ANNOTATIONS INCLUDE VOL. 192

NORTH CAROLINA REPORTS

VOL. 98

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1887

REPORTED BY

THEODORE F. DAVIDSON

ANNOTATED BY

WALTER CLARK

(FURTHER ANNOTATIONS ADDED, 1927)

(2D EDITION, ANNO.)

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CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SEPTEMBER TERM, 1887

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(1)

J. C. STOUT v. J. S. McNEILL, H. H. SLOCOMB, AND NEILL McQUEEN.

Contract—Injunction—Partnership—Officers—Exemptions.

1. A public ministerial officer—here a sheriff—should not be made a party to an action for an injunction to restrain the enforcement of a judgment of a court or the performance of any act as public agent, unless he has a personal interest in the subject of the action.
2. A member of a partnership has a right to require partnership effects to be first applied to the satisfaction of the partnership indebtedness.
3. One partner is not entitled to have his personal property exemption allotted from the partnership effects without the consent of his copartners.
4. Such consent does not constitute a contract between the partners, and it may be withdrawn at any time before the allotment is made.

(*Edney v. King*, 4 Ired. Eq., 465; *Lackay v. Curtis*, 6 Ired. Eq., 199; *McLane v. Manning*, Winston Eq., 59; *Allen v. Grissom*, 90 N. C., 90; *Burns v. Harris*, 67 N. C., 140; *Scott v. Kenan*, 94 N. C., 296; *Jones v. Boyd*, 80 N. C., 258; cited and approved.)

CIVIL ACTION, tried before *MacRae, J.*, at chambers, in CUM- (2) BERLAND, on 18 June, 1887.

The purpose of the present action is to have allotted to the plaintiff (who with the defendant, J. S. McNeill, had formed a copartnership,

and conducted a mercantile business in the name of McNeill & Stout, until they became insolvent), a personal property exemption out of the goods of the firm, and to restrain the sheriff, Neill McQueen, also a defendant, from proceeding to sell under an execution issued upon a judgment for a firm debt, by a justice of the peace, under which the goods had been seized, and were in his possession. The claim to this remedy rests upon an alleged consent of both partners, given to the sheriff, after he had made the levy, and which, when the appraisers were making out, or were about to make, an inventory of the joint effects, was withdrawn by the partner McNeill, who directed the officer to permit no exemptions for himself or his associate, and to proceed under the execution, sell the goods, and appropriate the proceeds as far as necessary to the discharge of the debt so recovered by the defendant Slocomb, and in amount a little over one hundred dollars. On 7 June (two days after the rendition of the first judgment), one A. Moore obtained judgment also against the firm, and sued out and delivered an execution therefor to the sheriff, with similar directions from the debtor for its prior payment out of the firm assets in his hands when they should be sold.

A preliminary application was made to the judge at chambers for a temporary restraining order, which, upon notice, was heard upon a series of affidavits offered by the contesting parties, and upon his finding of facts, was denied, with a further order appointing the said sheriff receiver, to take charge of such assets of the firm as remain, after satisfying the executions in his hands, which had been levied before June, 1880, the day on which the summons in the present suit was issued, and authorizing and requiring him to collect such assets until further action be taken in the premises.

(3) From the order denying the injunction and placing in the hands of the receiver so much only of the joint effects as were left after satisfying the executions, the plaintiff appealed.

D. Rose for plaintiff.
Thomas H. Sutton for defendants.

SMITH, C. J., after stating the case: Before proceeding to the consideration of the imputed error in the ruling, we call attention to the fact that the sheriff is improperly made a party in the cause, when the remedy by an injunction is sought, for when it issues against the defendant, it requires him to countermand any authority given to agents in contravention of the order, and so refrain from using the public agencies through which he must proceed in doing the forbidden act. In *Edney v. King,* 4 Ired. Eq., 465, *Ruffin, C. J.,* uses this language,

speaking of the introduction of the clerk and sheriff as parties defendant in the suit: "Those persons were most improperly made defendants, as they are merely ministers of the law, and have no interest whatever in the controversy. Upon notice of the injunction it would, it is true, have been a contempt in the sheriff to proceed on the execution, but to that purpose notice would have been sufficient."

This matter of practice has since been affirmed in *Lackay v. Curtis,* 6 Ired. Eq., 199, and in *McLane v. Manning,* Winston, 608.

The inquiry is, did what previously took place looking to an assignment to each of the debtors, with their consent, vest an irrevocable right in the plaintiff to have his exemption taken out of the partnership goods which had been levied on, and were in the sheriff's hands?

Now, it is plain that partnership effects ought to be first applied to partnership debts, and each partner has a right to (4) require this to be done in his own exoneration, the separate interest of each being in the surplus left after the partnership liabilities have been discharged. The whole subject is considered and discussed in *Allen v. Grissom,* 90 N. C., 90, rendering its further consideration needless.

In consequence of the absence of any direct lien or equity to be asserted by the creditors themselves against the property of the partnership debtors, and that it must be worked out through the individual partners in self-exoneration, their interests being similar, it follows that if they so choose, they may divide the joint property, and each thereafter holds his share in severalty, leaving their joint debts unpaid. Upon this principle it was decided in *Burns v. Harris,* 67 N. C., 140, that while one of the several partners cannot, as of right, have his exemption out of the partnership effects to the prejudice of creditors, it may be done with the consent of all, and this ruling is followed in the late case of *Scott v. Kenan,* 94 N. C., 296.

The assent thus required must be positive and voluntary, remaining, at least, if terminable even then, until the allotment has been made, liable in the meantime to be recalled at the pleasure of any one of the members of the firm, and ceasing when so recalled. Indeed, the common effects properly are applicable to the common liabilities, and their diversion to the personal advantage of the members when the creditors are unpaid, though legally capable of being done, is little short of, and may, as involving an intent to defraud, be carried so far as to amount to a remedial wrong. But however this may be, it is certainly in the power of any partner upon whom the wrong is consummated, to withdraw his consent and demand that the creditors be first paid, and such is the present case.

(5) It was suggested in the argument for the appellant, that the giving the consent of each to an appropriation of the effects to the other as a personal property exemption, amounts to a contract between them by which each is bound. We do not so understand the case, and the validity of such an agreement, if made, may well admit of question, as an attempt to withdraw property seized under execution and subject to the lien resulting from the levy, to the injury of the creditor.

But here it is an assent given to the sheriff, and before he has acted upon it, recalled, and he required to proceed under the writ. It is true this is mutual, and the inducement to each may have been, and doubtless was, the advantage he was to receive to himself, but the assent is the several act of each given to the officer, and is a matter between them.

Why should there not be a reserved right to arrest the doing an act of injustice to the creditor, and the consummation of a meditated wrong? The facts do not show a contract, nor a consideration for a contract, between the partners, and only an assent to the proposed allotment, and not less revocable than it would be if it was limited to the plaintiff, and he alone was to have his exemption.

We have considered the case upon the findings of fact by the court, because the case is thus presented to us by counsel, not intending to deny their right to have the evidence reviewed, and the facts ascertained *de novo,* had counsel so demanded; and further, we may add, that we do not see how, if we had passed upon the evidence, we could have arrived at conclusions different from those of the judge. *Jones v. Boyd,* 80 N. C., 258, and other cases.

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

No error. Affirmed.

Cited: Thornton v. Lambeth, 103 N. C., 89; *McMillan v. Williams,* 109 N. C., 256, 257; *Richardson v. Redd,* 118 N. C., 678; *Farmer v. Head,* 175 N. C., 275.

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(6)

JOHN DEVEREUX v. THE ROCHESTER GERMAN INSURANCE COMPANY.

Agent—Insurance—Payment—Contract.

1. Money paid voluntarily, with full knowledge of all the facts, in the absence of any agreement, express or implied, to repay it, cannot be recovered back, though such payment was made under protest.

2. It *seems* that an insurance agent or broker, upon a cancellation of a policy procured through his agency, is only entitled to commissions upon the amount of the premium earned by his principal before cancellation.

(*Mathews v. Smith*, 67 N. C., 374, and *Comrs. v. Comrs.*, 75 N. C., 240, cited.)

CIVIL ACTION, tried before *Merrimon, J.*, at August Term, 1887, of WAKE.

The plaintiff's action is to recover from the defendant company the sum of $535.18, alleged to be due him as commissions on a premium paid by the Carolina Central Railroad Company on an insurance of its property by the defendant company, brought about by the plaintiff's agency. The facts as ascertained by a reference made in the progress of the cause were:

The Carolina Central Railway Company paid to the defendant, the Rochester German Insurance Company, the sum of five thousand four hundred and seventy-one dollars and seventy-five cents ($5,471.75) premium upon a policy of insurance issued by it; and the defendant insurance company paid plaintiff $547.17 as commissions for procuring said insurance as broker and as agent for the railroad company; that eight days after said policy went into effect it was canceled by defendant company, and the defendant company returned to the railway company this amount, *less* the amount of the earned premium and the commission paid plaintiff, and demanded of the plaintiff that, under the defendant's agreement with him, made before the issuance of the policy, he should return the amount of commissions he had (7) received to the railway company, less commissions on earned premium.

The plaintiff, upon such demand, returned to the railway company the said sum of $535.18, protesting at the time that he was not bound to do so under his contract with defendant company, and did not waive any of his rights, and brought this action.

On this statement of fact, the court having intimated an opinion that the plaintiff could not recover, he, in submission thereto, took a nonsuit and appealed.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
C. M. Busbee and E. C. Smith for defendant.

SMITH, C. J. The rescission of the policy, it is not controverted, was in the exercise of a right reserved therein, nor is it anywhere intimated that it was not done in good faith and from a due regard to the supposed interests of the insurance company. The consequences of putting an end to the contract in this way are, that so much of the premium

is retained as measures the period during which the contract remained in force, of which the insured has had the benefit, and this without abatement for commissions allowed soliciting agents or other charges incurred. The referee finds it to have been the usage of such agents to refund their ratable charges, though he reports the plaintiff to be a "broker," to whom the rule did not apply, though "they did return such commissions whenever they saw fit."

Now, it may well admit of question, whether the contingent termination of the contract, an essential element in it, does not enter into and modify the contract which provides compensation for agents, dependent upon the amount of the premium received, so that the agent and the company share only in what is retained by the latter. Such
(8) would seem to result from the restoration of the contracting parties to their original status, except while the contract was in operation. But admitting the point to be disputable, and the construction of the agreement between the agent and his principal in this respect doubtful, the plaintiff, with the money in hand, upon the defendant's demand, pays over to the insured what was admittedly due it, and now ask the aid of the court to compel the defendant to pay it back to him. It was out of the premium that the plaintiff was to take his compensation. He did so, and while the defendant returned all that came into its hands, the plaintiff did the same as to his share, making the restitution in full to which the insured was entitled.

We know of no principle upon which the present demand can be supported. There was no mistakes as to facts, and though reluctantly done, it was the voluntary act of the plaintiff. *Mathews v. Smith,* 67 N. C., 374; *Comrs. v. Comrs.,* 75 N. C., 240. The action would not lie against the defendant for money received to the plaintiff's use, for it was not received by the defendant at all, nor for money paid to defendant's use and at its request, since in such case a contract is implied, whereas here it is expressly negatived by the facts. It must be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Bank v. Waddell, 100 N. C., 344; *Brummitt v. McGuire,* 107 N. C., 357; *Bank v. Taylor,* 122 N. C., 571; *Bernhardt v. R. R.,* 135 N. C., 263; *Hay v. Ins. Co.,* 167 N. C., 84; *Hooper v. Trust Co.,* 190 N. C., 426.

(9)

SHADRACK MANUEL v. THE BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

Counties—Municipal Corporations—County Commissioners.

1. Counties are not, in strict legal sense, municipal corporations, like cities and towns, but are political organizations, created by the State for the more convenient and effective exercise of governmental powers; and the general rule is, that in the absence of a statutory provision, they are not liable for damages sustained by the negligent acts of their agents and servants.
2. There is no statute in this State imposing such liability; and hence an action cannot be maintained against a county for damages sustained by one while imprisoned in the county jail by reason of the failure of the commissioners to provide adequate means for his health and protection.
3. Whether the commissioners are personally liable for such injuries, *quære.*

(*White v. Comrs.*, 90 N. C., 437; *McCormack v. Comrs., ibid.*, 441; *Dare County v. Currituck County*, 95 N. C., 189; *Lewis v. Raleigh*, 77 N. C., 229; cited and approved.)

CIVIL ACTION, tried before *MacRae, J.*, at November Term, 1885, of CUMBERLAND.

The plaintiff alleged, in substance, that he was imprisoned in the common jail of the county of Cumberland, about one month, according to law; that while he was so imprisoned, the defendants unlawfully and negligently failed to provide at all for his comfort and warmth, as they were required by law to do; that during a part of the time of his imprisonment, the weather was bitter cold and rough; that he suffered intensely and terribly from the same several days and nights, while the jailer was deaf to his appeals for relief; that as a consequence of such exposure and neglect while he was so imprisoned, he contracted a disease of the lungs, from which he has suffered greatly ever since, and the prospect is, that he will never recover; that he was strong and healthy when he went to prison, and has ever since his discharge from the same, suffered from the disease so contracted, and has (10) been and is frequently unable to labor for the support of himself and family who are dependent upon him, etc.; that by the gross neglect of the defendants as alleged, and the causes mentioned, he has sustained great damage, and demands judgment for the same, etc.

The defendants deny the material allegations of the complaint.

On the trial, pending the introduction of evidence, the court intimated the opinion, "that the defendants were not, in their corporate capacity, liable for damages sustained by the plaintiff by a failure of the proper

authorities to make a jail warm, and keep the same in a habitable condition while the plaintiff was imprisoned therein, if such was the case, as testified by the plaintiff."

Acting upon this intimation, the plaintiff, having excepted, suffered a judgment of nonsuit, and appealed to this Court.

No counsel for plaintiff.
Thomas H. Sutton for defendant.

MERRIMON, J., after stating the case: Counties are of and constitute a part of the State government. A chief purpose of them is to establish its political organization, and effectuate the local civil administration of its powers and authority. They are in their general nature governmental—mere instrumentalities of government—and possess corporate powers adapted to its purposes. It is not their purpose to create civil liability on their part, and become answerable to individuals civilly or otherwise. Indeed, they are not, in a strict legal sense, municipal corporations, like towns and cities organized under charters or particular statutes, and invested with more of the functions of corporate existence, intended to serve, not so much the purposes of the State, as, sub-
(11) ject to its general laws, the advantage of particular communities in particular localities in the promotion and regulation more or less of trade, commerce, industries, and the business transactions and relations in some respects of the people residing or going there collectively and severally—their purposes are more general, and partake more largely of the purpose and powers of government proper. *White v. Comrs.*, 90 N. C., 437; *McCormack v. Comrs., ibid.*, 441; *Dare County v. Currituck County*, 95 N. C., 189; Cooley Const. Lim., 240; *ibid.*, 247; Dillon on Mun. Corp., secs. 761, 762.

While what we have said is true generally, the Legislature, subject to constitutional limitations, may confer upon counties such corporate powers to make contracts, create civil liabilities, and serve such business purposes as it may deem expedient and wise, and make them answerable in damages for the negligence of their officers and agents in failing to properly exercise the powers with which they are charged, or for exercising them improperly, to the injury of individuals. But such corporate authority and liability must be especially created by and appear from statutory provision, expressed in terms or necessarily implied. Generally, a county is not liable for damages sustained by individuals, by reason of the neglect of its officers or agents, and there is no statute of this State creating such liability. *White v. Comrs., supra.* It is provided by statute (The Code, sec. 702), that "Every county is a body politic and corporate, and shall have the powers prescribed by statute,

and those necessarily implied by law, and no other." Liability for such damages is not declared or implied by any statutory provision. On the contrary, it seems that the Legislature did not contemplate or intend that it should exist. Hence, it has expressly provided (The Code, sec. 711), that "Any commissioner who shall neglect to perform any duty required of him by law as a member of the board, shall be guilty of a misdemeanor, and shall be liable to a penalty of two hundred dollars for such offense, to be paid to any person who shall sue (12) for the same," the purpose being thus to secure certainly the due discharge of official duty on the part of the commissioners.

This action is brought against the county, and not against the commissioners personally. They are its officers, and represent its corporate entity. "Its powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them," and "all actions or proceedings, by or against a county in its corporate capacity, shall be in the name of the board of commissioners of the county."

This case is very different in material respects from that of *Lewis v. Raleigh,* 77 N. C., 229, cited. It was an action against a city, brought for the purpose of the recovery of damages sustained by the intestate of the plaintiff therein, occasioned by the neglect of the city's officers and agents. But as we have seen, cities and towns stand on a footing very different from counties. Cities and towns are incorporated largely and mainly for the particular benefit of the corporators; they have special privileges and advantages, and exercise special powers, and are in many respects held responsible as such corporations for damages occasioned by the neglect of their agents.

The plaintiff cannot, therefore, maintain this action. It may be that he can have a remedy against the commissioners personally, but as to this we are not called upon to express an opinion.

If what he alleges is true, there was gross, inexcusable neglect on the part of the commissioners, resulting in serious injury to and shocking outrage upon him. It is difficult to believe that the commissioners so neglected to discharge their plain duty, and that a jailer could be so unfeeling and deaf to the appeals of a human being for relief from acute suffering that it was his duty to avert. We are glad to be assured by the counsel for the appellees that the allegations of the complaint have no real foundation in truth.

The law requires in explicit terms, and expects that county (13) commissioners shall provide for the tolerable comfort of prisoners; they ought to so provide, and jailers should execute their proper orders with fidelity; if they will not, the courts and solicitors should be vigilant to compel them to do so. It should never be forgotten that a

prisoner cannot help himself in essential respects, and the laws of the State require that his condition shall not be made or left intolerable. Judgment affirmed.

No error. Affirmed.

Cited: Worth v. Comrs., 118 N. C., 122; *Pritchard v. Comrs.*, 126 N. C., 912; *Bell v. Comrs.*, 127 N. C., 91; *Moody v. State Prison*, 128 N. C., 16; *Jones v. Comrs.*, 130 N. C., 452; *Bank v. Comrs.*, 135 N. C., 248; *Graded School v. McDowell*, 157 N. C., 319; *Jenkins v. Griffith*, 189 N. C., 634.

MARY SELLERS ET AL. v. PHILIP SELLERS ET AL.

Deed, Execution of—Registration—Evidence—Exceptions—Juror.

1. The tax required to be paid as a qualification to serve as a juror is that falling due in the fiscal year next preceding the time when his name was placed on the jury list.
2. A deed having once been duly admitted to probate and ordered to be registered, may, in the absence of any statute forbidding it, be registered at any time thereafter.
3. The certificates of registration made by registers of deeds are prima facie evidence of the facts therein recited.
4. A register of deeds has the power, and it is his duty to correct any error he may have made in the registration of a deed, either by inserting any omitted matter or by a re-registration of the entire instrument.
5. A deed will not be avoided by an inconsistency between the date of its execution and that of its probate and registration.
6. It is not essential that the words "his mark" shall be attached to the mark made or adopted by a person unable to write, in the execution of a deed. It is sufficient if it appears that he in fact made the mark or adopted it.
7. Exceptions to the charge of the court should point out the particular errors alleged.

