, is in all these aspects untenable, as will be seen in the inquiry into the defendants' liability to the plaintiff.

III. The interval between the date of the letter and the date of the draft, it not appearing that any harm has occurred to the drawees by the delay, is not unreasonable under the circumstances, so as to work their exoneration.

The main question then is, whether the appellants incurred responsibility to the plaintiff, who accepted the draft of Byrd upon the assurance contained in the letter shown him, and on which he relied, of

prompt payment on its presentation, there being money then in
(5) their hands upon their own representation, sufficient for the purpose.

It must be admitted that there is some diversity in the rulings in England and in this country, as to whether a promise made in writing to accept and pay a draft for a specified amount, yet to be drawn, and communicated to one, who upon the faith of such promise, becomes the payee of it, when drawn for value, is an acceptance in law, so that an action upon it can be maintained by the latter. In the case of *The Bank of Ireland v. Archer,* 11 M. & W. (Ex.), 383, it is decided that such a result does not follow, and there are decisions in some of the State courts to the same effect. But in the well considered and elaborate opinion of *Chief Justice Marshall,* in *Cooledge v. Payson,* 2 Wheat., 63-75, speaking in reference to the distinction between the cases of a bill drawn upon, and a bill drawn after such promise, it is said: "The Court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now this credit is given as entirely by a letter written before the date of the bill as by one written afterwards." The general rule is then declared in these words: "Upon a review of the cases which are reported, the Court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

The same doctrine is laid down in *Townsley v. Sumrall,* 2 Peters, 170-185, by *Justice Story,* and it is said to prevail when there are no funds of the drawer in the drawee's hands, and the action may be brought, says *Nelson, J.,* in *Cassell v. Davis,* 1 Black's C. C. Reports, by any one who makes advances on the bill upon such assurance of payment. To the same effect is 1 Daniel Neg. Instruments, secs. 559,
(6) 560, 561; and 1 Edw. on Bills, Notes, etc., sec. 567, and following; *Plummer v. Lyman,* 49 Me., 229; *Stiman v. Harrison,* 42 Penn. St., 49.

We are referred, however, to section 562, in Mr. Daniel's first volume, who says: "It seems applicable (the rule) to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight, for in order to constitute acceptance in the latter, a presentment is indispensable, since the time the bill is to run cannot otherwise be ascertained."

This may be true in a strict sense, an actual presentment and acceptance being necessary to determine the time of payment, as in a sight

draft, days of grace are allowed; but the presentation in this case has been made, and not only acceptance refused, but liability denied altogether. The present draft is in precise accord with the direction in the letter, and the plaintiff had advanced his money upon the assurance of its being met, and the governing general rule is, that the drawee thereby undertakes the obligations of the acceptor, and we see no reason why it should not be so in any form of a draft, made in pursuance of the terms of the promise, though in the exceptional cases, an actual presentation may be necessary to fix the time of payment, and authorize the action upon it as an acceptance.

But if a recovery be obstructed upon this ground, it may be effected upon the basis of an assignment of the fund in the drawee's hands. It is a transfer of the whole, not of a part, made known to the appellants before any other disposition is made of it, or any change taken place unfavorable to their liability. The point is expressly decided in *Wheatly v. Strobe,* 12 Cal., 92, the opinion being delivered by *Justice Field,* now of the Supreme Court of the United States, in which he says: "The order, though not available against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howell. It was given for an antecedent debt, and for the (7) full amount of the demand against Strobe. The consideration was valuable, and there was no splitting of the amount due into different and distinct causes of action, and in such cases, it is well settled that an *order, whether accepted or not,* operates as an assignment of the debt or fund against which it is drawn."

Following this ruling, Mr. Daniel says, that "it seems to be settled by the authorities, that if drawn for the whole amount, it (the draft) operates as an equitable assignment, which will take precedence of any subsequent lien or charge upon them; and that after notice to the drawee will bind him." Section 431.

As an equitable assignee then, the action can be maintained upon an implied contract to pay.

There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Hawes v. Blackwell, 107 N. C., 201; *Burrus v. Ins. Co.,* 124 N. C., 13; *Markham v. McCown, ibid.,* 166; *Bank v. Hay,* 143 N. C., 332; *Fidelity Co. v. Grocery Co.,* 147 N. C., 513.

JOS. WHITE ET AL. v. W. S. BUTCHER ET AL.

Equity Practice—Jurisdiction—Reference.

1. Where a suit in equity was pending in the Supreme Court at the time of the adoption of the present system of procedure, the Superior Courts are the proper tribunals to proceed with the cause, and this Court can make no order in it, except to remand the papers.
2. Where in such case, a decree had been made in this Court settling the rights of the parties, and only the final accounts remained to be taken, the Superior Courts cannot allow amended pleadings to be filed, or the rights of the parties as settled by the decree to be varied, but must proceed with the cause in accordance with the decree.
3. Under the former equity practice, in a suit for specific performance, a reference was ordered before the final decree to ascertain the balance due on the purchase money, but not to afford affirmative relief to the defendant.
4. Under the present practice, a reference will not be ordered after a final decree.

(Royster v. Chandler, 6 Jones Eq., 291; *Hart v. Roper*, 6 Jones Eq., 349; *Pearson v. Carr, post*, 194; cited and approved.)

(8) THIS was a motion made by plaintiffs, at the February Term, 1887, of the Supreme Court.

The nature and object of the motion appear in the opinion.

A. E. Holton for plaintiffs.
No counsel for defendants.

SMITH, C. J. The bill to enforce the specific execution of a contract for the sale of land was filed in the Court of Equity of Surry County, at Fall Term, 1857, and at Spring Term, 1861, set for hearing, and removed to the Supreme Court at June Term, and it was determined in favor of the complainant; and it was declared, that the defendant Holderfield, a purchaser with notice of the complainant's equity, must make title to him on payment of the residue of the purchase money, with interest, after deducting rents with which he is chargeable during his occupation, as to which there should be a reference and account, if so desired by the parties.

A year later such reference was ordered to the clerk, and he, at June Term, 1864, made a report, with the statement of the account, in which he finds that the rents, less the improvements put upon the land, computed to 1 January, 1863, exceed the amount of the unpaid purchase money by the sum of $53.96. At June Term, 1875, a motion was

entered to confirm the report of the referee, of which notice was directed to be given to the defendant Moses Pitman, and such notice was served on him and on the plaintiff.

At June Term, 1876, such confirmation was given, and a (9) decree entered, remanding the cause for further proceedings to the Superior Court, the successor of the Court of Equity, not prejudicial to the decree.

The remand is entered on the docket of said Superior Court, at Fall Term, and it was continued for a series of years, the record stating that the papers in the cause had not been sent down from this Court. Some action was taken during this period, and among others, a new order of reference to take an account of rents and profits, which remained unexecuted. At Spring Term, 1886, as appears in the record of that court, transmitted and certified by the clerk, this order was entered:

"This cause coming on to be heard upon the amended complaint, and answer of defendant Moses Pitman, and it appearing that the cause was transferred to the Supreme Court before the amended complaint and answer were filed, and that the cause was then depending in the Supreme Court, and that said amended pleadings were improvidently filed; it is ordered that the amended complaint and answer be stricken out, and that the cause stand as it stood before the filing of the amended complaint and answer."

At the last term of this Court plaintiffs' counsel moved for a decree of title, and for a further reference to ascertain the value of the rents of the land accrued since the taking of the first account; and notice having been served on one of the complainant's counsel, the motion has been pressed upon us at the present term.

This general history of a case which runs through a period of nearly a third of a century, with its attending irregularities and delays, is sufficient to show its present attitude and relation to the Court.

The last decree, following and in execution of that determining the merits of the cause, and the right of the complainant to a specific performance of the contract, lacked only an order for title to make a complete and final disposition of it. The remand arrested fur- (10) ther action here at this point, and carried with it the confirmation, leaving to the Superior Court the duty of taking such further action as was needed, and none other, for its consummation. The practice of remanding is settled by precedent. *Royster v. Chandler,* 6 Jones Eq., 291; *Hart v. Roper, ibid.,* 349.

The controversy adjusted in this Court, could not be reopened in the court below, as seems to have been attempted, by new pleadings introduced, or by permitting anything to be done inconsistent, or at variance with the rulings here made. The practical result to be secured was the

conveyance of the title to the property, as would have been the case here, had the jurisdiction over the cause been retained. But it was no longer in this Court for any further order, unless, perhaps, the transmission of the papers and transcript; but the neglect to transmit them, did not retain the cause itself after the order, nor impair the efficiency of the order.

The final and effectual relief in securing the estate in the land, must be found in an application to the court below, where the jurisdiction is; not in this Court, where it is not. As to further relief in a new reference, we may observe that in the old equity practice, unlike the present, the purpose of reference was to ascertain if payment had been made, or how much had been paid, as preliminary to the decree, but not to afford ground for affirmative relief for the defendant, and so is this case presented in the pleadings.

There was no cross-bill filed by the defendant, but his defense was confined to resistance to the plaintiffs' alleged equity. And even under our present system, which does not control this proceeding, no such additional reference is allowable after a final decree. *Pearson v. Carr, post,* 194.

The motion must be denied, with costs.

Denied.

Cited: Herndon v. Ins. Co., 108 N. C., 650; *S. v. Marsh,* 134 N. C., 197; *Tussey v. Owen,* 147 N. C., 337, 338; *R. R. v. Horton,* 176 N. C., 118; *Newton v. Highway Commission,* 194 N. C., 304.

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(11)

JOHN CORNWALL v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Contributory Negligence.

1. Although a servant be injured by the negligence of his master, yet if he could by reasonable care and prudence have averted the accident, and the injury can be traced to his own negligence as well as that of the defendant, he cannot recover.
2. Although a servant is ordered by his superior to perform a dangerous duty, this does not relieve him of the duty of avoiding any particular danger incident to carrying out the order.
3. In order to bar a recovery, the contributory negligence of the plaintiff must have been a proximate cause of the injury complained of.

4. Where the plaintiff, in obedience to the orders of his superior, attempted to get upon the pilot of a moving locomotive, and in doing so, his clothes were caught in the splinters on a worn rail: *It was held*, even if the master was negligent in not repairing the rail, yet it was the duty of the servant to use reasonable care, and it was error in the trial judge to charge the jury that if the plaintiff was ignorant of the condition of the rail, and got on the engine in obedience to the order, that he was entitled to recover.

(Johnson v. R. R., 81 N. C., 453; *Doggett v. R. R.*, 78 N. C., 305; *Owens v. R. R.*, 88 N. C., 502; cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, and a jury at Spring Term, 1886, of MECKLENBURG Superior Court.

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

The facts fully appear in the opinion.

W. P. Bynum for plaintiff.
George E. Wilson filed a brief for defendant.

SMITH, C. J. The plaintiff, while in the service of the defendant, as brakeman on one of its freight trains, was directed by the conductor, when the train on which he was employed reached the station known as Pineville, to cut loose the engine and change the switch (12) at the sidetrack, after doing which, in the effort to get on the pilot—or, as it is usually called, the "cow-catcher"—his pants became entangled with some iron splinters worn off the rail and projecting a few inches from it, which caused him to fall, and his hand was crushed by one of the truck wheels, rendering amputation necessary. To obtain compensation for this injury, the present action has been instituted.

The plaintiff testifies, that the conductor had given him general directions that in shifting trains at stations, he should ride back and forth on the engine, so as to be always at his post; and later in the examination, he adds that the order was, "to jump on and ride that way," meaning, as we suppose, upon the pilot.

A witness for the plaintiff there residing, saw the plaintiff run from the switch and attempt to jump upon the pilot of the engine whilst it was in motion, when he fell and sustained the injury mentioned. The plaintiff, while he had been thus employed for several years, had not before seen these frayed projecting pieces of iron, nor does the defect in the rail appear to have been called to the attention of the proper officers of the company, as involving possible danger, and the need of reparation. The conductor for the defendant testifies to the contrary about giving such order to the plaintiff, and both he, the engineer and the fireman, after describing so much as each saw of the accident, give a

somewhat different version of the occurrence, and of the plaintiff's action that immediately preceded it, as obtained from the plaintiff's own account of it, in answer to inquiries made as soon as he was known to be hurt. It was also shown from a book of the company, containing rules and regulations for the transportation department of its service, which are in minute detail, for the guidance of its officers, agents and employees, that "no person besides the engineer and fireman will
(13) be permitted to ride on the engine or tender, without a written order from the superintendent or master of trains," except, etc., not changing the prohibition so far as it affects the plaintiff.

An instruction was asked for the defendant, and refused, to this effect:

"If the jury believe from the testimony, that the accident was caused by the plaintiff's attempting to get upon the pilot of the engine while the same was in motion, he cannot recover," the last sentence being understood to mean, that the finding should be, upon the second issue of contributory negligence, in favor of the defendant. The instruction embodies the proposition, that in such case, the plaintiff being the direct cause of the accident, could have no claim on the defendant for remuneration. It is manifest that the rash and inconsiderate act of attempting to get on the pilot of a moving engine, was the immediate and direct cause of the injury, however much the blame may be put on the defendant for its antecedent neglect to replace the defective rail with a better one. Assuming, then, the negligence of the company in permitting this rail to remain in such condition, it does not relieve the plaintiff from exercising that care and attention which his own safety would suggest, for avoiding the consequences of the defendant's negligence. The correct rule is thus laid down in *Johnson v. R. R.*, 81 N. C., 453: "But in every case, he (the servant) must not by his own negligent conduct contribute to the injury, and if by reasonable care and prudence it could have been averted, he has no remedy against his employer." The doctrine rests upon sound reasoning, and is supported by numerous references to cases decided by this Court. Now, was not the plaintiff not only negligent, but engaged in committing a rash act, when he essayed under the circumstances, to get upon the pilot, and should he not have been observant of the condition of the frayed rail at
(14) the place where he essayed to mount it, before making the hazardous effort? If the evidence warranted the finding of the facts as hypothetically set out in the instruction, the jury should have been so charged, and there is error in refusing to give it.

The third instruction given, instead of that asked, and intended as a substitute, is in these words: "If the defendant company allowed a rail next to the switch to become splintered, and the splinters extended so

far, and were of such strength as to catch in the clothing of the plaintiff, and prevent him from getting on the train or engine, then the defendant was guilty of negligence, and if the plaintiff's injury was caused by such splinters catching in his clothing, and the plaintiff did not previously know the condition of the iron, the jury would respond to the first issue—yes."

After declaring that the burden of showing that the injury resulted from the defendant's negligence, the court proceeded to charge:

"It appearing from the testimony offered by the plaintiff, that he fell in attempting to mount upon the cow-catcher or pilot of an engine in motion, the plaintiff was negligent, and his negligence was one of the immediate causes of the injury he sustained, and the jury will find in response to the second issue in the negative, unless the conductor of the train, having authority to control the plaintiff as brakeman, ordered the plaintiff to ride on the pilot from the switch to the depot where cars were shifted to the sidetrack."

But he added, in substance, that if without knowing the condition of the track, he acted in obedience to an order which the conductor had the right to give, the response to the issue should be in favor of the plaintiff.

Now, it appears from the plaintiff's testimony only, that such general direction was given him by the conductor, and no special direction to this effect was given at this time or place, and it did not therefore dispense with proper vigilance and care on his part in carrying out the command. It was not less the plaintiff's duty to see and (15) avoid any particular dangers incident to obedience. He was to see to his own safety, and not recklessly act in disregard of the time and place in getting upon the engine. No reason is suggested why he did not select some other place, where there were no such splinters, and where this peril would have been avoided. We think the jury should have been told that the plaintiff was bound, even when executing the order, to use reasonable precautions for his own security; and if the attempt was not only without the exercise of them, but approximating a reckless indifference to his own safety, to which the orders of his superiors cannot extend, he, and not the defendant, in a legal sense, would be responsible for the consequences. As is said in *Doggett v. R. R.*, 78 N. C., 305: "If the plaintiff's negligence contributed directly to the injury, it is well settled that he cannot recover." "The negligence of the plaintiff," adopting the language of a recent author, "in order to bar a recovery, must have been a proximate cause of the injury complained of"; Thomps. Neg., page 1157, sec. 8; page 1151, sec. 5. See, also, *Owens v. R. R.*, 88 N. C., 502.

We have not considered the effect upon the defendant's liability of the relations between the conductor and the plaintiff, and whether they

are fellow-servants of a common principal, within the meaning of the rule that exonerates him or it, about which the decisions are conflicting, but upon the broader ground on which a stranger would stand.

We are of opinion that there is error in the rulings of the court, and that the defendant is entitled to a new trial.

Error. Reversed.

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(16)

N. A. MCNEILL ET AL. v. ELLA LAWTON.

Case on Appeal—Reference—Nonsuit.

1. Where there is a conflict between the record and the case on appeal, the record must prevail, but where matters are stated in the case, in regard to which the record is silent, they will be accepted as facts.
2. Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein, pending the trial before the referee.
3. So, a plaintiff may take a nonsuit while the case is pending before a referee, if the case be one in which he is entitled to do so.
4. While generally speaking a plaintiff can take a nonsuit at any time before verdict, yet he cannot do so if the defendant has pleaded a counterclaim, which arises out of the same contract or transaction which is the foundation of the plaintiff's cause of action.
5. When the counterclaim does not arise out of the same transaction as the plaintiff's cause of action, but falls under subdivision 2 of section 244 of The Code, the plaintiff may submit to a nonsuit. In such case, the defendant may either withdraw his counterclaim, when the action will be at an end, or he may proceed to try it, if he so elects.

(Farmer v. Williams, 75 N. C., 401; *S. v. Keeter*, 80 N. C., 472; *Bank v. Stewart*, 93 N. C., 402; *Whedbee v. Leggett*, 92 N. C., 469; cited and approved.)

CIVIL ACTION, tried before *Philips, J.*, at October Civil Term, 1886, of WAKE Superior Court.

The following is so much of the case settled on appeal as it is necessary to set forth here:

This is an action to enforce the payment of an amount alleged by the plaintiffs to be due to them by the defendant, for material furnished and work and labor done, in erecting and repairing certain buildings and personal property in the city of Raleigh, and to have the same declared to be a lien on said buildings, and the lot upon which the same
(17) are situated, discharged from all homestead claims on the part of the defendant.

At the October Term, 1886, of Wake Superior Court, the plaintiffs made a motion to be permitted to take a nonsuit. The defendant opposed the granting of said motion on the following grounds:

1. For that the court had no jurisdiction and no power to grant said motion, because, at the April Term, 1886, of said court, the said case was referred for trial by consent of parties plaintiff and defendant, and because the referee by consent of counsel for plaintiffs and defendant, had proceeded with the trial of said case upon complaint, answer, amended answer and replication, and because said case was then pending before said referee upon complaint, answer, amended answer and replication.

2. For that the defendant in her said answer and amended answer, set up a counterclaim existing at the time of the bringing of the action, and arising out of the transaction on which plaintiffs sued, and prayed for judgment against the plaintiffs for the sum of $768.53 and costs.

The facts in the case are as follows:

The plaintiffs filed their complaint in the Superior Court on 23 February, 1886; the defendant filed her answer in said court on 6 March, 1886; the plaintiffs filed their replication to the answer on 20 April, 1886. By consent of parties the defendant filed an amended answer, and plaintiffs amended their replication. Said answer and amended answer set up a counterclaim, existing at the time of the bringing of the action, and arising out of the transaction upon which defendant sues, and prays for judgment against plaintiffs for the sum of $768.53 and costs.

At April Term, 1886, of said court, by consent of parties, the case (then standing for trial upon complaint, answer, amended answer and replication), was referred for trial to Armistead Jones, Esq., with leave to defendant to withdraw her answer, and file a demurrer as to the validity of the lien.

The proceedings in said cause, taken and had before the referee, (18) were as follows:

On 26 June, 1886, by consent, the defendant's answer was considered as withdrawn, and the demurrer filed in said cause, was by consent, argued before the referee. Plaintiffs, upon motion, were allowed to file the contract as an exhibit to the complaint; and the defendant was allowed to amend her demurrer. The defendant excepted to the filing of the contract. The demurrer was overruled, and defendant excepted. The demurrer being overruled, the defendant, by consent, was allowed to answer. The defendant then refiled her answer and amended answer, setting up a counterclaim existing at the time of the bringing of the action, and arising out of the transaction on which plaintiffs sue, and asking judgment against plaintiffs, and by consent plaintiffs refiled their replication.

The court refused to permit the plaintiffs to take a nonsuit, and rendered judgment as follows:

"This cause coming on to be heard upon the motion of the plaintiffs to take a nonsuit, and the defendant resisting the motion on the ground that the case has been, and is now referred by consent, and on the further ground that the defendant has in her answer set up a counterclaim to the demand of the plaintiffs, arising from the same transaction out of which the plaintiffs' claim arises, and it so appearing to the court, it is now considered, ordered and adjudged, that said motion be refused, and that the defendant recover costs."

The plaintiffs having excepted, appealed to this Court.

Spier Whitaker for plaintiffs.

Ernest Haywood (A. W. Haywood was with him on the brief) for defendant.

(19) MERRIMON, J., after stating the facts: It is true, as contended by the counsel of the appellant, that the record and recitals therein must prevail, when these are inconsistent and in conflict with statements in the case stated or settled upon appeal by the court. *Farmer v. Williams,* 75 N. C., 401; *S. v. Keeter,* 80 N. C., 472. But we do not find such inconsistency in this case. The proceedings in the course of the action appear disorderly, but the pleadings all appear, and their nature and what is stated in them, indicate the proper order of them. Nor does the record note the consent of the parties in respect to the filing of the pleadings subsequent to the complaint. There is, however, nothing appearing in it inconsistent with the case settled, and the statements of facts therein as to the order of the proceedings, must be accepted as true. It had been better, if the court had required the record to be put in order—indeed, it ought to have done so.

The view suggested by counsel, that the consent reference in an action, as allowed by the statute (The Code, sec. 420), places the action pending the reference, or at all, beyond the control of the court, is unfounded. The *action* is not referred—it continues pending in court, and all proper motions may be made in it, not inconsistent with the reference and course of procedure therein, as prescribed by the same statute. (The Code, sec. 422).

The reference is for the *trial* of issues of fact or law, or both, accordingly as its terms may provide. The jurisdiction is that of the court, not that of the referee; he, by the written consent of the parties, becomes a mere adjunct of, and acts in the place of the court, or of the court and jury, in respect to the trial. What he does is ancillary to the

authority of the court in the action. He must make report of his proceedings and action, and his report, unless excepted or objected to in the way prescribed, stands as the decision of the court, and upon application to the judge, he may enter judgment upon the same. There is no reason why the plaintiff may not abandon his action, and (20) voluntarily submit to a judgment of nonsuit, as it is called, pending the reference. When he thus goes out of court, the action and all proceedings therein, including the reference, are at an end, except in the cases and as explained below.

Generally, a plaintiff may abandon his action and voluntarily submit to a judgment of nonsuit, at any time after bringing his action, and before the verdict of a jury, or what is tantamount to it. *Bank v. Stewart,* 93 N. C., 402, and the cases there cited.

He cannot do so, however, under the present method of civil procedure, if the defendant has pleaded a counterclaim—a cause of action arising out of the contract or transaction set forth in the complaint as the grounds of the plaintiff's cause of action. In such case, it is reasonable and just that the rights of the parties arising out of such contract or transaction shall be settled at the same time and in the same action, and that one party shall not be allowed to abandon the action without the consent of the other, until this shall be done. The plaintiff cannot justly complain if he is detained in court until the whole merits of his cause of action are tried, and the rights of the defendant growing out of the same are settled, if the latter shall so desire. *Whedbee v. Leggett,* 92 N. C., 469.

It is otherwise when the *counterclaim* is a cause of action arising independently of that alleged in the complaint, such as that allowed by the statute (The Code, sec. 244, par. 2). In that case, the plaintiff may submit to a voluntary nonsuit as to his own cause of action, but he cannot, by doing so, put an end to the defendant's right to litigate his counterclaim. The action continues for that purpose, unless the defendant shall see fit to withdraw his counterclaim, and thus abandon the action with which he has become identified, as seeking redress from the plaintiff, who becomes practically a defendant, while (21) the defendant becomes a plaintiff in the action thus prolonged. *Whedbee v. Leggett, supra.*

Now, in the present action the defendant pleaded a *counterclaim* arising out of the contract and transaction alleged in the complaint, as the foundation of the plaintiff's claim. It is therefore obvious, that they were not entitled to submit to a voluntary nonsuit. The defendant has the right to detain them in court until her alleged rights, growing out of the plaintiffs' alleged cause of action, shall be settled and determined.

There is no error. Let this opinion be certified to the Superior Court, to the end that further proceedings may be had in the action there, according to law. It is so ordered.

No error. Affirmed.

Cited: Bynum v. Powe, post, 377; *Morisey v. Swinson,* 104 N. C., 461; *Pass v. Pass,* 109 N. C., 486; *Jones v. Beaman,* 117 N. C., 262; *Stith v. Jones,* 119 N. C., 431; *Olmsted v. Smith,* 133 N. C., 586; *Yellowday v. Perkinson,* 167 N. C., 146; *S. v. Wheeler,* 185 N. C., 672; *Cohoon v. Cooper,* 186 N. C., 27; *Shearer v. Herring,* 189 N. C., 464.

LEVI CATES, ADMINISTRATOR, v. MARTHA E. PICKETT.

Judicial Sales—Irregular Judgments—The Code, sec. 387.

1. Before the adoption of the new system of procedure, it was the common practice for the administrator to file his petition to sell land for assets, and if the heir was an infant, to have a guardian *ad litem* appointed without any service upon the infant at all.

2. The appointment of a guardian *ad litem* is valid, although the infant has not been regularly served with process, but has only accepted service thereof.

3. Where an administrator filed a petition to make assets, and the heir at law, an infant under fourteen years old, accepted service of the summons, and a guardian *ad litem* was appointed, but no actual service was ever made; *It was held,* that the irregularity was cured by section 387 of The Code.

(Hare v. Holloman, 94 N. C., 14; *Sumner v. Sessoms,* 94 N. C., 371; *Williams v. Williams,* 94 N. C., 733; *Fowler v. Poor,* 93 N. C., 466; *Williamson v. Hartman,* 92 N. C., 236; *England v. Garner,* 90 N. C., 197; *Howerton v. Sexton,* 90 N. C., 581; *Mauney v. Gidney,* 88 N. C., 300; *Johnson v. Futrell,* 86 N. C., 122; cited and approved. *Moore v. Gidney,* 75 N. C., 34; *Allen v. Shields,* 72 N. C., 504; *Bass v. Bass,* 78 N. C., 374; *Stancil v. Gay,* 92 N. C., 462; *Larkins v. Bullard,* 82 N. C., 25; *Morrison v. Gentry,* 89 N. C., 248; *Mathews v. Joyce,* 85 N. C., 258; distinguished.)

(22) MOTION in the cause to set aside a judgment, heard on appeal from the clerk, before *Clark, J.,* at Chambers, on 1 June, 1886.

This was a motion made in the cause to set aside a sale made by the plaintiff, as administrator of E. W. Pickett, heard before *Clark, J.,* at Chambers.

On 27 March, 1874, the plaintiff, as administrator, filed a petition in the Superior Court of the county of Orange, against the defendant, the only child and heir at law of the said E. W. Pickett, for a sale of the land belonging to the estate of his intestate, to make assets for the payment of debts and costs of the administration. The petition was duly verified, and on the same day a summons was issued by the clerk of the Superior Court of Orange for the defendant to appear "within twenty days after the service, and answer the complaint," etc.

On the same day the summons was endorsed, "service accepted, and all errors waived," and signed by Martha E. Pickett.

On the same day a petition was filed in writing by the plaintiff, setting forth that the defendant was the only child and heir at law of his intestate; that she was a minor without general or testamentary guardian, and asking the court to appoint some suitable and discreet person, as guardian *ad litem* of the said Martha E. Pickett, upon whom service of summons may be made, and who may appear and answer in this action as such guardian."

On the same day an order was made appointing John W. (23) Blackwood guardian *ad litem,* and he filed an answer, stating that there was no objection to the sale, etc.

On 7 May, 1874, two orders, as appears from the record, were made in the cause, the first reciting that, "upon reading and filing the petition in this case, and it appearing to the satisfaction of the court that all proper persons have been made parties to the action and accepted service of the summons, and no answer has been filed; and there appearing no reason why the land mentioned in the petition should not be sold for the purpose of paying the debts of the deceased: it is therefore ordered," etc. The second order reciting that, "this cause coming on to be heard upon the petition and affidavits of Levi F. Cates, and being heard, and it appearing to the court that the personal estate of E. W. Pickett, deceased, is insufficient to pay the debts and charges of administration: it is therefore ordered and directed, that the administrator have license to sell," etc., setting forth time of notice, place, terms of sale, etc.

On 17 June, 1874, the plaintiff made his report of the sale, setting forth, among other things, that the land was sold on 15 June, when Martha F. Cates became the highest bidder and purchaser, at the price of $475, and had complied with the terms of the sale, and that the land brought a good and fair price, and recommended a confirmation of the sale. On 19 June an order was made confirming the sale, and directing title to be made to the purchaser upon the payment of the purchase money.

Some time in the year 187...., Martha F. Cates sold the land to J. W. Gattis, who afterwards sold separate portions of it to J. R. Gattis, Pen-

dleton Cole, and J. L. Watkins, and the portion purchased by J. L. Watkins was afterwards sold by him to W. W. Fuller.

This was a motion by the defendant, who is now the wife of J. H. Woods, after notice to Levi F. Cates, Martha H. Cates, J. W. Gattis, J. R. Gattis, W. W. Fuller and Pendleton Cole, moved on 5 May,
(24) 1886, before the Superior Court of the county of Orange, "to set aside the judgment, orders and decrees in said case, and to hold the same and all proceedings thereunder, ineffectual to preclude the defendant from setting up title to the land mentioned in the petition." The motion was based upon the alleged ground that the court had acquired no jurisdiction of the person of the defendant. The affidavit of J. H. Woods was filed, setting forth that Martha E. Pickett was born on 4 April, 1861, and intermarried with affiant in December, 1880. That the endorsement on the summons was in the handwriting of the counsel of the petitioner, Levi F. Cates, and that the signature of Martha E. Pickett to the endorsement was in her handwriting; that she was then an infant under fourteen years of age, and the endorsement was signed after the day it bears date, at the command of said Levi F. Cates, under whose control—as her step-father—she then was.

An affidavit of Martha H. Cates, the mother of the defendant and wife of the plaintiff, was filed, setting forth the age of her daughter, and that after she (the daughter) was twenty-one years of age, she received from Levi F. Cates and herself, the sum of $25, derived from the sale of the land, accompanied with a copy of the receipt therefor, signed by the defendant and her husband, and that she had heard the defendant say since she became of age, that she did not need the money, and asked Levi Cates to keep it for her.

The affidavit of L. F. Cates was filed, in substance that of Martha H. Cates.

The affidavit of J. W. Gattis was filed, setting forth that he had purchased of Martha H. Cates, for full value in money, in good faith, without notice of any fraud or irregularity in the sale or proceeding under which the sale was made; that he is now the owner of a portion of the land, having sold parts of it to other parties for value before any notice of this proceeding, some of which had been resold, without any notice, etc.

(25) The clerk, after setting forth the record of the appointment of the plaintiff as administrator of E. W. Pickett, the filing of the petition, and other proceedings in relation thereto, as herein stated, and that the motion was made upon the ground that the defendant "was a minor when she married, and that there was no service of summons upon the guardian *ad litem,* and that she was not properly before the court, and the whole proceeding void," gave the following judgment:

"That the proceeding was irregular, is admitted, but it is considered by the court that the irregularity is cured by section 387 of The Code, and it is adjudged that the motion to set aside the judgment be not allowed."

From the judgment there was an appeal by the defendant, which was heard at Chambers, and the judgment was affirmed, and from this judgment the defendant appealed to this Court.

W. W. Fuller and John W. Graham for plaintiff.

R. C. Strudwick, J. A. Long and John Devereux, Jr., for defendant, cited and relied on *Young v. Young,* 91 N. C., 359.

DAVIS, J., after stating the facts: We think, by the well settled construction placed by this Court upon section 387 of The Code, the irregularities in the proceeding and judgment sought to be set aside by the motion in this cause were cured, and there was no error in refusing to allow the motion.

Owing to the great change in our judicial system and practice, caused by the adoption of The Code, there was much uncertainty as to the correct mode of procedure, and many irregularities resulted from a want of familiarity with the new practice. Some legislation was absolutely necessary to cure these defects, and this Court has now (26) frequent occasion to pass upon questions bordering on the shadowy line that separates proceedings and judgments absolutely void, from those that are irregular—some of them exceedingly so—but within the curative power of the Legislature.

The proceedings and judgment in this case are within both the letter and spirit of section 387, and illustrate the justice of, and the necessity for its enactment. Under the old practice, it was quite common—in fact, the general practice—for the administrator to file his petition against the heir to make assets, and if an infant, without any service upon him, have a guardian *ad litem* appointed, who would accept service and answer for him. In this case, whether the acceptance of service by the infant defendant be treated as valid or null, there was a guardian *ad litem* appointed by the court to defend her interest; he answered for her, and the court proceeded to adjudicate the cause, which was clearly within its jurisdiction. *Hare v. Holloman,* 94 N. C., 14; *Sumner v. Sessoms,* 94 N. C., 371; *Williams v. Williams,* 94 N. C., 733; *Fowler v. Poor,* 93 N. C., 466; *Williamson v. Hartman,* 92 N. C., 236; *England v. Garner,* 90 N. C., 197; *Howerton v. Sexton,* 90 N. C., 581; *Mauney v. Gidney,* 88 N. C., 200; *Johnson v. Futrell,* 86 N. C., 122.

This motion is based upon the affidavits of the husband, not those of the defendant, made more than twelve years after the sale which it

seeks to make void, and long after the property had passed by conveyance from the original purchasers to other persons. There is no allegation of any actual fraud, nor is the proceeding impeached for fraud, which would bring it within the saving of the proviso of section 387. The irregularities which had grown out of the failure to comply with the provisions of chapter 17, section 59 of Battle's Revisal, as construed by the court, were those which section 387 was intended to cure; and, of course, if the provisions of that chapter had been complied
(27) with, as it is insisted by counsel for the defendant ought to have been done, there would have been no necessity for the remedial legislation. *Moore v. Gidney,* 75 N. C., 34; *Allen v. Shields,* 72 N. C., 504; *Bass v. Bass,* 78 N. C., 374; relied on, were all prior to the passage of section 387, and it is more than probable that the construction placed upon the law in those cases, led to the enactment of that section.

We will not consider the constitutional question presented by counsel for the defendant, for the power of the Legislature to pass the curative act, so far as it applies to this case, is well settled by this Court, which renders it unnecessary for us to discuss that point.

The cases of *Stancil v. Gay,* 92 N. C., 462; *Larkins v. Bullard,* 88 N. C., 25; *Morris v. Gentry,* 89 N. C., 248; *Mathews v. Joyce,* 85 N. C., 258; and other authorities cited by counsel for defendant, are distinguishable from this, in that, in those cases, there was either no service of process at all on the infant or guardian *ad litem,* or no appearance for the infant, or fraud, or other vitiating facts, that rendered the proceedings absolutely void, and not merely irregular.

There was no error. Let this be certified.

No error. Affirmed.

Cited: Edwards v. Moore, 99 N. C., 4; *Carter v. Rountree,* 109 N. C., 33; *Dickens v. Long,* 112 N. C., 315; *Smith v. Gray,* 116 N. C., 314; *Rackley v. Roberts,* 147 N. C., 205; *Hughes v. Pritchard,* 153 N. C., 143; *Harris v. Bennett,* 160 N. C., 344; *Welch v. Welch,* 194 N. C., 635.

JOHN U. SMITH v. SAM'L T. SMITH, ADMINISTRATOR.

Evidence—The Code, Sec. 580.

An administrator of a deceased debtor who is a defendant, is rendered incompetent by section 580 of The Code, to testify to any admissions which he may have heard his intestate make in regard to the nonpayment of a bond executed prior to 1 August, 1868.

***(Waddell v. Swann,* 91 N. C., 105; overruled.)**

SMITH *v.* SMITH.

CIVIL ACTION, tried on appeal from a justice of the peace, (28) before *Connor, J.*, at August Term, 1886, of ORANGE Superior Court.

There was a judgment for the plaintiff, and the defendant appealed. The facts appear in the opinion.

John W. Graham for plaintiff.
John Manning for defendant.

SMITH, C. J. The present action was begun on 22 June, 1886, before a justice of the peace, and by the defendant's appeal removed to the Superior Court of Orange County, and is upon three several bonds for the payment of money, made by Calvin, the intestate of the defendant, in the years 1849, 1852 and 1857. The defense set up in the answer is payment, in support of which the defendant relies on the statutory presumption by the lapse of time.

To rebut the presumption, besides other evidence of admissions of the deceased debtor, the plaintiff introduced the defendant himself, and, after objection to this competency made by the defendant and overruled, was permitted to examine the witness to prove other and similar declarations of his intestate, and he testified that he heard his father say, some time before his death, that he owed his brother John (the plaintiff), and wanted the principal of the debt paid. The competency of this witness to testify in this case, under the disabling act of 1883, The Code, sec. 580, is the only question we propose to consider. The ruling of the Court is in accordance with what is said in *Waddell v. Swann,* 91 N. C., 105, in putting a construction upon the act, and, as we suppose, was made upon its authority. In that case, the ruling was as to the admissibility of evidence from the defendant, in contradiction of declarations of himself, drawn out from other witnesses by the plaintiff under section 590. The judge in the court below held, not that the defendant was an incompetent witness for any purpose, but (29) that he could not testify to this particular matter. In this he was overruled. It was needless, therefore, to consider the act of 1883, and upon a more careful consideration, we are satisfied that the interpretation which confines its operation to cases in which the parties supposed to be personally cognizant of the disputed fact are before the court, is erroneous, and we recall it. The term "no person who is or shall be a party to an action founded on," etc., is too broad and comprehensive to be thus restricted, though the protection of the debtor is mainly secured by refusing to let testify the persons who are presumed to know whether the debt has or has not been paid, yet the act is far

reaching, and it excludes the personal representative as well, and indeed every one who is a party to the suit, and many who are not parties.

There is another inadvertence in setting out the terms of the statute. The disabling effect is limited to actions commenced *after* and not *before* August, 1868, as stated in the opinion.

There is error in permitting the defendant to be examined, for which the verdict must be set aside and a *venire de novo* awarded.

Error. Reversed.

L. H. REEVES v. W. B. BOWDEN.

Slander—Pleading.

1. Where in an action for slandering the plaintiff, the words set out in the complaint are ambiguous, but admit of a slanderous interpretation, it should be left to the jury to say, under all the circumstances, what meaning was intended.

2. So, where in such action, the defamatory words were as follows: "That damned scoundrel knows all about it from beginning to end," and it was charged in the complaint that thereby the defendant meant to charge the plaintiff with having feloniously abetted the crime of arson; *It was held*, that it was improper to nonsuit the plaintiff, and the case should have been left to the jury to say in what sense the words were spoken.

(*Sasser v. Rouse*, 13 Ired., 142; *Lucas v. Nichols*, 7 Jones, 33; cited and approved.)

(30) THIS was a civil action, to recover damages for slander, tried before *Shepherd, J.*, at January Term, 1887, of WAYNE Superior Court.

The first allegation of the complaint sets forth at considerable length the burning of certain houses on 23 April, 1886. One of these houses was occupied partly as a dwelling, partly as a storehouse, and partly as a warehouse; one other was occupied as a dwelling, and one other as a store.

The second allegation is as follows:

"II. That on 24 April, 1886, at Goldsboro, North Carolina, as plaintiff is informed and believes, the defendant, in a conversation with one John H. Edgerton, in regard to the burning of said houses, in the presence and hearing of John H. Edgerton and divers other persons, maliciously spoke, of and concerning the plaintiff, the false and defamatory words following, viz.: 'That damned scoundrel,' meaning plaintiff,

'knows all about it,' meaning the burning of said houses, 'from beginning to end,' thereby intending falsely to charge plaintiff with having wilfully, wantonly and feloniously aided and abetted in setting fire to and burning said houses."

The following is section two of the answer:

"That he admits speaking the words set out in the several allegations of the complaint, but denies that said words were false and defamatory, and that they were spoken maliciously."

"He further denies that he intended by said words to charge (31) the plaintiff with having wilfully, wantonly and feloniously aided and abetted in setting fire to and burning said houses."

The issues, which were agreed upon, were as follows:

"I. Did the defendant, in using the words mentioned in the complaint, thereby intend to charge the plaintiff with having wilfully, wantonly and feloniously aided and abtted in setting fire to and burning the houses mentioned in the complaint, or either of them?

"II. Was such charge false?

"III. What damages has the plaintiff sustained?"

The plaintiff introduced testimony as to good character. He also read in evidence allegations one and two of the complaint. He also introduced section two of the answer, but proposed to read only down to the word "but," in the third line. The defendant insisted that he should read all of said section, as explanatory of the allegations of the complaint, which had been fully read to the jury. This the plaintiff declined to do, and the court ruled that he must read all of said section or none. To this ruling the plaintiff excepted. The plaintiff then read the whole of said section. The court stated that by reading it, the plaintiff did not make it his evidence so as to preclude him from denying any part of it.

The plaintiff then closed his case.

At this stage of the proceedings the defendant moved, on the evidence and pleadings, for a verdict:

1. Because the complaint did not set forth a cause of action.

2. Because on the whole evidence the plaintiff has not made out a case.

The court held that the complaint did not set forth a cause of action, and that upon the whole case the plaintiff was not entitled to recover.

The plaintiff moved for a new trial and it was granted by the court, which after consideration was of the opinion that it erred (32) in holding that the complaint did not set forth a cause of action, and that upon the whole case the plaintiff was not entitled to recover. From the order granting a new trial the defendant appealed.

W. C. Monroe, C. B. Aycock and E. R. Stamps for plaintiff.
W. R. Allen for defendant.

DAVIS, J., after stating the facts: We think the allegations contained in the complaint did constitute a cause of action. In *Sasser v. Rouse,* 13 Ired., 142, it is said that "although the words do not, in their ordinary meaning, import a slanderous charge, yet *if they are susceptible of such a meaning,* and the plaintiff *avers a fact,* from which it may be inferred that they were for the purpose of making the charge; upon proof of this averment, it should be left to the jury to say whether the defendant used the words in the sense imputed, and not in their ordinary sense." So in *Lucas v. Nichols,* 7 Jones, 33, it was held, that when the words used were ambiguous, admitting of a slanderous interpretation, it was proper for the judge to leave it to the jury to say, under the circumstances, what meaning was intended. We think the language used, the connection in which it was used, accompanied by the averments in the complaint, and the point given to it by the epithets used, entitled the plaintiff to have the issues passed upon by the jury, and the plaintiff was entitled to the new trial given.

There was no error in granting the new trial. Let this opinion be certified.

No error. Affirmed.

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(33)

B. W. JONES AND WIFE v. JORDAN H. PARKER.

New Trial—Jurors—Impeaching Verdict.

1. Where the motion for a new trial is addressed to the discretion of the trial judge, his action is not the subject of review on appeal.
2. The testimony of a member of the jury cannot be heard to impeach the verdict.

(S. v. McLeod, 1 Hawks, 346; *S. v. Smallwood,* 78 N. C., 563; cited and approved.)

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

There was a judgment for the defendant, and the plaintiffs appealed. The facts appear in the opinion.

John Gatling for plaintiffs.
No counsel for defendant.

DAVIS, J. There is no error assigned in the record, but a motion was made for a new trial, based upon affidavits filed by some of the jurors, that they did not concur in the verdict, and by others that they did not understand portions of the charge of the court.

Counter-affidavits by other members of the jury were also filed. The case states, that "the court, considering the affidavits fully, and acting upon personal knowledge of what transpired in court, in the exercise of its discretion, refused the motion."

The granting of a new trial, when a matter of discretion, as in this case, is purely a subject for the consideration of the presiding judge, and this Court has no power to review or control the exercise of his discretion. This is too well settled to need the citation of authority.

His Honor gave full consideration to the affidavits of the jurors in regard to their verdict. In *S. v. McLeod,* 1 Hawks, (34) 346, *Henderson, J.,* said: "It has been long settled, and very properly, that evidence impeaching their verdict, must not come from the jury; but must be shown by other testimony"; and this has been affirmed in *S. v. Smallwood,* 78 N. C., 563.

We call attention to these authorities, because we think it unsafe and unwise, as a rule, to permit verdicts to be impeached by the testimony of jurors rendering them.

In this case no error having been assigned in the record, and none appearing, the judgment must be affirmed. Let this be certified.

No error. Affirmed.

Cited: S. v. Bailey, 100 N. C., 533; *Purcell v. R. R.,* 119 N. C., 739; *Bird v. Bradburn,* 131 N. C., 490; *Abernethy v. Yount,* 138 N. C., 342; *Lumber Co. v. Lumber Co.,* 187 N. C., 418.

E. A. ARMFIELD AND A. A. LANEY v. WILLIS G. MOORE.

Statute of Limitation—Nonresident Debtor.

1. Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence.

2. Where after the cause of action accrues the debtor leaves this State and resides out of it, the time of his absence from this State shall not be taken as any part of the time limited for the commencement of the action.

3. Where after the cause of action has accrued the debtor leaves this State and is continually absent for one year or more, although he may not have changed his domicile, the time of his absence shall not be counted on a plea of the statute.

4. Where the debtor was a nonresident of this State, but was here on visits of a day or two each year, such visits would not have the effect of putting the statute in motion, and the cause of action will not be barred, although more than the time required to bar it has elapsed since the cause of action accrued.

5. The provisions of section 162 of The Code apply to the obligations of nonresidents as much as to those of residents of this State.

(35) CIVIL ACTION, tried before *Montgomery, J.*, at February Term, 1887, of UNION Superior Court.

The plaintiffs brought this action on 28 October, 1886, before a justice of the peace, to recover the money due upon the note under seal of the defendant, for $61.93, dated 23 February, 1876, and at one day from date, bearing interest at the rate of eight per cent per annum, from 11 October, 1875. This note was executed in the town of Monroe, in this State, and at the time of its execution, the maker thereof, the defendant, was a nonresident of this State, and he has been so ever since that time; but two or three times each year, he comes to the town named above, to market, remaining a day or two on each visit. The plaintiffs, the obligees of the note sued upon, have been continually residents of this State since before the execution of the note.

The defendant pleaded and relied upon the statute of limitation, barring actions upon sealed instruments after ten years next after the cause of action upon the same shall have accrued.

The justice of the peace gave judgment for the plaintiffs, from which the defendant appealed to the Superior Court, where there was judgment for the plaintiffs, from which the defendant appealed to this Court.

E. C. Smith (Vann and Stevens also filed a brief) for plaintiffs.
Covington and Adams filed a brief for defendants.

MERRIMON, J., after stating the facts: The plaintiffs contend that inasmuch as the defendant was continually a nonresident of this State, and absent from it except for two or three brief business visits a (36) day or two each year, before the action was brought, the statute of limitation does not bar his right to recover the money specified in the bond sued upon, and the interest due upon the same, and we are of that opinion.

The statute (The Code, sec. 162) provides that, "If, when the cause of action accrues, or judgment be rendered or docketed against any

person, he shall be out of the State, such action may be commenced, or judgment enforced, within the times herein respectively limited, after the return of such persons into this State; and if, after such cause of action shall have accrued, or judgment rendered or docketed, such person shall depart from, and reside out of this State, or remain continually absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment."

It will be observed that this statutory provision prescribes and embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed: (1) Where the debtor was out of the State *at the time the cause of action accrued,* or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he shall return to the State—not simply on a hasty visit of a day or two, at long intervals—but for the purpose of residence. And if, after such return, he shall depart from the State for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed, if he had remained in this State. (2) When, *after* the cause of action accrued, or the judgment was rendered or docketed, the debtor—resident or nonresident of the State—departed from and (37) *resided* out of it, "the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment." (3) When, *after* the cause of action has accrued, or judgment has been rendered or docketed, the debtor shall depart from the State, "and remain continually absent for the space of one year or more," the time of his absence shall not be allowed in his favor.

This case seems to apply to a resident of this State against whom there is a cause of action, and who goes and remains out of it for the length of time mentioned.

The general purpose of the statutory provision under consideration, taken in connection with the statute of limitation, is to give the person having a cause of action accrued, or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him, to bring his action or enforce his judgment. Thus, in the case before us, if the defendant was out of this State *at the time* the plaintiffs' cause of action accrued, the lapse of time as to it in his favor, did not begin

until his return to this State to reside here. Or, if he departed from this State *after* the maturity of the note sued upon, to reside out of it, or to sojourn out of it for a year or more, the time of his absence could not be allowed to make part of the ten years on which he relied as a bar to the plaintiffs' action. To make the bar, there must have been a lapse of ten years less the time of such absence.

The purpose is, to prevent defendants from having the benefit of the lapse of time—the statute of limitation—while they permit debts against them, past due, to remain unpaid, or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, and thus prevent the person having the right to sue, from doing so. It is not the policy or purpose of the
(38) State, to drive its citizens, directly or indirectly, to seek their legal remedies abroad, or to encourage nonresidents to keep out of it and beyond the jurisdiction of its courts, as would in some measure be the case, if by keeping out of the State, the debtor or person against whom a cause of action exists, could avail himself of the lapse of time during his absence.

The counsel for the appellant insisted in the argument, that the statute under consideration does not embrace nonresidents of this State. We cannot so interpret it. The words "any person," employed to designate the persons to be affected and embraced by it, are very comprehensive, and there is nothing in its scope or purpose that excludes them. Why should they be on a more formidable footing as to the lapse of time than residents?

We can see no reason, founded in justice or sound policy, why this should be so. There is nothing in their legal *status,* or their circumstances as such, or in the nature of the statute of limitation, that ought justly to give them more favorable advantage. If there exists just cause of action against a nonresident in favor of a citizen of this State, properly cognizable here, he ought to discharge it, but if he will not, and stays beyond the State, so that the person aggrieved cannot have his remedy, he ought not to have the benefit of the lapse of time, when at last he is found here, and action has been brought against him. He is not entitled, in common justice, to such defense, and the statute, fairly interpreted, does not give it to him. He cannot reasonably complain of the staleness of his liability, any more than a resident who, under like circumstances, goes out of the State, and resides or remains there for a long while. If the demand is stale he made it so, in contemplation of law, and he shall not be allowed to take advantage of his own laches.

The courts of other states have given like interpretation to statutes substantially like that now before us. *Bennett v. Cook,* 43 N. Y.,

537; *Carpenter v. Wells,* 21 Barb., 594; *McCord v. Woodhull,* (39) 47 How. Pr. Rep. (N. Y.), 54; *Hacher v. Everett,* 57 Me., 548; *Lane v. Bank,* 6 Kan., 74.

There is no error. To the end the judgment may be affirmed, let this opinion be certified according to law. It is so ordered.

No error. Affirmed.

Cited: Alston v. Hawkins, 105 N. C., 6; *Lee v. McKoy,* 118 N. C., 522; *Williams v. B. & L. Assn.,* 131 N. C., 269, 270; *Bolivar v. Cedar Works,* 152 N. C., 657.

J. R. LONG v. J. B. FITZGERALD.

Arbitration and Award.

1. Unless a submission to arbitration is made under an order of the court, the award cannot be made a judgment of the court, except by consent.
2. Where a party files exceptions to an award and seeks to have it modified by the court, he waives all objection to the fact that the submission was made *in pais*, and the court can proceed to act on the award as if it had been made under an order in the cause.
3. Where all matters embraced in an action are submitted to arbitrators, and they make no mention in their award of one item of charge claimed by one of the parties, they will be taken to have disallowed it.

(Metcalf v. Guthrie, 94 N. C., 447; *Jackson v. McLean* 96 N. C., 474; cited and approved.)

CIVIL ACTION, tried before *Avery, J.,* at Fall Term, 1886, of HAYWOOD Superior Court.

With the issue of the summons, on 1 July, 1883, the plaintiff sued out a warrant of attachment against the defendant, a nonresident debtor, which was levied upon two stocks of goods, one at Waynesville and one at Pigeon River, as his property. The defendant disclaimed any interest in the last mentioned goods, and upon his own, and a series of affidavits of others, for matters therein set out, moved to vacate (40) the order of attachment, which being heard at Chambers, was modified by reducing the plaintiff's demand to $582.50, and directed the sheriff to retain only so much of the goods as would satisfy that sum and the costs incidental to the action, but a vacation of the order was refused; whereupon both parties caused appeals to be entered, that were not, however, prosecuted.

The parties just before filing the pleadings, and while the action was pending, with a view to a settlement of the controversies that had sprung up and become connected with the original cause of action, entered into an agreement in these words:

"Whereas, a civil action is pending in the Superior Court of Haywood County, between J. R. Long, plaintiff, and J. B. Fitzgerald, defendant, and whereas an attachment which was issued in said cause, was levied on a stock of merchandise in Waynesville, and also a small stock of goods at Clyde Station, and whereas the Hon. J. C. L. Gudger has ordered a modification of the said attachment, so as to hold thereunder enough to satisfy the sum of $582.50, and to return the remainder of the goods levied on the defendant, from which order the said J. R. Long as well as the said J. B. Fitzgerald have appealed to the Supreme Court: Now, therefore, we, J. R. Long and J. B. Fitzgerald, do hereby agree to refer this whole cause, together with the appeal, and it is a part of this agreement, that the arbitrators are to decide whether the stock of goods levied on at Clyde Station was the property of the defendant at the time it was levied on, and whether they are liable to satisfy the plaintiff's recovery in this action, in case he obtained judgment aforesaid, to A. L. Herren, W. W. Stringfield and John A. Ferguson as arbitrators. And under this agreement, it shall be their duty to settle all matters in dispute between the parties to this action, and also any claim of defendant
(41) for damages on account of said attachment, and the attachment as originally issued and levied, is to remain in force, and the goods to remain in the sheriff's custody, to abide the award of the said arbitrators. But this last agreement is not to affect the defendant's claim for damages, as above set forth. And we do hereby mutually covenant to and with each other, that we will each faithfully abide by and perform the award of the majority of said arbitrators, and their award, or that of a majority of them, is to be entered as the judgment of the court in this cause. This 24 August, 1885."

The award was as follows:

"Whereas, an action is pending in the Superior Court of Haywood County in the above-entitled cause, and whereas, the parties plaintiff and defendant have agreed in writing, dated 24 August, 1885, to refer the whole cause to A. L. Herren, W. W. Stringfield and J. A. Ferguson, as arbitrators, to hear and determine all the matters in dispute, and whereas, they further agreed in said writing to abide by the award of said arbitrators;

Now, therefore, we, the undersigned, in pursuance of the above agreement, met at the court room in the town of Waynesville, on 27 August, 1885. After hearing the evidence and argument of counsel, which was

concluded on 31 August, 1885, we find as our judgment and award, and so return to the Superior Court of said county, as follows, viz.:

1. That the defendant, J. B. Fitzgerald, was not a member of the firm of J. S. Fitzgerald & Co., doing business at Clyde; we therefore adjudge that the attachment be dismissed, and that said goods be returned to J. S. Fitzgerald & Co.

2. That the plaintiff had no cause of action on 1 July, 1885, and that the attachment levied on the stock of goods at Waynesville be dismissed, and that the plaintiff pay the costs of said attachment, (42) to be taxed by the clerk.

3. That the plaintiff, through his agent, contracted with the defendant's agent, on 28 March, 1885, for the sale of a stock of goods then in the town of Waynesville and to arrive soon, which stock, on 7 April, 1885, amounted to the sum of $2,450, as per contract, at "first cost," including five per cent.

4. That the defendant paid plaintiff on said amount, one note, including interest thereon, amounting to $1,567.50, and to plaintiff's agent, G. A. P. Long, $150 (including one-half month's wages to plaintiff's agent), making in all $1,717.50.

5. That the attachment levied on the stock of goods in the town of Waynesville on 1 July, 1885, be dismissed at the plaintiff's cost.

6. That the damages sustained by the defendant by reason of said attachment, are $432.50, which amount is to be taken from the above $2,450 in addition to the $1,717.50, leaving a balance of $300 due the plaintiff.

7. That the plaintiff should not have the house bought of Reeves to pay for, but in case he has said debt to pay, then the defendant, J. B. Fitzgerald, should become liable to plaintiff for the said debt.

8. That the defendant shall have ninety days from the time that the possession of the goods is given him to pay the balance on said goods.

9. That the sheriff at once put the defendant in possession of the said goods and house.

10. That the plaintiff pay the cost of the action, except one-half of the cost of this arbitration, which one-half shall be paid by the defendant and the other half by the plaintiff.

11. That we each charge for five days services in this arbitration at three dollars per day, making the amount due each $15.

12. That the clerk of said county tax the cost as above ad- (43) judged."

The plaintiff filed the following exceptions to the award:

"1. For that the arbitrators exceeded their powers in dismissing the attachment and ordering the goods taken under the attachment at Clyde Station to be released to J. S. Fitzgerald & Co.

"2. That said arbitrators exceeded their powers in finding 'that the defendant, J. B. Fitzgerald was not a member of the firm of J. S. Fitzgerald & Co., doing business at Clyde,' in that no such matter was referred to them.

"3. For that the said arbitrators failed to decide the question of rents due from defendant to plaintiff.

"4. For that said arbitrators failed to decide whether defendant hired G. A. P. Long from the plaintiff, and how much was due plaintiff for said G. A. P. Long's services as clerk.

"5. For that said arbitrators exceeded their powers in dismissing the attachment which was levied on the goods at Waynesville.

"6. That said arbitrators exceeded their powers in awarding the costs to be paid by plaintiff.

"7. That said arbitrators exceeded their powers in awarding damage to the defendant, and at the same time ordering the same to be taken from the amount due plaintiff for sale of goods.

"8. For that the said arbitrators exceeded their powers and erred in the law, in that they awarded that the $300, which they found due the plaintiff, should not be payable by defendant until ninety days after the possession of said goods should be given to him (defendant).

"9. That said arbitrators exceeded their powers and violated the law in awarding 'that the sheriff at once put the defendant in possession of said goods and house.'

(44) "10. For that the award is contrary to the law, in that it finds as a fact and a conclusion of law 'that the plaintiff had no cause of action on 1 July, 1885.'

"11. For that said arbitrators failed to decide whether defendant agreed to pay the balance due upon the goods in three months or not.

"12. That said arbitrators failed to decide and find what per cent of the sales made by the defendant had been paid to plaintiff."

The defendant brought forward an amendment to his answer, in the nature of a plea since the last continuance under the former practice, this award, as a defense and in bar of the further prosecution of the suit, the course suggested in *Metcalf v. Guthrie,* 94 N. C., 447, as the proper one to be pursued when the award is such as puts an end to the action.

To this the plaintiff replied, alleging the award to be irregular, illegal and void, for reasons contained in the impeaching exceptions already on file in the cause. Upon the hearing the court adjudged that the arbitrators had not power to order the redelivery of the attached goods to the defendant until the rendition of judgment upon the award, and sustained the first exception of the plaintiff.

The other exceptions were overruled, and judgment rendered for the plaintiff in the sum of $300, with interest from 1 September, 1885, and against him for costs, except half the allowance to the arbitrators, to be paid by the defendant in accordance with the terms of the award.

From this judgment the plaintiff appealed.

G. A. Shuford for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the facts: As is said in the opinion in *Metcalf v. Guthrie,* 94 N. C., 447, unless the reference was under an order made in the cause, the award could not, without the acquiescence of parties, in its various parts, become the judgment of (45) the court, except as disposing of the action and barring its future prosecution. But there is no reason why, by consent, this may not be done, and thus the whole controversy determined.

This result is accomplished by entering up judgment for the sum awarded the plaintiff, with costs, except those mentioned, against the plaintiff.

We concur with the rulings of the court upon the exceptions, and in filing them to be acted on by the court, all objection to the assumption and exercise of jurisdiction in disposing of them, as matters introduced in the case, has been waived.

The case is wholly unlike that of *Jackson v. McLean,* 96 N. C., 474, in which the right to take cognizance of the award, and enforce it, is strenuously denied. But for this concession, we should be compelled to follow that course of action, and leave the award to be enforced in some other way.

Obviously, the award embraces the whole subject-matter submitted, and must be understood as covering everything in the submission—the claim for rents, in disallowing it, as is specially mentioned.

The only point, then, presented for review, is as to the interference in so much of the award as directs an immediate restoration to the defendant of his attached goods, and this ruling is not unfavorable to the plaintiff, for it follows the payment of the debt due him, and is only a security for the debt. The award is complex, consisting of many parts, and must be performed, if at all, as an entirety.

Hence, as the suit is not dismissed, and the plaintiff recovers the $300, the result of the adjusted demands of the parties, the dissolution of the attachment at once exposes the same property to seizure and sale, and can work no practical injury to the plaintiff. Of this the defendant does not complain. Thus, the jurisdiction over the (46)

award, exercised with the acquiescence of both, settles the whole matter in controversy, and renders unnecessary a resort to a new action for its enforcement.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Reizenstein v. Hahn, 107 N. C., 158; *Kelly v. R. R.,* 110 N. C., 432; *Peele v. R. R.,* 159 N. C., 62.

R. J. PORTER v. THE RICHMOND AND DANVILLE RAILROAD COMPANY, AND THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Evidence—Contract—Judge's Charge.

1. In an action against a corporation for services rendered to it under a contract of hiring, which contract is denied by the corporation, a letter to the plaintiff from an agent of the corporation, recognizing him as a servant of the corporation, is competent evidence to establish the contract, and also to corroborate the plaintiff when his testimony has been contradicted by such agent.

2. Where the evidence presents the case to the jury in two aspects, it is not error in the trial judge to refuse a prayer for instructions, which would present the case to the jury only in one aspect.

3. Where a railroad corporation agreed with the authorities of a city to pay a certain proportion of the salary of a policeman to be assigned to duty specially at its depot, and the plaintiff was employed; *It was held,* that he could sue the corporation on the contract for a failure to pay him the part of his salary which it had agreed to do.

CIVIL ACTION, tried before *Montgomery, J.,* and a jury, at February Term, 1887, of MECKLENBURG Superior Court.

The complaint alleges:

"I. That on 16 May, 1882, at the request of the defendants, he was duly elected special policeman by the board of aldermen of the city of Charlotte, State aforesaid, the said defendants agreeing and
(47) promising to pay plaintiff two-thirds of such salary as should be fixed by the said board of aldermen; that the said board of aldermen then and there fixed plaintiff's salary at forty-five dollars per month.

II. That plaintiff served as such special policeman from said 16 May, 1882, until the ..... day of May, 1883, on which last named day, at the request of the defendants, the plaintiff was reëlected to said office, by the said board of aldermen, for the term of two years next thereafter,

the defendants agreeing and promising to pay plaintiff at the rate of thirty dollars per month for his said services as theretofore.

III. That plaintiff served the defendants as special policeman from said ..... day of May, 1883, to and including 11 May, 1885; that the defendants paid him for his said services at the rate of thirty dollars per month up to and including 31 July, 1884. That said defendants have failed and refused to pay plaintiff salary from said 31 July, 1884, to May 11, 1885, inclusive, for which said service the defendants are indebted to plaintiff in the sum of two hundred and eighty-one dollars."

The defendant broadly denies these allegations, and alleges as matter of defense as follows:

"For a further defense to plaintiff's first cause of action, the defendant says that, recognizing the necessity for a policeman at its passenger depot in the city of Charlotte, it applied to the board of aldermen of said city for the appointment of a special policeman to be stationed at this defendant's depot in said city, but for no definite length of service, and as an inducement to that end, agreed with the said city of Charlotte, to pay two-thirds of such salary as might be fixed by said board of aldermen for such policeman, which proposition was accepted, and the plaintiff appointed as such policeman by said board of aldermen. That as a matter of convenience, this defendant paid the amount of compensation agreed upon directly to the plaintiff, instead of into the (48) treasury of said city. That after the appointment of plaintiff, as aforesaid, he was under the control and authority of the city, and was assigned to duty at this defendant's depot. That this defendant complied with its agreement with the said city of Charlotte, as hereinbefore set forth, until 31 August, 1884, when it discovered that the plaintiff was so inefficient and negligent of his duties as such policeman, that it notified both the city authorities and the plaintiff, that the plaintiff's services were no longer desired, and this defendant refused to pay any further sum towards his salary, and thereafter the plaintiff never rendered any services to this defendant."

The following is so much of the case settled on appeal as it is necessary to set forth here:

"The plaintiff offered in evidence the records of the board of aldermen of the city of Charlotte, showing the proceedings of the meeting of the said board, held 20 February, 1882, the material part of which is as follows:

"Capt. S. S. Pegram, representing the Richmond and Danville Railroad Company, appeared before the board, to request that a policeman be appointed, with assignment to special duty of attending at the depot of said road on the arrival of passenger trains, and stated that the railroad company would consent to pay $30 per month towards the salary

of such policeman. On motion of Alderman Schenck, it was ordered that the request be complied with, and that the board proceed to the election of a policeman, who shall be paid $45 per month, provided that the railroad company furnish $30 of said amount, such policeman to be a regular city policeman, subject to the orders of the chief of police of this city, and assigned to special duty at the Richmond and Danville passenger depot, to attend the arrival and departure of all passenger trains, to be uniformed and equipped as other policemen. Captain Pegram suggested the name of R. J. Porter as a suitable person
(49) for the position, who was thereupon nominated by Alderman Wilkes, . . . and a vote having been taken, the mayor announced that R. J. Porter had received the majority of the votes, and declared him elected. Mr. Porter being present, then came forward, and the mayor administered to him the oath of office as a policeman, and he was at once assigned to duty."

The plaintiff next offered in evidence the records containing the proceedings of said board of 12 May, 1883, as follows:

"At the request of Captain Gormley, agent of the Richmond and Danville Railroad Company, the board proceeded to elect a policeman for service at the railroad passenger depot, the railroad company agreeing to pay two-thirds of his salary. Alderman Wilkes moved that R. J. Porter be elected, and he was elected unanimously, at the same salary as fixed for the other policemen."

The plaintiff next offered in evidence the charter and ordinances of the city of Charlotte, by which it appeared that policemen were elected for a term of two years, the election of plaintiff, 20 February, 1883, being for an unexpired term, which ended in May, 1883. The plaintiff introduced one Fred Nash as a witness, who testified that he had been secretary and treasurer of the city of Charlotte from a time long prior to 1882 up to this time; that in 1882, to May, 1883, the salary of a policeman was $45 per month, and in 1883, it was increased to $50 per month; that the Richmond and Danville Railroad Company never paid anything to the city on account of Porter's salary; that in 1882, and to May, 1883, the city paid Porter $15 per month on account of his salary, and after the salary was raised, paid him $20 per month.

The plaintiff, R. J. Porter, in his own behalf, testified that he entered upon his services as policeman at the depot of defendants when he was first appointed, in February, 1882; that he discharged the duties
(50) of a policeman at the depot from that time until in May, 1885; that his name was first put on the "pay-rolls" of the Richmond and Danville Railroad Company, and that he was paid by said company's paymaster every month just like the other employees of the company; that the company paid him for his services from February, 1882,

until May, 1883, regularly every month, and from the latter time on until 31 July, 1884, when the company stopped paying him, and had not paid him for the balance of his term; that the company paid him $30 per month prior to 31 July, 1884; that he served out his full term to 12 May, 1885, and demanded payment of the balance due of the said company, which was refused.

The defendant introduced J. J. Gormley, who testified that he acted as agent for the defendant in going before the board of aldermen; that defendants had joint depots; that Porter attended the trains and kept order until witness quit the service of the company; that he was agent of both companies.

Mr. Young, for the defendant, testified that he was ticket clerk for the defendants at their depot, in January, 1885, and was at the depot four times in the twenty-four hours; that he did not see Porter there about that time, as he recollected, though he could not say positively that he was not there; that he never saw him there.

W. A. Moody, for defendant, testified that he had been agent for defendant companies since 1 August, 1884; that Porter rendered no service, to his knowledge, after August, 1884; that witness was there nearly every day; Porter was on the pay-rolls for August, 1884, and was allowed his time, but never paid.

Mr. Kennedy, for defendant, testified that he was yard dispatcher of defendant companies, at their depot, in 1884; that Porter never rendered any service to defendant after August, 1884; that he (witness) had orders not to recognize him (Porter) as policeman for the company. Cross-examined, he stated that Porter was there, as (51) usual, after August, 1884, but that witness did not recognize him as serving the railroad company.

The plaintiff, recalled, testified that on or after 4 October, 1884, the witness Kennedy handed him a letter while he was at the depot acting as policeman.

The defendant objected to the introduction of the letter.

The plaintiff's counsel thereupon stated that they proposed to prove that Kennedy handed the letter to Porter for the purpose of showing, in contradiction of Kennedy, that Kennedy did recognize Porter as policeman at that time, and also as a circumstance tending to corroborate Porter's statement that he acted as policeman at the depot after August, 1884, and until May, 1885, and not to prove any fact by the contents of the letter.

His Honor admitted the evidence of the transaction between Kennedy and Porter for the purpose indicated, and the defendants excepted.

The plaintiff further testified that Kennedy handed him the letter, and asked him to attend to the matter; that he acted as policeman for

defendants at their depot after he received Moody's notice, and heard no objection until today; that he had a difficulty with Moody before he got the notice.

The defendant requested his Honor to charge the jury:

I. That plaintiff is not entitled to recover on his own testimony.

II. That plaintiff is not entitled to recover on all the facts of the case.

III. That according to the record evidence in the cause, the contract was made with the city of Charlotte by the defendant, and not with the plaintiff, and the plaintiff cannot recover in this action.

His Honor refused to give these instructions, and, among other things not excepted to, charged the jury, that if the defendant requested the city of Charlotte to appoint a special policeman to be assigned
(52) to duty at its depot for the special benefit of defendant, and it agreed to pay two-thirds of the policeman's salary—thirty dollars—and plaintiff was appointed as such policeman, and performed the services required of him, he would be entitled to recover of defendant, if it made the contract.

The defendant excepted to the refusal of the court to give its special instructions, and also excepted to the part of the instructions given.

There was a verdict for the plaintiff.

The defendant moved for a new trial; motion overruled; judgment for the plaintiff; appeal by defendant.

Platt D. Walker for plaintiff.
Chas. M. Busbee for defendant.

MERRIMON, J., after stating the facts: The letter handed to the plaintiff on 4 October, 1884, by the "yard dispatcher" of the defendant, was clearly competent evidence, as tending to prove, not the truth of what was said in it, but that the agent of the defendant at and about its depot, where the plaintiff, in the course of his employment as policeman was accustomed to be, recognized and treated him as a policeman in the service of the defendant, as contemplated by the contract of employment alleged in the complaint. And moreover, the fact of handing the letter to the plaintiff, and directing him to do service, was evidence corroborative of his testimony, while it tended to contradict the witness who handed it to him.

The defendant was not entitled to the special instructions which its counsel requested the court to give the jury, because, if the jury believed the evidence in the view of it contended for by the plaintiff, he was entitled to their verdict. There was evidence tending to prove the contract of employment, and service rendered the defendant in pur-
(53) suance of it, substantially as alleged in the complaint, while

there was evidence introduced by the defendant to the contrary. It was the province of the jury to hear and weigh it all, and determine what part of it they would believe. Nor was the contract in question made by the defendant entirely with the board of aldermen of the town of Charlotte. It was, indeed, a party to it, but so also was the plaintiff, in substance and legal effect.

The board of aldermen, at the instance of the defendant, agreed to appoint the plaintiff to be policeman, and did so appoint him, to do special police service at and about its depot, and to pay him a fixed part of the compensation agreed to be paid to him; the defendant, as certainly agreeing to pay him another fixed part of it; the plaintiff agreeing on his part, to accept the appointment with its terms, and to do the service required. This seems to us to be the fair, practical import and effect of the contract—a sort of arrangement for the convenience of all, and for the special benefit of the defendant. The parties so understood and acted upon it. The defendant understanding that it had agreed to pay the plaintiff a certain part of his salary, placed his name on its "pay-roll," and for a considerable while regularly paid him the compensation it agreed to pay. There is nothing of which we can conceive, in the nature of the arrangement and contract, that rendered it essential that the plaintiff's wages should go into the hands of the board of aldermen, and thence into his own hands. That would be a useless sort of circumambulation that ill comports with practical business transactions; and it is not surprising that the defendant took this view, until this action was brought. Whether the plaintiff did service in pursuance of the contract as alleged by him, was a question of fact to be determined by the jury, and this they found in favor of the plaintiff.

The instructions given the jury by the court were substantially (54) correct. Judgment affirmed.

No error. Affirmed.

T. B. TWITTY ET AL., EXECUTORS, v. W. B. LOVELACE.

Contract to Convey Land—Powers—Executors.

1. Where, acting under a power conferred by a will to dispose of the testator's estate in his land, the executor contracts to sell the testator's interest in a certain tract of land, and upon payment of the purchase money to convey such interest in fee to the purchaser, the executor is not liable, under the terms of this contract, either individually or in his representative capacity, for a failure in making title to a part of the land.

2. Before the act of 1797 (The Code, sec. 1492), when the obligor in a bond to make title died before doing so, the obligee had to look to the heirs, but that act conferred the power to make title in such cases upon the administrator, but he could only convey such title as his intestate had, and this only to the purchaser.

(Osborne v. McMillan, 5 Jones, 109; cited and approved.)

CIVIL ACTION, tried before *Avery, J.,* at Spring Term, 1886, of RUTHERFORD Superior Court.

The plaintiffs, executors of Sarah Hamilton, by virtue of a power conferred in her will, made sale of certain land as belonging to her to the defendant, and some three or four weeks thereafter, executed and delivered to him the following instrument in writing:

"BOND FOR TITLE.—Received of W. B. Lovelace $1,500 (check) on First National Bank, Charlotte, drawn by H. D. Lee & Co., in favor of W. B. Lovelace, and endorsed by him to L. F. Churchill, also a note for $1,500, to be due, with interest at eight *per cent* from date (27 December, 1883), on 1 December, 1884, the above being the consid-
(55) eration for Miss Sarah Hamilton's interest in her farm, known as her Second Broad River plantation, containing about 465 acres, and on payment of said note and interest, W. B. Lovelace is to have a deed in fee for said interest, from the executors of said deceased. 27 December, 1883."

The present action is to recover the amount due on the note, which represents the residue of the purchase money. The defendant resists the payment of the debt in full, alleging that the testatrix had only an estate for life in a portion of the land mentioned in the contract, consisting of 136 acres, for which suit has been brought against him by persons claiming as heirs at law of one James Arthur, and which suit had been compromised, and the title assured, by the payment of $200. For this sum he demands a deduction from what he yet owes. Two issues were submitted and responded to by the jury, to wit:

1. Are the plaintiffs unable to perform their contract set forth in the complaint? Answer: No.

2. What are defendant's damages? Answer: None.

During the trial the court announced that the jury would be instructed, that upon its face, the contract undertook to convey only such interest as the testatrix had in the land, and that the defendant was not entitled to damages under his counterclaim in abatement of the debt, if the plaintiffs were able and willing to make such conveyance.

The defendant thereupon, before the jury were charged, moved to add this additional issue: "Was the price mentioned in the contract a fair price for an estate in fee simple in the land described in the complaint?

The motion was refused, and the defendant excepted, and appealed from the judgment against him.

W. P. Bynum for plaintiffs.
John F. Hoke for defendant.

SMITH, C. J., after stating the facts: The only question pre- (56) sented on the appeal, is the correctness of the interpretation put upon the contract by the court, since the refusal to allow a third issue, if the subject of exception at that stage of the trial is connected with and dependent on it. In this we concur in the opinion of the judge, that a conveyance of the interest which the testatrix had in the entire tract, fulfills the requirements of the contract. It is stated that the sale of the premises was made some weeks before the paper-writing was delivered, and it is not to be supposed that the verbal contained more stringent obligations than are found in the written undertaking. The executors were but exercising a power, and acting as trustees in carrying out the directions of the will which confers the power and imposes the trust, and this would be done by selling the estate, whatever that might be, which was vested in the testatrix, without a personal assumption as to its nature and extent. This is plainly expressed in the contract itself, for it declares the price to be paid is "the consideration for *Miss Sarah Hamilton's interest* in her farm," and that when the purchase money has been paid, the defendant "is to have a deed in fee for said *interest* from the executors." The stipulation is to convey *her interest,* and to execute a deed in form sufficient to pass her estate in fee simple, if such she had.

It would be most unreasonable to expect the executors to enter into a *personal* obligation as to the title, or to attempt to impose it upon the trust estate. The latter they could not do, since the power given is to dispose of the testatrix's estate—not a larger or a better estate than she possessed in the farm, but that estate or interest which was vested in her. We have an illustration of the principle in *Osborne v. McMillan,* 5 Jones, 109, where the administrator of one who had entered into a contract for the sale of land, and had not made the deed, executed a deed therefor containing a covenant of quiet enjoyment, under the act of 1797 (The Code, sec. 1492), and was sued because of an eviction under a paramount title in another. Delivering the opinion, (57) *Nash, C. J.,* uses this language:

"Before the passage of the act of 1797, when a vendor entered into a bond to make title, and died before doing so, his heirs were the proper persons on whom the purchaser had the right to call for the necessary conveyance. If they refused to convey the title, the purchaser was

driven into a Court of Equity, and to such a suit the heirs were necessary parties. This proceeding was attended with much delay, trouble and expense. To avoid this expense, trouble and delay, the acts were passed, and they are express in limiting the operation of the administrator's deed, *so far as the estate of the intestate is concerned, to the title of the intestate.*"

The analogy in the cases is strong. As the statute enables the representative to pass the intestate's or testator's title, and this only to the purchaser, so the will, without aid from the statute, confers the same power to sell and convey the title of the testatrix in the land, and this is the full extent to which, as executors, discharging a fiduciary duty, the defendants could go, or have attempted to go.

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

No error. Affirmed.

M. P. PEGRAM v. THE WESTERN UNION TELEGRAPH COMPANY.

Telegraph Companies—Negligence.

1. An act which under some circumstances would be simply negligent under other circumstances would be grossly negligent.
2. A telegraph company may limit its liability from ordinary negligence in sending unrepeated messages to the amount paid for the transmission of the message, but it cannot exempt itself where there has been gross negligence.
3. What would be ordinary negligence in sending a message apparently of small consequence, might be gross negligence where it was manifest that the message was important.
4. A party sending a telegram is charged with notice of the printed contract at the top of the message, whether he has read it or not.
5. The failure by a telegraph company to employ careful and skillful operators is gross negligence.

(Lassiter v. Telegraph Co., 89 N. C., 336; distinguished.)

(58) THIS was a civil action, tried before *Montgomery, J.*, at November Special Term, 1886, of the Superior Court of MECKLENBURG County.

The defendant is a duly incorporated company, whose business it is to transmit messages over its lines for pay.

The plaintiff was engaged in the city of Charlotte, in the business of buying and selling railroad and other stocks for profit, and one Wm. C.

Sedden was engaged in similar business, under the firm name of Wm. C. Sedden & Co., in the city of Richmond, Virginia. On 14 February, 1881, the plaintiff delivered to the defendant, at its office in Charlotte, for transmission over its line to the said W. C. Sedden, in Richmond, a message in the following words:

"Party offers one hundred shares C. C. & A., at forty-three. Answer quick."

The charges for said message were paid, and the defendant company undertook and contracted, in consideration thereof, to transmit it. In response to the telegram so sent to the said Sedden, he caused to be transmitted to the plaintiff, over the same line, on the same day, a telegram in the following words, to wit: "Will take one hundred shares; draw at sight with stock attached, if wish."

The telegram delivered by the defendant company to W. C. Sedden at Richmond, was not the one sent by the plaintiff, but was in the following words: "Party offers one hundred shares C. C. & A. at forty. Answer quick."

The plaintiff alleges that in consequence of the offer of the (59) stock at forty dollars per share, as stated in the telegram delivered to the said Sedden in Richmond, he immediately sold the amount of said stock in Richmond, at the price of $41.75 per share, which was then the market price of the stock in that city, but in order to deliver the same, he had to purchase other stock of the said railroad, at that price or more, and that by reason of the said error in the price, and the negligence and carelessness of the defendant, the plaintiff was compelled to pay to the said Sedden the difference between 100 shares of said stock at $40 per share, and the same stock at $41.75 per share, and other costs and damages to the amount of $250.

For a second cause of action he alleges that the mistake in the transmission of the message, was owing to the gross and wilful negligence and carelessness of the defendant, whereby the loss and damage were sustained, for the recovery of which this action is brought.

The defendant admits the receipt and transmission of the message as alleged, but says that the price charged was only sixty-two cents, being the sum charged for messages of that length not required to be repeated to prevent mistakes, and says that the plaintiff was distinctly notified that mistakes were liable to occur in the transmission of messages, and that to guard against such mistakes, it was necessary to repeat the message for comparison, and that the charge for so repeating, was an addition of one-half to the regular charge; that the plaintiff was also distinctly notified that the defendant would not be liable for failure in the correct transmission and delivering of said message, unless the same was so repeated; that the plaintiff elected not to pay the additional toll

or charge, but expressly agreed with the defendant that, in consideration of its sending the message for the reduced toll, it should not be liable for any mistake or delays, or for nondelivery of such unrepeated message, whether happening by the negligence of its servants or
(60) otherwise, beyond the amount received for sending the same, and that the defendant contracted to transmit the message upon this agreement, and that the mistake occurred in the course of transmitting it over the wires and receiving it in Richmond."

The answer denies that the mistake was the result of carelessness or negligence, but was naturally incident to unrepeated messages, always liable to occur, and of this the plaintiff had full knowledge and notice, and by his agreement exempted the defendant from liability in respect thereof.

To the second cause of action the defendant answers, denying that the error or mistake was owing to the gross and wilful carelessness or negligence of the defendant or its employees, and denies liability on account of said mistake.

The plaintiff testifies that he delivered the original message to the defendant company; that he writes a legible hand, and that he prepaid the charges. In two hours after sending the message he received a reply from Sedden & Co. The next day he discovered the mistake, by receiving a letter or message.

The plaintiff then offered to show that he did not read the printed matter on the telegram, and did not know its contents. This was objected to, and the objection sustained and exception noted. The printed matter referred to, contains limitations upon the liability of the defendant in sending *unrepeated* messages, substantially as averred in its answer, and the printed request, preceding the written part of the message: "Send the following message, subject to the above terms, which are agreed to."

There was a judgment for the plaintiff for the sum of sixty-two cents—the cost of the message—and he appealed.

W. P. Bynum and Platt D. Walker (A. Burwell was with them on the brief) for plaintiff.

John Devereux, Jr., for defendant.

(61) DAVIS, J., after stating the facts: That the limitations restricting the liabilities of telegraph companies in the transmission of unrepeated messages are reasonable and proper, and that such limitations are binding upon the sender of a message who elects to take the risk of sending it unrepeated, rather than pay the small additional cost to secure accuracy, we regard as settled by the case of *Lassiter v. Tele-*

graph Co., 89 N. C., 336, and the authorities there cited; but, as was said in that case: "The exemption is not extended to acts or omissions involving gross negligence, but are confined to such as are incident to the service, and may occur where there is but slight attaching culpability in its officers and employees."

Negligence and gross negligence are relative terms. An act, under certain cirmustances, might be simply negligent; the same act, under other circumstances, might be grossly negligent.

Undoubtedly, a carrier would be charged with greater care in handling valuable glassware than iron ware, or in transporting a package of gold than one of brass. So, what might be slight negligence in a telegraph operator in transmitting a message of small apparent importance, might be gross negligence in transmitting one of apparently great importance.

Conceding that the defendant company had a right to limit its liability, and that the plaintiff was charged with notice of the printed matter contained in the telegram sent, but that such limitation did not extend to acts of gross negligence, was there evidence of such negligence in this case? It was the duty of the defendant to employ competent operators; there was evidence tending to show that the operator at Richmond was not competent. The witness, Dodge, said: "I did not consider the operator at Richmond a competent man." Dodge had been manager of the defendant's office at Charlotte, and testifies as to the method of transmitting messages. He testifies that the message sent contained fourteen words, and that he sent it exactly as (62) written. He says: "I telegraphed that I was sending fourteen words. I put fourteen words on the wires. It would be the duty of the receiving operator to answer, 'O.K.' if he received the number of words. If the message received did not contain that number of words . . . It was his duty to telegraph me that it was short. In this case, I put the telegram on the wires correctly. He telegraphed me, 'O. K.,' which means that he received the words correctly. I should say the wires were all right that day, and in good working order. . . . I have been operating for thirty-seven years, and I think I can give an opinion as to the competency of the operator at Richmond. My opinion was that he was not a fair operator for that office." The message delivered to the operator at Charlotte contained a proposition to Sedden & Co., to sell them stock at "forty-three"; the message delivered read "forty," leaving out the word "three." The witness Dodge says: "It is possible, but hardly probable, that the word 'three' could have been lost; but by the exercise of ordinary care, the mistake could have been avoided."

This case is clearly distinguishable from *Lassiter v. Telegraph Co., supra.* In that case, the mere fact of the mistake was the only evidence

of negligence. The number of words sent was the number of words received. There was no evidence as to how the mistake occurred, and no evidence of carelessness or incompetency on the part of the agents of the company. Nor was there anything to indicate that the message was of special importance.

Could the mistake here have been avoided by the exercise of ordinary care? Or was it the result of gross negligence?

The only issues which his Honor allowed to be submitted were:

First. Was the word "three" omitted by the gross negligence of the defendant or its servants?

Second. What are the plaintiff's damages, if any?

(63) The court instructed the jury that there was no sufficient evidence to go to them on which they could find that there was gross negligence, and they must respond to the first issue—No.

We think there was evidence of gross negligence, and that the court erred in not submitting it to the jury.

The plaintiff is entitled to a new trial. Let this be certified.

Error. Reversed.

Cited: Thompson v. Tel. Co., 107 N. C., 457; *Brown v. Tel. Co.,* 111 N. C., 191; *Rhyne v. Tel. Co.,* 164 N. C., 394.

R. R. PORTER, ADMINISTRATOR, v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Certiorari.

1. A *certiorari* in order to correct the case on appeal will not be granted, when it appears from the petition that the particulars in which the petitioner asks to have it changed, are not material to the proper hearing of the case.

2. Where it is sought to have the case as settled by the judge corrected by a *certiorari*, the petitioner should set out his grounds for believing that the judge would make the corrections if given an opportunity, and not merely that he believes that probably the judge would do so.

(McDaniel v. King, 89 N. C., 29; *Currie v. Clark,* 90 N. C., 19; *Cheek v. Watson, ibid.,* 302; *Ware v. Nesbit,* 92 N. C., 202; *S. v. Gooch,* 94 N. C., 986; cited and approved.)

PETITION by the defendant for a *certiorari,* heard at February Term, 1887, of the Supreme Court.

The petition of the defendant for the writ of *certiorari* represents that plaintiff's counsel prepared the case on appeal, which, with defendant's exceptions, was delivered to the presiding judge for his examination and settlement. That as settled by him, petitioner is in- (64) formed, it was sent by mail to the clerk of the Superior Court of Buncombe, but for some reason, never reached his office; that about three months later, another case was made out by the judge, and sent to the clerk, and is that certified in the transcript to this Court; that the present case, unlike what he learns was the former, does not, as did the other, set out the facts in full; that among the imperfections, the case omits to state that the first issue was changed after verdict (but in what particular is not shown); that it fails to state that the fourth issue, to which the next is a natural sequence, was submitted at the plaintiff's instance, after the argument had begun, and over defendant's exception; that the jury were charged upon each issue, and the responses thereto, treated as a special verdict; and also, that it is probable that his Honor would make the suggested corrections, if he had opportunity to do so.

The petition is signed by counsel, and the facts in it sworn to by both of them, while a separate affidavit, on another matter, is filed by the other.

The plaintiff in his answer admits the allegations made in regard to the preparation of the case on appeal, but in reply to the charge of omissions, says: That the only change in the first issue, was in adding to it, as first framed, the concluding words "by the defendant," which was suggested by the court, and this was done *"by consent of counsel for the defendant"*; that no complaint is made of the manner of setting out the evidence, and the defendant's counsel expressed at the trial his satisfaction with the verdict, and, deeming it favorable for the defense, moved for and obtained judgment thereon against the plaintiff.

No counsel for plaintiff.
C. M. Busbee for defendant.

SMITH, C. J., after stating the facts: There is no sufficient (65) ground shown for our interposition, in giving an opportunity to the judge to modify the statement, nor do those suggested appear material in disposing of the appeal. The defendant does not appeal from any ruling of the court, and the sole inquiry is, as to the judgment that should be rendered upon the facts ascertained.

Moreover, there are no reasons suggested why the judge would favorably entertain an application for amendment, and no facts stated to warrant the opinion that he would *"probably"* make any change or addi-

tion, if the matter was again brought before him. The *grounds* of the applicant's belief should be given, that we may judge of their sufficiency.

If reasonable grounds exist and they so appear, this Court may cause the matter complained of to come again before the judge, to enable him to review it and "to correct any error as he may deem proper." *McDaniel v. King,* 89 N. C., 29.

It ought to appear *upon facts shown,* "that the court would probably make the correction." *Currie v. Clark,* 90 N. C., 19; *Cheek v. Watson, ibid.,* 302; *Ware v. Nesbit,* 92 N. C., 202.

Where the action of the court has been careful and considerate, no occasion for "interference is presented." *S. v. Gooch,* 94 N. C., 986.

Such we deem the present application, and the writ must be refused.

Denied.

Cited: Boyer v. Teague, 106 N. C., 574; *Lowe v. Elliott,* 107 N. C., 719; *Broadwell v. Ray,* 111 N. C., 457; *Bank v. Bridgers,* 114 N. C., 108; *Riggan v. Sledge,* 116 N. C., 92; *Cameron v. Power Co.,* 137 N. C., 101; *Slocumb v. Construction Co.,* 142 N. C., 352; *Paul v. Burton,* 180 N. C., 48.

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(66)

R. R. PORTER, ADMINISTRATOR, v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Issues—General and Special Verdicts—Contributory Negligence.

1. Where issues are submitted which are not raised by the pleadings, without objection in the court below, objection cannot be made to them for the first time in this Court, and the findings must stand.
2. Where the jury respond affirmatively or negatively to the issues submitted to them, it is a general verdict although there be several issues; when they state the facts, and leave the court to apply the law arising upon them, it is a special verdict.
3. In actions for the recovery of money only, or of specific real property, the jury may in their discretion render either a general or special verdict, but in all other cases the court may direct them to find a special verdict, and it may instruct them, if they find a general verdict, to find upon particular questions of fact, material in the case, but which are not put in issue by the pleadings.
4. Where a servant knows that his coservant is negligent and reckless, and unfit for his employment, and yet continues in the service of the common master, and is injured by the negligence of such reckless fellow-servant, nothing else appearing, he has contributed to the injury and cannot recover.

5. Where a servant remains in the employment of his master after he knows that a fellow-servant is incompetent, he does not contract by implication to take the risk, but if prevented from recovering on this ground, it will be by reason of contributory negligence.

6. Where the findings on the issues are contradictory, a new trial will be granted.

7. So, where in response to one issue the jury found that there was no contributory negligence, but in response to another, they found that the plaintiff's intestate knew of the reckless character of his fellow-servant by whose negligence the injury occurred, a new trial was granted.

(Henry v. Rich, 64 N. C., 379; *Miller v. Miller*, 89 N. C., 209; *Swann v. Waddell*, 91 N. C., 108; *Wright v. Cain*, 93 N. C., 296; *Willis v. Branch*, 94 N. C., 142; *Patton v. R. R.*, 96 N. C., 455; *Smith v. McGregor*, 96 N. C., 101; *Morrison v. Watson*, 95 N. C., 479; *Crutchfield v. R. R.*, 78 N. C., 300; *Johnson v. R. R.*, 81 N. C., 453; *Pleasants v. R. R.*, 95 N. C., 195; *Bank v. Alexander*, 84 N. C., 30; *Mitchell v. Brown*, 88 N. C., 156; *Hilliard v. Outlaw*, 92 N. C., 266; *Turrentine v. R. R.*, 92 N. C., 638; cited and approved.)

(Cowles v. R. R., 84 N. C., 311; cited in the dissenting opinion.)

CIVIL ACTION, tried before *Avery, J.*, and a jury, at August (67) Term, 1886, of BUNCOMBE Superior Court.

The following is the single paragraph of the complaint that gives rise to the issues of fact and law that arise in this case.

"3. That on or about 5 May, 1883, one Daniel Donavin, the intestate of the plaintiff, was employed by, and in the service of, the defendant company, as a laborer and watchman at the Swannanoa Tunnel on said railroad, in connection with its business of operating said railroad; that while he was so employed, and duly engaged about his business and service as such laborer and watchman so in the service and employ of the defendant company, the defendant company, unskillfully, carelessly, negligently and recklessly, so managed, moved and ran one of its engines, as to strike and run said engine against, upon and over the body of the intestate, and thus instantly to kill him, the said intestate; and that the plaintiff, by reason of such killing of his intestate, has become entitled to recover from the defendant company thirty thousand dollars."

The material parts of the answer are as follows:

"3. Defendant admits that Donavin was a watchman in its employment at Swannanoa Tunnell. Defendant denies the rest of allegation No. 3.

Defendant for a further defense says:

1. That it is informed and believes, that the deceased came to his death by his own negligence, in not getting out of the way of an engine, and by not being in his proper place when killed; or,

(68) 2. That if he was killed through negligence at all, it was by the negligence of the engineer running the engine, who was a fellow-servant of the deceased; or,

3. That it was from some unknown cause or accident, for which the defendant is not liable."

At the trial the court submitted issues to the jury, whereof the following are copies, to which they responded as stated at the end of each:

1. Was the plaintiff's intestate injured by the unskillful, careless and negligent management of one of the defendant's engines, by the defendant? Answer: Yes.

2. Did plaintiff's intestate contribute to his own injury by his negligence? Answer: No.

3. Was the death of plaintiff's intestate caused by the negligence of Jack Edwards, an engineer and fellow-servant of plaintiff's intestate? Answer: Yes.

4. Did the defendant company retain the said Edwards in its service after the defendant company had knowledge, or by reasonable diligence might have ascertained, that said Edwards was incompetent, inefficient or reckless in running his engine? Answer: Yes.

5. Did the plaintiff's intestate know that said Jack Edwards was incompetent, inefficient or careless in running an engine, and with such knowledge remain in the service of the defendant till he was killed? Answer: Yes.