(*Pleasants v. R. R.*, 95 N. C., 196; *Clements v. Rogers, ibid.*, 248; *Tatom v. White, ibid.*, 453; *S. v. Byrd*, 93 N. C., 624; *Young v. Jackson*, 92 N. C., 144; *Holmes v. Marshall*, 72 N. C., 37; *Etheridge v. Ferebee*, 9 Ired., 312; *Beckwith v. Lamb*, 13 Ired., 400; *S. v. Carland*, 90 N. C., 668; *S. v. Haywood*, 94 N. C., 847; cited and approved.)

(14) ISSUES joined in a special proceeding, tried before *Boykin, J.*, at Spring Term, 1886, of ANSON.

The plaintiffs allege that they are tenants in common with the *feme* defendant of the land described therein, and seek to have partition

thereof, etc. The defendants deny the allegations of the petition, and allege that the *feme* defendant is sole seized of the land, etc.

In selecting a jury to try the issues thus raised, the plaintiffs challenged a juror for cause, and assigned as cause that he had not paid tax for the year next preceding the time when his name was selected and placed on the jury list by the county commissioners as prescribed by the statute (The Code, secs. 1722, 1723). It appeared that he had paid tax for the fiscal year 1884, but had not for the year 1885. The trial took place at the Spring Term of the court of 1886. The challenge was overruled, and plaintiff excepted.

On the trial the defendants put in evidence a deed purporting to have been executed 8 October, 1855, upon the sufficiency of which it seems the title of the *feme* defendant depended. The parts thereof, and the certificates of probate and registration thereof necessary to a proper understanding of the errors assigned, and the opinion of the court, are as follows:

"In testimony whereof, the said Roland R. Sellers, and Sarah (15) Sellers, his wife, hath hereunto set their hands and seals, the day and date above written.

R. R. SELLERS. [Seal.]
SARAH (X) SELLERS. [Seal.]

Signed, sealed and delivered in the presence of
A. LITTLE,
J. T. STREATER.

NORTH CAROLINA—ANSON COUNTY.

COURT OF PLEAS AND QUARTER SESSIONS—October Term, 1854.

Then Rowland Sellers, and Sarah Sellers, his wife, appeared in open court, and each acknowledged the due execution by them of the foregoing deed for lands in this county, to Thomas Ratliff, for the sole and separate use of Martha Sellers, independent of her husband, Philip A. Sellers, and of all his marital rights, dated 8 October, 1855; and thereupon Stephen W. Cole, a member of the court, is appointed to take the private examination of the said Sarah Sellers, who is a *feme covert,* and the said S. W. Cole, after having examined (privily) the said Sarah Sellers within the verge of said court, separate and apart from her said husband, Roland R. Sellers, touching her free and voluntary consent in the execution of said deed of conveyance, reports to the court that she acknowledged before him when so examined, that she had executed the said deed freely, of her own free will and accord, and

without any force, fear or undue influence of her said husband, or other person, and that she now and still doth voluntarily assent thereto. All of which, on motion, is ordered to be recorded.

S. W. COLE, *M. C.*

It is further ordered that the deed itself and the record of the above proceedings be registered.

J. WHITE, *Clerk.*"

(16) STATE OF NORTH CAROLINA,
27 October, 1855.

Then this deed came into my hands and was duly registered in the register's office in Anson County, in Book No. 14, page 482.

P. J. COPPEDGE, *Register.*

STATE OF NORTH CAROLINA,
28 November, 1885.

Then this deed and certificate came into my hands and were duly registered in the register's office of Anson County in Deed Book No. 24, pages 270, 271 and 272.

P. J. COPPEDGE, *Register of Deeds.*"

"The plaintiffs objected to the introduction of said deed on the following grounds:

1. Because the deed could not have been registered without an order therefor from the clerk of the Superior Court, there being no evidence offered outside of the deed and certificate, and the registry thereof, of the official character of S. W. Cole, a member of the County Court, and of J. White, clerk of said court.

2. Because the probate was taken in 1854, while the deed shows its execution in 1855.

3. Because the words 'her mark' do not accompany the X.

4. Because the register of deeds had no authority to add the word 'Seal' to the registry after the name of Sarah Sellers, one of the alleged grantors, after the commencement of this action, the register of deeds having put the seal to the name of Sarah Sellers on the registry at the request of defendants' counsel. Objection overruled and plaintiffs excepted."

There was some question as to whether or not there was a seal affixed to the name of Sarah Sellers at the time she executed the deed,
(17) but the evidence went strongly to prove that there was, just as it now appears, and the jury must have so found and so accepted the fact to be.

The deed was admitted; there was a verdict and judgment for the defendants, and the plaintiffs appealed.

J. B. Batchelor for plaintiffs.
J. A. Lockhart and Platt D. Walker for defendants.

MERRIMON, J., after stating the case: The first assignment of error cannot be sustained. The name of the juror challenged must, in the order as prescribed in the statute (The Code, secs. 1722—1727), have been selected and placed on the jury list on the first Monday in September, 1885. To render him eligible to sit on the trial as a juror at the Spring Term, 1886, of the court when it took place, he must have paid tax for the fiscal year next preceding the time when his name was so placed on the jury list, which was the fiscal year of 1884. It appears that he paid tax for that year, hence the objection was unfounded. *S. v. Carland,* 90 N. C., 668; *S. v. Haywood,* 94 N. C., 847.

Nor do we think that the objections to the deed and the probate and registration thereof can be sustained. The deed was a conveyance for land, situate in the county of Anson, and the makers, a husband and wife, acknowledged the execution of it by them before the late Court of Pleas and Quarter Sessions of that county, and the wife was privily examined by order of the court by a member thereof, as to her free and voluntary consent in the execution of it. This acknowledgment and privy examination of the wife was ordered to be recorded and registered, and it was registered, as appears from the certificates of the proper officers. These certificates appear to be sufficiently regular and complete for the purposes for which they were intended, and have the sanction of the statute (Rev. Stat., ch. 37, sec. 9), then in (18) force, and which as to them continue in force and have effect. *Etheridge v. Ferebee,* 9 Ired., 312; *Beckwith v. Lamb,* 13 Ired., 400.

At the time the probate of the deed was thus taken, and the order of registration made, these were effectual. They were made a part of the record of the court, and upon the certificate of the clerk of the court, without further evidence, it became, and was, the duty of the register to register the deed as he did, as appears from his certificate. These official certificates were of themselves prima facie evidence of the pertinent facts stated in them, and the record of the probate of the deed reciting that S. I. Cole was a member of the court, thus certified, was evidence that he was such member. *Etheridge v. Ferebee, supra.*

The probate of the deed and order of registration were sufficient when taken and made—they have each since then continued, and will continue, to be efficient and sufficient. There is no law, statutory or otherwise, that renders them inoperative because of lapse of time. If, there-

fore, the deed had not been registered in 1855, it might, in pursuance of the order, have been in 1885 without further order. We can conceive of no adequate reason why it might not have been done. The probate had once been taken, and the order of registration made by the proper competent authority. In the absence of statutory requirement, why should there be a further order necessary?

It seems to us that a re-registration of the deed was unnecessary. If the register failed at first to completely execute the order of registration, it continued in force and mandatory until it was completely executed, and it continued to be the register's duty to execute it until he had completely done so. If he found that he had by inadvertence omitted a word, a sentence, a paragraph or a scroll representing a seal,

(19) we think he might, in good faith, complete the registration in these respects. Of course he could not have authority to *interpolate* anything that was not in the deed, or other instrument, at the time the probate was made. It was therefore not improper for the register, as it appears he did, to add on the registry the scroll representing the seal affixed to the signature of the wife, which he had at first omitted.

But if this were not so, and the registration in 1855 was insufficient, we think the re-registration in 1885 cured any defect in that respect, because the order of registration, as we have seen, continued mandatory, and there was at that time no statute that forbade such registration. The statute (Acts 1885, ch. 147) had not then taken effect. It might have been regular to submit the probate to the clerk of the Superior Court, who is now the probate officer, to the end he might have made a further order of registration, but this was not essential. *Holmes v. Marshall,* 72 N. C., 37; *Young v. Jackson,* 92 N. C., 144.

Nothing appears in the record by which the apparent inconsistency between the date of the deed and the time of the term of the court at which its execution was acknowledged can be reconciled. It may be that the term of the court was in fact held in October, 1855—this is not improbable—it may be that in fact the deed was executed in October, 1854. But it is not indispensable that these dates shall be reconciled—it was only essential that the deed existed, and was proven, and these things appear from the record of the probate of it, which imports verity and which, while it remains unimpeached, prevails.

The certificate of probate settles the fact as to the existence of the deed and of the probate of it.

It was not necessary that the words "her mark" should be annexed to or accompany the cross mark of the wife in executing the deed on her part to identify herself with it as her deed. It was only essential that she made the mark herself, or adopted it as hers, if made by some other

person under her direction. Such words might be appropriate (20) as furnishing some evidence that she made or adopted the mark, but that she did so is the important fact, and this might be proven by any appropriate evidence, or she might acknowledge it as she did, before the appropriate probate court. The objection that the words "her mark" were not used in the connection mentioned has no force. *S. v. Byrd,* 93 N. C., 624; *Tatom v. White,* 95 N. C., 453.

The court gave the jury numerous instructions, and after a verdict for the defendant, it is stated in the record that the "plaintiffs excepted," but to what part of the instructions given, or to what rulings in other respects they excepted, does not appear from any assignment of errors in terms or by the remotest implication.

To except thus is no compliance with the statute in respect to the assignment of errors, and it is settled that the court will not notice such "exceptions." *Pleasants v. R. R.,* 95 N. C., 196; *Clements v. Rogers, ibid.,* 248.

No error appears, and the judgment must be affirmed.

No error. Affirmed.

Cited: S. v. Hargrave, 100 N. C., 485; *McKinnon v. Morrison,* 104 N. C., 362; *S. v. Gardner, ibid.,* 742; *Brown v. Brown,* 106 N. C., 458; *Devereux v. McMahon,* 108 N. C., 143; *S. v. Davis,* 109 N. C., 781; *S. v. Fertilizer Co.,* 111 N. C., 659; *Brown v. Hutchinson,* 155 N. C., 211; *Butler v. Butler,* 169 N. C., 591; *S. v. Levy,* 187 N. C., 585.

Z. B. NEWTON v. H. C. FISHER.

Register of Deeds—Public Records—Fees—Mandamus.

While it is the duty of the register of deeds to permit all persons to inspect the records committed to his custody, he will not be required, without the payment of his proper fees, to allow anyone to make copies or abstracts therefrom.

(*Bryan v. Comrs.,* 84 N. C., 105, cited.)

APPLICATION made in an action in CUMBERLAND for a writ of (21) *mandamus,* heard before *MacRae, J.,* on complaint and demurrer, at chambers, 9 July, 1886.

The complaint alleges that the plaintiff is a duly licensed attorney and counsellor at law, and now engaged in the practice of his profession in the county of Cumberland.

1. That the defendant is, and was at the time of the acts complained of, the duly elected and qualified register of deeds for the county of Cumberland.

3. That plaintiff has in his hands for collection a large amount of claims against persons living in said county, and in order to serve the interests of his clients, it is necessary for him to keep well informed as to all transfers of property in said county, and to know the financial condition of all the debtors of his clients; and in order for him to do so, it is necessary for him to have knowledge of all the transfers of property in said county.

4. That on 24 June, 1886, the plaintiff went to the office of defendant and demanded access to such of the registration books for the year 1886 as the defendant was not in the actual use of, for the purpose of making an abstract of all chattel mortgages, deeds, mortgages on real estate and deeds of trust, stating the date of the deed or mortgage, names of the grantor or grantors, grantee or grantees, the kind of property transferred, and if a mortgage, for what amount and when due, which demand was refused by defendant, unless plaintiff would pay to him twenty cents for each chattel mortgage and eighty cents for each deed or mortgage of real estate.

5. That on same day plaintiff demanded of defendant access to Book O, No. 3, for the purpose of making a copy of a deed recorded on page 423 of said book, which demand defendant denied plaintiff as a matter of right, but agreed to as a matter of courtesy to plaintiff.

6. That plaintiff desires to have a copy of said deed in his
(22) office for the purpose of bringing suit for the land conveyed in said deed.

Wherefore the plaintiff prays:

1. That a writ of *mandamus* may be issued, commanding the defendant to allow plaintiff to make an abstract of all transfers of real and personal property for the year 1886.

2. Commanding the defendant to allow plaintiff to make a copy of the deed recorded in Book O, No. 3, page 423.

The defendant moved to dismiss the action upon the ground that no cause of action is set out in the complaint, and the motion was considered in the nature of a demurrer *ore tenus*.

The demurrer was sustained and the action dismissed, and from this the plaintiff appealed.

D. Rose for plaintiff.
Thomas H. Sutton for defendant.

DAVIS, J., after stating the case: Among other duties, the registers of deeds in their respective counties are charged with the custody and safe keeping of the books in which are contained the records of the deeds, mortgages, and other instruments required by law to be registered.

These are the public records of the county, and all persons have a right to know, in fact are conclusively presumed to know, their contents.

All persons have a right, therefore, to inspect them, and it is the duty of the register, not only to record all instruments required by law to be registered, but to keep his office open, and be present "in person or by deputy," for such time as will afford ample opportunity to the public to inspect the records, and if necessary, the board of county commissioners may designate the times at which he shall attend. For his services he is compensated by fees fixed by law.

All persons have the *right* to inspect these records freely and (23) without charge, and all persons who may desire to do so, can get copies by paying the prescribed fees.

It is the duty of the register to keep them open to the inspection and examination of all who may desire to inspect and examine them, and for this there is no fee; it is his duty to furnish copies to all who require them and will pay the fees allowed. Perhaps, in addition to this, so long and so universal has been the custom, that it may be said to be the right of lawyers, and others needing them, to take such reasonable memoranda as may not interfere with the rights and duties of the register, and we have never known this refused. We know of no law that requires the register, in this respect, to do more.

No one has the right, to use the language of the learned judge in the court below, "to make copies or abstracts of the entire record of the office, including those instruments in which the person so desiring to make abstracts, etc., is not at the time interested, but simply anticipates that he will at some time be interested, and abstracts of which he desires to make for merely speculative purposes. This might have the effect to transfer from the register's office to the office of the attorney, who might have a place of business more conveniently located, a large part of the business and emoluments of the register of deeds, as no one would have a right to make copies of records in the office of the register, except upon payment of the fees allowed by law for copies, and this would deprive the register of the emoluments of his office. In this view, the plaintiff would be entitled to every facility for the legitimate prosecution of his business by access to the records for the examination of instruments registered, but the court is not satisfied of his right to make an abstract of all transfers of real and personal property for the year 1886, without

having an interest in the same for the prosecution of his business or paying any fee therefor."

(24) If he has the right to make abstracts of all the records of 1886, he has the right to make them for all the years; if he has the right to copy or make abstracts of parts of the records, it may be the material parts, he has the right to copy the whole. If it is the right of one, it is the right of all. Once concede the right, and where will it end? The records of this Court, of all the courts, of the executive departments of every public office in the State, would be subject to the same right in every individual in the State, and, aside from the inconvenience, and perhaps intolerable annoyance and loss of just emoluments to public officers, the danger and risk which they might incur in possible injury to the records, affecting public and private rights, make it manifest that such right cannot exist. It is not the right of all—it is not the right of one.

It is the first time, so far as our researches go, that this or any similar question has been before the courts of this State, but the identical question was before the Supreme Court of Michigan, *Webber v. Townley*, 43 Mich., 534 (Am. Rep., 38—213), and it was there held that the plaintiffs were not entitled to a writ of *mandamus* to compel the register of deeds to permit them or their clerks to inspect and "copy or abstract the public records, files and papers in the office of the register of deeds," to aid them in their business.

In that case, conceding the right of the plaintiffs to inspect the records, *Marston, C. J.*, says: "It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, the plaintiffs ask the right of copying or abstracting the entire record of the county for private and speculative purposes, they having no other interest whatever therein." Again he says: "As the use of the

(25) public records cannot thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally, without neglecting his official duties, and if he must employ clerks, or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies?"

To the same purport is the reasoning, supported by the authorities cited, in the case of *Brewer v. Watson*, 71 Ala., 299.

It was there held that the attorney for the collector had a right to *inspect* the settlement of accounts in the Auditor's books, in which his

client was interested, and it was put upon the ground of direct interest in the matter contained in the record.

The cases of *Bryan v. Comrs.*, 84 N. C., 105, and *Perry v. Williams*, 12 Vroom, 332 (Am. Rep., 32—219), cited by counsel for plaintiff, do not sustain his claim. The former only decides that there are some things which the sheriff must do without fee, and the latter is an authority for the defendant in this action, in that it holds that the person seeking the *inspection* of the record in that case, must have such an interest in the controversy as would enable "him to maintain or defend an action, for which the public documents will furnish competent evidence or necessary information."

The fifth and sixth allegations of the complaint were not insisted upon in this Court. There is no error.

No error. Affirmed.

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(26)

R. A. GILMER v. ALBERT A. HOLTON, CLERK OF THE SUPERIOR COURT OF GUILFORD COUNTY.

Constitution—Justice of the Peace—Office—Statute—Vacancy—Clerk of the Superior Court.

1. The statute, chapter 288, Laws 1885, conferring authority upon the Governor to fill vacancies in the office of justices of the peace, caused by the failure of the appointees of the General Assembly to qualify within the time therein prescribed, is not unconstitutional.
2. The authority of the clerks of the Superior Courts to appoint justices of the peace is confined to vacancies caused by death, resignation, or other causes during the term.
3. The effect of the recent changes in the methods of county government is to abrogate that clause in Art. IV, sec. 28, of the Constitution providing for the filling, by the appointment of the clerk, of vacancies caused "by the failure of the voters of any district to elect."
4. Subordinate officers of the Government should not assume that an act of the Legislature is in conflict with the Constitution. If their refusal to recognize the authority of such an act is ever justifiable, it is only where there is a palpable violation of the Constitution, or where irreparable harm may follow their action.

THIS was an application for *mandamus*, made in an action in the Superior Court of GUILFORD County, and heard before *Shepherd, J.*, at September Term, 1887.

The facts are fully stated in the opinion.

J. T. Morehead for plaintiff.
J. E. Boyd for defendant.

SMITH, C. J. The General Assembly, at its session held in 1876-'77, passed an act to establish county governments, wherein it is provided, under the authority of a recent constitutional amendment, that justices of the peace shall be elected by the General Assembly, and abrogating all the inconsistent provisions contained in article seven of the Constitution, except sections seven, nine and thirteen; Acts 1876-'77,
(27) ch. 141. This enactment, with some modification in its terms, is introduced into The Code, sec. 819, which declares that at each regular biennial session, the General Assembly shall elect one justice of the peace for each township in the several counties of the State, who shall hold their offices for the term of six years.

It further enacts, that in addition to the justices before mentioned, and when the terms of those then in office shall expire, there shall be elected an additional justice of the peace for each township in which may be situated a city or incorporated town, and also one for every one thousands inhabitants in such city or town, who shall hold their offices for six years; that the term of office shall begin on the first Thursday in August next after the election of them severally, and those heretofore or hereafter elected, who shall remain in office until their respective terms expire.