6. What is plaintiff's damage? Answer: Nine thousand five hundred dollars."

The court instructed the jury on the law and testimony bearing upon each of said issues.

(69) The plaintiff did not except, before or after verdict, to the instructions given or instructions refused. The plaintiff declined after verdict to move for a new trial. After the rendition of the verdict, the plaintiff moved the court for judgment upon the findings of the jury, on the first, second and sixth issues especially, and upon the whole verdict, in favor of the plaintiff for the sum of nine thousand five hundred dollars, and the costs of the action.

In the instructions given by the court bearing upon the second issue, and when the attention of the jury was directed to said issue, the court recapitulated all of the testimony offered by the parties, to show that plaintiff's intestate either did or did not contribute by his own negligence to cause the injury; but no reference was made by the court to the testimony as bearing upon this question, whether the plaintiff's intestate knew that Edwards was a reckless engineer, and remained in the service of the defendant company after he had such knowledge.

In the instructions given to the jury bearing upon the fifth issue, however, the court stated to the jury, as counsel on both sides had stated in the argument, that the only testimony bearing upon that issue, was the testimony of the wife of plaintiff's intestate, as to what he said to her about Jack Edwards.

The defendant's counsel contended that there was no conflict between the findings on the second and fifth issues, and if there was any such conflict, the findings on the fifth issue, being a special finding, would control under section 410 of The Code.

The court refused the motion for judgment by plaintiff, and rendered judgment for defendant for the costs. The plaintiff excepted to said judgment and to the refusal of his motion for judgment, and appealed.

John Devereux, Jr., (J. H. Merrimon also filed a brief) for (70) *plaintiff.*

Charles M. Busbee (D. Schenck and Charles Price also filed a brief) for defendant.

MERRIMON, J., after stating the facts: It is true, as contended by the counsel of the appellant on the argument here, that the pleadings did not raise the fourth and fifth issues submitted to the jury in this case. It was therefore irregular to submit them, but it does not appear in the record that the appellant objected to them at the trial, or at all, in the court below, nor is error assigned as to them, nor can error in such respect be assigned in this Court, as has been decided in many cases.

The verdict, in response to these issues, must be accepted and acted upon, for any proper purpose in connection with the judgment given, or that ought to have been given by the court. Improper issues should be objected to in apt time, and if it should turn out that submitting them resulted in prejudice to the party complaining, this would be ground for a new trial. Issues arise upon the pleadings, and the court has not authority to submit others that do not so arise in its discretion. It is a mistaken notion that seems to be entertained by some of the profession, that the statute confers such power. Generally, however, when issues of fact, not raised by the pleadings, are submitted to the jury without objection, the presumption is, that they were submitted by consent of parties. *Henry v. Rich,* 64 N. C., 379; *Miller v. Miller,* 89 N. C., 209; *Swann v. Waddell,* 91 N. C., 108; *Wright v. Cain,* 93 N. C., 296; *Willis v. Branch,* 94 N. C., 142; *Patton v. R. R.,* 96 N. C., 455; *Smith v. McGregor,* 96 N. C., 101.

The counsel for the appellee conceding that these issues were not raised by the pleadings, insisted that the statute (The Code, sec. 409), authorized the court, in its discretion, to submit them; and that,

(71) although the finding of facts in response to the fifth issue is inconsistent with the general verdict in response to the second issue, the former must prevail, as provided by the statute (The Code, sec. 410), and therefore, the court properly gave judgment for the defendant.

This argument, it seems to us, is based upon a misapprehension of the nature, extent and effect of the findings of the jury in response to the several issues submitted, and particularly the second and fifth.

The statute (The Code, sec. 408), prescribes that, "a general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court." This implies that the verdict is general, when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted—that it is special when it finds the facts in evidence, pertinent to, and bearing upon the issues submitted—when it states the facts, and leaves the court to apply the law pertinent and arising upon them. *Morrison v. Watson,* 95 N. C., 479.

Ordinarily, the verdict of the jury is general, upon the issues submitted to them, but this is not necessarily so. The statute (The Code, sec. 409), prescribes that, "in every action for the recovery of money only, or specific real property, the jury in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases, may instruct them, if they render a general verdict, to *find upon particular questions of fact, to be stated in writing,* and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes."

(72) It thus appears that in certain specified classes of cases, the jury may, *in their discretion,* render a special verdict. In all other cases the court may *direct* them to find a special verdict in writing upon *all* or *any* one or more of the issues; and it may instruct them if they render a general verdict, "to find upon *particular questions* of fact, to be stated in writing, and may direct a written finding thereon." The purpose of this provision is, to settle some important, leading *question* of fact, arising in the case, that is not made an issuable fact in the pleadings, but is one which the court deems material to a just determination of the case. In such case, the fact is found, and the court will determine its legal bearing and effect.

In the present case six issues were submitted to the jury. Their verdict upon each was general—a simple affirmative or negative response. The jury did not purport to render, nor did they in effect render a

special verdict. Nor did the court instruct them to find a special verdict in writing, upon all or any of the issues; nor did it instruct them to "find upon particular questions of fact," stated in writing; nor did they make such findings.

All the issues submitted are supposed to have arisen upon the pleadings, and the verdict as to each is general, and must be so accepted by the court.

The statute (The Code, sec. 410), which provides that, "where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly," does not apply, because, as we have seen, there is no special finding upon a question, or questions of fact, as contemplated by it. The findings are all upon *issues,* and not *questions,* of fact.

If the court intended, as allowed by the statute, to instruct the jury to find upon "particular questions of fact," embraced by the third, fourth, and fifth issues, it should have stated the questions in writing, and the jury should have found the facts—many or few—as in case of a special verdict, so that the court could have determined (73) their legal effect and application, and moreover, so that, if error had been assigned in such respect, this Court could, upon appeal, have corrected any error that might have appeared.

Then, treating the verdict as to all the issues as general, did it warrant the judgment the court gave in favor of the defendant? We think it did not. Manifestly, the findings upon the first, second and sixth issues, without regard to the findings upon the other issues, entitled the plaintiff to judgment. It appears from these, that the defendant, carelessly, negligently, and tortiously injured the intestate of the plaintiff, as alleged, and that the intestate did not contribute to his own injury by his negligence, and the damages are ascertained.

But the findings upon the third, fourth, and fifth issues, are inconsistent with the findings just referred to, and thus the verdict upon all the issues, as a whole, is rendered not only inconsistent and contradictory, but unintelligible, and no judgment ought to be rendered upon it.

It is first found broadly and without qualification, that there was no contributory negligence on the part of the intestate of the plaintiff, and in response to the fifth issue, in legal effect, that there was such negligence. For if the intestate and engine-man were fellow-servants, as the jury found they were, and the latter was negligent and unfit for the common service, and dangerous in doing such service to his fellow-servants, and the intestate well and clearly knew these facts, and with such knowledge continued in the service of the defendant while the engine-man did likewise, he was thus negligent himself, and when he

encountered the injury complained of, occasioned by the negligence of the engine-man, nothing else appearing, by such negligence on his part, he contributed to his own injury. *Crutchfield v. R. R.*, 78 N. C., 300; *Johnson v. R. R.*, 81 N. C., 453; *Pleasants v. R. R.*, 95 N. C., (74) 195; Wood on Master and Servant, sections 385, 422, 423; 3 Wood Railway Law, secs. 394, 396; Whitaker's Smith on Neg., note on p. 397.

The fifth issue, and the finding of the jury upon it, is indefinite and unsatisfactory as an ascertainment of contributory negligence. At what time the intestate first knew of the incompetency and dangerous carelessness of the engine-man—the extent of his knowledge in these respects, and how long he had such knowledge before he suffered the injury complained of, do not appear. And the evidence upon which this finding is based, is quite as indefinite and unsatisfactory. Nevertheless, as the issue and the finding of the jury upon it were treated as sufficient, and there was no objection, the verdict must be deemed a finding that there was contributory negligence. So that, there are two contradictory findings. Which is the true one? Which shall the Court accept as true? Why shall it accept one and not the other? Such findings leave the issues of fact undetermined, and it is not the province of the Court, unless by consent, to determine them. The material facts are contradictory, and no judgment can be rendered. In such a case, the Court will direct a new trial. *Bank v. Alexander*, 84 N. C., 30; *Mitchell v. Brown*, 88 N. C., 156; *Hilliard v. Outlaw*, 92 N. C., 266; *Turrentine v. R. R., ibid.*, 638; *Morrison v. Watson, supra.*

The learned counsel for the appellee insisted on the argument, that the facts ascertained by the verdict upon the fifth issue, did not, in legal effect, constitute contributory negligence, but was in effect, a finding that the intestate of the plaintiff, "*agreed* with the defendant company to risk the consequences of this dangerous contact and association" with the engine-man.

We cannot accept this view as correct. The law implies that the servant agrees to accept the ordinary risks incident to the business or service which he engages to do, but it does not imply that he (75) shall or will take upon himself extraordinary hazard, and especially such danger as the employer is bound to prevent and avert by the exercise of reasonable diligence on his part. Generally and ordinarily, the master and servant, in the contract of employment between them, do not contemplate extra hazards and unusual dangers arising in the course of the service to be done, and hence the law does not *imply*, in the absence of express stipulation to that effect, that the contract embraced such hazards. So far as appears, the contract of employment between the intestate of the plaintiff and the defendant was

the ordinary one in such cases. The parties did not contemplate extra and unusual hazards, nor such dangers arising from the rash and dangerous acts of the unfit engine-man, nor does the contract embrace them by implication.

The most that can be said in this respect is, that the intestate, by remaining in the defendant's service after he had certain knowledge of the unfitness of his fellow-servant engine-man—the defendant having the like knowledge—assumed the extra hazard as to his fellow-servant, and thereby waived his right to redress against the defendant in case of injury arising to him from that servant's reckless act. But by thus remaining in the defendant's service, he was negligent as to his own safety, and by such negligence contributed to his own injury, in the absence of anything to the contrary, just as certainly as if he had used, in the course of his employment, a defective and dangerous locomotive, or other defective implement, knowing the same to be dangerous and had suffered injury from the same, by reason of such defects.

It was the intestate's duty to avoid such hazard; he was negligent in failing to do so, and thus unfortunately contributed to the loss of his life.

The verdict and judgment must be set aside, and a new trial had according to law.

To that end, let this opinion be certified to the Superior Court. (76) It is so ordered.

DAVIS, J. I concur in the opinion granting a new trial.

SMITH, C. J., dissenting. As I do not concur with the Court in setting aside the verdict as self-contradictory, but am of opinion that judgment was properly rendered upon it in favor of the defendant, it is necessary for me to state the reasons upon which the dissent is based. Six issues were presented to and passed on by the jury, of which those numbered 2 and 5 are supposed to be in irreconcilable conflict, and to call for a reference to another jury, upon the ground that the intestate's co-operative negligence, denied in the first, is affirmed in the latter finding. I do not so interpret the case.

The finding upon the first three issues, as explained in the third, presents the case in which one servant is injured, in the present instance loses his life, by the negligence and want of due care of another, fellow-servants of the same master, for the consequences of which the authorities are uniform in holding that the common principal is not liable. Such hazards incident to the same, are voluntarily assumed in entering the service under an *implied,* involved in the actual *contract.* Contributory negligence on the part of the injured, is not a material element in

the exoneration, for if not present, and the injury proceeds from the sole carelessness of the employee, the result is the same.

To remove these obstacles to a recovery, and to bring home to the defendant its own negligence, the fourth and fifth issues were framed and passed on, from which it appears that the engine-man had before shown his unfitness for the place—indeed a recklessness in conducting his engine, and this was alike known to the deceased and to the com-
(77) pany, and yet the former remained in the service, without complaint made to the employing company.

It is well settled that a railroad company, or any other, employing servants in the different branches of its business, which converge to one end, must provide safe and suitable machinery, and employ competent and fit persons to discharge the various duties required of each for the security of all. This obligation extends to necessary reparations, and to the discharge of employees whose unfitness has been made apparent by their subsequent conduct.

As the employer alone acts in these matters, his duty to those whom he employs, imperatively demands the exercise of proper care in these particulars for the safety of the others, and not less the protection of his own interests. So, too, the servants who detect any defects in the machinery, or incompetency in those with whom they associate in the common undertaking, should communicate the fact to the employer, that he may provide a remedy. If, with this information, and without making it known to the employer, any one remains without complaint in the service, it is assumed that he adds the risks from this new source of danger to those which he took upon himself when he entered into the service.

These principles are recognized as governing the relation between the employer and the employed in reference to accidents occasioned by defective machinery, or known incompetent coemployees. "In this country," says Mr. Wharton, "the exception has been still further extended, and we have gone so far as to hold, that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them in such a way as to induce a confidence that they will be remedied. The only ground on which this exception can be justified is, that in
(78) the ordinary course of events, the employee, supposing that the employer would right matters, would remain in the employer's service, and that it would be reasonable to expect such continuance. But this does not apply to cases where the employee sees that the defect has not been remedied, and yet continues to expose himself to it. In such

case, on the principles heretofore announced, the employee's liability in this form of action ceases." Law on Negligence, sec. 221.

The doctrine is thus laid down in Wood's Law of Master and Servant, sec. 379.

"The fact that an employee has complained of a defect, and believes, or has reason to believe, that the defect will be remedied, *unless a promise to repair is made,* does not of itself entitle him to recover for an injury received from such defect. The real question is, whether the plaintiff was guilty of negligence in performing the service, after knowledge of the defect—no promise to repair it being given—does not operate to relieve him of the imputation of negligence, but may have directly the opposite effect. It is wholly a question of care or negligence, and if the servant knew, or ought to have known the danger, and a person of ordinary prudence would have regarded it as dangerous to remain, he cannot recover, even though he has complained of the defect."

The responsibility for using defective machinery and unfit implements, and for employing an incompetent servant, or retaining him after such incompetency has been shown, is substantially the same.

Our own rulings on this subject are in the same line, and the controlling principle is thus stated by *Bynum, J.*: "If the servant remains in the master's employ, with knowledge of defects in machinery he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects, so that they may be remedied in a reasonable time. But if he sees that the defects have not been remedied, *yet continues to expose himself to the danger, the employer's* (79) *liability ceases. Crutchfield v. R. R.,* 78 N. C., 302.

So it was subsequently declared, that "if the servant knows of defects in the machinery, and remains in the service, he cannot recover for injuries caused by such defects, unless he has informed his superior, and the latter fails to remove them." *Johnson v. R. R.,* 81 N. C., 458.

The proposition is stated with some modification by *Ruffin, J.,* thus: "In entering the service of the defendant, the plaintiff might be, and is, presumed to understand and take upon himself every risk naturally pertaining to such service, and amongst others, that which may proceed from the possible carelessness of such fellow-servants as he must know from the very nature of the employment, he may be required to associate with in the performance of his duties. But no such presumption is or should be raised, of his willingness to assume the risk growing out of the possible negligence of one, who while a servant to their common master, stands to himself in the light of a superior, whose commands and directions he is bound to obey."

The plaintiff in this case was a workman and under the direction and order of the conductor, who was also engineer of the train, and sustained the injury when obeying an order to go upon a certain car and apply the brake, by the bumping of the cars. *Cowles v. R. R.*, 84 N. C., 311.

The plaintiff's intestate was *not employed on the running train and controlled by the engineer,* but was in a distinct and separate service, so that the qualification of the general rule has no application to the present case.

It is true the company had knowledge, or by inquiry might have obtained it, of the inefficiency and incapacity of the engineer, so that it was unnecessary that the deceased should give the information. It is not for this purpose alone that he should have made complaint, but to show his unwillingness to be exposed to the new danger from the
(80) officer's reckless conduct, and that it may be removed. The failure to make complaint, and continuance in the service, *after as before knowing of the unfitness,* is an acquiescence in his retention, and a tacit assumption of the new risk, as of those personally assumed, incidental to the employment. As the employee, though unfit in some respects, may possess other qualifications for the place, rendering his retention, upon the whole, important to the principal, as also to his fellow-employees, the company, by keeping him, and the other servants in their acquiescence in the action of the company, assent to the risks to property and to person, and thus the parties stand upon an unchanged footing in respect to possible accidents from this cause.

In a recent work, this enunciation of the rule, with the reasons for it, is made: "If the servant, when the defect or danger is brought to his knowledge—when he discovers that the machinery, buildings, premises, tools or any other instrumentalities of his labor, are unsafe or unfit, or that a *fellow-servant is careless or incompetent—continues in the employment without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury.*" Beach Cont. Neg., sec. 140.

In support of the proposition, a large array of cases decided in this country and in England is given in the foot note, and among them the case of *Cowles v. R. R., supra.*

"Failure to speak promptly," the author proceeds to say, "is such contributory negligence as will bar a recovery from the master, in case he is injured by the defect in the machinery, or the unfitness of the servant. . . . But if, when the master is notified of the defect in the machinery, or of the incompetence in the servant, he promises to remedy it within a reasonable time" (or, we may add, gives reasons for the servant so to infer), "the servant will not be presumed to have

consented to it, or to have waived his rights by remaining for such (81) reasonable time in the service."

Now, the facts are, as found by the jury, that the intestate was aware, and as set out in the case on appeal, communicated to his wife, the fact of the reckless character of the engineer, and that his only apprehension of danger when in the tunnel, was from him. With this information he acquiesces in the situation, and continues in his employment until he loses his life.

The verdict is, that the intestate did not by his own negligence contribute to or directly bring about the disaster to himself, and this is not inconsistent with the further finding, that he remained in the company's service, with full knowledge of the engineer's unfitness, and thus waived any claim for damages resulting from such unfitness. Sometimes, as is said in the opinion, this conduct on the part of the servant, continuing in the service after such discovery, is designated as contributory negligence, though he may have exercised every possible care and attention to his own safety upon the particular occasion; but it seems to me the true ground upon which to place the exemption from liability of the employer, is that of the employee's voluntary exposure of himself to this new source of danger, and his assumption of the risks incident to it.

In a remote degree, negligence may be imputed to the servant in not quitting the service when he knows of the retention of an incompetent fellow-servant or associate, but it is not easy to see how this can be deemed contributory to an accident brought about by no agency of his own, and wholly the fault of another. Such is the sense in which the jury must be understood in finding that there was no contributory negligence on the part of the intestate.

I think, therefore, the judgment ought to be affirmed.

Error. New trial.

Cited: Quarles v. Jenkins, 98 N. C., 262; *Davidson v. Gifford,* 100 N. C., 22, 3; *Gatling v. Boone,* 101 N. C., 66; *Gordon v. Collett,* 102 N. C., 539; *Allen v. Sallinger,* 105 N. C., 339; *Bean v. R. R.,* 107 N. C., 742; *O'Connor v. O'Connor,* 109 N. C., 144; *McCaskill v. Currie,* 113 N. C., 316; *Brown v. Lumber Co.,* 117 N. C., 296; *Mitchell v. Mitchell,* 122 N. C., 334; *Johnson v. Townsend, ibid.,* 446; *Pressly v. Yarn Mills,* 138 N. C., 433; *Stern v. Benbow,* 151 N. C., 463; *Drennan v. Brooks,* 179 N. C., 514; *Erskine v. Motor Co.,* 187 N. C., 831.

(82)

LEWIS KIRK v. ATLANTA AND CHARLOTTE AIR-LINE RAILWAY COMPANY.

Issues—Contributory Negligence.

1. The only issues proper to be submitted to the jury, are those matters alleged on the one side and denied on the other, which are necessary to determine the controversy, and every such issue ought to be either submitted, or under the instructions of the court, clearly embraced in some other issue which is submitted.

2. In an action to recover damages for an injury caused by the negligence of the defendant, who pleads contributory negligence on the part of the plaintiff, the defendant is entitled to an issue on this question, unless the court includes it under the issue as to negligence, by proper instructions to the jury.

(Scott v. R. R., 96 N. C., 428; *Kirk v. R. R.*, 94 N. C., 625; cited and approved.)

CIVIL ACTION, tried before *Montgomery, J.*, at November Special Term, 1886, of MECKLENBURG Superior Court.

The complaint alleges that the defendant, by the negligent and unskillful management of one of its locomotives and cars attached, ran over the plaintiff's arm and broke it, and caused other injuries, by which he sustained damages to the amount of $20,000. And for a second cause of action, that "the plaintiff being employed by the defendant as a carpenter in its shops at Charlotte, the defendant by its servants, superior in authority to the plaintiff, required the plaintiff to go to a point on its railway . . . and there do and perform certain work for which he had not been hired, to wit, to go under and inspect a number of cars belonging to the defendant, . . . and while the plaintiff was so under the said cars inspecting the same, the defendant, by its servants not engaged in the same common employment with the plaintiff," negligently caused the engines and cars to crush his arm, etc.

(83) The answer denies that the plaintiff was injured by the defendant corporation or any of its agents or servants, but on the contrary, avers that the injuries received by the plaintiff resulted from his own negligence.

To the second cause of action the defendant answers, denying that the plaintiff was employed exclusively as a carpenter, but avers that he was employed to do all such work as might be required of him by the foreman of the shop, and admits that on the occasion of the injury, the plaintiff, at the request of the foreman, and without any objection, went to the place designated in the complaint for the purpose stated, but

denies that the injuries received were caused by the negligence of the defendant, or any of its agents or employees, but avers that the injury sustained by the plaintiff was the consequence of his own negligence. And for a further defense, the defendant avers, "that if the plaintiff was injured by the negligence of any of the agents or employees of this defendant, that said agents or employees were the fellow-servants of the plaintiff, employed with him in the same common employment, and that defendant is not responsible to plaintiff for the consequences of their acts."

Issues were tendered by the plaintiff, which were objected to by the defendant, who tendered the following issues:

I. Was the injury to the plaintiff caused by the negligence of defendant?

II. Did the plaintiff contribute by his own negligence to the injury?

III. Was the injury caused by the negligence of a servant of the company; if so, which one?

IV. What damage, if any, did the plaintiff sustain by reason of his injury?

V. Was the plaintiff employed to work exclusively as a carpenter, or was he employed to do such work as the company wished him to do?

VI. Was Harris, the engineer, an unfit servant?

VII. Did the defendant have knowledge of his unfitness?

His Honor refused to submit these issues, as tendered by the (84) defendant, and it excepted.

The issues were submitted by his Honor, which, with the responses of the jury, are as follows:

I. Was the plaintiff injured by the negligence of defendant's servants or agents? Answer: Yes.

II. By the negligence of which servants or agents was the plaintiff injured? Answer: Harris.

III. Was the defendant negligent in the employment or retention of the fellow-servants of plaintiff; if so, which one? Answer: Yes; Harris.

IV. What damage, if any, is plaintiff entitled to recover? Answer: Ten thousand dollars.

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

W. P. Bynum for plaintiff.
Chas. Price and C. M. Busbee for defendant.

DAVIS, J., after stating the facts: The *issues* are made by the allegations of the complaint and the denials of the answer; or when affirmative matter of defense is averred in the answer, by such averment and the

replication, but it does not necessarily follow, that every allegation of a fact which is denied, must be submitted to the jury as an *issue.* The issues submitted should be only those *evolved* from the pleadings, necessary to *determine the controversy,* and every issue of fact necessary for that purpose ought to be either distinctly submitted, or, under the instruction of the court, clearly embraced in some issue that is submitted.

Was the defendant entitled to have any one of the issues tendered by him submitted to the jury? The allegation of negligence is distinctly denied, and contributory negligence on the part of the plaintiff distinctly averred, and this raised an *issue,* which the defendant
(85) had a right to have submitted to the jury, unless so comprehended in some other issue, that, under the instruction of the court, the question of contributory negligence could be fairly presented to the jury, as was the case in *Scott v. R. R.,* 96 N. C., 428.

When this case was before this Court at a former term, 94 N. C., 625, it appears that the issues submitted to the jury were:

"1. Was the plaintiff's injury caused by the defendant's negligence?

"2. Was the plaintiff's negligence contributory thereto?

"3. What damages is he entitled to?"

One of the exceptions to the ruling of the court below upon that appeal was the refusal of the issue tendered by the defendant:

"Was the injury caused by the negligence of a servant of the company; if so, which one?"

We think the defendant was entitled to this issue. Perhaps, under proper instructions from the court in regard to the law as applicable to the different phases in which the evidence might be viewed by the jury, it might be included in the first issue that was submitted, but there was no instruction given the jury as to what constituted a fellow-servant, or of contributory negligence in relation thereto, and taken in connection with the third issue, which is not eliminated from any allegation in the complaint and denial in the answer, we think the issue as submitted was calculated to mislead the jury, and that the defendant was entitled to the first four issues tendered. With proper instructions from the court, every question necessary to decide the matter in controversy can be presented to the jury, and answered under these issues.

We think there was error in the refusal to submit the issues tendered, and that this error was not cured by those submitted, or by any instruction of his Honor to the jury, and this renders it unnecessary for us to consider the other exceptions.

(86) The defendant is entitled to a new trial. Let this be certified.

Error. Reversed.

Cited: McAdoo v. R. R., 105 N. C., 151; *Braswell v. Johnston*, 108 N. C., 152; *Smith v. R. R.*, 114 N. C., 763; *Morrisett v. Cotton Mills*, 151 N. C., 32; *Kerner v. R. R.*, 170 N. C., 96; *Roper v. Leary*, 171 N. C., 37; *Hutton v. Horton*, 178 N. C., 553.

G. W. JONES v. THE TOWN OF STATESVILLE.

Venue—Cities and Towns.

1. Cities and towns must be sued in the county in which they are located, and if suit is brought in another county, they have the right to have it removed.

2. Where an action is brought to the wrong county, and the defendant demands in writing that the place of the trial be changed, the words "*may* change the place of trial," in section 195 of The Code, will be interpreted as meaning "*must* change," etc.

(Cloman v. Staton, 78 N. C., 235; *Johnson v. Commissioners*, 67 N. C., 101; *Alexander v. Commissioners, ibid.*, 330; *Jones v. Commissioners*, 69 N. C., 412; *S. v. Commissioners*, 70 N. C., 137; cited and approved.)

MOTION to remove a cause pending in Catawba Superior Court to the Superior Court of Iredell County, heard before *Montgomery, J.*, at January Term, 1887, of CATAWBA Superior Court.

The plaintiff brought this action in the Superior Court of the county of Catawba, to recover damages alleged to have been occasioned by injuries sustained through the negligence of defendant's officers and agents, in failing to provide lights along its streets to enable persons passing along and over them in the night time, to see the pit into which the plaintiff fell, etc.

The defendant is a municipal corporation, the county town of the county of Iredell.

At the appearance term, before the time to answer had expired, (87) the defendant demanded in writing that the trial in the action be had in the county of Iredell, and that the court make a proper order to that end. This the court declined to do; whereupon, the defendant having excepted, appealed from the order in that respect to this Court.

No counsel for plaintiff.

C. H. Armfield for defendant.

MERRIMON, J., after stating the facts: The statute (The Code, sec. 191, par. 2), provides that actions must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to remove the same for trial, for cause prescribed by law, if the same be "against a *public officer,* or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid, shall do anything touching the duties of such officer."

And it further provides (The Code, sec. 195, par. 1), that: "The court may change the place of trial in the following cases: (1) Where the county designated for that purpose is not the proper county."

If the defendant demands in writing that the action of the class designated in the statutory provision first above recited, be sent to the county where the cause of action arose, this must be done, because it is so provided, except as modified by the statute (The Code, sec. 191), and herein the words, "may change," in the statutory provision last above recited, must be interpreted as implying that the court "must" or "shall change" the place of trial, etc. *Cloman v. Staton,* 78 N. C., 235.

The defendant is a municipal corporation—public in its nature; it is an artificial person, created and recognized by the law; invested with important corporate powers, public, and in a sense, official in
(88) their nature; and charged with public duties, which it executes by and through its officers and agents. We therefore think that actions against it fairly come within the meaning of, and are embraced by the statutory provision first above recited.

And the correctness of this view is strengthened by the fact, that a like statute (The Code, sec. 193), provides that: "All actions upon official bonds or against executors and administrators in their official capacity, shall be instituted in the county where the bonds shall have been given," etc., the obvious purpose being not to require official persons to go from the counties to which they belong, to defend actions brought against them in their official capacity. It would indeed be very inconvenient and expensive to the public to require cities and towns to go out of the counties where they are located, through their officers and agents, to defend actions brought against them. In such cases a public official agent is sued.

This Court has repeatedly and uniformly held that actions against counties must be brought in the county sued, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. *Johnston v. Commissioners,* 67 N. C., 101; *Alexander v. Commissioners, ibid.,* 330; *Jones v. Commissioners,* 69 N. C., 412; *S. v. Commissioners,* 70 N. C., 137.

The motion should have been granted. There is error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Mfg. Co. v. Brown, 105 N. C., 455, 6; *Brown v. Cogdell,* 136 N. C., 33; *Cecil v. High Point,* 165 N. C., 432; *Roberts v. Moore,* 185 N. C., 256; *Hines v. Lucas,* 195 N. C., 377.

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(89)

THE RANDLEMAN MANUFACTURING COMPANY v. B. F. SIMMONS.

Appeal—Assignment of Error—Case on Appeal.

1. An appeal will not be dismissed because there is no statement of the case or assignment of error, as neither is necessary to perfect the appeal, but if no error appears in the record in such case, the judgment will be affirmed.
2. The objection of the want of jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, may be made in the Supreme Court for the first time, although no error whatever is assigned in the record.
3. The appeal will be dismissed when it does not appear in the record that an appeal was taken.
4. Where a paper appeared in the transcript, purporting to be the case on appeal, but it was signed only by the appellant's counsel, and there was nothing to show that it had been served on the appellee or his counsel, or that either of them had ever seen it, it will not be considered.
5. No agreement of counsel will be recognized, unless in writing and signed by both parties.

(*S. v. Crook,* 91 N. C., 536; *S. v. Byrd,* 93 N. C., 624; *Neal v. Mace,* 89 N. C., 171; *Williamson v. Canal Co.,* 78 N. C., 156; *Meekins v. Tatem,* 79 N. C., 546; *Moore v. Vanderburg,* 90 N. C., 10; *Spence v. Tapscott,* 93 N. C., 576; *McCoy v. Lassiter,* 94 N. C., 131; *Brooks v. Austin, ibid.,* 222; cited and approved.)

MOTION by the plaintiff appellee to dismiss the appeal, filed at February Term, 1887, of the Supreme Court.

The grounds of the motion appear in the opinion.

George H. Snow for plaintiff.
No counsel for defendant.

MERRIMON, J. The appellee moved to dismiss this supposed appeal, upon the ground that no case stated or settled on appeal appears in the

record. Manifestly this is not ground for such motion. The
(90) appeal properly taken and perfected, brings the action into this Court, whether error be assigned or not. The assignment of error in a case stated or settled, is not essential to the appeal. Besides, error might be assigned in the record proper, in which case, a case stated or settled would be unnecessary. But it is not essential to the appeal that error shall be assigned at all. *S. v. Crook,* 91 N. C., 536; *S. v. Byrd,* 93 N. C., 624; *Neal v. Mace,* 89 N. C., 171. In the absence of error assigned, the appellant might move in this Court to dismiss the action, because the court had not jurisdiction; or because the complaint does not state facts sufficient to constitute a cause of action. These are objections that may be taken at any time in the court below, or in this Court, on motion, and without demurrer or answer, or error assigned. *Williamson v. Canal Co.,* 78 N. C., 156; *Meekins v. Tatem,* 79 N. C., 546. In the absence of error assigned, the proper motion of the appellee in this Court is to affirm the judgment. This motion might be made here, and perhaps allowed, but for the fact that on looking into the transcript of the record, we find that it does not appear that an appeal was taken. It does not so appear in terms nor is there any entry of record from which it may be inferred. It is not sufficient that the appellant intended to appeal, as perhaps he did, but it must appear of record that he did in fact appeal.

This is essential to make the appeal effective, and put this Court in relation with the Superior Court. The Code, secs. 549, 550; *Moore v. Vanderburg,* 90 N. C., 10; *Spence v. Tapscott,* 93 N. C., 576; *McCoy v. Lassiter,* 94 N. C., 131; *Brooks v. Austin, ibid.,* 222.

We find in the transcript what purports to be the case stated on appeal, signed by appellant's counsel, but it does not appear that this statement was served upon the appellee within five days, as required by the statute (The Code, sec. 550), or at all, or that he is or his counsel ever saw the same, or had any notice in any way of it, or ever
(91) assented thereto. This was necessary to give the statement any effect whatever.

It is said at the foot of the statement just mentioned, that the appellee's counsel agreed that the appellant's counsel "shall make up the case for the Supreme Court," but this is not signed by the appellee's counsel, nor does it appear that he ever saw or assented to it. This *ex parte* statement is wholly insufficient, especially as the appellee's counsel here refuses to recognize such agreement, or the statement sent up as and for the case stated on appeal. This Court will not recognize such an agreement, unless in writing, and signed by the counsel of both parties. Indeed, Rule 4, par. 1, provides, that "the Court will not recognize any agreement of counsel in any case, unless the same shall

appear in the record, or in writing, filed in the case in this Court." This rule is important. We have found from actual observation, that unless such agreements are put in writing, they are forgotten, misunderstood, or misinterpreted, lead to confusion, and sometimes, to unfriendly disputes.

The supposed appeal must be dismissed, not because no case was stated or settled on appeal, but upon the ground that it does not appear in the record that an apeal was taken. It is so ordered.

Dismissed.

Cited: Abernathy v. Withers, 99 N. C., 522; *Walton v. McKesson,* 101 N. C., 434; *Walker v. Scott,* 102 N. C., 488; *Peebles v. Braswell,* 107 N. C., 69; *Howell v. Jones,* 109 N. C., 102; *S. v. Foster,* 110 N. C., 510; *S. v. Price, ibid.,* 602; *Chemical Co. v. Bd. Agriculture,* 111 N. C., 137; *Hamilton v. Icard,* 112 N. C., 593; *Cummings v. Hoffman,* 113 N. C., 268; *McNeil v. R. R.,* 117 N. C., 643; *Westbrook v. Hicks,* 121 N. C., 132; *Hatch v. R. R.,* 183 N. C., 622; *Commissioners v. Dickson,* 190 N. C., 331; *Maguire v. Lumber Co., ibid.,* 808; *Waller v. Dudley,* 193 N. C., 750.

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*M. BRANTLEY v. D. R. FINCH, ADMINISTRATOR.

Justices of the Peace—Jurisdiction.

1. In actions arising out of contract, it is the sum demanded that fixes the jurisdiction.
2. It is only when the principal sum demanded exceeds two hundred dollars that the plaintiff is required to remit the excess above that sum in order to give justice jurisdiction.
3. So where the sum demanded, both in the summons and on the trial, was two hundred dollars, but the plaintiff filed an account showing more than that sum to be due, the justice had jurisdiction without any remission of the excess of the account over the sum demanded.

(Froelich v. Express Co., 67 N. C., 1; *Wiseman v. Withrow,* 90 N. C., 140; *Norville v. Dew,* 94 N. C., 43; cited and approved.)

CIVIL ACTION, tried on appeal from a justice of the peace, (92) before *Shepherd, J.,* at Fall Term, 1886, of NASH Superior Court.

This action was begun before a justice of the peace, to recover $200, which the plaintiff alleges that the defendant's intestate, in his lifetime,

*JUSTICE DAVIS having been of counsel, took no part in the decision of this case.

owed him for services rendered. On the trial before the magistrate, the plaintiff exhibited a statement of account, as follows:

"GRIFFIN BIRD *to* M. BRANTLEY,	Dr.
"15 January, 1876. For services as his agent, etc., till the fall of 1884 (without intermission)	$225.00
"Interest from 1 December, 1884	13.50
	$238.50
"Credit this account of principal	25.00
"Balance due for services	$213.50."

The following is the material part of the case settled on appeal:

The summons and the transcript (of the justice) both say that the sum demanded was $200.

The account (above set forth) was sent up by the justice, and it was conceded that it was presented before the justice by the plaintiff, on the trial.

(93) The plaintiff testified, that when he presented it, he stated to the justice that he did not claim but $200 on said account; that $25 had been credited on the principal, and that he claimed no more than $200. No *remittitur* was entered by the justice. Plaintiff testified that his services were worth $25 per year on an average.

The court charged the jury, that if the debt was over $200 the plaintiff could not recover; but that if not over that amount, and plaintiff had claimed no more than that amount before the justice, that the justice had jurisdiction, and plaintiff could recover what the jury considered the services were worth.

Before entering upon the trial, and after the return of the verdict, the defendant moved that the action be dismissed for want of jurisdiction, there being no *remittitur* as prescribed by statute. Motion each time overruled.

Judgment was rendered on the verdict, and the defendant appealed.

John Devereux, Jr. (Jos. B. Batchelor was with him) for plaintiff.
Chas. M. Busbee for defendant.

MERRIMON, J., after stating the facts: We are of opinion that the justice of the peace had jurisdiction. It is the *sum* demanded in an action on contract that determines the question in that respect. *Froelich v. Express Co.*, 67 N. C., 1; *Wiseman v. Withrow*, 90 N. C., 140;

Noville v. Dew, 94 N. C., 43. The plaintiff did not demand by the summons, nor insist on the trial, that the intestate of the defendant, in his lifetime, owed him a greater sum than two hundred dollars, and the justice of the peace had jurisdiction of that sum.

The "account" stated and exhibited on the trial, was a mere memorandum—it was not evidence of indebtedness—it did not determine or fix the plaintiff's demand, nor the liability of the defendant. He might—it seems he did—change his opinion in respect to the (94) value of his alleged services rendered, and the jury found by their verdict that they were not worth the sum he demanded. It is only when the principal *sum demanded* exceeds two hundred dollars, that the plaintiff shall remit the excess of principal above that, in order to give the justice of the peace jurisdiction, as prescribed and allowed by the statute (The Code, sec. 835). The plaintiff did not need to remit any part of his claim, because it amounted to only two hundred dollars, and he recovered less than that sum.

The judgment must be affirmed.

No error. Affirmed.

Cited: Cromer v. Marsha, 122 N. C., 565; *Knight v. Taylor,* 131 N. C., 85; *Teal v. Templeton,* 149 N. C., 34; *Petree v. Savage,* 171 N. C., 439; *Shoe Store Co. v. Wiseman,* 174 N. C., 717; *Williams v. Williams,* 188 N. C., 730.

D. D. DUPREE v. MARY B. TUTEN ET AL.

Appeal.

Unless errors are assigned in the record expressly or by necessary implication, the judgment will be affirmed.

(Meekins v. Tatem, 79 N. C., 546; *Paschal v. Bullock,* 80 N. C., 8; *Bank v. Its Creditors, ibid.,* 9; *Mott v. Ramsay,* 90 N. C., 29; *Pleasants v. R. R.,* 95 N. C., 195; cited and approved.)

APPEAL from an order, made by the clerk, in a Special Proceeding, heard by *Gudger, J.,* at February Term, 1886, of BEAUFORT Superior Court.

The point on which the case goes off in this Court renders it unnecessary to state the facts.

No counsel for plaintiff.

W. B. Rodman, Jr., for defendants.

(95) MERRIMON, J. It does not appear from the record that any exception was taken to the rulings of the court, nor are errors assigned either in terms or by reasonable implication.

There is nothing in the record that shows the slightest dissatisfaction on the part of the appellants, except simply the fact that they took the appeal.

It is the well settled rule applicable in such cases, that the judgment must be affirmed. *Meekins v. Tatem,* 79 N. C., 546; *Paschal v. Bullock,* 80 N. C., 8; *Bank v. Creditors, ibid.,* 9; *Mott v. Ramsay,* 90 N. C., 29; *Pleasants v. R. R.,* 95 N. C., 195.

The judgment must therefore be affirmed.

No error. Affirmed.

F. C. FISHER ET AL. v. THE CID COPPER MINING COMPANY OF NORTH CAROLINA.

Petition to Rehear—Exception in a Deed—Estoppel.

1. A petition to rehear will not be entertained unless it appears that some material point was overlooked, or some controlling authority escaped the attention of the Court, or some other weighty consideration requires it.
2. Where a grantor makes a valid exception in a deed, the thing excepted remains the property of the grantor or his heirs, but if the grantor has no valid title to the thing excepted, neither he nor his heirs can recover.
3. An estoppel by deed is always confined to the subject-matter of the conveyance, and cannot be extended to something not conveyed by the deed.
4. So where the plaintiff's ancestor conveyed certain land to those under whom the defendant claims, but excepted all the minerals on the land, the plaintiffs must prove title to the minerals, and the defendant is not estopped by the deed from denying such title.

(Watson v. Dodd, 72 N. C., 240; *Devereux v. Devereux,* 81 N. C., 12; *Haywood v. Daves, ibid.,* 8; *Lewis v. Rountree, ibid.,* 20; *University v. Harrison,* 93 N. C., 84; *Dupree v. Insurance Co., ibid.,* 237; *Ruffin v. Harrison,* 91 N. C., 398; *Fisher v. Mining Co.,* 94 N. C., 397; cited and approved.)

(96) PETITION by the plaintiff to rehear, filed at February Term, 1887, of the Supreme Court.

The case is reported in 94 N. C., 397.

The grounds of the petition appear in the opinion.

John Devereux, Jr., for plaintiffs.

T. F. Kluttz for defendant.

DAVIS, J. This action was heard at the February Term, 1886, of this Court, and the judgment below was affirmed. It is now before us upon a petition to rehear, "because," as the petition sets forth, "the decision there made proceeds exclusively upon the doctrine of estoppel, and its want of application to the case. The plaintiffs did not contend that the record called for an application of the doctrine of estoppel; but they did contend for an application of the presumption, or rule of evidence, that where a grantor makes a valid exception in a deed of conveyance, the thing *excepted* remains the property of the grantor and his heirs, nothing else appearing."

After a careful review of the opinion heretofore rendered (reported in 94 N. C., 397), we can find no ground upon which the judgment should be reversed. This Court has often said that former decisions must be adhered to and not reversed, unless it shall appear that some material point was overlooked, or some controlling authority was omitted to be brought to the attention of the Court, or some other weighty consideration required it. *Watson v. Dodd,* 72 N. C., 240; (97) *Devereux v. Devereux,* 81 N. C., 12; *Haywood v. Daves,* 81 N. C., 8; *Lewis v. Rountree,* 81 N. C., 20; *University v. Harrison,* 93 N. C., 84; *Dupree v. Virginia Home Ins. Co.,* 93 N. C., 237; *Ruffin v. Harrison,* 91 N. C., 398.

The very matter which the petition seeks to bring before the Court was considered and passed upon by it upon the former hearing. Undoubtedly when a "grantor makes a valid exception in a deed of conveyance, the thing excepted remains the property of the grantor, or his heirs"; but if the grantor has no valid title to the thing excepted, neither he nor his heirs can recover, and in this case the plaintiffs failed to show title to the thing excepted. It does not appear that either the plaintiffs or their ancestor, Charles Fisher, ever had title to the reserved minerals, which may have belonged to another, and as was said "the estoppel is necessarily confined to the subject-matter of the conveyance, to which conflicting claims are asserted"—in this case, to the land, and not the minerals.

The judgment of the Court as heretofore rendered is affirmed and the petition to rehear is dismissed.

Dismissed.

Cited: Patton v. Educational Co., 101 N. C., 411; *McAlpine v. Daniel, ibid.,* 558; *Weisel v. Cobb,* 122 N. C., 69; *Elmore v. R. R.,* 132 N. C., 866.

BARTHOLOMEW PAGE ET AL. v. JOHN BRANCH ET AL.

Adverse Possession—Statute of Limitation—Tenants in Common.

1. The possession of a widow remaining on her husband's land after his death, is not adverse to his heirs at law.

2. One tenant in common cannot make his possession adverse to his cotenant except by actual ouster, as he is presumed to hold by his true title, and it will take a sole possession of twenty years in the absence of actual ouster, to bar the cotenant's right of entry, and it is immaterial that the tenant in possession has conveyed to a stranger by a deed purporting to convey the entire estate, as the vendee only gets such estate as his vendor could convey. This rule extends to a purchaser at execution sale of the interest of a tenant in common, and the vendee of such purchaser.

(*Grandy v. Bailey*, 13 Ired., 221; *Black v. Lindsay*, Busb., 468; *Ward v. Farmer*, 92 N. C., 92; *Covington v. Stewart*, 77 N. C., 151; *Thomas v. Garvan*, 4 Dev., 223; *Claud v. Webb*, 4 Dev., 290; *Meredith v. Andres*, 7 Ired., 5; *Halford v. Tetherow*, 2 Jones, 393; *Linker v. Benson*, 67 N. C., 150; *Caldwell v. Neely*, 81 N. C., 114; cited and approved. *Baird v. Baird*, 1 D. & B. Eq., 524, distinguished and approved. *Day v. Howard*, 73 N. C., 4; explained.)

(98) THIS was a special proceeding for the partition of land, tried upon issues joined, before *Shepherd, J.*, at Fall Term, 1886, of PITT Superior Court.

The plaintiffs alleged that they were tenants in common with the defendants of the land mentioned in the petition. The defendants denied this, and claimed to be sole seized. Issues were submitted to a jury, who found that Bart. Page was entitled to an undivided share of three-fifths of one-sixth, and W. S. Page to one-fifth of one-sixth of the land, and that defendants were not sole seized.

It was conceded that if the plaintiffs were tenants in common with the defendants, they were entitled to the undivided interest claimed by them.

The plaintiffs introduced a deed from one J. H. McCluer and wife, dated 19 March, 1847. No question was made as to the title of McCluer. The case states that there was an endorsement on this deed, which was read to the jury, but it fails to state what the endorsement was. There was evidence tending to show that Dennis Branch entered under this deed, and died during the year 1847; that his widow, Rebecca, who had no deed, continued in the possession of the land till 1866,
(99) when she conveyed it to A. B. Branch, a son of Dennis Branch, who afterwards conveyed it to the defendants, who were also sons of Dennis Branch.

There was evidence tending to show that the widow paid off the debt to one Hazelton, and claimed the land as her own and adversely, until she conveyed it, and that no dower was ever assigned to her. There was also evidence tending to show that A. B. Branch and the defendants were in the adverse possession of the land from 1866 till the commencement of this proceeding, which was 31 July, 1883.

The plaintiffs introduced deeds and other evidence, showing that they had succeeded to the interest of certain heirs at law of Dennis Branch, to the extent of the interest claimed by them.

The court, among other things, charged the jury that it being conceded that the defendant and A. B. Branch were heirs at law of Dennis Branch, their possession from 1866 would not be sufficient to divest the title of the plaintiffs, unless they could show that they entered under an independent title, and that if they entered, as they claimed to have done, under Rebecca Branch, and she had never held the land adversely to the heirs at law of Dennis Branch, but had simply remained in possession as his widow, that the plaintiffs' estate would not be divested by the possession of the defendants and A. B. Branch from 1866. But if they found that Rebecca Branch held adversely, and A. B. Branch and defendants entered and held under her, the plaintiffs would be barred.

The defendants excepted to the charge, because the court refused to instruct the jury, as requested, that seven years' adverse possession under the deed of 1866 would be sufficient to bar the plaintiffs' title, even if Rebecca had not claimed adversely to the heirs at law or their grantees.

W. B. Rodman, Jr. (W. B. Rodman was with him on the (100) *brief) for plaintiffs.*

No counsel for defendants.

DAVIS, J., after stating the facts: The only question for our consideration is: Did the court err in refusing to instruct the jury, that seven years adverse possession under the deed of 1866 would be sufficient to bar the plaintiffs' title, even if Rebecca Branch had not claimed adversely to the heirs at law or their grantees?

The charge of his Honor and the finding of the jury, render it unnecessary for us to consider the character of Rebecca Branch's possession—it was not adverse. *Grandy v. Bailey,* 13 Ired., 221.

In 1866 the plaintiffs and defendants were tenants in common, and they continued so to be, unless the possession of the defendants under the deed of Rebecca Branch barred the plaintiffs. "The possession of one tenant in common is, in law, the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any

claim from another who has a right, and is under no disability to assert it, it will be considered as evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful and will protect it. . . . At any time, then, during the twenty years, the tenant out of possession had a right, and might have enforced it by an action." *Black v. Lindsay,* Busb., 468.

One tenant in common cannot make his possession adverse to his cotenant. He is presumed to hold by his rightful title, and it will take twenty years adverse possession to bar the cotenant, and a deed by a cotenant to a stranger, though it purport to convey the entire estate, has no other effect than to invest the vendee with the righs of the vendor,

(101) and does not change the relation of cotenant, which had subsisted between the vendor and the cotenant. This rule extends to the purchaser of the interest of a tenant in common at execution sale, and to the vendee of such purchaser, as was decided in *Ward v. Farmer,* 92 N. C., 92. In that case, the interest of W. W. Ward, one of the cotenants, had been purchased at execution sale by one Day, and Day by deed professing to convey the whole of the land, sold to the defendants, Farmer and Southerland, who entered into possession on 1 January, 1873, and occupied and used the same to November, 1883, claiming it as their own, under their deed from Day, no one else being in possession; clearing and otherwise improving it, occupying it by marked and visible lines publicly, and paying the taxes. The court below instructed the jury that no possession short of twenty years, except after an actual ouster, would be adverse as against tenants in common, and this was sustained. *Ashe, J.,* in the opinion in *Ward v. Farmer,* in referring to *Day v. Howard,* 73 N. C., 4, in which the same principle is held, calls attention to the fact that *Chief Justice Pearson,* who delivered the opinion in *Day v. Howard,* fixed the time at ten years, instead of twenty, and says, "it will be observed, that this was a mere *obiter dictum,* and the learned *Chief Justice* only says he is *inclined* to the opinion and expresses none, because that state of facts is not presented." And *Bynum, J.,* in *Covington v. Stewart,* 77 N. C., 151, says: "It has never been held in North Carolina that a less period than twenty years' adverse possession by one tenant in common, will raise the presumption of ouster and sole seizin; and this, whether the possession was held by the tenant in common himself, or by him a part of the time and until his death, and then continued by his heirs for the residue of the twenty years," and referring to *Day v. Howard,* adds that his Honor who tried the case of *Covington v. Stewart,* in the Superior Court, "was probably

(102) thrown from his guard by a suggestion made by the *Chief Justice* in delivering the opinion in the latter case, that where a tenant in common conveys to a third person, an adverse possession of

ten years by the purchaser would probably give him a good title, by the presumption of an actual ouster. The point did not rise in that case. . . . But the possession of twenty years, which raises a presumption of title, as the law has been heretofore administered, has now the force and effect of an actual title," and refers to the statute.

Assuming that the period of ten years, in the case of *Day v. Howard,* was inadvertently fixed, as is indicated by *Justice Bynum* and *Justice Ashe,* it may be stated as well settled in this State, that no possession for a period less than twenty years will amount to an ouster of one cotenant by another cotenant, or by any one deriving title under another cotenant. There must be something more than mere possession for a less period than twenty years, to constitute an ouster. In *Thomas v. Garvan,* 4 Dev., 223, *Gaston, J.,* says: "When the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting a legal presumption of such facts as will sanction the possession and protect the possessor," and this has been followed uniformly, unless *Day v. Howard* constitutes an exception. *Cloud v. Webb,* 4 Dev., 290; *Meredith v. Andres,* 7 Ired., 5; *Black v. Lindsay,* Busb., 467; *Halford v. Tetherow,* 2 Jones, 393; *Linker v. Benson,* 67 N. C., 150; *Covington v. Stewart,* 77 N. C., 151; *Caldwell v. Neely,* 81 N. C., 114.

The *length* of time necessary to raise the presumption of ouster, was not the point in *Day v. Howard,* and the principle enunciated, and the reasoning of the *Chief Justice* in that case, are in harmony with these decisions.

The case of *Baird v. Baird,* 1 D. & B. Eq., 524, though seemingly in conflict with the position here taken, will be found, upon a close examination of the elaborate and exhaustive opinion of *Chief Justice Ruffin,* to have rested upon a state of facts that amounted to an actual ouster and disseizin, and not upon the simple fact that seven (103) years adverse possession under color of title, but upon the character of the possession which, in that case, was attended by circumstances that constitute an actual ouster.

There is no error. The judgment of the court below is affirmed.

No error. Affirmed.

Cited: Hicks v. Bullock, 96 N. C., 171; *Hampton v. Wheeler,* 99 N. C., 226; *Love v. McClure, ibid.,* 295; *Orrender v. Call,* 101 N. C., 403; *Allen v. Sallinger,* 103 N. C., 17; *Ellington v. Ellington, ibid.,* 58; *Allen v. Sallinger,* 105 N. C., 342; *McMillan v. Gambill,* 106 N. C., 362; *Gilchrist v. Middleton,* 107 N. C., 681; *Jeter v. Davis,* 109 N. C., 460; *Ross v. Hendrix,* 110 N. C., 405; *Ferguson v. Wright,* 113 N. C., 545; *Carson v. Carson,* 122 N. C., 647; *Roscoe v. Lumber Co.,* 124

N. C., 48; *Shannon v. Lamb,* 126 N. C., 46; *Hardee v. Weatherington,* 130 N. C., 92; *Atwell v. Shook,* 133 N. C., 393; *Allred v. Smith,* 135 N. C., 452; *Bullin v. Hancock,* 138 N. C., 202; *Dobbins v. Dobbins,* 141 N. C., 217; *Lumber Co. v. Cedar Works,* 168 N. C., 350; *Roberts v. Dale,* 171 N. C., 467; *Bradford v. Bank,* 182 N. C., 230.

JAMES H. HARRIS v. J. J. MOTT.

Contract—Satisfaction of Judgment.

1. Where the terms of a contract, either written or oral, are explicit and precise, its effect is a question of law. Where terms of art are used, or the meaning of the contract is doubtful, it must be left to the jury to say what the contract was.

2. Where a judgment debtor agreed with the plaintiff that when he (the debtor) collected a debt due him by a third person, he would pay the judgment, it does not operate as a discharge of the judgment, and if the defendant fails to collect such debt, the judgment may be enforced against him.

(Massey v. Belisle, 2 Ired., 170; *Sizemore v. Morrow,* 6 Ired., 54; *Festerman v. Parker,* 10 Ired., 474; *Shaw v. Burney,* 86 N. C., 331; cited and approved.)

MOTION in the cause to enter satisfaction of a judgment, heard before *Phillips, J.,* at October Civil Term, 1886, of WAKE Superior Court.

His Honor refused the motion and the defendant appealed.

The facts appear in the opinion.

(104) *R. H. Battle for plaintiff.*
Thos. R. Purnell for defendant.

SMITH, C. J. On 7 November, 1884, the plaintiff, in an action before a justice of the peace of Wake County, recovered judgment against the defendant for $186.35, which, on 30 January thereafter, he caused to be docketed in the Superior Court.

On the day of its rendition, the parties and Lott W. Humphrey entered into and severally signed, an agreement in these terms:

"RALEIGH, N. C., 7 November, 1884.

George T. Wassom is due Dr. J. J. Mott for type and fixtures, principal and interest, $179.56.

Dr. J. J. Mott is due J. H. Harris for same he sold to Mr. Wassom, principal and interest, $179.56.

J. H. Harris is due L. W. Humphrey, principal and interest, $120. L. W. Humphrey transfers his debt against Harris, without recourse, to Dr. Mott, which leaves his indebtedness to Mr. Harris $59.56. Now it is understood and agreed, that when Dr. Mott collects his debt against Mr. Wassom, he will pay to said J. H. Harris the said $59.56, and to said L. W. Humphrey the said $120."

A credit for $120 was entered on the docketed judgment, also bearing date on 7 November, 1884, and the plaintiff's signature thereto, and as thus reduced in amount a transcript thereof was sent to Iredell County and docketed in the Superior Court of that county, and this was followed by an execution, issued on 13 September, 1886, to the sheriff of that county. His action under the process was arrested by a restraining order, and at October Term the defendant's counsel, pursuant to notice, entered a motion for an order directing an entry of satisfaction of the judgment. In support of the motion, the affida- (105) vits of the defendant and said L. W. Humphrey, with certain exhibits, were read in evidence, and in opposition the affidavit of the plaintiff, the statements contained in all of which, it is unnecessary particularly to set out, inasmuch as the conclusion to which our examination of the case leads, is not controlled by them.

The defendant insists that the agreement, interpreted in the light of the accompanying and explanatory facts, has the legal effect of a full discharge of the judgment, so far as the defendant is concerned, and that the plaintiff must look alone to Wassom for the collection of the residue of the debt.

There is a marked difference in respect to the appropriation of the two sums mentioned in the last clause of the contract. The transfer of the $120 due from the plaintiff to Humphrey, to the reduction of the judgment, was evidently intended to be, and was in legal effect, a payment of so much of it, and an extinguishment of the indebtedness to Humphrey. So it was considered by the plaintiff, and accordingly entered upon the docket.

But it is not the same as to the residue, for the defendant undertakes to collect the debt of Wassom, and when collected, to pay over the $120 advanced by Humphrey, and the $59.56 still due to the plaintiff. There are no words of personal exoneration of the defendant—nothing to indicate that he is to be discharged and the collection from Wassom alone looked to as a means of payment. The contract is, that when the defendant "collects his debt against Mr. Wassom, he will pay to J. H. Harris the said $59.56." The arrangement contemplates a discharge of the judgment from money expected to be obtained from Wassom, and perhaps some indulgence while the effort to collect is made, but the

debt is not to be discharged unless this is done. If there be a failure in this expectation, the judgment remains in force, as much as does (106) the indebtedness to Humphrey for his advance, and may be proceeded with. Such is the obvious meaning of the written arrangement among the parties, and the writing must be interpreted by its own terms.

When persons conclude upon an agreement and put it in writing, it is to be understood that all by which they are bound is inserted therein.

In a contract, written or oral, when the terms are precise and explicit, its effect is a question of law. *Massey v. Belisle,* 2 Ired., 170; *Sizemore v. Morrow,* 6 Ired., 54; *Festerman v. Parker,* 10 Ired., 474; unless terms of art are used, or they are of doubtful import. *Shaw v. Burney,* 86 N. C., 331.

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

No error. Affirmed.

Cited: Wilson v. Cotton Mills, 140 N. C., 55.

W. H. WEATHERSBEE ET AL. V. O. C. FARRAR.

Mortgage—Priority—Registration—Feme Covert—Estoppel.

1. The rule recognized in admiralty giving salvors a prior lien on the vessel and cargo saved by their exertions, is not recognized at common law.
2. So where there were two mortgages on a crop of cotton, and the first mortgagee advanced money in order to save the crop and prepare it for market, in excess of the amount secured by his mortgage, he is not entitled to the amount of such advances to the exclusion of the second mortgagee.
3. In such case, the registration of the second mortgage is notice to the first mortgagee, and it is immaterial that he does not have actual notice.
4. Unless the element of fraud is present in the declarations or conduct of a *feme covert,* upon the faith of which conduct another reasonably might rely, and has in fact relied to his injury, she is not estopped, as a *feme covert* cannot be estopped by a contract, or anything in the nature of a contract.
5. So, where a *feme covert* second mortgagee was ignorant of the dealings between the mortgagor and first mortgagee until they were consummated and finished, and upon learning of them was only silent, she is not estopped by her silence from asserting her rights under the second mortgage.

(Towles v. Fisher, 77 N. C., 437; *Burns v. McGregor,* 90 N. C., 225; *Loftin v. Crossland,* 94 N. C., 76; *Boyd v. Turpin, ibid.,* 137; cited and approved.)

CIVIL ACTION, heard upon exceptions to the report of a referee, (107) by *Shepherd, J.*, at Spring Term, 1886, of EDGECOMBE Superior Court.

The plaintiff, Weathersbee, on 1 January, 1882, being indebted to the defendant, Farrar, in the sum of $1,051.50, and desiring to raise a further sum to meet other liabilities, and to carry on farming operations during that year, executed his note to the latter, in the sum of $3,500, and gave a mortgage to secure the sum, and provide for its payment at maturity, in which is conveyed the crop to be grown on the land, with the stock and agricultural implements used thereon. The note was discounted and the interest taken therefrom in advance, at the rate of 9 per cent per annum, by the Pamlico Banking and Insurance Company, and the proceeds used, except a small sum otherwise appropriated, to the mortgagor's benefit in the payment of his indebtedness, including that due to the mortgagee.

On 4 March, 1882, the said Weathersbee, being also indebted to the *feme* plaintiff, his wife, in the aggregate of principal money, besides several years of interest on its constituent parts, of $2,360.25, to provide for its payment, executed a deed in trust to the plaintiff, H. L. Staton, conveying a tract of land of 400 acres, and, in subordination to the prior mortgage, the crop and other personal property therein (108) mentioned. These deeds were promptly proved and registered after being made.

On 14 October, 1882, the said Weathersbee delivered to the defendant, of the crop grown on the farm, 13 bales of cotton, of the value of $650.23, the proceeds of which, it was agreed between them, should go in discharge of unsecured advances in money and supplies to be used in housing and fitting the crop for market, but without the assent or knowledge of his wife, or of her trustee. On the same day, the defendant paid Weathersbee $80 in money, and furnished needed supplies of the cash value of $14.50. Additional advancements were afterwards, and previous to 1 January, 1883, furnished on the same terms, and under like necessitous circumstances in order to the gathering in of the crop and preparing it for market.

During the months of November and December, at different times, a further delivery was made to the defendant of 59 bales of the cotton grown on the farm, of the value of $2,664.53, which, as well as the preceding delivery, were applied to the running account between the parties, but without any specific arrangement to that effect.

The defendant had no actual knowledge of the second deed in trust, and of the posterior lien it created upon the crop and other personal property, until after all the cotton was received by him.

On 25 January, 1883, the defendant rendered to the mortgagor an account of their transactions, in which the latter is charged with the money and supplies, and credited with the proceeds of sale of the 72 bales of cotton, in which is shown an excess of $90.30 in favor of the credits. The account was delivered to Weathersbee, then confined to his bed by sickness, in the presence of his wife, who heard the conversation that passed between them, and thus knew how the cotton had been appropriated, and she made no objection to the account. But
(109) previous to that day, she did not know of the appropriation, nor did she at any time consent to this disposition of the trust fund, nor had her trustee any information of it, nor did he assent to what was done to the prejudice of the rights of the *feme cestui que trust* under the deed to him. The *feme* plaintiff became a free trader on 26 January, 1883, and on 6 February, paid part of her own store account to Farrar & Pippin, and agreed to pay the residue of $259.39. The personal property, besides the cotton, was sold on the last day of January for the sum of $1,622.95.

This is a summary and condensed statement of the facts found and reported by the referee under the order of reference, as corrected and modified by the court, upon the hearing of the numerous exceptions taken by the defendant thereto, who appeals from the judgment.

John Devereux, Jr., for plaintiffs.
George Howard (John L. Bridgers also filed a brief) for defendant.

SMITH, C. J., after stating the facts: Out of these facts arise the questions of law which alone are open for revision on the appeal; and, without considering them separately in detail, we will endeavor to extract the substance, and dispose of them all.

The present action, begun on 28 September, 1883, by Weathersbee, the grantor, and the trustee and *feme* creditor secured in the last deed, against Farrar, the mortgagee, has for its object the taking of an account of the administration of the trust funds in his hands, and the recovery of whatever excess there may be, after discharging the mortgage debt and the expenses incidental to the execution of the trust. To this end, the reference was ordered, and upon the findings and rulings, the sum of $1,097.18 ascertained to be in the hands of the defendant, after allowing all admitted and just charges, which belongs to and should be paid over to the parties interested in the second deed.

(110) I. The first contention in the argument for the appellant is, that inasmuch as the disallowed advances were essential to the gathering and securing of the crop, and without which it might have been lost, or its quantity and value greatly reduced, this expense should

be provided for and come out of the sales, as a paramount claim. Such is the doctrine in admiralty, in favor of those who by personal efforts and at great peril, save vessels and cargoes exposed to shipwreck and the dangers of the sea. But it is not a principle of the common law, nor recognized when in conflict with statutory regulations in reference to liens.

As soon as the trust fund satisfies the demand to which it is primarily devoted, the surplus belongs to the second or trust deed, and cannot be diverted to any other use. The right to this appropriation is given by the law, and is outside and independent of the defendant's knowledge of the existence of the deed. But it was on the registry, accessible to him, the very purpose of which was to prevent the excuse now made. It was his own fault if, without making any inquiry, he chose to withdraw the cotton from his own attaching trusts, and improperly use it in the payment of an unsecured debt. This he is not permitted to do, to the detriment of the plaintiffs, and the assumed necessity for the expenditure in the preservation of the cotton, without the concurrence of the *feme* plaintiff and her trustee, cannot have the effect of crowding out of its place their right to what remains after satisfying the first mortgage.

II. It is next insisted, and this is pressed with earnestness, that the *feme* plaintiff has acquiesced in this disposition of the fund, and that it would be a fraud in her now to set up any opposition thereto.

We do not find in the facts any support given to the argument. The *feme* plaintiff had no information of any arrangement between the defendant and her husband, whereby these advances were to (111) be put in front of her demands, and paid from the sales of the crop. Nor did her trustee know of it, or give an implied assent even, to the misappropriation. The transaction was entered upon and consummated between them, before either the trustee or the *feme* plaintiff were aware of what was going on. Her information was obtained, when in January the account in this form was presented to her husband, and it became the subject of conversation at his sick bed, and then she was silent. No declaration or act of hers induced the making the advances, or involves any ingredient of fraud. What was done was simply between her husband and the defendant, and can have no binding effect upon her.

The rule invoked in his aid cannot have the same rigorous application to one under coverture and incapable of making a personal contract except in special cases, as it has to such as are under no disability.

In *Towles v. Fisher*, 77 N. C., 437, *Rodman, J.*, after examining the cases cited in Biglow on Estoppel, says: "They all concur, that a married woman who is under a disability to contract, cannot be estopped by anything in the nature of a contract. To estop a married woman from alleging a claim to land" (the case then before the Court), "there must be

some positive act of fraud, or something done upon which a person dealing with her, or in a manner affecting her rights, *might reasonably rely, and upon which he did rely, and was thereby injured.* No one can reasonably rely upon the contract of a married woman, or on a representation of her intentions, which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound."

Unless the element of fraud is present in the declarations or conduct of a woman under coverture, upon the faith of which another has acted to his own injury, and which may reasonably be supposed to (112) induce him to act, she cannot lose any of her just rights of property. *Burns v. McGregor,* 90 N. C., 225; *Loftin v. Crossland,* 94 N. C., 76; *Boyd v. Turpin, ibid.,* 137, and cases cited.

These views, we believe, cover the essential subject-matter of the rulings upon issues of law, and leave little more to be said. The account is adjusted upon the basis of requiring the defendant to pay over what is left of the proceeds of the entire trust estate, including the cotton and other personal articles, after discharging his mortgage, towards the debts due the *feme* plaintiff, deducting, however, therefrom her own personal indebtedness, and this is in our opinion a proper settlement of the controversy.

In the rulings there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Farrar v. Staton, 101 N. C., 79; *Thurber v. LaRoque,* 105 N. C., 313; *Farthing v. Shields,* 106 N. C., 300; *Ray v. Wilcoxon,* 107 N. C., 524; *Wells v. Batts,* 112 N. C., 289; *Rich v. Morisey,* 149 N. C., 45.

C. N. SIMPSON, ADMINISTRATOR, v. M. A. CURETON.

Widow's Year's Support—Law of the Domicile.

1. The widow of a man who dies a citizen of another State, is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the law of the domicil.

2. If, in such case, the law of the domicile made provision for the relief of decedents' widows, and there are chattels in this State, but not enough property in the State of the domicil to satisfy such provision; *It may be,* that such laws would be given effect in this State, but this would always be in subordination to the rights of resident, and perhaps of all, creditors.

3. None but parties and privies are bound by a judgment.

4. Where the widow of one who died a nonresident of this State, applied to a justice in this State before administration was granted, and had her year's support allotted to her; *It was held*, that the judgment allotting it was void, and that she was liable for a conversion in an action against her by the administrator.

5. If a widow dies before the allotment of her year's support is made, or before the report is confirmed, her right ceases, and it does not survive either to the children or to her administrator.

(Medley v. Dunlap, 90 N. C., 527; *Cox v. Brown*, 5 Ired., 194; *Kimball v. Deming, ibid.*, 418; *Ex parte Dunn*, 63 N. C., 137; cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, at Spring Term, 1886, of (113) UNION Superior Court.

T. G. Cureton, a citizen, and with his family residing in South Carolina, died in 1882, intestate, leaving an estate both real and personal in this as well as in that State. Soon afterwards, and before the issue of letters of administration by a court of North Carolina, his widow applied by petition to a justice of the peace to have her year's allowance set apart out of the intestate's personal property, which was done by him and two other persons qualified to act under section 2121 of The Code, and she took possession of the articles so allotted, and applied them to the maintenance of herself and the minor children, included in the estimate of their value, under the directions of section 2118.

Administration was granted by the proper court, in March, 1883, to the plaintiff, who in December of the next year, instituted this suit to recover the value of the goods, as misapplied assets, needed in the payment of debts. The defenses set up are:

1. That the allowance being made in pursuance of the forms of law, the report made by the commissioners confirmed, and judgment regularly entered in the Superior Court for the deficiency estimated, the money to be paid out of assets when received by the administrator, the proceeding can be reached and set aside only by a direct im- (114) peaching action; until which the allowance must stand.

2. That as it does not appear that the nonresidence of the defendant was known to the commissioners, their action in the premises was regular and valid, and so must remain until reversed.

3. That the creditors and plaintiff, not having opposed the allowance, nor appealed from the finding of the commissioners, under section 2124 of The Code, are now concluded.

4. That the estimate for the children is in trust for their support, and having been thus used, no liability therefor rests upon the defendant.

The court, by consent of parties, found the facts as stated, and thereupon caused to be entered the following judgment:

"The court finds, as a conclusion of law, that the creditors having failed to object within the time prescribed by law, to the allowance made to the defendant out of the estate of the intestate, and to proceed as prescribed in chapter 53 of The Code, the administrator has no right to recover by action in this court the value of the property assigned to her.

It is further ordered, that the defendant go without day and recover of plaintiff costs of action, to be taxed by the clerk."

From this judgment the plaintiff appealed.

J. J. Vann for plaintiff.
D. A. Covington for defendant.

SMITH, C. J., after stating the facts: In our opinion there is error in the ruling, and this allotment and appropriation of the assets of the estate are unauthorized and void, and afford no defense to the action.

In *Medley v. Dunlap,* 90 N. C., 527, it is declared that section 2116 of The Code, does not "embrace widows of deceased husbands, citizens of other States," and that a subsequent removal to this State does (115) not change her relations towards the estate, since they are fixed, and her rights to share therein are determined at the intestate's death, and by the law of his domicil. If provision is made by the law of South Carolina for the temporary relief of a decedent's family, and there is no personal property, or not sufficient to meet the requirements, it may be, that such laws would be given effect upon the principle of comity, as in the distribution among those entitled under such laws, but this would always be in subordination to the demand of our own resident creditors, if not of all creditors.

To the pursuit of the property thus wrongfully converted, no legal impediment is interposed, inasmuch as the plaintiff was no party to it, and no administration had been then taken out to entitle him to make resistance to the allowance. The principle is too well settled to need a sustaining reference, that none but parties and privies are bound by any judicial action. The section referred to, entitled the representative, or any creditor, legatee, or distributee, to intervene and resist the finding of the commissioners, which though *ex parte,* would otherwise determine the amount of the allowance, and justify its recognition and payment, but this cannot extend to a claim unfounded *in toto,* and wholly without warrant in law. If the petition represented the case truly, the proceeding would show its nullity upon its face, and if suppressed, and the facts necessary to give validity to the demand not inquired into, the same result must follow when they are now developed. Can the administrator be charged as with a *devastavit?*—and this when the appeal must be taken "within ten days from the assignment," and no appointment

was made until three months thereafter? This section has reference to a proceeding instituted by a resident widow, who is entitled *under our laws,* who, on application to "a justice of the peace of the township in *which the deceased resided,* or some adjoining township," undertakes to act, and has the necessary jurisdiction to act in the case. (116) Here, there is not only a *nonresident* having no right to allowance, but a total want of jurisdiction, as much so as if exercised in a distant county, where no notice can be implied of an action for which the law gives no warrant.

Nor is there any force in the suggestion of a trust in respect to part of the allowance, and if there was, we do not see how it can protect the defendant from the wrongful conversion. But the allowance, when proper, is personal, the *amount* due her being estimated by the numbers that constitute her family of limited age, but it is nevertheless her own property, and to be used at her pleasure. So if the widow dies before the allotment is made, her right ceases, and neither her administrator nor her children succeed to it. *Cox v. Brown,* 5 Ired., 194; *Kimball v. Deming, ibid.,* 418. Nor if she die after allotment and before confirmation, does the right survive. *Dunn ex parte,* 63 N. C., 137.

There is error, and there must be an inquiry of damages, unless the parties consent to the valuation of the commissioners, in which event final judgment will be entered upon the findings. Otherwise such inquiry must be made, and to this end let this be certified.

Error. Reversed.

Cited: Burgwyn v. Hall, 108 N. C., 497; *Jones v. Layne,* 144 N. C., 603, 612.

J. W. WADSWORTH v. W. S. STEWART.

Pleading—Proviso.

1. Where a statute giving a right of action contains a *proviso,* the plaintiff need not negative it, but if the case falls within the *proviso* the defendant must set it up in the answer.

2. So, in an action for failing to keep a sufficient bridge over a canal cut across a public road, brought under section 2036 of The Code, the plaintiff need not allege that the road was laid off before the mill was erected, in order to negative the *proviso* in that statute.

(R. R. Co. v. Robeson, 5 Ired., 391; *Gorman v. Bellamy,* 82 N. C., 496; *Mulholland v. Brownrigg,* 2 Hawks, 349; cited and approved.)

(117) THIS was a civil action, tried on complaint and demurrer, before *Graves, J.*, at August Term, 1886, of MECKLENBURG Superior Court.

The plaintiff alleged, in substance, that there was, and had been for fifty years or more, a public highway, used and worked as such by the county authorities of Mecklenburg County, between the city of Charlotte and Rozzel's Ferry, on the Catawba River, leading to the town of Lincolnton.

That on 17 July, 1885, and for many years prior to that day, the defendant, and those under whom he claims, were the owners in fee of a tract of land in Mecklenburg County, on both sides of said public road, and lying on both sides of a creek, known as Asbury's Creek, where the said public road crosses the same.

That on said stream and land, a few hundred feet north of said public road, there was and had been for many years, a grist-mill, owned by the defendant and those under whom he claimed, and there was a dam just above said mill on said land, to provide water to run the mill.

That there was and had been for many years, a saw-mill about fifty yards south of the said public road, and a canal or race had been cut by the defendant or those under whom he claimed, of the depth of six or eight feet and about ten feet wide, across said public road, on the land of the defendant, for the purpose of carrying the water to the saw-mill, and there was a wooden bridge over the canal or race, over which the public passed on said highway.

(118) That the defendant, about fifteen or twenty years prior to 17 July, 1885, removed the grist-mill from the north side of the road to the south side thereof, at or near the place where the saw-mill had formerly stood, and used the canal or race to convey water to the mill, and it had been so used and operated by the defendant for fifteen or twenty years.

That it was the duty of said defendant, as the owner of said land and water-mill, in accordance with the provisions of section 2036 of The Code, to erect, construct, and maintain, such necessary and lawful bridges over said canal on said highway, for the use of the public, so long as the same might be needed by reason of the continuance of the mill.

That defendant, in disregard of said duty and obligation, failed and neglected to erect such a lawful and necessary bridge across the canal as was required by the statute, but so constructed the bridge, that it was not of the necessary width for vehicles to pass over, it being only about ten feet wide, and was wholly without railing or other protection at the sides thereof to prevent passengers or vehicles with horses from falling

into said canal, and by reason of the narrowness of said bridge, and the want of railing thereto, the same was highly dangerous to persons and animals crossing it.

That in consequence of the failure of the defendant to perform the duties and obligations resting upon him as aforesaid, and his failure to construct and maintain such a lawful and necessary bridge over said canal on the public highway, and to provide proper railing or protection at the sides thereof as hereinbefore alleged, the plaintiff's servant, while lawfully traveling on said highway, with a carriage and four horses of plaintiff, in the night time, on 17 July, 1885, without fault on the part of said servant in passing over said bridge, had the two lead horses of plaintiff precipitated into the canal, one of them drowned and the other so fatally injured that it died shortly thereafter; the (119) harness cut to pieces in the attempt to rescue said horses, and suffered other injuries to the damage of plaintiff five hundred dollars.

There was a second cause of action, charging the defendant with failure and neglect to keep the bridge in good repair for many months prior to 17 July, 1885, and with failure to erect railings or other protection to prevent horses and vehicles from falling into the canal, and in not removing from the bridge objects calculated to frighten horses in passing over the same; and also with having failed to make the bridge of sufficient width, by reason whereof it became dangerous to the public, and in consequence of which the damage herein before stated was sustained, etc.

The defendant demurred to both causes of action, the ground of demurrer to each being the same, to wit:

"1. That said alleged cause of action does not state facts sufficient to constitute a cause of action, in that the complaint does not state that the mill set forth in the complaint was erected, or the canal or race was cut, before the laying off of the public highway therein specified.

"2. Or that said road was not laid off by the request of the owner of the mill of this defendant or any other previous owner thereof."

His Honor gave judgment overruling the demurrer, and allowing the defendant to answer.

From this judgment the defendant appealed.

John Devereux, Jr., for plaintiff.

W. H. Bailey and Heriot Clarkson filed a brief for defendant.

DAVIS, J., after stating the facts: The section of The Code (2036) under which this action is brought, is as follows:

"It shall be the duty of every owner of a water-mill which is situated on any public road, and also of every person who, for the (120)

purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair, all bridges that are or may be erected or attached to his mill-dam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill or mill-dam, ditch, drain or canal: *Provided, that nothing herein shall be construed to extend to any mill which was erected before the laying off such road, unless the road was laid off by the request of the owner of the mill.*" . . .

The demurrer is based upon the ground that the complaint fails to allege that the mill set forth therein was erected, or that the canal or race was cut, before the laying off of the road, or if before, that the road was laid off by the request of the owner of the mill, and admitting all the other facts to be true, as stated in the complaint, the plaintiff is not entitled to recover, because of this failure.

It clearly appears from the allegations in the complaint, if true, that the highway existed before the canal or race was cut, for it alleges that the canal or race "was cut across said public road."

But it is insisted that the *proviso* in the statute must be set out in the complaint and negatived before a prima facie case can be made out against the defendant. In the case of *R. R. v. Robeson,* 5 Ired., 391, relied on by the defendant, it is said that "a *proviso* is properly the statement of something extrinsic of the subject-matter of the contract, which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance. . . . A proviso need not be stated in the declaration, for this, says Mr. Chitty, ought to come from the other side." In the same case, *Judge Nash,* quoting the opinion of *Ashurst,*
(121) *Justice,* in a case cited, says, in speaking of a *proviso:* "This, therefore, being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by the name of a *proviso,* by way of defeasance, or a condition subsequent, it must in its nature be a matter of defense, and ought to be shown by the defendants"; and *Gorman v. Bellamy,* 82 N. C., 496, is to the same effect. The duty of the defendant in regard to the bridge is clearly stated, and the breach is clearly stated. The complaint complies fully with the requisites of The Code, sec. 233. If the mill was erected before the laying off of the road, and the road was not laid off by the request of the owner, the defendant may avail himself of the benefits of the *proviso* by answer, and this will raise an issue of fact, to be submitted to the jury, and passed upon by them. It is a matter of defense, which,

under the old practice, it was not necessary to set out in the declaration, and which now need not be set out in the complaint. *Mulholland v. Brownrigg,* 2 Hawks, 349.

There is no error. Let this be certified.

No error. Affirmed.

Cited: Cox v. Wall, 132 N. C., 734.

JOS. THAMES ET AL. v. HENRY JONES ET AL.

Action to Recover Land—Demurrer—Parties—Tenants in Common.

1. Where the complaint in an action against several defendants to recover land, described the *locus in quo* as several tracts adjoining each other and situated in the counties of Cumberland and Bladen, of which the defendants are in possession and wrongfully withhold from the plaintiffs; *It was held,* that under this allegation, the Superior Court of Cumberland had jurisdiction.
2. Where the parties in interest are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, but how far those not actually before the court may be affected by the judgment, is left open.
3. One tenant in common may sue without joining his cotenants for the recovery of the possession of the common property.
4. A statement in a complaint of redundant matter, or of evidential facts, is no ground for demurrer.
5. So, where in an action to recover land, the plaintiff sets out his claim of title, the allegations in this respect cannot render the complaint demurrable on the ground that it joins several distinct causes of action.
6. Where in an action to recover several tracts of land, in the separate possession of several defendants, the complaint does not allege of which tract each defendant is in possession; *It was held,* that it constituted no ground for demurrer.

(Bronson v. Insurance Co., 85 N. C., 414; *Young v. Greenlee,* 90 N. C., 319; *Best v. Clyde,* 86 N. C., 4; cited and approved.)

THIS was an action to recover land, brought by Joseph Thames (122) and twenty others against Henry Jones and eighteen others, tried, on demurrer, before *Avery, J.,* at Spring Term, 1885, of CUMBERLAND Superior Court.

The complaint alleges that the plaintiffs are owners in fee simple and entitled to the possession of certain tracts of land, described in the first allegation of the complaint as adjoining each other, and situated on the

east side of the northwest branch of the Cape Fear River, and in the counties of Bladen and Cumberland.

The boundaries of the several tracts, sixteen in number, are separately set out at length. The first, known as the Daniel Bean tract, containing 400 acres; second, the John Bean tract, containing 250 acres; third, part of the Smith tract, containing 240 acres; fourth, the tract patented by Joseph Thames, 14 November, 1809, containing 41 acres; fifth, four tracts containing in the aggregate 291 acres; sixth, one tract of 50 acres, and also one of 170 acres; seventh, a tract of 154 acres; eighth, a
(123) tract of 181 acres; ninth, a tract of 29 acres; tenth, a tract of 100 acres; eleventh, one-half of a tract of 262 acres; twelfth, a tract of 200 acres; thirteenth, a tract of 300 acres; fourteenth, one-half of a tract of 640 acres; fifteenth, one-half of a tract of 300 acres; sixteenth, one-half of a tract of 250 acres.

That the defendants claim title to said lands either directly or by *mesne* conveyances from John T. Gilmore, who conveyed said lands to Stephen Hollingsworth, by deed dated 5 November, 1836, duly recorded in the register's office of Cumberland County, on 27 January, 1848, in Book W, No. 2, page 245.

That said John T. Gilmore, by the last will and testament of Joseph Thames (under whom said Gilmore claimed and held the lands), only had a life estate in said lands.

That said John T. Gilmore died before the commencement of this action, viz., about the year 1863 or 1864, and thereupon his estate and that of those claiming under him expired.

That the plaintiffs and those under whom they claim, are entitled, under the will of said Joseph Thames, to the estate in remainder in all of the aforesaid lands, after the expiration of the aforesaid life estate of the said John T. Gilmore.

That the said John T. Gilmore died after he had arrived at the age of twenty-one years without children begotten in wedlock.

That the defendants are unlawfully in the possession of the aforesaid lands, and wrongfully withhold the possession thereof from the plaintiffs.

The plaintiffs demand judgment:

I. That under the will of said Joseph Thames, they are entitled to an estate in fee simple in all of the aforesaid lands, in remainder, after the death of John T. Gilmore, the life tenant.

II. For the possession of said lands.

(124) III. For the rents and profits of said lands for the three years next immediately preceding the commencement of this action.

IV. For five thousand dollars damages for the withholding of the possession thereof.

The defendants' demurrer to the complaint is on the following grounds:

I. That, as appears by the complaint, the court had no jurisdiction of the subject of action, because a part of the lands described in the complaint is said to be in the county of Bladen, and it is not stated in said complaint which tracts of said land lie in the county of Bladen, and which in the county of Cumberland.

II. That, as appears by the complaint, there is a defect of parties plaintiff, the plaintiffs named in said complaint suing in behalf of all other heirs of David Thames, and others, without giving any reasons why the said heirs should not be named in the complaint.

III. That it appears by the complaint, that several causes of action have been united against these defendants.

IV. The complaint does not state facts sufficient to constitute a cause of action, in this, that it does not state which tracts are in possession of each defendant.

At the May Term, 1884, the following order was made by Philips, Judge, to which the defendants excepted:

"This cause coming on to be considered at this term, and it appearing to the satisfaction of the court, upon statements of counsel and inspection of the record in this action:

I. That this action involves questions of a common or general interest of many persons.

II. That the parties, both plaintiff and defendant, who have an interest in this action, are very numerous; that some of them have died since the commencement of this action; that this action has been pending in this Court since 30 December, 1876, and that it is impracticable to bring all the parties, either plaintiff or defendant, before the court:

To the end, therefore, that there may be a more speedy determination of this cause on its merits, it is now ordered by the (125) court that those persons named as the plaintiffs in the summons and complaint who are still living, or the last survivors of them be, and they are hereby permitted by the court, to prosecute this action to a final determination for and in behalf of themselves and all other persons interested herein as plaintiffs. And it is further ordered by the court, that those named in the summons and complaint, who are parties defendant to this action, and who have been brought into court as parties defendant by service of process heretofore, who are still living, or the last survivors of them, be, and they are hereby permitted, to defend this action for the benefit of themselves and all other persons having or claiming to have "an interest in the controversy involved in this action adverse to the plaintiff."

At the Spring Term, 1885, *Avery, J.*, gave judgment sustaining the demurrer, and from this judgment the plaintiffs appealed.

John W. Hinsdale for plaintiffs.
E. R. Stamps for defendants.

DAVIS, J., after stating the facts: The demurrer cannot be sustained upon any one of the grounds stated. Actions for the recovery of real property must be brought in the county in which the subject of the action, or some part thereof, is situated. It may be, that some of the tracts are wholly in the county of Bladen, and are in the separate possession of some of the defendants, but the complaint alleges broadly, that the defendants are in possession and wrongfully withhold the said land, and it is sufficient to give jurisdiction to the Superior Court of Cumberland County, and this disposes of the first alleged ground of demurrer.

(126) Where the parties, as manifestly appears in this case, "may be very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." The Code, sec. 185; *Bronson v. Insurance Co.*, 85 N. C., 414. It was clearly within the power of the court to make the order permitting the persons named as plaintiffs to sue for all, and the persons named as defendants, to defend for all. As to how far the judgment may affect persons made parties under this order, we express no opinion. But independent of this, any one or more of several tenants in common may sue for the recovery of the possession of land wrongfully withheld. *Young v. Greenlee,* 90 N. C., 319, and the cases there cited. This disposes of the second ground of demurrer.

Upon an examination of the complaint, we are unable to discover the misjoinder of several causes of action, made the third ground of demurrer. It is true, that the plaintiffs allege title under the will of Joseph Thames, and that the defendants claim under conveyance from John T. Gilmore, but these are unnecessary statements of the chain of title relied on by the plaintiffs and defendants respectively, and are not alleged as causes of action. They are unnecessary, and might well have been omitted or stricken out, but they furnish no ground for demurrer. *Best v. Clyde,* 86 N. C., 4. And this disposes of the third ground of demurrer.

The fourth ground of demurrer cannot be sustained. The complaint does state ground sufficient to constitute a cause of action, and the objection that the complaint does not state which tracts are in possession of each defendant, cannot be taken by demurrer. The complaint alleges broadly, "that the defendants are unlawfully in the possession of the aforesaid lands, and wrongfully withhold the possession thereof from

the plaintiffs," and if any of the defendants are not in pos- (127) session of all, they can disclaim as to the part not claimed.

There was error. Let this be certified, and the case remanded, to be proceeded with according to law.

Error.

Cited: Allen v. Sallinger, 105 N. C., 342; *Bryan v. Spivey,* 106 N. C., 99; *McGill v. Buie, ibid.,* 246; *Conley v. R. R.,* 109 N. C., 696; *Foster v. Hackett,* 112 N. C., 554; *Winbourne v. Lumber Co.,* 130 N. C., 33; *Allred v. Smith,* 135 N. C., 450; *Jones v. Comrs.,* 143 N. C., 65; *Cooperage Co. v. Lumber Co.,* 151 N. C., 456; *Hardwood Co. v. Waldo,* 161 N. C., 198; *Lee v. Thornton,* 171 N. C., 211; *Clark v. Homes,* 189 N. C., 709.

J. P. ARRINGTON ET AL., EXECUTORS, v. A. W. ROWLAND, EXECUTOR.

Principal and Surety—Statute of Limitation—Trusts.

1. Where a surety pays money for the principal debtor, in the absence of a covenant to repay, it is a debt due by simple contract, and is barred in three years.
2. Although a debt secured by a deed of trust or a mortgage may be barred, yet if the deed of trust or mortgage is not barred, a Court of Equity will enforce it, without regard to the fact that the debt is barred.
3. Where a principal debtor executes a mortgage to his surety to save him harmless for any loss he may sustain by reason of his suretyship, although the amount is unascertained at the time the mortgage is given, it becomes a debt due by covenant, and is not barred by the lapse of three years from the time the surety pays the money.

(Capehart v. Dettrick, 91 N. C., 344; cited and approved.)

CIVIL ACTION, tried before *Shepherd, J.,* at Fall Term, 1886, of NASH Superior Court.

The plaintiffs are the executors of the will of A. H. Arrington, who died in 1872, and to whom and for whose benefit the deed below set forth was executed.

The defendant is the executor of the will of W. H. Rowland, who died in January, 1886, and who was the maker of the deed referred to above.

The plaintiffs bring this action to recover $4,642.92, with interest thereon (less $130 paid 18 February, 1877), from 1 November, 1873, which they were compelled to pay as executors of their testator on account of the suretyship of their testator mentioned and pro- (128)

vided for in the same deed below set forth, and they allege that the money so paid by them is embraced by and constitutes part of the indebtedness provided for and secured by the same.

The defendant in his answer pleads that the alleged cause of action did not accrue within three years next before the bringing of this action, and the same is therefore barred by the statute of limitation.

The following is a copy of the deed above referred to, alleged in the complaint and relied upon by the plaintiffs:

"This indenture, made this 25 June, 1872, between W. H. Rowland of the one part, and A. H. Arrington of the other part, both of the county of Nash and State of North Carolina, witnesseth, that, whereas, the said W. H. Rowland, with Willis F. Rowland, did qualify as administrators on the estate of Elijah B. Hilliard, at August Term of Nash County Court, in the year 1862, and entered into bond as administrators aforesaid, in the sum of one hundred and fifty thousand dollars, or some other large amount, with said A. H. Arrington, H. G. Williams and L. M. Conyers as sureties on said bond; and whereas, there is a suit pending in the Supreme Court of North Carolina, between the heirs of the said E. B. Hilliard, deceased, as plaintiffs, and said W. H. Rowland and Willis F. Rowland as administrators aforesaid, defendants, the final decision of which suit is involved in uncertainty; and whereas, the result of said suit may involve the said A. H. Arrington and other said sureties, and cause them to be liable to pay and sustain loss on account of said suretyship; and whereas, the said W. H. Rowland is anxiously and honestly desirous to hold the said A. H. Arrington and other said sureties harmless on account of any loss from said suretyship, he, the said W. H. Rowland, agrees to advance and pay over all the funds and assets of every kind belonging to said estate that may be on hand, to
(129) meet any amount the court may decide is due the said estate, and the said W. H. Rowland agrees to pay all the funds he may have of his own, to meet said decision or judgment of the court, if necessary to pay the amount, and after the said W. H. Rowland shall have paid over to the said estate all the available assets belonging to said estate, and all the money he may have of his own, then, if there shall still be a balance due the estate, the said A. H. Arrington agrees to advance for the said W. H. Rowland, the said balance, on the following terms, and for the purpose of securing the said A. H. Arrington for any amount he may advance as above, on account of said securityship and for the said W. H. Rowland, with interest, and to hold him, the said A. H. Arrington, and the other said securities harmless, as said W. H. Rowland is honestly desirous of doing, the said W. H. Rowland, for and in consideration of one dollar, to him in hand paid, has this day bargained, sold and delivered unto the said A. H. Arrington, his heirs and

assigns, a certain tract or parcel of land in said county of Nash and State of North Carolina, being the land upon which said W. H. Rowland now lives, adjoining the lands of James Tucker, Dr. R. H. Marriott, Rhoda Archibald and Crawford Ricks, and on the north bounded by Beaver Dam Swamp, containing five hundred and seventy-one acres; to have and to hold the same with all the privileges and appurtenances thereunto belonging unto him, the said A. H. Arrington, his heirs and assigns forever.

"In trust, nevertheless, and upon the following condition, that the said W. H. Rowland is to remain on the premises and in possession of said land, and to manage and carry on the farming operations according to his own judgment, and whatever amount the said W. H. Rowland can spare after paying expenses of the farm and improvements on the same, he, the said W. H. Rowland, agrees to pay over to the said A. H. Arrington, or his representative, until the amount and interest the said A. H. Arrington may advance for the said W. H. Row- (130) land shall be paid.

"And if the amount and interest that the said Arrington may have to advance for said W. H. Rowland, on account of said suretyship, shall not be paid to said Arrington or his representative, before the death of said W. H. Rowland, the said A. H. Arrington, his executors and administrators, shall sell the said land, after giving due public notice, to the highest bidder on a credit of twelve months, retaining title until purchase money is paid, and the proceeds of said sale shall be applied to the payment of whatever amount may be due the said A. H. Arrington, and if there should be any surplus, the same shall belong to the estate of the said W. H. Rowland. Whenever the said W. H. Rowland shall pay off and satisfy any advances by, or loss to, the said A. H. Arrington, or other said securities, this deed and conveyance shall be null and void; otherwise to remain in full force and effect as above written."

The court ruled that the action was barred, and the plaintiffs appealed.

C. M. Busbee (Benj. Bunn and Jacob Battle also filed a brief) for plaintiffs.

No counsel for defendants.

MERRIMON, J., after stating the facts: The very purpose of the deed of trust was to recognize and secure an anticipated indebtedness of the testator of the defendants to the testator of the plaintiffs, and others, his cosureties of the testator of the defendant, that might arise out of the suretyship distinctly mentioned and described.

The defendants' testator covenanted, certainly in effect, and stipulated in the deed, to pay the testator of the plaintiffs the sum of money, whatever it might turn out to be, he might have to pay or advance for him, as contemplated by the deed, and this as certainly and (131) effectually as if the same had been ascertained and set forth in the deed itself. It was further mutually covenanted between the parties, that the testator of the defendants should have the right to cultivate the land embraced by the deed, if need be, during his lifetime, paying off the anticipated indebtedness, so much as he could, after paying the expenses of cultivation, out of the proceeds of the crops to be produced from year to year; and if the indebtedness should not be wholly discharged thus by him, then, after his death, the land should be sold to pay the balance then remaining unpaid.

The covenant to pay the indebtedness provided for, was a continuing one, and the right of the testator of the plaintiffs, or of his executors, to sue, did not accrue until the death of the testator of the defendants. Until then, the plaintiffs could not execute the power of sale contained in the deed, nor could they sue for and recover the money to come due.

In the absence of the deed or other like provision, the money paid by the plaintiffs on account of the suretyship mentioned, would have been a debt due by simple contract, and therefore barred by the statute of limitation; but by the express agreement of the parties to the deed, it becomes a debt due by covenant, due and actionable only at the death of the testator of the defendants.

If the debt secured by the deed of trust had been independent of, and apart from the deed, as contended by the defendants, the plaintiffs could have the right to have the trust executed. The court would not in that case deny the plaintiffs this remedy, simply on the ground that the debt intended to be secured is barred by the statute of limitation. *Capehart v. Detrick,* 91 N. C., 344.

We therefore are of opinion, that there is error, and that the plaintiffs are entitled to a new trial, and so adjudge. To that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Taylor v. Hunt, 118 N. C., 172; *Hedrick v. Byerly,* 119 N. C., 422; *Menzel v. Hinton,* 132 N. C., 663.

(132)

JANE E. YOUNG v. JAMES R. YOUNG ET AL.

Contingent Remainders—Powers—Judicial Sale.

1. Where a contingent remainder is created, the tenant in possession and those in remainder *in esse*, cannot have a decree for a sale of the land, unless some one of each class of contingent remaindermen are *in esse* and before the court.

2. Where a power is to be exercised entirely at the discretion of the donee of the power, Courts of Equity have no jurisdiction to force him to act, and if he has died without exercising the power, they cannot confer it upon a trustee appointed by the court.

3. So, where land was settled on a trustee, in trust for A. for life, remainder in trust for her children then living and the issue of such children as may have died leaving issue, with a power in the trustee to sell the land whenever in his opinion best for the interest of the *cestuis que trust*, with directions to reinvest the proceeds as he thought best; *It was held*, that a Court of Equity could not decree a sale at the instance of the life tenant and her children, and the trustee having died without executing the power of sale, a trustee appointed by the court could not execute it.

(Williams v. Hassell, 73 N. C., 174; *Ex parte Miller*, 90 N. C., 629; cited and approved.)

CIVIL ACTION, tried before *Clark, J.*, at June Term, 1886, of GRANVILLE Superior Court.

The plaintiff appealed.

The facts appear in the opinion.

Jos. B. Batchelor and John Devereux, Jr., for plaintiff.
No counsel for defendants.

SMITH, C. J. When this cause was before us at October Term, 1884, we declined to take jurisdiction and inquire into the merits of the subject-matter presented in the complaint, because of irregularities in the action of the Superior Court, and an order remanding it was made. These difficulties are now removed, and the appeal is from (133) a ruling, followed by a final judgment embodying it, in these words:

"The cause coming on to be heard on complaint and answer, the court declared that a sale of the real estate described in the complaint, and a reinvestment of the proceeds, would be to the advantage of the plaintiff, and all other persons who are, or may become entitled to an interest therein under the said deed of trust. But the court is of the opinion, that the power of sale conferred by said deed upon the late trustee, Peter

W. Young, was personal to and discretionary with the said Peter W. Young, and the power not having been executed by him in his lifetime, no other person succeeding him as trustee of said estate can execute said power, and therefore, and for asmuch as it cannot be known until the death of the plaintiff who will be entitled to or interested in the estate after her death under the limitations in said deed, this court has no power or jurisdiction to order a sale of said real estate by way of executing the said power of sale, or otherwise, and cannot confer upon any new trustee the court may appoint, by any conveyance it might direct to be made to him of the legal title of said estate, any power or discretion to sell the same, or any part thereof, and reinvest the proceeds of such sale, and for the reason aforesaid, an order of sale of said estate as prayed for in the complaint, is refused. The court is further of opinion that a new trustee ought to be appointed in place of Peter W. Young, deceased, and a proper conveyance made to such new trustee, and it is referred to the clerk, to inquire and report to the court the most suitable person to be appointed such trustee, who is willing to accept said appointment."

The deed made on 30 October, 1866, conveys for the consideration of $2,500, a lot and house in fee to Peter W. Young, and attaches to the estate the following declarations of trust:

(134) "But nevertheless, upon special trust and confidence, to, for and upon the uses and trusts following, and no other, that is to say, for the sole, separate and exclusive use and benefit of Jane Eliza Young, wife of the said Peter W. Young, for and during the term of her life, and at her death, for the use of her children then living, and the then living issue of such of her children as shall have died leaving issue, as sharers in fee simple *per stirpes;* and it is further agreed between the said Russell H. Kingsbury, trustee, etc., and the said P. W. Young, that at any time that it may seem to him to be to the interest of the said *cestuis que trust,* he may sell the said land and premises absolutely, provided that without delay he shall reinvest the proceeds of such sale in real or personal estate, at his discretion, or otherwise manage, apply or dispose of the said proceeds for the benefit of the said *cestuis que trust,* for the sole and separate benefit of the said Jane Eliza Young and her children, in the same manner as the lands and premises in this deed and conveyance are settled."

The contingent remainders, limited on the termination of the life estate, are to such of her children as are *then living, and to the then living issue of such as have died leaving issue,* so that it is impossible to tell who will be entitled when the life tenant dies. Those who would now succeed upon the happening of that event, may none of them be then living, and consequently there is no one of either class before the court to respresent the others. We are unable to distinguish between the

present case and the cases of *Williams v. Hassell,* 73 N. C., 174, and *Miller, ex parte,* 90 N. C., 629, except that the latter were suits for partition, and the estates were created by will. But the principle involved is the same, and each involves the exercise of like jurisdictional power, in transmitting title by a decree or order of sale. The defect of power is not dependent upon the instrument by which the limitations are created, but is inherent in the estates formed, and because being unascertainable, those who may succeed to the estates are not bound by (135) the judgment or decree.

It is suggested in argument, that the contingent remainders being equitable estates, the trustee represents them, and may act so as to bind them. At law this might be so, because *legal* titles are there only known. But this case is equitable, cognizable under former distinctions only in a Court of Equity, and in this Court such estates are recognized and treated as essential.

The only remaining objection to the rulings which seems to be complained of (for no specific errors are pointed out in the record), is to that which declares that the power of sale and reinvestment conferred upon Peter W. Young, and not exercised in his lifetime, was *personal to, and discretionary* with him, and is not transferable to the substituted trustee; in other words, became extinct at his death, and could not be judicially prolonged and vested in his successor.

This ruling is, in our opinion, not open to objection. The personal character of the power conferred to change the investment, is disclosed upon the face of the deed. It is to be exercised "when at any time *it may seem to him* (the trustee) to be to the interest of the said *cestuis que trust,*" to sell and to reinvest.

It is committed to the judgment and discretion of the husband of the life tenant, and the father or ancestor of those who are to have the remainder, as the case may be, and he may well be supposed to have their interests in view in any disposition that may be made, and possessing the confidence of the grantor that the conferred power will be prudently and discreetly used, if used at all.

"In the case of mere powers, that is, powers of which the exercise is arbitrary and discretionary, the court has no jurisdiction to interfere." Lewin on Trusts, 435.

"An express discretionary power," remarks another author, "may either apply to the doing or abstaining from doing a contemplated act; as where the trustees are empowered to do the act; or it is directed to be done, *if the trustees 'should think fit,'* or *'proper,"* or (136) *'at their discretion.'"* Hill on Trustees, 485.

"In some of the earlier cases," continues the author, "where trustees neglected or refused to exercise the discretionary powers vested in them,

the court itself assumed that discretion, and exercised the power in the manner which it conceived to be most beneficial for the *cestuis que trust.*"

"However," he adds, "this jurisdiction has been long since exploded, and it is settled, that the court will never exercise a mere discretionary power, either in the lifetime of the trustee, or upon his death or refusal to act." *Ibid.*, 48 and 211.

It is manifest, then, as long as Peter W. Young did not deem it best for those interested to dispose of the property in his lifetime, the power becomes extinct, and does not pass to the new appointee.

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

No error. Affirmed.

Cited: Overman v. Sims, 96 N. C., 455; *Irvin v. Clark,* 98 N. C., 445; *Branch v. Griffin,* 99 N. C., 183; *Creech v. Granger,* 106 N. C., 219; *Whitesides v. Cooper,* 115 N. C., 575; *Smith v. Smith,* 118 N. C., 736; *Baker v. McAden, ibid.,* 743; *Silliman v. Whitaker,* 119 N. C., 94; *Clark v. Peebles,* 120 N. C., 34; *Hodges v. Lipscomb,* 128 N. C., 63; *Springs v. Scott,* 132 N. C., 553; *Bowen v. Hackney,* 136 N. C., 192; *McAfee v. Green,* 143 N. C., 417; *Hayden v. Hayden,* 178 N. C., 263; *Thompson v. Humphrey,* 179 N. C., 52.

MARION BROOKS v. THOS. A. BROOKS, EXECUTOR, ET AL.

Jurisdiction—Creditor's Bill.

1. Where the court has jurisdiction of the person and subject-matter, its judgment will not be void, although there were grave irregularities which would have been fatal to the action if presented by the defendants in apt time.

2. So, where a proceeding in the nature of a creditor's bill was brought under section 1448 of The Code, to have a settlement of a decedent's estate and to have the land sold for assets, but the summons was not made returnable as prescribed by that section, and the plaintiff did not purport to sue on behalf of all the creditors, nor was there any advertisement for creditors as provided by the statute, nor were the statutory requirements at all complied with; *It was held,* that the proceeding was not void, no objection having been made by the defendants to these irregularities.

3. While a judgment may be irregular or erroneous, yet if no objection is made to it on that particular ground, it will not be reversed.

BROOKS *v.* BROOKS.

CIVIL ACTION, heard upon appeal from the clerk of the Su- (137) perior Court of CHATHAM County, by *Gilmer, J.*, at Chambers, on 1 July, 1886.

The defendant, Thomas A. Brooks, is the sole surviving executor of the will of Aaron D. Headen, who died in the year 1859, and his co-defendants, except the husband of the *feme* defendant, are the legatees and devisees of the will mentioned.

The plaintiff obtained judgment against the defendant executor, in the Superior Court of the county of Chatham, at Spring Term, 1881, thereof, for $399.31, with interest thereon from 20 March, 1876, and for $128.25 costs. He began this *special proceeding* in the Superior Court of the county named, by summons issued 3 March, 1884, made returnable before the clerk "within twenty days after the service of" the same, exclusive of the day of service, and it was served upon all the defendants, except Samuel Headen, on 1 May, 1884. Five of the defendants were infants, and their mother was appointed their guardian *ad litem*, and filed answer in their behalf as stated below.

The following is a copy of the case settled upon appeal by the court:

"This proceeding was begun on 3 March, 1884, and the plaintiff complains and alleges:

1. That Aaron D. Headen died in 1859, leaving a will which (138) was admitted to probate, and that Thomas A. Brooks is the sole surviving executor of the same.

2. That in 1881, plaintiff recovered judgment against the said executor for a considerable sum, and is informed and believes that the personal estate of the testator has been exhausted in the payment of debts.

3. That the testator died seized of the following real estate (which is described in the complaint, and the names of the devisees and legatees are also stated).

Wherefore plaintiff demands judgment, that a guardian *ad litem* be appointed for the infant defendants, and that a commissioner be appointed to sell the said real estate and pay off said judgment, and for costs, and such other relief as the court may deem right.

The complaint was subsequently amended by leave of court, and it was therein alleged, that a sale of all the interest of the testator in said lands was necessary for the payment of plaintiff's debt and costs, and that the plaintiff has often requested the defendant executor to institute proceedings to sell the same for the payment of said debt and cost, but the executor has refused to do so. That the tract of land contains about 550 acres, and is worth about $5 per acre, and the interest of the testator therein is one undivided half. That plaintiff has no information as to the value of the personal property nor as to its disposition.

The answer of Martha Headen (for herself and as guardian *ad litem* for the infant defendants), and of the other defendants other than Thos. A. Brooks, alleges:

That they have no knowledge or information to the effect that the personal estate has been exhausted, and therefore deny plaintiff's allegation as to that matter, and also deny that the testator died seized and possessed of the said land, or that he was the owner of any interest therein at the time of his death, and they deny that the defendants hold the said land by, through, or under the last will and testament of the said Aaron D. Headen.

(139) The defendants also say they have no knowledge of the number of acres of land as alleged by the plaintiff, and therefore deny the same. And they further say that $5 per acre is an overestimate of the average value of said land, and they deny that the testator has any interest in the same. Wherefore they demand judgment that this proceeding be dismissed.

It appearing that issues of fact arose upon the pleadings, the clerk transferred the case to the civil issue docket, to be tried at term.

And accordingly at May Term, 1886, the following issues were submitted to the jury:

1. Did Aaron D. Headen die seized of the Brooks-Headen tract of land? Answer: Yes.

2. Have the personal assets of Aaron D. Headen been exhausted in the payment of debts and charges? Answer: Yes.

And thereupon the court gave judgment for a sale of the land, and appointed a commissioner to sell the same and apply the proceeds to the plaintiff's judgment, and the balance, if any, to be paid to the executor, and the cause was retained for further directions, and from this judgment the defendants other than Thomas A. Brooks appealed, insisting that the proceedings should be dismissed, for that the complaint does not state facts sufficient to constitute a cause of action.

This cause coming on to be heard at Chambers, 1 July, 1886, on the appeal of defendants from the order of the clerk, it was adjudged that there was no error in the order authorizing the sale of said lands, and the cause was therefore remanded to the clerk, to be proceeded in by him according to law.

From the judgment the defendants appealed to this Court.

(140) *John Manning for plaintiff.*
Jos. B. Batchelor and John Devereux, Jr., for defendants.

MERRIMON, J., after stating the facts: It must be conceded that the proceedings in this special proceeding have been conducted very irregu-

larly from its beginning. If objection had been taken in apt time, without amendment allowed, it must have been dismissed. But no objection was at any time made because of irregularities, and now the sole question for our decision is, whether or not the complaint states facts sufficient to constitute a cause of action.

The manifest purpose of the plaintiff was to bring the special proceeding allowed by the statute (The Code, sec. 1448). The nature of his claim, and the relief he seeks, plainly indicate such purpose. He is a judgment creditor of the defendant executor, and seeks, because of the laches of the executor, to have his debt paid out of the assets of the testator, and inasmuch as the personal assets in the hands of the executor have been exhausted, he demands that the land of the testator devised by the will—all that he had—be sold to make assets to pay his debt.

The statute cited allows a creditor of a deceased person to bring a special proceeding or a civil action, "in his own name and in behalf of himself and all other creditors of the deceased," against the latter's personal representatives, "to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively"; and after prescribing the course of procedure as to notice to creditors to appear and prove their respective claims, taking accounts, etc., the statute (The Code, secs. 1474, 1475), further provides as follows: "If it shall appear at any time during, or upon, or after taking of the account of a personal representative, that the personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it shall be the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of (141) the personal representative, or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons, the proceeding shall be as directed in other like cases."

It thus appears that the Superior Court has jurisdiction by special proceedings, of the matters, and for the purpose indicated in the statute cited, and that in the course of such proceedings the clerk acts as and for the court, as he does generally in cases of special proceedings.

In this case, however, the summons was not made returnable as to time, as the statute (The Code, sec. 1450) requires—the plaintiff does not in terms, either in the summons or the complaint, purport to sue for himself and all other creditors of the testator—no notice was given to creditors to appear and prove their debts respectively—no accounts were taken—the executor was not sued alone, but the legatees and devisees of the will were at the beginning, and not at a subsequent stage of the

proceeding, as the statute (The Code, sec. 1474), provides, made parties defendant. No creditor except the plaintiff appeared before the court.

Notwithstanding such irregularities, we think the complaint states facts sufficient to constitute a cause of action, cognizable by special proceeding, and that the judgment is valid, upon the ground that the court had jurisdiction of the parties and the subject-matter, and no objection was made at any time by any of the parties, that the course of procedure was irregular.

The plaintiff brought his special proceeding, and he was therefore before the court. Although the summons was not made returnable as to time, as in such cases it ought to have been, it was served upon all the defendants except one, and the answer embraced him. The de-
(142) fendant executor made no objection to the relief demanded. The other defendants all appeared and made defense by answer; they did not contend that the proceeding did not purport to be for the benefit of all the creditors; it was not suggested by them that other creditors had been notified to appear and prove their debts, and that no account had been taken. They simply broadly denied that the land sought to be sold as that of the testator ever belonged to him, and that they claim title thereto under him; and they further denied that the personal assets of the testator have been exhausted. They admitted the plaintiff's debt. At the trial the verdict of the jury upon both the issues raised was in favor of the plaintiff, and the court gave judgment that the land be sold to make assets, that the plaintiff's debt be paid out of the same, and the surplus paid to the executor, for the benefit of the devisees. This judgment may be irregular, it may be erroneous, but no objection is made to it upon such grounds.

The plaintiff states facts which entitle him to have the land sold to pay his debt. The objection is that the procedure was not regular. The proceeding did not purport to be for the benefit of all the creditors. It may be, however, that the plaintiff was the only creditor. Moreover, the purpose of the proceeding obviously—necessarily—indicates its character, and the court might have directed notice to issue to creditors. It might even yet do so, and, indeed, ought to do so if there be any. The defendant devisees were not brought into court regularly at the proper time in the course of the proceeding, but they chose to appear and make defense upon the merits, making no objection on account of any irregularities. They must, therefore, be held to have waived them. The court properly held that the complaint states facts sufficient to constitute a cause of action, and in this respect there is no error. To the end that further proceedings may be taken in the cause, let this opinion
(143) be certified to the Superior Court. It is so ordered.

No error. Affirmed.

H. H. COOR v. S. O. ROGERS.

Stock Law—Burden of Proof.

1. Where the statute makes it the duty of the County Commissioners to build and keep in repair the fence around the territory embraced by the stock law, an owner of stock who resides outside of such territory, is not liable to have his stock impounded if found within such territory, unless the County Commissioners have kept the fence in good repair.
2. In such case the presumption is that the fence is in good order, and the burden of showing the contrary is on the party alleging it.

CIVIL ACTION, tried before *Philips, J.*, and a jury, at September Term, 1886, of WAYNE Superior Court.

This action, begun before a justice of the peace, was brought to recover possession of four hogs, which the plaintiff alleged to be his property, and he availed himself in the course of the action of the provisional remedy of claim and delivery.

The following is so much of the case stated on appeal as it is needful to set forth here:

"It was admitted that the stock had been taken up by the defendant while trespassing upon and doing damage to his crops, which were situated within the stock-law territory, described in chapter 115, laws of 1885; that all the requirements necessary to give force and validity to this act had been complied with, and that the act was in full force over said territory, and that the defendant had caused the stock to be duly advertised and registered, had impounded the same, and (144) had complied with all the other requirements of the act respecting said stock, and that the defendant resided within said territory, and that the plaintiff owned land, resided and farmed, and kept his stock on his farm outside of the territory. It is further admitted that the stock in question was the property of the plaintiff, and that he had turned them out to graze on his own lands.

The plaintiff testified that after he had turned them out they had been lost, and that he found them in the defendant's stable, within said territory, and that he then demanded them of the defendant; that he asked him what damage they had done; that he said he did not know; that he had got some parties, four or five men, to help him get them up, and that was worth fifty cents apiece; that said stock had eaten, after he took them up, one-half bushel of corn, and had damaged his wheat and turnips; that witness asked him if he wanted a committee to assess his damages, and he said he didn't know; that witness told defendant he

knew the stock was his, and if he didn't give them up, witness would get them; that witness asked defendant what he, witness, should pay him, to which he made no answer, and the witness then said to him, 'you wish me to sell the hogs, don't you? You know you tried to buy them, and are going to have them, anyhow.' The witness further testified, that he was then able to pay all costs, charges and damages due the defendant, having in his pocket at the time about fifteen or twenty dollars in money.

Plaintiff then offered to prove by himself that the gate on the public road leading from where the plaintiff had turned out his stock into said territory, required to be kept by the act on the line of said territory where it is crossed by the road, was at the time down, and had been so for a long time, and that the fence required by the act to be kept up around said territory, was down for from one-half to three-fourths of a mile, and had been so for some time, near the place where the
(145) hogs were turned out, and that said gate was three or four hundred yards from plaintiff's lands where he had turned out the hogs. To this evidence the defendant objected; the objection was sustained by the court, and the plaintiff excepted.

The court charged the jury that the law allowed the defendant to retain the possession of the property until the charges for taking up and impounding the same under the statute were paid, and on failure of the plaintiff to pay these charges, the defendant is entitled to a verdict, unless the plaintiff offered to pay them, and the defendant refused to receive them. Plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff having excepted, appealed to this Court.

E. R. Stamps and C. B. Aycock for plaintiff.
No counsel for defendant.

MERRIMON, J., after stating the facts: The statute (Acts 1885, chs. 115, 192 and 287), provide that live stock, including swine, shall not be allowed to run at large within the limits of Goldsboro Township, in the county of Wayne, and in additional designated adjoining territory therein named. To this end, it is likewise provided further, that certain commissioners named shall cause to be built a sufficient fence around the territory mentioned, and gates erected across all the highways leading into same, for the purpose of preventing live stock outside of such enclosure from intruding upon and running at large inside of it. It is expressly provided further, that the statute referred to shall not take effect and authorize the taking and impounding of such stock, and the collection of fines and costs in respect thereto, until the fence provided for shall be built, and notice thereof given as prescribed.

It is further provided: "After said committee shall have re- (146) ported the completion of said fence, said fence shall be under the control and management of the board of commissioners, and they shall discharge, with reference to said fence and the territory therein embraced, all the duties prescribed in chapter 20 of The Code, relating to territory where a stock law prevails." And the statute (The Code, sec. 2826, Vol. 2, ch. 20), thus referred to, provides that "the board of commissioners of the county may . . . make all regulations and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law."

It thus plainly appears, that the statutes first above cited, were to have effect only when the fence should be built, and that there was no purpose to prevent live stock from running at large outside of the territory enclosed. It also appears, if not in terms, certainly by reasonable and necessary implication, that the county commissioners shall keep the fence in reasonable repair, and make appropriate regulations; that is, appoint suitable agents, and raise money as allowed by law, and do other needful things for that purpose. The nature of the purpose suggests and requires that the fence shall be kept continually in repair, in order that the law may be continually operative and effectual.

Generally, such stock are allowed to run at large in unenclosed territory. If the fence is allowed to become ruinous and the gates to be thrown down and remain so, then cattle may wander inside of the enclosure unrestrained, and if they should, in such case, the owner thereof would not be liable to have them taken up and impounded, nor would he be liable for charges and costs in respect thereto, because the statute does not create such liability when the fence is so out of repair. When this is permitted, the county commissioners and their agents are in default, and not the owner of the stock straying at large; the owner is not bound to keep his stock confined, and thus keep them outside of the enclosure, nor to keep the fence in repair. The statute, properly interpreted, does not so require, and it would be palpable injustice (147) to require the owners of stock running at large, to be liable for costs and charges because of no default of his own, but that of the county commissioners or their negligent agents. The liability would not arise unless the fence or gate where the stock passed inside the enclosure was in reasonable repair. The presumption of fact is, that the fence is in repair, and the burden is on the party charged to show the contrary. If the fence is in repair, and vicious, mischievous stock shall break through or get over it, then the owner would be liable. Such animals should not be allowed to run at large.

If the fence or gates shall be out of repair, and as a consequence, stock shall wander inside of the enclosure, they should be gently driven out-

side, without injury, or the owner should be notified to take them out; and this is so, because of the default of the county commissioners, or their agents, and the owners are not in default.

It is important that the fence and gates shall be kept in repair. Otherwise, each owner of land inside of the enclosed territory will be exposed to annoyance and injury from intruding stock that cannot be taken up and impounded at the cost of the owners thereof. Every such owner of land has therefore a direct interest that prompts him to see that the county commissioners and their agents discharge their duties in respect to such fence and gates faithfully.

We are, therefore, of opinion that the court erred in refusing to admit the evidence offered by the appellant on the trial in respect to the alleged ruinous condition of the fence and gate.

The instructions given the jury were likewise erroneous. The court should have told them in substance, that if the fence and gate were in reasonable repair, and in that case, the hogs got through or over them, the plaintiff, although the owner of them, would not be entitled to (148) have possession of them until he had first paid the costs and charges of taking them up and impounding them; that, however, if the fence and gate were out of repair, as alleged by the plaintiff, then he would be entitled to recover possession of his hogs, although he had not paid the costs and charges demanded by the defendant.

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

Error. Reversed.

TURNER JOYNER v. WILLIAM MASSEY, JR.

Statute of Limitation—Principal and Surety.

1. Three years is a bar to an action against a surety although the note be under seal.

2. Where delay in bringing suit is caused by the request of the defendant, and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience; but in such case the creditor must bring his action within three years after such promise and request for delay.

3. By SMITH, C. J. In such case the request of the defendant for delay and his promise not to avail himself of the statute must be in writing, as provided by section 172 of The Code, except in cases where it would enable the defendant to perpetrate a fraud.

4. By MERRIMON, J. The right of the creditor to have the debtor restrained from setting up the statute where suit has been delayed at the debtor's instance, is not affected by section 172 of The Code, and need not be in writing.

5. Also by MERRIMON, J. The six-year, and not the three-year statute governs in such cases.

(Knight v. Braswell, 70 N. C., 709; *Welfare v. Thompson,* 83 N. C., 276; *Capell v. Long,* 84 N. C., 19; *Haymore v. Commissioners,* 85 N. C., 268; *Lyon v. Lyon,* 8 Ired. Eq., 201; *Barcroft v. Roberts,* 91 N. C., 363; *Daniel v. Commissioners,* 74 N. C., 500; cited and approved.)

CIVIL ACTION, tried before *Shepherd, J.,* at Fall Term, 1886, (149) of WILSON Superior Court.

The plaintiff alleged that one Martha Egerton and the defendant executed to him a note of which the following is a copy:

"With interest from date, at 8 per cent, we, or either of us, promise to pay Turner Joyner the sum of two hundred and thirteen dollars and twenty-five cents, for value received. 28 October, 1874.

(Signed) MARTHA EGERTON. [Seal.]
(Signed) WILLIAM MASSEY. [Seal.]"

And that no part of said note had been paid.

The defendant's answer admitted the execution of the note, but insisted that he had signed it as surety, and relied upon the statute of limitation.

The plaintiff replied, admitting that the defendant had signed the note as surety, but alleging that action had been delayed by the plaintiff at the special request of the defendant, for his accommodation, and upon his express promise to pay the same. The summons was issued 16 August, 1883.

Issues were submitted to the jury, who found: (1) That suit upon the bond was delayed by the plaintiff at the special request of the defendant for his accommodation, and upon his express promise to pay the same; and (2) That the request and promise were made in May, 1877.

Upon the verdict, the defendant moved for judgment, upon the ground that more than three years had expired after May, 1877, and after the note became due, before this action was commenced. (150) This was refused and judgment rendered for the plaintiff, and the defendant appealed.

H. F. Murray for plaintiff.
E. R. Stamps for defendant.

DAVIS, J., after stating the facts: It is admitted by the plaintiff that the defendant signed the note as surety. It is well settled by statute and by decision, that three years is a bar to an action against a surety to a note, although under seal. *Knight v. Braswell,* 70 N. C., 709; *Welfare v. Thompson,* 83 N. C., 276; *Capell v. Long,* 84 N. C., 19.

The only question for our consideration is, did the defendant's request for delay, and his promise to pay, remove the bar of statute? If the action had been brought within three years after this request and promise, the statute would not equitably have barred; though in *Shapley v. Abbott,* 42 N. Y., 443, it was held in a case like this, that a verbal promise not to plead the statute was not sufficient to avoid the operation of the statute.

In *Haymore v. Commissioners of Yadkin,* 85 N. C., 268, it was said that a Court of Equity would restrain a party from pleading the statute of limitation, who had agreed not to take advantage of the delay in bringing the action, thereby contributing to such delay; and the case of *Lyon v. Lyon,* 8 Ired. Eq., 201, is relied on. In that case, Eleanor Lyon, the plaintiff, who was the widow of Robert Lyon, deceased, the intestate of the defendant administrator, had lost her legal right to her year's support by a failure to petition therefor at the term of the court in which administration was granted, as was then required, and she pleaded her equity on the alleged agreement of the defendant, the administrator and only child of the intestate, that she need not apply for her year's support at the first term of the court, but might do so
(151) at a succeeding term, by which agreement she had lost her legal right to a year's support. The defendant denied this agreement, and sought to diminish the distributive share of the widow (who, together with himself, were the sole distributees), by charging her with sums which he had advanced and paid to her by mistake, as he alleged on account of her year's support. She was not allowed her year's support, nor was the defendant allowed credit for the advancements made to her on account of it. *Ruffin, C. J.,* said: "There is no equity between them, for if the defendant insisted that she had lost her right by not asserting it in proper time, she might urge, that to the extent of the advancements by him to her, he had waived the objection given him by the law, and more especially as he had deferred his objection until she could in no way proceed at law."

In *Barcroft v. Roberts,* 91 N. C., 363, it was held that the bar of the statute of limitation would not be allowed, when the delay which would otherwise give operation to the statute, "has been induced by the request of the defendants, expressing or implying their engagement not to plead it." In that case, the defendants had made payments, extending down to 26 August, 1875, from which time the statute would have run, and

the action was brought 21 October, 1878. It was found as a fact, that the bringing of the action was delayed because of the *repeated* promises of the defendant and his attorney, that the statute of limitation would not be relied on. It does not appear when these "repeated promises" were made, but from the date given, it may be inferred with certainty that they were within three years preceding the bringing of the action.

So in the case of *Daniel v. Commissioners of Edgecombe,* 74 N. C., 500, it was held to be against equity and good conscience, for defendants to rely upon the plea of the statute, when it had been agreed by them that the plaintiff's claim should abide the result of a trial of another suit pending against them upon a claim of similar character. *Rodman, J.,* said: "Deducting the time of *permitted* delay, the (152) plaintiff"s claim is not barred."

Conceding that these authorities, relied on by plaintiff's counsel, sustain fully the position that when the delay is induced by the request of the defendant and his promise to pay without relying upon the statute of limitation, the court will not allow the statute to bar, because it would be against equity and good conscience, we think the action should be brought within a reasonable time, and that equity should follow the law and give no greater effect to such promise than to a new promise made in writing, or to an original promise supported by a good consideration, or to a payment made on a note, which the statute fixes at three years. It does not destroy the defendant's relation as surety, and if the action is not brought within three years after such request for delay, and promise not to rely on the statute, it should be barred in equity as well as at law.

In the cases relied on by the plaintiff, the actions were brought within three years after the promises inducing the delay. In the case of *Burton v. Stevens,* 58 American Decisions, 153, cited by counsel for plaintiff, there was an endorsement in writing on the back of the notes, to the effect that the maker would "not take any advantage of the statute of limitation on the within two notes." This was held, very properly, to take the case out of the statute, but the action was commenced within the statutory limit, after the endorsement was made; and this case is not an authority against the defendant.

This view will give full effect to the equitable doctrine which will not allow a defendant to take undue advantage of delay induced by his own promises on the one side, and is in harmony with the statute on the other, which fixes the limitation at three years. In this action it was found that the request and promise were made in May, 1877, and the action was brought 16 August, 1883. (153)

There is error. Judgment reversed.

SMITH, C. J., concurring: While concurring in the judgment of the Court, that the action is barred by the statute of limitation, I do not ascribe any legal efficacy to the parol promise to pay the debt in consideration of forbearance to sue, in producing the result. Section 172 of The Code is explicit in declaring, that "no acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby." A construction that this plain language does not embrace a case in which delay has been superinduced by a reliance upon the good faith of the debtor in not setting up the defense, would be in a great measure to neutralize its operation, as it does directly contravene its terms. It is only when the lapse of time would be a bar, that the new promise would have any effect, and to give this effect to an *unwritten* promise, because of delay, which was the former law, would be to leave it unchanged, notwithstanding the new enactment. The cases relied on have reference to the principle recognized in equity, which will not allow a party to reap the advantages of his own fraudulent representations and conduct, when confided in and acted on by those to whom they were made, and the last one, *Barcroft v. Roberts,* carries the doctrine to its extreme limits, beyond which I am unwilling to go. In that case, it wuld have constituted a successful fraud to have permitted the defendant to escape responsibility.

It seems to me, as the promise to pay, so must the assurance not to take advantage of the statute, be in writing, and thus its efficacy enters into cases, as well in equity as in law, and the act operates evenly and uniformly in both jurisdictions. To this effect is *Shapley v.* (154) *Abbott,* in the Court of Appeals of New York, 42 New York, 443.

MERRIMON, J., concurring: In my judgment, the equitable right of a creditor plaintiff to have the debtor defendant restrained from availing himself of the statute of limitation where the former forbore to sue until after the bar, at the request of the latter, and with the assurance and promise on his part, that he would not afterwards plead the statute of limitation, is in no way affected by the statute (The Code, sec. 172), which provides that "no acknowledgment or promise shall be received as evidence of a new and continuing contract, whereby to take the case out of the operation of this title (that as to time of commencing action), unless the same be contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

The right is founded not upon a new promise on the part of the debtor to pay the debt barred, as contemplated by this statutory provision, but

upon the ground that before the bar, he requested the creditor not to sue until after the bar, upon the assurance and promise of the debtor that he would not afterwards avail himself of the statute of limitation. In view of such assurance and promise given by the debtor, and received and acted upon by the creditor, it would be perfidious and iniquitous for the debtor to plead the statute, and a Court of Equity will not allow him thus to take advantage of, and reap benefit from his own fraud and wrong. And this is so in the same degree, whether the promise was made verbally or in writing.

In the case where the equitable right arises as above indicated, the assurance and promise are given *before the bar arises.* In the case contemplated by the statutory provision above recited, the new promise to pay is made *after the bar, and must be in writing to be effectual.*

The equitable right thus arising, is distinctly recognized and (155) upheld in *Lyon v. Lyon,* 8 Ired. Eq., 201; *Daniel v. Commissioners,* 74 N. C., 494; *Haymore v. Commissioners,* 85 N. C., 268; *Barcroft v. Roberts,* 91 N. C., 363, and other cases.

But the Court of Equity will not thus interfere indefinitely—it will do so only for a reasonable time—not exceeding an extension of the time equal to that prescribed by the statute of limitation. In this case the plaintiff did not bring his action until more than eight years next after the bond sued upon matured as to the surety, the defendant appellant. I therefore think he cannot recover, as to the surety; I would think otherwise, however, if the action had been brought within six years after such maturity of the bond.

Error. Reversed.

Cited: Hill v. Hilliard, 103 N. C., 38; *Murray v. Penny,* 108 N. C., 326; *Dibbrell v. Ins. Co.,* 110 N. C., 209; *Redmond v. Pippen,* 113 N. C., 93; *Grady v. Wilson,* 115 N. C., 348; *Cecil v. Henderson,* 121 N. C., 247; *Wade v. Tel. Co.,* 147 N. C., 219; *Oliver v. Fidelity Co.,* 176 N. C., 601.

W. K. ANDRES, ADMINISTRATOR, v. J. W. POWELL AND W. C. POWELL, EXECUTORS, ET AL.

Executors—Statute of Limitation.

1. An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years after the filing of the final account, or it will be barred by the statute.

2. The rule announced in *Syme v. Badger*, 96 N. C., 197, affirmed, that a suit by a creditor to subject the descended land in the hands of the heir to the payment of the ancestor's debts is barred, if not brought within seven years after grant of administration and advertisement for creditors.

(*Briggs v. Smith*, 83 N. C., 306; *Vaughan v. Hines*, 87 N. C., 445; *Syme v. Badger*, 96 N. C., 197; cited and approved. *Davis v. Perry*, 96 N. C., 260; distinguished.)

(*Badger v. Daniel*, 79 N. C., 372; *Cox v. Cox*, 84 N. C., 138; *McKeithan v. McGill*, 83 N. C., 517; *Godley v. Taylor*, 3 Dev., 179; *Lawrence v. Norfleet*, 90 N. C., 533; *Worthy v. McIntosh, ibid.*, 536; *Speer v. James*, 94 N. C., 417; cited in the dissenting opinion.)

(156) THIS was a civil action, tried before *Clark, J.*, at January Term, 1887, of the Superior Court of COLUMBUS County.

The material allegations of the complaint are substantially as follows: A. J. Shipman, the plaintiff's intestate, died in the county of Bladen in 1869, and one J. W. Ellis was duly appointed and qualified as his administrator, on 17 May, 1869, with Thomas S. Memory, W. M. Baldwin and A. F. Powell, now deceased, as the sureties on his administration bond. The said J. W. Ellis died in 1883, without having fully administered the assets of the said A. J. Shipman, and on the ..... day of ....., 1883, the plaintiff, W. K. Andres, was duly appointed and qualified as administrator *de bonis non* upon the estate of the said Shipman; the said A. F. Powell, one of the sureties on Ellis's bond, died in the county of Columbus, in the year 1873, leaving a last will and testament, with the defendants, J. W. and W. C. Powell, executors thereto, who caused the will to be duly proved in the proper court, on 19 November, 1873, and on that day qualified as executors, and immediately thereafter made the advertisement notifying creditors, etc., as required by law.

On 23 February, 1885, a judgment was rendered in the Superior Court of Bladen County, in favor of the plaintiff, as administrator, etc., against Thomas S. Memory, W. M. Baldwin and the defendants, J. W. and W. C. Powell, executors of A. F. Powell, in an action in the name of the State of North Carolina, upon his relation, against the sureties on the bond of the said J. W. Ellis, administrator, etc., for the sum of $3,059.20, with interest from 23 February, 1885, and the further sum of $155.90 costs, and no part of said judgment has been paid.

(157) The said A. F. Powell left a large estate, both real and personal, which, after the payment of all his debts theretofore presented for payment, was divided among his devisees, the defendants in this action. Thomas S. Memory and W. M. Baldwin are insolvent, and the plaintiff asks judgment for an account, and that the personal estate of the testator, A. F. Powell, be subjected to the payment of the judgment

in his favor, and if the personal estate be insufficient, that so much of his real estate as may be necessary be subjected to the payment thereof.

The defendants, among other defenses in their answer, rely upon the seven years bar of the statute (The Code, sec. 153, sub-sec. 2); the six years bar (The Code, sec. 154, sub-sec. 2), and the three years bar (The Code, sec. 155, sub-secs. 1 and 6).

The summons was issued on 2 July, 1885, and at the August Term, 1886, the cause was referred by consent, to find the facts, and state his conclusions of law, and take an account of the administration of the estate of A. F. Powell, deceased, and report to the next term of the court.

At the January Term, 1887, the referee filed his report, finding, among other facts, those hereinbefore stated in the allegations of the complaint, and the following in addition thereto, necessary to be considered in determining the case before us on appeal.

On 8 October, 1875, the executors of A. F. Powell filed their final settlement, which was examined and approved. That there were no outstanding debts against the estate of the said A. F. Powell (meaning, of course, other than the claim of the plaintiff); that the final account of said executors had been audited and approved more than six years before the institution of the suit in Bladen against W. M. Baldwin, T. S. Memory and the said J. W. and W. C. Powell, executors of A. F. Powell, and that the other defendants were not parties to said action; and that breaches of his bond were committed by J. W. Ellis (158) more than six years before the institution of the suit in Bladen against the said Baldwin and others, and also within six years before the institution of said suit; that breaches of the bond of the said J. W. Ellis had been committed more than seven years next after the qualification of said executors, and their making the advertisement required by law, and also before the commencement of the suit in Bladen against Baldwin and others, and also within seven years; that some of the breaches of the bond of the said J. W. Ellis were committed more than three years before the commencement of the suit in Bladen, and some within that time, and that a right of action had accrued to the parties in interest more than three years before the commencement of said suit, and also within that time, that said J. W. and W. C. Powell, executors of A. F. Powell, after filing their final account and settlement, disbursed, paid out and turned over to the heirs, distributees, legatees and next of kin, the money and effects of their testator, more than three years next before the commencement of the suit instituted in Bladen County, . . . and more than three years next before the commencement of this action. The sum so paid out was, including interest, $22,823.02.

The referee, among other conclusions of law, finds:

"That the plea of the six years statute of limitation cannot avail the defendants.

"That the plea of the seven years statute of limitation is untenable and cannot avail the defendants.

"That the plea of the three years statute (The Code, sec. 155, sub-sec. 6), cannot avail the defendants."

To the report of the referee the defendants filed the following exceptions:

"1. It being found as a fact that this action was not commenced within seven years next after the qualification of J. W. and W. C.
(159) Powell, executors of the estate of A. F. Powell, deceased, and their making the advertisement required by law, the defendants insist that the plaintiff cannot recover under this state of facts, whereas the referee has found as a matter of law to the contrary, and in which the defendants insist there is error.

"2. The referee having found as a fact that the said executors, J. W. and W. C. Powell, filed their final account, which had been audited and approved more than six years before the institution of the suit in Bladen County against W. M. Baldwin *et al.*, he ought to have found as a conclusion of law, that the plaintiff could not recover in this action, whereas he found to the contrary, and in which the defendants insist there is error.

"3. The referee having found as a fact that the said executors, J. W. and W. C. Powell, after filing their final account and settlement, disbursed, paid out, and turned over to the heirs at law, legatees and next of kin, the moneys and effects of their testator, more than three years next before the commencement of the said suit in Bladen County by W. K. Andres, administrator *d. b. n., v.* W. M. Baldwin *et al.*, and that some of the breaches on the bond of J. W. Ellis, administrator of A. J. Shipman, occurred more than three years before the commencement of the said suit by W. K. Andres, administrator, etc., *v.* W. M. Baldwin *et al.*, he ought to have found as a conclusion of law, that the plaintiff's right of action was barred against the said legatees and next of kin, whereas he found to the contrary, and in which the defendants insist there is error."

His Honor was of opinion with the referee. The exceptions were overruled, and judgment rendered in favor of the plaintiff and against the defendants, ordering and adjudging that the land described in the report be sold, etc., and the proceeds applied to the satisfaction of the debt described in the complaint.

(160) From this judgment the defendant appealed.

John Devereux, Jr., for plaintiff.
A. W. Haywood for defendants.

DAVIS, J., after stating the facts: Section 153, sub-sec. 2, of The Code, prescribes that an action must be commenced within seven years, "by any creditor of a deceased person against his person or real representative," etc. Section 154, sub-sec. 2, prescribes that an action must be commenced against an executor, administrator, etc., within six years after the auditing of his final accounts. Section 155, sub-sec. 6, prescribes that an action must be brought against the sureties of any executor, etc., within three years after the breach complained of.

Section 1528 enacts, that "all persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest, or distribution, shall be liable jointly and not separately, for the debts of such decedent." And section 1529 provides, that no person shall be liable under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator, or collector of the decedent, and it is incumbent on the creditor to show the matters herein required, to render such person liable."

All these acts are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estates of dead men.

In *Briggs v. Smith,* 83 N. C., 306, it is held, that the action must be brought within six years after the auditing of the final accounts, if there is no such disability.

In *Vaughan v. Hines,* 87 N. C., 445, *Ashe, J.,* says: "Our conclusion is, that after the final account, the statute does run against the next of kin, and an action against the administrator upon his (161) official bond is barred after six years from the auditing of his final account. And if the statute protects the principal, it must also protect the surety on the bond."

If the executor or administrator fail to pay over to the next of kin within six years after the final account is audited, they are barred. To avoid the statutory bar, they must bring action within that period. It would be a curious legal anomaly, if, within six years, the next of kin should bring their action against the executor or administrator (and they must bring it within six years or be barred), and recover, and then more than six years after the auditing of the account, a creditor of the deceased should bring action, and be allowed to recover, either out of the executor or administrator, or out of the next of kin or heir. The statute might well be regarded as dead and worthless, if such could be the result, and the estate of dead men could never find repose.

The case of *Davis v. Perry,* 96 N. C., 260, and cited by counsel for the plaintiff, has no application. In that case the plea of the statute was not relied on in the answer, and the defense must be taken by answer. The Code, sec. 138.

A. J. Shipman died in 1869, and administration was taken out on his estate on 17 May, 1869, by J. W. Ellis. Ellis died in 1883, nearly fourteen years after, and it not only does not appear that the money could not have been collected out of him, but the *devastavit* complained of, was committed more than six years before his death. A. F. Powell died in 1873, and the final account of his executors was audited in October, 1875, and his estate distributed ten years before the bringing of this action, and eight years before the death of J. W. Ellis, the administrator of Shipman.

(162) This action was commenced in 1885, about twelve years after the qualification of the executor of A. F. Powell, and we think that it is barred, both by the six years and the seven years statutes. If those statutes have any life and force, they must apply to such a case as this. The case of *Syme v. Badger,* 96 N. C., 197, and the authorities there cited, are conclusive upon the point as to the seven years bar, and we need not consider it further, except to add to the authorities the case of *Peck v. Wharton,* Martin & Yerger (Tenn. Rep.), 360.

That was a suit instituted to subject the land descended to the heirs of Daniel Wharton to the payment of his debts, under circumstances very similar to those in the present case, and the same defenses were relied on as here, with the exception that the seven years bar was that of the act of 1715, which was embodied in the laws of Tennessee. In that case the Court say: "Situated as these parties are, who ought to lose, for it appears that a loss must be sustained? . . . In case, then, of a waste of the personal estate, who shall bear the loss? Is it more reasonable that it should fall upon the heir, who has no more power than the creditor (indeed not so much), to coerce the administrator to pursue the right course? The creditor can sue the administrator for his demands—the heir cannot compel the administrator to pay the debts of the estate; he may have a wish that it may be done, but what facilities has the law given him? Then to tie up the hand of the heir, first, as to the appointment of the administrator; secondly, as to the management of the personal estate; thirdly, as to bringing and prosecuting of suits for debts due by the ancestor, and yet say, that finally his estate shall be swept away, because an accident has happened in managing the personal estate, would be casting upon the heir a most unnatural and intolerable burthen. Upon the right of the heir to plead the statute of limitation, we are of opinion that he may insist upon it, and that he is not

(163) limited on the *scire facias* to contest only the finding of the plea

of fully administered. . . . We are, moreover, of the opinion that the act of 1715, of seven years, will operate as a bar, and that that act is in force, we consider one of the best established positions litigated in our courts. It is so held in North Carolina, and a concurrence of opinion in the judges of that State, even if we have doubts, would incline us to pause before we expressed them."

There is error, and the judgment must be reversed. Let this be certified.

MERRIMON, J., dissenting: The statute (The Code, sec. 153, par. 2) provides that actions brought by any creditor of a deceased person against his *personal or real representative,* must be brought within seven years next after the qualification of the executor or administrator, and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor and a creditor thus barred of a recovery against the representative of any principal debtor, shall also be barred of a recovery against the surety to such debt.

In my judgment, this limitation refers to and embraces only such causes of action as exist and are actionable at the time the executor or administrator qualifies as such, and makes the advertisement mentioned, with the exception of causes of action—claims and debts—as to which the executor or administrator gives the creditor express notice to present the same, as provided by the statute (The Code, sec. 1424), and as to which a different limitation applies. It does not apply to causes of action that arise—however they may arise—after the time designated, until they become actionable until a cause of action upon them has accrued, and particularly, it does not apply to debts and liabilities of the testator or intestate which had not matured and become actionable at that time, and does not apply to them until the (164) right of action upon them accrues.

The interpretation that it does, it seems to me, leads to the anomalous and absurd result of barring a party's debt or demand before it becomes actionable. Such an interpretation ought not to be adopted, if one more consonant with justice and reason can be given.

As I do not concur in the opinion and judgment of the Court, I will state some of the grounds of my dissent.

It is important to observe that the statute (Acts 1868-69, ch. 113), and several subsequent ones—some of them amendatory, and others not—all embodied in The Code, ch. 33, entitled *"Executors and Administrators,"* have, in many important respects, materially changed the statutory regulations of the State in respect to the settlement and disposition of the personal estates of deceased persons from what they formerly were.

It is to be regretted that these regulations are to some extent complicated and confused. They need to be clear, simple, and of easy comprehension, particularly because they are of general and constant application, and very frequently applied by officers and persons not skilled in the interpretation of statutes.

Now, applying this general remark, in a single respect applicable here, it is to be noticed that the present statute contemplates, as formerly, that the executor, administrator or collector shall regularly prepare the estate in his hands for final distribution, immediately after the lapse of two years next after his qualification. It is provided (The Code, sec. 1488), that "no executor, administrator or collector shall hold or retain in his hands, more of the deceased's estate than amounts to his necessary charges and disbursements, and such debts as he shall legally pay; but all such estate so remaining, shall immediately *after the expiration of two years,* be divided, and be delivered and paid to such person (165) to whom the same may be due by law, or the will of the deceased."

There is, however, no provision as formerly (Rev. Code, ch. 40, sec. 24), requiring refunding bonds to be taken from the next of kin, or legatees, or other person entitled to the personal estate, for the benefit of creditors. Regularly, at once after two years, the *personal* property of whatever kind ought to be delivered and paid to the persons entitled to the same, and the executor or administrator may be compelled to render his final account at any time after that time (The Code, secs. 1402-1510), except (The Code, sec. 1489), that, if it shall appear on an examination of the final account of the executor, administrator or collector, that a debt against the estate *is not due,* or on which a suit is pending, the court or judge shall allow a sum of money sufficient to satisfy such claim, or its proportion of the assets, to remain in the hands of such executor, administrator or collector, for the purpose of paying such debt when due, or when recovered, with the expense of contesting the same.

A creditor may, after the lapse of two years, as indicated above, sue the executor or administrator, have his debt ascertained, and judgment for the same (The Code, secs. 1427-1509), but he must, if the estate has been distributed to those entitled to it, as regularly it ought to have been, proceed against the "persons succeeding to the real or personal property of a decedent by inheritance, devise or distribution," who "shall be liable jointly and not separately for the debt of such decedent." (The Code, secs. 1528-1532.)

The executor or administrator would be required to account for any assets remaining or subsequently coming into his hands after the lapse of two years, as indicated; but if he had delivered and paid the same

to the persons entitled, the creditor would *proceed against the latter,* whether next of kin or legatee, and if the personal estate were insufficient to pay the debt or demand, then against the heir or devisee, to subject the land of the testator or intestate to the payment of (166) the same. If the heir or devisee had sold the land before the lapse of two years next after the grant of letters (The Code, sec. 1442), the creditor might still have it sold to satisfy his debt; if he sold it after the lapse of that time to a purchaser who had no notice of the debt, the latter would get a good title as against the creditor, but the latter would have the right to have the heir or devisee account to him for the value of the land so sold, or so much thereof as would be necessary to pay his debt. The Code, secs. 1509, 1528, 1534; *Badger v. Daniel,* 79 N. C., 372; *Davis v. Perry,* 96 N. C., 260.

This is the regular course of procedure in such respects, and the statute of limitation first above set forth has reference to and bears upon it.

If a creditor's debt or demand against the testator or intestate sued upon, was due and actionable at the time the executor or administrator qualified, and advertised for creditors to present their debts and demands, and more than seven years elapsed before he brought his action to recover his debt, the executor, administrator, or heir, or devisee, or all of them, might avail himself or themselves of this statute of limitation. The statute so expressly provides, and seems to contemplate that the cause of action at once affects the heir or devisee, as well as the executor or administrator; and hence, the purpose is to protect all by the same lapse of time. The creditor might therefore deem it prudent, especially after the lapse of two years, to bring a creditor's action, as allowed by the statute (The Code, secs. 1448-1511), alleging a deficiency of assets, and making the heir or devisee a party, so as to prevent the lapse of time.

But it would be otherwise as to causes of action accruing subsequent to the qualification of the executor or administrator, and advertisement as indicated.

In such cases, time would lapse as against the creditor, only (167) from the time his right of action accrued. This would be just and reasonable, and the statute so contemplates. The Code, sec. 1509, expressly provides, that "an action may be brought by a creditor, against an executor, administrator, or collector, on a demand at any time after it is due," etc., and the like right of the creditor to sue after his debt matures, is recognized in The Code, sec. 1427.

But what statute of limitation applies as to the class of cases last mentioned? It seems to me, to be that first above cited, because its scope, spirit and purpose take in all causes of action, whether matured or not, existing at the time of the qualification of the executor or administrator;

and moreover, it is the particular one that embraces in terms the *"personal or real* representative" of a testator or intestate. *Cox v. Cox,* 84 N. C., 138; *McKethan v. McGill,* 83 N. C., 517.

The last cited case is pertinent, as reflecting strong light upon the meaning of the statute now under consideration. It may be said, that this is the general statute of limitation, prescribing the time within which actions founded upon causes of action affecting the executor or administrator, as such, and the heir or devisee, with liability, directly or indirectly, must be brought.

Then, how does that statute just mentioned affect the present case? The testator of the defendant executors, A. F. Powell, deceased, was in his lifetime one of the sureties—the only solvent one—to the administration bond of the first administrator, J. W. Ellis, now deceased, of the intestate of the plaintiff, who qualified as such on 17 May, 1869, and afterwards died in 1883, without settling and closing the estate so in his hands, and the present plaintiff was appointed administrator *de bonis non,* in his stead. The latter afterwards brought his action against the sureties of his predecessor administrator, Ellis, upon his bond as administrator, assigning as a breach thereof, that his adminis-
(168) trator had neglected and failed to deliver and pay to the plaintiff, the property, effects and moneys, that were in his hands as such administrator, at the time of his death. The defendants, J. W. Powell and W. C. Powell, executors of the will of A. F. Powell, deceased, who was one of the sureties mentioned, were parties defendant to the last mentioned action, and the plaintiff therein, who is the present plaintiff, recovered judgment against them on 23 February, 1885, for $3,059.20, with interest, and for costs. It does not appear that the present defendant executors, who were defendants in that action, pleaded therein the statute of limitation. Be this as it may, the plaintiff obtained judgment as stated above.

The present action is brought to compel the defendant executors of the will of A. F. Powell, deceased, to account for assets in their hands, and pay the judgment mentioned; or if they have no such assets, but have delivered and paid to the legatees of their testator, property and money, then to compel them to pay the said judgment, and if they failed to receive personalty sufficient to pay the same, then to have so much of the land of the testator sold as may be necessary to pay the judgment, etc.

The legatees and devisees of the will are defendants. And all the defendants plead and rely upon the statute of limitation.

Now, it seems to me clear, that this statute is not a bar to the plaintiff's action. The administration bond mentioned, was a continuing one—there could be no bar to it, except in the cases specified by the

statute (The Code, sec. 154, par. 2), which provides, that an action against any executor, administrator, collector or guardian, upon his official bond, will be barred, if not brought within six years after the auditing of his final account by the proper officer, and the filing of such audited account as required by law; and likewise, in the case prescribed in the other statute (The Code, sec. 155, par. 6), which provides, that an action against the sureties of an executor, administrator, (169) collector or guardian, on the official bond of their principal, shall be barred, unless brought within three years after the breach thereof complained of. But no final account of the administrator Ellis ever was audited, and the breach of his official bond complained of, happened in 1883, and this action was begun on 2 July, 1885, less than three years next after the breach of the bond.

The plaintiff's particular cause of action sued upon in the action in which he obtained the judgment mentioned, and which he seeks by this action to have paid and discharged, did not accrue until in 1883. It must be remembered, that the official bond of the administrator is not the cause of action, and the statute of limitation does not apply to it at all—it is the *breach* of that bond that constitutes the cause of action, and it is to an action founded upon this breach, that the limitation applies. There may be numerous and different kinds of breaches of almost every official bond, and each of these might constitute a cause of action in favor of some person interested. In this case, it may be—it seems probable there were—numerous breaches of the official bond of the administrator Ellis. The plaintiff's cause of action was the last breach of it—that indicated and sued upon, and it happened, and the right of action accrued upon it, as we have seen, in 1883.

When Ellis, administrator, and his sureties executed it, they stipulated therein, that they would answer and be amenable for every breach of its *condition,* whenever this might happen.

The testator of the defendant executors, as surety to that bond, so stipulated and bound himself, and he was so liable in his lifetime, and this liability continued as to the executors of his will, and his estate in their hands, and in the hands of the legatees and devisees of his will after his death. The official bond was *current*—continuously operative and effectual—until the whole subject-matter embraced (170) by it was completely ended, and each succeeding time there was a breach of its condition, an action arose in favor of some person. Here, the cause of action so arose in favor of the plaintiff, and he at once, within a brief while, brought his action. The defendant executors, legatees, devisees and heirs, cannot avail themselves of the statute of limitation first above set forth, because the cause of action did not exist at the time the executors of the will of A. F. Powell, deceased, qualified

as such, and did not accrue until the breach of the bond executed by their testator, which happened in 1883.

I am therefore of opinion that the opinion and judgment of the Court rest upon the misapprehension that time began to lapse against the plaintiff's cause of action at once after the qualification of the executors, and years before the cause of action arose or became actionable. I cannot conclude that an interpretation of the statute in question, that leads to such results, is the correct one. I will add, that the interpretation I have thus given the statute first above cited and set forth, is fully sustained by this Court in interpreting a statute on the same subject, almost exactly similar in pertinent respects, in *Godley v. Taylor,* 3 Dev., 179. In that case, *Hall, J.,* said: "When the Legislature say that creditors shall make their claim within seven years after the death of the testator, they must have had in contemplation, such a creditor as had a *claim to make*—such a claim as might be enforced *in presenti.* They did not mean a claim that might arise *in futuro;* which could not be enforced until it did arise or accrue. By an equitable construction of the act, he must make his claim within seven years after it accrues. To require him to make it before, would be to require of him an impossibility."

(171) This decision has always been recognized and acted upon as a correct interpretation of the statute mentioned in it, and it is expressly recognized and approved in *McKethan v. McGill, supra.*

What I have said in no way conflicts with what this Court said or decided in *Lawrence v. Norfleet,* 90 N. C., 533, and *Worthy v. McIntosh, ibid.,* 536. In these cases the Court neither said, nor intimated, nor decided, that a debt or demand against an executor or administrator, or real representative, was barred after the lapse of seven years next after the qualification of the executor or administrator, although the debt or demand had not matured, and no cause of action had accrued. In both cases, the cause of action had accrued when the time began to lapse against the plaintiff.

It is by no means clear that the defendants, legatees, devisees, and heirs at law, are not, in any view of this case, precluded from pleading the statute of limitation, inasmuch as the defendant executors suffered the plaintiff to obtain judgment against them. *Speer v. James,* 94 N. C., 417. But I do not deem it necessary to express any opinion in respect to this view of the plaintiff's rights.

Error. Reversed.

Cited: Smith v. Brown, 99 N. C., 385; *S. c.,* 101 N. C., 352, 3; *Lee v. Beaman, ibid.,* 298; *Woody v. Brooks,* 102 N. C., 339; *Culp v. Lee,* 109 N. C., 678; *Miller v. Shoaf,* 110 N. C., 322; *Lee v. McKoy,* 118 N. C., 523, 524.

(172)

A. B. DAVIDSON v. McD. ARLEDGE ET AL.

Boundary—Evidence—Estoppel.

1. The map of a city or town, which is adopted and recognized by the municipal authorities as correct, is competent evidence to establish the location of a lot in the city.
2. In order to show title out of the State by a possession for thirty years, it is not necessary to show any privity between the different occupants.
3. Where there is a dispute as to the dividing line between two adjoining tracts, the acts and admissions of the adjoining proprietors recognizing one line as the true one, are evidence of its location when the line is unfixed and uncertain, but where it is well ascertained, such acts and admissions are not competent evidence either to change the line or to estop the party from setting up the true line.
4. *It seems*, that such acts will entitle the losing party to recover the value of the improvements he may have put on the land, in good faith.
5. The rulings made when this case was before the Court on a former appeal (88 N. C., 326), repeated and affirmed.

(*Davidson v. Arledge*, 88 N. C., 326; *Davis v. McArthur*, 78 N. C., 357; cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, and a jury, at Spring Term, 1886, of MECKLENBURG Superior Court.

The attached plat will explain the matter in controversy:

There was a judgment for the plaintiff, and the defendants (173) appealed.

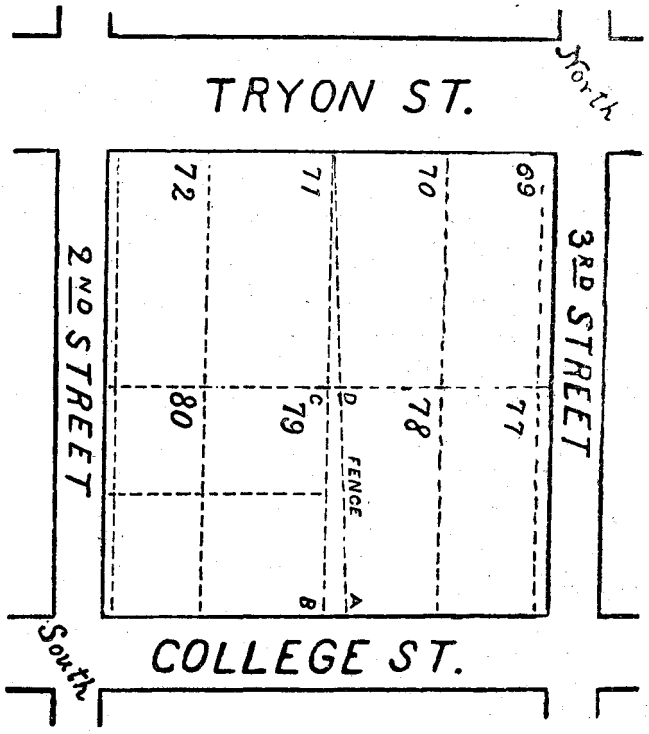
The facts fully appear in the opinion.

John Devereux, Jr., for plaintiff.

Platt D. Walker (A. Burwell and Geo. E. Wilson were with him on the brief), for defendants.

SMITH, C. J. When this cause was before the Court on the former appeal, 88 N. C., 326, and the title to the same narrow strip of territory formed by the different locations of the boundary line between lots numbered 78 and 79 was in dispute, it appeared that William E. White, under a deed from Daniel Asbury made in 1858, and (174) conveying the four lots, 69, 70, 77 and 78, the upper half of the square, and under a deed from the administrator of R. E. Carson, made in 1861, and conveying lots 79 and 80, one-fourth of the square, became the owner of both lots 78 and 79 and the different antecedent locations of their divisional line ceased to be the subject of controversy.

Upon his death, and under a power contained in the will, his executor in May, 1869, conveyed to the plaintiff the four lots constituting the upper portion of square No. 10, and designated as being in the city of Charlotte "on the plan thereof"; and in June, 1870, the executor conveyed to the defendants "that portion of lots numbers 79 and 80, fronting on College Street, and running back 80 feet to the line of the dower of Mrs. Carson; thence with said dower line to the line of the lots of



A. B. Davidson; thence with his line 80 feet to College Street; thence with College Street 198 feet to the beginning."

The solution of the controversy then, was to be found in ascertaining the location of the plaintiff's lot, number 78, for to its line that of the defendant came, and recognizing it, proceeded along that line to College Street.

There could be no overlapping nor any color of title to support a possession of such supposed overlapping territory. Such were the facts before us in the former appeal.

Upon the trial now under review, the defendant, so far as the record shows, offered no documentary evidence of title in himself, other than

that of possession, and resisted the plaintiff's recovery upon the ground that he had shown no title in himself to lot, number 78, and could not therefore maintain the action.

The plaintiff offered in support of his claim of property the following deeds:

I. A deed from George Augustus Selwyn, by Henry E. Mc- (175) Cullock, to Abram Alexander and others, dated in 1767, and conveying to them as trustees of the town proposed to be laid off, 360 acres of land on Garrison Creek, a part of 100,000 acres, being lot number 3, not proved to cover that in dispute.

II. A deed from Thomas Polk, Jerry McCafferty, and William Patterson, "trustees and directors of the town of Charlotte," to Isaac Alexander and eight others named, designated therein as "president and trustees of Liberty Hall in the county of Mecklenburg, and their successors in office," for four lots in Charlotte "known as lots numbers 69, 70, 77 and 78, on the south side of Tryon Street, beginning at a stake, running thence along the said street 12 poles front and 24 poles back, containing near two acres." This deed bears date 14 January, 1778.

III. A deed from Addie Osborne and John McNitt Alexander, for themselves and Isaac Alexander, Samuel McCorkle, Thomas W. McCaull, and James Hall, describing themselves as the "late president and directors of Liberty Hall College, Mecklenburg County," made 5 May, 1778, to Thomas J. Polk, conveying the same mentioned lots, "as known and designated in the plan of said town of Charlotte."

IV. A deed dated 26 September, 1826, from Thomas J. Polk to William J. Alexander, in which "the same lots as laid down on the map of Charlotte" and described.

V. A deed executed on 16 August, 1842, by the sheriff of Cabarrus County, to the Bank of the State of North Carolina, conveying the same lots in the description. There was no evidence given of his having any execution in his hands or authority to make the sale.

VI. A deed from the same bank, dated 15 August, 1843, to J. A. Johnston, similarly describing by the same numbers and with like reference to the plan of the town, the subject-matter of the (176) conveyance.

VII. A deed made by the grantee Johnston, "trustee of the Bank of the State of North Carolina," on 26 October, 1846, of the four lots by the same terms of description, to Thos. J. Grier.

VIII. A deed from the last named, executed to David Asbury, 5 July, 1848, "conveying the same lots as designated in the plan of said town, and as being the property formerly owned by said Alexander, and on which said Alexander lately resided"; referring, as we suppose, to the deed from Polk to William J. Alexander, before mentioned.

IX. A deed from said Asbury to William E. White, dated 11 November, 1858, in which the premises are described in the same terms, except in substituting the name of said Asbury in place of that of Alexander, as the present occupant.

X. A deed from White's executor, dated 22 May, 1869, to the plaintiff, conveying "lots numbers 69, 70, 77 and 78, in square number 10 as known and designated in the plan of the town of Charlotte, being the property on which the testator lived at the time of his death."

XI. The plaintiff further introduced the will of said White, bearing date 22 July, 1869, in which authority is conferred upon his executor to sell whatever land he owned.

He also exhibited a map or plan of Charlotte, now become a city, and proved by Frederick Nash, for fifteen years past its clerk and treasurer, its official recognition as such by the authorities of the city. This map was made by James Parks, presented to and adopted by the commissioners, and approved by the intendent, as a correct representation of the plan. T. J. Orr, a surveyor, testified to his having run and measured the lines from the intersection of Trade Street with Tryon and College streets, down to Fourth Street, thence to Third Street, and so continuing along Tryon Street 198 feet. The distance run
(177) from the two starting points was 396 feet to Fourth Street, then allowing 22 feet as its width, 396 feet to Third Street, then allowing 22 feet as its width, 198 feet as aforesaid. In like manner, the line was run and measured on College Street, until a point was reached on square No. 10, 198 feet from Third Street. These *termini* were then connected by a line which bisects the square. This forms the divisional boundary, as claimed by the plaintiff, between lots 70 and 71, and between lots 78 and 79; that this location of the lots and streets corresponds with the map of the city, and leaves the disputed territory within the limits of lot 78.

The witness stated that he found a plank fence on College Street, 18 feet north of his central line, on each side of which, extended towards Tyron Street, was a house, one on the north from 4 to 10 feet distant from the fence; the other on the south, from 6 to 7 feet distant, and through the middle of it the line so run passed; and that if the fence be the boundary, lots 77 and 78, would have a frontage on College Street of 180 feet, and lots 79 and 80, a frontage on the same street of 216 feet. Another witness, A. J. Caldwell, who acted with the preceding witness in making the survey, gave similar evidence about the running lines, and stated that Second and Third streets have been made wider since they were originally laid out, the former 4 and the latter 12 feet, taken from square 121, and for this change an allowance was made

in conducting the survey; that the disputed line, as made on his map, is northeast of the central line, and between it and the dotted line as shown in the map; that the distance from the terminus of the dotted line to Third Street, is 180 feet, to Second Street 212 feet, and to the line of Second Street, before it was divided, 216 feet, thus forming a square.

On cross-examination, he testified to finding the defendant's fence at the dotted line, as far back as 1879, with houses on either side, within a few feet, whereof the plaintiff had possession of one and the defendant of the other, while the line claimed by the plaintiff (178) would cut defendant's house in two parts. His further testimony was about the conformity of the streets to the map, wherein they are laid down, and it is not necessary to recapitulate it.

The plaintiff, now 78 years of age, examined on his own behalf, stated that he has known the lots in square 10 since 1835. That William J. Alexander then lived on the property now occupied by himself; then David Asbury, and he was succeeded by William E. White; that witness bought at the sale made by the executor in 1865, and has had possession ever since; that lots 71, 72, 79 and 80, were occupied from 1835 to 1840 by Marshall Polk, in 1840 by him or Dr. Caldwell, and in that year by R. C. Carson, and thence up to his death in 1857, and afterwards by his widow and heirs at law, until 1861, when they passed into the possession of Dr. Gregory, who had married Carson's widow; that in 1865, the executor of White had possession of the land claimed by defendant, then a clover lot, and had a stable and privy upon it; that according to his memory, there was not any fence there in 1835, running across the square where Alexander lived then, nor does he know that the latter had a garden on the premises; that when Asbury occupied it, there was a fence between lots 78 and 79, and so it was when witness entered into possession. It was an old fence, but while witness believes it was not on the same line as the last fence, he cannot undertake to say how the fact is, but while he has repaired it, he has never constructed a new fence.

It was admitted that the defendant had been in possession of the disputed land since 1871.

We pass over the objection to the admission of the sheriff's deed and the plan of the city, with the remark that it lies not to the introduction of the deed, but its effect, unsupported by proof of his possession of legal authority to make the sale and conveyance, and to its harmlessness as an offered monument of title, and say the map thus (179) authenticated was most clearly competent in ascertaining locations.

1st Exception: The defendant proposed to inquire of the plaintiff, in the course of his examination, if the defendant did not, in 1871,

with knowledge and without objection from the witness, build a house between the straight and dotted lines, as tending to show the position of the true line, and second, as an estoppel on the plaintiff now to contest it. This, on objection, was ruled out.

He again proposed to show, and for the same purpose, that in 1872, the defendant moved a house from some other part of the lot, near to the fence in the dotted line, and that it having slipped on the skids, and gone beyond the fence, the plaintiffs required its removal back to defendant's side of the fence, which was done; but being in a position that the water dripped on plaintiff's side of the fence, he was required to move it still further on plaintiff's side, and that thereafter the defendant erected a valuable house near the fence, with plaintiff's knowledge and acquiescence. This was also ruled out as incompetent.

The plaintiff asked for the following instructions, which were given:

I. That the fact that Julius Alexander and Asbury held up to the fence on the line claimed by the defendant, is not evidence for them to consider in determining where the three lines of lot No. 78 were, as laid down in the map of the city in 1860, when the deed to the plaintiff was made.

II. That the line to be ascertained by the jury, is the boundary line between lots Nos. 78 and 79, as laid down on the map of the town of Charlotte.

III. That if the jury shall find that the land in controversy lies within the bounds of lot No. 78, as designated in the map or plan of the town of Charlotte, then they must find the first issue for the plaintiff.

(180) The defendant asked for the following instructions:

1. That in order to recover, the plaintiff must show a title derived from the State, with which he must connect himself, which he has failed to do in this case, or he must show title out of the State, and seven years adverse possession of the land in dispute under color of title.

2. That the plaintiff has shown no adverse possession under color of title of the *locus in quo.*

3. That if the jury find that the line contended for by the plaintiff, is the line called for in the deed of White to the plaintiff, then the possession of a part of the land conveyed by his deed, would not be a possession of the *locus in quo,* provided there was an actual adverse possession of the *locus in quo* by some one else.

4. That the burden of proving where the true line between lots Nos. 78 and 79 is, is upon the plaintiff, and if the jury are in doubt as to its true location the defendant is entitled to a verdict.

5. That upon all the testimony in the case, the plaintiff is not entitled to recover.

The second and fifth prayers for instructions by the defendant were refused, and the others were also refused, except as they were included in the general charge of the court.

The defendant also asked his Honor to instruct the jury:

6. That even if the jury should locate the line between lots 71 and 70, as claimed by the plaintiff, yet if they find that in the year 1840, and from then on to 1861, when lot No. 79 was sold by Wilson, administrator, to White, R. C. Carson and others claiming under him, held actual, continuous, notorious and adverse possession of the land in dispute up to the fence, the plaintiff cannot recover, and they should find the issue submitted in favor of the defendant.

His Honor responded to this instruction as set forth in his general charge to the jury.

His Honor charged the jury as follows: (181)

1. The burden is on the plaintiff in this action, to show by a preponderance of testimony, that he has title to the land described in the complaint, and if the plaintiff has not satisfied the jury by a preponderance of testimony that he is the owner and has the title, the jury will respond to the first issue, "No."

If the plaintiff has so satisfied them, they will respond "Yes" to the first issue.

2. In actions for possession, the plaintiff may show title in himself by a connected chain of title from the State, or from the Sovereign of the British Empire before the date of our independence; or the plaintiff may show the title out of the State, and possession under color of title for seven years; or without exhibiting a title from the State or Sovereign, may show continuous adverse possession under color of title for twenty-one years; or after showing title out of the State by thirty years actual possession, the plaintiff may show continuous adverse possession in himself and those under whom he claims, for twenty years before the action was brought.

3. If both lots, Nos. 78 and 79, have been shown to have been enclosed and occupied by any person for thirty years, prior to 28 January, 1880, when the action was brought, not counting the time between 20 May, 1861, and 1 January, 1870, the law presumes from such possession that a grant has been issued by the State. It is not necessary that the persons holding possession of either or both lots should have claimed under the same right, or should have been in privity. Such possession would be sufficient to raise a presumption of a grant as to the *locus in quo*, if it is shown to have covered both lots (Nos. 78 and 79), whether in different persons or the same person, continuously from 1835 to the

bringing of this action, even though the possession of the *locus*
(182) *in quo* was adverse to the plaintiff, after the plaintiff entered in 1865, and up to the bringing of this action in 1880.

4. If the evidence raises a presumption that a grant was issued, and if the plaintiff has satisfied the jury by a preponderance of evidence, that lots Nos. 78 and 79 was each enclosed and held continuously in possession from 1835 till the former (No. 78) was conveyed to W. E. White by Asbury in 1855, and until the latter was conveyed to W. E. White by Carson's administrator in 1861, and that White and his executors held continuous possession of each of said lots from the time it was conveyed to him, till lot No. 78 was sold to the plaintiff in 1865 by said executor, then the plaintiff has shown continuous possession in himself and those under whom he claims, for twenty years, of the land described in the complaint, and the jury should respond to the first issue, "Yes."

5. The burden is also on the plaintiff, to show that the defendant was in the wrongful possession of the land in controversy when the action was brought, and if the plaintiff has shown title in White, and prima facie to lot No. 78 in himself, he must still satisfy the jury in the same way, that the line of lot No. 78 runs according to the plan of the city of Charlotte, as recognized by the constituted authorities of the town, on 22 May, 1869, including some portion of the land in controversy. If the jury find that the line of lot No. 78 so run, included any portion of the land south of the dotted line (fence) as laid down on the plot (supposing they have responded "Yes" to the first issue), then they will respond "Yes" to the second issue; otherwise, "No."

6. The court is asked to charge the jury, that if the line of lot No. 78, run according to the plan of the city made in 1855, includes the *locus in quo,* and the *locus in quo* was in the adverse possession of R. C. Carson and those under whom he claimed, from the year 1835, till Carson's administrator conveyed to William E. White in 1861, then the
(183) plaintiff has not shown title to the *locus in quo,* good against the heirs at law of R. C. Carson.

The court instructs you, that in order to maintain this proposition, the burden would be upon the defendant, to show by a preponderance of testimony, that a title by actual possession matured in R. C. Carson or his heirs at law in 1861, or prior thereto, and that the line of lot No. 78 included the *locus in quo,* not only subsequent to the making of the map of the city in 1855, but for twenty years prior to 3 May, 1861, and no evidence has been offered by either of the parties to locate the lines of said lot prior to 1855.

The jury found the issues in favor of the plaintiff.

It will be observed that every deed introduced in support of the plaintiff's title, except the earliest, which conveys 300 acres not shown to include the land in dispute, from that of the trustees and directors of the town of Charlotte to Isaac Alexander and others, undertakes to convey the four lots claimed by the plaintiff, designating them by numbers, and as being in Charlotte; and, all but the first, locating them according to the plan of said town. The survey made and accepted in 1855, as the town *then was,* and as presumed to have been originally laid out, except as intervening changes may have been made in widening the streets, as testified by the surveyor Caldwell, shows the disputed territory to be within the boundaries of lot 78.

While the title is not traced continuously and without interruption in these conveyances, they nevertheless, as evidence of asserted property in those who made them, show that the lots thus numbered and with defined lines, have been known as such for more than a century.

If then, the property in them has vested in the plaintiff, its extent is measured by the lines that enclose it, except as some other person has acquired a part by such possession and so prolonged, (184) as to operate as a legal transfer.

The testimony of the plaintiff as to the possession, commencing in 1835, of the lots as separated by the divisional line across the square, by the different claimants without the aid of antecedent deeds, was properly left to the jury, and warrants the verdict that the title of the State thereto had become divested by the presumption of the issue of a grant, for to effect this, it was not necessary to show a privity in estate of the successive occupants. *Davis v. McArthur,* 78 N. C., 357.

The succession of the deeds, from that of the sheriff to the bank, in August, 1842, down to that to the plaintiff, is unbroken, and the plaintiff testifies that William J. Alexander, who held the deed of Thomas J. Polk, made in 1826, was in possession of the lots, now in his own occupation, in 1835, and after Alexander, it was in possession of Asbury and White and witness.

The possession of Asbury, under his deed from Grier, executed in July, 1848, until he conveyed to White in November, 1858, more than ten years, would put the title in him, without the aid of White's continuance of possession afterwards.

In like manner, the lots 71, 72, 79 and 80, were proved to be occupied from 1835 to 1840, by one Marshall Polk, in that year by him or Caldwell, and then by Carson, until his death in 1857, and thereafter by his widow and her second husband, Gregory. The interest of Carson was transferred by the deed of his personal representative, in May, 1861, to the before mentioned William E. White, and are therein

described as "being in the town of Charlotte, and known as lots Nos. 71 and 72, fronting on Tryon Street, and Nos. 79 and 80 back, being the lots on which the late R. E. Carson lived at the time of his death," etc. Under this color of title, the possession of Carson to his death in 1857, would perfect it in him. But as such color, the deed would (185) enure to his benefit up to and not beyond the boundaries of the lots as fixed in the plan of the town.

Thus the title to both sets of lots was in White at his death, and his executor's prior deed of four of them to the plaintiff, and his posterior deed of the others to whomsoever made, of which no proof seems to have been offered at the trial, like its retention by himself, would be in subordination to the calls of that of the plaintiff.

Whatever divisional line might have resulted from previous long use and occupation, and the presumption thence arising, it is manifest that the plaintiff has acquired all the territory embraced in lot 78, as ascertained by reference to the plan and map of the city. Thus the controversy returns to the same position in which it was presented in the other appeal, and must be similarly solved.

The facts proposed to be proved, and ruled out, were, for reasons given in the former opinion, incompetent for the purposes indicated, since the line, if any, produced by occupation and acts of ownership, was obliterated by the union of the title to each in White, and his executor's deed must be construed by the descriptive words of the subject-matter contained in it. The rejected evidence would have been competent to fix an uncertain and controverted boundary, but not to *change* that made in the deed that distinctly defines it.

As an estoppel, it could not operate to vary the position of the dividing line, as determined by the grantor, who owned both lots, whatever equitable claim might thence arise as to the increased value imparted to the premises by reason of the improvement. Without going into a needless repetition (and the case has already been protracted in the examination and discussion), we deem the appellant's exceptions disposed of substantially in our former ruling, and find no reason (186) to disturb the verdict and judgment of the present trial.

The judgment is affirmed.

No error. Affirmed.

Cited: Roberts v. Preston, 100 N. C., 249; *Blow v. Vaughan,* 105 N. C., 205; *Cheatham v. Young,* 113 N. C., 166; *Hanstein v. Ferrall,* 149 N. C., 244; *Kirkpatrick v. McCracken,* 161 N. C., 200; *Taylor v. Meadows,* 175 N. C., 375; *Woodard v. Harrell,* 191 N. C., 197.

STATE EX REL. COLLINS, SOLICITOR, ETC., v. J. T. GOOCH ET AL.

Guardian—Receiver.

1. As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith, but when a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian.
2. A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made.
3. It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian.
4. A receiver or other trustee may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence he will not be held liable if the bank fails, but this does not authorize a loan to the bank by such trustee without taking security.
5. Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another State to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed: *It was held*, that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith.

(*Boyett v. Hurst*, 1 Jones Eq., 166; *Moore v. Askew*, 85 N. C., 199; *Railroad Co. v. Cowles*, 69 N. C., 59; cited and approved.)

CIVIL ACTION, heard on a case agreed, by *Shipp, J.*, at Janu- (187) ary Term, 1887, of HALIFAX Superior Court.

Pending the action on the guardian bond of the defendant Hervey and his sureties, John T. Gregory, clerk of the court, was appointed receiver, and funds belonging to the infants Annie N. and Maggie W. Conigland came into his hands as such. The order was made at Spring Term, 1882, in these words:

"This cause coming on to be heard, and it being made to appear to the satisfaction of the court, that John T. Gregory is a suitable and responsible person to appoint as receiver of the estates of Annie N. Conigland and Maggie W. Conigland: now, on motion of the relator of the plaintiff, and of the attorneys for the infants: It is ordered and adjudged by the court, that the said John T. Gregory be, and he is hereby appointed receiver of the estates of the said Annie N. Conigland

and Maggie W. Conigland, infants, with all the powers conferred by law upon such receiver; that no bond be required of him; and that he be permitted to expend the income of the said infants for their maintenance and education during the next twelve months, and such other sums not exceeding one hundred dollars, for services rendered, and to be rendered said infants by their attorneys; and that he make annual returns to this court, to be passed upon and audited in this cause by the judge presiding.

Among the moneys collected by the receiver, was the sum of $2,616.16 paid by the administrator of the deceased father of the infants, whereof a portion was deposited by him in a bank in Norfolk, and a certificate taken in the following form:

"THE EXCHANGE NATIONAL BANK

Norfolk, Va., 19 October, 1882.

"John T. Gregory has deposited in this bank twenty-two hundred and eighty-five dollars and nine cents, payable to the order of J. T. Gregory, receiver of Annie N. and Maggie W. Conigland, on the return (188) of this certificate properly endorsed.

"The holder is entitled to interest from date, at the rate of six per centum per annum, if it remains three months or longer, but this bank reserves the right, upon giving ten days notice, to reduce the rate of interest on the 1st day of January and 1st day of July of each year.

"Such notice to be served personally, or through the post office, directed to the address named on the books of this bank.

"No. 1051. JOHN W. WHITEHEAD, *President.*"

The bank failed in April, 1885, at which time it was indebted on the certificate of deposit $2,102.29, with interest from 19 September, 1884, of which $1,185.16, with interest from 1 November, 1884, was for the benefit of the said Maggie W. Conigland. The receiver had theretofore paid over to the said Annie N. Conigland, who became of age ..... day of ....., 188...., her part of the fund, her interest therein then belonging to him.

At the time of making said deposit, and up to the failure of the bank, the receiver believed it to be a perfectly safe and convenient investment, at a good rate of interest; the bank, up to its failure, was considered solvent, had good credit, and possessed the full confidence of the business community.

The receiver kept his own private account current with the bank, but had none of his funds deposited there or in any other bank, on

certificate, except, as he had paid over to said Annie N. her share of the deposit money, it had become his own.

The receiver filed annual accounts of the funds up to and including Fall Term, 1884, which were approved by the court, and ordered to be put on the record, but in none did he report what invest- (189) ments he had made, or what securities he had taken therefor.

It is unnecessary to go into further details, since in the general account of the trust funds, the only controversy is in reference to the personal accountability of the receiver for the loss sustained by reason of the insolvency of the bank.

Upon the facts embodied in the case agreed, the court was of opinion that the loss should fall upon the fund, and rendered judgment against the receiver for the residue in his hands with interest, instead of the larger sum of $2,203.78 which he owes, if charged with the sum so lost.

From this judgment the relator of the plaintiff appealed.

R. O. Burton for plaintiff.

W. H. Day (J. M. Mullen and Daniel also filed a brief), for defendant.

SMITH, C. J., after stating the facts: It is manifest that there being no guardian, the receiver was appointed to act substantially as such, in taking care of and disbursing the fund. He is allowed to expend the income in the maintenance and education of the infants during the succeeding twelve months, and required to make annual returns, "to be passed upon and audited" by the judge presiding. While a receiver generally, as a trustee, is responsible only for the consequences of his own neglect, and is protected when he acts in entire good faith in the management of the estate committed to him, yet the measure of duty and responsibility is to be found in the capacity in which he acts. In this case he is a *quasi* guardian, required to keep the money safely invested and bearing interest, which he may expend as income, for the infants; so that we may find in the similarity of functions, some aid in determining the liability of his office, in ascertaining that of guardians.

Now, we think a guardian would be deemed derelict who should (190) thus invest the estate of his wards, by deposit in another State and without security. However solvent may be the person or persons to whom, as principals, money is loaned, it is his duty to require further security. *Boyett v. Hurst,* 1 Jones Eq., 166.

While this is a positive obligation imposed by statute, it is a recognition of a safe rule for the preservation of the property, whose whole management is entrusted to the control and discretion of the trustee.

Moreover, it was an improvident disposition to place the fund not only in a bank in another State, but also far from his personal oversight and observation, which were due in order to its preservation.

Furthermore, it is made the duty of the guardian to render his annual account and report the manner and nature of such investment as he may have made of the trust estate, The Code, sec. 1617, *Moore v. Askew,* 85 N. C., 199, to the end that the sanction or direction of the court may be had for every act which could affect the ward or his estate. Is not this duty implied, and as much needed, when the receiver as a *quasi* guardian, is managing the trust fund? Had he reported the deposit and been sustained by the judge, he would have had ample protection. It was at his own risk that he neglected to secure this sanction. We do not impute to the receiver any intentional dereliction in the premises, for the unusual order dispensing with bond and securities shows the confidence both of the court and counsel in his personal integrity and fitness for the place, and we have no doubt that it was well merited, but we are indicating and enforcing a statutory rule of fiduciary obligation, necessary for the security of fiduciary interests. We are aware of cases, indeed they are numerous, where a receiver is held justified in using banks as depositaries and disbursing agents, as affording facilities in the settlement of estates and in transmitting
(191) money by bill to distant residents entitled, as in *Knight v. Lord Plymouth,* 3 Alk., 480; *Rowth v. Howell,* 3 Ves., 565. To like effect is the ruling in *R. R. v. Cowles,* 69 N. C., 59.

These, however, are acts done in discharge of a duty, to which such agencies furnish great facilities, and are strictly proper. But the present case is different. The receiver insists and takes a security in the form of an assignable certificate, designating, it is true, the character of the fund, as in other cases of making a loan. He leaves the fund for a considerable period, without asking the advice, or making known what he has done, to the judge, whose officer he is, and under whose authority he acts. Under the circumstances, we think there has not been that circumspection and vigilance due from the trustee, and that he ought to make good the loss.

Judgment reversed, and judgment for the whole amount. The residue of the judgment will not be disturbed.

Error. Reversed.

Cited: Moore v. Eure, 101 N. C., 15; *Cobb v. Fountain,* 187 N. C., 338.

JAMES L. CARROLL AND WIFE v. JOHN BARDEN.

Appeal.

Where neither the record nor the case on appeal shows any exception or assignment of error, the judgment will be affirmed.

(*Phipps v. Pierce*, 94 N. C., 514; *Lytle v. Lytle, ibid.*, 522; *Pleasants v. R. R.*, 95 N. C., 195; cited and approved.)

CIVIL ACTION, heard on appeal from a justice of the peace, by *Clark, J.*, at Fall Term, 1886, of SAMPSON Superior Court.

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

No counsel for plaintiffs. (192)

H. E. Faison, A. W. Haywood and Kerr for defendant.

MERRIMON, J. We have carefully examined the record of this appeal, and fail to find either in it, or the case settled upon appeal, any exception or assignment of error. There is nothing appearing, that in terms or by the remotest implication indicates the slightest dissatisfaction with the judgment appealed from, except simply that the appeal was taken to this Court. It is settled by a multitude of decisions, that in such case the judgment must be affirmed.

The presumption is that the judgment is not erroneous. The party who alleges the contrary must show it, not by oral suggestion on the argument, but he must assign it in the record in such reasonable way as that this Court can see it. This is essential. The statute prescribes how this shall be done. *Phipps v. Pierce,* 94 N. C., 514; *Lytle v. Lytle, ibid.*, 522; *Pleasants v. R. R.*, 95 N. C., 195. See, also, Clark's Code, p. ...., where many earlier cases are collected. Judgment affirmed.

No error. Affirmed.

R. J. M. BARBER v. R. M. ROSEBORO.

Judge's Charge—Exception to.

1. Where the assignment of error to the judge's charge to the jury, was "that the appellant excepted to the whole charge and especially to the instruction on the third issue": *It was held,* that such assignment of error was improper.

2. Where there is no evidence to prove the affirmative of an issue, it is not error for the judge to so charge the jury.

(193) CIVIL ACTION, tried before *MacRae, J.*, at February Term, 1886, of ROWAN Superior Court.

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

No counsel for plaintiff.
Theo F. Klutz for defendant.

MERRIMON, J. The case settled upon appeal states, that "the plaintiff excepted generally to the whole charge, and especially to the instruction given upon the third issue."

Error cannot thus be assigned as to the whole charge—it must be specified with reasonable certainty, and designate the particular part or parts of the charge to which there is objection.

We think the instruction given the jury as to the third issue was correct. The inquiry was: "Did the defendant wrongfully discharge the plaintiff?" So far as appears, all the evidence bearing upon it tended to prove that the defendant did not discharge the plaintiff; but another person—a subcontractor—did, the defendant objecting. The court might, therefore, properly tell the jury, that "on this testimony, you will be obliged to hold that defendant did not wrongfully discharge him." If there was no evidence tending to prove the affirmative of the issue, the court might so instruct the jury, and tell them that they ought to render a verdict in the negative.

The judgment must therefore be affirmed.

No error. Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 362; *Woodbury v. Evans,* 122 N. C., 781.

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(194)

RICHMOND PEARSON, EXECUTOR, ET AL. v. SAM'L CARR.

Reference—Final Judgment—Damages.

1. No order of reference can be made to ascertain any facts taking place after the final judgment.
2. After final judgment in the Supreme Court, the Superior Court has no power to order a further reference, or to take any action in the cause.
3. So, where after finding judgment in the Supreme Court, it was suggested that since the date to which the referee's report settled the rights and liabilities of the parties, the plaintiff had remained in possession of the land and become liable for additional rents: *It was held,* that the right

could not be enforced in this action, but the defendant must bring a new action to ascertain the amount of such additional liability.

4. Under the former practice, in an action of ejectment or trespass, damages were awarded only up to the time of bringing the action, but under the present system, they are recoverable up to the time of the trial.

(*Whissenhunt v. Jones*, 78 N. C., 361; *Burnett v. Nicholson*, 86 N. C., 99; *Grant v. Edwards*, 88 N. C., 246; cited and approved. *Bledsoe v. Nixon*, 69 N. C., 81; distinguished.)

MOTION, by the defendant in the cause, to reopen an account, heard before *Shipp, J.*, at June Term, 1886, of BUNCOMBE Superior Court.

This case was before the Court at February Term, 1886, and is reported in 94 N. C., 567-574. The motion was refused, and the defendant appealed.

The facts appear in the opinion.

No counsel for plaintiffs.
C. A. Moore for defendant.

SMITH, C. J. In deciding the double appeal in this case, at the February Term, 1886, we used these words in concluding the opinion: "The investigations of the referee have been careful, (195) painstaking and thorough, and the results conveyed in his report. Under the correcting hand of the revising Court, his errors have been rectified; and, in our opinion, substantial justice is meted out in the *final judgment of the Court;* and of this the plaintiffs have no just grounds for complaint."

Thus every matter in controversy in the suit was adjusted, and the cause absolutely determined. When the action of this Court was certified to the Superior Court, the defendant's counsel, suggesting that since the period down to which the referee brought the conflicting claims of the parties, the plaintiff continuing his occupancy of the land, has become liable for further rents and profits, as well as damages for waste committed, moved the court to reopen the reference, in order that an account of these may be taken, and the plaintiff charged with these also; that is, he proposes in effect to reopen the controversy, settled by a conclusive and final adjudication, and introduce matter of subsequent occurrence, not involved in the decision, for inquiry.

The court very properly refused to entertain the motion, for that the final judgment was not in that, but in the appellate court. From this the defendant undertakes to appeal, and thus bring up the record again.

Upon the hearing of the appeal, it was intimated to defendant's counsel that an interference with the cause, if permissible at all, must

be in this Court; and thereupon a petition was filed here, asking the same relief as was refused in the court below.

We have no hesitancy in denying the application, as irregular and warranted by no practice or precedent known to us. If it were allowable upon such grounds, causes would not be settled, though everything in dispute had been adjudicated, and judgments final would become little more than orders in the cause, and in violation of the maxim, *"interest republicæ, ut sit finis litium."* There must be some time in the
(196) progress of an action to which all opposing claims must be computed, and when that point is reached and these all determined, it of necessity comes to an end.

In *Bledsoe v. Nixon,* 69 N. C., 81, a similar effort was made in the Superior Court to obtain a new trial of one of the issues disposed of in the reference, and upon appeal the proceeding was dismissed, because the cause was in the Supreme Court.

But the application was entertained as made in the Supreme Court, and the relief, after some hesitancy, granted, and there would otherwise be no remedy for the wrong. This was done upon newly discovered evidence. While this case, as a precedent, sustains the ruling of the court below in declining to take cognizance of the subject-matter of the complaint, it gives no support to the present demand, in whichever court preferred.

Here there is no alleged wrong in any of the rulings entering into the judgment, which can only be corrected by its reformation, and this upon a petition to rehear, or for evidence lately discovered, material in its bearing, and where there has been no negligence in bringing it forward at the proper time.

The claims of the defendant, if well founded, are not concluded in what has been done, but may be asserted, and must be sought in a new action.