This was followed by an act passed in 1885, chapter 288, which, repealing all laws in conflict, declares all appointments of justices of the peace made by the General Assembly void, unless such appointee shall qualify within three months thereafter (section 1), and that all unfilled appointments "occurring under the provisions of the preceding section in the office of justice of the peace, shall be filled for the term, by appointment by the Governor."

The present action, began by the issue of a summons on 23 July, 1887, is to obtain a *mandamus* against the defendant, clerk of the Superior Court of Guilford, to compel him to administer the oath of office required of a justice of the peace, so as to enable him to assume and enter upon the duties thereof at the expiration of the term of the present incumbent. The cause coming on for trial before Shepherd, J., upon the pleadings and facts agreed, he gave judgment directing the mandate to issue, and the defendant appealed.

The following are the facts agreed:

(28) 1. That at its session of 1883, the Legislature elected one G. L. Anthony as a justice of the peace for Gilmer Township, in said county, who qualified in the time prescribed by law, and whose term of

office began on the first Thursday in August, 1883, and lasted till the first Thursday in August, 1887.

2. That at its session of 1887, the Legislature elected one F. A. Mathews as a justice of the peace to succeed the said Anthony in said township, whose appointment was duly certified by the Secretary of State to defendant clerk, and who being duly notified of his election (the same having been made in the month of March, 1887), failed to qualify within the time prescribed by law; and thereupon, on 7 July, 1887, the Governor of the State appointed the plaintiff as a justice of the peace for said township, to fill the unfilled appointment growing out of such failure of said Mathews to qualify.

3. That a list of justices of the peace appointed for said county by the Governor to fill the unfilled appointments that had occurred by the failure of those elected by the Legislature to qualify within the time prescribed by law, including the name of the plaintiff, was prepared, certified and signed by the Governor, attested by the seal of the State, and countersigned by W. L. Saunders, Secretary of State; that said certificate was enclosed in an envelope addressed J. W. Forbis, Esq., at Greensboro, who received the same on 9 July, 1887, and presented the same and filed it with the defendant clerk on 10 July, 1887, according to the directions of the Governor in his directions to J. W. Forbis.

4. That on 16 July, 1887, the plaintiff appeared before the defendant clerk and demanded to be qualified as such justice of the peace in and for said township, by virtue of such his appointment by (29) the Governor, when the defendant declined to qualify him.

5. That in consequence of such refusal the plaintiff began this action on 23 July, 1887.

It is the duty of the clerk to administer the oath to the justice so elected or appointed, and theirs to take and subscribe the same when so administered before him. The Code, sec. 821.

The defendant declined to do this upon the ground of a supposed incompatibility of the statute with section 28, Art. IV, of the Constitution, which remains in force, unaffected by legislation. This section is in these words: "When the office of justice of the peace shall become vacant otherwise than by expiration of the term, and in case of a failure of the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term."

Previous to the changes made in the provisions of article seven, the justices of the peace were chosen by the qualified voters of the several townships, and under the section recited, vacancies arising from the failure of the voters to have an election, or occasioned by death, resignation or other cause, during and before the expiration of the term, were filled by the clerk's appointments, and these respective provisions were

in harmony. But the result of the legislation on the subject is to render impossible the contingency first mentioned, since, as there can be no legal election in the township, there can be in no just legal sense a failure of the voters to elect. This clause in section 28 thus becomes practically inoperative, though it remains in force to meet any future condition produced by legislation to which it might then be applicable.

The other contingency in which the clerk may exercise the power of appointment is, that of a vacancy occurring during a term, and is confined to filling the unexpired portion of it. This is not the case before us. The term of the incumbent, G. L. Anthony, had not termi-
(30) nated when the plaintiff was appointed, and would not terminate before the first Thursday of the next month, and the Governor's appointment was for a full term, to begin at that time, and in the meantime the person then occupying the office was not to be disturbed.

So the act of appointment is in no wise in conflict with that part of section 28.

It is a proper occasion for us to remark, that if every subordinate officer in the machinery of State government is to assume an act of the Legislature to be in violation of the Constitution, and refuse to act under it, it might greatly obstruct its operations, and lead to most mischievous consequences. This is only permissible, if at all, in cases of plain and palpable violation of the Constitution, or where irreparable harm may follow the action.

The defendant is merely required to administer the oath, which interferes with no one. Instead of refusing to perform a clear duty imposed, he could as well afterward, if such he deemed to be the mandate of the Constitution, proceed to make an appointment himself, and thus leave to the contesting claimants of the office the settlement of the issue and the determination of their respective rights.

The administration of the oath does not put the appointee in possession of the office, but being qualified, entitles him to enter upon its duties and exercise its functions *eo instanti,* without further proceedings, when the existing term expired.

We are clearly of opinion that the appointment of the plaintiff was regular and proper, and warranted by law, and that he was entitled to take the oath of office before the defendant as clerk.

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

No error. Affirmed.

Cited: Board of Education v. Gilmer, 112 N. C., 569.

(31)

JOSHUA TUCKER ET AL. v. J. D. BELLAMY, JR.

Descent—Estate—Parent and Child.

1. The statute, The Code, sec. 1281, legitimating the children of colored parents living together as man and wife, who were born before 1868, and conferring upon such children the rights of heirs and distributees of such parents, does not extend beyond those persons occupying the relation of parent and child.
2. Therefore, where one who had been a slave died in 1880 seized of lands, without issue, but leaving surviving her the children of a brother who died in 1860, a slave: *Held*, that they were incapable of taking the lands by descent.

ISSUES joined in a special proceeding, tried before *Philips, J.*, at September Term, 1887, of NEW HANOVER.

The plaintiffs allege in their petition that they and the defendant are the owners as tenants in common of a certain lot of land therein described, they being the owners of one-half thereof and the defendant the owner of the other half, and they demand judgment that partition thereof be made, etc. The defendant in his answer denies the allegations of the petitioner and alleges that he is the sole owner of the land, etc.

On the trial of the issues raised by the pleadings the jury rendered a special verdict from which, among other things, it appears:

"That Clara McKoy owned, in the city of Wilmington, the east half of lot No. 4, block 280, having been conveyed to Martha Strudwick, in trust for her, by deed properly proved and registered in the years 1852 and 1858, respectively; that Clara McKoy, Henry Tucker, and Joshua Tucker (father of plaintiffs), were all slaves by birth, born of the same slave mother; that Clara McKoy died in the year 1880, intestate, leaving her surviving no issue or children, but a husband, to (32) whom she was lawfully married, to wit, one Levi McKoy, and she still owning said lot; that Joshua Tucker died prior to the year 1860, but left him surviving the plaintiffs, who were also born slaves, his children; that Henry Tucker was living at the death of Clara, and is still living; plaintiffs claim one-half undivided interest in said lots as heirs at law of Joshua Tucker; defendant is in possession exclusively of the premises, and claims title by deed in fee simple from said Levi McKoy in 1853, and from said Henry Tucker in 1887; defendant denies plaintiffs' claim; both Clara and her husband were emancipated prior to the year 1860."

Upon these facts the court "adjudged and decreed that the plaintiffs are the owners in fee of one-half as tenants in common with the defend-

ant, the other half owner of the lot described in the petition as the eastern half of lot No. 4."

And the defendant having excepted, appealed.

No counsel for plaintiffs.
M. Bellamy and J. D. Bellamy for defendant.

MERRIMON, J., after stating the case: While negro slavery prevailed in this State, the laws regulating the descent of estates of inheritance did not apply to slaves. There were no marriages among them recognized by law, and they could neither own nor inherit property. After they were emancipated—became freedmen—it was practically impossible to trace their relationships by blood while they were slaves, with any tolerable degree of certainty. The confused condition of their family ties and relationships, and their circumstances as slaves, rendered it necessary to prescribe by statute who should be the heir at law, and from whom he might inherit. As to slaves living together as man and wife before they were freed, and children of them born before
(33) that time, hence the statute (The Code, sec. 1281), which provides that "The children of colored parents, born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are hereby declared legitimate children of such parents, or either one of them, with all the rights of heirs at law and next of kin with respect to the estate or estates of any such parents, or either one of them."

It will be observed that this provision does not extend beyond parents and children, and the estates of such parents, and particularly for the present purpose, that it does not provide that persons so born before the time specified, can inherit from collateral kindred, such as uncles and aunts.

Now, the ancestor of the plaintiff died in 1860, and they were born prior to that time, and all were slaves. They could not at the father's death, nor while they were slaves, inherit from him or any person, and there is no statute that enables them to inherit from their deceased aunt, who was a slave. They had no such legal *status* in connection with Clara McKoy as their aunt as enabled them to inherit from her in the absence of statutory provision.

The court therefore erred in holding that the plaintiffs were tenants in common with the defendant of the land mentioned. The judgment must be reversed, and the proceeding dismissed.

Reversed.

Cited: Tucker v. Tucker, 108 N. C., 237; *Jones v. Hoggard, ibid.,* 182; *Bettis v. Avery,* 140 N. C., 187, 191; *Love v. Love,* 179 N. C., 118; *Bryant v. Bryant,* 190 N. C., 374.

(34)

F. N. HUSSEY v. THE NORFOLK SOUTHERN RAILROAD COMPANY AND M. K. KING.

Corporations—Ultra Vires—Slander—Libel—Malicious Prosecution—Tort—Master and Servant—Joinder of Parties.

1. An action may be maintained against a corporation for torts—*e.g.*, slander, libel, and malicious prosecution—however foreign they may be to the objects of its creation or beyond its granted powers.
2. And this liability extends to the tortious acts of its servants, done in its service.
3. The corporation and its servant, by whose act the injury was done, may be joined in the action.
4. Whether the act was committed by the servant in the service of the corporation or for his own purpose, or the latter authorized or participated in it, are questions of fact for the jury.

CIVIL ACTION, tried before *Avery, J.*, at Spring Term, 1887, of TYRRELL.

The plaintiff alleged:

"1. That the defendant, The Norfolk Southern Railroad Company, is a corporation duly chartered under the laws of North Carolina, doing business under said name, in building, constructing, equipping and operating a railroad in the State, and running steam vessels connecting the business of said road with several business and commercial points on Albemarle Sound and Alligator, Scuppernong and Roanoke rivers, in said State, and the defendant M. K. King is general manager of said company's business.

2. That G. M. Scott is a justice of the peace in and for Pasquotank County, having been duly appointed and qualified as such, and was at the time of the act hereinafter complained of, and his acts are entitled to full faith and credit as such, and were at that time.

3. That on or about 24 July, 1885, the defendants, maliciously and wantonly intending to injure plaintiff in his good name, fame and reputation, and to bring him into ridicule and public contempt, appeared before G. M. Scott, a justice of the peace of Pasquo- (35) tank County, in the State of North Carolina as aforesaid, falsely maliciously, wantonly, and without any reasonable or probable cause whatsoever, charged this plaintiff before said justice of the peace, in a written affidavit duly sworn to, with having left and withdrawn himself from the service of defendant company on or about 10 March, 1885, and carrying with him several amounts of money, towit, the sum of

$6.00, $23.02, $10.00 and $3.59, belonging to said company, with a felonious intent to steal the same and defraud said company; and further charged this plaintiff before said justice, at the same time, without any reasonable or probable cause whatsoever, with having embezzled said money while plaintiff was in the employment of said company, and converting the same to his own use, with the purpose of stealing the same, or of defrauding said company, and wantonly, maliciously, without any reasonable or probable cause, procured said justice of the peace to grant a warrant for the arrest of this plaintiff upon said charge, which was malicious, false and untrue in all respects, and defendants well knew said charge was false and untrue at the time.

4. That G. M. Scott, the said justice, issued his warrant accordingly on 24 July, 1885, and defendants caused this plaintiff to be arrested and imprisoned under the same, being held in custody of the officer of the law until he gave bail, as he was obliged to do, for his appearance at the trial and examination of the cause.

5. That afterwards, to wit, on 28 July, 1885, the day of examination and trial, the plaintiff having been examined and tried before said justice for said supposed crime, according to law, the said justice adjudged the plaintiff not guilty thereof, and fully acquitted him of
(36) the same, and discharged him, and that since that time the defendants have not further prosecuted their said complaint, but have abandoned the same.

6. That by means of said wanton, malicious, unlawful and false charge, and malicious prosecution of the defendants against this plaintiff as aforesaid, plaintiff has been injured in his person, good name, fame and reputation, and brought into ridicule and public contempt, and prevented from attending to his business, and compelled to pay large sums of money, costs and counsel fees, in defending himself against said charge, to his damage five thousand dollars."

For a second cause of action the plaintiff alleged that he was wrongfully and unlawfully arrested and imprisoned by reason of the warrant issued upon the false, wanton and malicious charge of the defendants; that he was acquitted of said charge by the justice, the warrant dismissed, and he was discharged from custody. The damages are laid at $5,000.

And for further cause of action plaintiff alleged:

"1. That on or about 24 July, 1885, the defendants wantonly and maliciously intending to slander and scandalize plaintiff in his good name, fame and reputation, and to bring him into ridicule and public contempt, and destroy his character, appeared before G. M. Scott, a justice of the peace of Pasquotank County, and State aforesaid, and

then and there, in the presence and hearing of said Scott and several other persons, charged plaintiff in the written affidavit of defendant M. K. King, general manager of defendant The Norfolk Southern Railroad Company, with having stolen and embezzled several certain sums of money belonging to the defendant company, to wit, the sum of $6.00, $23.02, $10.00 and $3.59, in words and figures as follows, to wit: 'That on or about 10 March, 1885, The Norfolk Southern Railroad Company, a corporation duly chartered by the Legislature of North Carolina, in said county of Pasquotank, delivered its check for four hundred and fourteen dollars and seventy-nine cents ($414.79), and drawn (37) upon the Exchange National Bank of Norfolk, Va., in favor of F. N. Hussey, master of steamer called *M. E. Dickerman.*

"That on or about the date aforesaid the said F. N. Hussey negotiated the said check and obtained the money therefor, and afterwards withdrew himself from the service of said company, and went away with a part of said money, with intent to steal the same and defraud the said company, to wit, six dollars, twenty-three dollars and two cents, ten dollars, three dollars and fifty-nine cents," thereby accusing and charging this plaintiff with the high crime of larceny.

"That the said F. N. Hussey, at or about the date above named, being then a servant of said company, and so possessed of certain money of said company entrusted to him, did, without the assent of his employer, the said Norfolk Southern Railroad Company, embezzle certain parts of said money, to wit, the sum of $6.00, $23.02, $10.00 and $3.59, and convert the same to his own use, with the purpose of stealing the same, or of defrauding the said company thereof, thereby and by these means intending to accuse this plaintiff with the high crime of embezzlement."

2. That though these charges were false and untrue, and defendant knew them to be so at the time they procured the said justice to grant a warrant for the arrest of plaintiff, and caused him to be arrested and imprisoned wrongfully and unlawfully upon said false charge, and detained in custody of the officer of the law, and to give bond to appear before said justice for examination and trial on 28 July, 1885, and the defendants then and there appeared upon said trial and examination, and again, in the presence of said G. M. Scott, and many others—divers persons, at the courthouse in Elizabeth City, Pasquotank County, N. C., and at divers other places before and since—charged and accused this plaintiff with stealing and embezzling money, the property of defendants, The Norfolk Southern Railroad Company, as above (38) set out, of the sum of $6.00, $23.02, $10.00, and $3.59, all of which acts and doings of these defendants are wrongful and unlawful,

and contrary to law, and has endamaged this plaintiff in the sum of five thousand dollars.

Wherefore plaintiff demands judgment for the wrong and damage, etc.

To this the defendant railroad company filed the following demurrer:

1. It does not state facts sufficient to constitute a cause of action.

(*a*) It appears from the complaint, that the injuries complained of resulted from the acts of M. K. King, not done in the scope of his authority or duty as agent, nor in the service of this company, nor by its authority at the time of or prior to the said acts; and it does not appear, and is not alleged, that said acts, or any of them, were ratified subsequently by this defendant.

(*b*) The complaint does not state what wrongful words were spoken, or acts done (except those spoken and done by the defendant King), nor where, nor when, nor by what agent or representative of the company they were spoken or done, so as to enable this defendant to answer the same.

(*c*) Except the words spoken and acts alleged to be done by the defendant King, it does not appear that any words were spoken, or acts done, with malicious purpose, and without probable cause.

(*d*) It appears that this defendant is a railroad corporation, and is not as such liable for an action for malicious prosecution.

2. There is a misjoinder of parties defendant, for that:

(*a*) The liabilities of the defendants are independent and distinct.

(*b*) The torts complained of are not joint, but several.

(*c*) The defenses of the two defendants are different, inconsistent and repugnant.

The court sustained items "a," "b" and "c" of defendant rail-
(39) road company's first cause of demurrer and overruled item "d," and overruled all of defendant company's second cause of demurrer. The plaintiff excepted and appealed.

E. F. Aydlett for plaintiff.

L. D. Starke for defendant.

DAVIS, J., after stating the case: The question presented by the appeal is: Was there error in sustaining the demurrer of the defendant company, as set out in paragraphs "a," "b" and "c" of the first cause of demurrer?

The Code, sec. 233, requires that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

The facts should be so stated as to leave the defendant in no doubt as to the alleged cause of action against him, so that he may know how to

answer, and what defense to make. The demurrer admits the facts contained in this complaint. Do they constitute a cause of action? The defendant company says no.

It is true that the defendant King is the general manager of the co-defendant company's business, and that the defendants King and The Norfolk Southern Railroad Company did the acts complained of, and the charge upon which the alleged malicious prosecution was instituted, and the false arrest and imprisonment made, was the alleged embezzlement of the money of the defendant company, and the warrant was sued out by the defendants, upon the written affidavit of the defendant King, general manager of the defendant company; but, says the defendant company, the plaintiff fails to allege that these acts were done by King "in the scope of his authority or duty as agent," etc., and therefore he cannot recover.

It is admitted (the demurrer admits) that the acts were done by the *defendant;* if so, does it matter how? Is it necessary to allege that the agent was authorized to do them, and that he was acting (40) within the scope of his authority and duty?

It must be necessary to prove any material fact, necessary to be alleged, unless admitted.

If corporations, as we shall presently see, are liable for torts and wrongs committed *ultra vires,* outside and beyond the purpose of their creation, and not within the scope of their granted powers and authority, it would seem a logical absurdity, to say that any tort or wrong so committed, was committed, or could be committed, by an agent or servant *within the scope of the authority* of such agent or servant. If the acts were *ultra vires,* they could not be within the scope of the power or authority of the company, or of its agent or servant, and the allegation, if necessary to be made, could not be proved, and the plaintiffs must fail. This cannot be so.

It was long thought that as the corporation has no mouth with which to utter slander, or hand with which to write libels, or commit batteries, or mind to suggest malicious prosecutions or other wrongs—as it was an artificial person and could speak and act only through and by the agency of others, it was, therefore, not liable for any torts except such as resulted from some act of commission or omission of its agents or servants, while acting within the scope of granted powers, or wrongfully omitting or neglecting some duty imposed by its charter or by laws; and consequently it was necessary to allege that the act committed was while acting within the scope of the power and authority of the company, or that the act omitted was required to be performed. Whether it was wise to depart from this rule, that exempted corpora-

tions from liability for the acts of agents in cases where the character of the act depended upon motive or intent, seems no longer an open question.