Under the former practice, when the possession of land was the object of the action, or where acts of trespass were to be redressed, compensation was awarded only for such as were committed before the bringing of the suit. Now, damages are recoverable up to the time of trial. *Whissenhunt v. Jones,* 78 N. C., 361; *Burnett v. Nicholson,* 86 N. C., 99; *Grant v. Edwards,* 88 N. C., 246.

But in no case in the one action are they to be recovered after final judgment. Such trespasses are continuous and separate, and
(197) no court can look into the future and determine how long they may be repeated, or when they will cease.

This appeal must be dismissed, and the application in this Court denied.

Dismissed.

Cited: White v. Butcher, ante, 10; *Brendle v. Herren, post,* 259; *Arrington v. Arrington,* 114 N. C., 120; *Credle v. Ayers,* 126 N. C., 16; *McCall v. Webb, ibid.,* 762; *S. c.,* 135 N. C., 366; *Tussey v. Owen,* 147 N. C., 337.

D. G. McMILLAN ET AL. v. MARCUS A. BAKER.

Practice—Res Judicata—Issues.

1. Where the Supreme Court has passed upon the effect of record and documentary evidence in one appeal and remanded the case for a new trial, it is not error for the trial judge to refuse to submit an issue to be found only on such evidence, when it was declared by this Court to be insufficient for that purpose.
2. The ruling of the Supreme Court in such case, is not *res judicata.*
3. A written statement of the defendant relating to the subject-matter of the action is clearly competent evidence against him.
4. Where there is a verdict in favor of the appellee, the Supreme Court can only award a new trial for error committed on the trial before the jury, and cannot reform the verdict or give final judgment for the appellant.

CIVIL ACTION, tried before *Boykin, J.,* and a jury, at May Term, 1886, of CUMBERLAND Superior Court.

The case has been twice before this Court, and is reported in 85 N. C., 291; and 92 N. C., 110.

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

N. W. Ray for plaintiffs.
E. R. Stamps for defendant. (198)

SMITH, C. J. When this case was before us on a former appeal, 85 N. C., 291, the force and effect of the documentary proofs offered in evidence in determining the nature and extent of the trust estate vested in Elizabeth Ann McMillan, the mother of the plaintiffs, and the defendant's title under the sale by execution against her, were passed on and decided.

It was declared, that the deceased trustee, Ronald McMillan, under the deed from Williams, made pursuant to the decree of the court, held the land in trust for the sole and separate use of the said Elizabeth Ann for life, and in remainder for their children.

It was further declared, that if any estate in the land passed to the defendant under the sheriff's sale and deed (which was by no means admitted), it expired at her death, and that of the plaintiffs vested in possession.

But the case was not presented in a form permitting a final adjudication in this Court, since the verdict under the adverse ruling of the court was in favor of the defendant, and could only be set aside to be passed on afterwards under proper instructions, unless the parties consented to act upon the opinion without another jury. This has not been done, and upon the trial issues were submitted and passed on as follows:

1. Are the plaintiffs owners of and entitled to the possession of the lands described in the complaint? Answer: Yes.

2. What damages have plaintiffs sustained by the defendant's possession of the lands described in the complaint since the death of Mrs. McMillan on 5 April, 1878, up to the present time? Answer: $1,000.

3. Did Ronald McMillan pay for the land in controversy when he bought from D. S. Williams with the trust fund received by him from Lewis, trustee? Answer: Yes.

(199) Judgment having been rendered for the plaintiffs, the defendant appealed.

Ex. 1. The court declined to submit an issue proposed by the defendant as to alleged mistake in the declaration of trusts in the deed from Ronald McMillan to David Lewis, trustee, made 21 May, 1849, in favor of the children of Elizabeth Ann by her husband Ronald. The refusal was based on the fact that the record and documentary evidence, now proposed to be introduced, was the same and none other, as that used in the former trial, upon which this Court had already ruled adversely to the defendant. The proofs being the same and their effect having been already passed on, though not presenting a case of *res judicata* with its consequences, the course of the court was entirely correct, and exhibits a proper respect for the opinion of this Court. The refusal stands upon the same footing as if an issue had been submitted and a response rendered under the direction of the court; or rather an issue, which, however answered, would be immaterial and without effect.

Ex. 2. The jury were instructed to find the first issue in the affirmative. There was no error in this, for it was but declaring the law as laid down in the first appeal, as the proofs were the same as were then before the appellate Court.

Ex. 3. The record shows an objection to the exhibition in evidence upon the question of damages, of a statement of account between the defendant and the plaintiff Daniel G., bearing the signature of the former, and offered to corroborate the testimony of the latter as to rents and

receipts from cotton grown upon the land. We infer from the statement of the judge, that this exception was not intended to be presented in the transcript, but it is there and must be disposed of.

We are unable to see any ground in support of the exception. It is the written statement of the defendant, and as clearly pertinent to the inquiry, so it is certainly competent. (200)

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

No error. Affirmed.

S. L. LOVE ET AL., EXECUTORS, ET AL. v. R. V. WELCH.

Specific Performance—Statute of Frauds—Pleading.

1. If one agrees in writing to convey land in consideration of the verbal promise of the vendee to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part, if he chooses to plead the statute of frauds.
2. In such case, the fact that the vendor is bound while the vendee is not, will be considered in passing on a demand for specific performance by the vendee, and if the vendee has allowed much time to elapse, specific performance will not be decreed.
3. So, where a vendee who was not bound in writing to pay the purchase money, allowed thirty years to pass before he asked for specific performance, during all of which time he had not tendered payment, and did not offer any excuse for his long delay, specific performance was refused.
4. 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, such discretion to be governed by the rules laid down by the courts of equity in this respect.
5. Where the counterclaim asking for specific performance, alleged that the purchase money was paid in full, but the jury found that this had not been done; *It was held*, that the defendant was not entitled to specific performance in this state of the pleadings.

(*Mizell v. Burnett*, 4 Jones, 249; *Green v. R. R.*, 77 N. C., 95; *Cannaday v. Shepard*, 2 Jones Eq., 224; *Llyod v. Wheatley*, *ibid.*, 267; *Herren v. Rich*, 95 N. C., 500; cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, and a jury, at Fall Term, 1886, of HAYWOOD Superior Court.

This action, begun on 12 February, 1885, by two of the four (201) executors of James R. Love, of the others, one having died, and

the other became insane since their qualification, to whom were afterwards added the other plaintiffs (the heirs at law and devisees of the testator, and the husbands of such as were married), is to have declared null certain deeds for land, bearing the signature and seal of the testator, alleged to have been delivered to the defendant without authority from the testator, and registered in the county.

The answer controverts these allegations; declares that full payment of the purchase money for both tracts has been made, and possession taken and maintained by the defendant for a long series of years; and as a claim for affirmative relief, demands that title be made to him for the 1757 acre tract described in the first article of the complaint, for which no deed had been given by the testator. Issues were submitted, and responded to as follows:

I. Were the deeds mentioned in the complaint delivered by James R. Love to his agent, P. W. Edwards, without the knowledge of the defendant Welch, and with instructions to retain said deeds in his possession until the defendant Welch should surrender to said Edwards certain bonds or evidences of title to land? Answer: No.

II. Were the said deeds delivered by James R. Love to said Edwards, with instructions to deliver them to defendant Welch, and did said Edwards deliver said deeds in accordance with said instructions from James R. Love? Answer: Yes.

III. Did the said Edwards deliver said deeds to Samuel L. Love, one of the executors of James R. Love, and did Samuel L. Love deliver said deeds to the defendant R. V. Welch, before the conditions prescribed by James R. Love as precedent to their delivery were performed by said Welch? Answer: No.

(202) IV. Were the said deeds delivered to the defendant Welch after the death of James R. Love? Answer: Yes.

V. Did James R. Love contract and agree with defendant R. V. Welch before the date of said deeds, to convey to him the land covered by the deeds, and did defendant pay the price agreed to James R. Love for said land? Answer: No.

VI. Did James R. Love contract and agree with defendant Welch to convey the 1,757 acre tract mentioned in defendant's answer, and covered by the paper signed by J. R. Love, upon the payment of a price agreed, as alleged, on 28 November, 1854? Answer: Yes.

VII. Has the defendant paid the purchase money so agreed upon as the price of said last named tract? Answer: No.

VIII. Was the instruction given to, or the understanding had between J. R. Love and Edwards, when said deeds were delivered to Edwards, in reference to said deeds, such, that under the terms of such instruc-

tions or agreement, said Love had the power to take said deeds out of the hands of Edwards at any time before delivery to defendant? Answer: No.

Upon the verdict, the following judgment was rendered:

"This cause coming on to be heard upon the issues and the responses thereto by the jury, upon motion of counsel, it is ordered and adjudged by the court, that the defendant is the owner of the twenty-seven hundred acre tract of land mentioned in the pleadings, and that plaintiffs are in law and equity the owners of the seventeen hundred and fifty-seven acre tract of land described in the survey appended to the defendant's answer, and mentioned in the pleadings, and that defendant is not entitled to conveyance for said land. And it is further ordered, that the defendant recover the costs of this action, to be taxed by the clerk of Haywood County." (203)

The only evidence of the contract for the sale of the 1750, more accurately 1,757 acre tract, is contained in the following writing:

"P. W. EDWARDS,

SIR—You will run for R. V. Welch all the lands from his lower line between him and the Plott line, and keeping a straight course to the top of the ridge which divides the two Richlands. I mean our fork and the Allen fork, keeping that main ridge to where the grassy ridge leaves the same, keeping down the grassy ridge to a stake on the original Allison line, then with that line to the "Ashe corner," at the head of a prong of Scott's Creek, near the wagon road, as I have sold him all my interest in the same at the rates of fifteen cents per acre.

28 November, 1854." (Signed) J. R. LOVE.

The land was accordingly surveyed as directed in this note, but no deed conveying it was ever executed, nor was there any evidence of the defendant's being in possession of any part of the tract, while it was conceded he did have possession of a portion of the 2,700 acre tract, described in the second article of the complaint, as a tenant in common with the testator, and had acquired such possession before the date of the deed therefor to him.

It was in evidence, that the smaller tract had greatly advanced in value since November, 1854, the date of the letter to the surveyor, and was now worth from one to three dollars per acre. The answer averred full payment for both tracts, while the verdict establishes the contrary as to the smaller, if not as to both.

From so much of the judgment as refuses specific performance (204) of the alleged contract to convey the 1,757 acre tract, on payment of the purchase money specified therein, the defendant appeals.

R. D. Gilmer for plaintiffs.
R. T. Gray, W. B. Furguson and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the facts: It is to be observed, that the defendant has never entered into a written contract to bind himself to pay for the land, and this is as necessary to impose an obligation on the vendee as it is upon the vendor. It is only required by the statute that the written instrument be signed by the party to be charged, or some one authorized on his behalf, and hence one may be bound and the other not by the contract. It is so ruled in *Mizell v. Burnett,* 4 Jones, 249, in which *Pearson, J.,* delivering the opinion, says: "If one agrees in writing to convey land, in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part, if he chooses to protect himself under the provisions of the statute." To same effect in *Green v. R. R.,* 77 N. C., 95.

The difference in the relations of the parties to the contract, its obligation resting on one, and incapable of being enforced against the other, if he chooses to resist, must be considered in passing upon a demand for specific performance, and particularly the reasonableness of the delay in making it. "If the one is bound and the other *foot-loose,*" (we quote from the same opinion), "the time must be short, for it would be *unreasonable to keep the parties in so unequal a condition for a long time.*"

(205) Here the evidence of the contract is contained in a written direction to the surveyor, given more than thirty years before the present suit was commenced, without any action on the part of the defendant, who alone could enforce it; without excuse for or explanation of the delay, and without paying any part of the inconsiderable sum due as purchase money. The vendor, and those who succeeded him, could not compel its payment, because no legal obligation rested upon the defendant, and if he had been bound by a written but unsealed instrument, the statute of limitation would have interposed a barrier to the recovery.

The defendant's long slumber upon his now asserted right, if not, unexplained, an abandonment, is strong evidence of an intent to abandon it.

Again, during this long period of inactivity, the value of the property has advanced from fifteen cents to from one to three dollars per acre; and it is only when awakened by the plaintiff's action upon an asserted equity to have all the lands restored, and the supposed deeds annulled, that, without having paid any of the purchase money, he asks the court to make the plaintiff convey the title to the smaller tract to him, on

payment of the purchase money. Is this claim to be upheld, and has it any support in the equity which the court administers? The answer is found in an extract taken from 2 Story's Equity Jurisprudence, sec. 771: "In general, it may be stated, that to entitle a party to a specific performance, he must show that *he has been in no default* in not having performed the agreement, and that he has taken all proper steps towards the performance on his part. If he has been guilty of gross *laches,* or if he applies for relief *after a long lapse of time, unexplained by equitable circumstances,* his bill will be dismissed."

The exercise of this form of remedial power, while in one sense discretionary, yet the discretion is not arbitrary, but is "controlled and governed by the principles and rules of equity to be found in the adjudicated cases" (Pom. Cont. sec. 36), and hence we have (206) considered the case in the light of them. 2 Story's Eq. Jur., sec. 742; *Cannaday v. Shepard,* 2 Jones Eq., 224; *Lloyd v. Wheatley, ibid.,* 267; *Herren v. Rich,* 95 N. C., 500.

Again, his case is not properly presented before the court in the answer, which, upon an allegation of payment, demands an unconditional conveyance of the title, while the fact is found by the jury that none of the consideration has been paid.

The only exception taken by the appellant is to the refusal of the court to render judgment for a specific performance of the contract upon payment of the purchase money for the 1,757 acre tract, and in this ruling we concur.

There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Ramsey v. Gheen, 99 N. C., 218; *Burnap v. Sedberry,* 108 N. C., 309; *Holden v. Purefoy, ibid.,* 170; *Beattie v. R. R., ibid.,* 439; *Improvement Co. v. Guthrie,* 116 N. C., 384; *Hall v. Misenheimer,* 137 N. C., 187; *Rudisill v. Whitener,* 146 N. C., 411; *Brown v. Hobbs,* 154 N. C., 550.

D. J. MUNROE ET AL. v. W. S. HALL ET AL.

Deed.

1. A *proviso* in a deed in absolute restraint of all alienation is void, but such condition if limited and reasonable in its application and as to the time when it must operate, will be upheld.

2. Where the condition in a deed upon which the estate is to be divested and go to a third party is founded on a contingency which never can happen, the grantee will take a fee simple.

3. Land was conveyed to two sisters and their heirs by deed, but the deed provided that in case either of them married, that the land should belong to their brother, and also provided that the grantees should not sell or dispose of the land in any way whatever. The *feme* grantees sold the land, and both died unmarried; *It was held*, that their grantee got a good title.

(207) CIVIL ACTION, tried before *Boykin, J.*, at May Term, 1886, of CUMBERLAND Superior Court.

It appears that Neill Munroe was the owner in fee of the land mentioned and described in a deed executed by him at the time therein mentioned, whereof the following is a copy:

"*To all people to whom these presents shall come, I, Neill Munroe, do send greeting:*

"Know ye, that I, the said Neill Munroe, of the county of Cumberland, and State of North Carolina, for and in consideration of the love and good will and affection which I have and do bear towards my living children, Thomas Munroe, Patrick Munroe, Annabella Munroe and Mary Munroe, of the county and State aforesaid, have given and granted, and by these presents do freely give and grant unto the said Thomas, Patrick, Annabella and Mary, their heirs, executors or administrators, all my lands and negroes in the county aforesaid, and in Moore County. Unto Thomas I give fifty acres of land, lying and being in the county of Moore, on the waters of Cameron's Big Branch; unto Patrick I give all that part of the plantation whereupon I now live, lying on the south side of the road, and negro boy named Whitington; and unto Annabella and Mary, I give all that part of said plantation lying on the north side of the road, as long as either of them is single, but if they should get married, then the whole of the plantation be Patrick's, and if he should die without lawful issue, then the land to belong to Thomas. I likewise give unto Annabella a negro boy named Isaac, and unto Mary I give a negro girl named Henny, provided that if the said Henny shall live to have children, the said Mary will give the first child unto Effy Jane, Thomas Munroe's daughter; provided always, that neither Patrick, Annabella nor Mary shall sell or dispose of any part of the above named land and negroes in any manner whatsoever. To have and to hold all the said land and negroes to them,
(208) the said Thomas, Patrick, Annabella and Mary, their heirs, executors or administrators, without any manner of condition.

"In witness whereof, I have hereunto set my hand and seal, this 31st day of August, one thousand eight hundred and twenty-nine.

NEILL MUNROE (Seal).

"Signed, sealed and delivered in the presence of

PATRICK MUNROE."

And at September Term, 1829, said deed was proved and registered.

Afterwards, about the year 1855, Patrick Munroe, named therein, died, and never having been married, left no lineal heir.

Annabella Munroe, named therein, died about the year 1863, never having been married, and never having had issue.

Mary Munroe, named therein, survived her last named brother and sister, and never having married, died on 14 May, 1883.

On 27 January, 1860, the said Mary and Annabella sold and conveyed by deed in fee, the land mentioned in the deed above set forth, to W. S. Hall, who thereafter died, leaving surviving him the defendant W. S. Hall and the *feme* defendant Julia McLauchlin, his only heirs at law, upon whom the lands of their ancestor descended, and they are in possession of the land in question, and claim to be the lawful owners thereof as such heirs.

Thomas Munroe, named in the deed above set out, died intestate many years ago, and the plaintiffs are his children and heirs at law. They contend that the deed above mentioned, operated to convey to Mary Munroe and Annabella Munroe, therein named, only a life estate in the land described in it, situate on the north side of the road designated, and therefore the title is in them.

These facts were agreed upon and submitted to the court for (209) its judgment. The court thereupon entered judgment, whereof the following is a copy:

"Upon the foregoing case agreed, it is adjudged by the court that the deed therein set out, conveyed to Annabella Munroe and Mary Munroe in fee simple the lands therein described, and the defendants are owners thereof in fee simple and legally in possession of the same. It is therefore adjudged, that the defendants go without day, and recover of the plaintiffs and their security the costs of this action, to be taxed by the clerk."

The plaintiffs having assigned error, appealed to this Court.

N. W. Ray for plaintiffs.

No counsel for defendants.

MERRIMON, J., after stating the facts: The sole question presented by the record in this case for our decision is, did the deed in question operate to convey the fee-simple estate in the land therein described as situate and being on the north side of the road mentioned to Annabella Munroe and Mary Munroe?

We cannot hesitate to answer this question in the affirmative. The deed by appropriate terms for that purpose, conveys the fee to them, and there is nothing in it that at all indicates a contrary intention on the part of the donor, except the words limiting the estate to these sisters "as long as either of them is single," and the *proviso* in a subsequent part of it, that they should never "sell or dispose of any part of the above named land . . . in any manner whatever."

The effect of the words "as long as either of them is single," need not be considered, because both the sisters died many years ago, and were never married. In any possible view of these words, they could only indicate a purpose to give the land to Patrick in a contingency (210) that never happened and never can happen. There is no intimation of any purpose to abridge the estate given them, unless in the contingency of marriage.

As to the *proviso* recited above, it is repugnant to the fee-simple estate previously conveyed, and is in absolute restraint of all alienation, and is therefore simply void. An important incident of the fee-simple estate, is the right of alienation, and hence, any condition in a deed conveying lands or a devise that seeks to prevent alienation altogether, is void, being repugnant to the estate conveyed. The rule, however, is not so comprehensive in its operation as to prevent all conditions and restraints upon the power of alienation. Such as are limited and reasonable in their application, and as to the time they must operate, are valid and will be upheld. 1 Wash. on R. P., 67-69; 4 Kent Com., 135; Pearson's Law Lec., 135.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: Lattimer v. Waddell, 119 N. C., 378; *Christmas v. Winston,* 152 N. C., 49; *Schwren v. Falls,* 170 N. C., 251; *Brooks v. Griffin,* 177 N. C., 8; *Stokes v. Dixon,* 182 N. C., 325.

W. W. ROLLINS ET AL. v. M. H. LOVE, ADMINISTRATOR.

Appeal—Undertaking on Appeal—Judgment.

1. An appeal which is docketed in the Supreme Court at any time during the term next after it was taken, is in time, and will not be dismissed, except as provided by Rule 2, par. 8.
2. If the appeal is not docketed before the call of the district in which it belongs, the appellee may move to docket and dismiss under Rule 2, par. 8.
3. An appeal will not be dismissed because of defects in the undertaking on appeal, unless the provisions of chapter 121, Laws of 1887, are observed.
4. As this statutory regulation only affects the procedure, the Legislature had power to make its terms applicable to appeals pending at the time of its passage.
5. Where a judgment is rendered against two defendants, one only of whom appeals, the appeal does not vacate the judgment as to the defendant who does not appeal.
6. Where a judgment has been rendered against a surety to a bond, who died after the judgment was entered, his administrator cannot set up as a defense to a notice to show cause why judgment should not be entered against him as administrator, and execution issue, that his intestate was insane when he signed the bond. Such matter must be brought forward by a direct proceeding to attack the judgment.

(*Barbee v. Green*, 91 N. C., 158; *Cross v. Williams*, 91 N. C., 496; *Williams v. Hartman*, 92 N. C., 236; *Fowler v. Poor*, 93 N. C., 466; cited and approved.)

MOTION in a cause pending in BUNCOMBE Superior Court, (211) heard by *Avery, J.*, at August Term, 1886, of said court.

After the appeal was docketed in this Court, a motion to dismiss was made: First, because the appeal was taken from a judgment rendered at August Term, 1886, of the Superior Court, and the appeal was not docketed in the Supreme Court until 22 December, 1886; and, second, because the undertaking on appeal was not in the terms required by the statute.

The October Term, 1886, of the Supreme Court, had not expired on 22 December, when the appeal was docketed.

The facts on the merits were as follows:

It appears that the action of *W. W. Rollins et al. v. R. M. Henry*, brought to recover land, was pending in the Superior Court of the county of Buncombe, and the defendant therein, in order to entitle himself to make defense, executed his undertaking in that behalf, as required by the statute (The Code, sec. 237), in the sum of $3,000, with R. G. A. Love as his surety thereto.

(212) Afterwards, at Spring Term, 1880, the plaintiff in that action and the appellee here, obtained judgment against the defendant therein and his said surety, for $2,400, from which judgment the defendant appealed to this Court. (*Rollins v. Henry,* 84 N. C., 569.)

At January Term, 1881, of this Court, the judgment so appealed from was affirmed, and judgment was entered in pursuance of that affirmance, in the Superior Court at the August Term thereof, 1881.

The said surety, R. G. A. Love, died pending the appeal mentioned, in May, 1880, and the present appellant was appointed administrator of his estate in June of the same year.

On 11 October, 1884, the appellant was served with notice to appear in court, "to show cause why judgment should not be entered against him, and execution issue thereon," as to the judgment above mentioned. Thereupon, the appellant appeared and opposed the motion of the appellee for judgment and execution, and in answer thereto alleged:

I. That at the time R. G. A. Love executed and signed the defense bond in said action, he did not have sufficient mental capacity to know the nature and obligation of said bond, or to make a contract, or to execute said bond.

II. That at the time of entering said judgment, R. G. A. Love was deceased, and the defendant, M. H. Love, was not made a party to said suit, and was not a party to said judgment, and had had no day in court.

V. That plaintiffs' motion is barred by the statute of limitation, which defendant especially pleads in bar of plaintiffs' recovery.

Wherefore the said M. H. Love demands that said motion be dismissed with costs.

The court heard the motion, and gave judgment, of which, except the recitals therein, the following is a copy:

(213) "Now, on motion of counsel for the plaintiffs, it is adjudged that the answer of the defendant is insufficient, and that the defense therein set up cannot be pleaded or shown on this motion; that said judgment, to wit: the judgment of Spring Term, 1880, be continued and revived against the said defendant, M. H. Love, as administrator of R. G. A. Love, deceased, and that said plaintiffs have execution for damages and costs aforesaid and interest thereon, against said Love, administrator of R. G. A. Love, according to the force, form and effect of the said judgment, and for costs of this motion."

From this judgment, the administrator, M. H. Love, appealed to this Court.

Chas. M. Busbee for plaintiffs.

R. D. Gilmer and John Devereux, Jr., for defendant.

MERRIMON, J., after stating the facts: This appeal was taken at August Term, 1886, of the Superior Court of the county of Buncombe, but was not docketed in this Court within the first eight days of the October Term, 1886, thereof, as it ought regularly to have been, and not until 22 December, 1886, during the term, but after the call of the docket of the district to which it belonged. The appellees moved at the present term to dismiss it, upon the ground that it was not docketed in due time.

The motion cannot be allowed. This appeal ought to have been brought up within the first eight days of the last October Term of this Court, but that it was not, is not ground for dismissing it—this only worked a continuance. As it was not docketed as required by Rule 2, par. 7, within the first eight days of the term, the appellees might, after the perusal of the docket, have moved to *docket and dismiss* the appeal, as allowed by Rule 2, par. 8, but they did not choose to do this, and so lost their opportunity to do so; it was too late after the appeal was docketed. *Barbee v. Green,* 91 N. C., 158; *Cross v. Williams,* (214) *ibid.,* 496.

As a second ground of the motion to dismiss the appeal, it was insisted that the undertaking upon appeal was insufficient. This we cannot consider, because the statute (Acts 1887, ch. 121), require that twenty days notice of a motion to dismiss an appeal upon such ground must be given the appellant as therein prescribed, and such notice has not been given. It applies by its terms to appeals pending at the time of its passage. This statutory regulation is one that simply affects the course of procedure, that the Legislature might have made applicable to appeals before this appeal was taken, and as it is merely such a regulation, it does not destroy or impair any vested right of the appellees.

Obviously, the judgment against the intestate of the appellant, of which he complains in his answer to the rule upon him to show cause, etc., was not vacated as to him, by the appeal of his codefendant Henry, and it does not appear that he appealed, as it should do if he did, and as it does not, the presumption is he did not. So that the judgment, certainly so far as appears, was rendered against him in his life time, and remained operative and effectual against him at the time of his death.

Nor can we see how in any aspect of the case, the statute of limitation was a bar to the motion of the appellees, if it were a proper one to be made, as to the judgment.

It seems that the appellant made no question as to the propriety and competency of the motion of the appellees, in the absence of valid objections to the judgment, and we are not called upon to express any

opinion, nor do we, in that respect. The alleged mental incapacity of the intestate to execute the undertaking and thereby bind himself, upon which the appellees recovered judgment, was not pertinent or material in opposition to their motion, because, the judgment was upon
(215) its face regular and valid, and its integrity could not be thus attacked.

Such incapacity was ground upon which the appellant might have attacked the judgment directly in that action by a proper proceeding, as it is still pending, or by independent action, if it were ended. *Williams v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 466.

It was insisted on the argument before us, that the court might—ought—to have treated the answer to the rule to show cause as a motion or petition in the action, directed against the judgment. Perhaps the court might have done so upon proper application, and after proper and necessary amendments to the answer. But the motion and matters pertinent to it were before the court—to these the attention of the parties and court were directed, and moreover, the appellant did not ask the court to so treat his answer. In case he had done so, upon such application, the allegations ought to have been made more specific, and the appellees should have had reasonable opportunity to answer them, and thus in an orderly way, have raised issues of law and fact, the appellant being the actor and so treated. Thus the proceeding would have been substantially a different one from that before the Court. Ordinarily, it is the office of counsel—not that of the court—to advise and direct litigants as to the proper methods of demanding and seeking redress through the courts. It may be, that the appellant can yet attack the judgment directly, in the way indicated, but as to that, no question is before us, and we express no opinion in that respect.

In our judgment the assignment of error in the record is not well founded, and the judgment must be affirmed.

To the end that further proceedings may be had in the action, let this opinion be certified to the Superior Court.

No error. Affirmed.

Cited: Bailey v. Brown, 105 N. C., 128; *Porter v. R. R.,* 106 N. C., 479; *Benedict v. Jones,* 131 N. C., 474; *Pope v. Lumber Co.,* 162 N. C., 208.

(216)

J. N. SHEARIN v. A. J. RIGGSBEE.

Conversion—Tenants in Common of Chattels.

1. One tenant in common of chattels cannot maintain trover against his co-tenant upon a mere demand and refusal to deliver to him his share of the common property, but the act of withholding must be tortious, having the effect so far as the plaintiff is concerned of an actual destruction of the property.

2. Where a contract of renting was that the landlord should have a part of the crop, and after it was gathered the landlord took it into his sole possession, and refused to divide when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire; *It was held*, that this did not amount to a conversion, and an action in the nature of trover could not be maintained, the landlord and tenant being tenants in common of the crop.

(*Pitt v. Petway*, 12 Ired., 69; *Hill v. Robinson*, 3 Jones, 501; *Jones v. Morris*, 7 Ired., 370; *Powell v. Hill*, 64 N. C., 169; *Rooks v. Moore*, Busb., 1; cited and approved.)

CIVIL ACTION, tried before *Connor, J.*, at February Civil Term, 1886, of WAKE Superior Court.

During the year 1884 the plaintiff cultivated land belonging to the defendant, under an agreement for an equal partition of the crops of wheat, corn and tobacco grown on the cleared portion, and for the retention of two-thirds by the plaintiff, of such as were raised upon the land he might clear and in the same proportion they were to pay for the fertilizers used. There is no controversy as to much of the contract, but in the answer, the defendant says, that the crop of tobacco, alone involved in the present suit, was to be stripped and assorted, or culled and separated, before a division.

The tobacco after maturing, was gathered by the plaintiff and placed in a house on the defendant's land, occupied as a place of residence by his son Thomas his general manager on the farm. After five days' notice of demand, the plaintiff on 3 November, went to the house and found that the lock with two keys, one of which he, and the (217) other the said Thomas kept, had been removed, and the door fastened with an additional lock. The defendant and his son were present, and were told that the plaintiff had come to have a division.

The defendant objected to doing this until the tobacco was stripped, alleging such to be the contract, which the plaintiff denied.

The defendant testified to his having objected to a division at that time, because the tobacco was in too dry a condition, and offered to allow it to be done, if the plaintiff would pay for the stripping and packing, which was refused. The house with what was in it was burned about four weeks afterwards, during which interval the weather continued too dry to permit its being handled for a division. Upon the issues submitted to the jury they find as follows:

1. The defendant did wrongfully convert the tobacco of plaintiffs, to his damage $434.38.

2. The plaintiff has performed his contract with the defendant.

3. The plaintiff is not indebted to defendant for advances.

The defendant requested an instruction that upon the evidence there was shown no conversion, instead of which the court charged the jury as follows:

"That if they believed upon the whole evidence, that on 3 November, 1885, the plaintiff having given five days notice of his intention to divide the crop, the plaintiff had in all respects complied with, and performed all of the stipulations of his agreement with the defendant, and had satisfied all of the liens of the defendant on the crop, and that the tobacco had been, up to the time of giving said notice, in the joint possession of the plaintiff and the defendant, and that upon the receipt of such notice the defendant took the tobacco into his exclusive control and possession, by placing another lock on the door of the house (218) and taking the key thereto, and that upon the demand of the plaintiff, the defendant refused to divide the said tobacco or permit the plaintiff to go into the barn, and that the said tobacco was in a condition to be divided without injury, that such facts would constitute in law a conversion, and that they would find the first issue in the affirmative. That it was incumbent upon the plaintiff to show the existence of such facts by a preponderance of the evidence, and unless he had done so, they would find the first issue in the negative. That if they found the first issue in the negative, they need not consider the second issue, but that if they found the first issue in the affirmative, the measure of damages would be the value of the plaintiff's share of the tobacco, it being admitted that the same had been destroyed. That there was no evidence to sustain the third issue, and they need not consider the fourth. That their finding upon the sixth and seventh issues was involved in the first issue. The third issue was an inquiry as to whether the burning was from defendant's negligence."

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

T. M. Argo for plaintiff.

J. S. Manning and E. C. Smith for defendant.

SMITH, C. J., after stating the facts: The sole question to be determined is, whether upon the facts, the plaintiff's share of the tobacco has been converted by the defendant to his own use, so that he has become answerable for the loss, whatever care he may have bestowed upon the property in preserving it for the common benefit of both.

Assuming a tenancy in common to exist, and a bona fide controversy between them as to some of its terms preceding the division, and as to the fitness of the article in its then dry condition to undergo the handling necessary thereto, was the present retention and refusal (219) to divide, an appropriation of the plaintiff's share, or such an exercise of dominion or tortious withholding, as subjects him to a responsibility for the entire loss?

Judge Cooley, in his work on Torts, 455, in reference to irreconcilable rulings as to what constitutes a conversion by one tenant in common of the share of another, says: "The rule in England is, that neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, nor even a sale of the whole, can be treated in law, as the equivalent of loss or destruction, or be considered a conversion; and this rule is adopted in some cases in Vermont, and in North Carolina it is also followed, but with this qualification, that a sale of the property out of the State may be treated as a loss or destruction,"—referring to *Pitt v. Petway,* 12 Ired., 69. But he adds that the rule "can have no reasonable application to such commodities as are readily devisable by tale or measure, into portions absolutely alike in quality, such as grain or money. Thus, if one is entitled to a half of a certain number of bushels of wheat, he is entitled to the half in severalty; and if his cotenant in actual possession refuses to surrender the half on demand *and deny his right,* this is a conversion, because it deprives him of his right as effectually as would a sale"; 455, 456.

The act of withholding, to warrant the action of the plaintiff tenant in common against his cotenant, must be *tortious,* "having the effect, so far as the plaintiff is concerned, of a total destruction of the property" at the time. 2 Greenleaf Evidence, sec. 646.

Our own rulings do not to the same extent recognize the distinctions made by Judge Cooley in reference to the subject-matters of the tenancy. Thus, in *Hill v. Robinson,* 3 Jones, 501, *Nash, C. J.,* says: "The fifteen sacks of salt were purchased with the joint funds of the plaintiffs and of Howell—five for the latter and ten for the former; but no specific bags were set apart, either by Howell or Robinson, as the prop- (220) erty of the plaintiffs; and until that was done, an action of trover could not be sustained by the plaintiffs for any portion of the salt."

"If A. sell to B. all the corn in a particular barn, and afterwards refuses to deliver it, B. may maintain an action of trover for the con-

version. But if the contract is for a portion less than the whole, then B. could maintain an action for a violation of the contract in the refusal to deliver, but not an action of trover"; citing *Jones v. Morriss,* 7 Ired., 370. In this case there had been a demand and refusal.

But the more recent case of *Powell v. Hill,* 64 N. C., 169, has the essential features of that before us. The plaintiff was employed by one Brodie to work on a farm the latter had rented, for a share of the crop. The crop was measured and the plaintiff's part ascertained but not separated from the bulk. The defendant, an incoming tenant, bought from Brodie the whole crop except the plaintiff's share, and took possession of the whole. *Rodman, J.,* delivering the opinion, says: "On the proof, he (the plaintiff) is a tenant in common with the defendant, and the court could not order the sheriff to put him in possession of any distinct and specific quantity of corn or fodder out of the common mass. Neither is he entitled to damages for the conversion of his share of the common property. It is well settled, that one tenant in common cannot recover in trover upon a mere demand and refusal to deliver to him his share."

In *Rooks v. Moore,* Busb., 1, it was held, that one who was to receive a share of the crop, could not maintain a trover before a division.

Had a portion of the common property been accidentally destroyed, would not loss have fallen on the parties in proportion to their respective interests?

(221) The authorities referred to in the argument for the plaintiff, apply when the tenant not only withholds from the cotenant, but exercises a dominion over the common property, in denial of, and inconsistent with the rights of the latter, and not in the mere assertion of his own.

Nowhere in the action of the defendant, is found any appropriation of the tobacco to his sole use. Where is the exertion of any dominion incompatible with the recognition of the equal claim of the plaintiff thereto? He refuses to permit partition, because, according to his understanding, something more was to be done before, and an injury would come to the article in the attempt to make it at the time. He sets up no claim to the plaintiff's undivided share, but keeps possession, only postponing the separation. Upon the verdict, this was wrongful, but it is not a conversion to the defendant's use. The plaintiff could have recovered his share under section 1755 of The Code, had the tobacco not been destroyed, and it was destroyed by no fault or negligence of the defendant. The mere fact that the plaintiff was debarred access to the house in order to force a division, and the crop was retained for a division afterwards, does not amount to a conversion, nor warrant an inference of an exclusive appropriation to his own use.

But while not a conversion, it was a wrongful resistance to the plaintiff's demand of a right to an immediate division, which entitles him to some, if no more than nominal damages, but not to the full extent of the value of his share, which can only be maintained by deeming the retention a conversion.

For the errors mentioned the verdict must be set aside and a new trial ordered. Let this be certified.

Error. Reversed.

Cited: Waller v. Bowling, 108 N. C., 294; *Parker v. Brown,* 136 N. C., 289; *Thompson v. Silverthorn,* 142 N. C., 14; *Doyle v. Bush,* 171 N. C., 12.

(222)

J. B. BRIDGERS v. M. T. DILL ET AL.

Damages—Evidence—Judge's Charge—Landlord and Tenant.

1. Even if improper evidence is admitted in evidence, the error is cured if the judge in his charge instructs the jury not to consider it.
2. Where the defendant by repeated and continuing trespasses pulls down the fence around the cultivated field of the plaintiff, whereby the growing crop of the plaintiff is ruined, the measure of damages is not limited to the expense of repairing and replacing the fence, but he may recover the value of the damage done to the crop.
3. Railroad corporations are liable for any damage caused by any improper or wrongful act done by them while building their roads.
4. The provisions of section 1943 of The Code, only apply to the mode of acquiring title to real estate and getting a right of way, but it has no application to trespasses committed outside of the right of way in building the road, and for such trespasses the corporations are liable in a civil action.
5. While it is true that under the provisions of section 1754 of The Code, the crops shall be deemed to be vested in the landlord, this is only for his protection, and as against third parties the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto.

(*Meares v. Wilmington,* 9 Ired., 73; cited and approved. *Roberts v. Cole,* 82 N. C., 292; *Sledge v. Reid,* 73 N. C., 440; *Holloway v. R. R.,* 85 N. C., 452; *R. R. v. Wicker,* 74 N. C., 220; distinguished.)

THIS was a civil action, tried before *Shepherd, J.,* at Spring Term, 1886, of NORTHAMPTON Superior Court.

In 1882, the plaintiff cultivated a farm in Northampton County, rented by him of Dr. R. H. Stancil, administrator of S. T. Stancil, deceased, and this action is brought to recover damages alleged to have been sustained by the wrongful acts of the defendants in unlawfully entering upon said land and pulling down the inclosure around his cultivated field, at different times and from day to day, and continuing to pull it down as the plaintiff would put it up, by reason whereof
(223) cattle entered and destroyed his crop, and prevented him from cultivating the land as he otherwise would have done. The defendants denied the allegations of the complaint, and for a second ground of defense, insisted that the court had no jurisdiction of the subject-matter, so far as it applied to the Meherrin Valley Railroad Company and those who entered upon said land as its agents; that there was a misjoinder of parties, and a misjoinder of two causes of action.

This second ground of defense was not relied upon in this Court.

Issues were submitted and the jury, in response thereto, found that the plaintiff was entitled to the possession of the land, as alleged in the complaint; that the defendants, M. T. Dill and the Meherrin Valley Railroad Company, trespassed thereon, and that the damage sustained by reason of such trespass was $650.00.

A summary statement of the evidence is necessary to a proper consideration of the defendants' exceptions.

J. B. Bridgers, the plaintiff, testified that in 1882, he was in possession of the land, which he had rented of Dr. Stancil for seven bales of cotton; that when he rented it, he did not know that a railroad was going to be built through it; that he had 75, 80, or 90 acres of land in cotton, and 50 acres in corn; that up to 1 July, he had a very good crop; the defendants did not take the fence down till June; . . . that he would put up the fence and they would pull it down again, and this at places outside of the right of way; the road ran through the corn and cotton field, and that the stock were turned in from both ways, and the hands would go over the fence anywhere; that stock, horses, cows and hogs commenced getting in in June, and continued to increase in number through July, August, etc.; that cotton was so trampled that he could not get hands to pick it out, and he only saved six bales; that they put in no cattle guard till in November; Dill would pull
(224) the fence down outside of the right of way, and leave it down or partially down; that he, witness, objected and forbade their coming from the first. Dill was the general superintendent. Witness said: "They destroyed all but six bales of cotton. The damages were about twenty bales—15 anyhow—fifty acres where I never picked out a pound: value $50 per bale. They damaged me seventy-five barrels of corn: value

$4 per barrel." This damage was done off the right of way by trampling down the crops and eating them up. They had a passway to Margarettsville over the field all the time—not over the right of way—kept the fence open and cattle came in: . . . had hogs and sheep in the pasture; could have put a cow pit there with one hand in not a great while, four sills would have done; they were hauling over there and a pit would not have done, but they could have put a gate there. Cow pits at all those places would have cost about $50. When this suit was brought, the rent was not due, and had not been paid; paid Stancil six bales and he released the remainder; saw cattle, hogs and sheep coming through the fence at other places than the right of way. To that portion of the foregoing evidence embraced in quotation marks, the defendant objected. Objections overruled and defendant excepted.

Dr. Stancil, for the plaintiff, testified, that he knew the farm; he (plaintiff) has paid me six bales of cotton; saw the crop at times from July to September; saw stock and sheep there.

Plaintiff said Dill would pull the fence down as fast as he could put it up. . . . Dill came to witness for permission; told him that Bridgers had rented the farm for a year, and that he, witness, did not consider that he had any right, and that he had no objection to his (Dill's) entering and building the road, if he could arrange with Bridgers; thinks Bridgers never paid all the rent; never released (225) any of it, though never expects to get it.

J. R. Johnson and Thomas Mason, witnesses for the plaintiff, testified as to stock, etc., in the field.

The defendant asked the court to instruct the jury:

I. That upon the evidence, the plaintiff cannot recover.

This was refused, and the defendant excepted.

II. That if the jury believed that Bridgers rented the land from Dr. R. H. Stancil, and has not paid all the rent, then the plaintiff cannot recover.

This was refused, and the defendant excepted.

The court in its charge as to the damages, told the jury, that they should not consider what the plaintiff might have raised upon the land but for the alleged trespass, and that such evidence was excluded; that they should give damages only for the injury to the crops as they then stood, and then only from the time of the pulling down of the fence up to the time when he could, by reasonable diligence, have replaced the fence and erected sufficient cattle guards.

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

W. H. Day for plaintiff.

R. B. Peebles for defendants.

DAVIS, J., after stating the facts: The exception to the evidence of Bridgers, objected to by defendants, cannot be sustained. The trespass was repeated as often as the plaintiff would put up his fence; it was a continued trespass, and the case is unlike that of *Roberts v. Cole,* 82 N. C., 292, where the damages were properly limited to such sum as would repair and put the fence in order, and cover the injury done to the crop, before the plaintiff knew of the trespass. But if the evidence excepted to was at all amenable to the objection that it was speculative and too remote, it was cured by the charge of the court. The case of *Sledge v. Reid,* 73 N. C., 440, relied upon by counsel for defend-
(226) ants, is distinguishable from this. In that case, which was an action to recover damages for the killing of two mules, it was held that the proximate damage to the plaintiff, was the loss of the mules, and his failure to make a crop was the secondary consequence, resulting from the damage, and was too remote and uncertain; but in this case, the injury to the crop was the direct and proximate damage resulting from the wrong of the defendants in repeatedly pulling down the fence and exposing the crop to the prey of cattle.

It is insisted that the public have an interest in railroads, and the grants of power by the State to build them are for the public benefit, and the right to acquire real estate and rights of way is secured to them by law. This is true, and for all damages necessarily incident to their construction, the statute provides, but they are liable for any damages that may occur to individuals by reason of any improper or wrongful acts done by them. *Meares v. Commissioners,* 9 Ired., 73, and the section of The Code, 1943, *et seq.,* relied on by defendants, relate to the mode of acquiring title to real estate, right of way, etc., by railroad corporations, and have no application to this action, which is to recover damages for injury to crops outside and off the right of way; and besides, it is not alleged, nor do the pleadings disclose the fact, that any title or right of way was ever acquired by the defendant, as provided by sections of The Code referred to, and the case of *Holloway v. R. R.,* 85 N. C., 452, and *R. R. v. Wicker,* 74 N. C., 220, are not applicable.

The second prayer for instructions to the jury was also properly refused.

In this action, Dr. Stancil was not a necessary party, and the relation between him and the plaintiff did not affect the rights of the plaintiff as against the defendants. While it is true that under section 1754 of The Code, the crops shall be deemed and held to be vested in posses-
(227) sion of the lessor, this is only for the lessor's protection, and, as against any one except him, the tenant is entitled to the possession of the land and of the crop while it is being cultivated, and

may maintain, in his own name, an action for any injury thereto, and for this purpose he is the "real party in interest" within the spirit and meaning of section 177 of The Code. The remedy given to the landlord by section 1754, and the subsequent section providing for the protection of the tenant's rights, make it quite clear that it was intended only by those sections to adjust the rights of the landlord and tenant as between themselves. In this case, the defendants were told by the landlord, Dr. Stancil, that he claimed no interest in the matter, and they must look to Bridgers, the plaintiff, for any arrangements they might wish to make.

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

No error. Affirmed.

Cited: S. v. Eller, 104 N. C., 856; *Blake v. Broughton,* 107 N. C., 228; *S. v. Wilson, ibid.,* 872; *S. v. Crane,* 110 N. C., 534; *Wilson v. Mfg. Co.,* 120 N. C., 95; *S. v. Higgins,* 126 N. C., 1113; *Reiger v. Worth,* 127 N. C., 236; *Gattis v. Kilgo,* 131 N. C., 208; *Coore v. R. R.,* 152 N. C., 704; *Cooper v. R. R.,* 163 N. C., 151; *S. v. Lunsford,* 177 N. C., 119; *Johnson v. R. R.,* 184 N. C., 105; *S. v. Stewart,* 189 N. C., 345; *Chauncey v. R. R.,* 195 N. C., 417.

JAMES K. WOOD, IN BEHALF OF HIMSELF, ETC., v. THE TOWN OF OXFORD ET AL.

Taxation—Constitutional Law—Qualified Voters—Municipal Corporations.

1. Municipal corporations are instrumentalities of the State government, are public in their nature, and the Legislature has control over them and may enlarge or modify their powers as it deems proper, within the limits of the Constitution.

2. The Legislature may authorize municipal corporations to apply their revenue and credit to any legitimate public purpose within the scope of its organization, unless prohibited by the Constitution, and such purposes as tend to the general good of the community, although the advantage does not reach every individual taxpayer residing there, is such public purpose.

3. The Legislature may authorize municipal corporations to subscribe to the capital stock of railroad corporations or other like public enterprises, or even to donate its money or credit to such corporation, while it cannot authorize any subscription or donation to a merely private enterprise.

4. The ruling made in *Markham v. Manning*, 96 N. C., 132, and *McDowell v. Construction Co.*, 96 N. C., 514, as to the meaning of the term "qualified voters" as used in the Constitution, and the effect of the provisions of Article VII, sec. 7, affirmed.

5. Where the act allowing a municipal corporation to contract a debt for other than necessary expenses, provided that such debt should be authorized by a vote of a majority of those voting and not by a majority of the qualified voters, but in fact a majority of the qualified voters did vote in favor of contracting the debt; *It was held*, that this cured the defect in the law, and that the vote authorized the corporation to contract the debt.

(Taylor v. Commissioners, 2 Jones Eq., 141; *Caldwell v. Justice*, 4 Jones Eq., 323; *Markham v. Manning*, 96 N. C., 132; *McDowell v. Construction Co.*, 96 N. C., 514; cited and approved.)

(228) MOTION to continue an injunction to the hearing, in a cause pending in GRANVILLE Superior Court, heard before *Merrimon, J.*, at Chambers, in Henderson, 26 February, 1887.

The defendant, the "Oxford and Clarksville Railroad Company," is a corporation organized under and in pursuance of the statute (Acts 1885, ch. 116), and its prescribed purpose is to construct a railroad to be devoted to the transportation of passengers and freight, its terminal points to be the town of Oxford, in the county of Granville, and a point on the Virginia State line, to be fixed by its directors, within a compass prescribed. Its railroad may be extended to other like roads designated, and it may construct branch roads not exceeding thirty miles in length. Counties, townships, incorporated cities and towns, through which its road is to be constructed and located, are authorized, in the way (229) and manner prescribed, to subscribe for the capital stock of that company, and to make "donations" to it; and to raise money for this purpose, they are respectively authorized to issue their bonds, with interest coupons attached, in the manner prescribed. But such subcriptions or donations cannot be made until a definite proposition to make the same shall have been submitted to the "qualified voters" of the township or town which it is proposed shall make the same. In case a "majority of the votes cast" shall be "for subscription," or "for donation," as is said in one section of the statute cited, or as to towns, as is said in another section, in case "a majority shall have voted for subscription," or "for donation," the same shall be made, etc.

The grounds and purpose of the action, and the relief sought by it, sufficiently appear from the eighth paragraph of the complaint, of which the following is a copy:

"8. Your petitioner, who sues in this behalf, for himself and other taxpayers of said town, alleges that the acts of the said commissioners, in issuing said bonds, and making said donation, will entail a heavy

burden and debt upon him and them; and that he is advised that the act incorporating the said railroad company is not constitutional, and that the bonds about to be issued by virtue of said act, are illegal and void, for that: (1) The General Assembly had no authority to authorize the voters of said town to donate public money for the purpose set forth in the said act; (2) That the power attempted to be conferred by said act does not come within the spirit or letter of the Constitution of the State; (3) That in the canvass of the votes, as is required in section 8 of said charter, a majority only of the votes cast is required, whereas the affiant is informed that said act should have required a canvass of all the qualified votes, and that while the provision is not inserted in section 12 of said charter, nevertheless said section, referring to and adopting the language of section 8, must have and bear the same meaning and interpretation. Wherefore, affiant prays that a restraining order (230) may issue to said defendants, to show cause, before his Honor, Fred Philips, at Chambers, at Greensboro, why an injunction shall not be granted forever enjoining them from the issue and donation of said bonds and the levy and collection of said taxes, to pay the same as aforesaid, and as in duty bound, he will ever pray."

A restraining order was granted, and also a rule upon the defendants to show cause at Chambers why an injunction until the hearing upon the merits should not be granted.

At the hearing of the motion for such injunction, it was denied, and from the order in that respect, the plaintiff appealed to this Court.

John W. Hays filed a brief for plaintiff.
Thos. B. Venable and R. W. Winston for defendants.

MERRIMON, J., after stating the facts: Municipal corporations, such as counties and incorporated cities and towns, are instrumentalities of the State government. They serve its political and civil purposes, more or less general in their nature and extent, and more particularly, where they are located. They are public in their nature, and the Legislature has control over them. It may determine and establish their purpose, and enlarge or modify their powers and authority from time to time; and it may create new ones, prescribing their powers and authority, as public necessity and convenience may require. It may confer upon them power to raise revenue by levying taxes and otherwise, and to use and apply the same for all legitimate public purposes, and likewise to create debts and issue their obligations to pay money for the like public purposes, except as its powers may be restrained by constitutional limitations. Such powers of the Legislature are to some extent, of its nature, and essential in the exercise of legislative authority, and in other

(231) respects, they are conferred upon it by the express provisions of the Constitution, or by necessary implication. They are freely exercised at every session of the General Assembly in effectuating the purposes of government by legislation.

It may be said in general terms, that the Legislature can authorize a county, city or town to use its revenues and credit for any legitimate public purpose within the scope of its organization, unless prohibited by the Constitution. This is necessarily so, because the ends to be attained by such municipalities cannot generally be accomplished without public expenditures. It may not always be easy to apply the rule of law to determine what is a legitimate object of such expenditures. It is clear, however, that they may be made for such public improvements and advantages as tend directly to provide for and promote the general good, convenience and safety of the county or town making them, as an organized community, although the advantage derived may not reach every individual citizen or taxpayer residing there. Hence, it has been held that the Legislature could authorize a town to subscribe and raise money to pay for capital stock of a navigation company operating in its neighborhood. *Taylor v. Commissioners,* 2 Jones Eq., 141. It has also been held that a county could subscribe and issue its bonds to raise money to pay for capital stock of a railroad company, whose road was located through it. *Caldwell v. Justice,* 4 Jones Eq., 323.

Indeed, the principles applied in the cases just cited, have been recognized and acted upon uniformly in a great number of cases decided by this Court.

And upon the same principle, a county or town may be authorized by the Legislature, for like public purposes, to donate its money, its credit, or other appropriate thing, to an individual or corporation.

(232) Such "donations" are not strictly such—they are not mere gratuities—they are made in consideration of the advantage, or supposed advantage, that the municipality, its business—its people, collectively and individually—and the public generally, directly and indirectly, derive from the public work, thus encouraged and helped. It may be conceded, a municipality could not have power to donate its revenues or credit to individuals or corporations in aid of a merely private enterprise or industry, because, in that case, the object is simply private gain—it does not in its nature and purpose, tend to afford public advantage. But it is otherwise when the enterprise or industry is public in its nature and purpose, and intended to confer public benefit, as well as secure private gain to its owners, as in case of a projected railroad. Although the road may belong to a private corporation, still its purpose and use are directly for the public use and advantage.

A chief purpose of counties, cities, and towns, is to secure public advantage and convenience, and thus public prosperity, by means of public works and enterprises, set on foot and prosecuted by themselves, or through individuals or corporations, and it can make no difference whether such works are encouraged by the county or town by taking the capital stock of a corporation, or by a "donation" of money or credit to it. In this case, the public benefit, or supposed benefit, is in substance paid for. This view seems to us just and reasonable, and substantially, it has been upheld by the highest courts of many of the States of the Union, as well as by the Supreme Court of the United States. *Town of Queensbury v. Culver,* 19 Wall., 83; 1 Dill. Mun. Corp., sec. 508.

It is not our province to decide upon the wisdom or expediency of the provisions of the statute under consideration. It was the office of the Legislature to do that, and as these provisions do not contravene the Constitution, it is our duty to uphold and give them effect.

We are also of opinion, that the election as to the proposition (233) to make the donation in question, was held, and the result ascertained, in substantial compliance with the statute and the provisions of the Constitution affecting it. It has been settled by repeated decisions at the present term, that "qualified voters" are such only as are eligible, and have been registered according to law, and that a majority of the qualified voters means a majority of the voters lawfully registered. *Markham v. Manning,* 96 N. C., 132; *McDowell v. Construction Co.,* 96 N. C., 514.

Now, it is clearly one of the declared purposes of the statute (Acts 1885, ch. 116), to authorize certain incorporated towns to make "donations" in the way prescribed, to the railroad company, the defendant, the Oxford and Clarksville Railroad Company, organized under and in pursuance of its provisions. And it plainly requires a proposition to make such a donation to be submitted to the "qualified voters" of the town which it was proposed should make the same. It may be, that the statute contemplates that if a simple majority of "the qualified voters" *voting,* shall be in favor of such donation, this shall be sufficient to authorize it to be made. This is questionable, but we need not decide whether it so provides or not, because the purpose to allow such donations to be made is manifest, and it appears in the case before us, that a clear majority of all the qualified voters of the town of Oxford voted in favor of the proposed donation of forty thousand dollars in question, thus certainly meeting the essential prerequisites provided by the statute and observing the provision of the Constitution (Art. VII, sec. 7), forbidding towns and other municipal corporations to make a debt, except, etc., "unless by a vote of a majority of the qualified voters therein," and likewise observing the requirements of the charter of that town (Acts

1885—Pr. Acts, ch. 21, sec. 30). As the purpose of the Legislature to allow such donations to be made is clear and express, it is suffi-
(234) cient, if the condition upon which it might be made, has certainly in the most adverse view of the proposition as to the vote, happened.

Unquestionably, the Constitution allows a county, city, or town to contract, pledge its faith, or loan its credit, for a proper purpose, if authorized to do so by the Legislature, when, and if a majority of the qualified voters therein shall vote in favor of the same.

In this case the purpose, as we have seen, was lawful—the Legislature authorized the donation to be made, and a debt to that end to be contracted, and a majority of all the qualified voters in the town of Oxford voted in favor of the donation, and thus in favor of the debt to be made. Thus the statute and Constitution allow, and sanction it, and it must be upheld as valid and lawful.

There is no error. Let this opinion be certified to the Superior Court according to law.

SMITH, C. J., concurring: If the matter of the present action were *res integra,* and the question involved in the appeal an open one, I should be reluctant to give assent to the proposition that a municipal corporation, even under legislative sanction and with an approving popular vote, may make a donation of its bonds to a railroad company in aid of its work, and impose taxes for their payment. It certainly cannot do this to advance any mere business enterprise not of a public nature, for the incidental and substantial benefits its successful prosecution may confer upon a community in the midst of which it is carried on. In a case recently before the Supreme Court of the United States, was drawn in question the validity of an act of the General Assembly of Kansas, under which bonds of the city of Topeka were issued as a gratuity to the King Wrought Iron Bridge Manufacturing and Iron Works, to aid the company in erecting and operating bridge shops in that city, in expectation of the advantages to be conferred upon the business
(235) interest of the community. In an elaborate opinion, citing many adjudications in its support, the act was held to be unconstitutional and the securities void, the Court declaring, through *Mr. Justice Miller,* "that there can be no lawful tax which is not laid for a public purpose." In reference to extending the debt-creating and taxing power beyond this limit, he thus speaks: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises, and build up private fortunes, is none the less robbery because done

under the forms of law, and is called taxation." *Loan Association v. Topeka,* 20 Wall., 655-664.

More especially would I hesitate, in view of the heavy indebtedness pressing upon the State, which caused a provision to be inserted, section 4 of Article VII, in the Constitution of 1868, which forbade the State to lend its credit to any person, association, or corporation, unless in completing unfinished roads, or in which the State has a direct pecuniary interest, unless the subject is submitted to the vote of the people of the whole State, and be approved by a majority of those who shall vote thereon.

The same popular sanction is required when a municipal corporation proposes to create a debt, pledge its faith, or lend its credit, or to levy a tax, except for necessary expenses, and this restraint is put upon legitimate improvements contemplated, and taxation therefor; Art. IV, sec. 7. But this does not extend to such as are not of a public nature.

But the authorities are numerous, that the aid rendered railroads, canals, and the like, which are both private undertakings and also *publici jures,* in the form of stock-subscriptions or in donations, is for a public purpose, and within the competency of the law-making power of the State, when not forbidden by the organic law, to bestow upon subordinate municipal bodies.

Yielding to the precedents and the practice, I concur in the (236) opinion of the other members of the Court, and sustain the enactment, not being at liberty to do more than ascertain the legislative will, and when not in conflict with the fundamental law, give it effect.

No error. Affirmed.

Cited: Riggsbee v. Durham, 98 N. C., 85, 86; *Smith v. Wilmington, ibid.,* 348; *Riggsbee v. Durham,* 99 N. C., 347; *Brown v. Comrs.,* 100 N. C., 98; *Bynum v. Comrs.,* 101 N. C., 414; *Jones v. Comrs.,* 107 N. C., 251, 265; *Bank v. Comrs.,* 116 N. C., 364; *Charlotte v. Shepard,* 120 N. C., 416; *Harriss v. Wright,* 121 N. C., 181; *Glenn v. Wray,* 126 N. C., 732, 4; *Cox v. Comrs.,* 146 N. C., 586; *Wittkowsky v. Comrs.,* 150 N. C., 95; *Hill v. Skinner,* 169 N. C., 410; *Woodall v. Highway Commission,* 176 N. C., 391; *Martin County v. Trust Co.,* 178 N. C., 32; *Hammond v. McRae,* 182 N. C., 752; *Davis v. Board of Education,* 186 N. C., 229; *Holmes v. Fayetteville,* 197 N. C., 746.

JANE C. YORKLY v. MARY A. STINSON ET AL.

Wills—Election—Widows.

1. The fact that a widow enters a *caveat* to a will and contests its validity, does not prevent her from accepting any benefit given her by the will, if its validity is established, or from entering her dissent thereto in the proper time.

2. Where a widow agrees to adhere to the provisions of a will, and in consequence thereof the executor proceeds to pay legacies and assume obligations which would cause loss to him if the widow were to dissent, she will be estopped by her agreement, and will not be allowed to dissent, but where in such case she offers to put the estate *in statu quo*, and the executor has not acted under her agreement so as to cause him any loss whatever, she is not estopped.

3. Where a widow is appointed executrix and proves the will and qualifies, she cannot afterwards renounce and dissent, but must carry out the will in all of its provisions.

(*Ramsour v. Ramsour*, 63 N. C., 231; *Hinton v. Hinton*, Phil., 410; cited and approved; *Mendenhall v. Mendenhall*, 8 Jones, 287; *Syme v. Badger*, 92 N. C., 706; cited and approved.)

PETITION FOR DOWER, heard by *MacRae, J.*, on appeal from a judgment of the clerk, at March Term, 1886, of DAVIDSON Superior Court.

Samuel Yorkly died in July, 1881, leaving a will, wherein he appoints the defendant, William F. Henderson, executor and testamentary
(237) guardian to his infant son, the defendant, Samuel Hill Yorkly. He left also a daughter, the defendant Mary A. Stinson, and the plaintiff, his surviving widow. At the time of his death the testator possessed over 500 acres of land, of which he devises one-half to his wife for life or widowhood, and the residue to his son in fee. Of his personal estate he bequeaths certain articles of the estimated value of $600, and a like sum in money. The will makes some provision for the daughter, but it is impossible to state more specifically the testator's dispositions of the estate, as no copy of the will, though declared in the complaint to be annexed thereto as a part, is found in the transcript, and only such information of its contents is furnished as is set out in the case agreed.

The will was proved in common form before the clerk on 1 August, 1881, and the executor and testamentary guardian assumed the trusts conferred, and undertook their due discharge. On the next day, after being advised of her right to dissent, the plaintiff gave her assent in writing to the will.

Afterwards, upon being more fully informed of her rights, and, as we suppose, with knowledge of the condition of the testator's estate, she entered her dissent thereto, on 27 January, 1882, in the manner and within the time limited by law.

On the same day, the plaintiff and the two children, she acting in the capacity of next friend to the infants, entered a *caveat* to the probate, and the issue thus made up and transferred to the Superior Court and afterwards removed from Davidson to Rowan County, was tried, and a verdict rendered in favor of the script.

During the interval between the giving the assent and its recall by an entry of dissent on the record, the plaintiff received the legacies given her by the testator, and has taken possession of and appropriated the use and profits of the devised real estate to her own benefit.

The present suit is for dower, and is accompanied with an offer (238) to account for whatever of the personal estate has come into the plaintiff's hands.

It is stated that the defendant, Mary A., has been advanced in the testator's lifetime, about the year 1848 or 1850, in personal property of the value of $2,650, of which there were six slaves that were sold at $400 for each, at the time when so advanced, and the plaintiff avers that this advancement being accounted for, she has had but little, if any more than a child's part.

The only answer put in, is that of the executor and testamentary guardian, and it sets up as a defense to the action the adversary and unsuccessful proceedings in opposition to the probate of the script, and the written adherence to the instrument, when proved *ex parte,* and the acceptance of the legacies and devises given her under it. It does not appear that any disposition of the personal assets, in the payment of debts or otherwise, will be disturbed by giving effect to the dissent, nor, if the funds are restored, that the estate cannot be administered as effectually and justly as if the dissent had not been given at the earliest moment. No complications are suggested, rendering it inequitable to remit the plaintiff to the share to which she would have succeeded in case her husband had died without making a will.

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

Frank Robbins for plaintiff.
Daniel G. Fowle for defendants.

SMITH, C. J., after stating the facts: We attach no special significance to the fact that the plaintiffs, with others, availed themselves of a clear legal right, possessed by every person interested in the result, to have the alleged testamentary paper propounded anew and proved *per testes.* The

right to require this in a proper manner, is conferred by law, and
(239) its exercise cannot be attended with the deprivation or impairment of other rights, because of an unsuccessful opposition to the script. It remains as if no resistance had been offered to the probate, for the plaintiff to assert any just claim accruing to her under the will, when established, as to accept the provisions made for her by law upon her recorded dissent thereto.

The ruling of the court below, adverse to the object sought in the action, is based upon the inconsistency of her taking and using property given her by the testator, and her present attempt to annul and render the will inoperative, so far as affects herself. It assumes that she has made an election, and cannot now be heard to reverse it. There would be much force in this reasoning, if the administration had been conducted upon the faith of her adhesion to her declared purpose to abide by the instrument, supported by her receiving the benefits it gives her, and dispositions made of the funds or obligations assumed, incompatible with the present claim, and which could not now be disturbed without loss or detriment to the executor, who relied upon her good faith in what was afterwards done. Such a case might furnish ground for an equitable estoppel against the right of dissent, and deny to her the statutory relief. But no such difficulties are suggested, and so far as appears, the return of the legacies and of rents for which the plaintiff may be liable, would restore the state of things existing at the original probate, and leave open the pathway to a due administration of the estate, without interfering with intermediate rights or interests of the personal representative or of others.

The statute (The Code, sec. 2108), allows six months from probate within which a widow may make an election to take under the will, or against it under the law, and this period is given in order that she may fully learn the condition of the estate and the advantages to be derived
under the provisions made for her, as compared with those accru-
(240) ing, as in case of an intestacy, and thus to considerately and intelligently exercise her right to dissent. We do not find in the facts any just ground for depriving her of the statutory provision in her behalf, of which she has undertaken to avail herself within the time limited by law.

The opinion of the Court was governed, we presume, by the decisions in *Mendenhall v. Mendenhall,* 8 Jones, 287, and *Syme v. Badger,* 92 N. C., 706, supposed to involve the same principle. But in those cases the estoppel was held to apply to a widow, who was appointed to execute the will, and of course in all of its provisions, and who accepted the office and undertook to carry out its directions, with which the legal

effect of a dissent was wholly inconsistent. The subject is considered in the last cited case, and leaves nothing now to be added.

But the case of *Ramsour v. Ramsour,* 63 N. C., 231, if not an authority, is in the line of the views we have taken of the present application.

In that case the plaintiff, who demanded dower in the action, had in May, 1868, conveyed part of the land claimed to be subject to dower to one Baxter in payment of her individual debts; and in August following caused her to dissent to the will to be entered, under the extension of the time for doing so allowed by the act of 22 February, 1866 (see *Hinton v. Hinton,* Phil., 410). The court below ordered the writ of dower to issue, and this ruling was affirmed on appeal.

We have not adverted to the haste with which the assent was given, nor to the unusual promptness with which the legacies were paid over, apparently to confirm and conclude her election, as tending to deprive the plaintiff of the time given by law for an examination of an estate, its resources and liabilities, and an intelligent and careful reflection as to the course to be pursued under the circumstances. They certainly do not indicate that deliberation in action which should (241) conclude and estop her from the subsequent exercise of a legal right to make a different choice. At least we cannot, *per se,* give such force and effect to the simple facts set forth in the case before us.

It must be declared there is error in the ruling, and the judgment must be reversed, and judgment rendered for the plaintiff; and to this end, and for further proceedings in the court below, let this be certified.

Error. Reversed.

Cited: Allen v. Allen, 121 N. C., 331; *Tripp v. Nobles,* 136 N. C., 113; *Whitehurst v. Gotwalt,* 189 N. C., 580.

GIDEON B. THREADGILL v. JAMES M. REDWINE.

Execution Sale—Tenants in Common.

1. A sale under execution transmits only the debtor's estate, in the same plight and subject to all the equities under which he held it.

2. Where two claimants of the same land covenanted with each other to become tenants in common in the land to sell the common property, and after adjusting an inequality existing in the amount paid by each to divide the proceeds, and the interest of one was sold under execution; *It was held,* that by purchasing the interest of his cotenant at execution

sale the other tenant in common did not acquire the land discharged of all claim by his cotenant, and that the equity for a division under the covenant did not pass by the sheriff's deed.

3. Where in such case, the defendant expended money after his purchase at the sheriff's sale in removing encumbrances from the common property, he is entitled to be reimbursed upon a sale before any of the proceeds go to his cotenant.

(Tally v. Reid, 74 N. C., 463; *Love v. Smathers,* 82 N. C., 369; *Flynn v. Williams,* 1 Ired., 509; *Giles v. Palmer,* 4 Jones, 386; *Smith v. Smith,* 72 N. C., 228; *Lewis v. McDowell,* 88 N. C., 261; cited and approved.)

(242) CIVIL ACTION, tried upon exceptions to a referee's report, before *MacRae, J.,* at Spring Term, 1886, of STANLY Superior Court.

The plaintiff and defendant having conflicting claims of title to certain lands previously belonging to one D. A. Underwood—the plaintiff through a sheriff's sale under execution—the defendant also through a coroner's sale under *fieri facias,* and also a deed from the assignee of Underwood—entered into the following agreement:

"The said Threadgill, for the sum of $100 to him in hand paid, has sold by deed of bargain and sale to said Redwine, one-half of his interest in said land, the said Redwine having sold by deed of bargain and sale one-half of his interest in said land. It is mutually understood and agreed by and between the parties aforesaid, that they are to own said lands jointly, each owning one individual half.

"It is further understood and agreed by and between the parties aforesaid, that they are to sell the lands, and upon a sale thereof, the proceeds are to be divided between them, as follows: Said Threadgill having paid out the sum of $389 for said land, and Redwine having paid out $55, each party, in the first place, is to have out of the proceeds of said land, the amounts they have paid out: And whereas, the said Redwine, as the surety of said Underwood, has received $500 back of the amount which the sureties of the said Underwood have paid for him to Thomas K. Kendall, said Threadgill is to have $500 more of the proceeds of the said lands than said Redwine.

"It is further agreed between the parties, that they will jointly pay a judgment due to Daniel Freeman from said Underwood, each to pay one-half."

The moiety of the plaintiff in the land was afterwards levied on by the sheriff of Stanly County under execution, and sold and conveyed for $750 to S. J. Pemberton, who made a deed therefor to the defendant, and the latter exonerated the land from a claim of dower, by paying the sum of $650 therefor.

(243) The value of the rents while in occupancy of the defendant, measures that due for his services and improvements, and the

judgment due Freeman was paid out of the sum of $2,600 for which the defendant, after acquiring the plaintiff's interest, sold the whole estate in the land.

These facts are admitted or found by the referee upon a compulsory order of reference and reported to the court, and to his finding no exception is taken.

His rulings upon matters of law are:

"1. That the deeds and contract having been made at the same time as parts of one and the same transaction, are to be construed as one instrument.

"2. That plaintiff had an interest in the land to the amount of $889, less the sum of $55 in excess of the interest which defendant had in the land, which was to be paid to him upon a sale of the land.

"3. That the said interest which accrued under the contract, as distinguished from the deeds, was not subject to sale under execution.

"4. That the sheriff, by his deed to S. J. Pemberton, only conveyed one-half interest in the land.

"5. That the sum of $650 paid for the dower, the sum of $1,000 paid to redeem the land sold under execution, and the sum of $300 expended for repairs, should be deducted from the sum for which the land was sold by defendant.

"6. That the action is not barred by the statute of limitation."

The defendant, J. M. Redwine, excepts to the report of the referee, as follows:

"1. That in his third conclusion of law, the referee finds 'that the interest of plaintiff, Threadgill, which accrued under contract, as distinguished from the deeds, was not subject to sale under execution,' when under the proofs, he should have found that the entire interest of the plaintiff was subject to sale under execution, was (244) in fact sold by the sheriff, and passed by the sheriff's deed to Pemberton, and from Pemberton to defendant, by the deed from the former to the latter, thus extinguishing the plaintiff's interest in the subject-matter in controversy in this action.

"2. That the referee, in his fourth conclusion of law, finds 'that the sheriff, by his deed to S. J. Pemberton, only conveyed one-half interest in the land,' whereas he should have found instead thereof, that by said deed the plaintiff's entire interest was conveyed to Pemberton.

"8. That instead of finding as he has done, that defendant is liable to plaintiff in any sum, he should have found that defendant had become the owner of all plaintiff's interest in the subject-matter of the controversy by reason of the sheriff's deed to Pemberton, and Pemberton's deed to defendant, and that defendant was not liable to plaintiff for anything."

Upon these findings, adopted by the court, the defendants' exceptions were sustained; and judgment being rendered against the plaintiff, he appeals.

J. A. Lockhart for plaintiff.
Jos. B. Batchelor and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the facts: Now, while the transfer under the deed of the sheriff of the plaintiff's undivided moiety to the purchaser, could not and did not carry the plaintiff's equities, and rights springing out of their mutual covenants, as the numerous authorities cited in the argument for the appellant show, *Tally v. Reed,* 74 N. C., 463; *Love v. Smathers,* 82 N. C., 369, and others, it is nevertheless true, that the estate passes, subject to and charged with the equities of the defendant attaching thereto, for such is the effect of a sale under (245) execution, and it transmits only the debtor's estate, in the plight and condition in which he held it. *Flynn v. Williams,* 1 Ired., 509; *Giles v. Palmer,* 4 Jones, 386; *Smith v. Smith,* 72 N. C., 228; *Lewis v. McDowell,* 88 N. C., 261.

The covenants as to the disposition of the proceeds of sale, so far as they inure to the advantage of the plaintiff, did not therefore pass to the purchaser at the execution sale, nor were they extinguished, through any supposed union with the legal estate, when he conveyed it to the defendant. The execution of the agreement in its literal terms became impracticable by the divesting of the moiety of the property out of the plaintiff, but this difficulty was removed, and the ability to give it effect restored, by the defendant's acquirement of that moiety, whereby he became sole owner. The several equities have been reunited with the legal estate, and the effect of the dissociation no longer remains as an impediment in their recognition and enforcement. But the expense incurred by the defendant is a paramount charge on the interest acquired, and it must be paid before the agreed mode of apportionment of the fund received upon the sale to the last purchaser, out of the plaintiff's share as well as the amount paid in removing an incumbrance common to the whole property.

We therefore declare that there is error in the rulings upon the exceptions, and in the rendition of judgment against the plaintiff. The cause will be remanded, to the end that the judgment be reversed, and such further proceedings had therein as are in accord with the law declared in this opinion.

Error. Reversed.

(246)

S. H. REEVES v. PINCKNEY WINN.

Slander—Evidence—Vindictive Damages.

1. In an action for slander, evidence of the pecuniary condition of the *defendant* is competent to increase the damages, when the plaintiff is entitled to vindictive or punitory damages, but the pecuniary condition of the *plaintiff* is not competent for such purpose, while it may be to show actual damage.
2. Vindictive or punitory damages are allowed when the misconduct is marked by malice, oppression, or gross and wilful wrong, and the law allows these damages, not simply to compensate the party injured, but to punish the wrongdoer.
3. *It seems*, that where the action is for a personal injury, as where by assault and battery or by the negligence of the defendant the plaintiff has been crippled so that he is unable to work, he may show the nature of his business and the value of his personal services, the loss of which may be more disastrous to a poor man than to one of wealth, but this is only for the purpose of showing actual damage.

(*Adcock v. Marsh*, 8 Ired., 360; cited and approved.)

THIS was a civil action to recover damages for slanderous words spoken by the defendant of the plaintiff, tried before *Shepherd, J.*, at January Term, 1887, of WAYNE Superior Court.

The slanderous words complained of are fully charged in second, third, and fourth allegations of the complaint. The answer of the defendant admits that the words charged were spoken by him, but denies that they were false and malicious, or slanderous, and sets out in detail and at considerable length, alleged facts and circumstances in justification of their use.

Issues were submitted to a jury, and in response they found that the defendant, in using the words set forth in the second and third allegations of the complaint, intended to charge that the plaintiff did wilfully, wantonly and feloniously burn the houses mentioned in (247) the complaint, and that this charge was false and malicious.

The defendant relied on his plea of justification, and in support of it introduced much testimony tending to show that J. H. Hollowell and the plaintiff conspired to burn the houses mentioned in the pleadings, and also testimony to show that J. H. Hollowell procured the plaintiff to burn, and that the plaintiff did burn them.

Upon the trial, the plaintiff offered himself as a witness in his own behalf, and, for the purpose of assessing vindictive damages, was asked the following question: "What was your pecuniary condition at the

time of the using of said words?" This was objected to by the defendant. The objection was overruled, and the plaintiff answered: "I have nothing, except what is necessary to get along with. I have no property." The defendant excepted.

The plaintiff introduced one Henry Lee, and asked him if he knew the general character of J. H. Hollowell. This was objected to by the defendant. The objection was overruled, and the witness was permitted to testify that the character of J. H. Hollowell was good. The defendant excepted.

Said Hollowell was not introduced as a witness, but the defendant offered evidence tending to establish the truth of all the matter alleged in the answer, in justification and mitigation, and that the plaintiff was employed as a clerk by J. H. Hollowell about a week before the fire.

The pleadings were not offered in evidence, but defendant's counsel argued in support of justification as well as in mitigation. The court, among other things, charged the jury, "that they must be satisfied that defendant, in speaking the words, intended to charge the plaintiff as stated in the *innuendoes,* and that if they so found, and that said charges were false, the law presumed malice, and the plaintiff
(248) would at least be entitled to nominal damages. That if there was actual malice they might give vindictive damages."

In telling the jury what circumstances they might consider on the question of vindictive damages if they found actual malice, the court said: "If the jury believe from the evidence, and from the facts and circumstances proved on the trial, that when the defendant filed his plea of justification he had no reasonable hope or expectation of proving the truth of it, and if the jury believed from the evidence that the defendant is guilty of the slander charged in the complaint, they may, in fixing the amount of the plaintiff's damages, consider this fact as a circumstance. That although they should find from the evidence, that the defendant has not sustained his plea of justification, still the fact that he has filed such plea, should not of itself be regarded by the jury as an aggravation of the original offense, if they believe from the evidence that it was filed in good faith and with an honest belief on the part of the defendant that he would be able to sustain the plea by evidence.

There was a verdict for the plaintiff.

Motion for a new trial by the defendant for error in receiving testimony as to the pecuniary condition of the plaintiff and as to the character of J. H. Hollowell, and for error in the charge of the court upon the effect of the plea of justification. Motion overruled. Judgment for plaintiff. Appeal by defendant.

E. R. Stamps and C. B. Aycock for plaintiff.
W. R. Allen for defendant.

DAVIS, J., after stating the facts: We think there was error in admitting testimony as to the *pecuniary* condition of the plaintiff for the purpose of showing vindictive damages.

In a certain class of cases, slander among them, when the (249) offense is marked by malice, oppression, or gross and wilful wrong, the jury may give damages, not simply to compensate the party injured, but *vindictive* damages to *punish* the wrong-doer, and to that end, it may be competent to show the pecuniary condition of the defendant, as was held in *Adcock v. Marsh,* 8 Iredell, 360. If the purpose is to *punish* the defendant, it will at once occur to every intelligent mind, that his pecuniary condition is a matter properly to be considered by the jury in determining the punishment. A verdict for a large sum, rendered against a man of large wealth, would be a less punishment than a verdict for a small sum against a poor man, but we are unable to see how the *punishment* of the defendant can be determined by the pecuniary condition of the plaintiff. The plaintiff is entitled to a verdict for all the *actual* damages sustained by him, without reference to the pecuniary condition of himself or of the defendant, and if the conduct of the defendant has been such as to warrant *vindictive* damages, the jury may add to the actual damages, by giving such additional sum by way of *punishment* to the defendant, as they may deem just; and for the purpose of ascertaining this, there is good reason why they should know the pecuniary condition of the *defendant,* but none why they should know or consider the pecuniary condition of the *plaintiff,* unless it can be made to appear that an equal amount of damages, if paid to one man, would be a greater or less punishment than if paid to another. There was a time when the slander of the great and rich, was held to be a more aggravated offense and meriting greater punishment than the slander of the humble and the poor, but in this day and country there is no such thing as *"Scandalum Magnatum"* on the one side, nor is there on the other, any law that discriminates in favor of or against the poor man, simply because he is poor. In meting out punishment, whether in imposing fines and penalties on the criminal side of the docket, or giving punitive and exemplary damages for malicious wrongs to individuals in (250) civil actions, it is necessary to know the pecuniary circumstances of the defendant, because a small fine or slight damages might be heavier punishment to a man of small means, than a heavy fine or damages would be to a man of wealth, but whether the fine or damages go to a poor man or to a rich man, the punishment is the same to the party who has it to pay. Odgers on Libel and Slander, 292, says, "in fact, although

in theory it is the duty of the jury to give such damages as will fairly compensate the plaintiff for the injury he has sustained, yet in justice, juries frequently, especially when the defendant has acted with clear and express malice, give vindictive damages, which are clearly meant, not so much as a compensation to the plaintiff for his loss, as a punishment to the defendant for his misconduct." The question is discussed at great length in the notes to the case of *Rome v. Moses,* 67 American Decisions, 560, cited by counsel for plaintiff, and while the decisions are both ways, it seems pretty well settled, by the weight of authority and by reason, that in proper cases for vindicative damages, the pecuniary condition of the defendant may be given in evidence, but it is there said: "The pecuniary circumstances of the plaintiff are admitted in evidence much less often than those of the defendant," and the cases relied on are nearly, if not all, for injuries to persons, and it is said that the evidence "is usually admitted, if at all, on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the damages caused by the tortious act, the poverty of the plaintiff making the injury the greater," as for instance, where, by an assault or battery, or the gross negligence of the defendant, the plaintiff has been so crippled and disabled as to be unable to work, and in such cases, he may show the nature of his business, and the value of his *personal* services, the loss of which may be more disastrous to a poor man than to one of wealth, and (251) these may properly come under the head of actual or special damages, and nearly all the cases cited by the counsel for the plaintiff, and which are referred to in *Rome v. Moses, supra,* are of this class.

In *Ware v. Cartledge,* 60 Am. Dec., 489, the pecuniary circumstances of the plaintiff were held to be inadmissible in an action for slander, while in *Clements v. Mahoney,* 55 Mo., 352, and *Sheets v. Barrets,* 7 Pick., 82, referred to in note to *Rome v. Moses,* it was held differently.

The question, so far as our researches go, is an open one in this State, for the pecuniary condition of the *defendant,* not the plaintiff, was the point decided in *Adcock v. Marsh, supra,* and we think the better reason would exclude evidence as to his pecuniary condition, where the only purpose of it is to increase vindicative damages, as in this case. We say only purpose, because there may be cases in which it may be proper, in determining his actual damages. There was error in admitting testimony as to the pecuniary condition of the plaintiff, and the defendant is entitled to a new trial.

This renders it unnecessary for us to consider the other exception presented in the record.

There is error. Let this be certified.

Error. Reversed.

Cited: Johnson v. Allen, 100 N. C., 139; *Bowden v. Bailes,* 101 N. C., 613; *Tucker v. Winders,* 130 N. C., 147; *Robertson v. Conklin,* 153 N. C., 3; *Baker v. Winslow,* 184 N. C., 9; *Tripp v. Tobacco Co.,* 193 N. C., 617.

(252)

STATE EX REL. JACOB C. SETZER v. DANIEL SETZER ET AL.

Marriage—Jurisdiction—Idiocy.

1. The courts of this State, both as succeeding to the jurisdiction of the Ecclesiastical courts, and under our statutes, have jurisdiction to declare a marriage void *ab initio* and to grant a divorce for that reason, but a judgment declaring the marriage to have been void *ab initio*, will not have the effect of bastardizing the issue.
2. The question of whether or not a marriage was void *ab initio*, there having been a marriage *de facto*, must be tried between the parties to the marriage, and this question cannot be raised in an action by the children of such marriage, claiming as next of kin or heirs at law, in order to bastardize them.
3. So, where the plaintiff brought an action as next of kin of his father, and the jury found that when the marriage was consummated the father was an idiot and did not have capacity to enter into the contract; *It was held*, that the issue was immaterial, and if this was the only defense the plaintiff would be entitled to a judgment *non obstante veredicto.*
4. Where two defenses are pleaded, and the court below gives judgment for the defendant on one of them without trying the other, which judgment is reversed on appeal, the case will be remanded in order that the other defense may be tried.

(Johnson v. Kincade, 2 Ired. Eq., 470; *Crump v. Morgan,* 3 Ired., 91; *Williamson v. Williams,* 3 Jones Eq., 446; *Brooks v. Brooks,* 3 Ired., 389; *Baity v. Cranfill,* 91 N. C., 293; cited and approved.)

CIVIL ACTION, tried before *Shipp, J.*, and a jury, at Fall Term, 1885, of CATAWBA Superior Court.

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

The facts appear in the opinion.

No counsel for plaintiffs.
M. L. McCorkle for defendants.

SMITH, C. J. In the month of August, 1859, Reuben Setzer (253) was married to Sophronia Morcus by a justice of the peace, upon

a due observance of all the formalities prescribed by law for entering into that relation. They lived together as husband and wife until the spring of 1862, when, having entered the military service of the Confederate States, the said Reuben lost his life at the battle of New Bern, in this State. The only offspring of the union was the plaintiff, who brings this action as relator upon the bond executed by the defendant, Daniel Setzer, who administered on the estate of the deceased, and the other defendant, one of his sureties, to recover his distributive share of the personal estate in the hands of the administrator. The action was begun by suing out a summons on 13 August, 1883.

The answer sets up as a defense (and this is the only matter necessary to be considered), that the intestate was of imbecile mind from his youth up, and had not capacity to understand and enter into the marriage contract, and that, this being absolutely void, the plaintiff, their only child, was not born in lawful wedlock, and could not claim any part of the estate.

The only issue passed on by the jury, was as to the intestate's mental capacity to make an effectual marriage contract at the time of its solemnization, and the response was that he did not have such capacity.

We do not propose to examine the exceptions to the evidence offered, among which was an inquisition taken in 1855, finding the intestate to be a lunatic, and an order appointing a guardian, since the appeal must be disposed of upon the single finding of the intestate's mental incompetency, and its effect upon the relator's right as a distributee.

In *Johnson v. Kincade,* 2 Ired. Eq., 470, a bill in equity was filed, upon facts very much like those before us, to have declared a nullity a marriage entered into by the plaintiff, on the ground of his idiocy, and it was suggested, that as the marriage was void *ab initio,* it was (254) so to be considered whenever the question came up, and the present suit could not be maintained. *Ruffin, C. J.,* asserted the jurisdiction, not only because the Courts of Equity in this country had succeeded to the functions of the Ecclesiastical Courts of England, in which this jurisdiction was exercised, but because it was expressly conferred upon the Superior Courts of Law and the Courts of Equity by law; Rev. Stat., ch. 39. "The act," he remarks, "creates and confers a jurisdiction over all matrimonial causes, and includes, necessarily, we think the jurisdiction to pronounce the nullity of a marriage *de facto* for want of capacity." The Court thereupon in this suit between the parties proceeded to pronounce the marriage "in law null and void for the want at the time of solemnizing the same of mental capacity on the part of said Reese, sufficient to understand the nature of, and assent to such a contract, and that the said Reese ought to be and is, set free and divorced from the said Ann."

The same doctrine is reaffirmed in *Crump v. Morgan,* 3 Ired. Eq., 91, by the same eminent Judge in a similar case.

In *Williamson v. Williams,* 3 Jones Eq., 446, a bill was filed for an account against the guardian of the plaintiff, and the answer set up the plaintiff's marriage with one Cashion as a defense. The plaintiff, anticipating the objection, alleged the marriage to be void, because of the *feme's* youth (she was thirteen years of age), the practice of fraud and artifice, with the use of some force in bringing it about, and her want of sufficient understanding to enter into the contract.

The court declined to try the issue thus made, and retained the cause "for further directions, to the end that the plaintiff, if so advised, may institute proceedings in the proper court to obtain a decree of nullity of marraige, after which they will be at liberty to move in this cause."

Delivering the opinion, *Pearson, J.,* after quoting and approving the language used in *Johnson v. Kincade,* that it was "con- (255) venient and fit in respect to the decent order of society, *the condition of parties, and the succession of estates,* that the validity of such a marriage should be directly the subject of judicial sentence, says: "And as the Legislature has conferred sole original jurisdiction in all applications for divorce upon the Superior Courts of Law and Courts of Equity—(Rev. Code, ch. 39, sec. 1)—and pointed out the mode of proceeding and the rules and regulations to be observed (section 5), and required that the material facts charged in the bill or libel shall be submitted *to a jury,* upon whose verdict and *not otherwise,* the Court shall decree (section 6), and authorize a decree from the bonds of matrimony, or that the *marriage is null and void*" (the italics in the above are in the opinion), and after a sentence nullifying or dissolving the marriage, all and every, the duties, etc., in virtue of such marriage, shall cease and determine, with a proviso as to the legitimacy of the children (section 11), we do not feel at liberty to decide a question of such grave importance, as a thing collateral or incidental to an ordinary bill for an account, where the trial will be made, without the intervention of a jury, upon depositions which are usually taken in a defective and unsatisfactory manner." He adds: "The propriety of requiring that fact to be established by the judgment or sentence of a tribunal having sole original jurisdiction, is too manifest to require any further observation." See *Brooks v. Brooks,* 3 Ired., 389.

Now it is expressly provided in the Rev. Stat., ch. 39, sec. 9, where it is decreed that *"the marriage is null and void,"* or for cause not affecting its original validity, as follows: "That nothing herein contained shall be construed to extend to, affect, or render illegitimate, any child or children born of the body of the wife during the coverture."

(256) A proviso in words essentially the same is found in the Rev. Code, ch. 39, sec. 11, and again in Bat. Rev., ch. 37, sec. 15.

Now if it is conceded that the validity of a marriage can be questioned in the collateral manner attempted, and when neither of the parties to it is before the court so that it is not a judgment changing their status, it can have no greater effect upon the right of offspring than such a judicial sentence, rendered in a direct proceeding, and as those rights are protected in the one case, so must they be in the other.

The present law is more explicit and clear, and as we have had occasion to inquire into its operation in the recent case of *Baity v. Cranfill,* 91 N. C., 293, we will pursue the subject no further, and content ourselves by declaring the result to be, that the present verdict cannot take from the relator any of his rights as a son of the intestate, to a share in the latter's estate, nor render his birth illegitimate. The issue was therefore immaterial, and we should direct judgment for an account, but that another defense set up in the answer, to wit: a compromise agreed upon in a former suit by the relator and his mother, has not gone before the jury, the judge deciding that upon the findings as to the marriage, the relator could not recover.

There is error, and there must be a new trial involving the other matters of defense, and to that end this must be certified.

Error. Reversed.

Cited: Sims v. Sims, 121 N. C., 299; *Ferrall v. Ferrall,* 153 N. C., 180; *Taylor v. White,* 160 N. C., 41; *Watters v. Watters,* 168 N. C., 414.

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J. H. N. BRENDLE v. A. L. HERREN ET AL.

Practice—Final Judgment.

1. After final judgment disposing of the rights of the parties, it is too late to introduce a new cause of action into the controversy.

2. So, in an action to have the holder of the legal title declared a trustee, it is too late after final judgment to ask for an account of the rents and profits.

(Pearson v. Carr, ante, 194, cited and approved.)

MOTION in the cause, heard by *Gilmer, J.,* at Spring Term, 1885, of HAYWOOD Superior Court.

In the progress of the cause, and after the admission of an interplea of T. D. Welch and some changes in the form of the action, at Fall

Term, 1882, of the Superior Court of Haywood County, an issue in this form was submitted to and a response returned by the jury:

What estate did the deed from T. D. Welch, dated 1 October, 1870, convey to Newton Brendle? Absolute? Answer: Yes, not absolute.

Thereupon it was adjudged by the Court:

"I. That the defendant A. L. Herren has a charge and lien upon the land sued for, for the sum of $300.00, with interest on the same from 12 October, 1870, and that he hold said land until the same is satisfied and paid.

"II. That upon payment of said sum with interest as above provided, the said defendant A. L. Herren is hereby declared a trustee for the plaintiff in respect to said land, for and during the life of T. D. Welch.

"III. That upon his death, and subject to the right of dower of Selina Welch therein, of the land which the said defendant acquired by the deed of 12 October, 1870, he is hereby declared to be trustee for the plaintiff of an absolute estate in fee simple in the remainder, and that he convey the same by sufficient deed. (258)

"IV. That the plaintiff recover the costs of the action; and that this judgment be enrolled."

From this judgment the defendants appealed, and upon the hearing in this Court it was affirmed. *Brendle v. Herren,* 88 N. C., 383, where the nature and object of the action are set out in the opinion.

Upon the return of the certificate of the clerk of this Court, at Fall Term, 1884, a motion of plaintiff was entered for an order of reference and the framing of an issue to ascertain if anything be due him on account of rents and profits received by the defendant in possession.

The motion was supported by an affidavit of an agent of the plaintiff, in which are set out what occurred at the trial, and the action of the judge in reference to the demand of plaintiff's counsel for rents, and the ruling thereon. At the same time, the plaintiff filed his petition for an amendment or modification of the previous judgment, so as to let in an inquiry into the liability of the defendant for rents and profits during his occupation. The application and the facts stated in the affidavit, were controverted in an opposing verified answer of the defendants.

At Fall Term, 1884, the following judgment was entered:

"The plaintiff moved that the case be referred to the clerk to take an account of the rents and profits, and for a writ of assistance upon the coming in of said report, which motion, being debated by counsel and heard by the court, upon the pleading in the cause and the judgment heretofore rendered, is refused. From this ruling plaintiff appeals."

T. F. Davidson for plaintiff.
Armistead Jones for defendants.

SMITH, C. J., after stating the facts: The application is not merely for rents accruing since the rendering upon its merits, but to change the judgment itself, and open up the general inquiry as to rents, (259) including those with which the defendant is chargeable before.

The appropriate time to institute the inquiry was after verdict and before judgment. The orderly and usual mode of proceeding, is to have all the facts ascertained, and before the court where the action is to be disposed of, and the rights of the parties settled by the final adjudication. This was not done, but the rights of the contestants declared, the plaintiff being entitled to a conveyance of the legal estate on payment of the sum due the defendant and subject to the contingent claim of dower. The payment to the defendant must precede the transfer of title, and now it is proposed to extinguish the debt by proof of the reception of rents sufficient to discharge it.

We concur with the court, that the judgment ought not, if the power was possessed to do so, to be disturbed after so long an interval, and after its affirmation in the appellate Court.

It is manifestly too late after such action, to reopen the controversy by introducing a new element of strife, after a final adjudication.

In *Pearson v. Carr, ante,* 194, we have so ruled.

This does not deprive the plaintiff of seeking compensation for rents accruing *since the judgment,* inasmuch as they were not recoverable in this action, and are not concluded in its rendition.

In our examination of the voluminous transcript sent up, much of it wholly needless, in order to a full understanding of the matter of appeal, we may have overlooked some part in the case, but the summary rehearsal of the proceedings we have given, is enough to explain the grounds upon which the ruling below is sustained. There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: S. c., 98 N. C., 539; *McCall v. Webb,* 126 N. C., 762; *Tussey v. Owen,* 147 N. C., 337.