(41) The old idea that because a corporation had no "soul" it could not commit torts or be the subject of punishment for tortious acts, may now be regarded as obsolete.

The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these "artificial persons" have become so numerous, and entered so largely into the every day transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts, as attach to natural persons, and this liability is not restricted to acts committed within the scope of granted power, but a corporation may be liable for an action "for false imprisonment, malicious prosecution, and libel." Pierce on Railroads, 273.

"The doctrine which once obtained that the master is not liable for the willful wrong of his servant, is now understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. . . . Whether the servant did the act with a view to the master's service, or to serve a purpose of his own, is a question for the jury." *Ibid.,* 279. Whether the corporation authorized or participated in the tort is matter for proof, and the defense of *ultra vires* is not admitted. *Ibid.,* 520.

It is true that it was held in *Orr v. The Bank of the United States,* 1 Hamm., Ohio Reports, 25, that a corporation could not be sued in an action for assault and battery, nor could it be joined in such an action with other defendants, and in *Gillett v. Missouri Valley R. R. Co.,* 55 Mo., 315, it was held by a divided Court that a railroad corporation was not liable for a malicious prosecution in the name of the State for alleged embezzlement of its funds, but a different doctrine seems now well established.

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

(42) They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner, and to the same extent, that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel." *National Bank v. Graham,* 100 U. S., 699, and many authorities there cited;

Merchants' Bank v. State Bank, 10 Wallace, 645; Angell & Ames on Corporations, sec. 388.

"It is no defense to legal proceedings in tort, that the torts were *ultra vires.*" *Gruber v. R. R.,* 92 N. C., 1. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley,* 21 Howard, 202, was an action against the defendants (plaintiffs in error) for libel. It was insisted that the railroad being a "corporation with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; and the action should have been instituted against the natural persons concerned in the publication of the libel. But a different view was taken by the Court, and it was held that a corporation could be held liable *ex delicto,* as well as *ex contractu,* and that this view was in consonance with the legislation and jurisprudence of the States of the Union, relative to "these artificial persons."

The subject is discussed at length in *Williams v. Planters' Insurance Co.,* 57 Miss., 759, and the note to the case as reported in 34 Am. Rep., 494, in which the authorities are collated, from which the conclusion is fully warranted, that a corporation is liable for malicious prosecution conducted by one of its agents.

In the still more recent case of *Denver & C. R. R. Co. v. Har-* (43) *ris,* 122 U. S., 597, in an elaborate opinion, in which many authorities are cited, it is said: "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civilter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civilter* for torts committed by its servants or agents, precisely as a natural person; and it is liable as a natural person for the acts of its agents, done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency, or authorizing the act."

"The corporation, and its servant, by whose act the injury was done, may be joined in an action of tort in the nature of trespass." Pierce on Railroads, 292.

In the case before us, the "statement" contained in the complaint, is sufficiently "plain" to enable the defendant company to understand clearly and without mistake, the nature of the tort with which it is charged, and it is thus enabled to answer and prepare intelligently for its defense.

There is error. The demurrer is overruled, and the defendant may take such action below as he is advised.

Error.

Cited: White v. R. R., 115 N. C., 636; *Daniel v. R. R.,* 117 N. C., 605; *Redditt v. Mfg. Co.,* 124 N. C., 103, 104; *Lovick v. R. R.,* 129 N. C., N. C., 433; *Jackson v. Tel. Co.,* 139 N. C., 354; *Sawyer v. R. R.,* 142 N. C., 5, 8; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 364; *Stewart v. Lumber Co.,* 146 N. C., 60; *Jones v. R. R.,* 150 N. C., 481; *Berry v. R. R.,* 155 N. C., 292; *May v. Tel. Co.,* 157 N. C., 421; *Fleming v. Knitting Mills,* 161 N. C., 437; *Cotton v. Fisheries Products Co.,* 177 N. C., 59; *Clark v. Bland,* 181 N. C., 112; *Hunt v. Eure,* 189 N. C., 487; *Kelly v. Shoe Co.,* 190 N. C., 411.

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(44)

JOHN M. ROSE v. R. W. HARDIE AND JOHN GODDARD.

Town Ordinance—Statute.

1. A town ordinance declaring that "all hogs, etc., found running at large within the town" shall be taken up, impounded, advertised, and if not claimed within a prescribed time, and the costs and penalty thereby incurred paid, shall be sold, is valid, whether the owner resides within the corporate limits of such town or not.

2. Chapter 58, Private Laws 1881, repealing the charter of the town of Fayetteville and making it the duty of the sheriff of Cumberland County to enforce all ordinances, etc., theretofore established for the government of said town as the town marshal might have done, is valid.

(*Hellen v. Noe,* 3 Ired., 493; *Whitfield v. Longest,* 6 Ired., 268; *Lilly v. Taylor,* 88 N. C., 489; cited and approved.)

CIVIL ACTION, originally commenced before a justice of the peace and carried by appeal to the Superior Court of CUMBERLAND County, and tried before *Boykin, J.,* at May Term, 1886, of said court.

The following is the statement of the case on appeal:

The plaintiff was not a resident of the town of Fayetteville. In the month of March, 1882, his hogs were found running at large in the town of Fayetteville. The defendant, R. W. Hardie, was then the sheriff of Cumberland County, in which county Fayetteville is situated. After the passage of the law as embraced in chapter 58, Private Laws 1881, the sheriff had appointed the defendant Goddard his deputy to enforce the provision thereof, which the sheriff was required to enforce.

Goddard, as such deputy, had taken up and impounded in the common pound of the town the said hogs of the plaintiff so found running at large, at the time above specified, under the following ordinance of the town, which was introduced in evidence: "All hogs and goats found running at large within the town shall and may be taken up and put in the pound, or other secure place provided by the town, (45) by the town marshal, or any other person; and it shall be the duty of the town marshal to notify the owner of such hog or hogs, goat or goats, as soon as practicable, if known to him; and to advertise at the courthouse, in the best manner he can, the hog or hogs, or goats, giving the ear marks or other distinguishing marks; and if the owner call for the same within three days, prove his or her property therein, and pay for each hog or goat the sum of $1.00 as a penalty for suffering it to run at large, and also 50 cents for the marshal's fee for impounding, and 10 cents a day for every day that the said hog or goat has remained in the pound, the same shall be delivered to such owner."

At that time, to wit, in March or April, 1882, the town charter had been repealed by chapter 58, Private Laws 1881. There were no town officers. The defendant Goddard, as deputy, was acting under said chapter 58, Laws 1881. The said law of the General Assembly of 1881 was introduced in evidence. Chapter 66, Laws 1811, was also read in evidence.

The plaintiff paid the amount due under said ordinance, for permitting his said hogs to run at large within the limits of said town, under protest, contesting the right of the officer to so impound his hogs. The property was then delivered into his possession, and he instituted this action to recover the $7.00 so paid to the officer.

The court charged the jury that, under the provisions of said chapter 58, Laws 1881, under which the defendants attempted to justify, neither the sheriff nor his deputy could justify the impounding of plaintiff's hogs, and that plaintiff was entitled to recover if they believed the evidence. Verdict and judgment for the plaintiff, and defendants appealed.

R. P. Buxton and D. Rose for plaintiff. (46)
N. W. Ray for defendants.

DAVIS, J., after stating the case: The validity of chapter 58, Private Laws of 1881, is not an open question. It is valid. *Lilly v. Taylor,* 88 N. C., 489. Section 8 of that act declares that "any person who within the lines heretofore known as Fayetteville, shall violate any of the police or sanitary regulations, or any of the rules or ordinances which have been prescribed by the mayor and commissioners of Fayetteville, or any

law prescribed for the government and well being of the citizens residing within the limits heretofore prescribed for Fayetteville, shall be guilty of a misdemeanor, and upon conviction, shall be punished as prescribed in laws, ordinances, rules and regulations. . . . And the sheriff of Cumberland County is hereby invested with all the power and authority, rights and duties, which now belong to, or are invested in the town marshal of said town.

The ordinance set out in the case stated is one to be enforced in the manner prescribed in the foregoing section. The ordinance was passed by virtue of the authority contained in section 3799 of The Code (Bat. Rev., chap. 111, sec. 15), and it was a misapprehension of the learned counsel for the plaintiff to suppose that as it was not authorized by section 3800 of The Code (Bat. Rev., ch. 111, sec. 16), it was invalid.

The latter section authorizes the commissioners to *tax* "swine" running at large in the town, the former authorizes them to prohibit hogs from running at large, if deemed necessary "for the better government of the town," and the commissioners are the judges of the necessity or expediency of the prohibition.

The validity of town ordinances similar to that in question—in fact identical—has more than once been the subject of judicial determination in this State. An ordinance passed in the town of Beaufort in
(47) 1841 ordained that after a day named, "each and every hog at large in the town will be taken up and penned, and advertised to be sold on the third day, unless the owner or owners of such hog or hogs shall pay," etc.

This ordinance was held to be valid. *Hellen v. Noe,* 3 Ired., 493; *Whitfield v. Longest,* 6 Ired., 268.

But the plaintiff says he was not a resident of the town of Fayetteville, and the ordinance could not affect the right of persons living beyond the limits of the town. It is the *hog* that is not permitted to run at large, and whether it be the property of a resident or non-resident, the mischief is the same and there can be no difference. The very point is decided in *Whitfield v. Longest, supra,* and the reasoning in that case and the authorities there cited are conclusive.

The plaintiff invokes the aid of chapter 66 of the Laws of 1811, in relation to hogs running at large in the town of Fayetteville, which requires the town constable, upon taking up the hogs of nonresidents, "to give notice to the owner of such hogs that they are taken up and pounded, and for such service he shall be entitled to receive two shillings for every head of hogs so pounded, from the owner thereof," etc. And he says that by this act the charge is limited to two shillings, and having collected more than that, the defendant is liable.

In reply, the defendant says that the Act of 1811 has become obsolete or rendered nugatory by subsequent legislation, and if in force, the plaintiff is not entitled to the benefit of it because it expressly provides "that persons residing without the limits of the town of Fayetteville who shall in future claim the benefit of this act, shall render to the town clerk of the commissioners of Fayetteville, in writing, the ear marks of their hogs." This the plaintiff has not done, and it becomes unnecessary for us to consider whether the act is still in force or not, as he has not entitled himself to its benefit by a compliance with its requirements.

It was insisted for the plaintiff that section 8 of chapter 58 of the Private Laws of 1881, makes the violation of the ordinance (48) a misdemeanor, and therefore it could not be enforced against a nonresident. The answer is, the sheriff was invested with the authority the town marshal had possessed to enforce the ordinance—the *hogs* were running at large—he had a right to take them up and impound them wherever and whoever the owner might be, and the owner could only get them out of pound by a compliance with the ordinance. This the plaintiff did, though under *protest,* and it would be a curious legal result if he should be allowed to recover back the money paid, because being a nonresident, he could not be convicted of a misdemeanor for violating the town ordinance.

If such were the law, the town marshal or sheriff should be protected from the consequences of the unlawful arrest and imprisonment of the hogs of nonresidents by requiring some mark to be put upon them to indicate that they were privileged nuisances.

The plaintiff is not entitled to recover, and there is error.

Reversed.

Cited: S. v. Tweedy, 115 N. C., 705; *Broadfoot v. Fayetteville,* 121 N. C., 420; *Daniels v. Homer,* 139 N. C., 223, 251; *Owen v. Williamston,* 171 N. C., 59; *Skinner v. Thomas, ibid.,* 107; *Marshburn v. Jones,* 176 N. C., 524.

SHADE WOOTEN AND J. W. ISLER v. CALHOUN HILL.

Agricultural Lien—Contract—Mortgage—Landlord and Tenant.

1. An agricultural lien duly executed and registered takes precedence of a mortgage of prior date and registration, upon the "crops" therein subjected, to the extent of the advances made.

2. The lien of the landlord takes precedence of all liens.

3. An agricultural lien and a mortgage may be created by the same instrument.

4. The operations of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument.

(*Patapsco Guano Co. v. McGee*, 86 N. C., 350; *O'Kelly v. Williams*, 84 N. C., 281; *Dail v. Freeman*, 92 N. C., 351; *Robinson v. Ezzell*, 72 N. C., 231; *Cotton v. Willoughby*, 83 N. C., 75; *Harris v. Jones, ibid.*, 317; *Rawlings v. Hunt*, 90 N. C., 270; cited and approved.)

(49) CIVIL ACTION, tried upon a case agreed, before *Philips, J.*, at August Term, 1887, of the Superior Court of LENOIR County. There was judgment for the defendant, and the plaintiffs appealed.

The action was originally commenced in the court of a justice of the peace, and was carried by appeal to the Superior Court. The facts agreed are, substantially, that the plaintiffs are the surviving partners of J. S. Wooten & Bro., and this action was commenced to recover money had and received by the defendant to the use of the plaintiffs; that on 1 January, 1886, one W. J. Watkins executed to one J. A. McGee a chattel mortgage, in the usual form, and includes, among other things, the "entire crops of corn, cotton, rice, wheat, rye, and all other produce growing, and to be grown," by the said Watkins, for the year 1886, on his own lands, or the lands of others; that said chattel mortgage was duly and properly registered on 29 January, 1886, and there is now due thereon the sum of $26.00, and the defendant is the owner of the same.

That on 29 January, 1886, the said Watkins executed to the defendant Hill a chattel mortgage, and which is in the usual form, and by which the said Watkins conveyed as follows: "My entire crops of every kind, to be made and grown on the lands upon which I now reside. . . . during the year 1886, whether the same are cultivated by me, or any one for me." This mortgage was also properly registered on 29 January, 1886, and there is now due on the same the sum of

(50) $525.

That on 2 April, 1886, said Watkins executed to J. S. Wooten & Bro. an instrument, of which the following is a copy:

"On 15 October, 1886, I promise to pay James S. Wooten & Bro., or order, sixty dollars for advances heretofore made to me, and hereafter to be made to me, in merchandise, by James S. Wooten & Bro. (in accordance with an act entitled 'An act to secure advances for agricultural purposes,' ratified 1 March, 1867) to cultivate a crop for the year 1886, not to exceed, in addition to what has been heretofore advanced to me, the sum of sixty dollars. To secure the payment of the same, I hereby constitute this a lien on the crop of corn, cotton, and other produce to be raised by or for me during the year 1886, in Duplin

County, on my own lands; and for the further security, I hereby convey to the said James S. Wooten & Bro. the following articles of personal property: One dark bay horse mule, eleven years old; one cow and calf, two steers, three sows and seven pigs, two buggies, one cart, farming utensils of all kinds, all of which I represent to be my own right and property, and that no other person has any claim on the same, except twenty-five dollars to John McGee. But on this special trust, that if I fail to pay said debt and interest on or before 15 October, A. D. 1886, then they may sell said property, or so much thereof as may be necessary, by public auction, for cash, first giving ten days' notice at three public places in the county, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and costs, and pay the surplus, if any, to me."

This was duly registered on 6 April, 1886.

Watkins was not indebted to Wooten & Bro. in any amount before the execution of this instrument, but this fact was not known to the defendant.

After its execution they made advances under it to enable him (51) (Watkins) to cultivate a crop on his own land during the year 1886, to the amount of more than $60. No advances were made before its execution, and no part of the advances made under it have been paid.

The defendant, on 1 December, 1886, took into his possession the crops raised by the said Watkins on his own land, in Duplin County, during the year 1886, and used the same, and refused to account for any part thereof to the plaintiffs. The crops were of the value of $95.

W. R. Allen for plaintiffs.
No counsel for defendant.

DAVIS, J., after stating the case: Section 1799 of The Code provides: "If any person shall make any advancement, either in money or supplies, to any person who is engaged in, or about to engage in, the cultivation of the soil, the person so making such advances shall be entitled to a lien on the crops which may be made during the year upon the land in cultivation, of which the advances so made have been expended, in preference to all other liens existing or otherwise, to the extent of such advances," etc., provided an agreement therefor shall be executed in the mode prescribed.

The plaintiffs claim under such a lien duly executed and registered 2 April, 1886; the defendant claims under chattel mortgages, duly executed and registered prior to that date, and the question presented by the appeal is, whether the lien or chattel mortgages shall be preferred, as to the crop mentioned in both? It is not claimed that the plaintiffs

have any right to have a prior discharge of their claim out of the personal property, other than the crop—as to that the plaintiffs hold only a chattel mortgage, subordinate to any prior chattel mortgage duly registered, for the instrument may operate as an agricultural lien in part, and a mortgage in part. *Rawlings v. Hunt,* 90 N. C., 270.

(52) When the statute (Act of 1866-'67, ch. ....) was passed, authorizing what are known as agricultural liens, it was, I think, the general impression of the profession that only such *fructus industriales* as at common law were subject to levy under execution, or went as emblements to the personal representative, instead of to the heir, were the subject of sale as personal property, and as the Act of 1844 (Rev. Code, ch. 45, sec. 11) excepted growing crops from levy under execution until matured, it was uncertain to what extent they could be mortgaged or sold. Some legislation was thought necessary to enable those engaged, or about to engage, in the cultivation of the soil, to procure aid in the way of supplies, and it was for this purpose the act was passed. It is now settled that an unplanted crop is the subject of mortgage. *Robinson v. Ezzell,* 72 N. C., 231; *Cotton v. Willoughby,* 83 N. C., 75; *Harris v. Jones,* 83 N. C., 317.

The authorities do not warrant the conveyance of an indefinitely prospective *unplanted* crop, and we think it should be limited to crops planted, or about to be planted, as the crop next following the conveyance.

As the crop, planted or unplanted, is now conceded to be the subject of sale and mortgage, it is insisted that a mortgage of such a crop is to be regarded as the mortgage of any other chattel, and is valid from its registration against all other liens. This is certainly not true as against the landlord, because, answers the objector, as against him the statute (The Code, sec. 1754) declares that the crop "shall be deemed and held to be vested in possession of the lessor or his assigns at all times," till all the stipulations in regard to the case shall be complied with, and the purchaser or mortgagee takes it, with a full knowledge of the statute, and of the rights secured to the landlord thereby; and this is a full answer in favor of the landlord.

(53) Section 1799 of The Code declares that the lien for advances made to enable the cultivator of the soil to make the crop, shall, as to the crop made by the aid of such advances, be good "in preference to all other liens existing or otherwise, to the extent of such advances," upon a compliance with the provisions of the statute, the only exception being that in favor of the landlord, contained in the following section. Why does not the purchaser or mortgagee of the crop take with as full knowledge of the provisions of this section of The Code as of that which secures the rights of the landlord? He takes with a full knowl-

edge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a *preferred* lien upon the crop, made by reason of such advances, and that this preference shall extend to "existing" liens. All laws relating to the subject matter of a contract enter into and form a part of it, as if they were "expressly referred to or incorporated in its terms." *O'Kelly v. Williams,* 84 N. C., 281; *Lehigh Water Co. v. Easton,* 121 U. S., 391. It impairs the obligation of no contract. Land is sold under execution—there is a lien on the crop for advances—the purchaser buys in subordination to section 1799 of The Code. *Dail v. Freeman,* 92 N. C., 351.