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W. W. HUDSON ET AL., ADMINISTRATORS, v. JOHN A. COBLE.

New Action—Motion in the Cause—Sale of Land for Assets—Parties—Judicial Sales—Statute of Frauds.

1. A proceeding to sell land for assets is essentially equitable, and the court has all the powers of a Court of Equity to accomplish its purpose.
2. Where relief may be had in a pending action, it must be sought by a motion in that cause, and if a new action is brought it will be dismissed by the court *ex mero motu*, if the objection is not taken by the defendant.
3. Before a purchaser at a judicial sale can be held to his bid, the sale must be confirmed by the court which ordered it to be made.
4. If a purchaser at a judicial sale fails to comply with his bid, the court may either decree: first, that he specifically perform his contract; or, second, that the land be resold and the purchaser released; or, third, that without releasing the purchaser, the land be resold, but in this case, the purchaser must undertake as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price.
5. Where a purchaser at a sale to make assets failed to comply with his bid, and the land was resold for a less price, he cannot be made liable in a new action for such deficiency, but the remedy is by a motion in the cause.
6. *Quære*, whether in such case, the administrator or the heir at law is the proper party to move it, it not appearing that the excess of the first bid is needed to pay debts.
7. The statute of frauds has no application to judicial sales.

(*Trice v. Pratt*, 1 Dev. & Bat. Eq., 626; *Murrill v. Murrill*, 84 N. C., 182; *Rogers v. Holt*, Phil. Eq., 108; *Singletary v. Whitaker*, *ibid.*, 77; *Cotton, ex parte*, *ibid.*, 79; *Council v. Rivers*, 65 N. C., 54; cited and approved.)

CIVIL ACTION, tried before *Clark, J.*, at February Term, 1886, of GUILFORD Superior Court.

The plaintiffs, administrators of William Hudson, finding the personal estate of the deceased insufficient, instituted, in association with his heirs at law, a proceeding against the widow in the Superior Court before the clerk, for a decree of sale of a tract of land (261) of about 90 acres, owned by him at the time of his decease, and its conversion into assets to pay his debts and the charges of administration.

The widow, at first demanding that her dower be assigned to her therein, came to an agreement with the petitioners, whereby she gave consent to a sale of the land free from any claim of her own on condition of receiving in lieu thereof $650, the first proceeds of the purchase money. A judgment was accordingly entered, authorizing and

directing the administrator to make the sale, on the terms that $700 be paid at once, and the residue in equal parts, with interest, at six and nine months from the day of sale.

The sale was made on 5 March, 1885, on the premises, and the present defendant being the last and highest bidder, became and was declared the purchaser at the price of $2,009.99.

The defendant did not comply with the terms, and afterwards repudiated his purchase altogether.

On 10 March, the administrators made report of the fact, and asked for another sale, which was made the day following. At the second sale the land brought $1,635, and this bid, the terms being complied with, was reported and confirmed on 18 May, and the title directed to be made when all of the purchase money was paid.

The administrators alone bring the present action against the first bidder, the defendant, to recover in damages the sum of $374.99, the difference in the bids, lost by the defendant's refusal to take the land at his own bid.

The defendant demurs to the complaint, as follows:

"The defendant, without waiving the many inaccuracies in the statement of the facts, and the omissions to state others, demurs to the complaint, for that it does not show a cause of action against the defendant, in this:

(262) 1. If they were entitled to any relief, it should have been asked in the proceeding to sell the land for assets, and they cannot institute a new action for the same.

2. According to their own showing, the alleged sale to defendant was not confirmed and ratified by the court and defendant's bid accepted.

3. They do not allege that any rule or notice was served upon defendant to show cause why he should not comply with the alleged terms of sale, or in any other way give him a day in court.

4. That the alleged sale, according to plaintiffs' own showing, was not in such manner and form as to bind him under the statute of frauds.

Wherefore defendant demands judgment whether he shall be compelled to answer the facts alleged in the complaint, and that plaintiffs' action be dismissed and defendant recover his costs."

Upon the hearing, the court sustained the demurrer, dismissed the action, and adjudged costs to the defendant, and the plaintiffs appealed to this Court.

L. M. Scott for plaintiffs.
No counsel for defendant.

SMITH, C. J., after stating the facts: We concur with the judge in the opinion that the action cannot be maintained, and that if the plaintiffs (if they, instead of the heirs, are entitled to recover the loss), have misconceived the mode of reaching the fund, in resorting to an independent action, the proper remedy must be sought in a proceeding in the cause, and to this end the first bid should have been accepted by the court, and the contract thus consummated. That this is the course to be pursued in equity is not disputed by appellants' counsel, and is fortified fully by precedents. Nor has the statute of frauds any application to judicial sales, as is held in case of *Trice v.* (263) *Pratt,* 1 D. & B. Eq., 626.

Numerous adjudications have established the general proposition, that where relief can be had in a pending cause, it must be there sought. *Murrill v. Murrill,* 84 N. C., 182, and many other cases.

In *Rogers v. Holt,* Phil. Eq., 108, *Battle, J.,* cites *Singletary v. Whitaker,* and *Cotton, Ex parte,* in the same volume, at pages 77 and 79, and asserts the proper practice in this language: "These cases assert the power of the Court of Equity, upon petition for the sale of land for the benefit of infants, to compel the purchaser by *orders made in the cause, to perform specifically his contract of purchase,*" etc.

Even if a bond had been given for the purchase money, it is held in *Council v. Rivers,* 65 N. C., 54, that a separate action cannot be prosecuted to enforce payment, but that the remedy is in an order in the pending cause, and that this objection to jurisdiction may be taken on appeal, or the court may act *ex mero motu.*

The method of procedure is particularly pointed out by the late *Chief Justice* in these words: "The orderly mode of proceeding was for the court to *accept the bid* of Coffield and Barnhill, by confirming the contract of sale, and then upon the matter set out in the report, to enter a rule against them, to show cause why they should not be required to comply with the terms of sale." He then proceeds to suggest that the purchasers may be decreed, (1) to specifically perform their contract: or (2) the land may be ordered to be sold and the purchaser released; or (3) without releasing the purchaser, such second sale may be directed, the purchasers undertaking, as a condition precedent to such order, to pay the additional costs, and make good any deficiency produced thereby. The ruling appealed from in that case, was that without the confirmation the land be resold and the purchasers pay the difference, if any, in the sales, and the order was set (264) aside and the ruling reversed.

The form of the present proceedings is essentially equitable, and must involve, when necessary to accomplish its purposes, the exercise of

similar powers. It could never have been intended by the Legislature to confer the jurisdiction, and leave the court without the means of making it effectual and complete. The application is in the Superior Court, the clerk exercises jurisdiction, and any question of law or fact may be referred to the judge or jury. There is no impediment suggested in the way of the exercise of all the functions pertinent to the case, and to a full and final determination.

There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Marsh v. Nimocks, 122 N. C., 479; *Crawford v. Allen,* 180 N. C., 246; *Lyman v. Coal Co.,* 183 N. C., 586.

SAM'L ALBERTSON, ADMINISTRATOR, v. HARPER WILLIAMS ET AL.

Res Judicata—Motion in the Cause.

Where the subject-matter of an action has been once determined by the court, a new action will not be entertained in regard to it. If for any reason the former judgment ought to be set aside, it can only be done by a motion in the cause for that purpose if the action is still pending, and if it has been determined and come to an end, then by a new action to directly attack it.

(Miller v. Frezor, 82 N. C., 192; *Gay v. Stancill,* 76 N. C., 369; *Long v. Jarratt,* 94 N. C., 443; cited and approved.)

CIVIL ACTION, tried before *Clark, J.,* at November Term, 1886, of DUPLIN Superior Court.

The defendant Thomas J. Carr, sheriff of Duplin County, and having in his hands executions against Samuel Houston, the intestate of the plaintiff, on the 4th Monday of September, 1862, by virtue
(265) thereof, sold at public sale according to law, a tract of land belonging to the judgment debtor to the defendant Harper Williams at the price of $5,000, bid by him. The purchaser paid of his bid to the sheriff $809.09, a sum sufficient to satisfy the executions and costs and no more, retaining the remainder in his hands, $4,190.91, to be accounted for with the said Houston, as appears from the return made on the said executions. The deed conveying the land to the purchaser was made in 1869, the debtor in the meantime remaining in the occupation of the land, represented by the present plaintiff to contain 730

acres, and to be of the value, in good money, of the sum at which it was bid off. At the time of executing the deed, the said Williams gave him a bond of indemnity against any liability he might incur to the said Houston by reason of his conveying the title. The present suit was commenced on 5 November, 1884, against the defendants by the plaintiff, as administrator of Houston, to recover the amount of the unpaid purchase money thus alleged in the complaint to be unlawfully withheld from him by combination between them.

The answer does not controvert the material allegations of fact made in the complaint, but sets up as a defense, the institution in 1871, of a suit by Williams against Houston for the recovery of possession of the premises, averring himself to be the owner in fee, pending which, a reference under a rule of court was made to arbitrators, who made their award and returned it to court, where it was confirmed, and the controversy between the parties in regard to the matters involved in the present suit settled and finally adjudicated.

Upon the present trial it appeared that a motion was entered by Houston, for reasons set out in affidavits by himself and one Peter H. Albertson, and resisted in counter affidavit of Williams, to recall and set aside the interlocutory order of reference and the report and its confirmation, upon which it does not appear what, if any, action was taken by the court. To sustain the bar of a former adjudica- (266) tion, the defendant exhibited a record of the suit in ejectment, in which appears this entry at Fall Term, 1871:

"This cause is referred to James M. Sprunt and A. G. Moseley, with power to choose an umpire, in case of disagreement, and their award, or that of their umpire, is to be the judgment of this court."

The referees, not controlled by the pleadings usual in an action of the kind, but in order to a settlement of the conflicting demands of the parties as to the subject-matter in controversy, and the title acquired at the sheriff's sale, returned their award to this effect:

"That there is due from Houston to Williams, $874.09 (paid by the latter to the sheriff), with interest, secured by the land conveyed by the sheriff, and if said sum be not paid in 90 days, the clerk to be required to sell the land for cash, and satisfy it, and if paid within the time specified, the said Williams is to reconvey to Houston by a quitclaim deed." The record stops with an order of confirmation, there having been no exceptions to the report, entered at Fall Term, 1872; for what reason the cause was discontinued from the docket does not appear.

The plaintiff further offered to show, that after confirmation of the referees' award, Williams brought another action against Houston, in which he had judgment, and was put in possession of the land.

The court being of opinion that the former action could not be impeached collaterally in the way proposed, excluded the proof and the plaintiff excepted.

The plaintiff then asked to have the former cause reinstated on the docket, to be proceeded with as if no discontinuance had intervened, and this was refused as not constituting any part of the present action, and for that no notice of the motion had been given.

(267) The court thereupon intimated an opinion that the plaintiff could not maintain his action until the confirming decree or order was put out of the way, by motion in the cause, or an independent action assisting it; in submission to which the plaintiff suffered a nonsuit and appealed.

Thereupon the defendants proposed to supply the defect in the record, by showing a sale by the clerk, in pursuance of the decree, of said land—a report and confirmation, and to prove the final decree by affidavit. The proposal was not entertained and the evidence not received, forasmuch as the cause had come to an end by the judgment of nonsuit.

H. R. Kornegay for plaintiff.

H. E. Faison and A. W. Haywood for defendants.

SMITH, C. J., after stating the facts: In all these transactions growing out of the sale of the intestate's large and valuable tract of land, it is nowhere suggested that any part of the purchase money, beyond that used in payment of the executions, has been paid by the defendant Williams to any one, and yet he claims the entire property as his own. It may be, that the clerk sold and he purchased for a sum only sufficient to pay his own claim and the costs attending the action. But of this there was no proof received or preferred at the trial. Williams may have acquired the legal title and extinguished the plaintiff's claim to any of the large surplus produced by the sheriff's sale.

Assuming that the record concludes with the confirming decree and contingent order of resale upon the default of the intestate, the action is incomplete, and should, even after such lapse of time, be reinstated on the docket and proceeded with, as if no such interruption had taken place, by executing the order of sale, as was done in *Miller v. Frezor*, 82 N. C., 192. If the cause, however, has been carried on to its final consummation, then, as suggested by the court, the only redress

(268) for wrong done the intestate's estate, would be found in a new action impeaching the decree or judgment, if sufficient grounds therefor exist. But whether any, or what remedies remain, it is manifest the present suit cannot be sustained, because the subject-matter of it has been passed upon and adjudged, and the rights of the parties de-

termined in the prior suit. This is so upon principle, and is so emphatically declared in *Gay v. Stancill,* 76 N. C., 369, and more recently in *Long v. Jarratt,* 94 N. C., 443, in affirmance of the maxim, *nemo debet bis vexari pro una et eadem causa,* as to need no further remark.

The affidavits used upon the motion to vacate the reference and judgment, were wholly irrelevant to the present trial to affect the rights of the parties, and would be only competent as admissions upon some disputed matter of inquiry.

Nor was there any error in rejecting the record evidence of the second ejectment suit, offered to impeach the action of the court in the first, since it is not competent to do so in the present action; nor, for a like reason, in denying the motion to bring forward that unfinished suit, and thus introduce in this, matter foreign to its purpose.

These rulings are correct, and the judgment of nonsuit must stand. It is so adjudged.

No error. Affirmed.

Cited: Wilson v. Chichester, 107 N. C., 391.

JOHN A. BOGGAN v. CALVIN HORNE.

Evidence—Judge's Charge.

1. Where the question in issue is the value of a horse, the plaintiff may testify what he gave for the horse, as the actual purchase at the price is an act done in pursuance of an opinion, and gives greater force to it.

2. Where a book containing entries not in the plaintiff's handwriting is offered by the defendant, the evidence is competent when the defendant testifies that the entries were made by persons from whom he got the merchandise, under instructions from the plaintiff, and when he further testifies that the book contains everything he got from the plaintiff.

3. Where any part of the judge's charge is excepted to, the exception should point out specifically wherein the error consists.

(McPeters v. Ray, 85 N. C., 462; *Bost v. Bost,* 87 N. C., 477; cited and approved.)

CIVIL ACTION, tried before *MacRae, J.,* and a jury, at Spring (269) Term, 1885, of ANSON Superior Court.

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

A. W. Haywood for plaintiff.
John D. Shaw for defendant.

SMITH, C. J. This action is to recover possession of a bale of cotton, a horse, and a wagon, claimed under a chattel mortgage made by the defendant to the plaintiff, in January, 1882, to secure a note of $75, due on 1 October thereafter. The property is described in the deed as a "one-horse wagon, one gray horse, and all my crops of every kind, raised by me during the year 1882," of which the bale claimed formed a part. Under the auxiliary process of claim and delivery, provided in The Code, sec. 331 and following, the articles were seized by the sheriff and delivered to the plaintiff, who sold them and appropriated the proceeds to his own use.

It is unnecessary to advert to the pleadings, further than to say that the defendant alleged that he had paid the secured debt and discharged the mortgage. The jury upon issues submitted to them say: (1) That the plaintiff is not entitled to any of the goods seized; (2) that the defendant did not wrongfully detain them; and (3) that the value (270) of the cotton is $42.50, of the horse $25, of the wagon $22.50; and that (4) the compromise and settlement set out in the complaint, as entered into since the commencement of the action, was not made.

Upon the trial the plaintiff took two exceptions to evidence offered and admitted against his objection.

Exception 1. The defendant in his testimony said: "The horse was worth about $75," and that he "gave that for him." The exception is to the latter part of the statement.

If authority were necessary, our own ruling upon the competency of such evidence in the case of *McPeters v. Ray,* 85 N. C., 462, disposes of the question, and we may consider that as an estimate of value, and not an opinion expressed. The actual purchase at the price is an act done in pursuance of an opinion and imparts greater force to it. In *Small v. Pool,* 8 Ired., 47, it was held competent to prove what the plaintiff gave, and what he sold an alleged unsound slave for, in estimating damages in an action of deceit.

Exception 2. In the course of the defendant's examination on his own behalf, a book was produced and identified as belonging to the defendant (who could not read), in which were entered advances made to the defendant, some of them in the plaintiff's own handwriting. The items in the book were read, the plaintiff objecting to any of them going to the jury not written down by himself. This was during the examination of the defendant, a witness for himself, and he testified that he "kept this book for the law. Some things plaintiff put down on it himself. As to

the others, plaintiff gave defendant orders, and told him to tell the clerk to put the things down when defendant got them, *and the clerk did put them down when the defendant got them, and this book contains all that defendant got.*"

Again he repeats, "this book contains everything defendant got from plaintiff," reiterating the manner in which the entries were made by merchants who filled the orders. Certainly this meets the objection, for the *fact* of receiving these advances by the defendant (271) and that they are all that were made by the plaintiff, of which the entries were *memoranda* to preserve their accuracy, is sworn to and proved independently; such evidence is clearly proper, and the exception to the ruling untenable.

The error assigned in the motion for a new trial "in instructions to the jury" is in terms too vague to be entertained. The assignment should specifically point out wherein the erroneous charge consists; and this rule of practice has been often asserted and its observance required. *Bost v. Bost,* 87 N. C., 477.

There is no error and the judgment must be affirmed.

No error. Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 362; *Perry v. Ins. Co.,* 137 N. C., 403; *Wilson v. Scarboro,* 169 N. C., 656; *Canton v. Harris,* 177 N. C., 14.

D. S. CAGLE v. W. N. PARKER.

Easement—License—Issue—Judge's Charge.

1. An easement can only be created by a conveyance under seal, or by long user, from which such conveyance is presumed.
2. Owners of land grant a license to other persons "to build a mill and back water on us, so they don't back on our bottoms": *Held* (1) That the license is exceeded when the dam is raised to such height that the water is ponded back so as to sob the "bottom" and render its drainage impossible, and make it unfit for cultivation, although it is not actually overflowed. (2) That it is *erroneous* for the court to instruct the jury "that damages would be recoverable only when the grant contained in the license was exceeded by ponding water on the 'bottoms.'"
3. That the plaintiff is entitled to have an issue submitted to the jury as to the amount of annual damages caused by raising the dam above its original height.

(272) THIS was a civil action, tried before *Boykin, J.*, at the Fall Term, 1886, of STANLY Superior Court.

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

The facts are sufficiently stated in the opinion of the Court.

J. A. Lockhart for plaintiff.
Batchelor & Devereux and M. S. Robbins for defendants.

DAVIS, J. This was a civil action tried before Boykin, J., at Fall Term, 1886, of Stanly Superior Court.

The plaintiff alleges that he is the owner of valuable land on Rocky River, in Stanly County; that the defendants own a mill about half a mile below this land, with a dam across the river; that for two years previous to the bringing of this action the said dam has caused the water to pond back on the plaintiff's land, rendering it sobby and unfit for cultivation, and rendering valueless two springs on his land that were valuable to it, and causing other damage to his land.

The defendants answer and say that as to the allegation that the plaintiff owns the land mentioned in his complaint, they have not sufficient knowledge or information to form a belief; that they are the owners of a mill on Rocky River, but whether it is a half a mile below plaintiff's land they do not know, nor do they know that the plaintiff has any land on Rocky River. The other allegations of the complaint they deny. This action was commenced at Spring Term, 1880, and at Spring Term, 1885, by leave of the court, the defendants amended their answer, setting forth therein the following license, to wit:

"6 October, 1860. Know all men by these presents, that we, the undersigned, Temperance Austin and C. S. Austin, do give to Sidney Parker and W. N. Parker full privilege to build a mill and back water
(273) on us, so that they don't back on our bottoms, for we are the owners of the land above: if they put the dam down near the mouth of the race, where they say they will put it, for we claim no damages on them.

(Signed) TEMPERANCE AUSTIN.
(Signed) C. S. AUSTIN.

Signed, sealed in the presence of
W. N. PARER."

"The plaintiff contended that the instrument pleaded as a license does not, in law, convey an easement, and that as a contract there is no consideration to support it; that the same is not binding on the plaintiff,

and does not operate against him, and he also denied the execution of the writing by Temperance and C. S. Austin. These contentions were overruled and the plaintiff excepted." It is conceded that the plaintiff derived title through the Austins, by deeds dated respectively 18 January, 1874, and 2 February, 1875, and took possession about the date of the execution of the deeds.

It was conceded that there was a dam in existence at the mill for some years prior to the plaintiff's purchase, and of which he had knowledge, "and there was evidence tending to show that after he became the owner of the land, the defendants repaired the dam and erected it to a greater height than it formerly was."

The plaintiff insisted that he was entitled to recover damages by reason of this increased height of the dam, and asked the court to submit the following issue:

What is the amount of annual damages sustained by plaintiff by reason of the erection and raising of the new dam higher than the one erected and in existence at the time of the plaintiff's entering into possession of the land claimed by him?"

The court declined to submit this issue, and stated that it was (274) covered by the second issue submitted. The following issues were submitted by the court:

1. Did Temperance and C. S. Austin both execute the license dated 6 October, 1860?

2. If so, have the defendants exceeded their license by ponding water on the bottom lands of plaintiff?

3. What is the amount of annual damage to the plaintiff by reason of the erection of defendants' dam?

The plaintiff excepted to the first and second issues.

The record does not set out the evidence in regard to the execution of the instrument relied on as a license, and we must assume that its execution was duly proved. It is clear that it does not convey an easement, for an easement can only be created by a conveyance under seal, or by long user, from which such a conveyance is presumed to have been made. Whether the instrument executed by Temperance and C. S. Austin operated as an irrevocable license, and, if so, whether the rights of the defendants under it are limited to the extent of its use by them under the dam as originally erected and kept up prior to the act complained of by the plaintiff in raising it higher, are questions which we need not consider, as the plaintiff is entitled to a new trial on account of the refusal of his Honor to submit the issue requested, and for improper instructions to the jury on the second issue, as submitted. "The court instructed the jury that under the license, the defendants were authorized to erect the dam to any height, provided it did not, when so

erected, in any manner *overflow* the 'bottoms' mentioned therein, and that the increased height to which the dam was built by the defendants, after the plaintiff purchased the land, did not, of itself, entitle the plaintiff to a verdict assessing damages, and that damages would be recoverable, only when the grant contained in the license was exceeded by ponding water on the 'bottoms,' upon the aspect of the case presented (275) to the court, and whether such 'bottoms' had been overflowed, was a question for the jury."

Even conceding (and upon that point we express no opinion), that the instrument relied on is an irrevocable license, it does not permit the defendants "to back water on the bottoms" of the plaintiff. The complaint is, that by the increased height of the dam, made seventeen years after the alleged license, the water is ponded "back on the plaintiff's land, rendering it sobby and unfit for cultivation" and destroying valuable springs. A fair and reasonable construction of the instrument, if capable of a sensible construction, would not permit the dam to be erected to such a height as to destroy by sobbing, the bottoms of the plaintiff. The language is, "privilege to build a mill and back water on us so they don't back on our bottoms." Is it not clear that it was the purpose of the parties to limit the privilege, so that the bottoms should not be damaged or destroyed in value? It appears that the privilege was so used, from the time the dam was originally erected down to a short period before the bringing of this action in 1880, as not to cause any complaint of injury to the bottoms. If, by the increased height of the dam, the injury resulted to the plaintiff's land, by sobbing and destroying its value, though not actually overflowed, he was entitled to damages. It was not necessary that the land should be actually overflowed and covered by the water. If so ponded back as to sob the soil and render its drainage impossible, the plaintiff has a right to damages for the injury sustained, and he was entitled to the issue which was refused, without *deciding* that the instrument set out in the answer was in any way binding upon the plaintiff. We are of opinion that the court erred in refusing to submit the issue requested by the plaintiff, and also in the instructions given to the jury as to the extent of the defendants' rights under the alleged license.

The plaintiff is entitled to a new trial. Let this be certified.

Error. *Venire de novo.*

Cited: Wilhelm v. Burleyson, 106 N. C., 389; *Hall v. Turner,* 110 N. C., 306; *Mullen v. Canal Co.,* 130 N. C., 502; *Tise v. Whitaker Co.,* 144 N. C., 513; *Davis v. Robinson,* 189 N. C., 600.

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E. J. LILLY v. JOHN E. WEST, EXECUTOR.

Statute of Limitation—Lien of Judgment.

1. The expiration of ten years after a judgment is docketed is equally a bar to an action, on such judgment, and to a motion to revive it, being dormant, so that execution may issue on it.

2. The lien of a judgment expires at the end of ten years from the time it is docketed. The only provision which extends this time is that contained in C. C. P., sec. 254; The Code, sec. 435.

(*Murchison v. Williams*, 71 N. C., 135; *Mauney v. Holmes*, 87 N. C., 428; *Sawyer v. Sawyer*, 83 N. C., 321; *McDonald v. Dixon*, 85 N. C., 248, and 87 N. C., 404; *Lytle v. Lytle*, 94 N. C., 683; cited and approved.)

THIS was a civil action, tried before *Clark, J.*, at October Term, 1886, of SAMPSON Superior Court.

Judgment was rendered in favor of the plaintiff, from which the defendants appealed. The facts are sufficiently stated in the opinion of the Court.

Ernest Haywood and H. E. Faison for plaintiff.
J. S. Stewart for defendant.

SMITH, C. J. The partnership firm of H. & E. Lilly, in an action instituted upon a promissory note executed by R. C. Lee & Co. and W. P. Beaman for $1,452.99, dated 27 March, 1861, and due at two months, recovered judgment which was docketed on 1 November, 1789, against the defendants R. C. Lee, W. P. Beaman, Noel Jones and Blackman Lee, the members constituting R. C. Lee & Co., and the said W. P. Beaman, personally. Blackman Lee died on 30 August, 1877, and the defendants in this action became by appointment under his will his executors, and qualified as such. On 31 October, 1879, the plaintiffs caused notice to issue to William Daughtry, administrator of said R. C. Lee, who had meanwhile died intestate, W. P. Beaman, Noel (277) Jones and the said John E. West and J. Williams, executors of Blackman Lee, to show cause before the clerk why leave to issue execution in enforcement of their judgment should not be given. The motion for leave was heard on 29 December, 1879, the executors making no resistance thereto, and the clerk allowed execution to issue within three years thereafter, against all except the said Noel Jones, who pleaded his discharge in bankruptcy, and as to him it was refused.

On 12 May, 1881, the present suit was commenced by the plaintiff (during the progress of which the name of Henry Lilly as a co-plaintiff

was stricken out) against the defendants, said executors, and the devisees and heirs at law of the testator Blackman Lee, to whom, it is alleged, real estate has come, subject to the lien of the judgment, and to enforce the same according to C. C. P., Title XIV, ch. 2, secs. 318 to 324 then in force but not brought forward in The Code.

A series of answers were put in, in all of which, among other defenses, specially relied on by some of the defendants also, they rely upon a lapse of ten years as a bar to the action, and, except one answer, the extinction of the judgment lien by expiration of time during which it continues in force. It does not appear that any execution did issue within the three years next after the order of the clerk, nor indeed at any time before the bringing of the present suit, whose manifest purpose is to uphold the judgment lien by the issue of process to sell the testator's land; and so the judgment rendered directs the issue of execution *"against the real and personal estate of Blackman Lee, at the date of docketing the said judgment."* Was the judgment, overriding both defenses arising out of the lapse of time, regular and right upon the facts stated? This is the inquiry presented in the defendants' appeal. The argument in support of the ruling attempts to eliminate from the count

(278) of time the three years from the grant of letters testamentary or of administration before which an action could be begun, insisting that suspending interval interrupted the running of the statute as well to the lien as to the remedy. C. C. P., sec. 319. The only provision, which occurs to us, as having the effect of prolonging the lien, is found in section 254 of C. C. P., which declares that "the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction or other order, or by the operation of any appeal, shall not constitute any part of the ten years aforesaid as against, etc.; and further, that when on such an appeal, undertaking is given, as is requisite to stay execution, and an entry on the docket of such judgment made, the lien "shall cease, during the pendency of such appeal, to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith." Section 254. None of these circumstances interpose in the present case, and we by no means concur in the suggestion that the vitality of the lien is extended by the limitations in the section authorizing this proceeding. The creditor is not deprived of his remedy and compelled to wait. He has direct access to the personal representative and the estate in his hands, and if, by reason of the insufficiency of the personal assets, resort must be had to the land, the lien will be recognized and the creditor will be first entitled to have his judgment satisfied out of the proceeds of the land to which the lien adheres. *Mur-*

chison v. Williams, 81 N. C., 135; *Mauney v. Holmes,* 87 N. C., 428; *Sawyer v. Sawyer,* 83 N. C., 321.

The repeal of the act giving a direct remedy against a deceased debtor's land transmitted with the encumbrance, indicates an intention to leave the administration entirely in the hands of the representative, and the repealed provisions merely added to the creditor's remedies in case of delay, and even then the representative is before the court, so that if he has applicable and unappropriated assets, he may be compelled to pay the debt and *pro tanto* exonerate the descended (279) and devised lands.

The ten years from the docketing of the judgment expired, even if the reckoning excludes the interval from that period to the first day of January, 1870, which result we do not mean to admit is produced by the suspension of the running of the statute of limitations, before the summons issued in the present case, and this is lost by the efflux of time.

But not less fatal is the objection founded on the limitation put upon the remedy. The bar is as effectual when it can be interposed by plea or answer to a motion to revive a dormant judgment that execution may issue, as to an independent action upon the judgment itself. *McDonald v. Dixon,* 85 N. C., 248, reheard and reported in 87 N. C., 404. Nor is it suggested that its running is arrested upon any of the grounds mentioned in C. C. P., ch. 3, secs. 41 to 54 inclusive.

There was error therefore in adjudging that process issue to enforce the expired lien, or that execution should issue at all.

It is true the validity of the judgment is preserved by frequent issues of executions, and may be sued out and acted on without regard to the lien, so as to subject such property of the judgment debtor as was liable to seizure and sale, but even this is lost as to the land after the death of the debtor. *Sawyer v. Sawyer,* 83 N. C., 321; *Lytle v. Lytle,* 94 N. C., 683.

The judgment must be reversed, and a new trial awarded, to which end this will be certified.

Error. *Venire de novo.*

Cited: Adams v. Guy, 106 N. C., 277; *McIlhenny v. Savings Co.,* 108 N. C., 312; *Smith, ex parte,* 134 N. C., 501; *Tarboro v. Pender,* 153 N. C., 430.

(280)

ELIZA A. YOUNG v. LEVI HERMAN, ADMINISTRATOR.

Parent and Child—Implied Promise—Presumption.

1. When a child, after arrival at full age, continues to reside with and serve the parent, the presumption is that such services were gratuitous.
2. But this presumption may be rebutted by proof of facts and circumstances which show that such was not the intention of the parties, and raise a promise by the parent to pay as much as the labor of the child is reasonably worth.

(Williams v. Barnes, 3 Dev., 348; *Hudson v. Lutz,* 5 Jones, 217; cited and approved. *Hauser v. Sain,* 74 N. C., 552; cited.)

THIS was a civil action, tried before *Clark, J.,* at the August Term, 1886, of CATAWBA Superior Court.

The plaintiff is the daughter of the intestate of the defendant, and brought this action to recover compensation for services which she alleges she rendered her father in his lifetime while she continued to live with him next after she became twenty-one years of age, as his daughter. She does not allege an express promise on the part of her father to pay her compensation, nor facts tending to prove such an implied promise, other than that she was of age at the time she did the service alleged and that the same was very burdensome and much of it disagreeable.

The following is so much of the case settled on appeal as it is material to set forth here:

"It was in evidence by the plaintiff herself, that she was the daughter of defendant's intestate; that she has never been married; that she is now about forty years of age, and that she lived continuously from her birth with her father to the date of his death, in the latter part of the year 1885; that her mother died about four years ago; that her father's mind has been unsound since some time soon after her mother's
(281) death; that he never made any agreement or contract to pay her anything; that she continued to live as a member of the family, eating at the common table, and that at the time of her mother's death her father owned a small tract of land worth about $ ....., some cattle, household and kitchen furniture and about $350 in money; that in the latter part of his life her father became feeble in body and mind and required a good deal of attention, and had to be waited upon as a child; that he had to be undressed and washed by her, sometimes as often as three or four times a day, and that she had a great deal of filthy and unpleasant work to do for him, as he was imbecil; that she did all the cooking and caring for and waiting on the old man, whose condition was helpless; that her father was born in 1805; that all the property above

mentioned was consumed except the land and about $50 worth of personalty; that she considered her services worth $10 per month. There was also other testimony as to the condition of the intestate's mind and body, and as to the character of plaintiff's services, some tending to show that he was able to labor and did some labor up to a short time before his death, and some tending to show on the contrary his total imbecility; that nothing had occurred in the family to interrupt the relation between the father and daughter as they had existed during her infancy; and that one of his other children assisted her on one occasion when the father was sick, though she alone remained at home."

There was a verdict and judgment for the plaintiff, from which the defendant appealed to this Court.

No counsel for plaintiff.
M. L. McCorkle for defendant.

MERRIMON, J., after stating the facts: Generally, when one person has done labor or rendered valuable services for another at the latter's request, either express or implied, the law implies a promise on (282) his part to pay the former reasonable compensation therefor. Ordinarily, in the course of the business relations of men, they serve each other for a valuable consideration, and hence, in the absence of an express promise to pay in such case, the person doing the services on the part of him receiving the benefit, there arises a presumption of such a promise.

But such a promise is not implied in all cases where one person does service for another, although the latter takes, and intends to take and have, benefit from it.

This presumption of fact may in some cases be rebutted, and when rebutted no such promise is implied, and no legal obligation to pay arises. Thus if the services were rendered as a pure gratuity or simply in discharge of a moral obligation, no such promise would be implied and no such presumption would arise. And so also, *the relations of the parties* may be such as to rebut such a presumption, as in case of parent and child. The law of nature imposes on the parent the duty to love, cherish, protect, help and encourage his offspring; to afford his children the benefits of family and domestic ties and proper training. To this end, he labors for his children.

He is not prompted by motives of gain from them, nor does he expect or desire such compensation—the reward he wishes and hopes for is priceless and noble—it is, that his children shall fill the just measure of their being, and thus afford him gladness and satisfaction.

And the same law imposes on children filial duty, that of love, gratitude, obedience and reverence; and they are bound by the ties of nature,

to aid, by such labor and services as they can do, or otherwise, when need be, in the support of their parents, their home and family. Indeed, the father is entitled to the services of his child until he or she shall arrive at the age of twenty-one years. At that age the child (283) becomes emancipated, that is, at liberty to leave the father's home, be free from parental control, and to seek his own fortune where and as he will, but such ties and obligations are not then completely broken.

The child never ceases to owe his parents honor and reverence, and also, help, support and protection, when he or she needs these things, whether such wants be occasioned by misfortune or the infirmities of age. Such duties and obligations are founded in nature, and it is not to be presumed that they are abandoned. Hence, if the child, though of the age mentioned, shall continue to live with the father as a member and part of his family, and shall labor for, or render services to the father, without any agreement or understanding as to pecuniary compensation therefor, the law does not raise the presumption of a promise to pay for the same, and the child cannot maintain an action against the father in that respect.

In such case the presumption is, that the parties do not contemplate or expect the payment of wages on the part of the parent, or payment for board, lodging, apparel and the like on the part of the son or daughter.

This is the orderly course of the natural relation of parent and child; the law favors and takes notice of it, and does not hasten to conclude that they intend to treat each other as debtor and creditor; it presumes the contrary. But such presumption is not conclusive; it may be rebutted and the reverse of it established by proof of an express or implied agreement to the contrary. Such implied agreement may appear from facts and circumstances which show that both parties at the time the labor was done, or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same. The mere fact that the child on attaining his majority, continued to labor for the parent as a member of the family for a long while, or that he did burdensome and disagreeable labor, is not sufficient evidence of itself (284) to prove an implied promise to pay wages for it, although the extraordinary character of the labor might be pertinent evidence in aid of other competent evidence to raise such implication. Such implied promise may be proven by pertinent declarations of the parties in the presence of each other, and facts and circumstances inconsistent with a purpose on the part of the parent and child that the latter should labor simply as a member of the father's family without wages for his labor, such as that the father had paid the child wages—had repeatedly

done so—that the father declared his obligations and purpose to pay wages; had promised to do so; that the child had said in the presence of the father, that he was working for wages and the father did not dissent; that the child had taken a part of the crop, sold the same on his own account with the father's knowledge and consent; that the child had paid for his own clothing, and the like evidence. Of course such evidence would be subject to proper explanation, and the opposing party might produce countervailing evidence.

This seems to us to be a correct and reasonable statement of the rule of law applicable in this and like cases, although it must be conceded that there is some diversity of decision on the subject.

The great weight of authority in this and other States is in favor of the rule as we have stated it above. Its correctness is plainly and approvingly recognized by *Ruffin, C. J.,* in *Williams v. Barnes,* 3 Dev., 348; and afterwards, by *Pearson, C. J.,* in *Hudson v. Lutz,* 5 Jones, 217. The case of *Hauser v. Sain,* 74 N. C., 552, however, seems to be in conflict with what is said in the cases cited above, although the learned *Chief Justice* who delivered the opinion of the Court in that case, delivered that in *Hudson v. Lutz, supra.* See Schouler on Dom. Rel., 269, and the numerous cases there cited.

The court below simply told the jury "that when one person (285) renders services to another, the law implies a promise to pay for the same what they are reasonably worth, and that the jury in passing upon the first issue, have the right to consider that the plaintiff was the daughter of the house, the manner in which she was boarded, provided for and treated, and if they believe that such board, treatment and provision was what her services were reasonably worth, they should allow her nothing; but if from the old man's mental and physical condition, they find that she rendered unusual and unpleasant services, and that these services were not compensated for by her board, treatment, etc., they could allow whatever such services were, according to the evidence, reasonably worth, during the three years before suit brought, over and above what received."

The court thus in effect ignored the relation of *parent and child,* and passed by the rule of law applicable, omitting any allusion to the important and pertinent question whether or not there was an agreement, express or implied, between the plaintiff and her father in his lifetime, that she should have pecuniary compensation for the labor she did. In this there is error. The jury should have been instructed substantially as indicated in this opinion. Indeed, the court might, if the whole of the evidence before the jury was sent up as part of the case on appeal, have told them that accepting the evidence as true, the plaintiff could not recover, and they ought to render a verdict in favor of the defendant.

There must therefore be a new trial. To that end let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. New trial.

Cited: Dodson v. McAdams, 96 N. C., 156, 7; *Everett v. Walker,* 109 N. C., 132; *Grant v. Grant, ibid.,* 714; *Callahan v. Wood,* 118 N. C., 758; *Hicks v. Barnes,* 132 N. C., 150; *Stallings v. Ellis,* 136 N. C., 72; *Dunn v. Currie,* 141 N. C., 127; *Winkler v. Killian, ibid.,* 580; *Lowrie v. Oxendine,* 153 N. C., 269.

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Z. F. LONG v. B. F. HALL AND OSCAR PEARSALL, COPARTNERS, ETC.

Levy—Judge's Charge.

1. To constitute a levy a seizure is necessary. If from the nature of the property, an actual seizure is impossible, some act as nearly equivalent to a seizure as practicable must be substituted for it.
2. Where there is conflict between the testimony of the witnesses, *it is error* for the court to single out one witness and tell the jury "if you believe him" you must find in accordance with his testimony.
3. Where the complaint alleges the conversion of seed cotton, the court ought to charge the jury that the plaintiff must show, by a preponderance of evidence, the conversion of such cotton; the failure to do so, when requested, is *error.*

(Brem v. Allison, 68 N. C., 416; *Anderson & Young v. Steamboat Co.,* 64 N. C., 399; *Jackson v. Commissioners of Greene,* 76 N. C., 282; *Rives v. Porter,* 7 Ired., 74; *S. v. Poor,* 4 D. & B., 384; cited and approved.)

THIS was a civil action, tried before *Boykin, J.,* at February Term, 1886, of the Superior Court of RICHMOND County, to recover the value of certain cotton mentioned in the complaint.

The complaint, among other things, alleges in substance, that the plaintiff was the sheriff of Richmond County, and as such, had in his hands on 31 August, 1881, four executions, amounting in the aggregate to $693.51, issued from the Superior Court of Robeson County to the sheriff of Richmond County, in pursuance of judgments in favor of Wisenfield & Co., against one J. D. Jowers, obtained before a justice of the peace in Robeson County, and duly docketed in the Superior Courts of Robeson and Richmond counties.

That on 2 September, 1881, the plaintiff levied said executions on "about 9,000 pounds of seed cotton in gin-house and crib, the property of the said J. D. Jowers, the defendant in the execution," and on

6 September he levied 'on all the matured crop of cotton in field (287) at J. D. Jowers', in Richmond County, adjoining the lands," etc., and "that by virtue of said executions, levies and his office of sheriff of Richmond County, he took possession of said property, and became the legal owner thereof," etc., and that afterwards the defendants wrongfully converted to their own use, about 7,500 pounds of said seed cotton, and about 2,500 pounds of the matured crop in the field.

All the allegations of the complaint are denied by the defendants.

The plaintiff offered in evidence duly certified transcripts of the judgments, executions and levies.

John Leach, witness for the plaintiff, testified as follows: "I was living at Shoe Heel in 1881; was merchandising, the firm being McLean & Leach. The deputy sheriff (Morrison) went to Jowers' place and levied upon cotton; we shipped the cotton to Hall & Pearsall (defendants), at least a portion of it—most of it to them; cotton was then worth 9 cents a pound, lint—seed cotton worth 3 cents a pound. To the best of my recollection, we shipped it all to them—45 or 46 bales. It was in the seed when we got it, and we ginned and shipped it to Hall & Pearsall. This includes the growing matured crop. I don't say they received all, but the bulk of the 9,000 pounds in the gin-house. We took the cotton because it belonged to us. We made advances to Jowers, and took three liens to secure us. We advanced $1,100 or $1,200 worth up to 2 September, 1881. Jowers' farm was one and one-half miles from Shoe Heel in Richmond and Robeson counties. Morrison came to Shoe Heel 2 September, 1881. I saw him before he went to the farm; he said he came to levy upon the growing crop, but he did not think it was right, and he didn't think he had a right to levy; that he would wait until he saw Mr. Shaw, who was then in New York. I saw Jowers before Morrison went out to the farm, and he turned over the crop to us; after that, we had control of the crop. I don't know that Morrison (288) went over the crop. Jowers never had any control over the crop after he turned it over to us. I found 5,000 or 6,000 pounds in gin-house and crib on Jowers' place, and carried it off three or four days afterwards from the gin-house. Morrison came to Shoe Heel two or three days afterwards. We found no one in charge of the cotton when we took it. I can't say as to shipping the identical cotton in gin-house to Hall & Pearsall. The little crib looked as if it had been nailed and broken open. I can't say as to the gin-house. After we got the cotton, we ginned and shipped it to Hall & Pearsall in a few days, according to my best impression."

D. M. Morrison, witness for plaintiff, testified: "In 1881 I was deputy sheriff of Richmond County, and Z. F. Long was the sheriff; had the executions in my hands against Jowers—four of them; went to Jowers'

place and levied on the seed cotton in the gin-house, and some I put in the crib; nailed one door of gin and locked the other, and fixed floor the best I could, and locked the crib. There were about 9,000 pounds seed cotton—didn't weigh it—about 100 pounds in the crib; found cotton in gin-house on Jowers' place; levied on it in gin-house on 2 September, 1881, and levied on growing crop on the 4th or 5th after; had no conversation with Leach before the levy; had a talk with him the second time I went to levy; didn't tell him that I would not levy upon the growing crop, except some corn, which was some time thereafter; had no conversation with him as to the 9,000 pounds in gin. On the 4th or 6th I levied on the growing crop. I had executions with me; found negroes in the field picking cotton, and drove them out, telling them I had executions and would levy, and they left. When I levied on the 2d, I left the cotton in the gin-house—went to sell on the 22d of September. My possession was as I told you. I went through the
(289) field two or three different ways, told the hands I had executions in favor of Wisenfield & Co., against Jowers, and think I read them, and told them to leave, and they did so; they were colored people. Patterson, a white man, came out; they came outside of the field into a little enclosure; don't recollect that I examined cotton then; put nobody in charge of cotton in the gin, or of the growing crop, after the levy. I went back to Rockingham, thirty miles from Jowers' farm, after the levy. On day of sale, I sold growing crop, and McNeill & McNeill, as attorneys for Wisenfield & Co., bought it and I delivered it to them. The cotton in the gin was not sold; only sold what was bought that day."

Louis Johnson testified, that McLean & Leach hired him to haul cotton, and that he got some out of the gin-house and some out of the crib from Jowers' place. . . . Jowers opened the crib, but witness did not know how.

This was the case for the plaintiff. The defendant then offered in evidence three agricultural liens, executed by Jowers to McLean & Leach, copies of which are filed with the record, one for $700, dated 1 April, 1881, recorded in Richmond 29 April, 1881, one for $700, dated 11 August, 1881, and recorded in Richmond 3 September, 1881, and one for $300, dated 1 April, 1881, and recorded 28 April, 1881, in Robeson County.

John Leach testified for the defendants, that he was a member of the firm of McLean & Leach, and that Jowers' farm was in Richmond and Robeson counties. . . . The gin-house, crib and cotton growing in the field were on the part in Richmond. McLean & Leach had advanced under the liens $1,699.12 to 1 October, 1881; had advanced $1,300 from 1 April to 2 September. . . . Before the levy and before Morrison

went to the farm, Jowers had delivered the crop to McLean & Leach to satisfy their liens, and he then had nothing more to do with it. McLean & Leach gathered the crop. The cost of gathering and shipping were about $500. Advancements, costs of gathering, etc., were (290) about $1,800 or $2,000. . . . Jowers did business in 1881 in Shoe Heel, Robeson County; voted there; slept and ate there; has been there ever since in the same way; is now deputy sheriff of Robeson County. . . . The crop was turned over to McLean & Leach on 2 September, and they sent a man there the next day to take charge. At that time they had struck no balance to ascertain the amount due. No change was made in the manner of keeping account with Jowers. McLean & Leach were having the cotton picked in the field from 2 to 22 September, the day of sale. . . . Jowers had but one house, and it was in Richmond County; he had charge of the place and called it his home. He had no place in Shoe Heel of his own. He lost his home place a short time after this. Three issues were submitted to the jury:

1. Is the plaintiff the owner of the property described in the complaint?

2. Did the defendants unlawfully and wrongfully convert to their own use 7,500 pounds of seed cotton, and 2,500 pounds of cotton growing and matured, levied on by plaintiff, or any part thereof?

3. If so, what damages did the plaintiff sustain?

Defendants asked his Honor to charge:

1. If the jury believe that prior to 1881, J. D. Jowers had been a resident of Richmond County, the mere fact of his eating and sleeping at Shoe Heel would not of themselves divest him of his residence in Richmond.

2. If they believe that McLean & Leach and Jowers agreed on the property to be sold, the presumption is that the right of property passed at once, unless there be something to indicate the contrary intention; and this is so, although nothing is said about payment or delivery, and the property passed immediately to McLean & Leach.

3. That plaintiff can only recover such an interest as Jowers (291) owned at the time of levy; and if prior to levy Jowers had bona fide transferred for value to McLean & Leach the crop described in the pleadings, the plaintiff cannot recover.

4. If the jury believe that plaintiff, through his deputy Morrison, made a levy on the property, and afterwards abandoned the levy, he cannot recover in this action; that it was his duty to take actual possession of the property in the gin-house and crib, and remove it to a place of safety, and if he failed to do so, the plaintiff cannot recover.

5. That before plaintiff can recover, the jury must be satisfied from the evidence, that the cotton received by defendants, if they received

any, was the identical cotton levied on by Morrison, if he did make such levy, in the gin-house and crib on 2 September, 1881, and the same as to growing crops that were grown on Jowers' farm in Richmond County, and gathered between 6 and 22 September, 1881.

6. That as plaintiff alleges the conversion of seed cotton, he must prove that defendants received and converted seed cotton; if he fail to do so, he cannot recover. Proof that they received cotton in bale, or lint cotton, is not proof that they received and converted seed cotton.

His Honor gave instructions 1, 2 and 4, with modifications, one of which was: "That if the jury believe that the plaintiff abandoned the levy made on the property described in the complaint, then the plaintiff cannot recover, but that it was not the duty of the plaintiff to take actual possession of the property, or to remove it. That the defendants contended that the plaintiff had abandoned the levy; but if the jury believe the facts in regard to the levy as testified to by Morrison, that there had been no abandonment of the levy; that if Morrison went there and took possession of the cotton in the gin-house and crib, and locked up the same and nailed the doors, and left it so and came to Rock-
(292) ingham, with the intention of returning and selling the same, and did so return, this would not be an abandonment."

The other prayers for instructions were not given.

The verdict was in favor of the plaintiff, and defendants moved for a new trial:

1. For refusal to give instructions asked for by defendants.

2. For misdirection in the charge as given, and remark to juror at the conclusion of the charge.

(This remark was in response to a question asked by a juror, "Suppose Jowers was not a resident of Richmond County at the time of the execution of the liens, but that before the levy he had turned the property over to McLean & Leach, for a debt due to them, what would be the effect of it?" to which his Honor replied, "that he had already charged them that they could not consider that in this case, as the evidence did not present this view.")

3. For expression of opinion, in that he informed the jury that the levy had not been abandoned by the plaintiff.

The motion for a new trial was overruled, and judgment given in favor of plaintiff on the verdict, from which defendants appealed.

T. A. McNeil for plaintiff.
W. H. Black and W. H. Neal for defendants.

DAVIS, J., after stating the facts: We need not consider the alleged error, in the response of his Honor to the inquiry of the juror, nor the

questions raised by his refusal to give the third and sixth instructions asked for, as we are of opinion that the defendants are entitled to a new trial for error in the charge complained of, and for refusal to give the fifth prayer for instruction to the jury.

His Honor seems to have assumed that there was no evidence (293) upon the question of levy and abandonment, except that contained in the testimony of the witness Morrison, whereas the witness Leach testifies to a conversation with Morrison, in regard to the levy, in which Morrison said he did not think he had a right to levy, and that he would wait until he saw Mr. Shaw, who was then in New York. Morrison denies that he had any conversation with Leach before the levy. Leach further testifies, that before Morrison went out to the farm, Jowers had turned over the crop "to us," meaning McLean & Leach, and that after that, they had the control of it. Where there are conflicting statements, as a rule, the judge ought not to single out a witness and say to the jury, "if you believe him, you must find in accordance with his testimony." "There may be," says *Reade, J.*, in *Brem v. Allison*, 68 N. C., 416, "cases where it would be proper, but generally it is safer to put the case to the jury upon all the evidence, with proper explanations." See, also, *Anderson & Young v. Steamboat Co.*, 64 N. C., 406; *Jackson v. Commissioners of Greene*, 76 N. C., 282.

If the witness Leach is to be believed, the property never was seized by the plaintiff. In *Rives v. Porter*, 4 Ired., 76, *Ruffin, C. J.*, says: "It answers the purpose of giving notoriety to the levy, for the officer to take possession of the chattels on the premises, provided he remain there with them, so as to be in a situation to exercise that dominion which owners in possession usually exercise." Here the testimony of Leach would leave it in doubt whether the plaintiff ever had or exercised any dominion over the property.

A seizure is necessary, and if from the nature of the property (as is the case with the growing crop, but not of the cotton in the gin and crib), an actual seizure be impossible, some act as nearly equivalent to a seizure as practicable, must be substituted for it. *S. v. Poor*, 4 D. & B., 385.

The defendants were entitled to the instructions asked for in (294) the fifth prayer. The complaint alleges the conversion by the defendants of seed cotton. There is no evidence that they ever received any seed cotton, but it is insisted that the baled cotton shipped to them by McLean & Leach was the same cotton, after it was ginned, which they (McLean & Leach) had gotten from the Jowers place. Whether this was a fatal variance between the allegations of the complaint and the proofs, as insisted by the defendants, or not there was some question as to whether the cotton received by the defendants was the identical

cotton claimed to have been levied on by Morrison, and the defendants were entitled to have it considered by the jury. The witness Leach says (and his was the only testimony that in any way connected the defendants with the cotton), "we shipped the cotton to Hall & Pearsall (defendants), at least a portion of it—most of it to them. . . . To the best of my recollection we shipped it all to them—45 or 46 bales," and afterwards he says: "I cannot say as to shipping the identical cotton in the gin-house to Hall & Pearsall." Forty-five or forty-six bales of cotton are many times greater, in quantity than the seed cotton claimed by the plaintiff would have yielded, and the only witness upon the point says that he cannot say that it included the identical cotton. It was the duty of the plaintiff to show, affirmatively, by a preponderance of evidence, that it was the identical cotton, and if the evidence presented any question on that point, it was for the jury to weigh and determine it.

The defendants are entitled to a new trial. Let this be certified.

Error. New trial.

Cited: Farthing v. Dark, 109 N. C., 299; *Gregg v. Mallet,* 111 N. C., 79; *Bowman v. Trust Co.,* 170 N. C., 303; *S. v. Moore,* 192 N. C., 210.

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(295)

D. D. BURLEYSON ET AL. v. LLOYD WHITLEY.

Will—Conditional Devises—Lapsed Legacy.

A testatrix gives and devises her whole estate for the support of her mother during her life. She further provides that "if L. W. will stay on my land and rent as much as he can well manage, and pay the customary rent for mother E. M.'s support, so long as she lives, then at her death I give and devise to him, the said L. W., my Bird place, etc. . . . She further disposes of all that may be left at her mother's death. Her mother died before the testatrix: *Held,* That the devise was for the benefit of the mother, and intended to be a remuneration for what the devisee might do for her, and the devise falls with the object for which it was made.

(Nunnery v. Carter, 5 Jones Eq., 370; *Lefler v. Rowland,* Phil. Eq., 143; *Woods v. Woods,* Busb., 290, *Whitehead v. Thompson,* 73 N. C., 450; *McNeely v. McNeely,* 82 N. C., 183; *Willons v. Jordan,* 83 N. C., 371; cited and approved.)

THIS was a civil action, tried before *Boykin, J.,* at Fall Term, 1886, of STANLY Superior Court.

The land in dispute belonged to Rebecca L. Mann, who died leaving a will, which was admitted to probate on 20 March, 1883. The dispositions made of her property therein are as follows:

"I give and devise to my beloved mother, Elizabeth Mann, my whole estate, both personal and real, or for it to be put to the use of taking ("care of" evidently omitted) her. She cannot manage it. I want my executor, Travis Redwine, to take my whole estate, both personal and real, in hand and pay himself out of it, and pay some person to take care of mother, Elizabeth Mann, and see that she is taken care of right. If one does not use her right, try another. Rent my land if you can for her support.

"If Lloyd Whitley will stay on my land and rent as much of it as he can well manage, and pay the customary rent for mother, Elizabeth Mann's, support so long as she lives, then at her death, I give and devise to him, the said Lloyd Whitley, my Bird place, fifty- (296) seven acres of land, to have and to hold to him, the said Lloyd Whitley, I will and bequeath to him henceforth and forever; but if he does not rent and stay on my land so long as she lives, if any other person that she wants will rent it, then the same way, I then give and devise to them whosoever it may be, my Bird place, fifty-seven acres of land, to have and to hold to them forever. But if no one will not rent my land, sell it as she needs it. Sell the Bird place first and see that mother is treated right and has plenty, so long as she lives. After paying my executor, and mother has all she wants as long as she lives, then if there be anything yet left, it is then to be divided into five parts. I then give and devise to Louisa Burleyson two-fifths of it all, to have and to hold for her, the said L. A. Burleyson, I will and bequeath to her henceforth and forever. I then give and devise to Joseph S. Burleyson, one-fifth, to have and to hold to him, the said J. S. Burleyson, I will and bequeath to him henceforth and forever. I then give and devise to Elizabeth A. Burleyson one-fifth, to have and to hold to her, the said E. A. Burleyson, I will and bequeath to her henceforth and forever. I then give and devise to sister Jane Burleyson one-fifth, to have and to hold to her, the said Jane Burleyson, I will and bequeath to her so long as she lives; then it is to be equally divided between L. A. Burleyson, J. S. Burleyson and E. A. Burleyson. In witness," etc.

The agreed facts, out of which in the construction of the will the controversy arises, are these:

The plaintiff, E. N. J. Burleyson, designated as sister Jane by the testatrix, is her sole heir at law as well as devisee, and the other infant plaintiffs, also devisees, are children of Jane. The defendant, at the death of the testatrix, was residing on the Henry land, also belonging to her but not specifically mentioned in the will, and five or six

(297) months afterwards moved to and has since occupied the Bird tract, to await the judicial construction of the clauses of the instrument relating to himself, and the determination of the question of title thereto. Elizabeth, the mother, and Rebecca, the testatrix, died on the same day, the former two hours before the latter.

If upon these facts, in connection with the proper interpretation of the will, the court shall be of opinion that the plaintiffs are entitled to recover the land in defendant's possession, then it is agreed judgment shall be entered for the plaintiffs, otherwise for the defendant.

The court rendered judgment for the plaintiffs and the defendant appealed.

M. S. Robbins and S. J. Pemberton for plaintiffs.
J. A. Lockhart for defendant.

SMITH, C. J., after stating the case: The instrument to be interpreted has been drawn by an unskillful hand, but it discloses throughout a predominant purpose to make ample provision for the comfort and convenience of the mother of the testatrix during her remaining life, and this even, if necessary, to the extent of consuming the entire estate. To assure care and attention to her wants, and the continued residence of the defendant upon another tract and an appropriation of rents for so much as he may be able to cultivate of it to the mother's support, she devises at her mother's death, the Bird tract to the defendant in fee simple. The defendant did remain on the land until the death of Elizabeth, which occurred just before that of the testatrix, thus dispensing with the conditional requirements of the devise, or rather, rendering their performance impossible.

Now under these circumstances, does the devise to the defendant fail altogether, or is it relieved of the super-imposed burdens and rendered absolute? This is the question to be solved.

(298) The inquiry is not embarrassed with the ruling in cases where a preceding limited estate to one, lapses by the donee's death before that of the testator and lets in the remainder at once as a *present estate,* as is held in *Billingsley v. Harriss,* 17 Ala., 214. Here the beneficial purposes are united with the devise itself, the one being the consideration and inducement for the other.

In *Nunnery v. Carter,* 5 Jones Eq., 370, the bequest was to a son, "provided he take care of his mother; if not, to be whose that does take care of her." She died in the lifetime of the testator, her husband. It was decided that "the legacy vested and was relieved of the burden imposed by the event, for the reason that the *condition was not the sole* motive of the bequest." *Battle, J.,* in the opinion, quotes with approval

from 2 Williams Executors, 786, in which the latter says, "with respect to conditions precedent which are impossible, a different rule is applicable to bequests of personal property from that which is prevalent respecting devises of realty. By the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void," adding that, "when a condition precedent to the vesting of a legacy is impossible, the bequest is single, that is discharged of the condition," etc. The Court however, annex a further limitation, that the legacy will be "void only when the impossible condition is the sole motive of the bequest."

This ruling was affirmed soon after in *Lefler v. Rowland,* Phil. Eq., 143, where the testator left the greater part of his estate to his son, coupled with the qualification that he "should live with me my lifetime and in case he will do so and help me pay all my just debts and demands against me and treat me and his mother with humanity and kindness," etc.

The son died before the father, and it was declared that as "it (299) appears that the *sole motive* with the testator for leaving the greater part of his estate to his son John, to the exclusion of all his other children, was that John should live with him and *help him pay his debts* as well as treat his parents with 'humanity and kindness,' the intervention of the act of God rendering the performance of 'the condition upon which he was to have the property,' " impossible, no interest vested which could be transmitted to his issue under the statute. Rev. Code, ch. 119, sec. 28.

Our case is not affected by the ruling in *Woods v. Woods,* Busb., 290, where land was devised with a charge of $300 to be paid to one who died in the testator's lifetime, and in *Whitehead v. Thompson,* 79 N. C., 450, where land devised was charged with similar payment to be made to others who died before the testator, since in these cases the legacies, though charged, are distinct, and had lapsed so as to divest the estate of the incumbrances. We refer to some other adjudications having an indirect bearing upon the case: *McNeely v. McNeely,* 82 N. C., 183; *Willons v. Jordan,* 83 N. C., 371.

These cases, with our own reasoning, conduct us to the conclusion reached by the court, that as the devise was entirely for the benefit of the mother, and intended to be a remuneration only for what the devisee might do in her behalf, the devise falls with the object for which it was made.

There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Tyson v. Tyson, 100 N. C., 368; *Askew v. Dildy,* 188 N. C., 148.

(300)

EPHRAIM CLAYTON v. J. H. CAGLE.

Conveyance by Corporation—Trust—Statute of Limitations.

1. A deed, which purports to be made between "C. M., president of the D. R. Manufacturing Co.," and "W. M., trustee," etc., and bears the signature and seal of "C. M.," with the suffix of "President of the D. R. Co.," and also of the trustee, with but one subscribing witness, is not in form and effect, the deed of the corporation, but is the personal act of the president, and, if effectual at all, can only pass his interest in the property.

2. When the statute of limitations is a bar to the trustee, it is also a bar to the *cestui que trust* for whom he holds the title, both at law and in equity.

(Insurance Co. v. Hicks, 3 Jones, 58; *Davidson v. Alexander*, 84 N. C., 621; *Bason v. Mining Co.*, 90 N. C., 417; *Welborn v. Finley*, 7 Jones, 228; *Herndon v. Pratt*, 6 Jones Eq., 327; *Blake v. Alman*, 5 Jones Eq., 407; *Clayton v. Rose*, 87 N. C., 110, cited and approved.)

THIS was a civil action, tried before *Avery, J.*, at August Term, 1886, of BUNCOMBE Superior Court.

The case on appeal contains the following statement of facts:

On 19 April, 1846, James W. Patton, Charles Moore and Thomas R. Miller, contracted to sell the tract of land described in the complaint, and executed their bond to make title thereto to the Davidson River Manufacturing Company, a corporation created under a special enactment of the General Assembly, of which they and others associated with them in the contemplated enterprise, were members. On 3 April, 1851, the said Charles Moore, its president, and by its direction, executed a deed, undertaking to convey therein, the interest of the company in said land to William Williams, *in trust,* among other things to indemnify and save the plaintiff from loss by reason of his having become liable on certain negotiable paper, to which the said Patton and Moore were sureties, discounted at the Branch Bank of Cape Fear,
(301) at Asheville, for the benefit of the company, and the moneys received therefor appropriated to its use.

The deed, of which we have a copy in the transcript annexed to the complaint, purports to be made "between Charles Moore, president of the Davidson River Manufacturing Company, of the one part, and William Williams, trustee, of the county of Buncombe, and State of North Carolina, of the other part," bears the signature and seal of Charles Moore with the suffix, "President of Davidson River Company," and also of the trustee, with but one subscribing witness.

On the same day the certificate of the county court clerk of Henderson shows an acknowledgment before him "by the maker thereof," and an immediate registration.

The land in dispute, at the time of the execution of the deed in trust, was in the territorial limits of Henderson, from which it was subsequently detached, and is part of that constituting the new county of Transylvania, in which there has been no registration, and this county was formed in 1867. The indebtedness to the bank provided for in the deed, after a renewal for the unpaid balance, increased by a further loan of $400, was afterwards put in suit, and upon an agreed compromise, the plaintiff paid $871.67 in discharge of the demand.

It was admitted that title had been divested out of the State since the year 1863.

The defendant exhibited in evidence a deed for the premises made by Moore and Patton to himself, and proved that he purchased and paid full value without actual notice of the deed in trust or of any claim of the plaintiff to the land; and that since the execution of the conveyance to himself in 1863, he had been in the actual, open, notorious and adverse possession of the same, claiming it as his own up to the time of trial.

The suit was begun on 2 January, 1880. (302)

The plaintiff, conceding that the defendant had not *actual* notice of the previous deed, insisted that by reason of the original registration, he had *constructive* notice of its existence and terms, and was therefore in law equally affected.

The court was of opinion that the defendant was not affected with notice of the deed, and that his deed, as color of title, supported by the long and continuous adversary possession under it, was sufficient to bar the plaintiff's action. The plaintiff, in deference thereto, suffered a nonsuit and appealed.

No counsel for plaintiff.
Charles A. Moore and Geo. A. Shuford for defendant.

SMITH, C. J., after stating the facts: I. The deed in trust is not in form and effect that of the corporation, so as to transfer its equitable estate, arising out of the making of the title bond, to the trustee. It is the personal act of the president, its chief officer, and if effectual at all, can only pass his interest in the property. *Ins. Co. v. Hicks,* 3 Jones, 58; *Davidson v. Alexander,* 84 N. C., 621.

II. If the deed were in form a corporate act, it has not been executed by the company either in the manner authorized by the common law, or under the provisions of the statute then in force. Rev. Code, ch. 26, sec. 32.

The essential conditions required to make effectual a conveyance of real estate owned by a corporation, have been sufficiently pointed out

in the recent case of *Bason v. Mining Co.*, 90 N. C., 417, and need no further elucidation or comment.

The case presented in the facts then is simply this:

III. The plaintiff claims, as a secured creditor, a lien upon the land by virtue of the deed to Williams, made in April, 1851, and a right to have it sold for the satisfaction of his demand. The defendant (303) holds under an absolute conveyance from Moore and Patton to himself, executed in 1863, and his possession and exercise of exclusive *proprietary* rights over the property ever since, without interruption from others. Most undoubtedly the latter must prevail, there being no suggestion of any disability resting upon the depositary and owner of the legal title. The annexation of trusts to the legal estate, cannot arrest the operation of the rule which, under the circumstances, ripens an imperfect into a perfect title, since during all this period the defendant was exposed to the action of the true owner, and his negligence in bringing it tolls his entry and bars his right of action. Rev. Code, ch. 65, sec. 1, repeated in The Code, sec. 145. The interest of the *cestui que trust* is, as against strangers to the deed, under the protection of the trustee, and shares the fate that befalls the legal estate by his inaction or indifference. Hill Trustees, *267; Wood Lim., sec. 208; Ang. Lim., sec. 390.

The principle has been distinctly adjudged in this Court. *Wellborn v. Finley,* 7 Jones, 228; *Herndon v. Pratt,* 6 Jones Eq., 327; *Blake v. Allman,* 5 Jones Eq., 407; *Clayton v. Rose,* 87 N. C., 110.

We therefore sustain the ruling of the court, and affirm the judgment.

No error. Affirmed.

Cited: King v. Rhew, 108 N. C., 700; *Culp v. Lee,* 109 N. C., 679; *Ervin v. Brooks,* 111 N. C., 360; *Clark v. Hodge,* 116 N. C., 766; *Cross v. Craven,* 120 N. C., 333; *Caldwell v. Mfg. Co.,* 121 N. C., 341; *Deans v. Gay,* 132 N. C., 231; *Power Corporation v. Power Co.,* 168 N. C., 221.

R. H. HUMPHREYS v. J. W. FINCH.

Evidence—Principal and Agent—Estoppel—Bond.

1. When the only issue submitted to the jury is, "Was the seal opposite the name of the defendant, on the note at the time that he signed it," evidence that there was no amount specified in the note at that time and that double the amount agreed on was inserted in the space left for that purpose, after the note was signed by the defendant, was incompetent, and could only be competent on a general denial of its execution.

2. An agent, to bind a principal under seal, must have authority conferred by a writing under seal; and a sealed instrument which is changed by an agent who has no authority by writing under seal, has no force to bind the principal.

3. Whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part, and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be matter of evidence.

4. When a principal verbally authorizes an agent to fill up with a specific sum a blank in a bond, left with him for that purpose, and then to deliver it in its completed form and obtain money on it, and another person acting in good faith and with no knowledge of these facts advances money on such bond, such principal is estopped from setting up the defense of want of authority in the agent, and denying his liability on the bond.

5. But if such bond were invalid, this would not invalidate the act of borrowing, which was thus authorized, nor remove the liability thus incurred by those whose names are subscribed to the bond and on whose credit the borrowing took place; and this is hardly a departure from the form of demand in this action.

(*McKee v. Hicks*, 2 Dev., 379; *Davenport v. Sleight*, 2 D. & B., 381; *Graham v. Holt*, 3 Ired., 300; *Marsh v. Brooks*, 11 Ired., 409; *Bland v. O'Hagan*, 64 N. C., 471; *Mason v. Williams*, 66 N. C., 565; *Saunderson v. Balance*, 2 Jones Eq., 322; cited and approved.)

THIS was a civil action, tried before *Boykin, J.*, at September (304) Term, 1886, of DAVIDSON Superior Court.

This action, begun before a justice of the peace on 30 January, 1886, and, after trial and judgment against the defendant, carried by his appeal to the Superior Court, is to recover the balance due, after certain endorsed payments, upon the following written instrument:

(305)

$300. 22 November, 1884.

One day after date, we promise to pay to the order of R. H. Humphreys three hundred dollars at 8 per cent interest. Value received.

CHAS. L. HEITMAN. (Seal.)
J. W. FINCH. (Seal.)

The defendant entered as pleas these memoranda, to wit: "General issue, payment and set off, counterclaim, accord and satisfaction, surety for Chas. L. Heitman, etc., *non est factum.*"

On the trial before the jury, the plaintiff introduced in evidence a note signed by C. L. Heitman and John W. Finch, the defendant, in the sum of three hundred dollars. The defendant when he began to introduce testimony, proposed to prove that when he signed the same,

the amount had not been inserted in the body of the note, insisting that if such be so, then he would not be liable for the payment of the said sum, and the note would be null and void as to him. He further proposed to prove, that he had agreed with the said C. L. Heitman to sign a note for him, in the sum of one hundred and fifty dollars, and that after he had signed the said note in blank, the said Heitman filled in the blank by inserting the sum of three hundred dollars. The court, upon objection of the plaintiff, excluded the proposed testimony, being of the opinion that if the seal opposite the name of the defendant was his seal, then the defendant would be responsible in law to the holder for the payment of the note. The defendant denied that the seal opposite his name was affixed thereto by him, or that it was written on the note at the time he signed it. The defendant excepted to the ruling of the court, excluding the testimony. The court then submitted to the jury the following issues, to wit:

Was the seal opposite the name of defendant, J. W. Finch, on the note at the time that he signed it? To which the jury responded in the affirmative. The defendant and the said Heitman were partners (306) in certain business enterprises, and the defendant had on two or three prior occasions signed other notes for Heitman, wherein the amounts had not been inserted. The plaintiff advanced the money on the said note to Heitman, without any knowledge or information and without notice of the alleged defects and irregularities in the execution of the same.

There was a verdict for the plaintiff. Motion by the defendant for a new trial. Motion refused.

Judgment signed by the court for the plaintiff. Appeal by defendant.

Frank Robbins for plaintiff.
M. H. Pinnix for defendant.

SMITH, C. J., after stating the facts: While the only specific issue submitted to the jury was as to the presence of the seal opposite the name of the defendant when his signature was affixed, and this is found against him, he was not allowed to prove the insertion in the space left open for the purpose, of a sum double that agreed upon between them. This evidence was not pertinent to the inquiry drawn up, and could only be competent upon a general denial of the execution of the paper. Except for this latter purpose, it was properly excluded, and this may have been the ground of the ruling of the court. But we are willing to consider the question of the effect of such proof, if fully establishing the fact, upon the defendant's liability.

The general proposition is not controvertible, that an agency to bind a principal by an instrument under seal (and this includes every essential part of it), must be created and the authority conferred by a writing under seal, and this in actions at law has been repeatedly ruled, as the cases to which we have been referred abundantly show. *McKee v. Hicks,* 2 Dev., 379; *Davenport v. Sleight,* 2 D. & B., 381; *Graham v. Holt,* 3 Ired., 300; *Marsh v. Brooks,* 11 Ired., 489; (307) *Bland v. O'Hagan,* 64 N. C., 471.

But while the instrument has no legal force as a covenant of the principal, when changed by an agent possessing written or oral authority only to act, a question arises whether one who verbally authorizes an agent to fill up a blank with a specific sum of money, left open and in his hands for the purpose, and then deliver it in its completed form, shall be at liberty when this is done and money obtained from another acting in good faith and with no knowledge of the fact, to disavow his obligation and consummate the fraud upon the holder. In a blended system of law and equity, shall the party who puts the means in the hands of his agent to get money upon a false assurance of his own liability, and with nothing to excite suspicion as to the integrity of the transaction upon the paper or otherwise, be allowed, when the money has been thus obtained upon his credit, to set up the defense and escape responsibility?

In *Mason v. Williams,* 66 N. C., 565, it is decided that one who has title and knows he has, who is present at a sale of the property as belonging to another, and is silent when it is publicly announced in his hearing before the bidding begins, that all persons claiming the same are requested to make known their claims, is not at liberty to deny the title acquired by an innocent purchaser at such sale. This was upon a sale of a steam engine.

In *Saunderson v. Ballance,* 2 Jones Eq., 322, the same doctrine was in a measure applied to a sale of land, except that the purchaser was required to repay the party estopped the money he paid for the land.

If by such conduct persons are not allowed to set up title to property and cause the loss of the money paid by an innocent purchaser, why should the defendant be permitted to avail himself of the want of sufficient legal authority in the agent to supply the blank in the bond, where, by his own act, he virtually declares to all who may take the paper, that such authority has been conferred? (308)

It has accordingly been held, where a defense to an action upon a bond was set up by some of the obligors, sureties, that it was not to be delivered until executed by another surety of which no indication was seen in the paper or otherwise given, that it could not be available to the sureties. *Dair v. United States,* 16 Wall., 1.

Delivering the opinion, *Davis, J.*, thus declares the law.

"Sound policy requires that the person who proceeds on the faith of acts or admissions of this character, should be protected, by estopping the party who has brought about this state of things, from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine, that whenever an act is done, or statement made by a party, which cannot be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

To this he adds, that "in the execution of the bond, the sureties declared to all persons interested to know, that they were *parties to the covenant, and bound by it.*"

This ruling is affirmed in *Butler v. United States,* 21 Wall., 272, and extended to embrace a case where every blank was left in the form of the writing to be filled, and was filled, this being done by the principal, *"in the scope of his apparent authority."*

But if the bond be a nullity, and no obligation imposed by it upon the defendant, it is not the less true, that authority was given to borrow the money upon the face of the paper, not limited, and we see no reason why the act of borrowing does not itself create the liability, even if the attempt to give it in the shape of a covenant proves ineffectual,
(309) and this is hardly a departure from the form of the demand in the action.

Its essence is the recovery of the unpaid residue of the money loaned, due on the bond or on the antecedent agreement expressed in it. The invalidity of the bond cannot invalidate the act of borrowing upon the credit of both whose names are subscribed to it, nor remove the liability thus incurred to repay. But it is unnecessary to pursue the inquiry further.

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

No error. Affirmed.

Cited: Cadell v. Allen, 99 N. C., 545; *Allen v. R. R.,* 106 N. C., 523; *Martin v. Buffaloe,* 121 N. C., 36; *Rollins v. Ebbs,* 137 N. C., 358; *S. c.,* 138 N. C., 145; *Lumber Co. v. Price,* 144 N. C., 56.

JOHN DICKERSON v. W. R. WILCOXON ET AL.

Judgment—Practice.

1. Ordinarily a judgment is conclusive as to all matters entering therein, and objection thereto should be taken at the time the judgment is rendered.
2. But when it appears from the record that an issue is raised by the pleadings, which is left open and undetermined, it is *error* to enter final judgment before such issue was tried.
3. When such issue was as to assets in the hands of an administrator to pay debts of the intestate, it was not erroneous for the court to refuse to allow execution to issue *de bonis propriis* before such issue was tried.

THIS was a civil action, tried before *Graves, J.*, at Spring Term, 1886, of ASHE Superior Court.

The plaintiff, Jackson B. Hosh and Allen Parkins, in the year 1855, formed and thereafter carried on a mercantile copartnership until its dissolution, in the spring of 1857. Allen Parkins died in 18...., leaving a will, which was duly proved, and the defendants appointed executors therein, who accepted the trust and undertook its discharge. On 6 November, 1869, the plaintiff commenced his action to have an (310) account taken of the firm transactions and for judgment for what may be found due him. The complaint alleges that the defendants have come into possession of assets, more than sufficient to pay off all the debts of the testator, and the answer denies that the defendants have any assets.

At April Term, 1870, reference was made to E. F. Foster to take and state an account, and his report afterwards made, was set aside, and reference made to J. P. Martin.

The latter filed his report at Fall Term, 1872, in which he finds due from testator to the plaintiff $623.70, and recommends judgment to be entered for that sum.

To the report the defendants filed exceptions, one of which was to the proposed entry of judgment against them in the absence of all proof of their having assets.

At Spring Term, 1883, counsel entered into the following agreement:

"In this case, it is agreed that the Hon. J. C. L. Gudger shall take all the papers in the case and find all the facts in the case necessary for a full determination of all the issues on the exceptions and the pleadings; that no further evidence be filed or offered, other than the depositions now on file and the testimony taken before the commissioners now on file, all of which are to be considered by the, judge, who shall

determine the same at his convenience before Watauga Special Term, in July, 1883. Either party may appeal within twenty days after notice of judgment."

Thereupon the following judgment was filed by Judge Gudger:

"This cause coming on to be heard upon the following depositions, etc., and the report of J. P. Martin, the commissioner last appointed in this case, and being heard, the court doth adopt the findings of facts of said J. P. Martin, and it is adjudged that the exceptions thereto,

(311) filed by the defendants, be overruled; said exceptions are hereto appended, marked 'A'; and it is further considered and adjudged, that the plaintiff have and recover of the defendants the sum of $623.70, with interest thereon from Fall Term, 1872, of Ashe Superior Court, together with the costs of this action, to be taxed by the clerk. It is further adjudged that the notes and accounts mentioned in the said report, if any remain on hand, be placed in the hands of ....., who is hereby appointed receiver, and who, upon giving bond in the sum of $500 as required by law, will proceed to collect the outstanding notes and accounts. The said receiver will report to the court from time to time as to the sums thus collected. The cause is retained for further orders."

"An appeal is hereby granted if desired. Bond fixed at $25. The name of the receiver is left blank and can be filled by the parties as they may agree, and in default of agreement application can be made for appointment."

Upon this judgment, on 18 March, 1884, an execution was issued, commanding the sheriff to satisfy the same *de bonis testatoris,* "and if no such property can be found, then out of the property of the defendants," etc.

On 28 April, 1884, the defendants filed a petition setting forth, amongst other things, "that the judge did not pass on the defendants' plea of fully administered and no assets, neither has there been any finding or judgment fixing these defendants with assets belonging to their testator's estate, or in any way making them personally responsible for this judgment or any part thereof, and praying that the sheriff be restrained from selling their property (which had been levied on) under said execution, until they have an opportunity at the next term of said court, to move to set the same aside as having been wrongfully and informally issued, and for such other and further relief," etc.

(312) On 5 May, 1884, Shipp, Judge, ordered that, "The clerk of Ashe Superior Court will issue an order restraining the plaintiff, etc., to desist from further proceedings in this case until Wednesday, 14 May, 1884," etc.

On 9 May, 1884, said order was issued and served.

On 12 May, 1884, it being the Spring Term of said court, upon due notice it was ordered by Judge Shipp, "That the restraining order heretofore made in this cause be continued until next term of Ashe Superior Court, and in the meantime that an issue be made up, to be tried at the next term of this court, whether or not the defendants have fully administered the estate of Allen Parkins, and whether they had any assets belonging to said estate, and if so what amount.

It was further ordered by the court that the old notes, judgments and accounts belonging to said estate be delivered to the defendants to make all of them they can for the estate.

At the August Term, 1885, Judge Avery vacated so much of said order as required an issue as to assets to be submitted to the jury, the court being of opinion that the issue as to assets, if raised by the pleadings, had already been adjudicated; and further ordered that execution *de bonis propriis* be restrained until the next term of the court, and that notice issue to defendants to show cause at the next term of the court why execution shall not be issued *de bonis propriis.*

Both plaintiff and defendants excepted to the order of the court, reserving their right to take the benefit of said exception after the final judgment in the same.

On this order execution *de bonis testatoris* was issued, returnable to Spring Term, 1886, and returned, endorsed *nulla bona.* Notice also issued for defendants to show cause at next term why execution *de bonis propriis* should not issue against them.

At Spring Term, 1886, his Honor, Judge Graves, defendants having filed an answer to rule:

"Adjudged upon the face of the proceedings, reports, orders (313) and decrees heretofore made, that the defendants have shown cause why execution *de bonis propriis* should not now be issued. Rule discharged."

Plaintiff excepted to the order, on the ground that his Honor erred in declining the motion of the plaintiff for execution *de bonis propriis,* and appealed to the Supreme Court.

Daniel G. Fowle for plaintiff.
Geo. N. Folk filed a brief for defendants.

SMITH, C. J., after stating the facts: The sole question brought up by the appeal, arises out of the refusal of the judge, upon the record, to award an execution against the personal goods of the defendants. While the possession of assets was directly averred and denied, and a material issue thus raised, which it was necessary to dispose of before the character of the final judgment could be ascertained, it has manifestly never

been considered by the referee, nor, so far as the record discloses, passed on by the judge. It was distinctly recalled to notice in an exception to the report. The agreement that the judge should take the case and find "the facts necessary for a full determination of all the issues on the exceptions and the pleadings," confines him to the proofs already taken, and therefore he could not affirmatively find any fact of which no evidence was furnished. In order to charge a representative with assets, they must be shown to be, or ought to have been, in his hands, and in the absence of all proof, the only possible finding, if there be any finding at all, must be in the negative. The entering up of judgment generally, was therefore not warranted, inasmuch as its legal effect then was to charge the defendants with assets, and to require them, if the debt could not be made out of the effects of their testator, after notice, to
(314) show cause, and when no cause is shown, to pay it out of their own property.

Now, was it out of the power of the court so far to reopen the cause and reform the judgment, as to permit an inquiry to be made as to the assets? or could the judgment be so modified as not to charge the defendants personally? or is it a case of wrong without remedy?

The argument of the appellees' counsel assumes the latter to be the correct view, for the reason that the objection should have been made upon the rendition of the judgment. Ordinarily this is so, and the controversy as to every matter entering into the judgment is concluded and settled.

But we think it plain, the dispute before the referee and transferred to the judge, was as to the *relations of the partners and the indebtedness of the deceased partner* to the one who sues. The resources of the debtor were not the subject of inquiry before either, and the question of assets is left by both, open and undetermined. The error lies in the entering of a judgment before this inquiry was made. We must put this construction upon the record to avoid obvious and unintended injustice, and therefore we concur in the refusal of the court to direct the issue of the execution asked, until the preliminary matter is settled. There is no error. This will be certified for further action in the court below.

No error. Remanded.

Cited: S. c., 99 N. C., 537; *Hardy v. Carr,* 104 N. C., 36.

(315)

J. M. ANDREWS ET AL. v. D. BEAM.

Public Road—Gates—Jurisdiction of Commissioners.

1. Jurisdiction to license the erection of a gate across a public road is conferred by The Code, sec. 2058, on the Board of Supervisors of Public Roads. This applies to roads already established.
2. Jurisdiction to lay out, etc., public roads, is conferred by section 2023, on the board of county commissioners; and in the exercise of this power, they may grant to a party over whose land any new road ordered by them to be laid out may pass, the right to erect gates across such road.

THIS was a petition for the laying out and establishing a new road, brought by appeal of the petitioners from the order of the board of county commissioners of RUTHERFORD County, and heard before *Shipp, Judge,* at the Fall Term, 1885, of the Superior Court of said county.

In November, 1883, more than forty of the citizens, residing in Logan Store Township, of Rutherford County, applied to the board of county commissioners by petition in writing, for an order to lay out and establish a public road between certain terminal points therein mentioned, some three miles in length, and over and along a cartway which had long been in use. The proposed road for about half the distance passes over land belonging to D. Beam, who alone by answer resisted the application. Afterwards Beam himself interposed by petition, and asked the board for leave to enclose his Houser plantation of 475 acres, at his own expense, under the stock law then in force, with the right to erect gates across the roads leading through the same.

The following action was taken in the premises by the board:

"In the matter of a petition to lay out a public road from the Punchen Branch, on the Shelby and Morganton road, to Logan's Store post office.

"This cause coming on to be heard upon the petition, and (316) upon the answer of D. Beam, the defendant, and the evidence introduced, it is ordered and adjudged that the prayer in the petition for a public road be granted, and that a public road be laid off as asked for in said petition, beginning at the Punchen Branch, on the Shelby and Morganton Road, and running thence with the old cart-way to the post-office at Logan's Store; said road to be laid out with as little prejudice to land and enclosures along it as may be, and with as much advantage to the inhabitants as possible.

"And let an order issue, and the sheriff of this county is ordered to summon a jury to lay out the same as the law directs, and to assess any

damages private persons may sustain, and make report of the same, and that the petitioners and the defendants each pay one-half the costs of this petition.

"The above order is made, and the road to be laid out, upon condition that D. Beam have the privilege of establishing and keeping up two gates on his Houser place, at such points as he may choose, said gates to be kept in good order for the convenience of the public."

From this order the plaintiffs, under section 2039 of The Code, took an appeal to the Superior Court.

When the case was called for trial, his Honor said that in his opinion there were no issues to be tried by the Superior Court, and dismissed the appeal. From which order the plaintiffs appealed.

W. P. Bynum for plaintiffs.
M. H. Justice filed a brief for defendant.

SMITH, C. J., after stating the facts: It will be noticed, that the removal by appeal or otherwise to the Superior Court, authorized by the section referred to, contemplates a trial by jury of any issue of fact which may arise and become material to the action of the com-
(317) missioners, and while this is the primary object, it is equally manifest that any error in law committed by them in exercising the conferred power, may be inquired into and corrected in the Superior Court. The appeal given to this Court will, however, bring up for review only *erroneous* and specified rulings made by the judge of the Superior Court.

There is no suggestion in the record of any irregularity or disregard of the requirements of the statute in acquiring jurisdiction of the subject-matter, authorizing the intervention of the judge of the Superior Court; nor of any controverted fact, to be passed on by the jury. There was then no wrong pointed out to be redressed by an appeal. The proper judgment then to be rendered was perhaps one of affirmation, but the dismissal of the appeal has the same effect in leaving the action of the commissioners in force and undisturbed.

The appeal to this Court, as is correctly argued in the brief of counsel of the appellee, can raise the only question of the legal efficacy of so much of the action of the commissioners as gives the defendant or contesting party the privilege of erecting and maintaining two gates on his land across the road, to be kept "in good order for the convenience of the public."

The authority to license in proper cases, and thus avoid the expense of double fencing, the putting up of gates across a public road is as explicitly conferred in section 2058 upon the board of township super-

visors, as is that to establish highways upon the county authorities, and when an independent movement to secure this privilege or *license* in reference to existing roads is made, it must be before the former body, to whose discretion the exercise of the power is committed.

But inasmuch as the laying out of highways is entrusted to the county commissioners, and this may be done *without* restrictions, we see no reason for refusing the authority to establish them, with such conditions, as without serious detriment to the public, lessen (318) the damages which would otherwise fall upon the owner of the land passed over, and when these conditions are such as may be annexed to the enjoyment of the easement by the separate subsequent action of the subordinate township supervisors. We confine the qualifying restrictions to such as are incident to the use of the public easement, and recognized as such by the law itself. Why, it may be asked, when the public sanction is sought and the whole subject is before a body with ample jurisdiction to allow or refuse the application of those who desire the highway, should the owner of the land over which it is to pass, be driven to another tribunal in seeking a relief which, as incidental to the application, ought to be given as a qualification of the allowance of the highway?

No sufficient reason for denying this right to the commissioners appears to us, and a resort to the form of procedure prescribed in the section (2058) becomes necessary only in cases of roads already established, and this for the greater convenience of the landowner himself.

There is no error and the judgment is affirmed.

No error. Affirmed.

Cited: McDowell v. Insane Asylum, 101 N. C., 659.

D. M. STANTON v. J. M. HUGHES AND WIFE.

Pleading—Practice—Rescission of Contract—New Trial.

1. The defendant, in his answer commingles the facts which he relies on both as ground for a rescission of the contract, sued on by plaintiff, and also as constituting a counterclaim: *Held*, 1. That when relied on as ground for rescission of the contract, these facts were deemed to be denied without replication; 2. The Court will not rescind a contract when the parties cannot be restored to the status occupied by them when the contract was made; 3. The right to recover damages for deceit in the sale of land, effected by fraudulent device and representation, is settled;

4. The defendant could only be entitled to interlocutory judgment and writ of inquiry of damages by the jury. This was not asked in this case, and therefore not passed on. He was not entitled to final judgment in either form.

2. There was no error in setting aside the verdict as against the weight of the evidence; therefore this could not be appealed from.

(Price v. Eccles, 73 N. C., 162; *McDowell v. Simms,* Busb. Eq., 130; *Pettijohn v. Williams,* 2 Jones Eq., 302 and 356; same case, 1 Jones, 145, and 2 Jones, 33; cited and approved.)

(319) THIS was a civil action, tried before *Clark, J.,* at February Term, 1886, of GUILFORD Superior Court.

The parties to the action on 1 September, 1882, entered into a covenant whereby the plaintiff agreed to sell and deliver to the defendants at the railway station in Greensboro, certain grist and flouring mills then in operation at LaGrange, in Lenoir County, with all the fixtures and appurtenances and the material of the building wherein they then were, for the price of $3,050. The defendant covenanted to pay for the same the said sum as follows: the sum of $200 in cash, of which the freight was to be part, the execution of four several bonds, the first for $250, payable at twelve months; the others for $450 each, payable respectively at 2, 3, and 4 years, all bearing interest from date; the conveyance of lands in Guilford of the estimated value of $1,250, and the making of a mortgage deed upon the lot on which the machinery was to be placed, to secure the deferred parts of the purchase money. The goods were delivered early in October and received by defendant, who paid the freight, was allowed some small deductions and gave his note for $28.52, the residue of the $200, and complied with his other stipulations in giving the four bonds, conveying the said lands and making the mortgage to secure the residue of the debt.

No other payments have been made, and the two first bonds having matured, the present action was instituted to recover judgment on them, and to procure a foreclosure and sale of the mortgaged lot upon
(320) which the structure for the mills and machinery had been erected, under a provision in the deed authorizing a sale upon a default in respect to any of the bonds therein secured.

The defendants answer and as a defense allege false and fraudulent representations of the capacity of the mills for doing work, and in other material particulars entering into the value of the property under which they were induced to enter into the contract of purchase, and have been deceived and wronged, and they demand a rescission of the contract, or a recoupment upon the agreed price, or damages compensatory for the deceit and fraud practiced in the sale, to be deducted from the plaintiff's demand.

Three issues were passed on by the jury, which with their responses to each are as follows:

1. Did the plaintiff make any false and fraudulent representations as set out in the answer, to induce the purchase of the mill and the execution of the notes secured by the mortgage? Answer: Yes.

2. Did defendant buy and give his notes and secure the same by reason of the false and fraudulent representations made by plaintiff? Answer: Yes.

3. What damages hath the defendant sustained, if any, by reason of the fraud and deceit practiced upon him by the plaintiff? Answer: None.

On the rendition of the verdict of the jury as above, the plaintiff moved for a new trial upon the judge's minutes, and to set aside the verdict as being against the weight of evidence. The defendants opposed plaintiff's motion, and on their own behalf made counter-motion for decree of rescission and restoration to their former position. On consideration, his Honor granted the plaintiff's motion and overruled that of the defendants.

The defendants thereupon prayed an appeal in open court, and had the same entered of record.

L. M. Scott for plaintiff. (321)
Dillard & Morehead filed a brief for defendants.

SMITH, C. J., after stating the facts: When the trial was entered upon, the defendants moved for judgment rescinding the contract of sale, for that their answer demanding this was a counterclaim, the facts alleged in which not being controverted, were to be taken as true. The court, not acceding to this view, denied the motion, and directed the trial to proceed, with the result shown in the verdict, the jury finding the false and fraudulent representations set out in the answer to have been made, and that by reason thereof the defendants were induced to make the purchase, but that no damages had accrued thereby to them. The answer, it will be observed, while averring the facts upon which their defense rests, commingles such as go in avoidance and also constitute a counterclaim. The primary and preferred relief, the annulling of the entire contract, is matter *in avoidance,* and is deemed to be controverted without a replication; The Code, sec. 268; *Price v. Eccles,* 73 N. C., 162; while the same matter, as furnishing a cause of action for compensating damages for the fraud and deceit, which leaves the transaction to stand as a sale and transfer of the title, constitutes a counterclaim. In our opinion, the case is not one for a rescission, for the obvious reason that the parties cannot be restored to the status occupied

at the making of the covenants, in consequence of dispositions since made of the property. *McDowell v. Sims,* Busb. Eq., 130; *Pettijohn v. Williams,* 2 Jones Eq., 302; and again in same volume, 356.

The right to recover remuneration in an action for deceit in the sale of land or fishing grounds, effected by fraudulent devices and representations, is settled by the case between the same parties, reported in 1 Jones, 145; and again in 2 Jones, 33.

(322) The defendants, however, demanded a judgment of rescission, and in this were properly overruled. They did not demand an interlocutory judgment and an inquiry of damages by the jury, and hence their right to this was not passed on by the court. The defendants certainly were not entitled to final judgment in either form. There being no error in this ruling, there could be no appeal from a judgment setting aside the verdict as having been rendered against the weight of the evidence, and especially with such repugnant findings.

The judgment must be affirmed. Let this be certified.

No error. Affirmed.

Cited: Buffkins v. Eason, 110 N. C., 266.

MATTHEW MOORE v. HENRY J. FAISON.

Lessor and Lessee—Sublessee—Lien.

1. When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives to a lessor.
2. The original lessor, *after his lessee has paid him in full, has no lien under the statute* on the crop of the sublessee for advances made by him to the sublessee.

(Montague v. Mial, 89 N. C., 137, cited and approved.)

CIVIL ACTION, tried on appeal from the judgment of a justice of the peace, at November Term, 1886, of DUPLIN Superior Court, before *Clark, J.*

The plaintiff, as landlord, rented certain premises for farming purposes to one David Cameron, who subrented a part of the same to one John Newell.

(323) The plaintiff made certain advances to subtenant Newell, without the request and not at the instance of the tenant Cameron.

The defendant made advances to Newell at the request of Cameron, who assumed and became responsible for the payment thereof; and for such advances Cameron seized (under claim and delivery before a justice of the peace) certain of the crop raised by subtenant Newell on said premises, and delivered the same to defendant in payment of said advances—the value of the crop being less than $50.

This action was brought by plaintiff to recover of defendant the sum of $33, due by subtenant Newell to the plaintiff for said advances.

It was in evidence that Cameron had paid to plaintiff the amount of rent and all advances, and had complied with all the stipulations contained in his lease. It was further in evidence that the property turned over to defendant was less in value than the advances made to subtenant Newell by the defendant, at the request of tenant Cameron.

Upon this state of facts the court gave judgment against plaintiff for costs, and the plaintiff appealed.

W. R. Allen for plaintiff.
Ernest Haywood and H. E. Faison for defendant.

SMITH, C. J., after stating the facts: The statute of 1876-77, in direct terms, vests in the landlord, who leases his land to a tenant, all the crop grown on the rented land in possession until the rent is paid, the other stipulations in the agreement fulfilled, or damages given instead, and until the lessor or his assignors "shall be paid for all advances made and expenses incurred in making and saving said crop." The Code, sec. 1754. These statutory relations grow out of the contract of lease for the security of the landlord and in aid of the credit of his tenant when his necessities require such advances to enable him to make and harvest his crop, and thus assure to both the fruits of his labor. (324) The lien given for supplies furnished grows out of the relation of the parties and is incident to that relation. The statute does not take in advances made to laborers, or sublessees acting under a subordinate and subsequent letting from the lessee, who, so far as relates to the lessor, are but agencies employed by him in carrying out his own agreement, at least unless made with the privity and assent of the lessee. In such case, practically the advances are to the lessee himself, and the statute affixes the lien. But the crop, in whatever manner raised, as well when the sublessee, as such, cultivates the land, or it is cultivated by employees under the direct control of the lessee, becomes subject to the statutory lien by force of the statute, his obligations to the landlord being primary and paramount to any subsequently created, as is decided in *Montague v. Mial,* 89 N. C., 137.

In the present case the plaintiff Moore made the advances for which the action is prosecuted, not to his own lessee, Cameron, but to the sublessee of Cameron, Newell, with whom the plaintiff has no contract relations, and this, not only without his request or at his instance, by which Cameron himself was supplying the wants of his own tenant, through the defendant Faison. For the manner of furnishing is tantamount to its being done by Cameron himself, so far at least as concerns the plaintiff's asserted claim to a prior lien for his advances. Cameron, for advances made to *his tenant,* would occupy towards him the relation of lessor with the rights incident to that relation, but it would be in subordination to those acquired by Moore in his original letting of the land, since whatever arrangements are entered into by Cameron they are under and by virtue of the lease obtained from the owner of the premises. *Montague v. Mial, supra.*

(325) It is sufficient for determining the appeal to say that Moore, in voluntarily crediting, not his own lessee, but one engaged in performing the obligations of Cameron, under Cameron's control, cannot assert a lien therefor, and, as every stipulation in his lease has been complied with, his right of possession terminates. There is no error. Judgment affirmed.

No error. Affirmed.

Cited: Brewer v. Chappell, 101 N. C., 254; *Jarrell v. Daniel,* 114 N. C., 214; *S. v. Crook,* 132 N. C., 1054; *Land Co. v. Cole,* 197 N. C., 457.

D. F. KINNEY v. P. F. LAUGHENOUR.

Execution against the Person—Arrest—Constitution—Seduction.

1. It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person, under sections 442, 447 and 448(3) of The Code.

2. Such execution should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law.

3. Section 291(2) of The Code, authorizing the arrest of a person in an action for seduction, is not in conflict with the provision of the Constitution prohibiting imprisonment for debt.

(*Moore v. Mullen,* 77 N. C., 327; *Hoover v. Palmer,* 80 N. C., 313; *Moore v. Green,* 73 N. C., 394; *Long v. McLeod,* 88 N. C., 3; *Houston v. Walsh,* 79 N. C., 35; and *Peebles v. Foote,* 83 N. C., 102; cited and approved.)

KINNEY *v.* LAUGHENOUR.

THIS was a motion upon the return of an execution against the person, heard before *McRae, J.*, at Spring Term, 1886, of DAVIDSON Superior Court.

In the complaint, the plaintiff alleges the cause of action against the defendant for the seduction of his step-daughter, who was at the time thereof a member of his family and his servant. At the time the summons was issued, the plaintiff obtained the warrant of arrest, (326) which was duly executed upon the defendant.

In the course of the action he obtained a judgment against the defendant, and thereupon an execution duly issued against his property, which was returned unsatisfied.

Thereafter an execution issued against his person, of which the following is a copy:

DAVIDSON COUNTY—SUPERIOR COURT.

D. F. Kinney, Plaintiff,
against
P. F. Laughenour, Defendant. } *Execution.*

THE STATE OF NORTH CAROLINA,

To the Sheriff of Yadkin County—*Greeting:*

Whereas, judgment was rendered on 7 September, 1885, in an action between D. F. Kinney, as plaintiff, and P. F. Laughenour, as defendant, in favor of said plaintiff, and against the said defendant, for the sum of two hundred dollars as damages, and two hundred and sixty-one and 25-100 dollars as cost, as appears by the judgment roll filed in the office of the clerk of said court; and whereas, the said judgment was docketed in this county on 7 September, 1885; and the sum of two hundred dollars as damages, and $261.25 as cost are now due thereon, with interest on two hundred dollars from 7 September, 1885; And whereas, an execution against the property of the said P. F. Laughenour has been duly issued to you and returned unsatisfied:

You are therefore commanded to arrest the said P. F. Laughenour, the defendant herein, and have his body before said court, at its next term, to be held for the county of Davidson, at the courthouse in Lexington, on the first Monday in March, 1886. Herein fail not, and have you then and there this writ. (327)

Issued 14 January, 1886.

C. F. LOWE,
Clerk Superior Court Davidson County.

Under this execution, the sheriff accepted a bond in the sum of six hundred dollars conditional for the appearance of the defendant before the court in term, "and not depart the same without leave," etc.

At the Spring Term, 1886, of the court, further proceedings were had, whereof the following is a copy:

"The defendant presents himself in answer to the execution issued against his person, dated 14 January, 1886, and in exoneration of his bond given the sheriff of Yadkin County. Plaintiff moves that he be taken in custody and committed to the common jail of Davidson County, to answer the exigency of the writ. The judge being of the opinion that this execution was not in its form warranted by law, denied the motion at cost of plaintiff, and plaintiff excepts.

"Plaintiff now moves that the judge order that an execution against the person of defendant issue forthwith. The judge being of the opinion that it is unnecessary for the plaintiff to apply to the court in term for the issuance of such process as he may be entitled to under the law, declines to make the order. Plaintiff excepts, and appeals to the Supreme Court."

M. H. Pinnix for plaintiff.
No counsel for defendant.

MERRIMON, J., after stating the case: The statute (The Code, sec. 291, par. 2) provides, that a defendant may be arrested "for seduction," and it has been held, that this provision is valid, and not in (328) conflict with Art. II, sec. 16, of the Constitution, which provides, that "There shall be no imprisonment for debt, except in cases of fraud." Damages recovered in an action for seduction do not constitute a debt, in the sense implied by this provision. *Moore v. Mullen,* 77 N. C., 327; *Hoover v. Palmer,* 80 N. C., 313; *Moore v. Green,* 73 N. C., 394; *Long v. McLeod,* 88 N. C., 3.

The statute (The Code, sec. 442) provides, that there may be execution against the person of the judgment debtor, and section 447 prescribes that, "If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property, unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been secured, as provided in Title IX, subchapter 1, of this chapter, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 291," cited above.

In this case, it appears that the verified complaint sufficiently alleged a cause of action against the defendant for the seduction of the plaintiff's step-daughter, and in addition, there was an affidavit upon which and the complaint, a warrant of arrest issued. Upon the judgment obtained, an execution against the property of the defendant issued, and this was returned unsatisfied. A proper execution against the person of the defendant might therefore have been issued. There had been an order of arrest served upon him, and moreover, the complaint contained a statement of facts showing a cause of arrest. An execution, purporting to be such a one, did issue, but it was insufficient. It ought to have commanded the sheriff, or other proper officer, as directed by the statute (The Code, sec. 448, par. 3), to arrest the defendant, "and commit him to the jail of the county, until he shall pay the judgment, or be discharged, according to law," and to make due return of the execution to the court, and how he had executed the same. It (329) would have been well, also, in connection with the other recitals in the execution, to have made brief reference to the cause of arrest, although, perhaps, this is not essential in such execution. The party thus arrested must be committed to the jail of the county from which the execution issued. The Code, sec. 444; *Houston v. Walsh,* 79 N. C. 35; *Peebles v. Foote,* 83 N. C., 102.

It must be observed, in *Houston v. Walsh, supra,* that the *Chief Justice,* in pointing out the defects in the execution referred to in that case, had reference to the statute (Battle's Rev., ch. 18), suspending the Code of Civil Procedure in certain respects, and not to C. C. P., sec. 261, par. 3, which provided just as the statute (The Code, sec. 448, par. 3), now provides.

As the defendant asked the court to commit him to jail in exoneration of his surety, if the plaintiff had joined in such request, it might have made a proper order so committing him, "until he shall (should) pay the judgment or be discharged, according to law," but the plaintiff did not ask for such an order. The court, therefore, properly declined to make it.

Nor was it necessary that the court should order that an execution issue forthwith against the person of the defendant. The facts being as they appear to us, it was the duty of the clerk, upon application of the plaintiff, or his counsel, to issue a proper execution against the person of the defendant, as indicated above, without an order of the court. Nothing appearing to the contrary, the plaintiff may yet apply for and obtain such execution.

There is no error, and the order appealed from must be affirmed.

No error. Affirmed.

Cited: Patton v. Gash, 99 N. C., 284; *Burgwyn v. Hall,* 108 N. C., 498; *Carroll v. Montgomery,* 128 N. C., 280; *Huntley v. Hasty,* 132 N. C., 281; *Ledford v. Emerson,* 143 N. C., 534; *Oakley v. Lasater,* 172 N. C., 97; *Coble v. Medley,* 186 N. C., 482.

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E. B. KERLEE ET AL. v. M. A. CORPENING, EXECUTOR, ET AL.

Presumption—Payment—Parties—Pleading.

1. Where a clerk and master, in the years 1855 and 1858, received moneys arising from the sale of lands for partition, under a decree of the Court of Equity, but no demand was made or proceedings instituted by the parties entitled to receive them until the year 1880: *Held,* that the statutory presumption of payment or satisfaction must prevail.
2. Under an order of reference, by consent, containing directions to the referee to ascertain what sums the clerk and master had received, when received, and a further provision that "his decision of the law is open to revision in this and other courts having jurisdiction," it is competent for the defendant to set up the presumption of payment from lapse of time, notwithstanding no answer was filed.
3. In all actions and proceedings demanding relief, the names of all the parties thereto should be properly set forth in the summons and pleadings. A general designation of them as "the heirs of M. C." is irregular and will not be tolerated.

(Bradford v. Erwin, 12 Ired., 291, cited and approved.)

THIS is a civil action, which was tried at Spring Term, 1886, of MCDOWELL Superior Court, before *Graves, J.,* upon referee's report and exceptions.

The facts upon which the present action depends are those set out in the case of *Curtis' heirs,* reported in 82 N. C., 435, where a remedy was sought in a motion in the cause as originally constituted in the Court of Equity and reinstated on the docket of the Superior Court for that purpose. It is needless to restate them. The present proceeding, suggested in the opinion then delivered, is by an independent motion after notice, made under the provisions of The Code, sec. 1880. A demurrer to the complaint was put in, and not being acted on at Fall Term, 1883, an order of reference by consent, was made to M. H. Justice, "to take and state an account, showing:

(331) (1) What sums of money, if any, came to the hands of C. L. S. Corpening, deceased, former clerk and master, as the proceeds of

the sale of the lands of Moses Curtis, deceased, and when such sums came to his hands;

(2) What amount, if any, is now due the plaintiffs in this case in consequence of a failure to pay over to the parties in interest.

(3) What sums have been paid, when paid, if any, by the said Corpening in his lifetime.

(4) The referee will pass upon all questions of fact and state his conclusions of law, and make his report to the next term; and it is agreed that the referee find his facts and upon such facts give his opinion as to the law arising thereon, it being fully agreed that the decision of the law is open to revision in this and other courts having jurisdiction."

It appears that lands belonging to Moses Curtis, and at his death devised to his wife for life, and to his children in remainder, were sold under a decree of the Court of Equity of McDowell County, and after confirmation and an allowance for selling, it was ordered, at Fall Term, 1855, that "the clerk and master loan the purchase money, after paying the costs in the case, *until the next term,* taking bond and security," etc.

William M. Carson, who had previously held the office of clerk and master, at the same term resigned it, and C. L. S. Corpening, testator of the defendant Martha, was appointed in his place, and continued to hold it until the court to which it was attached ceased to exist, in 1868. Mary Curtis died in 1884, and the plaintiff, who had married a daughter, became her administrator. The testator of the defendant, as is averred in the pleadings, died in 1875.

The referee finds from the recitals in the deed from C. L. S. Corpening, executed in his official capacity, by direction of the court, to Thomas Hemphill, substituted in place of Thomas L. Hill, the original purchaser, whose surety he had become, and who had paid the debt, for a portion of the lands so sold, that the testator, Corpening, received on 28 October, 1855, the sum of $238, which, with interest (332) thereon, he is charged with, in the account rendered. This sum is somewhat enlarged by an erroneous mode of computation, whereby the principal money is increased by an excess of interest above a small credit, which thus itself becomes an interest-bearing principal.

The defendants excepted to the report of the referee:

1. That it appeared that the clerk and master was ordered, at Fall Term, 1855, to loan out the money in question, and there was no evidence that he was ever afterwards directed to collect the money, or, at least, the principal.

2. That if the same was collected, there was under the facts of this case, a presumption that it had been paid to the parties entitled, and there was no evidence to rebut the same.

The case coming on to be heard, upon the report and the exceptions thereto, filed by both parties, it was ordered that all the exceptions of the plaintiff be overruled; and it was further ordered that the first exception of the defendant be overruled, but the second exception of the defendant, to the effect that demand is presumed satisfied, discharged and abandoned, was sustained. It was further adjudged that the defendants have judgment for cost.

From this ruling, and the judgment rendered thereon, the plaintiffs appealed, and the only question presented is, as to the raising of the statutory presumption of payment upon the facts found.

W. H. Malone and John Devereux, Jr., for plaintiffs.
No counsel for defendants.

SMITH, C. J., after stating the case as above: There passed into the hands of Corpening, by virtue of his office, in October, 1855, the sum of money mentioned, and he was by the decree directed to lend it out (333) on security until the succeeding term, but it does not appear that any such loan was made. He received from another purchaser, Spoke, on 27 April, 1858, the sum of $76, which on the next day he paid over to one Burgin, guardian of Mary Curtis, as the order apportioning the fund required; and again he paid the plaintiff, E. B. Kerlee, her succeeding guardian, $20, on 3 November, 1859; from what source received does not appear. There is no controversy in regard to these funds, since the referee only charges the clerk and master with his collection from Hemphill, and the facts are adverted to in conection with the long silence that has since intervened up to the institution of the present action, in September, 1880.

Now, the fund is traced into the clerk's hands, and in no manner is he acquitted of his direct responsibility to those entitled to it. If he misappropriated the money, or failed to lend it, and collect and pay over the annual interest, it would be a breach of his bond, and subject him to an action. It is from this long delay, and in explanation of it, that the statute deduces the inference of payment or satisfaction, and requires affirmative proof of nonpayment. None such has, in this, been offered. The presumption, therefore, must prevail.

But it is argued that no such defense has been set up specifically, and this is true as to every defense, since no answer has been filed, unless what is termed a demurrer be so considered, and this does not purport to be. But the consent reference, signed by counsel and "affirmed" by the judge, sends the whole subject of controversy to the referee, and specially to determine what is due from the testator's estate to the plaintiffs, and payments partial or in full must be inquired into, to

ascertain the result. The defendant has the same right to contest as the plaintiffs to establish their claims, and to avail themselves of the rules of evidence applicable thereto. We concur, consequently, in the ruling of the judge and his disposal of the cause.

We have proceeded to consider the appeal upon its merits (334) because our conclusion is against the plaintiffs. Had our opinion been different, we should have paused in making a decision until the parties interested in the fund are introduced into the cause. But three only of the plaintiffs' names are found in the pleadings, the plaintiff Kerlee and wife in their right, and himself, as administrator of Mary Curtis, and the numerous others are described, without naming them, as "heirs at law of Moses Curtis, deceased," and this cannot be tolerated. Who are the heirs at law of a deceased person, is a question of law. *Bradford v. Erwin,* 12 Ired., 291; and the defect, after being pointed out in the demurrer, has not been removed. Persons who demand money from others, must appear in the record in proper person, so that the defendant may know the money will go into the hands of rightful claimants, and he not be exposed to a suit for the same from others. When the summons was issued there were no named plaintiffs, and only the comprehensive term, "heirs of Moses Curtis," was used to cover all who might have that relation toward the deceased, while these were designated by name when the complaint was filed.

There is no error, and the judgment below is affirmed.

No error. Affirmed.

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W. H. PHIFER, ASSIGNEE OF M. E. CROWELL, v. MARSHALL E. ALEXANDER.

Issues—Judge's Charge—Exceptions.

1. Where at the commencement of the trial certain issues were agreed upon by the parties to the action, but subsequently the court substituted others without objection: *Held,* that, after verdict an exception that such issues were not properly submitted, came too late.

2. While it may not be sufficient ground for a new trial that the court failed to give instructions to which the appellant might have been entitled if he had requested them, it is nevertheless the duty of the judge to declare and explain the law arising upon the facts as they bear upon the issues; and simply calling attention to the issues, without further instruction, is error.

(Albright v. Mitchell, 70 N. C., 445; *Miller v. Miller,* 89 N. C., 209; *Waddell v. Swann,* 91 N. C., 108, cited and approved.)

PHIFER *v.* ALEXANDER.

THIS is a civil action, which was tried before *Avery, J.*, at October Term, 1886, of MECKLENBURG Superior Court.

The action was brought by the plaintiff, as assignee of a mortgage debt, to recover damages for the unlawful seizure and conversion of a stock of goods by the defendant, which the plaintiff alleges belonged to him by virtue of a mortgage made to secure the debt mentioned, and which was assigned to him by the mortgagee therein. The defendant denies the material allegations of the complaint. He alleges that he seized and sold the goods in question, as sheriff, by virtue of certain executions properly in his hands, and that the plaintiff had no title to them; that his supposed title was fraudulent and void as to the creditors of the mortgagor under which he claimed, etc.

When the trial was commenced the following issues were agreed upon by the counsel:

1. Is the plaintiff owner of the property described in complaint?
(336) 2. Did the defendant wrongfully seize and convert it?
3. What is the value of it?

There was much evidence produced, part of it tending to prove fraud, as alleged by the defendant, and other parts of it, to prove the contrary. In the course of the trial:

"During the argument of the case by the last counsel for defendant, his Honor announced to the counsel that he had determined to submit the issues set forth in the record, with a view to elicit the facts in the nature of a special verdict or finding of fact, and read the issues he proposed to submit, and same were examined by defendant's counsel who last spoke, and commented on to the jury. There were no exceptions taken to his Honor's ruling.

The court then called the attention of the jury to the testimony as bearing upon the issues which his Honor had framed, but did not give any instructions upon the law; nor was there any request by the defendant that his Honor should give the instructions; nor any exceptions because his Honor did not give the instructions; but at the conclusion of the testimony handed his request for special instructions to the court.

After the jury had returned the verdict upon the issues, the defendant, by his counsel, moved the court:

1. For judgment upon the verdict.
2. For a judgment upon the facts admitted, and the verdict.
3. If judgment for defendant is refused, defendant then moves for a new trial for errors committed in the trial of said cause, in admitting evidence against defendant's objections, in refusing prayers for instructions submitted by the defendant, and for errors in the instructions given, for refusing to submit issues tendered by defendant, and agreed on; and in submitting issues which were passed upon by the jury."

The court denied the motion for a new trial, and gave judgment for the plaintiff, from which the defendant appealed to (337) this Court.

D. A. Covington for plaintiff.
Platt D. Walker and W. W. Fleming for defendant.

MERRIMON, J., after stating the case: The issue agreed upon by the parties before the trial began, to be submitted to the jury, were the principal ones raised by the complaint and answer, and ought regularly to have been submitted. The appellant had the right to have them, or others substantially like them, submitted, if he had insisted upon his right at the proper time. *Albright v. Mitchell,* 70 N. C., 445; *Miller v. Miller,* 89 N. C., 209; *Waddell v. Swann,* 91 N. C., 108.

But the court, during the progress of the trial, and before the argument of counsel to the jury was closed, deemed it proper and expedient to submit numerous issues other than those agreed upon—drew them up and gave the appellant's counsel notice of, and opportunity to discuss them, and he did comment upon them to the jury, raising no objection to them and making none, that the issues agreed upon had been set aside. If the appellant was not satisfied with what the court did in this respect, he ought, when it declared its purpose, to have made proper objection, as he had the right to do; and as he did not, he must be held to have waived his right to object to them, especially, as, taking them altogether, they, in effect, secured the finding of the principal facts by the jury embraced by the material issues raised by the pleadings. It could not be just, nor would it comport with the dignity and seriousness of orderly procedure, to allow a party to test his fortune in the course of the action by submitting issues of fact to the jury, not in themselves illegal, to which he made no objection at the time they were submitted, and failing of success, to grant him a new trial, upon the ground (338) that he might have objected successfully in apt time to such issues, and failed to do so. Having agreed—certainly by implication—to submit numerous issues, instead of the three agreed upon, he cannot be allowed to change his purpose after an unsuccessful result, and have a new trial, because he might possibly have been more fortunate if the three issues, or they and others, had been submitted.

It appears that the court simply directed the attention of the jury to the bearing of the evidence upon the issues submitted, "but he did not give any instructions upon the law"—the case settled on appeal so states—nor was there any special request by the appellant, after the three issues agreed upon were rejected; that the court should give the special instructions at first prayed for, nor were exceptions taken at the

time the issues were given to the jury, because they were not given. But the statute (The Code, sec. 413) expressly prescribes, that the judge shall "declare and explain the law arising" upon the facts as they bear upon the issues submitted, while it may be, if he fails to do so, and the party complaining fails at the proper time to ask that particular or proper instructions as to the law be given, or to object because such instructions were not given, he might not afterwards be heard to complain. In this case, at the close of the evidence, the appellant's counsel did ask the court to give numerous special instructions, intended no doubt at first to apply to the three issues set aside, but they were quite as pertinent to the issues submitted, and ought to have been given, if they embraced the law applicable; or if they did not, then they should have been modified and given; or the prayer should have been denied, and proper instructions as to the law, given. The instructions asked for were not withdrawn; they remained before the court, and should have been disposed of in a proper way. As they were not, there is (339) error. The appellant is not entitled to judgment upon the verdict. The material facts of the case are not admitted on either side. A copy of the deed of mortgage attacked for fraud is not set forth in the record, but so far as appears from the pleadings and the evidence, it is not upon its face fraudulent, and the jury expressly find that it was not made "with the actual intent of the parties" to it, to defraud the creditors of the mortgagor. He is, however, entitled to a new trial, and to that end let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. *Venire de novo.*

Cited: Phifer v. Erwin, 100 N. C., 60; *Cotton Mills v. Abernathy,* 115 N. C., 409.

J. E. AUSTIN AND WIFE v. J. E. KING.

Evidence—Tax List.

1. The facts that one of the parties listed the land in controversy for taxation, and paid the taxes assessed, *before there was any controversy about it,* and that the other did not, are admissible in evidence to be considered by the jury, with other evidence, tending to show the claim of title to, and possession of the land by the parties, and their acts and conduct towards it.

2. The tax-lists are admissible in evidence to show these facts.

(Thornburg v. Mastin, 93 N. C., 250, cited and commented on.)

AUSTIN *v.* KING.

THIS was a civil action, tried before *Avery, J.,* at February Term, 1886, of UNION Superior Court.

There was a verdict and judgment for the plaintiffs, from which the defendant appealed. The facts are sufficiently stated in the opinion of the Court.

D. A. Covington for plaintiffs.
J. J. Vann for defendant.

DAVIS, J. The *feme* plaintiff claims under a deed from J. (340) Morgan Rea to J. L. Rea, her ancestor, dated 25 March, 1857, and registered 27 May, 1880. The plaintiff also offered in evidence a deed from J. L. Rea to J. Morgan Rea, dated 18 October, 1858, and registered 9 September, 1884. It was admitted that both these deeds covered the land in question, and it was contended by the plaintiffs that the last named deed was in their possession at the commencement of this action, and was filed with the clerk of the court for the inspection of the defendant, and while so in custody of the clerk, the defendant procured possession thereof, and had it registered without the sanction of the court, and without the knowledge of the plaintiffs and against their will. They contend that this deed from J. L. Rea to J. Morgan Rea was surrendered by the latter to the former, for cancellation, before registration, for the purpose of revesting the title in the said J. L. Rea, and one of the issues submitted to the jury was:

"Did J. Morgan Rea surrender to J. L. Rea, the deed executed by J. L. Rea to J. Morgan Rea, for the land in controversy, for the purpose of annulling the said deed and revesting the title in said J. L. Rea?"

The defendant denies that the deed was surrendered for any such purpose, and claims:

1. Under the said deed from J. L. Rea to J. Morgan Rea.

2. Under the will of J. Morgan Rea, dated 26 March, 1859, by which the land in controversy was devised to the widow of the testator for life, with remainder to his two sons, James Rea and Pinkney Rea and by *mesne* conveyances from said James and Pinkney Rea.

W. F. Rea, a son of J. Morgan Rea, testified, among other things, that in December, 1858, he was at his father's house, and J. L. Rea was there—that J. Morgan Rea and one Austin were looking over the papers of the said Morgan Rea, and while so engaged, J. L. Rea said to his father, Morgan Rea: "There is that deed now," pointing to a deed among the papers; his father took up the deed and handed (341) it to him and said, "here, that is yours." The next morning, in response to a question, J. Morgan Rea told the witness that J. L. Rea had had a difficulty and was about to go to Georgia, and in order to

save his land, had conveyed the same to him (the father); that he had been to Georgia, had returned, fixed up his difficulty, and that he (the father) had, on the day before, surrendered the deed to his son, J. L. Rea.

There was other evidence tending to show that J. M. Rea had surrendered the deed to J. L. Rea.

The defendant, to sustain his contention that the deed from J. L. Rea to J. M. Rea was never surrendered by the latter to the former, with other evidence, proposed to offer the tax lists of Union County, for the purpose of showing "that J. L. Rea returned for taxation for the year 1858, 107 acres of land, none for taxation for the year 1859; that J. M. Rea returned no part of the land in dispute for 1858, but in 1859 returned for taxation 180 acres," and they proposed further to show that the 107 acres was the land in dispute. "The plaintiff objected to this testimony, in so far as it related to J. M. Rea giving in said land for taxation, because it was a declaration in his own interest, and was therefore incompetent." This objection was sustained and the defendant excepted.

This is the first exception in the record, and presents the question: Was there error in excluding the tax lists?

We have been unable, either by the aid of counsel or our own researches, to find any direct adjudication of the question in the courts of this State. In *Thornburg v. Mastin,* 93 N. C., 258, the plaintiff was seeking to enforce the specific performance of a contract for the purchase of the interest of one Mastin in certain land owned by said Mastin and one Transon. The contract was made in 1863, and it was (342) insisted by the defendants (heirs of Mastin) that the plaintiff had abandoned his contract. It was in evidence, and, it seems, without objection, that Thornburg had not returned the land for taxation, but there was no evidence as to who had listed it. It was insisted for the defendants that the failure of Thornburg to list the land for taxation was strong evidence of the abandonment of his equity, and on the other side, the plaintiff insisted that as there was no evidence to show who had listed it, it was to be presumed that Transon (the other tenant in common) had done so. In that case, the court charged the jury that where there were tenants in common of land, either of them could give it in for taxation, and if given in by either, it was sufficient. The defendant excepted to this charge, and on appeal, this Court sustained the judge below. *Ashe, J.,* said: "Any one supposing that he had a claim upon the land of another, may list it and pay the taxes, but that would be very slight, if any, evidence tending to establish his title; for two or more persons may give in the land for taxation, which is sometimes done, each thinking that it in some way tends to strengthen his

claim. The tax-book did not show who had listed the land for taxation since the plaintiff's bill was dismissed, but the plaintiff may have supposed, as he had only an equitable claim upon the land, it was the duty of the owner of the legal estate to list it for taxation."

Such evidence may be of greater or less weight, according to circumstances; of this the jury must determine. The listing of land and paying taxes for supposed advantage, where there is controversy, would be of no weight, and if done, *post litem motam,* should be excluded. But where there is conflicting evidence as to what the purpose of the parties was, we can see no reason why the acts and conduct of each of them toward the subject-matter, at a time when there was no dispute, should not go to the jury to aid them in coming to a conclusion as to what that purpose was.

The fact that at a time when there was no controversy about (343) the title—*ante litem motam*—A. listed property for taxes, prior to a given period, and ceased to list it after that period, and B., claiming A.'s title, did not give it in prior to the period named, but did give it in subsequent to that period, is some evidence to show that B. and not A. became the owner, legal or equitable, after the change. It is not the *declaration,* but the *act* of the party; an independent circumstance, to be weighed by the jury.

"The books of assessment of public taxes are admissible to prove the assessment of the taxes upon the individuals, and of the property therein mentioned." 1 Greenleaf Ev., sec. 493.

Strode v. Seaton, 2 Ad. & El. (reported in 29 Eng. Com. Law Reps., 62), was an action of ejectment, tried before *Lord Denman, C. J.,* at the Bristol Assizes. The land tax assessments were offered in evidence, and it was objected to as inadmissible, but "the *Lord Chief Justice* received them, subject to the objection," and this ruling was sustained by the ruling of King's Bench. The *Chief Justice,* referring to the question of title involved in that case, said: "That depended upon a number of deeds, upon the assessments, and upon a great deal of other evidence, which was very largely discussed on both sides, and I think the verdict was correct."

In *Roukindorff v. Taylor's Lessee,* 4 Peters, 358, the tax-books, regularly made up by the proper officers, were admitted as evidence. See, also, *Fletcher v. Fuller,* 120 U. S., 534.

When this case was before this Court, as reported in 91 N. C., 290, *Merrimon, J.,* referring to the evidence, said: "A slight fact may have turned the scale on the trial in favor of the defendant, so that it became important to exclude slight improper evidence on the one side or the other." It is of equal importance that no proper evidence, though it may be slight, should be excluded.

(344) We think there was error in excluding the tax lists, and this entitles the defendant to a new trial.

It is not necessary that we should consider the other exceptions presented in the record. There is error.

Error. *Venire de novo.*

Cited: Peck v. Manning, 99 N. C., 160; *Faulcon v. Johnston,* 102 N. C., 269; *Ruffin v. Overby,* 105 N. C., 86; *Ellis v. Harris,* 106 N. C., 397; *Pasley v. Richardson,* 119 N. C., 450; *Bernhardt v. Brown,* 122 N. C., 590; *Ridley v. R. R.,* 124 N. C., 39; *Gates v. Max,* 125 N. C., 144; *R. R. v. Land Co.,* 137 N. C., 332; *Martin v. Knight,* 147 N. C., 581; *Christman v. Hilliard,* 167 N. C., 7; *Alexander v. Cedar Works,* 177 N. C., 148; *Tilghman v. Hancock,* 196 N. C., 781.

ROBT. SIMPSON AND WIFE v. JAMES M. HOUSTON.

Homestead—Exemption from Sale under Execution.

1. The plaintiff R. S., having been adjudicated a bankrupt, and the land in controversy having been assigned to him as his homestead in the bankruptcy proceedings, it is exempt from sale under execution issued on a judgment for a fiduciary debt which is not discharged by his discharge in bankruptcy.
2. This exemption from sale under execution against the homsteader follows the land when conveyed by him to another party.
3. When the wife does not join with the husband in making the deed, the status of the land as a homestead is unaltered.

(Markham v. Hicks, 90 N. C., 204; *Lamb v. Chamness,* 84 N. C., 379; *Murphy v. McNeil,* 82 N. C., 221; cited and approved.)

THIS was a civil action, tried before *Avery, J.,* at February Term, 1886, of UNION Superior Court.

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

The facts are the same as in the case of *Hasty v. Simpson,* 84 N. C., 590.

W. P. Bynum for plaintiffs.

D. A. Covington for defendant.

SMITH, C. J. The facts stated in the case in the present appeal are essentially the same as those before the Court in *Hasty v. Simpson,* reported in 84 N. C., 590, and the rehearsal is entirely unnecessary to an understanding of the matter in controversy. Then the ap- (345) plication was to set aside the execution under which the land allotted as a homestead to the bankrupt had been sold, and it was refused. The present action, as suggested in that opinion, is to test the validity of the title acquired by the purchaser at the sale, and is instituted by the plaintiff Simpson and his wife the latter claiming under a conveyance of her husband to one Wittkouski, and thence by successive deeds to herself.

The deeds were all executed before the sale under execution, which took place in July, 1869.

The lien created by the rendition of judgment at Fall Term, 1880, of Union Superior Court, it is insisted for the defendant, overreaches alike the deeds and the adjudication in bankruptcy in June, 1873, and warrants the sale.

We have no hesitation in holding, that the land assigned the bankrupt as a homestead is as effectually and fully protected from execution against the still subsisting and unsatisfied portion of the fiduciary debt, which has shared in the distribution of the estate, as against any other.

This remains in force, but not to disturb the effect of the action in the bankrupt court, and expose exempt property to sale under final process. Can there be any reasonable doubt entertained of the application of the rule to the exempt personal estate; and is this any more protected from creditors than the exempt real estate?

Suppose the bankrupt were to fail to obtain his final discharge, so that *all his unsatisfied* debts remain in force; can the creditors, after participating in the surrendered estate left, and assenting to the exemptions allotted, seize upon and appropriate that assigned and set apart as exempt, to the further payment of their demands? This would be to defeat the operation of the law and to annul what had been done under it. The creditor having a fiduciary debt stands in no better position in this respect than any other creditor when the dis- (346) charge is refused. The effect in each case is to leave the debts in force, to be made out of any future acquisitions of the bankrupt, and to forbid any access to that which is exempt.

Some doubt was expressed in the opinion in the former case, as to the effect of the bankrupt's alienation of the land, and whether the same immunity followed it into the hands of the mortgagee, or ceased at the transfer. This doubt is now to be resolved, and the inquiry answered.

The land itself, as we said in *Markham v. Hicks,* 90 N. C., 204, is set apart to the debtor, protected from the pressure of the claims of creditors for a definite period. Invested with this immunity, and yet capable of alienation by the debtor, the estate passes under the mortgage in the plight and condition in which it was held by the debtor, to be enjoyed unmolested for the specified term. While the primary object of the exemption is to preserve a home for the insolvent and his family, there is nothing in the enactments of this State, or of the United States, in which ours is incorporated, to indicate that the interdict put upon the creditor is to cease by the debtor's transfer, and leave the property at once exposed to sale under execution. If such was intended, why was it not said that the protection should cease when the debtor parted with his property? and this in effect would be practically to render it unalienable, for what of value would be obtained by the purchaser when the property could be at once taken and disposed of by a creditor? The value of what is assigned consists in the right to possess and enjoy it, as the assignor could for the same term, and under the same securities. It seems to us that these consequences result from the right of the debtor to dispose of, free from creditors, that which he thus himself enjoys. *Lamb v. Chamness,* 84 N. C., 379; *Murphy v. McNeil,* 82 N. C., 221.

(347) But the present action is in the name of husband and wife, and if the successive deeds were insufficient to divest his rights, the case not showing, as did the other, that his wife joined in making the mortgage, the status of the land as a homestead would be unaltered, and so in neither view could the purchaser, at the attempted sale under execution, get a right of possession to defeat the action.

We are not unadvised of the difficulties that may grow out of this decision should other homestead exemptions be allowed, while perhaps but one is in contemplation of the statutes, but we cannot deny to the insolvent debtor the right to exchange the one homestead for another, and thus better his condition, which would be the practical result of subjecting the alienated exempt land at once to the process of the creditor. Our ruling not only conforms to the letter of the enactment, but best subserves its generous purposes as a relief to the debtor.

There is error, and judgment must be entered for the plaintiffs.

Error. Reversed.

Cited: Van Story v. Thornton, 112 N. C., 206; *Stern v. Lee,* 115 N. C., 429.

W. D. JONES ET AL. v. THOS. J. COFFEY ET AL.

Estoppel by Matter of Record.

1. When in an action brought against the executor and heirs at law and devisees of the testator, the court—having jurisdiction both of the persons and of the subject-matter of the action—ordered the land in controversy to be sold, and it was sold and purchased and paid for by the defendant herein, and the sale was confirmed, and title ordered by the court to be made to the purchaser, which was done, the defendants in such action are estopped by the judgment, and cannot impeach it collaterally in this action by showing that the land belonged to them, and was embraced in the orders of the court by mistake, inadvertence or misapprehension.

2. If the first action is still pending, they must seek their remedy, if they have any, in it; if it is determined, then by a new action.

(Burke v. Elliott, 4 Ired., 355; *Armfield v. Moore*, Busb., 157; *Gay v. Stancel*, 76 N. C., 369; *Morris v. Gentry*, 89 N. C., 248; *Long v. Jarratt*, 94 N. C., 443; *Maxwell v. Blair*, 95 N. C., 317, cited and approved.)

THIS was a civil action, tried before *Graves, J.*, at Spring (348) Term, 1886, of WATAUGA Superior Court.

The plaintiffs are the heirs at law of John T. Jones and Walter L. Jones, who died intestate long before this action began, and as the plaintiffs allege, seized of the land described in the complaint, which, in that case, descended to them as such heirs.

The defendants allege in their answer, that the land in question belonged to Edmund P. Jones, who was the ancestor of the plaintiffs, who died in 1878, leaving a will, which was duly proven; that afterwards, the First National Bank of Charlotte, and others, brought their action to the Fall Term, 1879, of the Superior Court of Caldwell County, against the executor of the will mentioned, and the present defendants; that in the course of that action a receiver was appointed, and the land in question was sold under a proper decree made therein; that at that sale the defendants became the purchasers of the land, paid the purchase money therefor—the sale was duly confirmed, and the receiver, under the direction of the court, made a proper deed to them, under which they claim title to the land.

On the trial in this action, a question arose as to whether the land in controversy was of the land sold as above stated, and embraced by the decree and deed under which the defendants claim. It was identified as part of the land so sold, but the plaintiffs contended that if it was, it was so embraced by inadvertence, mistake and misapprehension—that in fact, it belonged to them as heirs at law of these brothers, as first above stated, who died—one in 1863—the other in 1864.

(349) The defendants contended that the plaintiffs are estopped by the record in the action mentioned, which was put in evidence on the trial, but the court gave judgment for the plaintiffs, whereupon the defendants, having excepted and assigned errors, appealed to this Court.

A. M. Lewis for plaintiffs.
E. C. Smith for defendants.

MERRIMON, J., after stating the facts: It appears that in the action of the First National Bank of Charlotte, and others, against the executor of the will of Edmund P. Jones, deceased, and the present plaintiffs, mentioned in the pleadings, the court had competent jurisdiction of the parties thereto, including the present plaintiffs, and as well of the subject-matter—the land—embraced by it.

The land now in controversy was embraced by it, although this was controverted, and sold under a valid decree, so far as appears, the defendants being the purchasers.

They paid the purchase money—the sale was confirmed by the court, and under its direction, the receiver executed a proper deed of conveyance to the defendants. In that action the rights of the plaintiffs here contended for, came directly in question, and they ought then to have set up their title to the land they now seek to recover. As they did not, they are concluded by the record made against them; they are bound by it so long as the judgment therein remains unreversed, and they cannot attack it collaterally in the present action. *Burke v. Elliott,* 4 Ired., 355; *Armfield v. Moore,* Busb., 157; *Gay v. Stancell,* 76 N. C., 369; *Morris v. Gentry,* 89 N. C., 248.

The plaintiffs contend, that if the land they seek to recover by this action was embraced by and sold under the decree in the action mentioned, it was so by mistake and misapprehension. It appears that that action is not yet determined. If so, the plaintiffs ought to seek
(350) their remedy, if they have any, in it; if it is determined, then by an independent action. *Long v. Jarratt,* 94 N. C., 443; *Maxwell v. Blair,* 95 N. C., 317, and the cases there cited.

There is error. The judgment must be reversed, and judgment entered below for the defendants. To that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: Wilson v. Chichester, 107 N. C., 391; *Herndon v. Ins. Co.,* 110 N. C., 283; *Fleming v. Strohecker,* 117 N. C., 373.

R. E. LAWING v. B. RINTLES.

Contract—Part Performance—Quantum Meruit.

1. When the terms of a contract are that the plaintiff shall build certain houses for the defendant, within a given time, for which he is to receive so much, he cannot recover anything, either upon the special contract, or upon a *quantum meruit*, unless he avers and proves an entire performance.
2. This rule is not altered by the fact that the property was destroyed by accidental fire just before the work was completed.
3. If the defendant received anything by insurance on the property, the plaintiff has no right to any part thereof.

(*Brewer v. Tysor*, 4 Jones, 180; and 5 Jones, 173, cited and approved.)

THIS was a civil action, tried before *Montgomery, J.*, at the November Special Term, 1886, of the Superior Court of MECKLENBURG County.

The plaintiff alleges that about 27 June, 1883, he contracted to furnish the material and erect certain houses and fences on the lot of the defendant, in the city of Charlotte, and have the same completed by 1 October, 1883, for which the defendant was to pay to him the sum of $2,950, in installments, as the work was performed.

That he entered upon the work of erecting the said houses, and (351) performed a large portion of the work and furnished material amounting in value to $2,720.35, when he demanded of the defendant payment for the said work, which was refused by the defendant, in violation of her contract, by reason whereof he was prevented from completing the said houses by 1 October, 1883.

That subsequent to 1 October, he was proceeding, with the assent of the defendant, to complete said buildings, being ready and able to do so, when the same were destroyed by fire, without any negligence or default of the plaintiff, whereby he was prevented from completing the same. That the value of the work and labor done and material furnished was $2,720.35, of which the defendant has paid $2,048, and there is still due and owing to the plaintiff the sum of $672.38, for which there has been demand and refusal.

For a second cause of action, the plaintiff alleges, that the defendant, in consideration that the plaintiff would furnish material and erect said buildings, would pay therefor what the same was reasonably worth, in installments equal to the value and amount of material furnished and labor done, from time to time, as the work progressed, with other allegations similar to those in the first cause of action.

The defendant answers and denies the allegations of the complaint in regard to the contract, and says that she entered into a written contract with the plaintiff (a copy of which is set out in the pleadings), and no other, which has never been modified or changed, and that she has always been ready and able to perform her part of the same.

That she has paid the sum of $2,048, as stated in the complaint, and that the houses which the plaintiff was erecting for the defendant, under the written contract, were destroyed by fire before they were completed and delivered to the defendant, and that the plaintiff has never performed his part of said contract.

(352) The written contract is under seal, dated 27 June, 1883, and is as follows: "The said R. E. Lawing hereby agrees to erect two one-story frame houses and outhouses and all necessary fencing, on the lot (describing it), as per plans and specifications, attached and marked 'A' and 'B,' which are part of this contract, the whole to be completed by 1 October, 1883. The said Mrs. Rintles agrees to pay said R. E. Lawing for the erection and completion of said houses, outhouses and fences, the sum of $2,950, to be paid in such installments as the progress of the buildings will justify and warrant."

Upon the trial, it was admitted that the above was the only contract between the parties, and that the houses contracted to be built were destroyed by fire, before completion, without the fault of either party, and after 1 October, 1883, and that the defendant had paid the sum of $2,048 only, and the buildings were nearly completed.

The plaintiff testified in his own behalf, that he was a carpenter and contractor in 1883, and contracted with the defendant to build the houses. . . . The defendant was at the houses pretty near every day, and went through them and made no objection, but said that she thought they were very nice; witness further stated that he had no insurance on the houses.

He then proposed to prove that the defendant had taken out a policy of insurance on the houses.

The defendant objected because:

1. The evidence was irrelevant and immaterial, and,

2. Because the policy was not produced, and the best evidence not offered. Objection sustained, and plaintiff excepted.

His Honor intimated to the plaintiff, that he could not recover, whereupon, in deference to the intimation, he submitted to a nonsuit and appealed.

(353) *S. F. Mordecai, Jos. B. Batchelor and John Devereux, Jr. for plaintiff.*

P. D. Walker for defendant.

DAVIS, J., after stating the facts: It is contended for the plaintiff, that he was entitled to pay for the material furnished, and the work and labor done on the buildings up to the time of their destruction by fire, and for this he cites many authorities; but upon examination they do not sustain the position. *Brewer v. Tysor,* 3 Jones, 183, referred to, is direct authority the other way. The court say that the contract being an entire one, the plaintiff cannot recover unless he avers and proves an entire performance. The plaintiffs sought to relieve themselves of the obligation to perform the entire contract, by reason of sickness, upon the maxim, that *actus Dei neminem facit injuriam,* but the court said that did not excuse them, but when the case was again before the Court at a subsequent Term, 5 Jones, 173, it appeared that the contract was for work divided into three separate parts, for each of which a separate price was to be paid, and the Court said there was no reason why the plaintiffs should not be paid for the work done on the two parts which had been finished, according to the contract.

Instead of the plaintiff's right to recover, the weight of authority would require him to rebuild, and thus perform his contract.

In *Adams v. Nichols,* 19 Pick., 275, it is said: "It is not material to consider whose property the house was before the conflagration. The defendant had contracted to build and finish the house on the plaintiff's land. After the conflagration he might have proceeded under the contract, and if he had completed the house, according to the terms of his agreement, the plaintiff would have been bound to perform his part of the contract."

In this case, it was held, that the contractor was not discharged (354) by the conflagration from the duty to build. In *School District v. Dauchy,* 25 Conn., 531, the defendant had contracted to build a schoolhouse by a day named—just before the day, it was set fire to by lightning and wholly destroyed. It was held, that the nonperformance of the contract was not excused. The whole question seems to be well and fully considered in the case of *Tomkins v. Dudley,* 25 New York, 272. The defendant had guaranteed the performance of a contract by a builder, to erect a schoolhouse, which he failed to perform. The Court says: "In justification of such nonperformance, he alleges the destruction of the building by fire, an inevitable accident, without any fault on his part. The law is well settled, that this is no legal justification for the nonperformance of the contract." This is the conclusion at which the Court arrived in that case, after a review of numerous decisions upon the question, and we are well satisfied in this case, that the plaintiff has no right to recover.

When the contract was entered into, he could have protected himself against loss by fire, either by a stipulation in the contract or by insurance, but as this was not done, it is his misfortune. The position that the plaintiff was entitled to the money received by the defendant upon the policy of insurance which she had on the building, was not seriously insisted upon in this Court. By the insurance she was only indemnified against loss on account of the payments which she had made.

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

No error. Affirmed.

Cited: Wooten v. Walters, 110 N. C., 256; *Kelly v. Oliver,* 113 N. C., 444; *Coal Co. v. Ice Co.,* 134 N. C., 579; *Kell v. Construction Co.,* 143 N. C., 432; *Sykes v. Ins. Co.,* 148 N. C., 18; *Hendricks v. Furniture Co.,* 156 N. C., 572; *Steamboat Co. v. Transportation Co.,* 166 N. C., 586; *McCurry v. Purgason,* 170 N. C., 469.

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(355)

JOHN McADEN v. THE BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY AND W. F. GRIFFITH, SHERIFF, ETC.

National Bank—Taxation of Shares in.

In the taxation of shares of stock in a national bank, under the revenue act of 1885, ch. 175, sec. 12, clause 5, and Rev. Stat. of U. S. sec. 5219, the owner of such shares has the right to deduct from the assessed value thereof the amount of his bona fide indebtedness, as in case of other investments of moneyed capital.

THIS was a civil action, tried on demurrer, before *Montgomery, J.,* at February Term, 1887, of MECKLENBURG Superior Court.

The plaintiff on 1 June, 1886, being the owner of 200 shares of the capital stock in the Merchants and Farmers National Bank, and of 132 shares in the First National Bank of Charlotte, both organized and operating under the act of Congress for the formation of national banking associations, at Charlotte, rendered during that month a list of his taxable property, in which 100 shares of such stock were given in at the par value of $100 per share. The shares were assessed by the commissioners at $85 per share, and the plaintiff charged with all the stock, at an aggregate value of $28,220; and the list thus reformed was

delivered to the sheriff for collection. The plaintiff reduced this estimated value, by deducting his alleged indebtedness of $18,220, claiming the right to do so, to the sum stated in the list. The sheriff, acting under the directions of the Treasurer of the State, in reference to the raising of revenue, refused to make any abatement, and was proceeding to enforce payment, when, in an order made in the present action against the county commissioners, they were restrained; he having paid the entire tax against him upon the basis of the deduction claimed, and as set out in the rendered list.

The defendants demurred to the complaint, assigning as (356) grounds therefor:

1. That it appears by the said complaint, that the shares of stock of the two national banks owned by the plaintiff, were not, when listed for taxation, subject to deduction for debts owing by him, and there are no facts stated or alleged in the complaint from which it appears the plaintiff's said shares of stock are exempt from taxation, or have been improperly and unlawfully listed for taxation by the defendant commissioners.

2. That it appears from the complaint, that by the laws of this State, the defendant commissioners are fully authorized and required to list the said shares of stock for taxation in the manner in which they have listed them as set forth in the complaint, and that the taxes imposed upon the same are due and owing by the plaintiff, and that the defendant sheriff has the lawful power and authority to collect the same, as other taxes are collected.

3. That it appears from the said complaint, the said commissioners have acted in strict conformity with the statutes of this State in listing said shares of stock for taxation, and it does not appear that the Congress of the United States has enacted any legislation which protects the said shares of stock, or the plaintiff as the owner thereof, from the full operations of said statutes; nor is there any law of Congress that restricts or limits the power of this State to tax shares of stock of national banks, so as to deprive it of the power exercised in this particular case.

The following judgment was rendered:

"This cause coming on to be heard upon demurrer filed by the defendants, and the same being argued by counsel of the parties and considered by the court; the court doth overrule the demurrer filed, and give leave to the defendants to file an answer to the complaint.

"It is further adjudged, that the restraining order heretofore (357) granted be continued to the hearing."

From this judgment the defendants appealed.

W. P. Bynum for plaintiff.
Platt D. Walker for defendants.

SMITH, C. J., after stating the facts: The revenue act of 1885, ch. 175, sec. 12, in its enumeration of taxable property contains this clause, numbered 5:

"The amount of solvent credits, including accrued interest uncollected, owing to the party, whether in or out of the State, whether owing by mortgage, bond, note, bill of exchange, certificate, check, open account due and payable, or whether owing by any State, or government, county, city, town or township, individual, company or corporation. Any certificate of deposit in any bank, whether in or out of the State, and the value of cotton, tobacco, or other property, in the hands of commission merchants or agents, in or out of the State, shall be deemed solvent credits within the meaning of this act. If any credit be not regarded as entirely solvent, it shall be given in at its true current or market value. *The party may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor.*"

Not only are stocks not included in the credits, as defined in the clause, but some forms of visible property, crops in the hands of agents, are included in the term.

The act of Congress, without the authority of which no taxation upon the shares of these national banking associations could be imposed, confers this power upon the States within whose limits they are located, with the restrictions "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State, shall (358) be taxed in the city or town where the bank is located, and not elsewhere." Rev. Stat. of U. S., sec. 5219.

The term "moneyed capital" has been construed to embrace investments in banking associations as well as credits in a more strict sense, and hence an act denying deductions for indebtedness of the share owner from the value of his stock, when it is allowed to creditors who owe, is in violation of the permitting act of Congress, and is void as to shareholders who are indebted and have not such property as the deductions are allowed to be made from. The discrimination against such shares is wholly unauthorized.

In *Hepburn v. School Directors,* 23 Wall., 480, *Waite, C. J.,* says: "We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are "other

moneyed capital"; that certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term.

In *Adams v. Nashville,* 95 U. S., 19, *Hunt, J.,* after remarking that the act did not mean to interfere with exemptions from taxation of homesteads and other property for meritorious considerations by a State, adds: "The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination of the States in the exercise of their taxing power."

In *People v. Weaver,* 100 U. S., 539, an act of New York was declared null, in that it refused "to the plaintiff the same deduction for debts due by him from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested," etc.

So it has been held, that while the statute of the State requires all moneyed capital, including national bank shares, to be assessed at its true cash value, the systematic and intentional under-valuation of all other moneyed capital and of shares in national banks at their full value, is a violation of the act of Congress. *Pelton v. National* (359) *Bank,* 101 U. S., 143; *Cummings v. National Bank, ibid.,* 153.

The subject was more elaborately examined in *Hill v. Exchange Bank,* 105 U. S., 319, on appeal from the Circuit Court of the United States for the Northern District of New York. The suit was brought by the bank, suing in right of and as representing the stockholders, to prevent the enforcement of the tax imposed by the State upon national bank shares, on the ground that no provision was made "for deduction from the assessed value of these shares of the debts honestly owing by the share-holders." The Circuit Court declared the enactment void; and while this ruling was reversed, it was declared that the share-holder had a right to have his own indebtedness taken from the valuation of his shares.

It was again considered, in *Evansville Bank v. Bretton, ibid.,* 322, in which the opinion of the majority of the Court is delivered by *Miller, J.* He reiterates the proposition, "that the taxation of bank shares by the Indiana statute, without permitting the share-holder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress." The statute referred to, somewhat like our own and less obnoxious to the objection, allowed the taxpayer's debts to reduce his:

I. Credits or money at interest either within or without the State at par value, and

II. All other demands against persons or bodies corporate either within or without this State. Three of the Court dissented, the *Chief Justice* and *Justice Gray* being of opinion, that the deduction allowed of one indebtedness from another indebtedness, was not within the purview of the enactment, and was not a prohibited discrimination, while *Justice Bradley* held the whole provision for taxing national bank shares inoperative, whether the owner owed debts to be de-
(360) ducted or not. The State statute was held by the Court to be void only as it interfered with the right of one in debt to have his valuation of stock diminished thereby when subjected to taxation.

These cases settle the question of construction and we abide by the rulings in them.

There is no error, and this will be certified to the court below.

No error. Affirmed.

STATE ON RELATION OF R. H. COLE v. J. R. PATTERSON.

Board of County Commissioners—Power to Declare and Fill Vacancies in Office.

The Code, secs. 706 and 707, requires the board of county commissioners to meet on the first Monday in December to accept the bonds of county officers elected at the preceding election. Such officers are also required to prepare and tender their official bonds on that day. The board has the power—all the business before them being disposed of—to adjourn on that day, and, if any officer shall fail to perfect his bond according to law, before such adjournment, to declare such office vacant, and to fill it, when the power to fill such vacancy is vested by law in the board.

THIS was a civil action, tried before *Graves, J.*, at Spring Term, 1887, of BUNCOMBE Superior Court.

The trial by jury being waived, the court found the facts as follows:

At the regular election, November, 1886, R. H. Cole received the highest number of votes, and was elected register of deeds, and was duly declared elected.

(361) At the meeting of the board of county commissioners of Buncombe County, on the first Monday in December, the said R. H. Cole did not tender a sufficient bond, but had a bond, acknowledged before the clerk of the Superior Court, signed by two sureties, and asked for further time, until the next day, in which to complete his bond; that it had not been the custom to require sureties to be present before the said board of commissioners; that the day of said meeting

was exceedingly inclement, the snow very deep—the deepest known in the county of Buncombe—so it was exceedingly uncomfortable, and inconvenient to travel on horseback, and almost impracticable to travel in vehicles; that some few persons did travel, and came to the courthouse that day; that the Superior Court was adjourned in consequence of the inclement weather; that only twelve jurors answered to their names in the said court, four from the town of Asheville, and eight from the country; that by reason of the inclement weather, one Mr. Eller, an old, infirm man, who would have signed relator's bond, was prevented from attending said meeting, and perhaps others who would have signed relator's bond would have been present but for the inclement weather; that on that day the sheriff gave his official bond; that relator presented a bond, acknowledged before the clerk of the Superior Court, signed by two parties, and exhibited a letter to the said board of commissioners from said Eller, and from one of the members of said board, and asked the said board of commissioners to give further time—until the next day—for the completion of his bond; that the bond of relator would not have been sufficient if said Eller had executed it. That the said board of commissioners refused to give further time, and refused to accept the bond offered, and refused to hear evidence as to the solvency of the persons who had signed the bond presented to them, but no witnesses were tendered or under summons, to show such solvency, and the commissioners knew of the insufficiency of the sureties.

Late in the evening of the said first Monday in December, (362) 1886, the commissioners having delayed so as to give the relator the day in which to complete his said bond, having disposed of all the other business before them, declared the office vacant, and elected the defendant and accepted his bond, and inducted him into the office of register of deeds for said county of Buncombe.

There was no fraud, or fraudulent combination; and the commissioners acted as they honestly believed they had the right to do.

At request of the relator, the following additional facts were found:

1. That the proof indicated that at least two persons in the town on that day offered to have the bond made, on the condition of employing certain persons as clerk, or giving a part of the proceeds of the office, and the proof showed an indisposition on the part of the relator to accept these terms. One of the parties thus proposing to become surety, required that he (the surety) should have a supervision over the office.

2. That the relator, both in person and by attorney, at different times during the day, asked the board to give an answer as to whether they would adjourn until the next day. The board did not give an answer until late in the evening, and when they did give the information, they at the same time told the relator that the office had been declared vacant.

3. At the time of giving the relator the information that the office had been declared vacant, the relator, by his attorney, asked for ten minutes, in which to send for Mr. Jesse Starnes. This request was refused by the board. Jesse Starnes is one of the parties who had proposed to have the bond made on condition of his having an oversight over the office, and that his brother should be made clerk. That
(363) said Starnes said he left the room of the commissioners to keep from going on the official bond of the relator.

4. The relator tendered a bond at the meeting of the board, on the first Monday in January, 1887, which was admitted to be good, and the court finds the fact that it was good. The board refused the bond offered on the first Monday in January, on the grounds that they had already decided the matter.

Upon the foregoing facts, it is considered by the court, that the law required the relator to give bond in the sum of five thousand dollars, conditioned for a faithful performance of the duties of the office of register of deeds, before his induction into office.

That it was his duty to have tendered such a bond on the day fixed by law.

That it was in the discretion of the board of commissioners to have extended the time in which said bond might be given, for a reasonable time.

That in case the board of commissioners did not, in their discretion, deem it best to extend the time in which the relator should give his bond, they were not compelled by the law to extend the time for giving such bond, and were not bound to adjourn to next day, for the purpose of allowing the bond to be completed.

That in case a good and sufficient bond, conditioned as required by law, is not tendered on the day designated by law, the board of commissioners may, in their discretion, late in the evening of that day, refuse to give further time, and declare that there is a vacancy in the office of register of deeds.

That in case said board of commissioners did so declare a vacancy in the said office of register of deeds, they then had the right to elect to fill the office of register of deeds, for said county of Buncombe.

(364) That in the exercise of their discretion in refusing to give further time for giving bond by the relator, and then on the first Monday of December, 1886, declaring a vacancy, and immediately filling the said vacancy, by the election and appointment of the defendant, to be register of deeds for the said county of Buncombe, did not exceed their power, and whether the court should approve or disapprove of the manner in which that discretion was exercised, it cannot reverse it or control it.

It is therefore adjudged that the defendant, J. R. Patterson, is rightfully in his office of register of deeds of the said county of Buncombe, and the relator is not entitled to the said office.

From which action of the court the relator, by the Attorney-General, excepts in law, and prays an appeal to the next term of the Supreme Court.

W. H. Malone for plaintiff.
C. M. Busbee for defendant.

SMITH, C. J., after stating the facts: The county commissioners are required to meet at the courthouse on the first Mondays in December and June, in each year regularly; The Code, sec. 706, and on the day first mentioned, proceed "to qualify, and induct into office, the following county officers who have been elected in the previous month: clerks of the Superior and Inferior Courts, sheriff, coroner, treasurer, register of deeds, surveyor and constables; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds," sec. 707, subdiv. 28. While this is an enjoined duty, and it may be deferred until another day, and time given to an officer elect to fortify his bond, if deemed insufficient, with other sureties or for other sufficient cause, as determined in *Buckman v. Commissioners,* 80 N. C., 121, and in *Jones v. Jones, ibid.,* 127, it nevertheless becomes them to pass upon the bond tendered, and (365) if approved, admit the elected or appointed applicant to his office, as early as practicable, and it rests in their discretion to allow or refuse further time under a just sense of their own official responsibilities, and its exercise cannot be corrected upon an appeal of the wronged party aggrieved by their action. In the present case, nearly a month had passed after the result of the vote had been ascertained and declared, during which the bond, with adequate security, could have been prepared and held in readiness for the meeting of the board, and yet that tendered falls so entirely short of the requirements of law, that its rejection was unavoidable, and the action of the commissioners foreseen. The verification of the two sureties was for the sum of $1,000 each, while the statute fixes the penalty at $5,000, and the sureties to justify in this aggregate amount. The Code, secs. 3648 and 1876.

So stringently is the obligation of seeing to the sufficiency of the bond, when accepted, enforced, that the commissioners knowing or believing it insufficient, assume the personal liabilities of a surety. Section 1879. Their good faith in refusing the bond tendered is not impugned in the action; but their refusal to prolong the session for a short time, and to postpone the matter until another day, in view of the inclemency

and extraordinary condition of the weather at the time, is urged as an oppressive and uncalled for abuse of power, which demands a correction from this Court.

While it would be, under the circumstances, a reasonable request to defer final action in the premises, and thus enable the relator to make further efforts to obtain additional security, his claim to such indulgence is not as strong as that of one, expecting his bond to be received, and who finds it rejected. The relator must have known, and the face of the instrument indicates it, that his bond would not be satisfactory and could not be accepted without gross dereliction of duty, and he is (366) not free from blame in not coming prepared, as the other persons elected were prepared, to comply with the conditions of the law, common alike to them all.

While it is not our province to pass upon the propriety of the course pursued in refusing all delay, the commissioners acted within the limits and according to the directions of the statute, in closing the labors of the session, of which the declaring a vacancy and filling it by the appointment of the defendant seem to have been among the last, in a single day.

The argument to support the appeal, proceeds upon the false idea that because the session *may* be prolonged beyond the day, it *must* be so prolonged, although all other business has been dispatched.

Nor can the contention be maintained, that the relator is deprived wrongfully of an office to which he had been elected. He cannot take the office, and is not in it until admitted after compliance with the essential conditions required. He has a *right* to be inducted when he gives the bond satisfactory to the commissioners and takes the prescribed oath. Indeed he then is in the office, and can only be deprived of it by a due course of law. The action of the commissioners may have been unwise and hasty—seemingly harsh and unusual, but it was in conformity with the law, and cannot be reversed by any authority conferred upon this Court.

We therefore sustain the ruling and affirm the judgment in the court below.

No error. Affirmed.

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F. C. DURANT ET AL. v. M. E. CROWELL AND WIFE.

Receiver—Evidence—Notice.

1. Where the plaintiff establishes a prima facie right to property, which is not rebutted by the defendant, he is entitled to a receiver, if he shows that there is danger of loss of the rents and profits.

2. Only the purchaser of the legal title without notice of a prior equity can hold it against such equity.

3. The fact that the purchaser of the legal estate paid very much less than the land is worth, is evidence to show that he purchased with notice.

4. The value of the property in controversy cannot be considered in passing on the question of the solvency of the defendant.

5. Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff.

(Winborn v. Gorrell, 3 Ired. Eq., 117; *Polk v. Gallant*, 2 Dev. & Bat. Eq., 395; *Hamlett v. Thompson*, 1 Ired. Eq., 360; *Kerchner v. Fairley*, 80 N. C., 24; *Rollins v. Henry*, 77 N. C., 467; *Kron v. Dennis*, 90 N. C., 327; *Lumber Co. v. Wallace*, 93 N. C., 23; cited and approved.)

MOTION for a receiver *pendente lite*, a civil action, pending in the Superior Court of UNION County, heard before *Graves, J.*, at Chambers, at Shelby, on 26 October, 1886.

The plaintiffs allege that in 1854 Jackson C. Lemmond and others, owners of the land in controversy, conveyed it for the consideration of $25,000, to Charles Judson and W. F. Durant, in fee, in trust for themselves and their associates.

That in June, 1857, said trustees, for the consideration of $1.00, conveyed the said land to Robert Taylor, in fee, and on the same day, the said associates, for the consideration of $1.00, released their interest to said Taylor. That these deeds were made to enable Taylor to borrow money upon a mortgage of the said land, for the benefit of the association, formed for mining purposes, and after he had done (368) so, to convey the land to the said trustees, or to one of them, in trust for said associates; that in pursuance of this agreement Taylor, on 16 July, 1857, borrowed of Thos. C. Durant the sum of $23,170, and conveyed to him, by a mortgage deed, the said land to secure the same; that in August, 1857, Taylor, in further pursuance of said agreement, conveyed the said land to Charles Judson, for the consideration of $1.00, in trust for himself and associates, subject to the mortgage to Durant; that in 1859, Thos. C. Durant assigned the said mortgage and the money due thereon to Chas. W. Durant; that the mortgage deed executed by Taylor to Durant to secure the loan was intended to be in fee, but by the ignorance, inadvertence, or mistake of the draftsman, by the omission of the word "heirs," a life estate instead of a fee, was conveyed; that at the time of the execution of the mortgage, and ever since, Taylor had his residence and domicil in New York, and that at the said time, and up to the dates of their deaths, respectively, Thos. C. Durant and Charles W. Durant were domiciled in New York, and Charles Judson and the other associates, except Hugh Downing, were nonresidents of this State, the

said Hugh Downing alone of said associates having resided in Union County, and that in 1861, he took possession of said land, as one of the associates, and as agent of the trustees; that in 1867 he contracted with C. W. Durant to purchase his interest in the land, under the mortgage, and retained possession till 1878, recognizing the right of the trustee and the existence of the mortgage, and that the mortgage debt had not been paid, and no part of the consideration under the contract to purchase the interest of Durant had been paid; that Downing died in 1870, when his administrator took possession of the land, and held it until 1878, after which time, one Wager entered into possession, recognizing the right and interest of Charles W. Durant, as the administrator
(369) of Downing, had done, and by an agreement in writing promised to pay $50 per year, for the term of five years as rent therefor; that while the said Wager was in possession in 1878, under a special proceeding for the purpose of a sale of the interest of Hugh Downing, to make assets to pay his debts, the interest of the said Downing in said land was sold, and purchased by the *feme* defendant, at the price of $66; that at the time of said sale, the land was worth, for agricultural purposes, at least $8,000, besides its great mineral value, and that the said purchaser had full knowledge of the mortgage, and was not a purchaser for value or without notice.

The plaintiff Heloise, and W. W. Durant are the heirs at law of Thos. C. Durant, and the said W. W. is his administrator; the plaintiff F. C. Durant is the executor of Chas. W. Durant, deceased, and is entitled to receive the amount that may be found due upon the said mortgage, and the other plaintiffs are necessary parties.

It is alleged that the defendants are in possession and insolvent, and that if permitted to remain in possession and receive the rents and profits (which are alleged to be $600 per annum), the plaintiffs will sustain irreparable damage.

The prayer is for the appointment of a receiver—the correction and reformation of the mortgage deed—the foreclosure of the mortgage and payment of the debt secured thereby, and an account, etc.

The defendants answer, and deny that the deeds to Taylor were made for the purposes alleged, or that there was any mistake in the mortgage deed; or that the mortgage debt has not been paid. They also deny the alleged contract between Durant and Downing. They aver that the *feme* defendant purchased the land at the price of $66 under the special proceeding set out in the complaint, and in March, 1880, received a deed from the commissioner for the same, and that the plaintiffs have
(370) had possession under said deed at the bringing of this action.

They further say, that in April, 1881, Chas. Judson, for the consideration of $1, released his interest to Wager, and that in the same

month Wager, for the same consideration, conveyed to the defendant. They say that at the time of the purchase of the land, $2,500 was as much as it could have been sold for on the market, and $4,000 would be a fair valuation, etc., and the annual rental value at the time of the purchase was not more than $100, and at present will not exceed $400.

They deny any knowledge that the mortgage was an encumbrance upon the land, to the extent of the fee, and say that the *feme* defendant purchased at a fair and public sale, as the highest bidder, without any notice of any equity, etc.

His Honor refused to appoint a receiver, and the plaintiffs appealed.

Platt D. Walker and A. Burwell for plaintiffs.
D. A. Covington and Adams filed a brief for defendants.

DAVIS, J., after stating the facts: Without considering in detail the voluminous evidence contained in the record, it appears from the mortgage deed, executed by Taylor to Durant on 6 July, 1857, that the land in controversy was conveyed to the said Durant to secure the payment of $23,170, borrowed, and from the evidence, this was largely more than the agricultural value of the land, and though it was of considerable value for mining purposes, it was much more than the value of a life estate therein.

This inherent fact, and the affidavit of Taylor, who executed the mortgage deed, to the effect that it was the understanding and agreement of the parties that the land should be conveyed in fee to secure the said loan, and that it was by the ignorance, mistake or inadvertence of himself and Durant, or of the draftsman of the mortgage, that words of inheritance were omitted—that no part of the said mort- (371) gage debt has been paid, but that every part thereof is still due and payable—that at the time of the execution of the mortgage, it was understood and agreed, and so expressed in the mortgage, that he was not to be personally liable for the said debt, but that the land was to be the only security, establish an *apparent right* in the plaintiff, to have the deed corrected and reformed. The deed of 26 June, 1857, executed by Durant and Judson to Taylor, conveyed a fee, and the mortgage deed refers to it, and purports to convey "all the estate, title and interest, dower and right of dower, of the said parties of the first part therein," making it apparent that the estate in fee was intended as a security for the debt. But the *feme* defendant says she was a purchaser at a fair and open public sale, and as the highest bidder, without notice, etc., and it is insisted that, as against her, all the equities of the plaintiffs are fully met.

The land was bid off, says the answer, by Wager and Asbury for the *feme* defendant. It was worth, according to the answer, $2,500 "on the market." Flow, the administrator of Downing and the commissioner who sold the land, makes oath, in effect, that he never believed that the title of his intestate was good, and that he had frequently told his (Downing's) heirs, that he did not have a title—that he had heard Downing say that he held the land for others.

Howie states in his affidavit, in substance, that he rented a portion of the land in question for several years; that frequently during that time Downing told him that he (Downing) held the land for the Durants, who held the mortgage; that he was the agent for the Durants merely. That after the death of Downing, he continued on the land and paid rent to James Flow, the administrator of Downing, and sometimes to Mrs. Wager, the daughter of Downing, or to W. H. D. Wager, till about 1878, when he heard that Gen. Rufus Barringer, of Charlotte,
(372) was Durant's agent, and signed a paper agreeing to hold the land in his possession as tenant of said Durant, and that this writing, which is filed as an exhibit, was witnessed by James Flow, the administrator of Downing.

Cochrane, another witness, makes affidavit upon information and belief, that it was announced at the sale, before the bidding commenced, so that the announcement could be heard by all present, that only the interest of Downing was sold, and that it was bid off by Wager and Asbury with full knowledge of the fact.

Mr. Barringer makes affidavit, that he was in 1867 employed as attorney and agent for Durant, and sets out, in detail, an arrangement with Hugh Downing, under which he remained in possession of the land, recognizing the encumbrance of the mortgage and its lien upon the land, and after his death, an arrangement with the heirs of Hugh Downing, under which they were to hold the land for five years. "That from the death of Hugh Downing, until 1882-'3, his active administrator (Jas. Flow) and his heirs at law frequently and from time to time admitted to affiant that the said mortgage debt was unpaid, and was a subsisting lien upon the land, and that during the period of affiant's agency for Durant, which agency was well known to the administrator and heirs of Downing and Wager, and to the defendant, M. E. Crowell, as far back as 1878, . . . there was no adverse possession to affiant as agent up to 1882, or 1883. That defendant M. E. Crowell was present during the negotiations which resulted in the contract for a lease, . . . and that neither he, in his own right or otherwise, nor his wife, ever claimed the land, till the year 1882, or '83." That under the contract of lease, the rents were paid by Wager for the years 1880, '81 and '82.

There are also letters of Downing, written in 1866, filed as exhibits, recognizing the mortgage debt as a lien upon the property.

It appears that the parties interested in the mortgage resided (373) in New York, and the mineral value of the land was of chief consideration with them, and the negotiations referred to by Mr. Barringer in his affidavit account for the delay in bringing the action.

These facts, taken in connection with the vast disproportion between the price paid by the *feme* defendant and the actual value of the land, would seem to fix the defendant with notice. The fact that property, worth at the lowest estimate $2,500, and, according to some of the evidence, $8,000, for agricultural purposes, with a large speculative value for mining purposes, should be bid off at the insignificant price of $66, was certainly sufficient to put her on inquiry. "Only the purchaser of the legal title, without notice of a prior equity, can hold against such equity"; *Winborn v. Gorrell,* 3 Ired. Eq., 117; *Polk v. Gallant,* 2 D. & B. Eq., 395; *Hamlett v. Thompson,* 1 Ired. Eq., 360.

In this case, the defendant acquired only the title which Downing had, which was not a legal title, if any title at all. We think the plaintiffs have established an apparent right to have the mortgage deed reformed and the property sold to pay the debt, and that this apparent right is not sufficiently controverted by the answer, and if there is danger of the rents and profits being lost, they are entitled to have a receiver. The plaintiffs allege the insolvency of the defendants, and danger of loss; the defendants admit the insolvency of M. E. Crowell, but say that the *feme* defendant is entirely solvent, and worth $2,500 or $3,000 in excess of her exemptions. The only other evidence upon this point is: 1. The affidavit of James Flow, in which he says: "that the said Delia A. Crowell had no property at her marriage, in her own right, and has since owned none, except the tract of land claimed by her in this action"; 2. The certificate of the property listed by M. E. Crowell, agent for D. A. Crowell, in 1886, amounting to $4,647, of which $4,000 is for the land in dispute in this action. Of course the value of the land in controversy cannot be considered in (374) determining the security to which the plaintiffs are entitled, and where there is imminent danger of loss by insolvency of the defendant, it is within the rightful authority and the duty of the court to secure the rents and profits, through the appointment of a receiver; *Kerchner v. Fairley,* 80 N. C., 24; *Rollins v. Henry,* 77 N. C., 467; *Kron v. Dennis,* 90 N. C., 327; or to permit the defendant to remain in possession, upon the execution of a bond, payable to the plaintiff, with security approved by the court in such sum as may be deemed sufficient to secure the rents and profits and such damages as may be adjudged

in favor of the plaintiff, upon a final determination of the action. *Lumber Company v. Wallace,* 93 N. C., 23.

There was error in refusing to allow the motion of the plaintiffs.

Let this be certified, to the end that the court below may make such order in the cause, in accordance with this opinion, as will secure the plaintiffs against loss by reason of the insolvency of the defendants.

Error. Reversed.

Cited: Williams v. Johnson, 112 N. C., 432; *Smith v. Fuller,* 152 N. C., 13; *Arey v. Williams,* 154 N. C., 610; *Brown v. Harding,* 170 N. C., 268.

J. G. BYNUM v. W. E. POWE ET AL.

Practice—Counterclaim—Constitution—Jurisdiction.

1. A plaintiff cannot take a nonsuit when the defendant sets up a counterclaim arising out of the contract or transaction which constitutes the plaintiff's cause of action—or when the defendant has acquired in an *equitable action* any other right or advantage which he is entitled to have tried and settled in the action.

2. Under sections 12 and 22, Art. IV, of the Constitution, the Legislature has the power to establish, limit, and define the jurisdiction of the Superior Courts; to prescribe the methods of procedure in them, and the extent, manner, time and place of exercising their jurisdiction; and can declare what judgments and orders may be given by these courts in or out of term—except that issues of fact can be tried by a jury only in term time.

(McKesson v. Hunt, 64 N. C., 502; *Pescud v. Hawkins,* 71 N. C., 300; *Graham v. Tate,* 77 N. C., 120; *Tate v. Phillips, ibid.,* 126; *Purnell v. Vaughan,* 80 N. C., 46; *Whedbee v. Leggett,* 92 N. C., 469; *Bank v. Stewart,* 93 N. C., 402; *McNeill v. Lawton, ante,* 16; *Harrell v. Peebles,* 79 N. C., 26; *Molyneux v. Huey,* 81 N. C., 106; *Shackelford v. Miller,* 91 N. C., 181; *McDowell v. McDowell,* 92 N. C., 227; *Branch v. Walker, ibid.,* 87; *Coates v. Weeks,* 94 N. C., 174; *McAden v. Benbow,* 63 N. C., 461; cited and approved.)

(375) CIVIL ACTION, pending in BUNCOMBE Superior Court, on appeal by defendant from judgment of nonsuit rendered by *Montgomery, J.,* at Chambers, in McDowell County, on 15 October, 1886.

The purpose of this action was to obtain relief by injunction.

On 25 June, 1886, a judge declined to grant a restraining order applied for. Afterwards, upon a like application, another judge granted a restraining order and a rule upon the defendants to show cause in term

time why an injunction should not be granted pending the action, and until the hearing upon the merits.

Subsequently, at chambers, the judge vacated the restraining order and denied the motion for an injunction. Afterwards, on 15 October, 1886, the plaintiff, out of term time, at chambers, moved the court to allow him voluntarily to submit to a judgment of nonsuit.

The defendants resisted this motion, contending that the plaintiff had no right thus to be nonsuited, because one judge had refused to grant a restraining order, and afterwards another judge, having granted such order, had discharged it, and refused to grant the motion for an injunction pending the action. The court allowed the motion, and judgment of nonsuit was granted. This was assigned as (376) error by the defendants, and they appealed to this Court.

W. P. Bynum for plaintiff.

S. J. Erwin (I. T. Avery was with him on the brief) for defendants.

MERRIMON, J., after stating the facts: Strictly, a plaintiff cannot be said to "take a nonsuit" regularly in the course of an action, after the jury are sworn, if he finds that he cannot succeed because there is a defect in the evidence, or it is insufficient to warrant a verdict in his favor, or there is other like cause why he cannot; in that case he fails to appear, and allows himself to be "called"; he does not answer. The jury render no verdict, but are discharged, and there is judgment of nonsuit against the plaintiff, and he is said to be "nonsuited"—properly, he voluntarily suffers a judgment of nonsuit, and he thereby gains the advantage, that there is no verdict against him, and no judgment upon the merits of the action that concludes him, and he may bring a new action for the same cause of action. He only pays costs of the action thus terminated.

But it has become common in practice to say that the plaintiff "takes a nonsuit," and it is settled practice in this State, that he has the right voluntarily to submit to such judgment at any time before the verdict of the jury is rendered, unless before he asks to be allowed to do so, the defendant shall have pleaded a *counterclaim,* in which case he cannot do so, if it be a cause of action arising out of the contract or transaction that constitutes the plaintiff's alleged cause of action. If, however, the plaintiff's cause of action is distinct from that alleged as a *counterclaim,* and the latter comes within the statute (The Code, sec. 244, par. 2), the plaintiff may, if he see fit, suffer a judgment of nonsuit as to his alleged cause of action, and in that case the defendant may continue to prosecute his counterclaim, or withdraw (377) or abandon it, in his discretion.

This rule of practice seems to rest upon the ground, that the plaintiff ought to be allowed to abandon his action—not his cause of action, at his pleasure, unless, in the course of the action, some right or advantage of the defendant has supervened that he has the right to have settled and concluded in the action. *McKesson v. Hunt,* 64 N. C., 502; *Pescud v. Hawkins,* 71 N. C., 300; *Graham v. Tate,* 77 N. C., 120; *Tate v. Phillips, ibid.,* 126; *Purnell v. Vaughan,* 80 N. C., 46; *Whedbee v. Leggett,* 92 N. C., 469; *Bank v. Stewart,* 93 N. C., 402; *McNeill v. Lawton, ante,* 16; 3 Chit. P., 911; Bing. on Judg., 28.

That the cause of action in this case is purely equitable in its nature cannot affect the plaintiff's right to submit to a judgment of nonsuit. Under the present method of civil procedure there is but one form of action, and the plaintiff, as indicated above, may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except that in cases purely equitable in their nature he cannot do so, after rights of the defendant in the course of the action have attached that he has the right to have settled and concluded in the action. Thus, if an order of reference has been made, and the referee has made a report, the correctness of which is conceded by both parties, and the case is in condition to be disposed of finally; or if an account has been taken and report made, or a decree has been made under which the defendant has acquired rights, the plaintiff will not be allowed to suffer a judgment of nonsuit, and this is so because the defendant has acquired such rights and advantages in the action as give him a positive interest in it. This rule is reasonable, and rests upon grounds of manifest justice. *Pescud v. Hawkins, supra; Purnell v. Vaughan, supra;* Ad. Eq., 373; Story's Eq. Pl., secs. 456, 793.

(378) But in this case obviously the defendants acquired no rights by virtue of anything done in the course of the action. The plaintiff had simply made a motion for an injunction pending the action, and until the hearing upon the merits, which motion was denied. He might therefore have had such judgment as the one granted out of term time by the consent of parties, or in term time without such consent.

We are, however, of opinion, that the judge had no authority to grant the supposed judgment in question out of term time without the consent of parties, and that it is therefore void. There is no statute prescribing and regulating the course of civil procedure that authorizes such a judgment to be granted out of term time at chambers without the consent of parties, and there was no such consent.

That judgments may be granted in civil actions by the judges of the Superior Courts out of term time, only by the consent of parties, is now well settled, but the practice in that respect is of doubtful ex-

pediency, and ought not to be encouraged in ordinary cases. It is out of the general course of procedure and practice, and not infrequently gives rise to misapprehension, distrust and confusion.

To avoid this as far as practicable the consent of parties should always appear certain, in writing, signed by the parties, or their counsel, or the judge should recite the fact of consent in the orders and judgments he directs to be entered of record. *Hervey v. Edmunds,* 68 N. C., 246; *Harrell v. Peebles,* 79 N. C., 26; *Molyneux v. Huey,* 81 N. C., 106; *Shackelford v. Miller,* 91 N. C., 181; *McDowell v. McDowell,* 92 N. C., 227; *Branch v. Walker, ibid.,* 87; *Coates v. Weeks,* 94 N. C., 174.

The Constitution, Art. IV., sec. 22, declares that "The Superior Courts shall be at all times open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury," and it is contended that this provision directly confers upon the judges of the courts named jurisdictional authority to make all proper orders and to grant all proper judgments, and to do and (379) require to be done, all proper things in all civil actions and proceedings in the course of procedure out of term time, "except the trial of issues of fact requiring a jury."

This provision of the Constitution does not stand alone—it has reference and relation to, and bears materially upon other provisions on the same subject, and must in such connection and bearing receive such just and reasonable interpretation as will give it intelligent operative effect.

An essential part of the system of judicature established and provided for by the Constitution, is the apportionment and distribution of jurisdictional authority, and a method or methods of procedure. These are not supplied by the Constitution except to a very limited extent. As to courts, other than the Supreme Court, power is expressly conferred upon the Legislature to prescribe, define and limit their jurisdiction respectively, and proper methods of procedure therein. It is declared by section 12 of the same article above cited, that "the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction, which rightfully pertains to it as a coördinate department of the government; *but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court,* among the courts prescribed in this Constitution or which may be established by law, *in such manner as it may deem best,* provide also a proper system of appeals, and regulate by law when necessary, the methods of proceeding in the exercise of their powers, of all courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

It thus appears plainly that the Legislature has ample power to establish, define and limit the jurisdiction of the Superior Courts, and prescribe the methods of procedure in them. This power must embrace the power to prescribe the extent, manner, time and place, of
(380) exercising jurisdictional authority. This is essential to secure certainty, consistency, order and practical convenience in the due administration of public justice. Without proper regulations in these respects, disorder and confusion must inevitably prevail to a greater or less extent, to the detriment of the public and individuals.

The Legislature may make such regulations as it shall deem fit and expedient, in the respects mentioned, and they will be operative if they do not conflict with provisions of the Constitution other than those contained in the section last above recited. It is insisted, however, that the present method of civil procedure is in conflict with the constitutional provision first above set forth. We think otherwise. Giving it a reasonable interpretation that makes it harmonize with the power conferred upon the Legislature just adverted to, and as well, one that gives it intelligent practical effect, it implies that "the Superior Courts shall be at all times open for the transaction of all business within their jurisdiction," as at the time, at the place, and in the manner prescribed by law, "except the trial of issues of fact requiring a jury." As to the trial of issues of fact by a jury, they shall not be continuously open—they shall be open only at stated periods—in term time—but as to all other matters, they shall be *continuously open*—open for the transaction of any—all—business that may properly come before them, at the time, in the order, at the place, and in the way prescribed, but not necessarily that such business shall be continuously transacted. They are continuously open, so that the Legislature may prescribe that certain classes of business shall be transacted only in term time, certain other classes may be transacted out of, or in term time, or that all business may be transacted at any time without regard to terms of the court, except as to the trial of issues of fact by a jury. These courts in their nature are continuously open as contra-distinguished from courts that are closed except at certain periods, called term time, such as were the
(381) Superior Courts of this State before the adoption of the present Constitution, except in certain respects.

Very soon after the adoption of the Constitution of 1868, the Legislature passed a statute prescribing a Code of Civil Procedure, which in a sense contemplated the continuous transaction of business in the Superior Courts of which they had jurisdiction, but this feature of it prevailed for a brief while. Afterwards the Legislature, deeming the statute in the respect referred to inexpedient and unsuited to the wants and interests

of the people, passed a statute (Acts 1868-1869, ch. 76) suspending the Code of Civil Procedure in certain respects, and enacting that civil actions should be brought, the pleadings therein filed and trials had in term time only. The validity of that statute was contested in *McAdoo v. Benbow,* 63 N. C., 461, on the ground that it was in conflict with the provision of the Constitution now under consideration. This Court held after much consideration that the act was valid, and the decision in that case has been repeatedly and uniformly recognized as settling the construction to be placed upon that provision. Indeed the construction given it has been recognized and acted upon by the courts and the Legislature ever since it was made. This statute was by its terms to remain operative only for a brief period. It was afterwards extended in its material provisions by a subsequent statute (Acts 1870-1871, ch. 42), and subsequently by statute (Bat. Rev., p. 248); and substantially the provisions of this statute are now incorporated into and permanently form part of the *Code of Civil Procedure* (The Code, ch. 10).

While the Legislature can provide for the continuous transaction of business of the Superior Courts of which they have jurisdiction without regard to stated terms thereof, except as "to the trial of issues of fact requiring a jury," because they are always open, it is too well settled to admit of serious question, that it can prescribe, as indeed, it has done, that civil actions, with certain exceptions, shall be brought to, proceeded in, tried and disposed of in term time only. *Hervey* (382) *v. Edmunds,* 68 N. C., 243.

So, accepting the provisions of the Code of Civil Procedure affecting the question presented by the record for our decision as operative and valid, did they authorize the judge to grant the judgment of nonsuit complained of, out of term time?

We think this question must be answered in the negative. It appears from a careful examination of the Code of Civil Procedure that all ordinary civil actions must be brought to and proceeded in to their determination at regular terms of the Superior Courts. This is the general course and extent of procedure, and there is no authority of the court or judge to grant orders, judgments, or take any action in such actions out of term time, except in respects specially provided for; such as provisional remedies, proceedings supplementary to execution, submitting a controversy without action, confessing judgment without action, applications for mandamus, and the like.

And moreover, whenever the judge may take any such action out of term time, in the course of an action, or otherwise, his authority to do so is exceptional, and is prescribed in terms, or by necessary implication. He cannot do so simply upon the ground that the courts are always

open for the transaction of all business within their jurisdiction; he must or may do so only when the prescribed course of procedure allows or directs something to be done.

Now, this is an ordinary civil action, in which the particular and principal relief demanded is a perpetual injunction. It was brought to a regular term of the court, and must be proceeded in in term time, to its end, however that may be reached. There is no exceptive provision in the Code of Civil Procedure that allows a judgment of voluntary nonsuit to be suffered by the plaintiff out of term time any more (383) than to try and determine the action upon its merits. The judgment might have been granted with the consent of parties, because the court is always open, but it could not without such consent, and for the reasons already stated above.

The suffered judgment of nonsuit must be treated as void, and further proceedings had in the action in term time, according to law. And to that end let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: McNeill v. Hodges, 99 N. C., 249; *Gatewood v. Leak, ibid.,* 365, 6; *Anthony v. Estes, ibid.,* 599; *Goodwin v. Monds,* 101 N. C., 356; *Skinner v. Terry,* 107 N. C., 109; *Pass v. Pass,* 109 N. C., 486; *Parker v. McPhail,* 112 N. C., 504; *Fertilizer Co. v. Taylor, ibid.,* 151; *Wilkins v. Suttles,* 114 N. C., 558; *S. v. Parsons,* 115 N. C., 734; *Bank v. Gilmer,* 118 N. C., 670; *Olmsted v. Smith,* 133 N. C., 586; *Boyle v. Stallings,* 140 N. C., 527; *Banks v. Peregoy,* 147 N. C., 296; *R. R. v. R. R.,* 148 N. C., 69; *Clark v. Machine Co.,* 150 N. C., 375; *Webster v. Williams,* 153 N. C., 311; *Campbell v. Power Co.,* 166 N. C., 490; *Haddock v. Stocks,* 167 N. C., 73; *Cahoon v. Brinkley,* 176 N. C., 7; *S. v. Humphrey,* 186 N. C., 536; *S. v. Stewart,* 189 N. C., 346.

J. L. QUEEN, TRUSTEE, v. A. WERNWAG ET AL.

Evidence—Confusion of Goods.

1. When the plaintiff sues to recover a stock of goods conveyed to him as trustee by defendant W., to secure a creditor of said defendant, evidence is admissible to prove: First, that it was agreed between the trustee and creditor, and said W., that said W. should remain in possession of the goods and sell them, and pay the debts of the firm, composed of said W.

and the secured creditor; second, what goods were in the store when the deed in trust was executed, and what, when the goods were seized by the sheriff; third, what additions had been made to the stock by adding goods purchased with funds which were the separate estate of the *feme* defendant, and which of the goods seized were thus added.

2. In such case the trustee can claim only such of the goods as composed the original stock, and not those added by the *feme* defendant.

3. The rule, that he who produces a confusion of goods shall lose his own, is carried no further than necessity requires, and applies only to cases where it is impossible to distinguish what belonged to one from what belonged to the other. When the articles can be easily distinguished and separated, no change of property takes place, but the burden is on the guilty party to distinguish his property or lose it.

THIS was a civil action, tried before *Avery, J.*, at Fall Term, (384) 1886, of HAYWOOD Superior Court.

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

The facts are sufficiently stated in the opinion of the Court.

No counsel for plaintiff.

W. B. Ferguson and W. L. Norwood (Geo. H. Smathers also filed a brief) for defendants.

SMITH, C. J. This action is prosecuted under the provisions of The Code, secs. 321 to 333, inclusive, by the plaintiff, who claims title under three several conveyances of the defendant A. Wernwag, in trust to secure certain recited debts due Samuel Isler, to recover possession of a stock of goods and merchandise then held by him. The goods were seized and delivered to the plaintiff under an order made in the cause on 6 June, 1885, on which the summons was sued out, and the order to take the goods from the defendant was issued. The allegations made in the complaint being denied in the answer, issues were submitted to the jury, which, and the responses to each, are as follows:

I. Is the plaintiff the owner of the property described in the complaint? Answer: Yes.

II. Did the defendants wrongfully detain said property? Answer: Yes.

III. What is the value of the goods seized? Answer: Four hundred dollars.

On the trial the plaintiff testified on his own behalf, and on his cross-examination the defendant proposed to show by the witness that he permitted the defendant A. Wernwag to remain in possession of the goods from the day of making the deeds (9 December, 1884), until the seizure;

what goods were then in the store, and what, when taken by the
(385) sheriff, of the original stock; that the said defendant continued thereafter as before to sell and dispose of the goods assigned, and that the stock had been meanwhile replenished by additions thereto, made with the funds of the *feme* defendant, and out of her separate estate. The evidence was refused, and defendants excepted.

The defendant, A. Wernwag, a witness for himself, proposed to prove an agreement between himself and the plaintiff, made at the time the deeds were executed, to which the creditor Isler also assented, that the witness was to remain in possession of the goods, sell them out and pay the debts of A. Wernwag & Co., constituted of the witness and the said Isler. This testimony was also, after objection, ruled out, and defendant excepted.

The substance of the offered evidence was to show that the continued sale and disposition of the goods was with the assent of both the trustee and secured creditor, under a resulting agency in the reduction of the stock, and the residue left of the stock on hand when the assignment was made. We do not know upon what ground the proof was declared to be inadmissible, if, in the separation, the additions could be distinguished from the other articles of merchandise, because the property in the latter only was in the trustee.

It may be that it was deemed a confusion of goods, whereby the title to the goods added, was lost, upon a well known rule of law, or it may have been considered a replenishment of the stock from the proceeds of such as were sold. On neither ground ought the evidence to have been excluded.

The rule is thus stated by *Chancellor Kent:* "If A. will *wilfully intermix* his corn or hay with that of B., or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B. But this rule is carried no further than necessity requires, and if the goods can be easily distinguished and separated, as articles of furniture, for instance,
(386) then no change of property takes place." . . . "It is for the party guilty of the fraud to distinguish his own property satisfactorily or lose it." 2 Kent Com., 365.

"We cannot but think," says Mr. Parsons, "that the intent of the parties and the moral character of the transaction would enter into the law of the case. 2 Pars. Cont., 474.

So remarks *Morton, J.,* after citing the passage from Kent, "but this rule only applies to *wrongful* or *fraudulent* intermixtures. *Rider v. Hathaway,* 21 Pick., 298.

The intermixture of goods of different kinds in a store is unlike that of a commingling of wheat, corn and melted metal into one undistin-

guishable mass, for it is possible that the original articles had labels, marks or other devices, or that those which formed the accession had them, so that the identity of the several parcels could be ascertained, and for this purpose the evidence of the plaintiff himself was offered and refused.

Not only was this ruling untenable on the first ground suggested, nor was there any evidence that the accessions to the stock came from purchases made with money received from what were sold; the testimony to establish the contrary was disallowed.

There is error and must be a new trial, to which end this will be certified.

Error. *Venire de novo.*

Cited: Keith v. Rogers, 101 N. C., 272.