In *Herman v. Perkins,* 52 Miss., 813, it is said that although an agricultural lien may be junior in date to a mortgage, yet the right of the mortgagee is subordinate to the agricultural lien subsequently imposed by the mortgagor upon the crop. The statute giving the lien in Mississippi is not more absolute or imperative than ours.

In *Stone v. Simpson,* 62 Ala., 194, a similar construction was placed upon the agricultural lien law of that State, and it was held that, under the statute, a crop lien had "precedence over all *prior* mortgages, and all *prior* liens, except that of the landlord for rent." A similar construction has been placed upon similar statutes in New Jersey, Arkansas, and other States. *Vreeland v. Jersey City,* 37 New (54) Jersey, 574; *Case v. Allen,* 21 Ark., 217.

It is said that the lien in question is not in accordance with the requirements of the statute, because, by its terms, it is to secure advances "heretofore made," as well as those "hereafter" to be made, and we are referred to *Patapsco Guano Co. v. McGee,* 86 N. C., 350.

The case agreed states that no advances were made before the execution of the lien, but all were made after its execution.

We think that in this respect it sufficiently complies with the statute. The plaintiffs' lien is preferred to that of the defendant, and there is error.

Error. Reversed.

Cited: S. v. Garris, post, 736; *Burr v. Maultsby,* 99 N. C., 267; *Knight v. Rountree, ibid.,* 394; *Gwathney v. Etheridge, ibid.,* 575; *Brewer v. Chappell,* 101 N. C., 254; *Smith v. Coor,* 104 N. C., 141; *Killebrew v. Hines, ibid.,* 194; *Taylor v. Hodges,* 105 N. C., 348; *Loftin v. Hines,* 107 N. C., 360; *Spruill v. Arrington,* 109 N. C., 194; *Pipe Co. v. Howland,* 111 N. C., 617; *Ballard v. Johnson,* 114 N. C., 144; *Brasfield v. Powell,* 117 N. C., 141; *Hahn v. Heath,* 127 N. C., 29; *Hurley v. Ray,* 160 N. C., 379; *Morton v. Water Co.,* 168 N. C., 586; *Hogan v. Utter,* 175 N. C., 335; *Williams v. Davis,* 183 N. C., 93.

JOHN C. GRISSOM v. W. M. PICKETT AND J. J. PICKETT.

Contract—Lien—Attachment.

1. The liens provided for by secs. 1781 and 1782 of The Code arise out of the simple relation of debtor and creditor for labor done or materials furnished, and where there is no other security than the personal obligations of the debtor.

2. *Therefore*, where the plaintiff, having abandoned a contract made with the defendant to cultivate a crop upon shares, upon the ground that the defendant had failed to furnish the necessary stock, etc., as agreed, and attempted to assert a lien for the labor he had bestowed upon the crop: *Held*, that the statute did not embrace his case.

(*Reynolds v. Pool*, 84 N. C., 37, and *Curtis v. Cash*, *ibid.*, 41, cited.)

(55) MOTION to vacate an attachment, heard before *Boykin, J.*, at Spring Term, 1886, of ANSON.

The plaintiff and the defendant, W. M. Pickett, late in December, 1884, entered into an agreement, by the terms of which said defendant was to furnish land for cultivation during the succeeding year, with three mules to be worked on it and fed, and the necessary farming implements, while the plaintiff was to supply all the labor and look after and manage all the farming operations until the crop was made and gathered, when after paying such expenses as were incurred and not provided for, there was to be an equal division of the crops between the parties. The plaintiff received from the defendant the number of mules agreed on, and entered upon and proceeded to cultivate the land until 6 June, when he quit work and abandoned the premises for the alleged reason that the provender furnished the mules was insufficient in quantity and defective in quality, and in consequence of not being well fed, two of them broke down in May and June and became unfit for service, and the defendant, when applied to for others, without which it was impossible to carry on operations to the stipulated extent, refused to provide them. Thereupon the defendant took possession of the premises and placed the other defendant, his son, in charge, who proceeded to make the crop.

In September the plaintiff, claiming the right by reason of the essential failure of the defendant to fulfill his stipulations and enable him to go on with his work, to treat the agreement as annulled, filed in the clerk's office his claim for work and labor done in the crop by himself and family, and for money paid by him to hired employees, asserting a lien on the crop raised on the land, amounting in the aggregate to nearly eight hundred and fifty dollars. Subsequently the plaintiff sued out an

attachment to enforce the lien, under which the sheriff seized a lot of corn and cotton, and levied on the same lands. After notice, and upon defendant's motion, on 24 November the clerk made an (56) order vacating the attachment as to the land, and, as the plaintiff had an interest in the crops, as tenant in common, vacating also the attachment as to them on the defendants giving a sufficient bond to the plaintiff in the penal sum of $300 to secure to the plaintiff his share therein, upon the final adjudication in the cause.

From this ruling both parties appealed to the judge, the defendants from so much thereof as required the giving the bond, and the plaintiff from the vacating order.

At April Term, 1886, the appeal came on to be heard, when the defendant's motion to vacate the order for attachment was allowed, and the plaintiff appealed to this Court.

Platt D. Walker for plaintiff.
J. A. Lockhart for defendants.

SMITH, C. J., after stating the case: While it may not be easy to distinguish the arrangement for the cultivation of the lands for the joint benefit of the contracting parties from that made in *Reynolds v. Pool,* 84 N. C., 37, and in *Curtis v. Cash, ibid.,* 41, where it was held that the relations of copartners had been formed, we do not deem it needful to put our ruling upon that ground.

The case is not in our opinion within the letter or purpose of the enactment giving liens as contained in The Code, secs. 1781 and 1782.

The first creates the lien upon the property on which labor had been expended, or to which materials have been contributed, not generally, but "for the payment of all debts contracted for work done on the same, or material furnished."

The next section, without enlarging the scope of the other, gives efficacy to the lien or encumbrance which attached subsequent to the time when the work was begun, or the materials were furnished.

It is quite obvious that *debts* only are provided for, that is, (57) claims for labor or materials supplied to be paid for as such, so that between the employee and the employer were formed the relations of debtor and creditor. Such were the claims intended to be secured, and not such as might grow out of an agreement, wherein, as in our case, compensation was to be sought in its fruits, which are contingent and uncertain.

Nor, in our opinion, can the joint arrangement, because of a violation of its terms by one party, and the election of the other to abandon it in consequence, be converted into a case of debtor and creditor, so as

to bring the claim within the act, whatever may be the result in the personal relations of the parties.

The plaintiff chose to look to the result of the year's farming operations, and to seek remuneration for his work in a share of the crops, and for any breach of the defendant's obligations may obtain redress commensurate with the injury suffered. But he is not at liberty, without regard to results, to fall back upon an implied contract, so as to give it the same operation under the statute as if it had been the original contract, when in fact it was not.

The enactment protects those who work or supply materials, and who, but for it, would have no security beyond that of the personal obligations of the employer.

The order for the attachment was therefore improvidently made, and we concur in the action of the court in recalling it and dissolving the attachment.

No error. Affirmed.

EDWARD JAFFRAY ET AL. v. SOLOMON BEAR ET AL.

Appeal—Continuance.

The order of the court directing the continuance of an action, upon suggestion of the death of a party—although not a necessary party—will not be reviewed upon appeal.

(*Austin v. Clark*, 70 N. C., 458; *S. v. Lindsay*, 78 N. C., 499; *Isler v. Dewey*, 79 N. C., 1; *S. v. Vann*, 84 N. C., 722; *Johnson v. Maxwell*, 87 N. C., 18; cited.)

(58) MOTION heard before *Philips, J.*, at September Term, 1887, of NEW HANOVER.

Thomas W. Strange and M. Bellamy for plaintiffs.
George Davis and D. L. Russell for defendants.

MERRIMON, J. The following is a copy of the case stated on appeal for this Court:

"Plaintiffs having announced their readiness for trial, the counsel of the defendants suggested the death of Marcus Bear, one of the defendants, since the last term. The fact of the death was not controverted, and the defendants' counsel stated that he believed the defendants were ready for trial, but the case was not in condition to be tried. That the personal representative of Marcus Bear was an indispensable party,

and was not before the court, and in his absence the case could not be tried. The plaintiffs' counsel insisted that such personal representative was not a necessary party, and urged an immediate trial of the cause. The judge ordered the case to be continued." To this ruling the plaintiffs excepted and appealed to this Court.

It has been repeatedly and uniformly held by this Court that no appeal lies from an order continuing the action for trial or other proper proceeding in it. Such order is made in the exercise of the discretion of the court, and is not reviewable. And moreover, the (59) appeal could serve no practical purpose, as before this Court could hear and determine it, the term of the Superior Court at which it was sought to have the trial, or other proper steps taken, would terminate, necessarily leaving the case open for proper action in it at the next succeeding term. *Austin v. Clark,* 70 N. C., 458; *S. v. Lindsay,* 78 N. C., 499; *Isler v. Dewey,* 79 N. C., 1; *S. v. Vann,* 84 N. C., 722; *Johnson v. Maxwell,* 87 N. C., 18.

The counsel for the appellants insisted in the argument that the court below erroneously held that the personal representative of the deceased defendant was a necessary party defendant, and this sufficiently appears in the record, and that in effect the appeal was taken from the decision of the court in this respect. If it certainly appeared from the record that the court so decided, it might well be questioned whether an appeal would lie from an order directing the personal representative to be made a party, as such an order would have been only interlocutory, but it does not appear that such a decision was made, unless by mere doubtful inference.

The court seeing that the action did not necessarily abate by the death of a party, may have deemed it just and proper to continue the action, to the end that reasonable opportunity might be afforded any of the several defendants interested to take steps to make the personal representative a party, or to allow him such opportunity to apply to be so made, leaving any and all questions as to the necessity and propriety of making him a party, or his right to be so made, to be decided when they should arise in the course of the action. Indeed, this seems to have been the view the court took, acting on the suggestion of the appellees' counsel. Orders and judgments appealed from should always appear in the record with certainty.

The appeal was improvidently taken, and must be dismissed. (60)

Dismissed.

J. H. STRAUSS v. NORRIS FREDERICK, EXECUTOR OF WILLIAM C. FREDERICK, HANNAH J. FREDERICK, AND CHARLES L. FREDERICK.

Reference—Exceptions—Jurisdiction.

Where the exceptions to the report of a referee were to his finding of fact, either because they were without evidence or against its weight, and none were made to his conclusions of law or to the ruling of the judge upon them: *Held*, that no error was assigned of which the Supreme Court had jurisdiction.

CIVIL ACTION, tried before *Clark, J.*, at November Term, 1886, of DUPLIN, upon exceptions to a referee's report.

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

The plaintiff, John H. Strauss, early in November, 1872, executed a note in the sum of five thousand dollars to the partnership firm of Frederick & Son, which was constituted of the defendant Norris Frederick and William C. Frederick at their instance, and to be used in conducting their business; and said note was indorsed to and discounted by the First National Bank of Wilmington, and the proceeds paid to said firm. To protect and indemnify the plaintiff against his liability, and to reimburse him any loss he might sustain by reason thereof, the said William C., on 12 November, executed a deed of mortgage to the plaintiff, and therein conveyed to him a tract of land in Duplin
(61) County containing 361 acres—the title to which he had derived from his father the said Norris—in trust and to be held as a security against loss or damage to result from the plaintiff's liability upon said note, and all renewals in whole or in part that might thereafter be given for said indebtedness. There was no power of sale in case of default conferred upon the mortgagee.

The complaint alleged that divers payments were made by Frederick & Son on said debt and securities given in renewal upon balances found to be due, and that the amount due on 21 November, 1878, was reduced to one thousand five hundred and thirty-eight dollars and forty-two cents, which the firm and the mortgagor neglected and refused to provide for, and the plaintiff being required by the bank to pay, did pay to its full discharge; and that the said William C. died—at a date not specified—leaving a will in which he appoints the said Norris executor, and gives his property, with limitations among them, to the said Norris and the other defendants, the mother and a brother of the testator.

The demand is for a judgment foreclosing the right of redemption and directing a sale of the land for the plaintiff's reimbursement.

The separate answer of said Norris, personally and as executor, as well as the joint answer of the other defendants, made on information and belief, not contradicting the material facts set out and charged in the complaint in other respects, deny the averment that any sum was due at the time stated by the plaintiff for which he was liable in consequence of his said suretyship against which the mortgage was given. In an amended answer the two last named allege that the executor, some time about February, 1879, turned over to the plaintiff a stock of goods worth about $2,300 of the said Frederick, amply sufficient to pay the sum claimed, and with which the plaintiff ought to be charged.

At Spring Term, 1885, a reference was made in these words:

"It is ordered by the court, by consent of the parties, that all (62) the issues of law and fact arising on the pleadings in this action, be referred for trial to R. W. Nixon, Esq., with full power to summon witnesses and hear testimony; whose duty it shall be, upon notice of twenty days to the parties of the time and place of hearing, to examine the evidence, reduce the same to writing, find the facts, and state his conclusions of law thereon arising, and such testimony and finding of law and facts the said referee shall report to the next term of this court."

The commission was executed, and report made to the court at its session in February, 1886, with a full statement of the evidence bearing upon the exceptions taken during the progress of the hearing, with numerous exhibits, covering a large number of closely written pages of legal cap paper, proper for the revising examination of the judge in the court below, but impertinent, and having no place in the appeal to this Court.

The defendants at the same term filed exceptions, fifteen in number, all but the last taken to the referee's findings of fact upon insufficient evidence, or against its weight, and the last to the referee's failure to report what occurred in court at a former trial, in which the judge stated that unless plaintiff submitted to a nonsuit, so as to place the plaintiff in a position to bring a new action, he should direct the jury to find against him.

The exceptions were all overruled, the report confirmed, and judgment rendered ascertaining the debt due, and ordering a sale of the land, in order to its satisfaction, unless the same was paid within sixty days, and if so paid, a release to be executed to the defendants entitled thereto, of all estate and interest in the land vested in the plaintiff under the said mortgage deed.

W. R. Allen for plaintiff. (63)

R. H. Battle and J. L. Stewart for defendants.

SMITH, C. J., after stating the case: There are no exceptions filed to the referee's conclusions of law, nor specifically to the ruling of the judge upon any of them, and the appeal consequently brings up no assigned error within the jurisdictional power of this Court, which has so often been said, and is so well understood, as not to require any citation of authority in support of the proposition.

The last exception is in reference to matters, so far as we can see, wholly immaterial to the issues now before the Court, and if they had been, the judge should have ordered a recommittal, in order that the omitted testimony be also reported, or a special direction to the referee to report it without a recommittal.

There is no error, and the judgment must be affirmed, with such change of terms as the delay resulting from the appeal has produced.

No error. Affirmed.

Cited: Harris v. Smith, 144 N. C., 441; *Chemical Co. v. Long,* 184 N. C., 399.

OCTAVIA A. PERRY ET AL. v. WILLIAM R. PETERSON, ADMINISTRATOR OF CHARLES R. VANN ET AL.

Irregularity—Judicial Sale—Purchaser—Notice—Issues.

1. A license to sell lands for assets granted before the determination of an issue as to the title raised by the pleadings in the proceedings is irregular; and *it seems* that a purchaser at a sale made thereunder, with notice of the irregularity, will not be protected against an action to set it aside.

2. But before the sale and proceedings thereunder are vacated, if the notice is denied, the facts in respect thereto should be ascertained by an issue submitted for that purpose.

(64) CIVIL ACTION, tried before *Gilmer, J.,* at February Term, 1886, of SAMPSON.

Chester R. Vann died intestate in 1864, in the county of Sampson. At November Term, 1866, of the Court of Pleas and Quarter Sessions of that county, William R. Peterson, one of the defendants, being the administrator, filed a petition for leave to sell the lands therein described for assets, alleging that the intestate had died seized and possessed thereof. The heirs at law—the plaintiffs in the present action, and who were then infants without guardian—were named as parties defendant, but no service of process was made upon them. Their grandfather, John Vann, was also made a party defendant, as trustee. The

clerk of the court was appointed guardian *ad litem,* and as such accepted service of the petition.

The grandfather filed an answer—which was adopted by the guardian *ad litem*—on behalf of the heirs, in which it is alleged that the intestate never owned any interest in the lands, but that it had been conveyed by himself directly to the infant children of said Chester.

Upon these pleadings, an issue of title was, under the direction of the court, framed, but before it was disposed of, at February Term, 1868, of said court, a decree was filed granting the license to sell, under which the land was sold, and purchased by one Mathis. The sale was reported to the court and confirmed. Mathis then reconveyed to the administrator, and the latter to the present defendants, or to those under whom they claim.

This action was brought by the heirs at law of Chester R. Vann, against his administrator, and the persons claiming under the sale made by him, to set aside the decree for sale, and all orders, etc., made in pursuance thereof. They alleged that all the purchasers took with notice of their title, and of the irregularities in the proceedings, upon which they were founded.

The defendants, among other defenses, alleged that the land (65) belonged to Chester R. Vann; that the order for sale was granted by consent; that the purchasers, from the administrator paid a valuable consideration and had no notice of the plaintiffs' claim, or of the alleged irregularities. They also averred that the plaintiffs were estopped by the orders, decrees, etc., made in the petition to sell, and by the further fact that in 18.... the present plaintiffs made a motion in the Probate Court of Sampson County to set aside the sale, which was refused, and this refusal was affirmed upon successive appeals to the Superior and Supreme Courts.

Upon these pleadings two issues were submitted:

1. Have the plaintiffs an equity in the land?
2. Did defendants purchase it with notice of this equity?

Upon the trial, the record of the Court of Pleas and Quarter Sessions was put in evidence, showing substantially the facts alleged in the complaint.

It was also in evidence that the said administrator, William S. Peterson, under said decree, conveyed said land to one Abram Mathis, who reconveyed to the said William S. Peterson, who conveyed to the defendant William Sutton, and that the said Sutton, before his purchase of said land, had been notified of the plaintiff's claim to the land.

Upon the case so made, the court was of the opinion that the first issue should be found in favor of the defendant; that there being no allegation in the complaint, and no proof on this trial, that the decree of

February, 1868, of the said Court of Pleas and Quarter Sessions ordering a sale of the said land, was obtained by fraud or mistake, that said decree was conclusive upon the defendants therein, who are the plaintiffs herein, and that said plaintiffs had no equity to set said decree aside, but that if the jury believed the evidence, the defendant Sutton had purchased the land with knowledge of the plaintiff's claim. In deference to which opinion of the court, the plaintiffs suffered a non-
(66) suit. Judgment accordingly, and appeal by the plaintiffs.

J. L. Stewart and M. C. Richardson for plaintiffs.
No counsel for defendants.

MERRIMON, J. The order of sale made in the proceeding in the late Court of Pleas and Quarter Sessions mentioned, was irregular and improperly made. It ought not to have been made until the issue which preceded it in the record, as to the title to the land mentioned and described in the petition in that proceeding had been tried and disposed of as the preceding order of the court directed.