(387)

VIRGIL WEBB v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Fellow-Servants.

1. Where an employee of a railroad company is injured by the negligence of a fellow-servant, the common master is not liable.
2. The fact that a coemployee has authority from the common master to discharge his fellow-servants, does not, of itself, constitute him a vice-principal.

THIS was a civil action, tried before *Avery, J.,* and a jury, at Spring Term, 1886, of the Superior Court of MECKLENBURG County.

The action was brought to recover damages for an injury to the person of the plaintiff, who was an employee of the defendant.

The plaintiff, a witness in his own behalf, testified in substance, that he was employed to flag the trains, but was ordered by the yard-master, on the occasion when he was injured, to couple some cars. That he got upon the step at the back of the engine, and when the engine approached the cars he was to couple, he notified the engine-man to stop his engine, but that he did not do so, but moved it back rapidly, in consequence of which the injury happened; that the yard-master had the power to discharge the employees; and it was his duty to give signals to the engine-man when coupling was to be done, but that he failed to do so on this occasion.

The plaintiff's testimony was contradicted by the witnesses for the defendant, who testified to a state of facts, which, if believed, showed that the plaintiff was injured by his own carelessness.

The plaintiff asked his Honor, among other things, to charge the jury, that if they believed that the yard-master had authority from the
(388) defendant to discharge the plaintiff, then they were not fellow-servants. His Honor refused this charge.

The jury found a verdict for the defendant, and the plaintiff appealed.

No counsel for plaintiff.
Chas. M. Busbee for defendant.

MERRIMON, J. We do not deem it necessary to advert in detail to the several assignments of error in this case, because in our judgment, in any just view of the facts of it as they appear in the record, the injury sustained by the plaintiff was most probably the result of casualty—possibly, his own carelessness and lack of expertness, and if there was any carelessness on the part of any employee of the defendant, engaged in shifting or moving the cars at the time the injury was sustained, it was obviously that of a fellow-servant, for which the defendant is not amenable.

The injury so sustained by the plaintiff was his misfortune.

It seems that the defendant, nevertheless, generously and commendably cared for him.

No error. Affirmed.

Cited: Hobbs v. R. R., 107 N. C., 3; *Pleasants v. R. R.*, 121 N. C., 495; *Richardson v. Cotton Mills*, 189 N. C., 654.

STATE v. COMMISSIONERS OF WAYNE COUNTY.

Fence Law—County Commissioners—Indictment.

1. County commissioners are not required by the stock law to personally superintend the fence around the no-fence territory, but they discharge their duty under the statute when they levy the necessary taxes, appoint the committees, etc., to keep the fence in repair.

2. An indictment against public officers for a failure to perform a public duty, must set out the specific duty imposed on them which they have neglected.

(S. v. Fishblate, 83 N. C., 654; cited and approved.)

STATE *v.* COMMISSIONERS.

INDICTMENT, tried before *Philips, J.*, and a jury, at July (389) Term, 1886, of WAYNE Superior Court.

The defendants were indicted for neglect of duty in failing as commissioners of the county of Wayne, to keep in repair a stock-law fence, and upon the trial, they introduced evidence to show that they had, as a board, levied the assessment prescribed by law to raise money to keep the fence and gates in repair; that they had appointed suitable persons to superintend and keep in good order the gates and fences; and had made necessary orders appropriating the funds applicable to the payment of expense in making such repairs.

The defendants asked the court to instruct the jury that, "If they were satisfied from the evidence, that the commissioners had made the proper orders and regulations; appointed proper overseers and committees to look after the fence; and levied the tax as allowed by law, they were not guilty, for it was not the duty of the commissioners to personally look after the condition of the fences or repair the same by their own exertions."

The court refused to give this instruction, and gave the following: "The defendants are public officers, in the sense of being liable for any neglect of duty. The law provides that the commissioners shall keep the fence in repair, and failing or neglecting to do that which the law says shall be done, is an act of omission which renders them liable to indictment. The solicitor only contends for a verdict against the defendants for failing to keep the fence up and in repair after it was built. The law looks to the board of commissioners of Wayne County to keep that fence in repair. It appoints no other person or officer to do it, wherefore for any failure or neglect to keep the fence in proper condition, the commissioners are the only persons to whom the law (390) looks to make them liable for the omission. The board of commissioners had a right, if they chose, to appoint some person or persons to superintend the fence and keep it in good order, if such person or persons would accept such appointment, but the appointment of such agent or agents does not relieve the commissioners from their liability, but the jury can consider all the orders and regulations appointing overseers and committees to look after the fence, along with all the other evidence, in determining whether there is failure or neglect to perform the duties required of them in keeping in repair the fences. Was there wilful neglect on the part of the defendants to keep the fence in good condition? From all the evidence the jury must be satisfied beyond a reasonable doubt, that there was a wilful failure and neglect on the part of the defendants to keep the fence in good condition, or else they must acquit. If upon a consideration of the whole case, the jury are so satisfied, they will convict, otherwise, they will return a verdict of not guilty."

Defendant's counsel excepted.

There was a verdict of guilty, and a motion for new trial, which was overruled.

The defendants' counsel then moved in arrest of judgment, upon the ground that the indictment was defective, in that it failed to set out the specific duty imposed upon the defendants, which they had neglected. Motion denied, upon the ground that the bill pointed out the said duties by referring to, and naming the statutes imposing the same.

The Attorney-General for the State.
J. W. Bryan for defendants.

DAVIS, J., after stating the facts: We think the defendants were entitled to the instructions asked for, and that the error in refusing
(391) to give them was not cured by the charge given. The law does not require or contemplate that the commissioners shall personally superintend the fences and keep them in repair. They are required to make all regulations, and to do all other things necessary to carry into effect the provisions of the chapter of The Code relating to the stock law; The Code, sec. 2826; and in doing this, they could hardly do more than was covered by the instructions asked for by the defendants. The act to prevent livestock from running at large in Goldsboro Township, chapter 115, section 10, Laws of 1885, authorizes and directs a committee of persons named therein to cause a fence to be built around the township in the manner prescribed in the act, and to report to the board of commissioners; and then section 14 directs, that after the committee shall have reported the completion of the fence, it shall be under the control and management of the board of commissioners, and they shall discharge with reference to said fence and the territory therein all the duties prescribed in chapter twenty of The Code, relating to territory where the stock law prevails. Section 2826 of The Code, already referred to, defines their powers and duties, and the instruction asked for, was in effect, that if the jury should be satisfied that the defendants had made proper regulations to carry into effect the provisions of the law, then they should find a verdict of not guilty.

But after verdict of guilty, we think the motion in arrest of judgment should have been allowed.

The indictment charges that the defendants "unlawfully and wilfully, did fail, omit and neglect to cause to be put up, and to keep up, a good and sufficient fence, and good and sufficient gates, about and around the territory within said county in which, under chapter 115 of the Laws of the session of the year 1885, of the General Assembly of the State, entitled 'An act to prevent livestock from running at large in Goldsboro

Township, Wayne County, and the several acts of said General Assembly hereinafter named amendatory of said act, it was, then (392) and there, for the space of time aforesaid, and yet is, required to be enclosed by a good and sufficient fence, with good and sufficient gates thereto, to the common nuisance and great damage of the good people of the State then and there living, residing and inhabiting, against the form of the statute in such cases made and provided; and especially in violation of said first named act of the General Assembly aforesaid, and of the acts passed at the said session of the year 1885 by the General Assembly, amendatory of the said first named act, to wit, chapters 192, 242, and 287, of the Laws of the General Assembly," etc.

Nowhere in any of the acts referred to, is it made the duty of the defendants "to cause to be put up, and to keep up, a good and sufficient fence," etc.

It may be that the bad condition of the fence was the consequence of a failure on the part of the commissioners to "make all regulations," etc., necessary, as required by section 2826 of The Code, to carry the law into effect, but they were not obliged, by their own exertions, to build or repair the fences. "They are only to use the means to that end which the law has placed in their power," and if by reason of their failure to use the means given to them by the statute, if by any omission of their duty, the public suffer, they may be indicted, but the indictment must point out the particular public duty neglected—must "set out the specific duty imposed upon them, which they have neglected"; *S. v. Fishblate,* 83 N. C., 654, and the authorities there cited, are conclusive on this point.

There is error. Let this opinion be certified to the Superior Court of Wayne County, that further proceedings may be had in conformity to this opinion.

Error. Reversed.

Cited: S. v. Leeper, 146 N. C., 665.

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STATE v. DANIEL MCBRYDE.

Evidence—Intent.

1. Whether there is any evidence, is a question for the court; what weight is to be given it when there is any, is for the jury.
2. When the evidence only raises a suspicion of the defendant's guilt, it is error to leave it to the jury.

3. When the act of a person may be reasonably attributed to two or more motives, the one criminal and the other innocent, the law will always ascribe the act to the innocent motive.

4. The fact that the prisoner entered a dwelling-house in the night time, he having no right to be there, and fled upon being discovered, is some evidence to go to the jury that he entered with intent to steal, in the absence of any explanation on his part, although no theft was committed.

5. Where the *gravamen* of the crime consists in the intent alone, the jury may infer the intent from the circumstances.

(S. v. Patterson, 78 N. C., 470; *S. v. Rice*, 83 N. C., 663; *S. v. Massey*, 86 N. C., 660; cited and approved; *S. v. Boon*, 13 Ired., 244; *S. v. Haynes*, 71 N. C., 79; commented on.)

(S. v. McDaniel, 1 Winst., 249; cited in the dissenting opinion.)

INDICTMENT, tried before *Gilmer, J.*, and a jury, at August Term, 1886, of ROBESON Superior Court.

This was an indictment for entering the dwelling-house of one J. A. Hornaday in the night time, otherwise than by a burglarious breaking, to wit: through an open window, with a felonious intent.

There were two counts in the indictment, the first charging the entry to have been with intent to steal the goods of J. A. Hornaday, and the second with intent to commit a rape upon Mary E. McQuagin.

The State introduced the said Mary as a witness, who testified in substance, that on 22 July, 1886, she was at the house of J. A. Hornaday, in the county of Robeson; that there was an open window in the room in which she was sleeping, and that she woke up about two
(394) o'clock in the night, and saw the prisoner sitting on the foot of the bed. That she was not frightened, and that the prisoner did not put his hand upon her; that she screamed, and the prisoner immediately ran and jumped out of the open window. It was a moonlight night, and there were several windows in the room. That when she went to bed, there was a dress on a trunk at the open window, and when she awoke the dress was on the head of her bed, and that she did not know who put it there; that there was another lady sleeping in the room, and that their beds were about ten feet apart."

There was no evidence as to whom the dress belonged, or who removed it, or whether the witness or other lady retired first.

J. A. Hornaday was then put upon the stand and testified as follows:

"That he was sleeping in the house on the night of 22 July, 1886, in a different room from the ladies, and he heard the screaming, and jumped up and got his gun and went into the room where they were, and when he got there, the person who had entered the room had gone, and that the witness Mary E. McQuagin, informed him that Daniel

McBryde was the person who had been in the room; that the moon rose that night about eleven o'clock."

The defendant offered no evidence.

His Honor, in response to the first prayer for instructions for the defendant, charged the jury: "That the evidence in the case is not reasonably sufficient to maintain the charge against the defendant of an intent feloniously to ravish and to have carnal knowledge of Mary McQuagin, forcibly and against her will," and in response to the third prayer, he charged the jury: "That even if they should believe from the evidence, that the prisoner entered the house for an unlawful purpose, they could not convict him, unless that purpose was with the intent to feloniously steal, take and carry away the goods and chattels of J. A. Hornaday; and if the jury, from the evidence, are left in doubt as to the (395) intent with which he entered the dwelling-house, they could not convict, as the prisoner is entitled to the benefit of all doubts."

The second prayer for instructions was as follows: "That the evidence in this case is not reasonably sufficient to maintain the charge against the defendant, that he did unlawfully and feloniously, otherwise than by a burglarious breaking, to wit: did then and there feloniously enter the dwelling-house of J. A. Hornaday, in the night time through an open window, with the felonious intent then and there of the goods and chattels, money and other property of the said J. A. Hornaday in the said dwelling-house then and there being, feloniously to steal, take and carry away." His Honor refused to give this charge, and in addition to the charge given as above, charged the jury, "that there was no evidence as to who removed the dress, or whose property it was, and if they were fully satisfied that the prisoner entered the house of the said J. A. Hornaday with the felonious intent to steal, take and carry away any of the goods, chattels, money or other property of J. A. Hornaday in the said dwelling, that they would find him guilty, and that if they were not so satisfied, they would find him not guilty."

There was a verdict of guilty. Judgment and appeal to this Court.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: It is insisted for the defendant, that there was no evidence that should have gone to the jury, and that the court should have directed an acquittal. Whether there is any evidence, is a question for the court; what weight is to be given to it when there is any, is for the jury. "When there is no evidence,

(396) or if the evidence is so slight as not reasonably to warrant the inference of the defendant's guilt, or furnish more than material for mere suspicion, it is error to leave the issue to be passed upon by the jury"; *S. v. Patterson,* 78 N. C., 470; *S. v. Rice,* 83 N. C., 663, and the cases there cited.

"When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. It is neither charity, nor common sense, nor law, to infer the worst intent which the facts will admit of"; *S. v. Massey,* 86 N. C., 660, and the cases there cited.

These cases from our own reports, and others of a similar purport, cited by counsel for the defendant, are relied on as authority for the position that in this case, there was *no evidence* that should have been submitted to the jury upon the question of *intent* to commit the crime charged. It is often difficult, in the application of the principle that requires the court to withhold from the jury the evidence, when so slight as not reasonably to warrant a conviction, to determine the point where the power and duty of the court end, and the right and duty of the jury begin. The same facts and circumstances impress different minds with different degrees of force, and what may, in the opinion of one be entirely sufficient to warrant an inference of guilt, would, in the opinion of another, be slight and unsatisfactory. That difficulty is presented in this case, but after full consideration, we think there was evidence to go to the jury, and that there was no error in the charge of the court. The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when dis-
(397) covered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. Here there was no larceny or other felony actually committed, and the guilt, if any, consisted in the *intent* to commit a felony, which was not consummated. There was no *"breaking,"* but by statute (The Code, sec. 996), it is made a misdemeanor, "if any person shall break or enter a dwelling-house of another, otherwise than by a burglarious breaking, . . . with intent to commit a felony or other infamous crime therein."

The intent, which is the substantive crime charged, is not the object of sense—it cannot be seen or felt, and if felonious, is not usually

announced, so where no felony has been actually consummated (in which case the intent may be presumed from the act) it would be difficult to prove any crime consisting of the intent alone, unless the jury be allowed to infer the intent from circumstances. What are the circumstances in this case? The prisoner entered the dwelling-house of Hornaday about two o'clock in the night time; two ladies were asleep in a room of the house in the warm month of July—the window was open, and when one of them awoke, she saw the prisoner sitting on the foot of her bed; she screamed, and he fled instantly through the open window—some clothing had been displaced. He offered no evidence to explain his intent.

The humanity of our law will not permit juries to draw any inference to the prejudice of a prisoner from the fact that he does not himself go upon the stand as a witness in his own behalf, but there was no explanatory fact or circumstance from any source, to show any intent not criminal, and the facts and circumstances proven are sufficient to outweigh the legal presumption of innocence, and put him upon his defense.

The jury was relieved from any consideration of the intent (398) charged in the second count of the indictment by the charge of his Honor. Of this the prisoner certainly could not complain, unless it be error, in considering the intent to steal, to exclude an hypothesis of a more heinous intent than that charged.

"The intention of the parties," says Roscoe, "will be gathered from all the circumstances. . . . Persons do not in general go to houses to commit trespasses in the middle of the night." Criminal Evidence, 347: "The very fact of a man's breaking and entering a dwelling-house in the night time, is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty, unless the contrary be proved." Wharton's Criminal Law, 1600.

Blackstone, in speaking of the intent as an ingredient in the crime of burglary, says, "it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge." 4 Blackstone, chapter 16.

In *Rex v. Brice* (English Crown Cases), Russell & Ryan, 449, it was left to the jury to say, whether from the breaking and entering they were satisfied that the prisoner's intention was to steal, and upon conviction ten of the twelve judges held that it was proper. The same was held by *Park, J.*, in Lewin's Crown Cases, Vol. 2, page 37.

Similar authority is found in Archbald's Crim. Prac. and Pleading, 340.

We have gone more fully into the consideration of the question presented in this case, because in some of our own Reports, notably

S. v. Boon, 13 Ired., 244, and *S. v. Haynes,* 71 N. C., 79, evidence stronger perhaps than that presented here, seems to have been regarded as slight, though permitted to go to the jury. It will be observed, that the evidence in the cases related to the crime of burglary, a capital felony, and if deemed of sufficient weight to warrant the jury in
(399) convicting of the higher crime certainly it would be admissible in a case of misdemeanor, as this is.

There is no error. Let this be certified.

SMITH, C. J., dissenting: Two ingredients enter into and are essential to the constitution of the offense charged in the indictment. As in case of burglary, the entering into the dwelling-house of another, otherwise than by a burglarious breaking, and the there formed intent to commit a felony or other infamous crime therein. Both elements must coexist and be proved, in order to a conviction of the statutory crime. It differs from burglary, in that no breaking is necessary in the removal of fastenings; the house need not be a dwelling—nor the entry made in the night season. But in both cases, the act done is inseparably associated with the intent, and the crime is consummated when they coexist. If the attempt be abandoned after entrance, it would not remove the criminality; *S. v. McDaniel,* 1 Winst., 249, nor would the offense have been perpetrated, by a felonious purpose formed, and a felony committed, only after entering. But the inference would, in the latter case, be almost irresistible that the purpose to do what was done, was present in the mind of the accused, and an incentive to his entering.

It has been held in the case cited in the opinion of the Court, that a jury might infer an intent to commit a larceny from a mere burglarious breaking into a dwelling-house at night, when the party was repulsed before effecting his purpose or giving any indications whatever of it. It is not necessary to call in question the correctness of the ruling, further than to say, that when an objection was made to a conviction for burglary, based on the want of evidence of the imputed intent, this Court, not content with resting its decision upon such authority, met the point thus: "The prisoner broke and entered the dwelling about 10 o'clock in the night, and shortly after the inmates had gone to bed. When
(400) discovered, he fled; the dress containing the pocket-book had been displaced from where it was, upon the chair, and separated from the other garments, and thrown upon the floor, and the pocket-book, which was in it, when the prosecutrix retired to bed, was gone; and there was no evidence that any other person had been in the house." *S. v. Haynes,* 71 N. C., 84.

But assuming that the breaking into a dwelling at night, is so usually done for the purpose of stealing goods therein, that a jury may infer

the one fact from the other (and it is certainly going far enough to make the admission), the finding ought to be controlled very much by the indications of the purpose promoted by the conduct of the person after he has entered, rather than by conjectures of the purpose in the absence of any such evidence. The defendant, whose manner of getting into the house is not known, though most probably through the open window, is found quietly sitting at the foot of the bed when the prosecutrix awakes, making no disturbance himself. Startled by her cries, he springs up and dashes out of the window. Another woman occupies a bed some ten feet distant. Nothing is missed, and only her dress, left on a chair, is found now on her bed; by whom removed, does not appear. How long he had been in the room is not known, but while if theft was his object, he had ample opportunity to take what he was in search of and depart, without disturbing the slumbers of the occupants of the room, yet nothing was carried away. Why was he quietly waiting in that position, unless for some unlawful design upon the person of the prosecutrix, whether to be accomplished by force, if need be, or by voluntary submission hoped for, which would have been frustrated by offering violence before trying her volition? Do not these facts and this conduct repel the suggestion that larceny was his object? The jury were directed not to convict upon the charge which alleges an intent to commit rape, for he did not touch the person of the (401) prosecutrix, as did the prisoner grasp the ankle of the sleeping young lady, and thus indicate meditated violence, in *S. v. Boon,* 13 Ired., 244, which evidence, the late *Chief Justice* said, "is certainly very slight," of the imputed intent. Surely, whether sufficient or not to warrant a conviction of an intended rape, it tends strongly to disprove that stealing was the purpose of the unlawful entry, for all the facts are at variance with that hypothesis.

In my opinion, therefore, there was not sufficient evidence of the intent charged to warrant a conviction, and so ought the jury to have been instructed.

No error. Affirmed.

Cited: S. v. Mitchener, 98 N. C., 693; *S. v. Goings,* 101 N. C., 709; *S. v. Telfair,* 109 N. C., 882; *Spruill v. Ins. Co.,* 120 N. C., 149; *S. v. Hawkins,* 155 N. C., 472; *S. v. Spear,* 164 N. C., 453; *Ellis v. Cox,* 176 N. C., 619.

STATE v. JOSEPH E. SHEPPARD.

Indictment—Quashing—Arrest of Judgment.

1. The court may, in its discretion, allow a motion to quash at any time before verdict.
2. Judgment can be arrested only for some matter appearing on the face of the record, or for some matter which ought to be in the record, but is not there.
3. The endorsement on the back of an indictment is no part of the record.
4. Where it did not appear from the endorsement on the indictment that the witnesses sent to the grand jury had been sworn, it was held no ground to quash the indictment after a plea of not guilty, or to arrest the judgment after verdict.

(*S. v. Hines*, 84 N. C., 810; *S. v. Roberts*, 2 Dev. & Bat., 540; *S. v. Eason*, 70 N. C., 90; cited and approved.

THIS was a criminal action, tried before *Graves, J.*, at Spring Term, 1886, of MITCHELL Superior Court.

The defendant was charged with an assault and battery with a (402) deadly weapon, upon one Mosely. The names of two witnesses were endorsed on the bill of indictment, with the further endorsement: "Those marked thus × sent by the solicitor, and sworn and examined by me, and this bill found a true bill," and signed by the foreman of the grand jury. There was no mark set opposite the name of either witness, to indicate that he had been sworn and examined before the grand jury.

The defendant entered a plea of "not guilty."

Upon the call of the case, and before the jury was empaneled, the defendant moved to quash the indictment, upon the ground that it did not appear from any endorsement upon the bill, that either of the witnesses marked had been sworn and examined before the grand jury.

This motion was overruled, and the defendant put upon his trial. Upon the trial, the State offered as a witness, the clerk of the court, and the records of the court, to show that the grand jury had returned the bill in open court, endorsed, "a true bill," with the names of the witnesses endorsed on the indictment, as they appeared at the time of the trial.

There was no other evidence to show that the witnesses had been sworn and examined at the finding of the bill of indictment.

There was a verdict of guilty. The defendant moved in arrest of judgment. Motion overruled, and judgment, from which the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: The first exception was to the refusal of the court to quash the indictment. The record shows that the defendant had entered the plea of "not guilty," and issue joined. After plea and issue joined, the motion to quash may be allowed, (403) at the discretion of the court, at any time before verdict. *S. v. Eason,* 70 N. C., 90. Being a matter of discretion, upon proof of the fact that the witnesses were not sworn, the court, in the exercise of its discretion, would doubtless have granted the motion, but if refused, the defendant might have pleaded in abatement, and shown, if such was the fact, that the witnesses had not been sworn. *S. v. Hines,* 84 N. C., 810.

The second exception was to the refusal to grant the motion in arrest of judgment. "Judgment can be arrested only for matter appearing in the record, or for some matter which ought to appear, and does not appear in the record." The endorsements on the indictment have been held to be no part of the record. *S. v. Roberts,* 2 D. & B., 540; *S. v. Hines, supra.*

After plea of not guilty, the defendant was not entitled, as a matter of right, to take advantage, by either motion, of the omission of the foreman to put a × before the name of a witness.

A proper motion, in apt time, would doubtless have resulted in a correction of the omission, and as he was found guilty upon the issue raised by his plea, he suffered no wrong or injustice, of which he can complain.

There is no error. Let this be certified.

No error. Affirmed.

Cited: S. v. Hollingsworth, 100 N. C., 537; *S. v. Flowers,* 109 N. C., 845; *S. v. Sultan,* 142 N. C., 573; *S. v. Efird,* 186 N. C., 484; *S. v. Mitchem,* 188 N. C., 610.

(404)

STATE v. LEE KELLY.

Criminal Trials—Right of Prisoner to be Present.

1. In capital felonies, the prisoner has the right to be present in court at all times during the course of his trial, and if he is absent at any time, it vitiates a conviction.
2. In felonies less than capital, the prisoner has the right to be present at all stages of his trial, but his presence is not essential to the validity of the conviction.

3. *It seems*, that a prisoner in a capital felony can waive his right to be present at all stages of the trial, but his counsel cannot waive it for him.

4. If a prisoner in an indictment for a felony less than capital flee the court during the trial, he will be deemed to have waived his right to be present, and the court need not stop the trial.

(*S. v. Crayton*, 6 Ired., 164; *S. v. Blackwelder*, Phil., 38; *S. v. Bray*, 67 N. C., 283; *S. v. Jenkins*, 84 N. C., 812; *S. v. Epps*, 76 N. C., 55; *S. v. Payton*, 89 N. C., 539; *S. v. Sheets, ibid.*, 543, cited and approved.)

INDICTMENT, heard before *Meares, Judge,* at February Term, 1886, of the Criminal Court of MECKLENBURG County.

The defendant was indicted at the October Term, 1885, of the Criminal Court of the county of Mecklenburg, for the crime of larceny.

Being under recognizance to answer in that behalf at that time, he appeared in person, having counsel present, and pleaded not guilty, and was put upon his trial. He was present during the trial, as was also his counsel, "until the jury were returning to the court room (they having retired to consider of their verdict), to render the same in the case, at which time the defendant fled, and on being called, failed to answer. One of the defendant's counsel was present at the rendering of the verdict against the defendant, and made no objection to the (405) taking of the verdict in the defendant's absence. The verdict was rendered and entered, the defendant being so absent, his counsel present.

Afterwards, at February Term, 1886, of the same court, the defendant having been arrested, was brought into court for judgment, whereupon he moved that he be discharged, on the ground that he was not present when the verdict was rendered and entered against him. He contended that it was therefore void. The court denied the motion. There was a motion for a new trial, based upon the same ground, which was likewise denied. The court gave judgment that the defendant be imprisoned in the penitentiary for the term of two years, and having excepted, he appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: That the prisoner in capital felonies has the right to be, and must be, personally present at all times in the course of his trial, when anything is done or said affecting him as to the charge against him on the trial, in any material respect, is not questioned. Indeed, it is conceded that he has such right, and that he must be so present. *S. v. Crayton,* 6 Ired., 164; *S. v. Blackwelder,* Phil., 38; *S. v. Bray,* 67 N. C., 283; *S. v. Jenkins,* 84 N. C., 812.

As to felonies less than capital, the prisoner has precisely the same right to be present, but it is not essential that he *must* be at all events.

In the case last cited, *Mr. Justice Ruffin* said, in reference to the prisoner's right to be present: "Whether the right can be waived in such cases, is a point about which the authorities seem to be still divided—some holding his actual presence to be necessary during the entire trial, and others, that being a right personal to the accused, and established for his benefit, it might be waived by him."

The rule that he must be so present in capital felonies is (406) *in favorem vitæ*. It is founded in the tenderness and care of the law for human life, and not in fundamental right—certainly not in this State, as seems to be supposed by some persons. The Constitution (Art. I, secs. 11, 12, 13), provides in respect to persons charged with crime, that, "In all criminal prosecutions, every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and to have counsel for his defense." That he shall be put to answer for a criminal charge, only "by indictment, presentment, or impeachment," except in cases of petty misdemeanors, and that he shall not be "convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court." These embrace all the provisions of the Constitution bearing upon the subject, and surely they cannot be reasonably interpreted to imply that it is essential that the party "put to answer any criminal charge," shall—must—be continuously present at his trial at all events. They do not have such meaning in terms or effect. The just and reasonable implication is, that the party accused of crime shall have fair opportunity to defend himself in all respects as allowed and secured by the principles of law, procedure, and statutory provisions, applicable to and regulating criminal trials.

While it is settled in this State, that the prisoner has the right to be so present during his trial upon a charge for a felonious offense, not capital, there is neither principle nor statute, nor judicial precedent, that makes it essential that he shall be. Nor, in our judgment, is there any common principle of justice, essential to the security of personal right, safety and liberty, that so requires. Unquestionably, a party "put to answer any criminal charge, may plead guilty, or *nolo contendere*. In such case, he waives a trial altogether. The law allows him to do so, presuming that he has capacity and intelli- (407) gence to know and be advised as to his rights, and that he will not voluntarily refuse to make defense, if innocent. The law in such cases, will not compel him to make defense for himself, nor will it make defense for him—it will only afford him just opportunity to do so for

himself; he could not reasonably expect or ask more, nor is there anything in the nature of personal safety or liberty that requires more.

If the prisoner may thus waive his right to a trial altogether, why may he not waive his right to be present at his trial, if he shall for any cause see fit to do so? We can conceive of no just reason why he may not, especially when he is represented by counsel, as he has the right to be, who, it is presumed, is fully advised by him, and can generally take care of his rights better than he could do himself. He may deem it of advantage to him not to be present, or it may be inconvenient for him to be. He may choose to rely upon the skill and judgment of his counsel, and expect that the court will see that the trial is conducted according to law, as it will always do. He may do this, but the waiver should appear to the satisfaction of the court, either expressly, or by reasonable implication from what he says, or by his conduct. His counsel cannot waive his right for him. *S. v. Epps,* 76 N. C., 55; *S. v. Payton,* 89 N. C., 539; *S. v. Sheets, ibid.,* 543; *Price v. State,* 36 Miss., 531; *Figlet v. State,* 7 Ohio, 180; 128 Am. Decisions, 626, and numerous cases there cited.

Generally, if not in all cases, the State will require the prisoner's presence when the judgment is entered, especially when the punishment to be imposed requires it.

The court will always require the presence of the prisoner in court during the trial, as already indicated, if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present, but the court may require it, if it
(408) shall deem it advisable to do so. When, however, the prisoner is not in close custody, but is only under recognizance for his appearance, the court will not begin a trial in his absence, unless he expressly waives his right to be present. If, however, he be under recognizance for his appearance—is present when the trial begins, and afterwards, pending it, he voluntarily and on purpose absents himself—as when he flees the court—he must be deemed to have waived his right to be present during the remainder of the trial, while he is so absent, and will not be entitled to be discharged, or to have a new trial, because he was so absent. In such case, he has fair opportunity to be present and might, and ought, as matter of duty, to be; if he is not, by the strongest, if not conclusive implication, he consents to be, and is voluntarily absent, and waives his right. He has no right to flee—he is bound not to do so—he flees at his peril, and is justly held to take the consequences of his unlawful conduct. It would savor of absurdity and positive injustice, when a party charged with crime thus flees, to allow him to take advantage of his own wrong, and obtain his discharge, or a new trial! A party charged with a felony less than capital, has the

right to give bail and be at large, unless at the trial the court shall order him into close custody. In such cases, if the defendant fly, pending the trial, the court is not bound to stop the trial and discharge the jury, and thus give the defendant a new trial. To do so, would compromise the dignity of the court, trifle with the administration of justice, and encourage guilty parties to escape. The defendant has no right, fundamental or otherwise, that renders such absurd practice and procedure necessary.

It appears that the defendant in this case was not in close custody—that he was under recognizance for his appearance, and present when his trial began.

In the course of the trial, when the jury were going into court (409) to render their verdict, he fled the court, and was not present when it was received and entered by the court. The court properly held that this was not ground for a new trial. In such a case, it might, however, in its discretion, grant a new trial for just cause, as when the defendant is ignorant and frightened, and was prompted by fear to fly, if it appear that he might have suffered prejudice by such flight.

There is no error. Let this opinion be certified to the criminal court according to law. It is so ordered.

SMITH, C. J., dissenting: It is a well settled rule, that in criminal trials the accused has the right to be present at every stage of the proceeding, and in crimes of the grade of felony, he must be, whenever any action is taken to his prejudice.

"The rule indeed," remarks *Battle, J.*, in *S. v. Blackwelder,* Phil., 38; "is but a full development of the principles contained in the 7th section of the declaration of rights (section 11 of Article I of the present Constitution); "That in all prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers with witnesses and other testimony," "and this," he adds, "ought to be kept forever sacred and inviolate." "The rule is," says *Reade, J.*, "that in a criminal trial, nothing shall be done to the prejudice of the defendant without his presence. The exception is that in a criminal trial for a *misdemeanor* the rule may be relaxed by the consent of the defendant." *S. v. Epps,* 76 N. C., 55.

In *S. v. Bray,* 67 N. C., 283, the charge was for larceny and receiving, and the jury returned a verdict of acquittal upon the first count, and guilty on the second, before the judge at his room. The verdict was so entered at the opening of the court the next morning.

On appeal the verdict was set aside, because not rendered in (410) the defendant's presence. *Boyden, J.*, delivering the opinion, says: "We think the case of *S. v. Crayton,* 6 Ired., 164, and the case

of *S. v. Blackwelder,* Phil. Law, 38, and particularly the last, are decisive of this case. It is true that both of the above cases were capital, *but the reasons for the decision in the latter case apply equally to a case like the present;* and besides, we believe the practice has been uniform to *receive such a verdict only in open court and in the presence of the prisoner."*

In *S. v. Jenkins,* 84 N. C., 812, the defendant was charged with burning a mill, and a verdict convicting him of the offense was delivered to the judge at his room, at a late hour in the night, in presence of his counsel and with their consent. Speaking for the Court, our late associate, *Ruffin, J.,* says: "In every criminal prosecution, it is the right of the accused to be informed of the accusation against him and to confront his accusers. In capital trials this right cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial. In prosecutions for *lesser felonies, he has exactly the same right.* Whether the right can be waived in such cases is a point about which the authorities seem to be divided."

In *S. v. Sheets,* 89 N. C., 543, the indictment was for malicious mischief in poisoning a mare colt, and one of the exceptions was to the judge's rehearsal of part of the evidence in his charge to the jury in the defendant's absence. It was overruled, in doing which *Ashe, J.,* our deceased associate, says: "The indictment is only for a *misdemeanor,* and the defendant, we presume, was out on bail, as the record does not show he was in custody. If he thought proper to absent himself during the progress of the trial, it was his own fault."

(411) In *S. v. Payton,* 89 N. C., 539, the charge was for a felony, made such by statute (acts 1874-75, ch. 228), in burning a stable in one count, a granary in the other, and the error assigned was in permitting one of the counsel for the State to make his argument to the jury when the defendants were not present in court. The same judge distinguishes between felonies, classing those of an inferior grade with misdemeanors, citing in recognition of the distinction, several cases decided in this Court, and concludes his review in these words: "So, it seems in the trial of *inferior felonies,* the strictness of the rules enforced on the trial of capital offenses is to some extent relaxed, and this may account for the fact that we have been unable to find any case where it has been held, that the absence of a prisoner on a trial for an inferior felony, while his case is being argued before the jury, has been held to be a ground for a new trial."

In the case of *S. v. Bray, supra,* the conviction was of an aggravated misdemeanor, punished with the same severity as the associated charge of which the defendant was acquitted, and yet the manner of rendering

the verdict vitiated the trial, and was held to entitle him to a *venire de novo*. But the ruling can be sustained upon the other ground, that no action was taken to the prejudice of the accused by the court or by the jury in his absence.

The difficulty of running the dividing line between felonies of a higher grade and felonies of an inferior grade, is an insuperable objection, to my own mind, to making such a classification, and placing the one with crimes that are capital, and the other with such as are misdemeanors, so as, under some circumstances to require the presence of the accused, and in others to dispense with it, when the verdict is rendered and judgment pronounced.

Instead of this, it is safer and more consonant with the practice in criminal trials, to recognize the broad line of demarcation that separates a felony of whatever grade from a misdemeanor; a distinction intelligible and susceptible of easy application in practice.

"Where the punishment is corporal," we quote again from (412) *S. v. Payton, supra,* "the prisoner must be present, as was held in *Rex v. Duke,* Holt, 399, where the prisoner was convicted of perjury, *Holt, C. J.,* saying, 'Judgment cannot be given against any man in his absence for corporal punishment,' and he adds: 'For if one give judgment that he be put in the pillory, it might be demanded, when? And the answer would be when we catch him; and there never was a writ to take a man and put him in the pillory.'"

In the 3d Vol. of Whar. Cr. Law, sec. 2991, the author, after stating that the accused must be present in person, proceeds: "Nor does the necessity for the defendant's presence cease with the opening of the case. Should he be at any time absent, the proceedings cease to be valid, and it will be ground for a new trial, should the court proceed with the case in defiance of this rule," except that this right may be waived in misdemeanors, in which no corporal punishment is imposed.

"Never has there heretofore" (he quotes the words of *Gibson, C. J.,* in *Pruin v. Com.,* 6 Harris, 104, which are reiterated by *Williams, J.,* in *Dougherty v. Com.,* 69 Penn., 286), "been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar, and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. *These things* (the text is in italics), *are matters of substance, and not peculiar to trials for murder. They belong to every trial for felony, at the common law, because the mitigation of the punishment does not change the character of the crime.*"

In Massachusetts, Arkansas and Ohio, statutes have been passed requiring the presence of the accused in person during a trial for felony,

and this doubtless is to prevent any ruling that this great princi-
(413) ple can be waived by any act of his own, or by his counsel, for the case cited in the opinion of the court in this case, shows that the correcting hand of the Legislature was needed.

Now, it is true, the conduct of the accused in his hasty departure, when the jury were about to deliver their verdict, the purport of which he seems to have anticipated, entitles him to no favor, but it is the importance and value of the principle which is sacrificed in giving effect to it, and the judgment consequent on its rendition.

In a sister State, where precisely the same facts occurred upon a charge of larceny, the Court say: "In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and *must be present,* during the trial, and until the final judgment. If he be absent, either in prison *or by escape,* there is a want of jurisdiction over his person to proceed with the trial, or to receive the verdict, or to pronounce the final judgment."

This ruling is followed in two other cases, *Andrews v. State,* 2 Sneed, 550; *Hutchison v. State,* 3 Cold., 97; *Webb v. State,* 5 Cold., 16.

In *Sneed v. State,* 5 Ark., 431, the Court declare the statute in that State but an affirmance of the common law, and say that when the defendant is out on bail, the principle is the same, the law not regarding the cause of his absence, as whether he is away voluntarily or against his will.

The subject is fully discussed and the cases on the point examined, in the note of the editor to the case of *Figlet v. State,* found in 128 Vol. of Am. Dec., 626.

I am not disposed to relax those safeguards which the wisdom of past ages has provided for the security of persons charged with crime, while the modern tendency is manifested in some of the courts to dispense with them, upon the idea of a waiver, because of the inconvenient necessity for a new trial, which an observance of them may render neces-
(414) sary. I am therefore constrained to enter my dissent to the ruling of the Court, and the great extent to which the opinion goes.

No error. Affirmed.

Cited: S. v. Jacobs, 107 N. C., 782; *S. v. Austin,* 108 N. C., 786; *S. v. Mitchell,* 119 N. C., 786; *S. v. Cherry,* 154 N. C., 626; *S. v. Freeze,* 170 N. C., 711; *S. v. Hartsfield,* 188 N. C., 361; *S. v. Hardee,* 192 N. C., 537; *S. v. Bazemore,* 193 N. C., 339; *S. v. O'Neal,* 197 N. C., 549.

STATE v. CICERO WILLIAMS.

Insolvent Debtor's Oath—Cost—Fine.

A prisoner is entitled to be discharged from imprisonment for the nonpayment of a fine and costs upon complying with the provisions of The Code, ch. 27, sec. 2067, *et seq.*, and this is so, although a workhouse has been established by the county commissioners in accordance with the provisions of The Code, sec. 786.

(*S. v. McNeely*, 92 N. C., 829; cited and approved.)

MOTION by the defendant to be discharged from custody, heard upon appeal from the clerk, by *Shepherd, J.*, at February Term, 1887, of WAKE Superior Court.

At the January Criminal Term, 1886, of Wake Superior Court, the defendant, Cicero Williams, having been convicted of assault and battery, it was adjudged that he be imprisoned in the common jail for twelve months, beginning 16 January, 1886, and that he pay the costs in the indictment, and if he failed to pay the costs at the expiration of the sentence, that he remain in jail till said costs are paid. In the event of failure to pay the costs, the county commissioners were authorized to imprison him in the workhouse, instead of the jail.

After having been confined in prison twelve months, and in the workhouse for twenty days after the expiration thereof, and after due notice, the defendant filed his petition to the Superior Court, before the clerk, alleging his insolvency and inability to pay the costs, and praying the court to be allowed to file his schedule, take the oath pre- (415) scribed for insolvents, and be thereafter exempt from arrest because of said costs.

After certain proceedings had in relation to said petition, to wit, on 28 February, 1887, the defendant having taken the prescribed oath, it was ordered and adjudged by the clerk that he be discharged from custody.

From this judgment the State and county commissioners for the county of Wake appealed to the Superior Court in term, and the said appeal being heard at the February Term, 1887, of the Superior Court, before Shepherd, Judge, the judgment of the clerk discharging the defendant was affirmed, and from that judgment the State and county commissioners aforesaid appealed to this Court.

Attorney-General for the State.
Geo. H. Snow for the county of Wake.
Thos. P. Devereux and Sam'l Wilder for defendant.

DAVIS, J., after stating the facts: Chapter 27, section 2967 of The Code, prescribes, that "every person committed for the fine and costs of any criminal prosecution" may be discharged from imprisonment upon complying with the provisions of said chapter. The defendant filed his petition, and in all other respects complied with the provisions of chapter 27; taking the oath prescribed in section 2972 of The Code, which, it will be observed, requires the insolvent to swear that he is not worth the sum of "fifty dollars, in any worldly substance," etc., instead of "one dollar in any worldly substance, above such *exemption as is allotted to me by law,*" etc., as was required prior to the act of 1881, chapter 76. It was suggested, the change might contravene the constitutional provision in regard to homestead and personal property exemptions, but a moment's reflection will remove all doubt. Upon
(416) conviction the judgment of the court is, that the defendant be in the custody of the sheriff until the sentence of the court is complied with, usually until the fine and costs are paid. The prisoner can discharge himself from custody only by paying the fine and costs, or, which he is allowed to do, by complying with the provisions of chapter 27 of The Code, and taking the oath prescribed. He has his election to pay the fine and costs, or remain in custody, or if he has not the means wherewith to pay the fine and costs, he may give the notice, and take the prescribed oath. None of his rights of property are violated.

But section 707, subsection 17, of The Code, authorizes "the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors, shall be restrained, and usefully employed, etc., and section 786 of The Code provides for the establishment of workhouses "for the safe-keeping, correcting, governing, and employing of offenders legally committed thereto," and the board of county commissioners for Wake say that this has been done in Wake, and the defendant was legally committed to the workhouse, and that he is not entitled to his discharge, until the fine and costs are paid. This we think is governed by section 3448, of The Code, which relates to the same subject, and which provides that the detention of the prisoner shall not extend "beyond the time fixed by the judgment of the court." That "the amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction"; and that, "it shall not be lawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize."

These sections of The Code are *in pari materia,* and the conclusion to be drawn from them is, that the imprisonment, whether *"in arcta et*

stricta custodia," or in the workhouse, or the prisoner be farmed or hired out, cannot be extended "beyond the time fixed by the (417) court."

This view is sustained by *S. v. McNeely,* 92 N. C., 829. The judges of the Superior Court may, in the exercise of their discretion, fix the time of imprisonment, and authorize the board of county commissioners to farm out the convict, as provided in section 3448 of The Code, or employ him in the workhouse, as provided in section 786, and the proceeds of his labor shall be applied to the payment of the fine and costs, but the imprisonment cannot extend beyond the time fixed, and he may be discharged from commitment for the fine and costs, in the manner prescribed in section 2967, *et seq.* There is no error.

No error. Affirmed.

Cited: S. v. Burton, 113 N. C., 657; *Fertilizer Co. v. Grubbs,* 114 N. C., 472; *Lockhart v. Bear,* 117 N. C., 308; *S. v. White,* 125 N. C., 685; *S. v. Morgan,* 141 N. C., 732; *Oakley v. Lasater,* 172 N. C., 97.

STATE v. ROBERT POWELL.

Town Ordinance—Penalty—Misdemeanor—Jurisdiction.

1. Under Article I, section 13, and Article IV, sections 12, 14 and 27, of the Constitution, the Legislature may establish courts inferior to the Superior Court—may constitute the mayor of a town an "inferior court, with the jurisdiction of a justice of the peace," or may constitute him a "special court within the corporate limits of the town," with a larger jurisdiction than that of justice of the peace—and may dispense with a jury trial in "petty misdemeanors," and provide other means of trial for such offenses.

2. Persons violating sections 3 and 4 of the ordinances of the town of Morganton, not only incur the penalty prescribed therein, but under sections 11 and 12 of the charter of said town are also guilty of a misdemeanor, for which they may be tried and punished by the mayor as a "special court" for said town.

(Causee v. Anders, 4 D. & B., 246; *Pendleton v. Davis,* 1 Jones, 93; *Smithwick v. Ward,* 7 Jones, 64, and *S. v. Moss,* 2 Jones, 66; cited and approved.)

INDICTMENT on appeal from the mayor of the town of Mor- (418) ganton, tried before *Graves, J.,* at Spring Term, 1886, of BURKE Superior Court.

The court dismissed the proceeding for want of jurisdiction, from which the Solicitor appealed. The facts are sufficiently stated in the opinion of the Court.

Attorney-General for the State.
S. J. Erwin for defendant.

SMITH, C. J. The prosecution against the defendant, commenced and tried before the mayor of the town of Morganton, is for a misdemeanor, in violating a town ordinance, and by defendant's appeal was carried to the Superior Court. The ordinance is set out in the record, and among other subjects of taxation, imposes upon the keeper of each stable a tax of ten dollars per annum, to be paid in advance, and a license obtained to carry on the business, and concludes with affixing a penalty, in these words:

"Any person or persons, or companies, who shall begin, carry on or practice any of the business, trades, practices, professions or arts enumerated in section 3 (preceding), without first having paid the tax, and procured from the secretary of the board a license, shall forfeit and pay the sum of twenty-five dollars in addition to the tax."

The charge is, that the defendant did begin and carry on the trade or business of keeping a "livery stable for pay, without first having paid the privilege tax of ten dollars, and procuring a license from the secretary," etc.

The record of the proceedings in the Superior Court is not in entire harmony with the statement contained in the case sent, but the variance is not material. The entry in the record is: "Demurrer sustained. On motion of defendant's counsel, this action is dismissed for want of jurisdiction."

(419) The case sets out that the defendant moved to quash and dismiss the said warrant and proceeding, upon the ground that the said ordinances enacted under said charter (Private acts 1885, ch. 120), created no criminal offense, but provided a simple penalty, recoverable by civil action, "which motion was sustained by the court." The prosecuting solicitor in the court below contended, as the Attorney General here contends, that by virtue of sections 11 and 12, the violation of the ordinances, although affixing a penalty, is likewise constituted a criminal act, the jurisdiction to try which is conferred upon the mayor.

The first of these sections confers upon this officer, in general terms, the jurisdiction and authority of a justice of the peace, and then proceeds to declare, that, "the mayor shall further be a Special Court within the corporate limits of the town, to have arrested and try all persons who are *charged with a misdemeanor for violating any ordi-*

nance of the town; and if the accused shall be found guilty, he shall be fined at the discretion of the court or mayor, not exceeding the amount specified in the ordinance or ordinances so violated, or imprisoned at the discretion of the court or mayor, not exceeding the length of time specified in the ordinance or ordinances, so violated, *or both: Provided,* the fine shall in no case exceed the sum of fifty dollars, nor the imprisonment thirty days." Section 12 enacts, "that any person violating any ordinance of the town, *shall be deemed guilty of a misdemeanor,* but the punishment thereof shall not exceed a fine of fifty dollars, and imprisonment at labor on the streets for thirty days, *or both.*"

It is quite apparent that violations of town ordinances not only impose a definite penalty, consisting of the license tax, which ought to be paid, increased by adding twenty-five dollars thereto, recoverable as such, but the quality of a criminal offense is imparted to them by the recited provisions of the incorporating statute.

Statutes are not infrequent in the course of legislation where a (420) penalty is imposed for an act or neglect, and at the same time it exposes the offender to a criminal prosecution by the public, nor do we find the exercise of this power under the Constitution to have been questioned. It presents, not the case of a double punishment for one offense, but a single and divided punishment, enforced by different methods. In an action for an assault and battery where the object is the recovery of damages for the personal injury, a jury adds those that are punitory, while at the same time the wrong-doer may be made to suffer by a public prosecution for the same *illegal* act; *Causee v. Anders,* 4 D. & B., 246; *Pendleton v. Davis,* 1 Jones, 98; *Smithwick v. Ward,* 7 Jones, 64.

While the right of every person charged with crime of whatever grade to a trial by jury was secured in the former Constitution, and no power to punish without a convicting verdict could be conferred upon the officers of a town, as was decided in *S. v. Moss,* 2 Jones, 66; a change has been made in the present Constitution, and the Legislature "may provide other means of trial for petty misdemeanors, with the right of appeal." Art. I, sec. 13.

The General Assembly is moreover authorized to distribute "the power and jurisdiction which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or *which may be established by law, in such manner as it may deem best.*" Art. IV, sec. 12.

The first clause in section eleven of the charter, constitutes the mayor "an Inferior Court" and clothes him with the functions of a justice of the peace, whose jurisdiction is conferred and defined in section 27, of Article IV, of the Constitution. This jurisdiction in criminal cases is limited to the imposition of a fine or imprisonment, to each of which a

maximum is affixed, and while neither can be exceeded, both punishments cannot be imposed, nor any parts of both.

(421) But the mayor is also constituted, "a Special Court within the corporate limits of the town," and in this capacity his authority is enlarged, extending to the infliction of both punishments, by express words used in that and in the next section.

This enlargement of jurisdiction may have been the result of inadvertence, but is plainly said, and must be held to convey the legislative intent. To this end we must annex to the exercise of the power under the Constitution, the incidents appertaining to the exercise of power by a justice of the peace in reference to a jury and an appeal, as contained in The Code, section 898, and following. The association of the mayor's functions as those of "an Inferior Court" and of "a Special Court within the corporate limits" seems to indicate a similarity in the manner of their exercise as suggested.

There is error in the ruling, and this will be certified that the cause may proceed to trial according to the law as declared in this opinion.

Error. *Venire de novo.*

Cited: S. v. Davis, 111 N. C., 734; *S. v. Burton,* 113 N. C., 663; *S. v. Whitaker,* 114 N. C., 821; *S. v. Brittain,* 143 N. C., 669.

STATE v. L. W. RICE.

Town Ordinance.

Where a town ordinance leaves the fine or penalty imposed by it uncertain as to the amount, it is void for uncertainty, and a warrant founded on it will be quashed.

(S. v. Crenshaw, 94 N. C., 877; *S. v. Cainan, ibid.,* 883; *Commissioners v. Harris,* 7 Jones, 281, cited and approved.)

INDICTMENT, heard before *Gilmer, J.,* at March Term, 1887, of DAVIDSON Superior Court.

(422) The defendant was held under a warrant issued by the mayor of the town of Lexington, to answer criminally, and was convicted before him, for the alleged violation of a town ordinance, and the part thereof material to be set forth here provides, that "any person whose duty it shall be to make such alterations, and who shall refuse to

do so, after due notice thereof, shall be fined a sum *not exceeding* five dollars, and one dollar for each and every day he may neglect to make such repairs."

The defendant appealed to the Superior Court, and that court held that the ordinance in question was void, quashed the warrant, and gave judgment for the defendant, from which the State appealed to this Court.

Attorney-General and M. H. Pinnix for the State.
F. C. Robbins for defendant.

MERRIMON, J., after stating the facts: We cannot distinguish this case from *S. v. Crenshaw,* 94 N. C., 877, and *S. v. Cainan, ibid.,* 883. In those cases, and that of *Commissioners v. Harris,* 7 Jones, 281, it was held that a town ordinance that left the fine or penalty to be imposed uncertain as to the amount of the same, was void for uncertainty. Here the fine to be imposed might be five dollars or any less sum. It was therefore uncertain, and the ordinance void.

There is no error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Irvin, 126 N. C., 995; *S. v. Addington,* 143 N. C., 686.

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(423)

STATE v. ALBERT STARNES.

Newly Discovered Evidence—Appeal—Bill of Indictment—How Returned into Court.

1. A new trial for newly discovered evidence cannot be given by the Supreme Court in a criminal action.
2. *Quære,* whether after an appeal and the affirmance of the judgment, the Superior Court can grant a new trial for newly discovered evidence in a criminal case.
3. A new trial will not be granted for newly discovered evidence, when the new evidence is merely cumulative, and only tends to contradict the witness for the other side.
4. No appeal lies from the refusal of a judge to grant a new trial for newly discovered evidence.

5. Where the record sets out that a bill of indictment was returned into open court by the hands of the foreman of the grand jury, it sufficiently appears that the grand jurors were present in court, and the entry is a proper one.

(Simmons v. Mann, 92 N. C., 12; *Carson v. Dellinger*, 90 N. C., 226; cited and approved.)

INDICTMENT for rape, heard before *Graves, J.*, at September Term, 1886, of the Superior Court of UNION County.

The defendant appealed.

The facts fully appear in the opinion.

Attorney-General for the State.
D. A. Covington for defendant.

SMITH, C. J. When this cause was before the Court on the former appeal of the defendant, 94 N. C., 973, and no error was found in the record of which the prisoner could complain, application for an order for a new trial to be had in the court below, was made upon the ground of the discovery of new and material testimony in favor of the accused, since the former trial. The motion, so far as our own and the (424) researches of counsel disclose, is without precedent in the administration of the criminal law on appeals to this Court, and so fundamentally repugnant to the functions of a reviewing Court, whose office is to examine and determine assigned errors appearing in the record, that we did not look into the affidavits offered in support of the motion, nor hesitate in denying it.

When the decision was certified to the Superior Court of Union, in order that it should proceed to resentence the prisoner, his counsel, when inquiry was made of him if he had aught to say why judgment of death should not be pronounced against him, at Fall Term, 1886, renewed the application for setting aside the verdict and granting the prisoner a new trial, upon the same grounds, sustaining it by the evidence contained in several affidavits, that of the prisoner himself among them.

The material new testimony, aside from that produced to show the use of due diligence in the preparation of the defense and the procuring of witnesses in its support at the first trial, is contained in the affidavit of Eugenia Moser, a witness summoned and then too ill to be present and whose testimony, her husband, Arch Moser, stated to prisoner's counsel, would be essentially the same as his own, in consequence of which information, the trial was not delayed for her absence.

This affidavit, mainly is not altogether relied on as bringing the application within the rule that prevails in civil suits, is reproduced in her own words, so far as they are pertinent to the inquiry: "It was about half an hour before 12 o'clock on a Friday night, in November, 1884,

when Rosa came to our house, and said that some one had outraged her. She did not tell us who had done it, nor did she accuse any one; said she knew who did it. She also said, 'I have never told you all who did it.'"

The affiant, after mentioning her going to the house of Rosa (425) the next morning, and finding her sitting on the hearth crying, proceeds: "Just then Pomp Belk passed in a wagon. Rosa saw him, and said, 'I believe that negro (pointing to Pomp) is the man who outraged me.' They asked me to see if he had boots on, and said the man who was here last night had boots on."

At a subsequent time when Pomp came to Mr. Moser's house and inquired for him, and then asked to see Rosa, who from fear, would not go out, affiant states Rosa again said: "I believe he is the man who outraged me, for he handles the same words that were handled to me last night. I think he is the man from his voice." In a second affidavit, she states more fully the occurrences of the night when the crime was committed, and described what Rosa then detailed of the circumstances, in these words: "She said that the man who committed the outrage told her he would not hurt her, and said he was the same man who talked to her when she was picking cotton for John Whitley, and he was picking cotton for Billy Steal; that she knew who the man was, but was not going to tell any of us."

Affiant further states, that after Rosa had gone to town for the warrant and returned, John Whitley came to the house of affiant, and said to Rosa, he was afraid she had made a mistake, and taken out the warrant for the wrong man, and that something not understood having been spoken about Pomp Belk and John Dees, she told Whitley to go and have Pomp Belk put in the warrant.

The court declined to set aside the verdict and reopened the case, finding as follows:

I. That the newly discovered witness, Eugenia Moser, would testify to the matters set out in her affidavit, and that such matters are most probably true.

II. That this evidence would tend to discredit the prosecutrix, and is material.

III. That the prisoner has used due diligence.

IV. That on the trial, evidence was offered tending to dis- (426) credit the testimony of the prosecutrix, and the newly discovered evidence is cumulative merely; And

V. That it may probably change the result upon a second trial.

The court, upon these findings, refused a new trial, in deference to the adjudication of the Supreme Court, that a new trial should not be granted where the additional evidence is merely cumulative and im-

peaching, and not independent. To this ruling the prisoner excepts, and in answer to the same propounded interrogatory if he had aught further to saw why sentence should not be pronounced, moved in arrest of judgment, for that,

I. The record fails to show that the bill of indictment was returned into open court by the grand jurors as a body; and

II. The record affirmatively states the contrary.

This motion was also overruled, and from the judgment of death pronounced against the prisoner, he appealed.

Without stopping to inquire whether at this late stage in the proceedings, and after an unsuccessful appeal to the Supreme Court upon alleged errors in law, such an application can be entertained in the Superior Court, to whose jurisdiction the cause has been remitted, we proceed, as did the judge who assumed the right to act upon the application, to consider the case upon its merits, as if made in due and apt time, and to a court having jurisdiction.

The judge refused to exercise the invoked power upon a simple legal ground that it was unwarranted by the practice recognized and acted on as a governing rule, which requires the newly discovered evidence to be something more than cumulative, and that this was competent only for the purpose of discrediting the witness, in her identification of the prisoner as the author of the outrage upon her person. It all
(427) tends to show that no reliance can be placed in what she swears about the prisoner, because she first charged the crime upon another. But she had charged the same man, Pomp Belk, in the warrant sued out for the crime, and this was in proof upon the former trial. The new but intensifies the former evidence, that the prosecutrix first accused another party, and this does not seem to have been in any manner contradicted when heard by the jury, and must have been considered by them in determining the credit due to her testimony in identifying the accused, after her conflicting previous statements.

Not only is the proposed evidence directed to the impairment of confidence in her sworn recognition of the criminal, but it is also of the same character and but a repetition of what was before shown. The present are her declarations made soon after the outrage, and in the confusion incident to its perpetration, and before they were embodied in the more solemn form of suing out a State warrant and charging the crime upon another.

Not only does the proposed proof assail the integrity or memory of the witness, or both, but it is confined to the very same point, and not more forcible than that before adduced. It is therefore only cumulative, and to the same point. The law was properly declared by the court as regulating the practice in similar applications in civil cases.

"It is a well settled rule of law" (we quote from the opinion of *Merrimon, J.*, delivered for the Court in *Simmons v. Mann,* 92 N. C., 12), "that a new trial will not be granted upon the ground of newly discovered evidence, if this evidence is merely *cumulative* (the italics are in the opinion), or in corroboration of evidence received on the former trial in respect to a particular point, or in support of a particular allegation." See cases cited.

Moreover, the granting or refusing a new trial for such cause, is the exercise of an unreviewable discretion in the judge, as decided in *Carson v. Dellinger,* 90 N. C., 226, where the practice is fully discussed.

While in this case, the judge puts his refusal upon the ground (428) that the case made does not come up to the rule in one essential particular, he does not abnegate the power to make the order when all its requirements are met, and this in the pending application, and there is no error in law in his ruling.

The motion in arrest of judgment, based upon the manner of returning the bill into court, though not specifically mentioned in the opinion in the former appeal, is necessarily disposed of in the concluding declaration of this Court, "that there is no error in the record." But if it had been, the motion finds no support in the record, which says, "which said bill of indictment the jurors aforesaid, on 7 April, 1885, it being Tuesday of the first week of the term of the court, returned into open court by the hands of J. M. Ferrell, their foreman." This language is not reasonably susceptible of the interpretation put upon it by the prisoner's counsel. It is explicit that the grand jurors themselves were present and returned the bill, and that their foreman, in their behalf, and by their assent, handed in the bill, and this is the usual and proper practice. There is no error.

We deem the occasion a proper one to speak of the zeal, ability, and persevering energy with which the prisoner's defense has been conducted by counsel assigned by the court, and without fee, and the assurance which professional devotion to duty gives, that justice will be impartially administered to all, irrespective of their means or condition in life, in our courts.

No error. Affirmed.

Cited: S. v. DeGraff, 113 N. C., 694; *S. v. Edwards,* 126 N. C., 1055; *S. v. Council,* 129 N. C., 513; *Turner v. Davis,* 132 N. C., 190; *S. v. Register,* 133 N. C., 754; *Aden v. Doub,* 146 N. C., 13; *Crisco v. Yow,* 153 N. C., 436; *Johnson v. R. R.,* 163 N. C., 454; *S. v. Ice Co.,* 166 N. C., 404; *Land Co. v. Bostic,* 168 N. C., 100; *Alexander v. Cedar Works,* 177 N. C., 537; *Brown v. Hillsboro,* 185 N. C., 380; *S. v. Hartsfield,* 188 N. C., 358; *S. v. Griffin,* 190 N. C., 135.

(429)

STATE v. ED. GILMER.

Evidence—Larceny—Judge's Charge.

1. Where a defendant is introduced as a witness in his own behalf, his testimony is to be considered by the jury, and he has the right to have the jury instructed as to the effect of his evidence, if believed by them.

2. Where the evidence presents the case in two aspects, the trial judge should charge the jury in both aspects of the case.

3. Where the defendant was indicted for larceny and evidence of his guilt was introduced by the State, and as a witness in his own behalf, he testified that the prosecutor was intoxicated, and at his request, he (the defendant) was taking care of property alleged to have been stolen; *It was held*, error in the trial judge not to present the case to the jury in the aspect presented by the defendant's evidence.

(*Bailey v. Pool*, 13 Ired., 404; *S. v. Cardwell*, Busb., 245; *S. v. Dunlap*, 65 N. C., 288; *S. v. Matthews*, 78 N. C., 523; *S. v. Grady*, 83 N. C., 643; cited and approved.)

INDICTMENT for larceny, tried before *Clark, J.*, at June Term, 1886, of GUILFORD Superior Court.

The defendant is indicted for the larceny of goods, taken from the person of the prosecutor, one Sherwood.

There was evidence for the State, tending to prove the guilt of the defendant.

He was examined on the trial as a witness in his own behalf, and testified as follows: "That he took the walk at Sherwood's instance; that Sherwood was intoxicated, and threw away the articles except the hat, and that he gathered them up to preserve them for Sherwood, who sat down in the woods, where he was found by Reese; that Sherwood's hat dropped off, and Sherwood took defendant's hat, put it on, and leaned his head against a tree; that defendant placed the articles in Sherwood's hat, and insisted on returning, which Sherwood refused to do;
(430) that defendant then, by agreement with Sherwood, returned to the saloon, at which place he was to wait for Sherwood; that shortly thereafter, while engaged in a game of "pool" at Jeffries', he was arrested by Reese."

The defendant's counsel asked the court to instruct the jury, that if they believed his testimony, then he was not guilty. The court "did not so instruct the jury, but told them that if Sherwood was so drunk that he did not know that the defendant took the goods; or that if defendant resorted to a trick to procure them, and if he took them feloniously, he was guilty of larceny."

There was a verdict of guilty, and judgment for the State, from which the defendant appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: In our judgment, the defendant was entitled to the instruction prayed for by his counsel, or the substance of it. He was a competent witness in his own behalf, and he had the right to have his testimony go to the jury, and be considered by them like that of any other witness, and have them give it such weight as they might deem just. If his testimony was true, plainly he was not guilty, because, in that case, in no reasonable view of what he did, could it constitute the crime of larceny.

According to his account of what he did, he was walking in the woods with an intoxicated companion at the latter's request, and instead of stealing the property in question, he only sought to take care of it for the owner, who was not in a condition to take care of it himself. Truly such friendly acts, under such circumstances, could not be deemed larceny.

It may be, that his testimony was not true, but it was for the jury to determine any question in that respect, and without (431) prejudice.

The court made no allusion in its charge to the testimony of the defendant, although expressly requested to do so. That it did not, tended to prejudice him before the jury, especially, as the charge directed their attention to the evidence of the State going to prove guilt.

Granting that the charge, so far as it went, was correct, the court ought to have gone further, and directed the attention of the jury to that view of the evidence favorable to the defendant, certainly as he asked it to do so.

When on the trial, the evidence is conflicting and presents the case in two or more distinct aspects, one or more of them favorable to one side, and one or more favorable to the other, the court, in applying the law, should direct the attention of the jury to such various aspects, more especially when called upon to do so. It might—oftentimes would—greatly and unjustly prejudice a party, if this were not done. It would be worse, if the court should direct the attention of the jury to the view favorable to one side, and not to that favorable to the other. *Bailey v. Pool,* 13 Ired., 404; *S. v. Cardwell,* Bus., 245; *S. v. Dunlap,* 65 N. C., 288; *S. v. Matthews,* 78 N. C., 523; *S. v. Grady,* 83 N. C., 643.

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

Error. Reversed.

Cited: S. v. Melton, 120 N. C., 597.

(432)

STATE v. WILSON CROWDER.

Removal of Crop—Evidence.

1. The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it, is not complete, unless the crop is removed without giving the five days notice, for if the notice is given, removing the crop is not an offense.

2. The want of such notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee.

(*S. v. Wilbourne*, 87 N. C., 529; cited and approved.)

INDICTMENT for removing a crop, tried before *Clark, J.*, and a jury, at January Term, 1887, of ANSON Superior Court.

There was a verdict of guilty, and the defendant appealed. The facts appear in the opinion.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The statute (The Code, sec. 1759), in respect to "landlord and tenant," provides that, "Any lessee or cropper, or the assigns of either, or any other person, who shall remove said crop, or any part thereof from such land, without the consent of the lessor or his assigns, and without giving him or his agent five days notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns on said crop, shall be guilty of a misdemeanor; and if any landlord shall unlawfully, wilfully, knowingly, and without process of law, and unjustly, seize the crop of his tenant, when there is nothing due him, he shall be guilty of a misdemeanor."

The offense thus prohibited is not complete unless the lessee, or cropper, or the assignee of either, or other person, removed the crop,
(433) or a part of it, without giving the lessor or his assigns five days notice of such intended removal, and this essential fact must constitute part of the charge in the indictment. The statute plainly so provides.

It is not simply such removal without the consent of the lessor or his assigns and before satisfying all liens on the crop held by them, that constitutes the offense; this is not the offense prohibited—but it is this, done without giving five days notice to the lessor or his assigns or his agent, that constitutes it.

The purpose is to make it indictable to thus remove the crop or any part of it, without notice to the lessor or his assignee, and thus deprive him of just opportunity to enforce his lien, and to that end, take such steps as need be taken to prevent such removal. If the notice is given, and the lessor or his assignee fails to enforce his lien and to take steps to prevent the removal, then it is not indictable to remove the crop. In that case, the inference would be, that the lessor or his assignee assented to the removal, or that he had no lien on the crop.

The court instructed the jury, that the defendant "must pay for the rent and supplies, and he must give the five days notice. If he failed to do *either of these things,* he would be guilty." In this there is error, for the reasons stated above.

It was incumbent on the State to prove that the defendant did not give the five days notice as required, because that fact was an essential constituent element of the offense charged. *S. v. Wilbourne,* 87 N. C., 529. It was not, however, necessary to prove that fact by the lessor or his assignee; it might be proven by any competent evidence that would satisfy the jury that such notice had not been given.

There is error, and the defendant is entitled to a new trial. To (434) that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

Cited: S. v. Bell, 136 N. C., 675; *S. v. Connor,* 142 N. C., 704; *S. v. Harris,* 161 N. C., 268; *S. v. Johnson,* 188 N. C., 594.

STATE v. SAMUEL B. PEARSON.

Illegal Voting—Pardon.

1. The decision of the judges of election that a person is entitled to vote, is a complete defense to an indictment for illegal voting, although such person may not in fact be entitled to vote.

2. *Quære,* whether a pardon will restore the right to vote to one who has been convicted of an infamous crime.

(S. v. Boyett, 10 Ired., 336; *S. v. Hart,* 6 Jones, 389; cited and distinguished.)

INDICTMENT, tried before *Graves, J.,* and a jury, at March Term, 1886, of BURKE Superior Court.

The defendant is indicted under the statute (The Code, sec. 2709), for having unlawfully voted at the general election in November, 1884.

He pleaded not guilty, and the jury rendered a special verdict, from which it appears, that at Spring Term, 1882, of the Superior Court of the county of Burke, he was convicted of the crime of manslaughter—that at the time of the conviction he was only nineteen years of age—that subsequently, and before he attained his majority, the Governor pardoned him for this offense, he having been sentenced to ten years imprisonment in the penitentiary; that after he came of age, and shortly before the general election for Governor, President and other officers, in 1884, he had himself registered as a voter in Silver Creek Township, in the county mentioned above; that on the Saturday next preceding
(435) this election, when the registrar and judges of the election had assembled, as required by the statute (The Code, sec. 2677), to afford opportunity to those who wished to do so, to challenge voters, he was notified that on the registration book his name was marked "challenged"; that he appeared at once and told the judges "that if he had the right to vote, he wanted to vote, but if they decided he had not a right to vote, he would not vote, as they were the ones to decide it"; that on the day of the election he appeared at the polling-place, and handed his ballot to the judges of the election; one of them called out his name and said, "registered and voted," and his ballot was deposited in the ballot-box, and there was no challenge of his vote at that time.

The court being of opinion that upon the facts found by the special verdict he was not guilty, a verdict to that effect was entered, and thereupon there was judgment that the defendant be discharged, and go without day, from which the State appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: The findings of the facts by the special verdict in some respects are not as definite and satisfactory as they should be; but we think that it sufficiently appears, that there was no question of the defendant's right to vote, except upon the ground that he had been convicted of the crime of manslaughter. As to that, he had been pardoned by the Governor. His right to vote had been challenged. He at once appeared before the registrar and judges of the election, at the time and place as required by law, and frankly submitted to them the question of his right to vote, saying as he did so, if he "had the right to vote, he wanted to vote, but if they decided he had not a right to vote, he would not vote, as they were the ones to decide."
(436) It was the duty of the registrar and judges to hear and decide the

question thus submitted. It does not appear affirmatively that they did deliver any formal decision and enter the same in a book or on paper—this was not necessary—it was sufficient if they decided. Their proceedings were summary and informal. The presumption is, they did decide. The registrar did not erase his name from the books, as he was required to do, if the challenge was sustained. The defendant was afterwards allowed to vote without question or further challenge, the same judges receiving his vote, and the registrar being present. It was their duty to challenge his vote on the day of election, if they had reason to believe or suspect that he was not qualified.

So that we think it sufficiently appears that the registrar and judges of election did decide that he had the right to vote.

This decision, however erroneous, if honestly made, and so acted upon by the defendant, gave him the right to vote in contemplation of the statute making it criminal to vote illegally, although the rightfulness of his vote might afterwards be questioned in any proper civil action or proceeding. While the decisions of the registrar and judges of election in respect to the qualifications of electors, are very important, and should be made upon vigilant inquiry, care, scrutiny and deliberation, they are not final and conclusive. They are intended to facilitate the right of the elector entitled to vote, and secure an honest and just election, subject to the authority of any proper jurisdiction, to inquire into and decide upon the lawfulness of any vote, or any number of votes given. But their decision in favor of the right of a party to vote, in the absence of fraud and collusion, must have the effect of securing the voter immunity from criminal liability, if it should afterwards appear that he did not have the right to vote. It would be unjust and monstrous to establish a tribunal, charged with jurisdictional functions to decide questions that might arise as to the right of one claiming the right to vote (437) at an election, and in case of a decision in his favor, and he voted, to make him amenable criminally and subject to prosecution! The statute does not so provide.

It is not alleged or suggested that the registrar and judges of election and the defendant acted in bad faith in this case, and the former having decided that the defendant had the right to vote as he did, he was not guilty of the offense charged against him.

This renders it unnecessary for us to decide upon the legal effect of the pardon mentioned in respect to the defendant's eligibility as an elector, and we express no opinion in that respect.

This case is unlike the cases of *S. v. Boyett,* 10 Ired., 336, and *S. v. Hart,* 6 Jones, 389. In these cases, the judges of election did not decide in favor of the right of the parties respectively to vote or at all—they voted in the absence of any decision. The learned judges who delivered

the opinions of the Court in them, said, however, that if there had been a decision in favor of the right to vote, the defendants would not have been guilty.

There is no error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

(438)

STATE v. CHRISTOPHER A. BLAND.

Manslaughter—Police Officer.

The law does not clothe a police officer with authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue, and it must be left to the jury to pass on the necessity for such killing.

(*S. v. Stalcup*, 2 Ired., 50; *S. v. McNinch*, 90 N. C., 696; *S. v. Pendergrass*, 2 D. & B., 365; cited and approved.)

THIS was an indictment for manslaughter, tried before *Merrimon, J.*, at January Term, 1887, of PITT Superior Court.

The defendant was charged with the felonious slaying of one John Cannon.

There was no objection to the admission of testimony, but the accused was a police officer of the town of Bell's Ferry, and the evidence showed that the homicide was committed while in discharge of his duty as such, and the only point insisted upon was, that his Honor in his charge to the jury, failed to draw a proper distinction between a homicide committed by an officer in the discharge of his duty in arresting and confining prisoners, and one committed by a private person.

The evidence and charge of the court are set out at length in the record, but no exception is taken to the evidence, and the charge of his Honor complained of, sufficiently refers to it to render the exceptions intelligible, without reporting it here.

After charging the jury that they must be satisfied beyond a reasonable doubt that the death of the deceased was caused by the blow admitted to have been inflicted by the prisoner, or they must acquit, he proceeds as follows: "If the jury shall be satisfied by the evidence, that the defendant was at the time a police officer of Bell's Ferry, ad-
(439) mitted to be an incorporated town, and that Tom Brooks was in said town at the time, engaged in a difficulty with a negro, or was

drunk and disorderly in the presence of the defendant, then the defendant not only had the right, but it was his duty to arrest him, without a warrant, and if he did arrest him under such circumstances, he had the right, and it was his duty, to keep him in custody, and to this end to commit him to the place of confinement used by the town, until he could conveniently be carried before the mayor of the town; and if while he had him under arrest, the deceased attempted to rescue him, or to prevent the defendant from using the necessary means to keep him in custody until such time as he might conveniently take him before the mayor for trial, and if in order to keep Brooks in custody and prevent his rescue by deceased, it was necessary for the defendant to strike the deceased with the "billy," and defendant in striking the blow used no more force than was necessary (and in estimating the necessary force in this view of the case, the jury need not be very nice, or as is sometimes said, weigh in gold scales), the defendant will be justified or excused, and the jury will return a verdict of not guilty. But when the defendant arrested Brooks, it was his duty to carry him before the mayor for trial as soon as he conveniently might, and if he could have done so, immediately, and Brooks at the time was not too much intoxicated, but in a condition to be tried by the mayor, then the defendant had no right to carry him to the place of confinement used by the town, and unless defendant acted honestly according to his sense of right, and not under a pretext of duty in starting with Brooks to such place, if he struck the deceased the fatal blow to prevent the deceased from defeating his, defendant's, purpose, to carry Brooks to such place of custody, he would be guilty of manslaughter.

"In any view of the case, the jury must be satisfied from the (440) testimony, that it was absolutely necessary for the defendant to strike the deceased, for it is *necessity* that distinguishes between manslaughter and excusable homicide, and it is for the jury to say from the testimony, whether the defendant acted honestly, and not under a pretext of duty, in starting with Brooks to a place of confinement used by the town, instead of to the mayor.

"If at the time the defendant struck the deceased, the deceased was coming at him with a stick drawn upon him, and defendant had reason to believe, and did believe, he was in danger of losing his life, or suffering great bodily harm at the hands of the deceased, and struck because it was necessary for him to so protect his life or himself from enormous bodily harm, and there was no other way of saving his life or avoiding such harm, he would be justified. But in this view of the case, the jury must be satisfied from the testimony, that unless the defendant had struck the deceased, he, the defendant, was in imminent and manifest

danger of losing his life, or suffering enormous bodily harm, or that he had reasonable grounds to believe, and did believe, that he was in such danger.

"In order to enable the jury to form a correct judgment whether the defendant at the time was in such danger or not, they may, as far as possible from the testimony, place themselves in the defendant's situation, surrounded with the appearances of danger, if there were such appearances, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed, if he possessed such knowledge.

"The jury are to judge of the reasonableness of the defendant's apprehension of danger, from the testimony, and must be satisfied that they were well grounded. . . . The defendant insists that he was a duly appointed and sworn officer, and that as such officer he had the right to arrest Brooks without a warrant, because he was in defendant's (441) view, disorderly, cursing and swearing, in violation of an ordinance of the town. He insists that he did arrest Brooks, and had him lawfully in custody, and when he had him so arrested and in custody, the deceased, armed with a stick, attempted to rescue him, and to prevent the rescue, it was necessary for him to strike the deceased with the "billy," and that he did strike him, because it was necessary for him to do so. If you are satisfied beyond a reasonable doubt from the evidence, that the blow caused the death of the deceased, then, unless you are satisfied from the testimony, that it was necessary to prevent the deceased from rescuing Brooks, to strike the blow, you will find the defendant guilty, unless he struck the blow in self-defense.

"If the defendant was a policeman of the town, as he insists he was, the law clothed him with the same authority to make arrests within the town, as is vested in a sheriff, and if he could have kept Brooks in custody and prevented deceased from rescuing him without striking, it was his duty to do so. Were there by-standers? If so, he had authority to call them to his aid, and if by doing so he could have avoided striking the deceased, he should have done so, and if he failed to do so, he was not justified in striking the deceased, and it will be your duty to return a verdict of guilty; but if the situation was such that he could not reasonably and conveniently procure assistance, then he had a right to use such force as was necessary under the circumstances, to secure Brooks, and if in the due exercise of that right he struck deceased, he was justified."

There was a verdict of guilty, and from the judgment the defendant appealed.

Attorney-General for the State.
Thos. M. Argo for defendant.

DAVIS, J., after stating the facts: We have set out the charge (442) of his Honor fully, because it was insisted by the counsel for the defendant, that being a policeman, clothed with the authority to arrest and detain the person violating the ordinance of the town of Bell's Ferry, he was the sole judge of the propriety and necessity of carrying him to the place of confinement, and of the necessity of using force to prevent his rescue, and of the extent to which it was necessary, and that the charge of his Honor failed to present to the jury a proper distinction between a homicide committed by a private individual, and one committed by an officer thus clothed with the authority, and charged with the duty of arresting and detaining violators of the law, and invested with the rights, within their discretion, to judge of the necessity and of the mode of confining such violators.

Upon a careful review of his Honor's charge, we are unable to discover any error of the nature complained of, and altogether it presents to the jury the rights and authority of the defendant as an officer, and the extent of his power, in as just and favorable light as he was entitled to.

The case of *S. v. Stalcup,* 2 Ired., 50, was relied on by the defendant. In that case it was held, that the officer was justified in tying a prisoner, when it was necessary to secure him, and of the necessity of adopting that mode of securing him, the officer was the judge, but in that case *Judge Gaston* said: "He (the officer) will be liable, although he does not transcend his powers, if he grossly abuse them, and whether he did or not so abuse them, was the proper inquiry to be submitted to the jury. Upon this inquiry, we hold that the instructions should have been . . . that there was an abuse of authority, if the facts testified to convinced the jury that the officer did not act honestly in the performance of duty according to his sense of right, but under the pretext of duty, was gratifying his malice, but if they were not so convinced, he did not abuse his authority."

Stalcup was a constable, and indicted for an assault and bat- (443) tery upon the prosecutor, whom he had tied as a mode of securing him, and of the necessity of adopting that mode he was the judge; but it was for the jury to say from the evidence, whether he was acting honestly and from a sense of duty, or under a pretext of duty. The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine from the testimony, the existence or absence of the necessity. They must judge of the reasonableness of the grounds upon which the officer acted, and the charge of his Honor is fully warranted by the cases of *S. v. Stalcup, supra; S. v. McNinch,*

90 N. C., 696; and *S. v. Pendergrass,* 2 D. & B., 365; and is a full and clear statement of the law as applicable to the several phases of the testimony in the case.

There is no error. Let this be certified.

No error. Affirmed.

Cited: S. v. Pugh, 101 N. C., 740; *S. v. McMahan,* 103 N. C., 382; *S. v. Rollins,* 113 N. C., 733, 5; *S. v. Simmons,* 192 N. C., 696.

STATE v. W. K. BALLARD.

Evidence—Collateral Matters—Contradicting Witness—Larceny of Growing Crops—Indictment.

1. While as a general rule the answer of a witness on cross-examination to questions about collateral matters is conclusive, the rule does not apply to questions in regard to matters which, although collateral, tend to show the temper, disposition and conduct of the witness in relation to the cause or parties.

2. Where the cross-examination, instead of being general, descends to particulars, the party is bound by the answer to collateral matters, even when they go to show the witness's temper and conduct in relation to the cause or parties.

3. An indictment for the larceny of growing crops need not allege that the crops were cultivated for food or market, unless the larceny charged was that of some fruit or vegetable cultivated for food or market, not specifically mentioned in the statute.

(*S. v. Patterson,* 2 Ired., 346; *S. v. Roberts,* 81 N. C., 606; *S. v. Glisson,* 93 N. C., 510; *Clark v. Clark,* 65 N. C., 661; *S. v. Liles,* 78 N. C., 496; *S. v. Bragg,* 86 N. C., 690; *S. v. Thompson,* 93 N. C., 538; cited and approved.)

(444) THIS was an indictment for larceny of growing crops, tried before *Gilmer, J.,* at September Term, 1886, of ANSON Superior Court.

The indictment charged that the defendant, "one peck of corn, of the value of six pence, the property of A. B. Wheeless, then and there standing and remaining ungathered in a certain field of the said A. B. Wheeless, there situated, feloniously did steal, take and carry away," etc.

Robert A. Carter, a witness for the State, testified that he had employed three members of the bar to assist the solicitor in the trial, and that he had paid them for their services; that he had no interest in the

property alleged to have been stolen by the defendant, and that the owner of the alleged stolen property had declined to prosecute this indictment.

He was asked by defendant's counsel, if he had not gone to the defendant's house, about the time the indictment was found, carrying with him a double barrel shot gun, and finding that the defendant was not at home, if he had not said to the defendant's wife, that if Ballard (meaning to include the defendant), did not get off from the land they were then on, he would put them all in jail? In answer to this question, he said he did go to the defendant's house with the shot gun, and finding the defendant absent from his house, he left a message with the defendant's wife, which was as follows:

"Tell your husband (meaning the defendant), he must get off the land which I claim and he now holds." He further stated that the land claimed was then in suit between the witness (Carter) (445) and W. K. Ballard.

The wife of the defendant was then put upon the stand, in behalf of the defendant, and in the course of her testimony she was asked: "Did R. A. Carter come to the house of your husband, with a double barrel shot gun, and finding your husband away from home, say to you: 'that if the Ballards, meaning the defendant and his father, did not get off from the land the defendant was then on, being the land then in suit between him and the defendant, he would put them in jail?'"

The solicitor objected to the question and the answer thereto. The objection was sustained by the court, and the defendant excepted. There was a verdict of guilty. Motion for a new trial. Motion overruled.

The defendant then moved in arrest of judgment, upon the ground that the indictment omitted the words "cultivated for food or market," which he insisted, constituted a material part of the offense.

This was overruled, and judgment was pronounced, from which the defendant appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts; The first exception is based upon the rejection of the testimony of the defendant's wife, to controvert the statement of the witness Carter.

It has been well settled in this State, since the case of *S. v. Patterson*, 2 Ired., 346, that while the rule has been to regard the answers of witnesses on cross-examination as conclusive in reply to collateral questions, yet the rule does not apply "as to matters, which although collateral, tend to show the temper, disposition and conduct of the witness in rela-

tion to the cause or the parties." His answers as to these mat-
(446) ters may be contradicted. *S. v. Roberts,* 81 N. C., 606; *S. v. Glisson,* 93 N. C., 510; 1 Greenleaf, sec. 449.

In this case, the temper, disposition and conduct of the witness Carter were sufficiently apparent from his words and acts, and as was said by *Pearson, C. J.,* in *Clark v. Clark,* 65 N. C., 661, "When the cross-examination, instead of being general, descends to particulars, then the party is bound by the answer, and cannot be allowed to go into evidence *aliunde,* in order to contradict the witness, for it would result in an interminable series of contradictions in regard to matters collateral, and thus lead off the mind of the jury from the matter at issue."

We think there was no error in excluding the testimony of defendant's wife in the particular excepted to.

The motion in arrest of judgment was properly disallowed.

The Code, section 1069, declares that "if any person shall steal or feloniously take and carry, away any maise, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any fruit, vegetable or other product cultivated for food or market, growing, standing, or remaining ungathered, in any field or ground, he shall be guilty of larceny and punished accordingly."

It is manifest, not only from a fair and proper construction of the language of the statute, but from the course of legislation upon the subject, that the qualifying words, "cultivated for food or market," apply and are limited to "any fruit, vegetable, or other product," and do not apply to the several articles specifically named in the statute. At common law, growing crops were not the subject of larceny. The first statute upon the subject was in the Acts of 1811, incorporated in the Rev. Stat., ch. 34, sec. 24, and made the stealing of specific crops therein named larceny. This was brought forward in the Rev. Code, chap. 34, sec. 21, and the qualifying words, "cultivated for food or market." The

taking of figs, watermelons, blackberries, or other fruits or
(447) vegetables, unless cultivated for food or market, would not be larceny, and as to such products the qualifying words of the statute constitute a material and necessary part of the descriptions, but they are not necessary as to the articles specifically named in the statute. *S. v. Liles,* 78 N. C., 496; *S. v. Bragg,* 86 N. C., 690; *S. v. Thompson,* 93 N. C., 538.

There is no error. Let this be certified.

No error. Affirmed.

Cited: S. v. Williams, 117 N. C., 764; *Burnett v. R. R.,* 120 N. C., 519.

STATE v. WILLIAM ELLIS.

Evidence—Confessions.

1. A defendant in a criminal matter can only be examined as a witness by his own request, but if he does make the request and is examined, his statements can be used as evidence against him.

2. Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committing magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true; *It was held*, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were not true.

(*S. v. Roberts*, 1 Dev., 259; *S. v. Whitfield*, 70 N. C., 536; *S. v. Lawhorn*, 66 N. C., 638; *S. v. Efler*, 85 N. C., 587; cited and approved.)

THIS was a criminal action, tried before *Graves, J.*, at Fall Term, 1886, of LINCOLN Superior Court.

The defendant was indicted for larceny of money, the property of one W. C. Putman. It was in evidence, that in August, 1886, the defendant was a servant in a hotel in the town of Lincolnton, (448) and was discharged from service on the morning of the day on which the money was taken from the trunk of Putman, in the hotel. In a few days after, he was arrested in Spartanburg, South Carolina, and imprisoned. While he was in prison in that State (and in the presence of an officer from Lincolnton, who had gone after him), he was told by the officer in whose charge he was that he had better confess to the stealing, and compromise it when he returned to Lincolnton, and he would be released. On this representation, the prisoner confessed the crime when he got to Lincolnton on the next day, to Putman, who had lost the money, and proposed to compromise it with him. This confession was objected to by counsel for the prisoner and ruled out.

On the same day, after this confession, the prisoner was arraigned before a justice of the peace, who was offered as a witness on the trial, to prove the admissions and confessions of the prisoner while on trial before him. This was objected to but admitted by the court, and the defendant excepted. The magistrate stated that the prisoner was sworn at his own request, before him, on the trial, after having been properly cautioned; that the prisoner stated that he had made the confession to W. C. Putman, under the belief that he could compromise it, and that

he would be released, as advised by the jailer in South Carolina, but that he had not stolen the money. There was a verdict of guilty, judgment and appeal.

Attorney-General for the State.
J. F. Hoke for defendant.

DAVIS, J., after stating the facts: The objection to the admission of the confession, made upon the suggestion of the jailer in South Carolina was sustained, and it is insisted by counsel for the defendant that the statement made on the trial before the magistrate was made (449) under the continuing inducement that prompted the first confession, and ought to be excluded. It will be observed that the confession was made the day after the suggestion made to the prisoner in South Carolina. In the case of *S. v. Roberts,* 1 Dev., 259, *Henderson, J.,* said: "But, it is said, and said with truth, that confessions induced by hope, or extorted by fear, are, of all kinds of evidence, the least to be relied on, and are therefore to be entirely rejected." In the same case, *Taylor, C. J.,* in speaking of the admissibility of confessions made two or three days after the confession made under duress, and therefore excluded, said, "before it (the latter confession) is admitted, the court ought to be thoroughly satisfied that it was voluntary." "It is," says *Pearson, C. J.,* in the case of *S. v. Whitfield,* 70 N. C., 356, "contrary to the genius of our free institutions, that any admissions of a party should be heard as evidence against him, unless made voluntarily." In the case of *S. v. Lawhorn,* 66 N. C., 638, relied on by the defendant's counsel, the first confession made by the accused having been induced by hopes held out to him, the same confession made some time after to the same party was presumed to have resulted from the same motive, and was excluded. Confessions, made under such circumstances, are excluded, upon the ground that they are not voluntary, but if *voluntarily* made, even while under arrest, they are competent. The law now allows the accused to testify in his own behalf; he cannot be made to testify—he may offer himself as a witness in his own behalf, and if he does so, it is voluntary, and must be, "at his own request, but not otherwise." The record states that the defendant was sworn at his own request, and it is difficult to conceive how his statements, made under oath, could be excluded, upon the idea that they were not voluntary. In *S. v. Efler,* 85 N. C., 587, *Ruffin, J.,* says: "In declaring him to be a competent witness, we understand the statute to mean, that he, shall occupy the same position as any other witness, be under the same (450) obligations to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited."

But admitting the declarations made by the prisoner as a witness in his own behalf before the magistrate, to be competent, it is insisted that the witness stated that he had not stolen the money, and the whole statement must be taken.

The jury must consider all that was said by the witness, but they may believe a part, and disbelieve a part—they are not obliged to believe it all. They may believe that part which charges the prisoner, and disbelieve that which is in his favor, if they are satisfied that one is true and the other not.

It must be borne in mind that the statement made by the defendant was not under the examination provided for in section 1145, *et seq.*, of The Code, for "such examination shall not be on oath," but it was upon his examination as a witness sworn "at his own request," as allowed by section 1353 of The Code, and we can see no reason why a statement thus voluntarily made should be excluded.

There is no error. Let this be certified.

No error. Affirmed.

Cited: S. v. Spurling, 118 N. C., 1252; *S. v. Simpson,* 133 N. C., 677; *S. v. Fox,* 197 N. C., 487.

STATE v. JAMES H. MILLER.

Appeal.

Where in a criminal proceeding, the prisoner appealed from the judgment, which was affirmed by the Supreme Court, and upon receiving the certificate the judge of the Superior Court passed the same sentence which had before been imposed, from which the defendant again appealed, but without assigning any error or showing any new facts, the appeal will be dismissed.

(S. v. Speaks, 95 N. C., 689; cited and approved.)

INDICTMENT, heard by *Philips, J.,* at July Criminal Term, (451) 1886, of WAKE Superior Court.

The facts appear in the opinion.

Attorney-General for the State.

John Gatling, E. C. Smith, T. C. Fuller and George H. Snow for defendant.

SMITH, C. J. Upon the hearing of the appeal from the judgment rendered against the defendant, at February Term, 1886, it was declared there was no error. Upon receiving the certificate of the decision in this Court, the presiding judge of the Superior Court pronounced the same sentence, and the defendant again undertook to appeal, and the transcript of the record sent up contains no assignment of error, but certain testimony is transmitted, upon which no action was had, other than the rendition of judgment. The case is not distinguished from that of *S. v. Speaks*, 95 N. C., 689, and the same disposition must be made of the appeal by dismissing it. So ordered.

Dismissed.

STATE v. JAMES H. MILLER.

Insolvent Debtor—Costs—Habeas Corpus.

1. The application of an insolvent confined for the nonpayment of costs, is a proceeding in the cause in which he was convicted, and should be made by petition to the court wherein the judgment against him was entered.
2. If in such case, the clerk should refuse to allow the prisoner to take the oath, the remedy is by an appeal to the judge holding the courts of that district, and it is *intimated* that it is irregular for the judge of an adjoining district to release the prisoner on a writ of *habeas corpus*.
3. Where, in such case, the prisoner has been released by the writ of *habeas corpus*, if he has complied with all the conditions of the statute, this Court will not reverse the judgment.
4. The State has no appeal from a judgment releasing a prisoner in a *habeas corpus*.

(Gatling v. Walton, 1 Winst., 333; *Musgrove v. Kornegay*, 7 Jones, 71; cited and approved.)

(452) APPLICATION for a writ of *habeas corpus*, heard before *Gudger, J.*, at Chambers, in Warrenton, on 24 September, 1886.

After the defendant's appeal to the Supreme Court was adversely decided, 94 N. C., 904, and the certificate received at July Term of Wake Superior Court, the same judgment as before was pronounced, and the same punishment imposed for his offense. He has undergone the full term of imprisonment, and desiring to take the benefit of the act for the imprisonment of debtors, and intending to remain in imprisonment for the space of 20 days in order thereto, The Code, sec. 2967, he gave notice thereof to the sheriff, that he would at the expiration of the time

make application to the court to take the required oath. This he was prevented from doing, and instead of continuing in prison, was transferred to the custody of the superintendent of the workhouse by direction of the county commissioners and there kept at hard labor until the 20 days had passed. Thereupon he made his application to the clerk for permission to file his schedule, surrender his property, and take the required oath, in order to be discharged from custody, and being refused, he sued out a writ of *habeas corpus* before a judge holding a court in an adjoining district, instead of bringing the ruling of the clerk for review before the judge then exercising the jurisdiction in the district to which the county belongs.

Upon the hearing and upon the facts briefly stated, it was adjudged that the clerk proceed to administer the oath, upon the prisoner's complying with the requirements of the statute; that he appoint a trustee to take charge of the property surrendered, and dispose (453) of the same in the manner pointed out in the order, and that upon taking such oath, the prisoner be discharged from further confinement. From this judgment the State appealed.

Attorney-General and R. H. Battle for the State.
T. C. Fuller, E. C. Smith and John Gatling for defendant.

SMITH, C. J., after stating the facts: We are advised that the mandate has been obeyed, and the prisoner released, so that no practical purpose is to be subserved in prosecuting the appeal, whatever may be our opinion as to the action of the judge in his summary intervention in the case.

It is certainly a singular method, to say the least, of acquiring jurisdiction and directing proceedings in it in a case depending in another court not of his district, by the issue of the present writ. The obvious course would be suggested to carry up to the jurisdictional judge the alleged denial by the clerk of the prisoner's right to a discharge, by whom his error may be corrected, and the prisoner's demand sustained.

The statute (The Code, sec. 2968) is explicit in requiring an imprisoned debtor to apply by petition *"to the court wherein the judgment against him was entered,"* and as this is action in the cause, it must be construed as a proceeding therein. This is plainly the only legal course to be pursued in obtaining relief.

While, however, the prisoner's enlargement was brought about by a coercion, through an unauthorized order, it is nevertheless a fact accomplished, and the clerk has done, while not using his own judgment, what he had a right and it was his duty to do in a case where all the condi-

tions of the law are observed, and the correctness of his action,
(454) assuming it to be free, is not presented in the present record.

Moreover, we find no precedent for an appeal from the decision of the judge acting under such a writ and in such a case.

The prisoner was under a final sentence, and his exoneration from restraint was sought under an act evidently not contemplating a remedy in this way; The Code, sec. 1646. Proceedings under the writ of *habeas corpus,* which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if action could be arrested by an appeal, would lose many of their most beneficial results. In case where the writ was resorted to for the purpose of determining the custody of minor children, and these became substantially controversies between conflicting claimants, the right of appeal is given by act of 15 February, 1859, Acts 1858-'59, chapter 53, and this enactment is transformed into section 1662 of The Code.

It is a significant indication of the legislative intent in giving an appeal in this case only, not to recognize it in other cases. The right to review by means of the writ of *certiorari* in a class of cases of which cognizance is acquired, but to which ours does not belong, is maintained by the Court in *Gatling v. Walton,* 1 Winston, 333, but we find no instance of jurisdiction obtained by an appeal.

It has been exercised under the enabling act; *Musgrove v. Kornegay,* 7 Jones, 71. While, then, we cannot sustain the illegal course taken by the judge in interposing for the prisoner's relief, the appeal by the State is not within the provision of section 1237, and for the other reasons stated cannot be entertained. Dismissed.

Cited: S. v. Herndon, 107 N. C., 935; *In re Williams,* 149 N. C., 437; *Stokes v. Cogdell,* 153 N. C., 182; *In re Holley,* 154 N. C., 166; *In the matter of Wiggins,* 165 N. C., 458.

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(455)

STATE v. ISAAC WILLIAMS.

Penalties—Repealing Statutes.

1. Under the provisions of section 3764 of The Code, a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty.
2. The repeal of a statute pending a prosecution for an offense which it creates, arrests the prosecution and withdraws all authority to pronounce judgment even after conviction.

3. So, where the defendant was indicted for retailing spirituous liquors within five miles of a certain church, and pending the prosecution the act was repealed, and a new act passed limiting the distance to two miles, the judgment was arrested.

(Governor v. Howard, 1 Murph., 465; *S. v. Cress,* 4 Jones, 421; *S. v. Nutt,* Phil., 20; *S. v. Long,* 78 N. C., 571; cited and approved.)

INDICTMENT, tried before *Gilmer, J.,* and a jury, at September Term, 1886, of RICHMOND Superior Court.

The defendant is charged with selling spirituous liquor to one Nathan Thomas, within five miles of Bethel Church, in the county of Richmond, in violation of section 5, chapter 234, of the acts passed at the session of the General Assembly held in 1881, and upon his trial was found guilty, and adjudged to pay a fine of five dollars, at Fall Term, 1886.

From this judgment he appeals to this Court.

Attorney-General for the State.

P. D. Walker and Tillett (A. Burwell was with them on the brief), for defendant.

SMITH, C. J. The section declares, "that the sale of spirituous liquors shall be prohibited within five miles of the following places, to wit," designating among other places, "Bethel, Silver Grove, Holly Grove, and Carthages Creek churches in Richmond County.

At the late session, this statute, as affecting the locality of (456) Bethel Church, was repealed, and an enactment that went into operation on 7 March, 1887, was substituted, which, among other provisions, narrowed the limits of the prohibited territory to the distance of two miles from that church, and made the sale of spirituous liquors therein an indictable offense. So that it is not criminal to do now what was done before the repeal and whereof he is convicted, and no sentence upon such a finding can be pronounced. The act punished must be *criminal when judgment is demanded,* and authority to render it must still reside in the court. The recent statute has no saving clause, continuing it in force until pending prosecutions are ended, and in withdrawing the power, the act arrests all further action in the matter.

We are not without authority in past adjudications of the court.

In *Governor v. Howard,* 1 Murph., 465, the repeal of an act imposing a penalty was held to put an end to a suit instituted for its recovery. It is otherwise now in respect to suits for forfeitures, which proceed as if not repealed under the general law. The Code, sec. 3764.

That such is the effect of a repeal of a statute making criminal an act which was not so before, upon a pending prosecution, is expressly decided

in *S. v. Cress,* 4 Jones, 421; *S. v. Nutt,* Phil., 20, and *S. v. Long,* 78 N. C., 571. The enactments referred to in the case last mentioned, were modifications of the first, and the last expressly repeats the provisions found in the two former, but not more effectually than does the clause in that under review, which repeals all laws inconsistent with it. "It is well settled," says the Court in *S. v. Long,* "that the repeal of a statute pending a prosecution for an offense created under it, arrests the proceedings, and withdraws all authority to *pronounce judgment even after conviction";* and it is equally clear that no aid can be derived from the last enactment, which is necessarily prospective only in its operation,
(457) and under the Constitution cannot apply to antecedent acts.

The judgment must be arrested, to which end let this be certified.

Judgment arrested.

Cited: S. v. Massey, 103 N. C., 359; *S. v. Biggers,* 108 N. C., 764; *S. v. Coley,* 114 N. C., 883; *S. v. Perkins,* 141 N. C., 808.

STATE v. W. H. HARGRAVE.

Evidence.

1. Hearsay evidence is inadmissible, except when the bodily or mental feelings or condition of an individual are material, when the usual expression of such feelings are admissible, although hearsay.

2. Where the defendant was indicted for stealing a horse, the hearsay declarations of a party that a horse in the possession of a witness was the horse of the prosecutor, are inadmissible.

(Wallace v. McIntosh, 4 Jones, 434; *S. v. Harris,* 63 N. C., 1; cited and approved.)

THIS was an indictment for larceny, tried before *Boykin, J.,* at September Term, 1886, of DAVIDSON Superior Court.

The defendant was charged with stealing a bay mare, the property of W. P. Brown, and the following is the case on appeal:

"There was evidence that immediately after the larceny, the owner's son was sent in search of the stolen mare by his father. The mare was found in Tazewell County, Virginia, in the possession of one Buchanan, who had testified that he obtained the mare from the defendant. The defendant denied that the mare he traded to Buchanan was the property of Brown, the person in whom the property was laid in the bill. The

State insisted that the mare was the property of Brown, and that (458) the defendant knew it, having been heard to admit as much on a certain occasion. The State was permitted to prove, under objection of the defendant, that upon seeing the mare in the possession of Buchanan, in Virginia, the owner's son exclaimed: *'That's father's mare!'* as tending to establish the identity of the mare."

There was a verdict of guilty, and judgment, from which the defendant appealed.

Attorney-General for the State.
M. H. Pinnix and Frank Robbins for defendant.

DAVIS, J., after stating the facts: There was error in admitting the exclamation, which was but the declaration of a person who was not put upon the stand as a witness, who was not sworn, and whom the accused had no opportunity to cross-examine. Every person accused of a crime has a right to confront the accusers and witnesses against him, and there is no surer safeguard thrown around the person of the citizen than this guarantee contained in the Declaration of Rights. We are unable to perceive any ground upon which the exclamation, "that's father's mare," can be admitted as evidence against the accused, to show the identity of the mare. If any number of persons of the most undoubted credit had seen the mare in the State of Virginia, in the possession of Buchanan, and had made affidavits as to its identity as the property of W. P. Brown, they would have been inadmissible as evidence; certainly the exclamation of the son would be equally as inadmissible. It can come under no one of the classes of exceptions to the general rule of evidence that excludes hearsay.

Whenever the bodily or mental feelings or condition of an individual are material to be proved, the usual expression of such feelings are admissible as original evidence, and the authorities relied upon by the counsel for the State are of this class; *Wallace v. McIntosh,* 4 Jones, 434; *S. v. Harris,* 63 N. C., 1; 1 Greenleaf Ev., secs. (459) 102, 124, 125, 162.

There is error, and the prisoner is entitled to a new trial. Let this be certified, and a *venire de novo* awarded.

Error. Reversed.

Cited: Sherrill v. Tel. Co., 117 N. C., 363; *S. v. Martin,* 173 N. C., 809; *S. v. Jeffreys,* 192 N. C., 320.

STATE v. JOHN BETHEL.

Receiving Stolen Goods—Evidence.

1. Since the statute allows the defendant to become a witness in his own behalf, he can testify as to any fact which it would be competent to prove by any other witness.
2. When the charge is knowingly receiving stolen goods, the defendant has the right to prove by himself from whom he received them, and under what circumstances, and what conversation took place at that time, in reference to the goods, between himself and the party from whom he received them. Such conversation forms part of the *res gestæ*, and is therefore admissible.

(*S. v. Howell*, 84 N. C., 461; *S. v. Anderson*, 92 N. C., 732; cited and approved.)

INDICTMENT for larceny and receiving stolen goods, tried before *Clark, J.*, at February Term, 1886, of GUILFORD Superior Court.

The appellant and John Harris were indicted in a first count for the larceny of one peck of chestnuts, and in a second count for receiving the same knowing them to have been stolen.

On the trial—the appellant alone was on trial—he was examined as a witness in his own behalf. In the course of his examination, among other things, he said he "was at home when Harris came
(460) (this was in the night time); he went out to the gate and Harris came in and left the chestnuts." The defendant's counsel here offered to prove the conversation had between Harris and Bethel at the time, to show that Bethel knew nothing of the goods having been stolen, as being part of the *res gestæ*.

The conversation offered was as follows, to wit: That when John Harris came to his house that night and he went to the gate to see him, Harris said that he had some chestnuts which he wanted Bethel to sell; that he asked Harris where he got the chestnuts; Harris replied, I got them from a partner of mine, John Branch, and we want them sold; he said to Bethel, that I will divide profits with you; that Harris then brought the chestnuts in, and they changed the chestnuts to a good sack, as they were spilling out of the sack they were in through a hole. The court excluded this proposed testimony, and this is assigned as error.

There was a verdict of guilty of receiving, and judgment for the State, from which the defendant appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: The statute gave the defendant the right to be a witness in his own behalf, and as such he was com-

petent to testify as to any pertinent material facts, just as any other witness might do.

The substance of the charge against him was, that he had knowingly and illicitly received the stolen chestnuts. How he got them, was a material inquiry, and he had the right to show by himself, as well as other witnesses, that he got them honestly—where, from whom, how, under what circumstances, and what was done and said at the time, and in connection with the receipt of them, by himself and the person from whom he received them. What was thus said was explanatory—part of the *res gestæ*. In the ordinary course of human (461) conduct, the words expressed at the time an act is done in connection with, and in respect to it, indicate its character and purpose. They are evidence of the purpose. Of course, if it appears that what was said, was said with the distinct intent to mislead, it would not be evidence. In Roscoe's Cr. Ev., 24 (4 Am. Ed.), it is said that, "On a charge of larceny, when the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to show in behalf of the prisoner, that a third person left the property in his care, saying that he would call for it again afterwards; for it is material in such case to inquire under what circumstances the prisoner first had possession of the property." (1 Phil. Ev., 233, 7th Ed.) And so in this case, it was competent for the defendant to show that he received the chestnuts from Harris in the lawful course of business, the latter saying at the time he delivered them, that they were the property of himself and his partner, and they wished the defendant to sell them. It may be that the suggested conversation was feigned and the proposed evidence false; nevertheless, it was evidence to go to and be weighed by the jury. *Evans v. Howell,* 84 N. C., 461; *S. v. Anderson,* 92 N. C., 732; Ros. Cr. Ev., 23; 1 Gr. Ev., sec. 108.

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

Error. *Venire de novo.*

(462)

STATE v. JAMES SWAIM.

Judge's Charge—Practice.

1. Defendant was indicted for perjury, committed on the trial of a warrant before a justice for assaulting his wife on 17 November, 1885, on the trial of which, as a witness in his own behalf he swore that he did not strike his wife on the day mentioned in the warrant and had not struck her for three years before that time. The State introduced several witnesses

who proved the assault on the day mentioned and other assaults on other days, and also corroborating circumstances: *Held*, that it was not error for the court to charge the jury "that the date in the warrant should be considered in connection with the testimony of the witnesses for the State and as to the various assaults mentioned in the testimony for the purpose of determining whether the assault was actually committed as charged in the warrant."

2. It is not material (except in cases where time is of the essence of the offense) to charge in an indictment the true day on which an offense was committed; nor to prove the day as charged.

THIS was an indictment for perjury, tried before *Boykin, J.*, at the February Term, 1887, of the Superior Court of YADKIN County.

The case is sufficiently stated in the opinion of the Court.

Attorney-General for the State.
A. E. Holton for defendant.

DAVIS, J. The perjury charged in the indictment was alleged to have been committed upon the trial of the defendant for an assault and battery upon the person of his wife, Nancy Swaim, before R. G. Howell and J. F. Cook, justices of the peace. The State introduced evidence tending to show that the defendant swore upon the trial of the warrant, that he did not assault his wife on the occasion charged in the warrant, and that he had not assaulted or struck her but once (463) and then only in fun, in three or four years.

Lafayette Mathews, a witness for the State, testified that he saw the defendant, in the Fall of 1885, strike his wife with a large switch, and that she ran into the house, he pursuing her, and that while they were in the house, he heard several blows and the screams of a woman.

Bennett Holliman, for the State, testified that about, or a short time before the warrant was taken out (warrant dated 17 November, 1885), he saw the defendant strike his wife with a bull whip. There was other evidence for the State, tending to show that the defendant did assault and beat his wife at the time charged in the warrant, and also on divers occasions within three years prior to the issuing of the warrant; that the said Nancy Swaim frequently, within the said period, bore bruises under her eyes, cuts on her head, and finger prints on her throat, and that she appeared as a witness upon the trial of the warrant having marks of violence upon her person. The defendant introduced his wife, Nancy Swaim, as a witness in his behalf, who testified that her husband (the defendant) did not beat her, as charged before the justice of the peace, nor had he at any time struck her, and that she had not sworn

before the justice of the peace that he had beaten her, nor had she so stated at any time.

The State then introduced R. G. Howell, the justice of the peace before whom the warrant was tried, who testified that Nancy Swaim swore before him that her husband did strike her.

The State introduced other witnesses, who testified that Nancy Swaim swore before the justice that her husband beat her, and also several witnesses who testified to declarations made by her at the time when she bore marks of violence, to the effect that her husband had beaten her, and that she could stand his violence no longer.

"The court charged the jury, that it was material for them (464) to determine whether the defendant assaulted his wife on 17 November, 1885, as charged in the warrant before the justice; that the previous declarations of the defendant's wife in which she inculpated him, as well as the warrant taken out by her against him, could only be considered by them as tending to contradict her and impeach her testimony; that the date in the warrant should be considered in connection with the testimony of the witnesses for the State and as to the various assaults mentioned in the testimony, for the purpose of determining whether the assault was actually committed, as charged in the said warrant."

To this the defendant excepted.

It was earnestly insisted by the counsel for the defendant in this Court, that the court erred in charging the jury, "that the date in the warrant should be considered, etc., for the purpose of determining whether the assault was actually committed," as charged in the warrant. This was the only exception relied on here, and seems to have been based upon the assumption that it was necessary that the State should prove that the alleged assault was committed on 17 November, 1885; that the exact time was essential to be proved, and that the date in the warrant was thought to be necessary, as corroborative evidence, to fix the time.

This was a mistaken view of the law, and the charge of his Honor that it was material "to determine whether the defendant assaulted his wife on 17 November, 1885," if intended to convey the idea that the precise day on which the offense was committed was material to be proved, was more favorable to the prisoner than he was entitled to. In laying the time in an indictment (except in those cases where time is of the essence of the offense) it is only necessary that it shall appear that the offense was committed before the finding of the bill, and a variance in the day proved from the day alleged, is not fatal. This is too well settled to need the citation of authority. (465)

It is familiar learning, that a person charged with perjury can only be convicted upon the testimony of two witnesses, or of one witness, supported by corroborating circumstances. Here the evidence is, that the defendant swore, not only that he had not beaten his wife on the occasion charged in the warrant, but that "he had not assaulted or struck her but once, and then in fun, in three or four years." This was not only contradicted by the oaths of two witnesses, but by strong corroborating evidence, and the testimony of his unfortunate wife, contradicted as it was, added nothing in the way of mitigation to his crime.

There was no error. Let this be certified.

No error. Affirmed.

STATE v. W. T. MASSEY.

Indictment—Statute—Repealing Act.

1. If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and continue an averment that the offense was committed before the amendment was passed.

2. Where a statute makes an act a crime if done "wantonly and wilfully," these words are not sufficiently supplied by an averment in an indictment drawn under the statute, that the act was done "unlawfully and maliciously."

3. The term "unlawfully" implies that an act is done in a manner not allowed by the law; the term "wantonly" denotes turpitude, and that the act done is done of wicked purpose; the term "wilfully" denotes that the act is done knowingly, and on purpose, but not of malice.

4. Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause.

(466) INDICTMENT, heard before *Montgomery, J.*, at Spring Term, 1887, of LINCOLN Superior Court.

The indictment charges in several counts, that the defendant, *on the first day of April,* 1885, "unlawfully and maliciously and feloniously did set fire to" a certain mill, "with intent thereby to injure and defraud" certain corporations named in the various counts, "contrary to the form of the statute," etc. It is founded either upon the statute (The

Code, sec. 985), or upon it as amended by a subsequent act, (Laws of 1885, ch. 66). The defendant contends that this amendment repealed the material parts of the statute of which it is amendatory, and that the statute as amended took and had effect on 16 February, 1885, the day of its ratification, which it is conceded was *after* the time of the commission of the offense charged, if indeed it was committed at all, and he moved to quash the indictment, upon the ground that no offense under the amended statute is charged therein. The court allowed this motion, and gave judgment in favor of the defendant, from which the State appealed to this Court.

Attorney-General and E. C. Smith for the State.

W. P. Bynum, John F. Hoke, Charles Price and John Devereux, Jr. (D. Schenck, Alexander Hoke and Joseph B. Batchelor, were with them on the brief), for defendant.

MERRIMON, J., after stating the facts: For the reasons we now proceed to state, we are of opinion that the indictment was properly quashed.

The statute (The Code, sec. 985, par. 6) provides, that "whoever shall *unlawfully and maliciously* set fire to any church, chapel, or meeting-house, or shall *unlawfully or maliciously* set fire to any stable, coach-house, outhouse, warehouse, office, shop, *mill,* barn (467) or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same, or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, *with intent thereby to injure or defraud any person or persons, body politic or corporation,* shall be guilty of felony, and imprisoned in the penitentiary for not less than five, nor more than forty years."

It seems that the intention of the pleader was to found the indictment upon this statute. If so, it cannot be sustained, because *after* the time the offense charged was committed, if at all, and before the indictment was found, the statute had been amended by a subsequent one (Acts 1885, ch. 66), which struck out of it the words, "unlawfully and maliciously," wherever they occurred, and substituted in their stead the words, "wantonly and wilfully," and likewise struck out the other words, "with intent thereby to injure or defraud any person or persons, body politic or corporation," thus prescribing a new and different offense in material respects, and there is no averment in the indictment from which the Court can see that the offense charged was committed before the amendment.

If it was so committed, the indictment ought to have charged that "before 16 February, A.D. 1885, (the day the amendment was ratified) to wit: on 1 April, A.D. 1884, "the defendant did," etc., etc., so that it would appear that an offense was charged to have been committed while the statute upon which it was founded was in all respects operative. This was essential, because it must appear upon the face of the indictment that an offense is charged. No offense is charged under the statute before it was amended, because the indictment charges the offense to have been committed subsequent to that time. None is sufficiently charged under the statute as amended, because the
(468) offense is not charged to have been done "wantonly and wilfully," and these words are not supplied in substance by the words, "unlawfully and maliciously," which are employed in the indictment. The term "unlawfully" implies that an act is done or not done, as the law allows or requires, but the term "wantonly" implies turpitude—that the act done is of wilful, wicked purpose. The term "wilfully" implies that the act is done knowingly and of stubborn purpose, but not of malice.

The counsel for the appellee contended on the argument that the statute first above mentioned was repealed by the amendatory statute cited, and therefore the appellee could not be indicted for the offense imperfectly charged against him. It is not necessary that we shall decide definitely any question in this respect now, but we deem it not improper to say, that the amendatory statute does not purport to repeal the statute it amends—it contains no repealing clause, and it seems to operate only *prospectively* from the date of its ratification, leaving the statute still operative as to offenses theretofore committed. It can scarcely be supposed that the Legislature intended to allow persons who had violated the statute before the amendment of it to go unpunished; if it had so intended, it would most likely have incorporated into the amendatory statute an express clause of repeal. It is more probable that it did not so intend, and that it did not deem an express saving clause as to offenses then already committed necessary, as the general statute (The Code, sec. 3766) provided and still provides, that "where a part of a statute is amended, it is not to be considered as having been repealed and reënacted in the amended form; but the portions which are not altered, are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment."

(469) There is no error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Morgan, 98 N. C., 642; *S. v. Halford,* 104 N. C., 876; *Leak v. Gay,* 107 N. C., 481; *S. v. Pierce,* 123 N. C., 746; *Brown v. Brown,* 124 N. C., 21; *Bailey v. R. R.,* 149 N. C., 174; *S. v. Broadway,* 157 N. C., 601; *S. v. Millican,* 158 N. C., 623; *S. v. Mull,* 178 N. C., 750; *S. v. Falkner,* 182 N. C., 798.

STATE v. JOHN JONES.

Jury—Challenges—Constitutional Law—Judge's Charge.

1. Where a jury has been obtained before the defendant has exhausted his peremptory challenges, it must be conclusively presumed that a fair and impartial jury has been obtained.
2. The right given a defendant to challenge certain jurors is not a right to select such jurors as he may wish, but only to insure a fair and impartial jury.
3. Where, therefore, a jury has been obtained before the defendant has exhausted his peremptory challenges, the Supreme Court will not consider any exception on the appeal as to whether the trial judge improperly allowed or disallowed challenges for cause, or allowed the State to stand aside temporarily too great a number of jurors.
4. Where a statute creating a Special Criminal Court for certain counties allows every facility to the accused of getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for the Superior Courts.
5. A trial judge is not required to give a prayer for instructions in the very words in which it is asked, nor is it his duty to give instructions not pertinent to the case.
6. The trial judge, in his charge to the jury, is not required to recite to them the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue.

(S. v. Gooch, 94 N. C., 987; *S. v. Hensely, ibid.,* 1021; *S. v. McNeill,* 93 N. C., 553; *S. v. Moses,* 2 Dev., 452; *S. v. Jones,* 67 N. C., 288; *S. v. Jones,* 87 N. C., 547; *S. v. Rogers,* 93 N. C., 523; *Holley v. Holley,* 94 N. C., 96; cited and approved.)

INDICTMENT for burglary, tried before *Meares, J.,* and a jury, (470) at November Term, 1886, of the Criminal Court of NEW HANOVER County.

The court ordered a special venire of one hundred and twenty-five persons to be drawn and summoned in pursuance of the provisions of

the act of the General Assembly prescribing how a special venire in capital cases should be drawn in the Criminal Court of New Hanover County.

Upon the trial, and after the names of the special venire had been called and put in the hat, the prisoner challenged the array, on the ground, that the 19th section of chapter 63, Laws 1885, which prescribes the mode in which a special venire must be drawn for the Criminal Court of New Hanover County, was unconstitutional and void.

The prisoner made several exceptions to jurors in drawing the jury, and asked to be allowed to challenge them for cause, and also to the action of the court in allowing the State to stand ten per cent of the jurors to the foot of the panel, but a jury was obtained before all the peremptory challenges of the prisoner were exhausted.

The other facts appear in the opinion.

The jury found a verdict of guilty, and from the judgment the prisoner appealed.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The cause of challenge to the array is wholly without merit. The statute (Acts 1885, ch. 63, sec. 19), prescribing how a special venire ordered by the judge of the Criminal Court in capital cases shall be drawn and summoned is substantially in effect the same as the general statute (The Code, sec. 1739) on the same subject. The prisoner is not deprived of any right or cause of challenge that any other person, charged with the like felony in the Superior Court of any county (471) in the State, would have under similar circumstances. The objection seems to rest upon the unfounded supposition, that the prisoner has the fundamental right to select the jury to try him. He has no such right; he has only the right to have a fair and impartial jury, and when it is selected without objection, the prisoner having the right to make additional peremptory challenges, it must be presumed conclusively that such a jury has been obtained. His failure to object when he could, is an implied admission on his part that the jury is a fair and unexceptionable one, though perhaps not the one he would have preferred. The right of challenge is not allowed to enable the prisoner to select jurors who will probably be disposed to acquit or afford him undue advantage, but to select just and impartial ones. It would be a reproach upon the administration of criminal justice, to afford opportunity in the course of procedure to select jurors on the one hand, who would more likely convict, or on the other, would more likely acquit the prisoner. The law does not allow or tolerate, but on the

contrary forbids and frowns upon any procedure or practice that leads to such results. Hence, it has been repeatedly held, where the jury was obtained before the prisoner had exhausted his right of peremptory challenge, that it was unnecessary for this Court to decide whether or not the court below had improperly allowed or disallowed challenges for cause, or had allowed the State to stand aside temporarily too great a number of jurors. As the prisoner ceases to object while he has the right to make additional peremptory challenges, it must be taken that he accepts the jury as fair and impartial, and this is such a one as the law contemplates and desires.

And so in this case, as the jury was obtained before the prisoner had exhausted his right of peremptory challenge, it is unnecessary to decide the questions that arise in the course of the selection of the jury other than the challenge to the array. *S. v. Gooch,* 94 N. C., 987; *S. v. Hensley, ibid.,* 1021, and the cases there cited. (472)

The general objection that the statute first above cited is unconstitutional, and therefore void, is without foundation. It creates and defines the jursdiction of Criminal Courts for the counties of New Hanover and Mecklenburg. Power is expressly conferred upon the Legislature to establish such and like courts, with such jurisdiction as may be prescribed, not inconsistent with the Constitution. We are wholly unable to see how this statute in any way, respect or degree, destroys, abridges or impairs any constitutional right of the citizens of the counties named, or of any county, unless possibly in so far as it provides that an indictment concurred in by nine grand jurors shall be sufficient. It was suggested in *S. v. McNeill,* 93 N. C., 553, that this provision might be questionable, but if it were void, this would not render the whole statute void. An indictment concurred in by twelve grand jurors would be good, as was decided in that case.

The mere fact that the number of jurors required to be drawn and summoned to attend these courts is not so great as in other counties, and that a special venire shall be drawn in New Hanover County to serve each succeeding day of the term of its Criminal Court, does not render the statute void. The qualifications of jurors in these courts are the same as the qualification of jurors in other counties, and a sufficient number are or may be provided for, to afford every just facility to obtain a fair and impartial jury in any case. The persons objected to, are intended to secure more certainly such jurors as the law contemplates, and does not deprive any person of any right. Ample provision is made for selecting eligible, lawful jurors, just as in other counties of the State, and this is all that any citizen is entitled to have. The purpose is, not to deprive any one of the right to have a lawful jury, but to

prevent the selection of an unlawful one, and the provisions complained of are certainly in some measure adapted to that purpose, without (473) depriving the citizen of any right. It is a false and vicious notion, that the right exists at all, to have opportunity and that facilitated, to select a jury favorable on the one hand to convict, or on the other, to acquit the party charged with an offense. The law does not allow any but a fair and impartial jury, composed of good and lawful men, and the statute in question makes reasonable and just provision for selecting such a jury; that is sufficient.

The court was not bound to give the special instruction prayed for in the very language of the prayer, granting that the prisoner was entitled to it; it was sufficient to give the full substance of it, and this the court did. It might be questioned whether the prisoner was fairly entitled to the instruction thus given, because, the evidence as to him, was mainly direct and positive. It is not the duty of the court to give instructions not pertinent to the case; indeed it ought not to do so; such instructions only tend to confuse and mislead the jury. Nor was it the duty of the court to recapitulate or state the testimony of each witness examined on the trial to the jury in the consecutive order in which he was examined. The statute (The Code, sec. 413) prescribes that the court "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." This does not imply a mere recital of the evidence; this would be of little or no service; it means a clear, fair, intelligent statement of it in its bearings, its relations, one part with another, and its legal bearings upon the issues submitted to the jury. The object is to help the jury to clearly apprehend and apply it, and to give it just and proper weight, this being the sole province of the jury. The statement should not have the tone or form of an argument in favor of the one side or the other; this should be avoided as far as practicable; nor should it intimate the opinion of the court as to what weight should be given any (474) part or the whole of the evidence. But the fact that the evidence, parts or the whole of it, thus fairly stated, bears strongly on one side or the other, cannot be justly regarded as an argument of the court; this must be attributed to its simple weight and force, appearing without the aid of argument. *S. v. Moses,* 2 Dev., 452; *S. v. Jones,* 67 N. C., 288; *S. v. Jones,* 87 N. C., 547; *S. v. Rogers,* 93 N. C., 523; *Holley v. Holley,* 94 N. C., 96.

Nor was the statement of the evidence to the jury by the court obnoxious to the objection that it was argumentative. Upon a careful examination of it, we think it was intelligent, fair and just. If it bore heavily against the prisoner, this was because the evidence tended strongly to prove his guilt.

We do not discover error in the record. Let this opinion be certified to the Criminal Court, to the end that further proceedings may be had in the action there according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Potts, 100 N. C., 462; *Bank v. Sumner,* 119 N. C., 593; *S. v. Ray,* 122 N. C., 1099; *S. v. Booker,* 123 N. C., 725; *S. v. Peterson,* 149 N. C., 174; *S. v. Little,* 174 N. C., 802; *S. v. Carroll,* 176 N. C., 731.

STATE v. E. D. HALL, MAYOR, ET AL.

Indictment—Municipal Corporations.

1. Different parties cannot be charged in the same indictment with different and distinct offenses.
2. Where two separate and distinct departments of a municipal corporation are charged with separate duties in the government of the corporation, the officers of such two departments cannot be joined in one indictment, charging a breach of public duty.
3. Where an officer of a municipal corporation is indicted for a failure to perform a public duty, the indictment should state with what duty he is charged, and his failure to perform it.

(S. v. Fishblate, 83 N. C., 654; *S. v. Commissioners,* 2 Car. Law Rep., 419(617); *S. v. Commissioners,* 3 Jones, 399; *S. v. McNeill,* 93 N. C., 552; cited and approved.)

INDICTMENT, heard on a demurrer thereto by the defendants, by (475) *Meares, J.,* at November Term, 1886, of the Criminal Court of NEW HANOVER County.

The facts appear in the opinion.

His Honor sustained the demurrer, and the State appealed.

Attorney-General for the State.
No counsel for defendants.

MERRIMON, J. No doubt the mayor and aldermen of "the city of Wilmington" are indictable for any wilful or negligent failure to discharge the duties devolved upon them by its charter, "to secure order, health and quiet in said city, and for one mile around it." They cannot, with impunity, arbitrarily refuse to exercise the powers with which they are invested for that purpose, nor can they wilfully pervert them. It is their

duty to exercise the same by making "all needful ordinances, rules and regulations," the appointment of suitable and necessary officers and agents, and the employment of appropriate, authorized means to such ends.

Any wilful and negligent omission or failure in these respects constitutes a criminal offense, for which they might be indicted. *S. v. Fishblate,* 83 N. C., 654; *S. v. Comrs.,* 2 Car. Law Rep., 419 (617); *S. v. Comrs.,* 3 Jones, 399.

And so, also, it may be that the persons composing "The Board of Audit and Finance of the City of Wilmington" are indictable as such for failing to discharge their duties as prescribed by the statute (Acts 1876-'77, ch. 143) creating that board. But they are not a constituent part of the mayor and board of aldermen of that city. The respective duties and powers of those two boards are different, and for the most part entirely distinct. The mayor and aldermen represent and exercise the chief corporate powers of the city, while the "board of audit (476) and finance" are an adjunct of the city government, charged with important prescribed powers and duties in respect to its finances.

The indictment seems to contemplate that these two boards are a unit—certainly in some material respects—and exercise powers, and have duties, in common. This, we think, is a clear misapprehension of their respective natures and purposes, as above indicated. They are separate and distinct bodies, and intended to serve distinct purposes.

One count of the indictment charges that the defendants "board of audit and finance" unlawfully, wilfully and negligently did refuse and wholly omit to approve estimates and rates of assessments of taxes to meet the necessary expenditures for the said several departments of the said city government." If this were the only charge in the indictment, it would be fatally defective, if for no other reason, because it is not charged that the board of aldermen had passed ordinances levying taxes for such purposes and submitted them to the board of audit and finance for their approval. This essential matter must be charged, and also, that it became, and was the duty of the board to approve, etc., etc.

Another count charges the mayor and aldermen with having permitted and tolerated for a long while a dangerous nuisance in the city; but it does not charge that they had wilfully and negligently failed to exercise their power, authority and means with which they were charged to prevent and suppress such nuisance, and that they so failed to pass "all needful ordinances, rules and regulations to secure" the health and safety of the city, and the good people there residing, etc., etc.; nor does it charge how or in what particular respect they were negligent—as that they had failed to appoint or employ proper agents, or supply other

proper agencies for the prevention and abatement of such and like nuisances, etc., etc. This is necessary, because it is not the duty of the mayor and aldermen themselves, personally, to execute their ordinances, rules and regulations—it is their office and duty to (477) make these, and appoint proper agents, and supply necessary means to execute them. So that this charge also is insufficient.

We point out these fatal defects in order to show, that if but one of the two boards had been indicted, the indictment could not be sustained. But moreover, the indictment insufficiently charges two distinct offenses against two distinct boards of officers, sustaining distinct relations to the city of Wilmington. This is wholly unwarranted by principle or precedent. Different parties cannot be charged with different and distinct offenses, in the same indictment. Such a practice would be impracticable, and lead directly to injustice and confusion.

This case is not like that of *S. v. McNeill,* 93 N. C., 552. In that case, the same parties were charged in several indictments with like offenses.

The demurrer was properly sustained.

There is no error. Let this opinion be certified to the Criminal Court, according to law. It is so ordered.

No error. Affirmed.

Cited: Threadgill v. Comrs., 99 N. C., 356; *Moffitt v. Asheville,* 103 N. C., 255; *S. v. Harris,* 106 N. C., 686; *S. v. Perdue,* 107 N. C., 855; *Coley v. Statesville,* 121 N. C., 316; *S. v. Wilson, ibid.,* 655; *McIlhenny v. Wilmington,* 127 N. C., 153; *Scales v. Winston-Salem,* 189 N. C., 471.

STATE v. JAMES L. YOPP.

Police Power—Highways—Nuisance.

1. Every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the use of their property.
2. Subject to constitutional provisions, the Legislature may impose reasonable restraints upon the use which a citizen makes of his property, in order to protect others in the use of their property.
3. The Legislature has complete power to regulate the highways in the State, and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them, and the preservation of the road.

4. A statute which only regulates the use of property in a manner beneficial to the public, but does not destroy it, is not unconstitutional, unless the restraint is so manifestly unjust and unreasonable as to destroy the lawful use of the property.

5. If the use of property creates a nuisance the Legislature has the power to destroy it.

6. The Legislature has the power to pass an act which may leave the doing or not doing of certain things allowed or forbidden by the act to the discretion of some designated agent or commissioner.

7. Where a statute forbade the use of bicycles on a certain road, unless permitted by the superintendent of the road, *it was held*, that the act was not unconstitutional.

(478) INDICTMENT, heard before *Meares, J.*, at September Term, 1886, of the Criminal Court of NEW HANOVER County.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

The facts appear in the opinion.

Attorney-General (C. M. Stedman and Weill, also filed a brief), for the State.

D. L. Russell and Ricaud for defendant.

MERRIMON, J. The power of government—commonly called the police power—to regulate the conduct of individuals in the exercise of their personal rights, and the use of property, with the view to secure the just enjoyment of right, of whatever nature, of every individual—to promote the public convenience, safety, and common good, is essential, and as well, very great and comprehensive in its nature and extent. It is founded very largely in the maxim, *sic utere tuo ut alienum non lædos,* and also, to some extent, that other maxim of public policy, *salus*
(479) *populi, suprema lex,* and it is of almost universal application in regulating the interests of society within the jurisdiction of the State. It is too well settled to admit of serious question, that every person is subject to it in his person and property. And however absolute his rights to and ownership of property may be, he holds it subject to the implied obligation that he will use it in such way as not to prevent others from having their property, and enjoying the just use and benefit of it, and as will not destroy, abridge or injure the rights of the public. The Legislature, in the exercise of this power, may, subject to any constitutional limitations, prescribe just and reasonable regulations and restraints, in order to secure such important ends, and enforce them by such proper penalties and other means as it may deem expedient and wise.

The extent of this power has not been defined with precision. Indeed, it seems to be practically impossible to do so, because of the vast variety of conditions and circumstances governing its application. We are not, however, embarrassed by any question in this respect here. It is clear that the Legislature has complete power to provide proper and reasonable police regulations, and to amend or alter them from time to time, in respect to the highways of the State, and persons going upon and over them with their vehicles, horses, and other motive power, with a view to protect the roads, and the safety and comfort of passengers going over them. The power is constantly exercised, and it is prudent and necessary to do so, as common experience everywhere proves. Many persons are more or less selfish, and seek their own advantage, and consult their own convenience, fancy or pleasure, without proper regard for the like rights of others—sometimes at their expense; and hence legal restraints and regulations are necessary.

As we have seen, no man has the right, in the use of his own (480) property, of whatever nature, to use it so as to injure another in the just use of his, or the exercise of his personal rights. Hence, there is no reason why the owner of a particular kind of vehicle, which, because of its peculiar form or appearance, or from the unusual manner of its use, frightens horses, or otherwise imperils passengers over the road, or their property, shall be allowed to use such vehicle on the road. He has no right to use it to the prejudice or injury of others, who are lawfully exercising their rights in the use of their property.

If it be said, when shall one person be restrained in doing as he will with his own property—from going, for example, on the highway with his own vehicle of whatever kind—the answer is, whenever in the ordinary lawful course of things in that connection, he would, by the use of his property—his vehicle, in the case suggested—interfere materially in any respect, with another, in the ordinary, lawful use of his property or rights. He might be restrained in one place, and not in another—he might go upon one highway, and not upon another—he might go upon one highway at one time, and not at another—he might be restrained under one class of circumstances, and not under another—in all such cases, the restraint depending on the different attendant circumstances, as perhaps the numbers and kinds of persons passing over the highway—the kinds of roads, the character and purposes of the highway—its use at one time as different from the same at another, and the like considerations. The person thus restrained might be affected adversely in the use of his property—disappointed in his cherished wishes—in the indulgence of his fancy—in taking pleasure or recreation—perhaps as to his substantial interests—but these must all give way to the extent

necessary to allow others to have and enjoy their lawful rights, however these may arise, to the exercise of the power of government to prescribe such regulations and restraints.

(481) In the case before us, the statute (Pr. Acts, 1885, ch. 14) forbids every person "to use upon the road of said company a bicycle, or tricycle, or other nonhorse vehicle, without the express permission of the superintendent of said road," etc. The purpose of this statutory provision is not to destroy the defendant's property—his bicycle—or to deprive him of the use of it, in a way not injurious to others, but to prevent him from using it on a particular road—that mentioned—at a particular time or season, when it would, by reason of its peculiar shape, and the unusual manner of using it as a means of locomotion, prove injurious to others—particularly women and children, constantly passing and repassing in great numbers over the particular road mentioned, in carriages and other ordinary vehicles drawn by horses.

The evidence tended strongly to show, that the use of the bicycle on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road. In repeated instances, the horses became frightened at them, and carriages were thrown into the ditches along the side of the road. It was not uncommon for horses to become frightened at them, and become unruly, if the evidence is to be believed.

The statute did not deprive the defendant of the use of his property—he might have gone another way—he might have gone at an opportune time, with the express permission of the superintendent of the road. In any case, he had no right to go, using his bicycle, at the peril of other people, he giving rise to such peril. The statute did not therefore, in any just sense, destroy his property, as contended, or deprive him of the proper and reasonable use of it; nor was such its purpose. Its purpose was lawful, and in our judgment, it does not provide an unreasonable police regulation—certainly not one so unreasonable as to warrant us in declaring it void. Such statutes are valid, unless the purpose, or

(482) necessary effect is, not to regulate the use of property, but to destroy it.

As we have said, it is the province of the Legislature to decide upon the wisdom and expediency of such regulations and restraints, and the courts cannot declare them void, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence, are not within the proper exercise of the police power of the government. Courts cannot regulate the exercise of this power—they can only declare the invalidity of statutes that transcend its limits. The exercise of this power does not extend to the

destruction of property, under the form of regulating the use of it, unless in cases where the property, or the use of it, constitutes a nuisance. In such cases, if the owner of the property suffers injury, it is such as happens in the illegal use of it, or because the property itself, in its nature or application, is unlawful, and it is *damnum absque injuria.* No man has a right to use his property so as to produce a nuisance, or to have property which is a nuisance where it may be situated.

It is further objected, that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use "a bicycle or tricycle, or other nonhorse vehicle" on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably and without prejudice or partiality, for the just purpose of effectuating the intention of the statute. If there be times or seasons, or occasions, when persons wishing to use bicycles or other like vehicles embraced by the prohibitory clause of the statute in question, it is his plain duty to allow them to do so at such times. The authority is not his—he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in (483) him, and the creation of the discretion implies that there may be occasions, or times, or seasons, when bicycles may be used on the road.

It not infrequently happens, that statutes require particular things to be done, or not to be done, that must be made to depend upon the judgment—discretion—of a designated agent or commissioner, or officer, and the discretion in such cases is not arbitrary—it is lawful, and must be lawfully exercised.

The learned counsel for the appellant directed our attention to the case of *Yick v. Hopkins,* 118 U. S., 356. That case, in our judgment, has no application here. The Court declared a *city ordinance* void, upon the ground, that its manifest purpose was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred upon certain authorities of the city were purely arbitrary—intentionally so—and therefore unlawful and void. And the same may be said of *Mayor and C. of Baltimore v. Bodeeke,* 49 Md., 217, cited in the case above mentioned. In our case, the purpose of the statute is obviously a lawful one—a proper regulation of the use of property—and the designation of the agent, and the discretionary power conferred upon him, is for the lawful purpose of effectuating the just intent of the statute, and he is amenable, as we have indicated above.

There is no error. Let this opinion be certified to the Criminal Court of the county of New Hanover according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Barringer, 110 N. C., 529; *S. v. Tenant, ibid.,* 616; *Durham v. Cotton Mills,* 141 N. C., 644; *S. v. Williams,* 146 N. C., 630; *Bizzell v. Goldsboro,* 192 N. C., 353; *S. v. Yarboro,* 194 N. C., 506.

(484)

STATE v. BANKS MILLER.

Evidence—Accomplice—Corroboration.

1. A conviction upon the uncorroborated evidence of an accomplice is legal, although it is the almost universal custom of trial judges to instruct juries that they should be cautious in convicting on such evidence.
2. The corroboration of an accomplice, ought to be as to some matter, the truth or falsehood of which goes to prove or disprove the offense charged against the prisoner.

(S. v. Haney, 2 Dev. & Bat., 390; *S. v. Hardin, ibid.,* 407; *S. v. Holland,* 83 N. C., 624; cited and approved.)

THIS was an indictment, tried before *Meares, J.,* at October Term, 1886, of the Criminal Court of MECKLENBURG County.

The defendant and one Sam Dick were charged with stealing money from one Wm. Boyd, in 1886. Said Boyd was offered as a witness for the State, and testified, that he had lost money at different times in August and September, to the amount of $175.00 or $200.00; that on the night of 15 September he lost $50 in bills, and a considerable amount in silver. . . . That the defendant lived on his plantation, and that one Wm. Lucas, a colored boy, slept in a cook room adjoining his chamber, from which a door opened into his chamber, and that this door was not locked or fastened; that he discovered the loss about midnight of 15 September, and arrested Lucas before daylight the next morning, and kept him under arrest during the entire day.

The State then introduced the boy, Wm. Lucas, who testified that the defendant and one Dick had employed him to keep Boyd's dogs off, while they went into Boyd's room and stole his money; that on the night of 15 September he did keep the dogs quiet, and they went
(485) into Boyd's room, and afterwards gave witness some of the money. He further testified, that on one occasion he went with

the defendant to the store of one Thomason, a few miles from Boyd's house, and that on that occasion the prisoner had a ten dollar bill, which he, the prisoner, got Thomason to change, and with which he purchased some articles of clothing, and paid witness $3.00; that he never saw the bill until prisoner produced it in the store. Witness said in his direct and redirect examination, that the transaction at Thomason's store was on the morning of 16 September, the morning after he saw the prisoner go into Boyd's house.

On his cross-examination he said it occurred a week or so before 16 September.

The defendant then introduced as a witness one Wm. Thomason (one of the owners of the store mentioned), who testified that on the occasion alluded to by Lucas, he, Lucas, and the prisoner came to the store owned by his brother and himself—that Lucas took from his pocket the $10 bill alluded to, and handed it to prisoner, and the latter handed it to witness—that Lucas bought some articles from the store, and directed him to take payment from the bill—that he did so, and placed the change on the counter, and prisoner pushed the money to Lucas and said: "Here is your money," and Lucas took it up and handed $3 to the prisoner. This was about dark on 1 September. James Thomason testified to the same facts. The prisoner then, in his own behalf, testified, denying the statements of Lucas as to the stealing, and testified as to the transaction at Thomason's store, giving precisely the account given by William and James Thomason.

The case states that: "There were other circumstances relied on by the State as corroborative evidence, but which are not material to the exception."

"The court instructed the jury, that it was unsafe to convict the defendants (Miller and Dick were both on trial) upon the uncorroborated testimony of an accomplice. That the most im- (486) portant witness for the State (Lucas) was an accomplice in the commission of the alleged crime, and that he stood before the jury in the attitude of a self-confessed thief, and the jury ought not to convict those defendants upon the statement of Lucas unless his statement had been corroborated as to material facts, and to such extent as to carry home to their mind a strong conviction of the truthfulness of his statements. That the State had alleged and endeavored to establish the truth of several transactions relating to the use and exhibition of money on the part of the defendant, Banks Miller, as corroborative of the statements of Lucas."

His Honor then recapitulated the testimony of the witnesses Lucas and Boyd, witnesses for the State, and of the prisoner Miller and W.

and James Thomason for the defendant, and speaking of what occurred at Thomason's store, he said: "This was one of the circumstances or transactions which the State alleged was strongly corroborative of the other testimony of the witness Lucas, as to the alleged robbery of Boyd's money on the preceding night. That in the consideration of these alleged corroborative facts and circumstances, it was exclusively within the province of the jury to pass upon the degree of credibility to be attached to the statements of witnesses, and to decide whether the State had established the existence of the facts or circumstances beyond a reasonable doubt, and that if they were so convinced, the next question for them would be, to what extent did such established facts corroborate the account of the robbing as stated by the witness Lucas. That the alleged corroborative facts, if established by the State, should be so strong, that when taken in connection with the account of the robbing as given by Lucas, as to convince the jury beyond a reasonable doubt of the truthfulness of his account of the robbery and the guilt of the defendant.

(487) "The court then recapitulating all the testimony on both sides going to prove and disprove the alleged facts and circumstances, among them the alleged payment of money by Banks Miller to Lucas at Kindrick's store and denied by defendant, the alleged exhibition of a five dollar bill and some silver by Miller at Celia's house, which was denied by Miller—the alleged fact that the defendants went over to South Carolina on the night after the robbery, and returned on the third day, when they had been induced to believe that they would not be arrested, that Boyd asked the defendant Miller if he had seen Lucas with any money of late, stating that he had been frequently robbed of money since 12 August, and that Miller did not tell Boyd of his seeing Lucas with any money, all of which alleged facts were denied by Miller. The court then gave the same instructions with regard to each and all of these alleged corroborative facts as were given in regard to the transaction at Thomason's store."

There was a verdict of guilty, and judgment and appeal.

Attorney-General for the State.
P. D. Walker (H. C. Jones also filed a brief), for defendant.

DAVIS, J., after stating the facts: It has been repeatedly laid down, that a conviction on the testimony of an accomplice uncorroborated is legal; Roscoe's Criminal Evidence, 121; and this has been well settled as the law of this State, certainly since the cases of *S. v. Haney,* 2 D. & B., 390; *S. v. Hardin, ibid.,* 407; *S. v. Holland,* 83 N. C., 624.

It is, however, the almost universal practice of the judges to instruct juries that they should be cautious in convicting upon the uncorroborated testimony of accomplices, and *Gaston, J.*, in *S. v. Haney,* says: "The judge may caution them against reposing hasty confidence in the testimony of an accomplice. . . . Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach a rule of law." (488)

If the unsupported testimony of the accomplice produce undoubting belief of the prisoner's guilt, the jury should convict. The manner and bearing of the witness upon the stand, the probability of his statements, are all matters for the sole consideration of the jury.

We understand the counsel for the defendant to concede that his Honor, in charging the jury that they ought not to convict upon the testimony of Lucas, unless corroborated, erred in favor of the prisoner, but it is insisted that he erred in telling them that what occurred at Thomason's store was corroborative, and that the jury were, or might have been misled thereby.

The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offense charged against the prisoner; *Rex v. Addie,* 6 Carrington & Payne, 452; *Commonwealth v. Barnett,* 22 Pick., 397.

In this case, we do not understand his Honor as charging the jury that the testimony of Lucas was corroborated by what was done at Thomason's store, but he was giving the State's contention, and said the "State alleged" that the circumstances and transactions were corroborative. It is admitted that Lucas was a thief and that the money of Boyd was stolen.

The defendant was in company with Lucas at Thomason's store—they seemed to be associates, and whether Lucas or the defendant had the money, it was passed from one to the other, and these circumstances were doubtless subjects of comment by the solicitor for the State, and his Honor did nothing more than recapitulate the evidence and the aspects in which it had been presented by counsel. The charge was altogether as favorable to the prisoner as was warranted by the evidence, and there was no error of which he could justly com- (489) plain. No error. Let this be certified.

No error. Affirmed.

Cited: S. v. Rowe, 98 N. C., 637; *S. v. Mitchener, ibid.,* 694; *S. v. Barber,* 113 N. C., 713; *S. v. Register,* 133 N. C., 753; *S. v. Ashburn,* 187 N. C., 728.

STATE v. CRAWFORD WALTERS.

Punishment—Certiorari—Bail.

1. Where a statute provides that a party guilty of the offense created by it, shall be fined *or* imprisoned, the court has no power to both fine and imprison.

2. The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense, or increase the punishment.

3. Where a defendant has lost his appeal, but is granted a writ of *certiorari* in *lieu* thereof, the granting of the writ has the effect of an appeal as to a stay of execution, and if the offense be bailable, he is entitled to bail.

(S. v. Kenny, 1 Hawks, 53; *S. v. Mitchell,* 5 Ired., 350; *S. v. Lawrence,* 81 N. C., 522; *S. v. Swepson,* 82 N. C., 541; cited and approved.)

APPLICATION for a *certiorari* as a substitute for an appeal from a judgment of *Clark, J.,* at March Term, 1887, of COLUMBUS Superior Court.

Attorney-General for the State.
George V. Strong, E. R. Stamps and R. T. Gray for defendant.

MERRIMON, J. The defendant was convicted of the offense of slandering an innocent woman, in violation of the statute (The Code, sec. 1113), which prescribes, that "every person so offending, shall (490) be guilty of a misdemeanor, and fined *or* imprisoned, in the discretion of the court." The court gave judgment that the defendant be imprisoned for the term of twelve months, *and* fined the sum of one thousand dollars."

It is insisted that this judgment is erroneous, and we are clearly of that opinion. The statute in plain and positive terms, prescribes that the punishment in such cases shall be a fine *or* imprisonment—either, but not both. There is nothing in its terms, or phraseology, as it appears in The Code, or in it as originally enacted (Acts 1879, ch. 156), that affords ground for interpretation, and we suppose that the learned judge who gave the judgment inadvertently failed to notice that the terms of the statute prescribing the punishment, are only in the alternative. Moreover, it may be added, that the word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense, or increase the punishment. If there be reasonable doubt, the accused party is entitled to the benefit of the doubt.

This is the rule of justice as well as mercy. *S. v. Kenny,* 1 Hawks, 53; *S. v. Mitchell,* 5 Ired., 350.

There is, therefore, error, and the judgment must be reversed, and judgment entered against the defendant according to law.

It appears that the defendant took an appeal from the judgment mentioned and referred to above, but he failed to perfect the same, and hence it failed. At the present term, he applied for the writ of *certiorari* as a substitute for the appeal lost, and it was allowed, and thus the case is in this Court. As the appeal was not perfected, the defendant was committed to jail in execution of the judgment, and is now in prison. His counsel insists that as the writ of *certiorari* has been so allowed, he is not now in jail in execution of the judgment, and he has the right, as he is charged with a bailable offense, to give bail and be at large, pending the case in this Court.

The statute (Acts 1887, ch. 191, sec. 1) above cited, while pro- (491) viding that an appeal in criminal actions shall not have the effect of vacating the judgment appealed from, further provides that upon perfecting the appeal as now required by law, either by giving bond, or in *forma pauperis,* "there shall be a *stay of execution,* during the pendency of the appeal." So that, if the appeal taken had been perfected, the defendant would have been entitled to have bail during its pendency. The writ of *certiorari* is in *lieu* of and a substitute for the appeal, and only serves that purpose. The appeal having been lost, the case could have been before this Court for the correction of errors, only by and through the writ of *certiorari,* employed as such substitute. The Code, secs. 544, 1234; *S. v. Lawrence,* 81 N. C., 522; *S. v. Swepson,* 82 N. C., 541. It must, therefore, be treated as having the effect of an appeal as to the stay of execution—certainly from the time it was granted.

The obvious intent of the statute is, that the execution shall be stayed until opportunity shall be afforded according to law to have alleged errors corrected by this Court. In cases like this the writ of *certiorari* would poorly serve the purpose of a substitute for an appeal, if it failed to so operate as to stay the execution. Indeed, in some cases, it would prove utterly futile, because, pending the case in this Court, the judgment might be completely executed. The law does not contemplate or allow such an unjust and unreasonable state of things to come about in the course of procedure. The execution is stayed as indicated, and the defendant is entitled to give bail, if he can do so, according to law, for his appearance at the next term of the Superior Court of the county of Columbus, to the end that that court may enter such judgment against him in this action as the law allows.

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

Error. Reversed.

Cited: S. v. Jones, 101 N. C., 724; *S. v. Crowell,* 116 N. C., 1058, 9; *S. v. Taylor,* 124 N. C., 803; *S. v. Blake,* 157 N. C., 611; *S. v. Satterwhite,* 182 N. C., 893.

(492)

STATE v. B. A. LAWRENCE.

Liquors.

1. No person can authorize a dealer in spirituous liquors to give or sell such liquors to an unmarried minor.
2. Where the father of a minor gave permission to a dealer in such liquors to sell them to his son: *It was held,* that the dealer was nevertheless guilty under the statute.

INDICTMENT, tried before *Montgomery, J.,* at January Term, 1887, of CATAWBA Superior Court.

The defendant was a *dealer* in intoxicating liquors, and was indicted for giving one gill of such liquors to Daniel Brinkley, Jr., an unmarried person, knowing him at the time to be under the age of twenty-one years. He pleaded not guilty. On the trial he offered evidence to show, that the father of the infant named gave the defendant his permission to give his said son the spirituous liquors for his use.

The solicitor for the State, admitting that the witness could prove the fact, insisted that the father's permission would not be any legal excuse or justification for the defendant.

The court so decided, and the defendant excepted.

There was a verdict of guilty, and judgment thereupon for the State, and the defendant appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: The statute (The Code, secs. 1077, 1078), forbids in strong, peremptory terms, all dealers in intoxicating "drinks or liquors" to sell in any manner, or to give away to any unmarried person under the age of twenty-one years, knowing

such person to be under that age, any such drinks or liquors, and makes it a misdemeanor and indictable to do so; and moreover gives the father, or if he be dead, the mother, guardian or employer of (493) any minor to whom such sale or gift shall be made, a right of action against the guilty party, and in an action brought upon the same exemplary damages, not less than twenty-five dollars, may be recovered.

The plain purpose of this stringent statute is to protect as far as practicable all unmarried minors from the insidious and dangerous evils of drinking intoxicating drinks and liquors, obtained from dealers in the same by sale or gift. It is at drinking places kept by such dealers, that the youth of the State too frequently learn and contract ruinous habits of dissipation, that unfit them for usefulness, and oftentimes render them a real curse to society. The object of the statute is to cut off, prevent, and suppress such evil, as to minors, who, in the weakness and immaturity of youth, more readily contract abnormal appetites and dangerous habits than persons of mature years and experience. The statute is very broad in its terms. All such dealers are embraced, and there is no exceptive provision that appears in terms or by resonable implication. The terms and purpose of the statute are so strong and peremptory as to exclude exceptions by inference or construction. No person can authorize or permit a *dealer* in liquors—that is, one who keeps on hand intoxicating liquors for the purpose of sale or profit—to sell or give such minor any quantity of such drinks or liquors. The father, mother, or guardian, or employer is as much without authority to grant such permission as any other person. The right of action to recover exemplary damages is given them, because it is supposed they sustain special injury, but that they do, does not imply authority in them to foster and permit the evil the statute is intended to prevent and suppress. The statute is intended to protect society, as certainly as those who may have a personal interest in the minor, by reason of blood, or otherwise. The father cannot suspend the statute! (494)

There is no error. Let this opinion be certified to the Superior Court, according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. McBrayer, 98 N. C., 621; *S. v. Walker,* 103 N. C., 414; *S. v. Scoggins,* 107 N. C., 961; *S. v. Best,* 108 N. C., 749; *S. v. Kittelle,* 110 N. C., 561; *S. v. Bishop,* 162 N. C., 554.

STATE v. J. N. TALBOT ET AL.

Forcible Trespass.

Although the entry on land in the possession of another be peaceable, yet if after entering the defendant, upon being ordered to leave, uses violent language and pursues the occupant to his house, he is guilty of forcible trespass.

(*S. v. Widenhouse*, 71 N. C., 279; *S. v. Lloyd*, 85 N. C., 573; cited and approved.)

INDICTMENT tried before *Gilmer, J.*, and a jury, at November Term, 1886, of CUMBERLAND Superior Court.

The defendants were tried and convicted upon an indictment charging them with a forcible entry upon the premises of the prosecutor, P. N. Talbot, he being present and forbidding the same.

It was in evidence that the defendants and two others were found by the prosecutor at work clearing off a ditch, which divided his field from that of the defendant, G. T. Talbot, the latter, if not both defendants, being on the prosecutor's side, and using a grass blade or brier hook in removing the briers. He ordered them to desist and to leave, but they kept at work, and commenced to curse and abuse him, until he retreated back to his dwelling, the defendants following him with continued abuse, threatening and cursing, one with the brier-hook in his hands, up to the gate, some forty or fifty yards distant, where they re-
(495) mained some ten minutes, still abusing, and then left without entering the gate. The prosecutor had been in possession of the premises for seven years, and had raised and cut a crop of oats from the field in June previous to September when all this occurred.

In January of the same year, his father had given the land to defendant, G. T. Talbot, though the prosecutor continued to occupy it as before, and in February he had refused to surrender the possession or pay rent, until he received remuneration for improvements put upon the land. The testimony of the wife of the prosecutor as to what occurred at the gate, was corroborative of his, until she went into the house, fearing there would be a fight.

The court was asked to charge that the evidence was insufficient to warrant a verdict of guilty, which was refused; and in answer to a request of the solicitor, the jury were instructed that if they believed the evidence, both defendants were guilty. Judgment was pronounced imposing a fine on each of the defendants, and therefrom they appeal.

Attorney-General for the State.
N. W. Ray for defendants.

SMITH, C. J., after stating the facts: The only question presented is, do the facts sustain the charge?

While the original entry, though so near the dwelling, was peaceful and without violence by one to whom the premises belonged, and in the absence of the prosecutor, yet the farther encroachment in pursuing him with menaces and abuse, even up to the yard gate, was in law sufficient to warrant the charge. It would have been scarcely more an entry for the defendants to have pursued the occupant into his yard, than it was by violence to push him up to its entrance; and it was a fresh aggression to pass with a strong hand over other parts of the field, when the prosecutor was present forbidding it, with demonstrations of (496) violence which intimidated and overcame resistance.

The charge of the court is borne out by the adjudications in this Court; *S. v. Widenhouse,* 71 N. C., 279; *S. v. Lloyd,* 85 N. C., 573.

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

No error. Affirmed.

Cited: S. v. Lawson, 98 N. C., 762; *S. v. Gray,* 109 N. C., 792; *S. v. Webster,* 121 N. C., 588; *S. v. Jones,* 170 N. C., 756; *S. v. Tyndall,* 192 N. C., 561; *S. v. Fleming,* 194 N. C., 43.

STATE v. GEORGE THOMPSON.

Evidence—Arrest of Judgment.

1. Where the defendant was indicted for setting fire to an outhouse, evidence is competent to show that at the same time an attempt was made to fire a dwelling-house near it, the evidence directly connecting the defendant with the latter attempt.
2. Where the defendant was indicted for burning an outhouse, it is competent to show threats made by him against the son and grandson of the owner of the house.
3. The objection that there is a failure of proof, must be taken before verdict, and cannot be taken on a motion in arrest of judgment.
4. Unquestioned evidence of possession is sufficient proof of ownership in an indictment for arson.

(S. v. Rush, 12 Ired., 382; *S. v. Gaitor,* 71 N. C., 88; *S. v. Green,* 92 N. C., 779; *Aycock v. R. R.,* 89 N. C., 321; cited and approved.)

STATE *v.* THOMPSON.

INDICTMENT, tried before *Clark, J.*, and a jury, at Fall Term, 1886, of ONSLOW Superior Court.

The facts appear in the opinion.

(497) *Attorney-General for the State.*
No counsel for defendant.

SMITH, C. J. The defendant is charged with setting fire to and burning an outhouse belonging to Charles Gerock, in an indictment containing four counts, in two of which it is simply described as an outhouse, and in the others with the superadded words, "used as a kitchen." The counts omit to aver the "intent thereby to injure or defraud," which is an essential ingredient in the offense created under paragraph 6, of section 985, of The Code, but which are rendered unnecessary by the amendment of 1885, chapter 66, which strikes out those words. The defendant was tried and convicted before the jury, and these exceptions were taken during its progress, and brought up by the defendant's appeal.

I. The State, after objection made and overruled, was permitted to show that at the same hour, and on the same night when the outhouse was burned, the dwelling-house, some fifteen yards off, was also attempted to be set fire to, by means of fagots of wood, tied up with a rope belonging to the defendant, while both buildings had been saturated in places with kerosene oil.

This evidence was received, as tending to show that the same person had fired both at the same time.

II. In like manner, after objection, in order to show a motive, evidence was admitted, of declarations of the defendant, made shortly before, of threats to do injury to the son and grandson of the occupant of the premises. It was in proof that the father, Charles Gerock, and his wife, were old and decrepit, and lived by themselves, about a half mile from that son, who had himself several grown sons, and had a party at his house on that night. Another son resided still nearer to his threatened brother's house, and the defendant lived nearer to that brother.

There was no error in admitting the evidence, which tended,
(498) to what extent the jury was to decide, to identify the person who committed the outrage. The circumstances strongly pointed to a single agency, and with the ownership of the rope, with which the kindling materials were bound, to the defendant as the guilty author of both of the firings. The facts proved are parts of one continuing transaction, and are but the development of the conduct of the person by whom the successive acts were done; 1 Whar. Cr. Law, sec. 649. The proof of threats directed against the son and grandson, from their near relationship to the owner of the burned house, was also relevant, though

perhaps feeble, in showing general ill-will to the family, and a motive for the act. *S. v. Rush,* 12 Ired., 382; *S. v. Gailor,* 71 N. C., 88; *S. v. Green,* 92 N. C., 779.

The defendant moved in arrest of judgment, for that no proof had been offered of property in the alleged owner of the outhouse, other than possession.

The exception, if properly taken, must be to the failure of the proof introduced to sustain the averments as to the ownership of the outhouse, and this must be on the trial. It is too late after verdict, and never furnishes cause for arresting judgment.

But if the objection had been in apt time, it would have been overruled, because possession unquestioned, is sufficient evidence of property to warrant the verdict. This is ruled in *S. v. Gailor, ante; Aycock v. R. R.,* 89 N. C., 321.

It may admit of question, if the facts be as stated in the case, that the house burned was "within the curtilage" and appurtenant to the dwelling-house occupied by the said Charles Gerock as his residence, whether the offense was not in law a capital felony, but the solicitor has chosen to put his accusation in a milder form, and his humanity leaves no just grounds of complaint of the charge or of the proof offered in its support. (499)

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

No error. Affirmed.

Cited: S. v. Weaver, 104 N. C., 761; *S. v. Rhodes,* 111 N. C., 650; *S. v. Jeffries,* 117 N. C., 729; *S. v. Lytle, ibid.,* 802; *S. v. Daniel,* 121 N. C., 576; *S. v. Graham, ibid.,* 628; *S. v. Shines,* 125 N. C., 732; *S. v. Battle,* 126 N. C., 1041; *S. v. Adams,* 138 N. C., 694; *S. v. Sprouse,* 150 N. C., 861; *S. v. Clark,* 173 N. C., 745; *S. v. Deadmon,* 195 N. C., 707.

STATE v. ALEXANDER SLOAN.

Certiorari—Judge's Charge—Case on Appeal—Jury—Challenge.

1. A *certiorari* to correct a case on appeal will not be granted when it appears that the omissions complained of were not made by the judge by any inadvertence or oversight, and there is no reason to believe that the trial judge would amend the case if given an opportunity.

2. Where exception is taken that the judge refused certain prayers for instruction, in preparing the case for this Court, the prayers for instruc-

tion, and so much of the evidence as bears upon them, should be set out in the case, and not merely a statement that the instructions asked were substantially given in the charge to the jury.

3. The right to a jury *de medietate linguæ* is not a part of the common law, and has never obtained in this State.

4. Where a negro is accused of crime, it is no cause of challenge to the array, that the special *venire* is composed entirely of whites, there being no charge of corruption or unfairness made against the sheriff.

5. It cannot be assigned as error that the trial judge told the solicitor how many jurors he might put to the foot of the panel, it not being shown that it caused any harm to the prisoner.

(Ware v. Nesbit, 92 N. C., 202; *S. v. Gay*, 94 N. C., 821; *S. v. Miller, ibid.*, 902; *S. v. Gooch, ibid.*, 982; *S. v. Benbow*, 2 D. & B., 196; *Capehart v. Stewart*, 80 N. C., 101; cited and approved.)

INDICTMENT for murder, tried before *Boykin, J.*, and a jury, at November Term, 1886, of ROWAN Superior Court.

There was a verdict of guilty, and from the judgment the (500) prisoner appealed.

The facts appear in the opinion.

Attorney-General for the State.
No counsel for defendant.

SMITH, C. J. The prisoner is charged with murder, and upon his trial at November Term, 1886, of the Superior Court of Rowan, before the jury, was found guilty, and sentenced to suffer death. He appealed to this Court, and the transcript of the record was received and docketed on the 14th day of March thereafter. On 12 May his counsel made application for a writ of *certiorari*, looking to a conviction of the case, by adding a series of instructions, six in number, set out in the petition, which were asked and refused, and exception taken thereto.

It is further stated that the judge, after reading them, not in the hearing of the jury, said that he thought he had charged substantially what was prayed for, and that in this he is mistaken.

It is not suggested, however, but rather the contrary is to be inferred, that the omission complained of proceeded from inadvertence, and was not considered by the presiding judge, for it appears the instructions were not inserted in the case, because he thought their substance was embraced in his general charge, and it was unnecessary to put them in the record.

We do not approve of this method of disposing of such exceptions, since it leaves it in the breast of the judge to determine the substantial conformity of the one to the other, beyond the form of correction, should there be error, while both those asked and those given should be sent up,

so that the Court could see if the variations are material, and might be such as the prisoner was entitled to have. But we must assume, as the judge himself says, that the instructions prayed were em- (501) bodied in the charge, and no harm has come to the prisoner from the refusal.

Moreover, the petition is essentially deficient in not showing to this Court some sufficient reason for supposing the amendment will be made if again brought before the judge, and an opportunity given him to do so. *Ware v. Nesbit,* 92 N. C., 202; *S. v. Gay,* 94 N. C., 821; *S. v. Miller, ibid.,* 902; *S. v. Gooch, ibid.,* 982. Besides, the addition of the instructions as abstract propositions of law, would be unavailing, unless accompanied by the evidence in its different aspects, so that their pertinency to the facts could be seen, and this would involve the restatement of the case.

The application must be denied and the merits of the appeal considered.

The indictment is for murder, on which the prisoner was tried, found guilty, and adjudged to suffer death, at November Term, 1886, of the Superior Court of Rowan.

A special *venire* of fifty men was returned by the sheriff, among whom were no persons of color, as was the prisoner, while the victim of his crime was a white man. There were in the county colored freeholders, intelligent, of good moral character, and qualified to serve as jurors.

For this cause, and without imputing to the sheriff prejudice against, or favor for either the slain or the accused, or any improper influence prompting his action in summoning the jurors, the prisoner's counsel challenged the array, and the challenge was overruled. It seems to have been based upon the idea that the prisoner had a right to have jurors of his own color on the list from which the panel was to be formed, in analogy to the rule introduced under the statute 27 Elizabeth, by which an alien charged with felony was entitled to have a jury *de mediætate linguæ.* But this was not a principle of the common law, and never had application to this country, whose population is so largely drawn from foreign countries. But the right of challenge for favor, (502) whether to the array or to individual jurors, is allowed, not to enable the party to select such as he may suppose to be favorable, but to get rid of obnoxious jurors, and have the panel constructed of such as are impartial and fair minded.

Nor can the color line be recognized in the administration of criminal justice, for all are equal under the law; *S. v. Benbow,* 2 D. & B., 196, and cases cited in the note to Battle's edition of the volume; *Capehart v. Stewart,* 80 N. C., 101.

In summoning jurors, the sheriff acts under a sense of official responsibility, and as was said in the case last cited, in reference to such discriminations, "the law knows no distinction among the people of the State, in their civil and political rights, and correspondent obligations, and none such should be recognized by those who are charged with its administration."

The second exception is to the answer of the judge to an inquiry from the solicitor, as to how many jurors the State would be permitted after challenging for cause, to stand aside, and have the cause of challenge passed on after the perusal of the panel, as tending to prejudice the prisoner's case before the jury. While this is not assignable for error, and the standing aside of jurors is mostly a matter of discretion, and we cannot see how its exercise has been prejudicial to the prisoner in the present case, in which the judge should not have committed himself as to the number to be put aside, but reserved that discretion, and interposed when he saw the State carrying the privilege to an unwarrantable and needless extent. But it does not appear that the permission has been abused, and if it had been, we have no doubt the court would have interfered and put a stop to it, for such abuse would have warranted a recall of the permission. We understand the course pursued in this (503) case is not uncommon among the judges.

We find no error in the record, and the judgment is affirmed.

No error. Affirmed.

Cited: Bank v. Bridgers, 114 N. C., 108; *Riggan v. Sledge,* 116 N. C., 92.

STATE v. F. M. BISANER.

Sheriff—Costs—Taxes—Variance.

1. A sheriff is not entitled to the fee of fifty cents as for an execution against each taxpayer, after the tax list is placed in his hands, but only becomes entitled to such fee, if at all, when he actually levies and seizes property in order to collect the tax.
2. Where the defendant was indicted for extortion, and the bill charged that it was done as tax collector, while the evidence showed that he was deputy sheriff, and collected taxes by virtue of this office, and not that of tax collector, the variance was held to be fatal.
3. Where the defendant was indicted for extortion in collecting two dollars and thirteen cents as taxes, when only one dollar and sixty-three cents was due, and the evidence showed that he collected one dollar and sixty-three cents as taxes, and fifty cents as costs, the variance was held to be fatal.

STATE *v.* BISANER.

INDICTMENT, tried before *Meares, J.*, and a jury, at February Term, 1887, of the criminal court of MECKLENBURG County.

The indictment charges that the defendant, "being one of the special tax collectors in and for the county and State aforesaid, duly appointed and qualified as such in conformity to law, to perform the duties of that office, not regarding the duties of that office, but contriving and intending one Robert Gray, to injure and oppress, on the said day aforesaid, by color of his said office, did knowingly, wilfully, corruptly and extortively, demand, take and receive from the said Robert Gray, (504) the sum of two dollars and thirteen cents, as the tax due to the said county and State by the said Robert Gray, for the fiscal year commencing 1 June, 1886, and ending 1 June, 1887, whereas in truth and in fact, the tax computed against and owing by the said Robert Gray for the said fiscal year amounted to one dollar and sixty-three cents, as he, the said F. M. Bisaner, then and there well knew, contrary," etc.

To this indictment the defendant pleaded not guilty. On the trial, the jury rendered a special verdict, from which it appeared, that the defendant was a deputy sheriff, qualified to collect taxes, and "was specially charged with the collection of certain poll taxes due and unpaid"—that on 27 November, 1886, the agent of the prosecutor Gray "paid to the defendant $2.13," of which "$1.63 was paid and received as the tax due from Gray, and fifty cents was demanded and received by defendant as a fee for collecting said tax," and this was so paid by the agent. It was further found as a fact, that the defendant had been told that he was entitled to such a fee, and he honestly believed he was so entitled, as did the agent.

Upon the special verdict, the court directed a verdict of guilty to be entered, gave judgment for the State, and the defendant appealed to this Court.

Attorney-General for the State.
Platt D. Walker and A. Burwell for defendant.

MERRIMON, J., after stating the facts: The statutory provision in question (Acts 1885, ch. 177, sec. 28) gives the tax list of county and State taxes, with the proper order of the county commissioners entered thereon as prescribed, "the force and effect of a judgment and execution against the property of the person charged in such list," when the same went into the hands of the sheriff or tax collector for collection, but this did not imply that it was to be treated as an execution (505) in the hands of the sheriff against each taxpayer, so as to entitle him at once and certainly to an execution fee of fifty cents, as in case of an execution in his hands, commanding him to collect the sum of money

therein specified, from one party for another named. There was no provision that in terms or effect gave the sheriff such right. He, on receiving the tax list, at first held the same to permit the taxpayer to pay the taxes due from him without costs. The statute mentioned (section 37) required him to "attend at the courthouse or his office in the county town during the months of September and November for the purpose of receiving taxes," and in like manner, "to attend at least one day during the month of October at some one or more places in each township," of which notice should be given, to receive taxes—the obvious purpose being, to give taxpayers convenient opportunity to pay without cost. If any one of them should fail to pay voluntarily, then the sheriff becomes authorized to seize and sell the property of the delinquent, to make the sum of money required, and in case of such seizure and sale, he becomes entitled, if at all, to an execution fee, because, in that case, the "tax list" served the purpose of an ordinary execution. So it is clear that the defendant had no right to demand and receive from the prosecutor the fee of fifty cents. But the present revenue law expressly provides that the sheriff shall have such fee in case of levy and sale of property to pay taxes.

We think, however, that the court erred in directing the verdict of guilty to be entered, upon the ground that the charge made in the indictment was not proven substantially as made. The charge was that the defendant, "being one of the special tax collectors in and for the county and State aforesaid," etc. The proof was that the defendant was a deputy sheriff, qualified to collect taxes and account for the same to the sheriff. A tax collector is an officer whose sole duty it is to collect
(506) the State and county taxes, and a special tax collector is one appointed in the place of the sheriff, in case he fails to qualify himself to collect the same.

It may be, the defendant went to trial under his plea of not guilty, prepared to defend himself against the charge made against him as special tax collector, but not as deputy sheriff. Moreover, if he should be indicted as deputy sheriff for the extortion charged upon him in this action, he could not plead his conviction or acquittal in this action, in that, because, the two charges would be different, not simply in form, but in substance.

Further, the charge was that the defendant collected from the prosecutor two dollars and thirteen cents as the tax due from him to the county and State for the fiscal year of 1886-87, whereas, the tax so due from him was but one dollar and sixty-three cents, etc. The proof was that the defendant demanded and collected but one dollar and sixty-three cents *as tax* so due, and in addition thereto, fifty cents as and for his fee, which he claimed he had a right to collect. Now the charge as made is

so materially different from that proven, as that a conviction or acquittal in this action could not be pleaded in a subsequent action for extorting fifty cents as a fee.

The defendant is charged as a special tax collector with extortion in collecting more money as taxes for the county and State than was due from the prosecutor; the proof was that he, as deputy sheriff, collected the exact amount so due, but unlawfully collected a fee for himself of fifty cents not due.

The offense charged and that proven, though similar in their nature, were so distinctively different as to the material facts of each, as that they were not the same, but distinct offenses in contemplation of law. The court ought, therefore, to have directed a verdict of not guilty to be entered, and given judgment for the defendant.

There is error. Let this opinion be certified to the Superior (507) Court according to law. It is so ordered.

Error. Reversed.

Cited: S. v. Pritchard, 107 N. C., 927.

STATE v. STEPHEN M. GODFREY.

Injury to Livestock—Construction of Statutes.

1. In order to complete the offense of injury to livestock, it is not necessary that the offense should be consummated within the enclosure not surrounded by a lawful fence, for if it is begun therein and completed outside of such enclosure, the offense is complete.
2. So, where the defendant set his dogs on a cow who was in a field not surrounded by a lawful fence, and the dogs chased and worried her both within the field and also outside of it; *It was held,* that the defendant was not entitled to an instruction to the jury that unless the cow was injured in the field he would not be guilty.
3. If in such case, the cow had been gently driven out of the field, and then the injury inflicted, the case would be different.
4. While criminal statutes must be strictly construed, yet they must be construed so as to give effect to their plain meaning when this appears.

INDICTMENT for injury to livestock, tried before *Shipp, J.,* and a jury, at Fall Term, 1886, of HERTFORD Superior Court.

On the trial, the evidence was, that the cow charged in the indictment to have been injured, was in the field of the defendant, which was not

enclosed by a lawful fence five feet high; that the defendant set his three dogs at the cow to drive her out; that the dogs chased her through the field, and bit her legs; that she went into the road, followed by the dogs, and while in the road, the defendant took the largest dog (508) off the cow, while he was biting her on the fore leg; the ear was badly bitten and torn, and the fore leg injured. The witness could not say whether she was injured in the field or not.

The defendant asked the court to charge the jury, that unless the cow was injured *in the field,* he would not be guilty, and that there was no evidence to go to the jury that she was injured inside the field. This instruction the court declined to give, but told the jury that "if the dogs were set upon the cow by the defendant, as stated by the witness, to drive her from a field not surrounded by a lawful fence, and the dog bit her in the field, but did her no actual injury until he got into the road, that the defendant would be guilty, if he set the dogs upon the cow wilfully, and thus injured her after she had gotten into the road."

There was a verdict of guilty, and thereupon, a motion for a new trial was made, which was denied. The court gave judgment against the defendant, and he appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: We think the instructions of the court given to the jury were proper, reasonable and just. The statute (The Code, sec. 1003) violated provides that, "If any person shall wilfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court: *Provided,* that this section shall not apply to any county or territory where the stock law prevails." Its obvious purpose is to prohibit and prevent every person from unlawfully and wilfully killing and abusing livestock not his own, but (509) that of another, that may get into, and trespass upon enclosures not surrounded and protected by a lawful fence, while so trespassing. This is the mischief to be suppressed. This purpose would not be accomplished in this and like cases, if the statute should be so narrowly construed as to mean that no offense is committed, unless the abuse complained of should be consummated inside of the enclosure.

If the attack resulting in abuse and injury, is begun inside and completed just outside, then no offense is committed! So narrow an interpretation cannot be allowed, if one more in harmony with the reason and purpose of the statute can be adopted. Criminal and penal statutes, as

well as others, must receive such reasonable construction as will effectuate their purpose when this appears.

The defendant's enclosure was not surrounded by a lawful fence. He was, therefore, in default, and being so, when the cow of the prosecutrix got into his field, he should have gently driven her out of it without abusing or injuring her. This he did not do, but on the contrary set his dogs at her, and they chased her through the field, and bit her legs; she ran out into the road, where the dogs still pursuing her, bit her ear badly, and the defendant took off the largest dog that was biting her on the leg, which was injured.

It was a violation of the letter of the statute to thus set three dogs upon, chase and harass the cow inside of the enclosure, but if there could be any doubt as to this, surely to chase her through and out of the field, and just outside of the fence, let the dogs bite, worry, injure and abuse her as described by the evidence, was a violation of the reasonable and just meaning of it. Such abuse of the cow was the result of one continuous attack upon her, begun inside and completed just outside of the enclosure, and the attack was made because she got inside of the field not surrounded by a lawful fence. The purpose of this statute is to prevent such abuse in such case, in the absence of a (510) lawful fence.

If the cow had been driven gently from the field, and then, outside of it she had been abused, the case would be different.

There is no error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

STATE v. E. W. RAY AND W. A. ANDERSON.

Judgment—Judges—Jurisdiction.

1. Whether a judge can grant a judgment taxing a county with the payment of costs, at Chambers and in vacation, *quære.*

2. The resident judge of a district has no other powers within such district in vacation, than any other judge of the Superior Court.

(Bear v. Cohen, 65 N. C., 511; *Myers v. Hamilton, ibid.,* 567; *Morriss v. Whitehead, ibid.,* 637; *Howse v. Mauney,* 66 N. C., 221; *Corbin v. Berry,* 83 N. C., 27; *Galbreath v. Everett,* 85 N. C., 546; cited and approved.)

MOTION to tax costs, heard before *Avery, J.,* at Chambers, in Morganton, on 5 January, 1886.

It appears that E. W. Ray and W. A. Anderson were indicted in the Superior Court of the county of Mitchell for the crime of murder. The

action was removed to the Superior Court of the county of Caldwell for trial, which was there had. Ray was convicted of manslaughter, and Anderson of murder. Afterwards they escaped and fled the country. The costs of the prosecution were considerable, and the convicted parties were insolvent. Parties claiming costs in the action, gave notice
(511) of a motion to be made before a judge at Chambers, to tax the costs of the action against the county of Mitchell.

At Chambers, on 14 November, 1885, the judge made an order in the action mentioned above, requiring the commissioners of the county of Mitchell to show cause on 21 December, 1885, before him at Chambers, in Morganton, "why the county of Mitchell shall not be adjudged to pay the costs in the above entitled cases."

Notice of this order was served upon the commissioners of the last named county.

On 21 December, 1885, at Chambers, the motion mentioned above was continued, to be heard at Chambers, in Morganton, on 5 January, 1886, at which time the judge gave a judgment, whereof the following is a copy:

"It appearing to the satisfaction of the court, that notices were duly served on the commissioners of Mitchell County, to show cause why the county of Mitchell should not be adjudged to pay the costs in the above case, at Chambers, in Morganton, before me on 21 December, 1885, and said cause having been continued until today, to give said commissioners further time to answer, and no answer being filed; and it appearing that the felonies for which the defendants were indicted were committed in Mitchell County, and that said costs were incurred in said cause by the State, and that defendants have broken jail, and have not been retaken, and that the said defendants are insolvent, and said bills of costs having been duly approved by the solicitor, it is now, on motion, ordered and adjudged, that the county of Mitchell pay said costs, as taxed by the clerk."

Afterwards, at the Spring Term, 1886, of the Superior Court of the county of Caldwell, the commissioners of the county of Mitchell moved to strike out or set aside the judgment above set forth, upon the ground that the judge had no authority to make the same in vacation at Chambers; and the further ground, that it is irregular, and sug-
(512) gested upon affidavit, that numerous items of cost, amounting to a large sum of money, had been improperly taxed in the bill of costs, etc.

The court denied this motion, upon the ground that it had no authority to grant it, and gave judgment accordingly, from which the commissioners appealed to this Court.

Chas. M. Busbee for Mitchell County.
No counsel contra.

MERRIMON, J., after stating the facts: It is very questionable whether any judge could, at Chambers, and out of term time, grant a judgment like that in question here purports to be, without the consent of the parties, but we need not now decide that question, for, if he could, we think the particular judge who undertook to grant this one had not authority to do so.

This Court takes judicial notice of the judicial districts of the State, and what counties each embraces, and also of where the several judges of the Superior Courts are, in the course of their ridings, and in the course of the discharge of their official duties respectively. This is so, because these matters are regulated by public statutes. Although the judges may exchange particular courts in their respective districts with the sanction of the Governor, still the presumption is, that each is in the particular district to which the law assigns him, and if the contrary is the fact, it must in a proper way be made to appear.

It appears from the record, that the judge of, and residing in the Tenth Judicial District, gave the judgment, which the appellant insists is void or irregular, on 5 January, 1885, at Chambers, in Morganton, in the county of Burke, which county is in and forms part of that district. At the time this judgment was given, regularly and properly, the judge who gave it had authority in the discharge of his (513) official duties in the Eleventh Judicial District, and not in the Tenth. The statute (Acts 1885, ch. 180, sec. 2) redistricting the State, provided that the judge of the Tenth District should ride the Fall circuit thereof of 1885, and thereafter he should "ride the circuits and hold the courts of the several districts in the order of their numbers in rotation"; and section 8 of the same statute provides, that "the judge riding any Spring circuit shall hold all the courts which fall between January and June, both inclusive; and the judge riding any Fall circuit shall hold all the courts which fall between July and December, both inclusive."

The wholesome purpose of the statutory provisions just cited is, to establish order, and prevent confusion in the exercise of judicial authority by the judges of the Superior Courts. Each one is assigned to and knows the territorial subdivision of the State within which, for a stated period of time, he may exercise his general authority as judge, and he is not authorized to exercise his ordinary jurisdictional power elsewhere. The first period in each year begins on the first day of January, and ends on the thirtieth day of June inclusive—the second begins the first day of July, and ends the thirty-first day of December, inclusive. This

is the just and reasonable import of the statute, and thus the periods are made certain and definite.

The judgment in question was one to be granted or refused by the judge in the ordinary exercise of his judicial authority—it was not extraordinary and exceptional, and did not come within that class of cases and matters as to which the judge has jurisdiction anywhere and everywhere in the State, as in the case of granting a restraining order, and in the like cases.

That each judge of the Superior Court has general jurisdiction only in the judicial district to which he is assigned by the statute, except in case of the exchange of courts with another judge, or of special
(514) commission to hold a special term of court in a particular county, seems to have been understood as the law ever since the present system of judicature in this State was established. *Bear v. Cohen,* 65 N. C., 511; *Myers v. Hamilton, ibid.,* 567; *Morriss v. Whitehead, ibid.,* 637; *Howse v. Mauney,* 66 N. C., 221; *Corbin v. Berry,* 83 N. C., 27; *Galbreath v. Everett,* 85 N. C., 546.

It follows that the judge had no jurisdiction to grant the supposed judgment of which the appellants complain. It was therefore void, and should have been so declared by the court below.

The motion of the appellees pending before the judge of the Tenth Judicial District at the time he passed into the Eleventh, should have been left to be disposed of by his successor.

There is error. The order appealed from must be reversed, and further proceedings had in the matter of the motion, according to law. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: Anthony v. Estes, 99 N. C., 599; *S. v. Snow,* 117 N. C., 776; *Moore v. Moore,* 131 N. C., 372, 373; *Ward v. Agrillo,* 194 N. C., 322.

STATE v. LAFAYETTE NASH.

Liquors—Prohibition Laws—Special Verdict.

1. Where a special verdict is returned, no appeal lies until there has been a judgment entered on the verdict.

2. Under the provisions of chapter 32 of The Code, the sale of domestic wine is not prohibited.

3. It is intimated that the provision of chapter 32 of The Code, allowing the sale of home-made wine, while prohibiting that raised in other States, is unconstitutional.

4. Where an act made the sale of wines imported from other States a misdemeanor, but allowed the sale of domestic wine; *It was held*, that although the provision in regard to domestic wine might be unconstitutional, yet it did not make the sale of such wines a misdemeanor under the act, but that the provision in regard to foreign wines might be inoperative.

5. *Quære*, whether an act which forbids the sale of spirituous liquors, includes in its inhibition the sale of vinous and malt liquors.

(*S. v. Lockyear*, 95 N. C., 633; cited and approved.)

INDICTMENT, heard before *Philips, J.*, and a jury, at July (515) Criminal Term, 1886, of WAKE Superior Court.

The defendant is charged with selling spirituous liquors in a township in which prohibition prevails, in violation of section 3116 of The Code. Upon the trial of his plea of not guilty, the jury rendered a special verdict in these terms: "At an election regularly called and held in Raleigh Township, in said county, on the first Monday in June, 1886, under the provisions of chapter 32, Vol. 2, of The Code, to ascertain whether spirituous liquors might be sold in said township, a majority of the qualified voters of said township voted tickets on which was written the word, "Prohibition"; and that no election has since been held reversing said election, and the result of said election in favor of prohibition was duly declared by lawful authority two days thereafter.

"That on 15 July, 1886, the defendant sold to the witness for the State, who was of full age, a corked and sealed bottle of wine, manufactured in this State, from grapes raised in this State and containing no foreign admixture of spirituous liquor, but deriving its ardent spirit from vinous fermentation only, and the same was not sold to be drunk on the premises where sold, and was not drunk thereon.

"If, upon these facts, the court be of opinion that the defendant is guilty, then the jury so find for their verdict; but if the court be of a contrary opinion, then the jury for their verdict find the (516) defendant not guilty."

The court adjudged the defendant not to be guilty, and the State appealed.

Attorney-General for the State.
E. R. Stamps and R. T. Gray for defendant.

SMITH, C. J., after stating the facts: The record has the same defect that was found to exist in the case of *S. v. Lockyear*, 95 N. C., 633, and

must be disposed of in the same manner. The action of the court perfects the verdict by removing that which made it conditional, and as in case of a general verdict, calls for a judgment discharging the defendant, if there are no other charges against him requiring a further detention.

The argument has been, however, upon the merits, the liability of the defendant to a criminal prosecution upon the facts found; and as the question is one of public interest and ought to be settled, we will proceed to express the conclusion at which we have arrived, as was done in the former case.

The section (3116) which makes the selling of any "spirituous liquor" within a prohibited district a misdemeanor, is part of chapter 32 of The Code, and the first section thereof (3110), in express terms, sanctions the sale of "wines from grapes, blackberries, currants, gooseberries, raspberries and strawberries manufactured in this State from fruit raised in the State," when "sold in bottles corked or sealed up and not to be drunk on the premises," and which wines do not "contain any foreign admixture of spirituous liquors" and "derive their ardent spirit from vinous fermentation."

The special verdict finds all the conditions necessary for exoneration in the act imputed as criminal. The statute does not, therefore, punish the act of the defendant, and, as modified, has no application to what he did. The Attorney-General urges that this qualifying portion of
(517) the enactment is in conflict with the Constitution of the United States in discriminating in favor of home products, and, therefore, being void, leaves the other section in operation. But these consequences do not follow. The discrimination may be inoperative when it affects injuriously the interests and rights of those who undertake to dispose of similar products of other States introduced into this, but it cannot lop off an essential exception or qualification of the penal statute, and leave the penal part of it in force. It must stand or fall in the form which the legislative will has assumed, and the sale of such wines as are described is not prohibited. The invalidity of an essential interwoven part of the enactment may avoid it altogether, where it is sought to be enforced against one who sells similar wines manufactured in another State, but this unauthorized discrimination cannot, in disregard of the legislative intent, render that an offense not made such in the act itself.

The argument at the bar has been principally directed to an inquiry as to the meaning of the term "spirituous liquors," in which we do not propose to follow, further than to say, the inclination of our opinion, in construing this penal enactment in connection with the use of the words in other parts of The Code, is to confine it to such liquors as are formed from distillation, and not to extend it to such as generate alcohol by

vinous fermentation only, according to the definitions given both by Dr. Webster and Dr. Worcester in their dictionaries. But we leave the point undecided, and open for a fuller consideration, when it shall be directly presented and require determination.

But the appeal must be dismissed, and this will be certified for final judgment in the court below.

Dismissed.

Cited: S. v. Giersch, 98 N. C., 727; *Guilford v. Georgia Co.,* 109 N. C., 313; *Hospital v. Florence Mills,* 186 N. C., 555.

INDEX.

CLERK.

It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person, under sections 442, 447 and 448 (3) of The Code. *Kenney v. Laughenour*, 325.

COMPLAINT.

1. The statement in a complaint of redundant matter, or of evidential facts, is no ground for demurrer. *Thames v. Jones*, 121.

2. So, where in an action to recover land, the plaintiff sets out his claim of title, the allegations in this respect cannot render the complaint demurrable on the ground that it joins several distinct causes of action. *Ibid.*

3. Where in an action to recover several tracts of land, in the separate possession of several defendants, the complaint does not allege of which tract each defendant is in possession; *It was held*, that it constituted no ground for demurrer. *Ibid.*

4. Where the complaint in an action against several defendants to recover land, described the *locus in quo* as several tracts adjoining each other and situated in the counties of Cumberland and Bladen, of which the defendants are in possession and wrongfully withhold from the plaintiffs; *It was held*, that under this allegation the Superior Court of Cumberland had jurisdiction. *Ibid.*

CONDITION.

1. A *proviso* in a deed in absolute restraint of all alienation is void, but such condition if limited and reasonable in its application and as to time when it must operate, will be upheld. *Munroe v. Hall*, 206.

2. Where the condition in a deed upon which the estate is to be divested and go to a third party is founded on a contingency which never can happen, the grantee will take a fee simple. *Ibid.*

3. Land was conveyed to two sisters and their heirs by deed, but the deed provided that in case either of them married that the land should belong to their brother, and also provided that the grantees should not sell or dispose of the land in any way whatever. The *feme* grantees sold the land, and both died unmarried; *It was held*, that their grantee got a good title. *Ibid.*

CONFESSIONS.

Where a prisoner made lertain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committing magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true; *It was held*, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were not true. *S. v. Ellis*, 447.