A material allegation, not very distinctly made in the complaint in this action, is that the purchaser of the land under the irregular order of sale mentioned, and the present defendants, Peterson and Sutton, had notice of such irregularity, and at the time they respectively purchased the land, had also notice of the claim of the plaintiffs (except James Chestnutt) that it belonged to them, and they had valid title for the same. No issue in this respect was tried, nor does it appear from the case on appeal that Abram Mathis, who purchased directly under the order of sale, had notice of such claim of the plaintiffs. It does appear affirmatively that the defendant Sutton had such notice, and by inference that the defendant Peterson likewise had, but the court, before passing upon the merits of the case, should have ascertained whether Mathis had or had not like notice. If he had, and it had so appeared on the trial, it may be that the court would and ought to have given judgment in favor of the plaintiffs.

The pleadings in their compass and effect, required that such an inquiry should be made, and the action could not be properly determined without it.

(67) 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. Reversed.

THE BANK OF NEW HANOVER v. MARY E. BRIDGERS, JOHN L. BRIDGERS AND ROBERT N. BRIDGERS.

Consideration—Contract—Endorsement—Purchaser—Notice—Married Women—Forbearance.

1. The payment of a note executed by a married woman, with her husband, without any consideration inuring to her separate estate, cannot be enforced against her.
2. But if, after the termination of the disability of coverture, she executes renewal notes, whereby an extension of time is obtained, a sufficient consideration is created to render her liable.
3. An obligation given for or on account of a contemporaneous or preëxisting debt suspends all right of action on such debt for the period of its duration, the agreement to forbear being a sufficient consideration.
4. A consideration to support a promise need not inure to the promissor—it is sufficient if it consists in a detriment to the person to whom the promise is made.
5. The absence of consideration will not prevail against an endorsee for value, and before maturity, without notice of that fact, unless it be shown that the instrument was executed under circumstances which raise a strong suspicion of fraud upon the maker, when the endorsee will be required to show how and upon what consideration he became the holder.
6. Giving successive notes for the same debt, not differing in legal effect, will be regarded as cumulative securities, and the creditor may sue on any preceding one, provided he has possession of the latter at the trial, to be surrendered.

(*Spear v. Atkinson*, 1 Ired., 262; *French v. Barney, ibid.*, 219; *Tredwell v. Blount*, 86 N. C., 33; *Felton v. Reid*, 7 Jones, 269; *Harshaw v. McKesson*, 65 N. C., 688; *S. c.*, 66 N. C., 266; cited and approved.)

CIVIL ACTION, tried before *Connor, J.*, at Spring Term, 1887, (68) of NEW HANOVER.

The complaint, in separate counts, is for the nonpayment of two promissory notes, each in the sum of $3,333.91, made on the same day, 8 May, 1885, and maturing respectively on 1 December and January following—executed by Mary E. Bridgers and John L. Bridgers to Robert R. Bridgers, and endorsed before becoming due to the plaintiff. On the notes partial specified payments are admitted to have been made, and the action is to recover the residue.

The defendant, Mary E., in her answer admits that she signed both notes and that they came to the plaintiff by the payee for value, but denies her liability upon either, and in support of her defense alleges as follows: That in the year 1867 she intermarried with one John L.

Bridgers, who died in January, 1884; that while the wife of the deceased, they and the defendant John L. Bridgers, on 8 February, 1883, made two other promissory notes to the same payee, by whom they were endorsed to and became the property of the plaintiff, one for $3,500, due 20 November, the other for $4,000, due 20 December of the same year; that certain payments were made on them, and the notes described in the complaint were in renewal, and for the balance due on them at that time, and without further consideration as to her; and that by reason of her coverture when she signed the first notes, and the absence of any consideration for the renewal, she has incurred no obligation in the premises.

The other defendants answered and admitted the facts stated in the complaint, averring, however, each of them, that he was a surety only—the endorser that he was a surety for both defendants, and the said John L. that he was surety for the *feme* defendant. Thereupon the following issues were submitted to the jury, to all of which, except the two last, there was an affirmative response:

(69) 1. Was the defendant, Mary E. Bridgers, married to John L. Bridgers, Sr., in the year 1867?

2. Did the said John L. Bridgers die during the month of January, 1884?

3. Did the said Mary E. Bridgers, with her husband and the other defendants, execute the notes dated 8 February, 1883, and referred to in the answer?

4. Were the notes set out in the complaint given by the said Mary E. Bridgers and the other defendants in renewal of the said notes of 8 February, 1883?

5. Was the defendant Robert R. Bridgers a surety of the other defendants?

6. Was the defendant John L. Bridgers a surety to the defendant Mary E. Bridgers?

7. Was the money for which the original notes were given borrowed for the benefit of the separate estate of the defendant Mary E. Bridgers?

To which the jury responded "No."

8. Did the trustee Maricus J. Battle assent to the execution of said note?

To which the jury responded "No."

The defendant Mary E. Bridgers moved for judgment that she go without day and for her costs. The motion was refused and the defendant excepted.

Whereupon the plaintiff, upon the verdict and facts set forth in the pleadings, moved for judgment against all the defendants, which was rendered and the defendant Mary E. Bridgers appealed.

George Davis for plaintiff.
Thomas N. Hill and Thomas W. Strange for defendants.

SMITH, C. J., after stating the case: There can be no question upon the findings by the jury, that the appellant incurred, in signing the note with her husband, no obligation which could have been legally enforced against her, and it is argued that she is not (70) bound by that given in renewal, because there was no existing liability, and no further consideration to sustain the contract.

It is to be observed that the notes now sued on differ from the two former ones, in that the principal and deceased debtor is not a party to them, and in the extension of the time of payment for more than nine months, so that the new and superseding contracts have a consideration more than a mere naked promise to pay a subsisting debt, which as such would be inoperative in creating a new obligation. The taking of the new security thus suspends the remedy upon the old, at least, as to those who united in executing it.

"There is no doubt that a negotiable bill or note," says *Mr. Daniel,* "given for or on account of a cotemporaneous or preëxisting debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency—that is, until it is dishonored by nonacceptance or nonpayment." 2 Dan. Neg. Ins., sec. 1272. "Where a man who has a judgment debt," is the language of the Court in *Baker v. Walker,* 14 Exch., 468, "takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note." To the same effect are *Putnam v. Lewis,* 8 Johns., 389; *Frisbie v. Larned,* 21 Wend., 450.

And so this Court held, that where one indebted by note gives a mortgage to the creditor for his security, upon the terms of an indulgence, there is an implied promise in accepting the mortgage to suspend action on the note. *Harshaw v. McKesson,* 65 N. C., 688; and it was also decided that the mortgage could not be foreclosed until the termination of the last credit. Same case, 66 N. C., 266.

A consideration to support a promise need not involve a (71) benefit to the person promising; it is equally sufficient when it consists in a detriment to the person to whom it is made.

Again, the appellant is not in a more favorable condition to contest her liability by reason of executing the notes under the disability of coverture, than she would be if she had had no connection with them, and can it admit of question that she, when *sui juris,* and with restored capacity to act and bind herself like any other person, may contract to

pay a debt due from others on a stipulated forbearance for a fixed time given to those who are liable?

The case relied on by her counsel—*Felton v. Reid,* 7 Jones, 269—is not applicable, for there was no new consideration to sustain a promise for which the *feme* was not liable, and this is true of any other person whose contract is founded on no consideration.

Beyond and outside of this aspect of the case, the present plaintiff is an endorsee for value, taking, so far as the case discloses, without notice of the infirmity imputed to the instrument as emanating from the appellant. In such case, as a consideration is implied, the want of it cannot follow and defeat the notes, when the fact was unknown to the purchaser for value, or any indication sufficient to put him on inquiry, the note not having matured.

"In an action by the endorsee against an original party to a bill," the words are those of Mr. Greenleaf, in Vol. II, sec. 172 of his work on Evidence, "if it be shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or, if a strong suspicion of fraud be raised, the plaintiff will then be required to show under what circumstances and for what value he became the holder. It is, however, only in such cases that this proof will be demanded of the holder. *It will not be required when the defendant shows nothing more than* a mere absence or want of consideration on his part,"

(72) 1 Dan. Neg. Inst., secs. 814 and 815; Pars. Bills, pages 218 and 219; *French v. Barney,* 1 Ired., 219.

In the last case cited *Daniel, J.,* says: "He being the holder, the law implies, until something be shown to the contrary, that he gave value for it, or rather came fairly and legally by it."

More recently the same proposition is ruled in *Tredwell v. Blount,* 86 N. C., 33.

It is true that the giving successive notes for the same debt, when not differing in legal effect, may be deemed cumulative securities for that debt, and the creditor may sue on a preceding one; provided, if the latter be a negotiable note or bill, he has it in his possession at the trial, to surrender, as held in *Spear v. Atkinson,* 1 Ired., 262. But the rule does not extend to cases like the present, where the new and substituted note varies essentially in its terms, and protracts the period of payment. This becomes the contract until it is broken, and then the plaintiff is at liberty to fall back upon his former security. In no aspect of the case do we see how the appellant can claim exoneration from a liability assumed voluntarily, and when she had full legal capacity.

We must therefore affirm the judgment, and it is so ordered.

No error. Affirmed.

Cited: Branch v. Griffin, 99 N. C., 184; *Costner v. Fisher,* 104 N. C., 393; *Southerland v. Fremont,* 107 N. C., 575; *Long v. Rankin,* 108 N. C., 336; *Hinton v. Jones,* 136 N. C., 36; *Bank v. Walser,* 162 N. C., 60; *Sills v. Bethea,* 178 N. C., 318; *Grace v. Strickland,* 188 N. C., 372; *Exum v. Lynch, ibid.,* 396; *Hooper v. Trust Co.,* 190 N. C., 427.

(73)

FIELDING R. KNOTT v. RALEIGH AND GASTON RAILROAD COMPANY.

Common Carrier—Contract—Evidence—Negligence—Agency.

1. A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or of an allegation in the pleadings and proof of an association or copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. In such cases its liability is confined to that of a forwarding agent.

2. To show that the freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition, to forward them, and that such examination was made and forwarding done, is admissible.

3. The record of the state of the weather made by one who is appointed for that purpose by the Signal Service Bureau of the United States is, at least, a *quasi*-public record, and is of itself evidence of the conditions of the weather at any period embraced by it.

(*Burwell v. R. R.,* 94 N. C., 451; *Phifer v. R. R.,* 89 N. C., 311; cited and approved, and *Phillips v. R. R.,* 71 N. C., 298, cited and distinguished.)

CIVIL ACTION, tried before *Philips, J.,* at Spring Term, 1887, of GRANVILLE.

The tobacco—for damages for injury to which this action was brought—was delivered by the plaintiff to the Oxford & Henderson Railroad on 19 February, 1884, for which a receipt was given as follows:

"Received of F. R. Knott, subject to conditions named on back of this receipt (the tobacco, designating it) in apparent good order, to be sent to Allen & Shaffer, Richmond, Virginia."

The conditions named on the back of the receipt contained a number of limitations upon the liability of the company, of which the only one material to this case is as follows:

"The O. & H. R. R. Co. is hereby authorized to deliver goods (74) to any other company or person for transportation, such com-

pany or person so selected to be regarded exclusively as the agent of the owner, and as such, alone liable; and the O. & H. R. R. Co. shall not in any event be responsible for the negligence or nonperformance of any such person or company."

It was in evidence that the Oxford & Henderson road, the Raleigh & Gaston road, the Petersburg & Weldon road, and the Richmond & Petersburg road, were connecting roads and in the line between Oxford and Richmond; that the Oxford & Henderson road is separate and distinct from the others, and not under the same management; that the plaintiff's tobacco was received from the Oxford & Henderson road on 19 February, about 10 o'clock a.m., and forwarded by the defendant company to Weldon, a distance of about fifty-five miles, about 11 o'clock on the same day.

W. J. Robards, agent for the defendant company at Henderson, among other things testified: "Freights from Oxford to Richmond would go over the Oxford & Henderson, the Raleigh & Gaston, the Petersburg and Weldon, and the Richmond & Petersburg roads; that they were connecting lines, but not under the same management; that he saw no bill of lading for the tobacco, nor was any notice given him that one had been given; that he gave manifests for the tobacco, marking on it 'F. R. Knott, consignor, Allen & Shaffer, Richmond, Va., consignee,' and under Knott's name was written, *O. & H. R. R.,* to show from whom it was received. The Oxford & Henderson road manifests to us, and we from Henderson. The Raleigh & Gaston and the Petersburg & Weldon roads divide freights; our custom is to run freights to Richmond, and collect when they get to Weldon."

It was in evidence that on 19 February, at 6 o'clock p.m., the cars containing the plaintiff's tobacco were turned over to the Peters-
(75) burg & Weldon road. J. B. Tilgman, assistant agent for the defendant company at Weldon, among other things testified:

"No exception was made to the delivery of the freight. . . . The agent of the Petersburg & Weldon road made an examination of the cars, and no exceptions were made. The cars, when they arrived at Weldon, were sealed and in good condition. . . . To the best of my knowledge they (the goods) were in good order and condition when received in Weldon."

The defendant's counsel asked the question:

"What do you found that knowledge upon?"

The witness answered:

"Upon the custom that exists between the roads at Weldon, that if the agent of the Petersburg & Weldon Company, after examination, found that anything was wrong, he would not have received them, and when he checked them, meaning they were all right."

The answer was objected to by the plaintiff; objection overruled; exception.

T. A. Clark, witness for defendant, testified: "That in February, 1884, he kept a meteorological record at Weldon, by appointment from the chief signal officer of the United States, at Washington, and that he has kept such a record since February, 1872; that it is a public record, and his appointment is in writing, but he did not bring it with him; that he is known as a volunteer weather observer, and makes monthly official reports to Washington, D. C.; . . . that he has taken no oath, given no bond, and his appointment is not under seal; that the record now produced is in his own handwriting, having made it contemporaneous with the matter of which it purports to speak."

The defendant then offered to show by this witness and record "that in Weldon, 19 February, 1884, at 2 o'clock p.m., it was fair, at 7 o'clock p.m., it was clear, and that no rain fell before 9:45 p.m. The rain began then and stopped next morning at 2:30; between (76) these hours there was a storm."

The plaintiff objected; objection overruled, and plaintiff excepted.

The witness testified as above, and upon cross-examination said: "He had no personal recollection of the storm; he did not always know when it starts to rain."

There was evidence tending to show that the tobacco was in good order when shipped from Oxford on 19 February, and that it was shipped in good, well protected cars. There was also evidence tending to show that one package of it was received in Richmond on 20 February in a wet, sobby and damaged condition.

The plaintiff tendered the following issues, which were submitted to the jury:

1. Was the tobacco in good condition when delivered to the defendant?

2. Was it damaged when in possession of the defendant?

3. Was it damaged by the defendant's negligence, or that of its agents or servants?

4. If so, what was the amount of damage?

The counsel for the defendant asked the court to charge the jury that there was no evidence of any damage to the tobacco while it was in the defendant's possession.

In reply to which his Honor said: "I will not read over my notes to see if there is any evidence or not, that the tobacco was damaged while in the defendant's possession, but will leave it to the jury to pass on the issues from all the evidence; the counsel for the plaintiff and the defendant agree that I need not read over my notes to refresh the memories of the jury as to what the witnesses testified to while on the stand."

"The court charged the jury that if they believed that the tobacco was not damaged while it was in the custody of the defendant, but that the same was delivered in good condition to the Petersburg &
(77) Weldon road, the plaintiff is not entitled to recover."

The plaintiff excepted to the charge.

There was verdict and judgment for the defendant, and appeal by plaintiff.

A. W. Allen and R. W. Winston for plaintiff.
E. C. Smith for defendant.

DAVIS, J., after stating the case: The plaintiff insists that the Raleigh & Gaston Road was the first of the continuing connecting lines of roads to Richmond, and that it was liable for damages sustained on any one line of the continuous roads; that if the damage did not occur on the Oxford & Henderson road, then the defendant was responsible for the safe delivery in Richmond, and for this he cites *Phillips v. R. R.*, 78 N. C., 298. The cases are unlike. In that case the North Carolina Railroad Company received from the plaintiff a bale of goods, to be shipped from Raleigh, N. C., to Monroe, La.

The bale was delivered at the terminus of the North Carolina road at Charlotte, to the Charlotte & Columbia road, was lost between Charlotte and Monroe, and the plaintiff sought to hold the North Carolina road responsible, alleging a special contract.

The issues submitted were:

1. Did the defendant make a *special* contract with plaintiff to transport the goods to Monroe?

2. Was the bale lost on the route?

It was held that the receipt given by the defendant, and the assurance given by its agent to the shipper, that the goods would reach Monroe in a few days, in good condition, and that he (the shipper) could pay the freight at Monroe when the bale reached that place, was no evidence of a special contract on the part of the North Carolina Railroad
(78) Company that the goods should be safely delivered at Monroe, and its liability was discharged when it delivered the goods to the next connecting road, and the jury having found upon such evidence that there was a contract, it was declared to be erroneous, and a new trial was awarded. In the case before us, there was no evidence of any contract, except that contained in the receipt given by the Oxford and Henderson road, and that could in no way bind the Raleigh and Gaston road; and the manifest given by the agent of the defendant at Henderson does not bind the company to do more than deliver the goods, as a

forwarding agent, to the next succeeding line, in the absence of any contract, express or implied.

There was *evidence* tending to show that the Raleigh and Gaston, and the Petersburg and Weldon roads belonged to a line of associated railroads, and that these roads divided the freight charges, but there was no evidence of such a division with the Richmond and Petersburg road. Undoubtedly a connecting line of carriers may form an association or copartnership by which each may become liable for the others, but assuming that there was in fact such an association, there was no allegation of it in the complaint, or that by any contract or agreement the Raleigh and Gaston road was to be liable for any carrier beyond its own terminus, and in the absence of any allegation or proof of such an agreement, its liability ceased when, as a forwarding agent (and in the absence of proof, it could be held to be no more, as the Oxford and Henderson road was), it delivered the tobacco in good condition to the succeeding line. It is true that in the third allegation of the complaint it is charged that the defendant agreed to carry the tobacco safely to Richmond, but this was denied, and though it made an issue, it was not presented nor tendered as such by the plaintiff, and cannot therefore be considered.

In response to the material issues tendered by the plaintiff, the (79) jury find that the tobacco was not damaged when in the possession of the defendant, or by its negligence or that of its agents or servants.

In *Phifer v. R. R.*, 89 N. C., 311, it was alleged that the defendant company (the Carolina Central), "for a valuable consideration contracted to carry cotton from Lincolnton to New York over its own and the line of other companies, using the latter as agencies of its own for this purpose," and in a second cause of action, "that the defendant as one of a partnership association of common carriers formed by itself (and other companies, naming them) on behalf of all, undertook and agreed to convey cotton safely along and over the entire route to the terminus in New York. There was not *only allegation* of *association,* but of *partnership,* and the evidence was certainly as strong as in the present case (in which there are no such allegations) and it was held that the facts of that case, to which we need only refer, constituted a mere association between the different lines, each undertaking to transport over its own line, and not as agent in forwarding to the next succeeding line, and that it was not a copartnership in which one was liable for all. The subject is there discussed at length by the *Chief Justice,* and we refer to it and the authorities cited (among them *Phillips v. R. R., supra*) as conclusive against the plaintiff upon the question of the liability of the defendant for loss beyond its terminus.

The objection to the answer given by the witness Tilgman cannot be sustained. The Raleigh and Gaston road delivered to the Petersburg and Weldon road at Weldon; the agent of the receiving road makes examination of the goods or packages, and if not in good condition or apparent good condition, they will not be received, but if in good condition, they are checked as "all right." This was the custom, and was a very good foundation for his knowledge.

(80) Neither can the objection to the evidence of the witness Clark, and the record introduced by him, be sustained. Undoubtedly he might refresh his memory by a written memorandum made at the time, but the record of the state of the weather was something more; it was a record (official or *quasi* official in its character, and of a public nature) made in the course of his public duty, of what occurred under his personal observation, and when properly authenticated, was in itself evidence. 1 Greenleaf, sec. 483. It was competent to show the state of the weather. *Burwell v. R. R.*, 94 N. C., 451. It does not appear from the record, though insisted upon here for the plaintiff, that there was any objection to the refusal of his Honor to charge the jury that there was *no evidence* of any damage to the tobacco while in defendant's custody, and we cannot see how the refusal to so charge could prejudice the plaintiff. It was agreed that the notes of his Honor need not be read, and we cannot discover any expression of "opinion" as is insisted by the plaintiff, in what was said by his Honor in refusing to give the instruction asked for by the defendant. There is

No error. Affirmed.

Cited: Washington v. R. R., 101 N. C., 246; *Meredith v. R. R.*, 137 N. C., 483; *Insurance Co. v. R. R.*, 138 N. C., 52.

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(81)

A. M. RIGSBEE v. THE TOWN OF DURHAM AND THE SCHOOL COMMITTEE OF THE TOWN OF DURHAM.

Constitution—Qualified Voters—Injunction—Statute—Registration—Election.

1. The General Assembly cannot authorize a municipal corporation to create a debt, or levy a tax for graded schools, by the assent of a majority only of votes *cast* at an election held thereunder; but if at such an election it is made to appear that a majority of the "qualified voters" within the corporation did vote for the proposition, the creation of the debt, or the levy of the taxes, it will not be void.

2. The action of the local authority declaring the results of an election to ascertain the will of the voters to a proposed debt or tax is not conclusive; it may be reviewed in a proper proceeding, but not collaterally.

3. A body clothed with power to canvass the result of an election may conduct its examination by means of the agency of a committee of its own members, and the report of such committee, being ratified by the canvassing tribunal, will be taken as its action.

4. The registration books are prima facie evidence of who are qualified voters.

5. In an action for an injunction, if the plaintiff's whole equity is denied, and it appears from the answer and affidavits that his case is fully met, the injunction should not be continued to the final hearing.

(*Wood v. Oxford*, 97 N. C., 227; *McDowell v. Construction Co.*, 96 N. C., 514; *Perry v. Michaux*, 79 N. C., 94; *Munroe v. McEntyre*, 6 Ired. Eq., 65; *Miller v. Washburne*, 3 Ired. Eq., 161; *Sharp v. King, ibid.*, 402; *Perkins v. Hollowell*, 5 Ired. Eq., 24; *Norment v. Charlotte*, 85 N. C., 387; *Duke v. Brown*, 96 N. C., 127; *Southerland v. Goldsboro*, 96 N. C., 49; cited and approved.)

THIS was an appeal from an order made by *Shepherd, J.*, at chambers in Hillsboro, on 12 August, 1887, dissolving a restraining order theretofore granted, in the cause pending in the Superior Court of DURHAM.

Chapter 86 of the Acts of 1887 authorizes the board of commissioners of the town of Durham to submit to the "qualified" voters of said town, "whether a tax shall be annually levied therein for the support of the schools in said town, provided for by the act." The act (82) prescribes the manner in which the election shall be held, "and if a majority of the votes *cast* shall be in favor of such tax, the same shall be levied and collected by the town authorities, under the same rules and regulations under which other town taxes are levied and collected," etc.

The plaintiff, who is a taxpayer of the town of Durham, alleges that this act is unconstitutional upon its face, in that it contravenes Article VII, sec. 7, of the Constitution, in allowing a majority of the votes *cast*, instead of requiring a majority of the *qualified* voters, to determine the result of the election; and he alleges that notwithstanding the said act is unconstitutional and void, the commissioners of the town of Durham ordered an election to be held in pursuance of its terms, at which election it is alleged a majority of the *qualified* voters did not vote in favor of said tax.

It is further alleged, in substance, that notwithstanding a majority of the qualified voters of the town of Durham did not vote in favor of said tax, and establishing the graded school provided for in the act, the board of commissioners of said town appointed a committee, who, after refusing to hear any evidence to the contrary, or permitting an oppor-

tunity to the plaintiff to be heard, and without hearing any evidence, reported that one hundred and ..... voters, whose names appeared on the registration book, were not qualified voters of the town, and that the vote cast in favor of the said tax and school was a majority of the qualified voters of the town of Durham; whereupon the commissioners declared that the said act had been qualified by a majority of the qualified voters of the town of Durham, whereas, as alleged by the plaintiff, there were 983 registered voters of the said town, of whom only 410 voted for ratification.

(83) The plaintiff further alleges, that notwithstanding the act was void upon its face, and notwithstanding it was not ratified by a majority of the qualified voters of the town, the board of commissioners have proceeded to appoint the defendants (naming them) a school committee of the town of Durham, and are threatening to place on the tax list, and have collected, the tax provided for by the act, and carry out the provisions of the act to the irreparable injury of the plaintiff and other taxpayers of said town.

The plaintiff asks that the act of the Legislature be declared unconstitutional, and the action of the commissioners null and void, that they be enjoined, etc.

The defendants answer, admitting the passage of chapter 86 of the Acts of 1887, and deny that it is unconstitutional; they also deny the other material allegations of the complaint, and say, in substance, that the election complained of was regularly and duly held, in accordance with the provisions of the act, on 4 April, 1887, "and on the day following said election, to wit, 5 April, 1887, the inspectors of election certified and reported to the commissioners of said town that at said election 411 votes were cast and counted 'for school,' and 151 votes were cast and counted 'against school'; and on 5 April, 1887, at a meeting of said commissioners to enable them to declare truly the result of said election as directed by said act, a committee of their body was appointed to revise the registration book of said town used at said election, and report to the full board the number of qualified voters of said town at said election. Said committee reported that they had examined the book of registration, and that the total number of names therein was 980, and of said number of names there was 180 names of persons included, who were not on 4 April, 1887, qualified voters of said town, by reason of deaths, removals, and other disabilities, and they therefore reported that they found and reported 800 to be the correct num-

(84) ber of qualified voters on 4 April, 1887; that said report was adopted by the full board, and it was thereupon officially declared by the board as the result of said election, that a majority of the votes

cast at said election was 'for school,' and that the aforesaid 410 votes as aforesaid 'for school' was a majority of all the qualified voters of the town at said election."

They further say, that before the meeting of the board of commissioners on 5 April, "at the instance of the mayor of the town, Commissioners Parrish and Mackey, together with the town attorney, chief of police, register of election, and other citizens of the town, met in the mayor's office to examine the registration books, and to hear and consider and make inquiry, with the view of ascertaining the correct number of qualified voters; that each name was canvassed, and a list only of those known to be dead or removed, or otherwise disqualified, was made, upon the personal knowledge of some one or more present at said meeting; that said list contained 180 names of persons on the registration book who were not qualified voters of the town of Durham, and who did not vote in said election; that the names of registered voters whose qualifications were in doubt were not included in said list, but counted amongst the qualified voters . . . that of the committee of three appointed by the board of commissioners, said Parrish and Mackey were two, and the list as prepared was carefully revised, together with the registration book, in presence of counsel for the plaintiff, the plaintiff himself, and others . . . and the number of qualified voters separated by the committee and declared by the board of commissioners, was the result of a fair, honest and open canvass and consideration upon evidence."

The following is the order made by his Honor dissolving the injunction:

"This cause coming on to be heard, upon motion of plaintiff to continue the restraining order, temporarily granted, and time having been granted the plaintiff to file additional affidavits in reply (85) to affidavits of defendants, now upon consideration of all the affidavits, and it appearing as facts to the satisfaction of the court, that at an election held in the town of Durham, on 4 April, 1887, under the provisions of the act in relation to the graded schools in the town of Durham (chapter 86 of the Laws of 1887), 410 qualified voters voted 'for schools,' as provided in said act, which said number was a majority of the qualified voters of said town, and the result of said election was duly canvassed, determined and declared, and upon consideration of the whole case, it is ordered and decreed that the motion of plaintiff be denied, and the injunction and restraining order heretofore granted be and is hereby vacated and annulled, and the plaintiff will pay the costs."

R. C. Strudwick and John Devereux for plaintiffs.
John W. Graham and W. A. Guthrie for defendants.

DAVIS, J., after stating the case: The plaintiff insists that the act of the Legislature "in relation to the public schools in the town of Durham (chapter 86, Laws of 1887) is unconstitutional. The question is identical, in principle, with that presented in the case of *Wood v. Oxford,* decided at the last term of this Court, 97 N. C., 227. It was then carefully and fully considered, and upon a review of the argument presented in the present case, we can see no reason to reverse the decision then made.

The Constitution, Art. VII, sec. 7, will not permit the tax for the support of the public schools in the town of Durham to be levied or collected "unless by a majority of the *qualified* voters therein," and the question was submitted to the "*qualified* voters." If a majority of the votes *cast* shall also be a majority of the *qualified* voters, no violence will be done to the letter or the spirit of the Constitution. The
(86) act is not unconstitutional, and we content ourselves with a reference to *Wood v. Oxford, supra.* This disposes of the first objection presented.

The next is, that a majority of the *qualified* voters of the town of Durham did not vote "for school," and that the action of the board of commissioners, in ascertaining and declaring the result, was illegal. No objection appears to the regularity of the proceedings touching the election, antecedent to the appointment of a committee by the board of commissioners to ascertain and report what names on the registration book were not qualified voters of the town of Durham. It is insisted that the board of commissioners alone could investigate and judicially determine the result of the election and declare whether a majority of the *qualified* voters had voted in favor of the tax—that they could not delegate this duty, nor any part of it, to a committee of their own number, and that the action of the board, in appointing such a committee, and in receiving and acting upon its report, and declaring that a majority of the qualified voters had voted for the ratification of the act, was illegal; that the board could not, by any such method, ascertain legally what names on the registration books were not qualified voters, by reason of deaths, removals, or other disqualifying causes. We do not understand that it is claimed for the defendants that the action of the board of commissioners in declaring the result (unless collaterally brought in question) is final or conclusive, or that the regularity and validity of the election, including the ascertainment and declaration of the result by the board of commissioners, may not be attacked by a direct proceeding as this is, instituted for the purpose of contesting the validity of the election. This may be done. *McDowell v. The Construction Co.,* 96 N. C., 514, and cases there cited; and the plaintiff seeking to have the election declared illegal and void for the causes stated,

had a right to the temporary restraining order as incidental to (87) the relief sought, and if, upon the answer and proof, it shall appear that the plaintiff's allegations are not sufficiently negatived, and that there is reasonable ground to believe that irreparable injury will be sustained, the restraining order will not be dissolved, but continued to the hearing. *Perry v. Michaux,* 79 N. C., 94; *Monroe v. McIntyre,* 6 Ired. Eq., 65; *Miller v. Washburn,* 3 Ired. Eq., 161. "But," as was said by *Bynum, J.,* in *Perry v. Michaux,* "it is also a well settled rule that when by the answer of the defendant, the plaintiff's whole equity is denied, and the statement in the answer is credible, and exhibits no attempt to evade the material charges in the complaint, an injunction, on motion, will be dissolved." *Perkins v. Hollowell,* 5 Ired. Eq., 24; *Sharpe v. King,* 3 Ired. Eq., 402. This is clearly so, if, upon the complaint, answer and affidavits, it appears that the plaintiff's claim to have the restraining order continued, is fully met. This makes it our duty to examine the complaint, answer and proofs, to ascertain whether the plaintiff has made a case entitling him to have the restraining order continued to the hearing. All the material allegations of the complaint are distinctly denied, or met by a clear and positive statement of what transpired in canvassing and determining the result of the election. Is the matter left in such doubt as to entitle the plaintiff to have the restraining order continued to the hearing?

The registration book contains the prima facie evidence of the list and number of qualified voters in the town. *Norment v. Charlotte,* 85 N. C., 387; *Duke v. Brown,* 96 N. C., 127; *Southerland v. Goldsboro,* 96 N. C., 49.

But the list, as was said by the *Chief Justice,* in *Duke v. Brown,* is "*open to correction for deaths, removals and other causes subsequently occurring, and perhaps for intrinsic disqualifications existing at* the time of registration, and error in admitting their names to (88) the list."

How is this correction to be made?

The plaintiff says that the board must act judicially upon each name sought to be erased—that it cannot conduct the investigation or any part of it, by or through a committee, and that, in the present case, the action of the board in appointing the committee and considering its report in their determination of the result was illegal.

We take a different view. It is, we believe, the common, if not universal practice, in cases of contested elections (and this is to contest the result of an election to be determined by the board) to commit the investigations of controverted matters of fact and details to committees, and the reports of such committees, when made, are considered and acted upon. They are not conclusive or binding, but when adopted or to the

extent of their adoption, it was never contended or suggested that the result was rendered invalid by reason of the fact that they were considered, although, as usually is the case, they may have formed the basis upon which the result was ascertained.

In *Norment v. Charlotte, supra,* the board appointed and acted upon the report of a committee.

It is the constant practice of courts to appoint commissioners to investigate and report upon matters of account, and questions which may more conveniently be determined in this way—and when acted upon and confirmed they are valid.

Upon a careful examination of the evidence, we think there was no error in the finding of facts. There were 216 names on the registration book about which there was controversy; it is in evidence that every name about which there was doubt remained on the registration book, and of the 216, only 180 were adjudged to be disqualified, and it does not appear that a single name contained in the affidavit, in behalf of the plaintiff was erased. There is

No error. Affirmed.

Cited: Bynum v. Comrs., 101 N. C., 414; *Jones v. Comrs.,* 107 N. C., 251; *Cotton Mills v. Comrs.,* 108 N. C., 687; *R. R. v. Comrs.,* 109 N. C., 162; *Bank v. Comrs.,* 116 N. C., 365; *Claybrook v. Comrs.,* 117 N. C., 459; *Moran v. Comrs.,* 168 N. C., 290; *Barnes v. Comrs.,* 184 N. C., 327; *Plott v. Comrs.,* 187 N. C., 132; *Tobacco Growers Asso. v. Harvey and Son Co.,* 189 N. C., 498.

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(89)

M. M. McKINNON v. PETER McINTOSH.

Amendment—Counterclaim—Deceit—Pleading—Warranty.

1. The court in which an action is pending has the power, and it is its duty, to require any pleading to be amended so as to make it plain, definite, and certain.

2. To sustain an action for deceit three things are essential: (1) That the representation was false; (2) that the party making it knew it to be false; and (3) that the purchaser was thereby deceived.

3. The positive representation by a vendor that the article sold possesses a certain value amounts to a warranty, though he may not have known such representation to be false; and in an action to recover the price stipulated, the vendee may, by counterclaim, set the breach of the warranty and reduce the sum claimed by the difference between the contract price and the actual value, though there was no deceit in the sale.

(*Johnson v. Finch*, 93 N. C., 205; *McElwee v. Blackwell*, 94 N. C., 261; *Howe v. Rea*, 70 N. C., 559; *Thompson v. Tate*, 1 Mur., 97; *Ingel v. Bond*, 3 Hawks, 101; *Foggert v. Blackmuller*, 4 Ired., 238; *Bell v. Jeffreys*, 13 Ired., 350; *Henson v. King*, 3 Jones, 419; *Lewis v. Rountree*, 78 N. C., 323; *Baum v. Stevens*, 2 Ired., 411; cited and approved, and *Lunn v. Shermer*, 93 N. C., 168, approved and distinguished.)

CIVIL ACTION tried before *Clark, J.*, at February Term, 1887, of RICHMOND.

The plaintiff alleged that he sold and delivered to the defendant, in the months of April and May, 1883, a quantity of Lister Bros. Ammoniated Dissolved Bone at $38 per ton, amounting to $297.66, for the recovery of which this action is brought.

The defendant admitted the purchase, stipulated price and receipt of the quantity of Ammoniated Dissolved Bone mentioned in the complaint, and for a "special defense and counterclaim," alleged:

"1. That the plaintiff falsely represented to the defendant (90) that the said guano was valuable as a fertilizer, and that the same was actually worth the sum of $38 per ton, and was as good as any other on the market for that price.

"2. That said guano, as mentioned in the complaint, was not worth $38 per ton—that it was not a valuable fertilizer, and was not as good as many other brands on the market for the money, to wit, $38.

"3. That defendant did not receive value for the sum claimed by the plaintiff, to wit, $297.66.

"4. That defendant received value from said fertilizer not to exceed $150, and he is able, willing, and ready to pay that amount, and agrees that judgment may be rendered against him for that amount."

The jury having been empaneled, complaint and answer were read by respective counsel, whereupon the court inquired if the following were not the issues:

1. Is defendant indebted to plaintiff?

2. If so, how much?

Defendant's counsel assented, but plaintiff's counsel objected to any issue, and moved for judgment, because the answer admitted the cause of action, all the facts set up in complaint, and nonpayment of the debt, and that the facts stated in the answer did not constitute a defense in not setting out the necessary averments.

The court then offered to allow defendant to amend his answer. This the defendant declined to do. The court then gave judgment for plaintiff. Defendant excepted and appealed.

Frank McNeal for plaintiff.

Platt D. Walker for defendant.

DAVIS, J., after stating the case: The ruling of his Honor in the court below was based upon the decision of this Court in the case of *Lunn v. Shermer*, 93 N. C., 164.

(91) If the defendant had amended his answer upon the suggestion and offer of the court to allow him to do so, it would have removed all doubt and obviated the necessity of this appeal.

Under the present liberal statutory provision and practice in regard to amendments, this necessity ought not to have arisen, and it may be a question whether an appeal which could have been so easily obviated should not be dismissed for that cause. "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge of *defense* is not apparent, the court may *require* the pleading to be made definite and certain by amendment," The Code, sec. 261, and his Honor would have been warranted in requiring it in this case, and removing all doubt.

Upon a careful examination of the authorities, and a review of the case of *Lunn v. Shermer,* we think the question presented by this case is unlike, and must be distinguished from that. That was an action for a deceit by false representations, and three things were held to be essential: First, that the representation was false; second, that the party making it knew it was false; and third, that it was the false representations that induced the contracing party to purchase.

In the present case, it is alleged in the answer by way of counterclaim, in substance and with sufficient clearness, that the plaintiff made representations in regard to the quality and value of the fertilizer which were not true, and that in consequence, instead of being worth $297.66, it was worth only $150, and he asks that judgment be entered against him for that amount only.

This was stated with sufficient definiteness to constitute a defense, and the amount of damage sustained by the defendant because of the difference between the value of the fertilizer as represented and its real value, though informally stated, is yet set out with sufficient accuracy to

(92) present fairly and unmistakably the defense relied on. *Johnson v. Finch,* 93 N. C., 205; *McElwee v. Blackwell,* 94 N. C., 261.

The case is more like that of *Howie v. Rea,* 70 N. C., 559, which was an action to recover the stipulated price of certain castings, in which the defendant was allowed to reduce the stipulated price by showing that the castings received were not such as were contracted for, and the position is clearly sustained by the authorities there cited.

In addition to this, the defendant had a right to have the question whether the force and effect of the affirmations of the plaintiff in regard to the quality of the fertilizer did not constitute a warranty of the quality.

If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury. *Thompson v. Tate,* 1 Murph., 97; *Inge v. Bond,* 3 Hawks, 101; *Foggert v. Blackmuller,* 4 Ired., 230; *Bell v. Jeffrey,* 13 Ired., 356; *Henson v. King,* 3 Jones, 419; *Lewis v. Rountree,* 78 N. C., 323; *Baum v. Stevens,* 2 Ired., 411.

We think there was error in not submitting to the jury the issue raised by the answer, and there must be a new trial.

Error. Reversed.

Cited: *Martin v. Goode,* 111 N. C., 290; *Alpha Mills v. Engine Co.,* 116 N. C., 802; *Finch v. Gregg,* 126 N. C., 179; *Wright v. Ins. Co.,* 138 N. C., 494; *Beasley v. Surles,* 140 N. C., 609; *Wrenn v. Morgan,* 148 N. C., 104; *Harris v. Cannady,* 149 N. C., 82; *Robertson v. Halton,* 156 N. C., 220; *Hodges v. Smith,* 158 N. C., 260; *Tomlinson v. Morgan,* 166 N. C., 560; *Kime v. Riddle,* 174 N. C., 444; *Swift v. Meekins,* 179 N. C., 174; *Wiggins v. Motor Co.,* 188 N. C., 320.

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(93)

C. F. HARVEY, ASSIGNEE, v. J. D. BREVARD AND C. E. GRAHAM.

Removal of Action—Conversion—Public Officers—Venue.

1. The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons, "who, by his command or in his aid shall do anything touching the duties of such office." The Code, sec. 191 (2).

2. Therefore, where an action was brought in the county of L., against such obligors residing in the county of B., as aiders and abetters of the sheriff of the latter county in the unlawful seizure and conversion of goods under execution: *Held,* that it was not error to refuse to remove the cause to the county of B. for trial.

THE plaintiff, a resident and citizen of Lenoir County, claiming title to a stock of goods in Asheville, Buncombe County, under an assignment from J. J. Desmond, a merchant doing business in said town, brings this action in the Superior Court of LENOIR, against the defendants as aiders and abetters of J. R. Rich, sheriff of Buncombe, to recover damages for

the seizure and conversion of said goods. The sheriff took the goods by virtue of executions issued at the instance of creditors of said Desmond, who allege the assignment by him to be fraudulent and void, and therefore liable for his debts, and against the defendants, obligors to an indemnifying bond, which the sheriff required before he would proceed.

At the term of the court to which the summon was returnable, and before answering the complaint, the defendants moved the court to remove the record to Buncombe for the trial of the cause in that county, as alone possessing jurisdiction under secs. 191 and 195 of The Code.

The judge refused the motion, to which ruling the defendants excepted and appealed.

(94) *J. B. Batchelor for plaintiff.*
George V. Strong and E. R. Stamps for defendant.

SMITH, C. J., after stating the case: Section 191 provides that certain actions must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial as in other cases, and in enumeration of the actions embraced in the general clause recited, are "actions against a public officer or a 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 office." Par. 2.

There seems to have been no controversy as to the county in which the cause of action occurred, and whether sheriffs are "public officers" within the terms of the act, nor could there be. The dispute is whether the defendants who gave the indemnifying bond, required before the sheriff would proceed, are, upon a fair construction of the statute, within the terms "in his aid." Its purpose obviously is to require suits against public officers for what they have done in their official capacity, complained of by others, tried in the county wherein the alleged wrongful act was done, and where the means of defense were most accessible, and to extend the protection to such as aided under command, or in aid of the principal in doing the act. This would include all who coöperated in the seizure of the goods, and overcoming resistance thereto, or in holding the goods afterwards under his direction. But it would, in our opinion, be straining the words, so as to take in those who beforehand bound themselves to secure the officer against loss, although without such indemnity he would have refused to proceed.

The words "in his aid," immediately following the words "by his command," were meant to extend the immunity to all who assisted
(95) and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing.

How can it be said that these defendants did "anything touching the duties of such officer" when they only entered into an obligation for his indemnity? Giving the bond is not such an act, for it is no part of the duties of the office.

We therefore concur in the ruling of the court, and affirm the judgment.

No error. Affirmed.

Cited: Harvey v. Rich, post, 96.

C. F. HARVEY, ASSIGNEE OF J. J. DESMOND, v. J. R. RICH, G. A. MEARES, A. C. DAVIS, AND W. H. PENLAND.

Removal of Action—Nolle Prosequi.

An action brought in one county against the sheriff of another, and also against other parties (who had executed to him an indemnity bond) for the unlawful seizure and sale of goods under execution, if a *nol. pros.* is entered as to the sheriff, his codefendants are not entitled to have the cause removed to the county of the sheriff for trial.

Vide Harvey v. Brevard, ante, p. 93.

THIS was a motion by defendants to remove the case for trial to Buncombe County, under secs. 191 and 195 of The Code, heard before *Clark, J.,* at Fall Term, 1886, of LENOIR.

The facts were that J. J. Desmond, a merchant in Asheville, had made an assignment of his stock of goods to the plaintiff to secure certain debts. Certain judgment creditors of Desmond sued out executions on their judgments, and placed the same in the hands of J. R. Rich, sheriff of Buncombe, and directed him to levy on said stock, alleging that said assignment was fraudulent as to them, and executed (96) to said sheriff a bond indemnifying him against damages in respect to said levy. And thereupon the sheriff levied the executions upon said stock; and this action was brought against the sheriff and the other defendants (some of them obligors on said bond) to recover damages on account of said levy. A *nolle prosequi* was entered by the plaintiff as to the said sheriff.

His Honor refused the motion, and the defendants appealed.

J. B. Batchelor for plaintiff.

George V. Strong and E. R. Stamps for defendants.

SMITH, C. J. This case differs from that of *Harvey v. Brevard,* in that the summons was issued against and served upon the defendant Rich, the sheriff of Buncombe, who made the seizure of the goods and committed the alleged trespass, as well as upon others, part of those who gave the bond of indemnity. The same motion for removal, and upon the same grounds, were made when a *nolle prosequi* was entered as to the said Rich, and the action placed thereby in the same position as the other.

The court refused the motion, and the defendant appealed.

It is not necessary to determine whether the effect of suing those not entitled, with the officer who is, to the privilege conferred, would not make it common to all, while the association of all in one action remains, but the *nolle prosequi* having separated them, and the officer being no longer in the suit, we see no reason why it may not proceed against the others as if he had never been a party, when done in proper time.

(97) We therefore affirm the judgment, refusing the motion to remove.

No error. Affirmed.

MARK COHEN AND CHARLES COHEN v. JAMES P. STEWART AND W. H. WHITEHEAD.

Sale—Delivery—Vendor and Vendee.

S., residing in North Carolina, being indebted to C., residing in Virginia, for goods sold, applied for further credit, which was refused unless he paid the account then due. Thereupon he executed to C. a bill of sale for five hundred cords of wood, then at a point designated on the line of a railroad a hundred miles distant, being all the wood he had there, at a fixed price per cord. The sum realized to be placed to the credit of his account when C. should sell the same. Thereupon C. gave credit to S. for "500 cords of wood, more or less, at $1.25 per cord." Subsequently S. made an assignment of the wood in trust for his creditors: *Held*, that the transaction with C. was an absolute sale, and no title passed to the trustee by virtue of the subsequent assignment.

(Wittkowsky v. Wasson, 71 N. C., 451, cited and approved.)

CIVIL ACTION, tried before *Merrimon, J.,* at Fall Term, 1887, of NASH.

This action was brought to recover the value of certain wood mentioned in the complaint. It is alleged that the plaintiffs purchased the wood from the defendant Stewart, and that the latter afterwards undertook by deed of assignment to sell the same to the defendant W. H. Whitehead, in trust, to resell the same, and with the proceeds of sale pay sundry debts of Stewart in the deed mentioned.

By consent, a referee found the facts of the matter in controversy, upon which the case was submitted to the court as follows:

1. In April, 1886, and prior thereto, the plaintiffs were doing (98) business and trading under the firm name and style of M. Cohen & Son, in the city of Petersburg, State of Virginia. The defendant Stewart was trading and doing business at Battleboro, State of North Carolina, and had for some time past been dealing and trading with the plaintiffs.

2. That on 21 April, 1886, the defendant Stewart was indebted to the plaintiffs for goods, wares and merchandise sold and delivered to him, in a large sum, to wit: more than six hundred dollars. On 21 April, 1886, Stewart visited plaintiffs' place of business in Petersburg, and saw plaintiff Charles Cohen, his object being to buy more goods. At that time plaintiffs believed Stewart to be solvent.

3. The plaintiffs refused to sell him more goods unless he paid something on the account then due; he said he had no money, and was asked to give real estate security, which he refused. He stated he had no money then, but expected to get some so soon as he sold some wood and tobacco he had. That he expected to sell the wood soon, and get some money; plaintiffs replied, "This is too uncertain and indefinite"; and Stewart then proposed to give them a bill of sale for the wood and some tobacco; plaintiffs accepted the offer, and the following bill of sale was then executed, to wit:

BATTLEBORO, N. C., 22 April, 1886.

Messrs. M. Cohen & Son, of Petersburg, Va., bought of Joseph P. Stewart, of Battleboro, N. C., 500 cords of railroad wood at $1.25, $625, lying on the Atlantic Coast Line Railroad, between Battleboro, N. C., and Rocky Mount, upon which there is no encumbrance whatever. In consideration of one dollar to me paid by M. Cohen & Son, I sell and convey the above named lot of wood to M. Cohen & Son, the amount of which is to be placed to the credit of my account with M. Cohen & Son, when M. Cohen & Son shall have sold the same and realized the money from the same. (99)

JOS. P. STEWART.

A similar bill of sale for the tobacco was executed, except no price was named.

4. That the plaintiffs, after the bill of sale was executed, entered a credit on their books of 500 cords of wood, more or less, at $1.25 per cord, with postscript added, referring to the bill of sale. No receipt was given to Stewart for the wood.

5. The wood mentioned was all the wood owned by Stewart on the line of said railroad, and was on the said railroad line between Battle-

boro and Rocky Mount, being placed there to sell to the railroad company, and was distant from Petersburg about one hundred miles.

6. The wood was tagged or marked in Stewart's name, and remained so. Wood of this grade was worth from $1.50 to $1.60 per cord, and sometimes, to effect a sale, less was taken for it. The wood remained just as it was at the execution of the bill of sale. It was agreed that Stewart might sell the wood for and on account of plaintiffs, and they would try to sell it at the same time.

7. Plaintiffs endeavored, soon after the bill of sale was executed, to sell the wood to the railroad company, but did not effect a sale; Stewart did sell about sixty cords of the wood, and sent to plaintiffs the check he received in payment for same. He remitted same, to be placed to his credit; he gave plaintiffs no notice of sale.

8. That some time afterwards Stewart made a deed of assignment to his codefendant Whitehead, which was duly recorded; that defendant Whitehead shortly after took possession of said wood, being advised that it was embraced in the deed of assignment; that plaintiffs, so soon
(100) as they were informed that Whitehead claimed the wood under the assignment, notified him that it was their property.

9. It was agreed that Whitehead should sell the wood and hold the proceeds. He did sell what remained, after the sixty cords previously sold by Stewart, amounting to 292 cords, and brought $413.14.

10. There was no cancellation, extinguishment, or credit of plaintiffs' account by reason of the wood transaction other than the entries set out and stated in the evidence of Charles Cohen, who testified that he made the entries.

Upon consideration of the facts thus agreed upon, the court gave judgment for the plaintiffs, and the defendant appealed.

W. E. Daniels for plaintiffs.
Jacob Battle for defendants.

MERRIMON, J. The plaintiffs contend that they purchased the wood in question absolutely from the defendant Stewart. The defendants, on the other hand, contend that the plaintiffs did not so purchase it, but simply took it as a security for the debt, and hence, had only a mortgage on it, which not being registered as required by statute, is inoperative as to creditors of the mortgagor, and subsequent purchasers for value, and therefore the title to it passed to the defendant Whitehead, by virtue of the deed of assignment to him executed by his codefendant Stewart.

The facts of the matter in controversy are found settled. It is not our province to find other facts or draw inferences from those found. We must treat them as they appear, according to their just meaning,

legal effect, and bearing upon each other. And thus treating them, do they import an absolute sale of the wood in question to the plaintiffs?

We think this question must be answered in the affirmative.

A sale of personal property implies the transfer of the absolute (101) or general property in the thing sold, from the vendor to the vendee for a price in money, paid or agreed to be paid by the latter, or by some one for him, to the former, and the property thus passes by actual delivery thereof, or it passes without such delivery, when the parties certainly agree that it shall.

When there is an actual delivery, without an express agreement to pay a stipulated price, the law implies a promise to pay a reasonable price—the reasonable value of the property.

Generally, the property so sold must be designated, identified, separated, so that the particular property sold can be certainly known, else the sale is incomplete, and the contract of sale is executory in a material respect. Thus, if the vendor sell all the corn in a particular crib mentioned, for a particular price paid, or agreed to be paid, and presently deliver the same to the vendee, or agree that it shall at once pass, without such actual delivery, the sale would be an absolute one; but if the vendor should agree to sell one hundred bushels for a price to be paid, to be taken from his particular crib, containing one thousand bushels, the sale would not be complete—the property would not pass at once—not until the one hundred bushels had been measured and set apart, because it could not, until such ascertainment, be seen what particular corn was sold. If, however, the vendor should sell his corn—all of it—in a particular crib, at the price of one dollar per bushel, and it was intended that it should pass to the vendee, the sale would be good as an absolute sale, and this is so, because it was intended that all the corn should pass, and the price per bushel is specified only for the purpose of ascertaining how much money was agreed to be paid. It is essential that the property sold can in some way be identified at the time of sale, if it is intended that it shall at once be absolute. *Wittkowsky v. Wasson,* 71 N. C., 451; Benjamin on Sales, secs. 1, 314, 318, 329, 332.

Now, in the present case, the defendant Stewart owed the plain- (102) tiffs a considerable debt, and he desired to increase it by the purchase of goods. The plaintiffs would not allow such increase, unless he would pay a part of the existing debt, and he was requested "to give real estate security." This he refused to do, but said he then expected to get money soon, for some wood and tobacco he had for sale, plainly implying that he expected to sell the same soon, and with the money thus realized he could pay a part of their debt against him. The plaintiffs said in reply, "This is too uncertain and indefinite." He "then proposed to give them a bill of sale for the wood." Nothing was said,

however, of a conditional sale of it. It was not suggested that the plaintiffs should take and hold and sell the wood as a security for their debt—it was not proposed that they should take a mortgage of it. They "accepted the offer," and Stewart accordingly executed the "bill of sale," in which he says, without words of limitation or condition, that he *sold* to the plaintiffs, and they *bought* from him, "the lot of wood"—that is, "500 cords of railroad wood at $1.25, $625, lying on the railroad" named, between two designated places. The plain implication from the facts is that he sold, and intended to sell, all the wood he had there, more or less. The plaintiffs gave him credit on their books for five hundred cords, "more or less," at the price specified, referring to the "bill of sale." The wood in question was on the line of the railroad between the places named, and was all the wood he owned on the line of road mentioned. The price to be paid was agreed upon, to be paid not at once, but when the plaintiffs should sell and realize the money for the wood, by then crediting the same on Stewart's debt due to them. "It was agreed that Stewart might sell the wood, for and on account of plaintiffs," and he "did sell about sixty cords of it," and "send to plaintiffs the wood check he received in payment for same," and "he remitted same, to be placed to his credit." The mere fact that such wood was worth "from
(103) $1.50 to $1.60 per cord" could not change the nature of the transaction. Indeed, it appears that such wood was sometimes sold for less, and it does not appear that the wood in question was worth, or that it, or any part of it, was sold for a greater price than that agreed to be paid for it; it seems that in fact it sold for less. The sale of the wood to the plaintiffs was an absolute one, and hence the supposed sale of it to the defendant Whitehead was inoperative. Stewart could not convey to him a valid title, because he had none himself. Judgment affirmed.

No error. Affirmed.

Cited: Ramsey v. Wallace, 100 N. C., 83; *Lumber Co. v. Wilcox,* 105 N. C., 38; *Whitlock v. Lumber Co.,* 145 N. C., 124.

S. R. TOWNSEND AND J. W. CARTER v. McKOY McKINNON.

Agricultural Lien—Chattel Mortgage—Construction of Contract.

Where it is clear that the creation of an agricultural lien was intended by the parties, and the agreement embodies all the requisite elements, it will be enforced as such, though it contains words of conveyance and is in the form of a chattel mortgage. The Code, secs. 1799, 1804.

TOWNSEND *v.* MCKINNON.

THIS was a summary proceeding, begun before the clerk of the Superior Court of the county of Richmond, as allowed by the statute (The Code, sec. 1804), to enforce a lien upon the crops described in the warrant, for advances made, etc. After the warrant had been issued, and the sheriff had seized the crops and delivered the same to the plaintiffs, upon motion of defendant, the clerk dismissed the proceeding, upon the ground that the instrument upon which the plaintiffs (104) founded their proceeding was not such lien, but a chattel mortgage. The plaintiffs appealed from the order of dismissal to the judge at chambers, who reversed the same, and gave judgment for the plaintiffs, from which the defendant appealed to this Court.

Frank McNeill for plaintiffs.
Platt D. Walker for defendant.

MERRIMON, J., after stating the case: The following is a copy of the paper-writing in question, omitting immaterial words:

Whereas, S. R. Townsend & Company have agreed to make advances of agricultural supplies, etc., to McKoy McKinnon, who is engaged in the cultivation of the soil, to enable him to cultivate his farm, adjoining the lands of (describing it), for the year 1886, to the value of $1,000, and not to exceed $1,000; and whereas, McKinnon agrees with Townsend & Company to cultivate not less than seventy-five acres in cotton, fifty acres in corn, fifty acres in peas, and a certain other number of acres in tobacco and potatoes; now therefore, in consideration of the premises and in pursuance of the law in such case made and provided, the said McKinnon does hereby give, grant, bargain and sell to said Townsend & Company all the crops of any kind which may be made by him during the present year on said farm, upon the trust that in default of payment of the said $1,000 on or before 1 November, 1886, for the advances so made; or if McKinnon shall fail to deliver to Townsend & Company all the crops by the day aforesaid, at Shoe Heel, then the said Townsend & Company shall have full power to take into their possession all of said crop, wheresoever the same may be found, and sell so much thereof as may be necessary by public auction, for cash, to the highest bidder, first advertising, etc., and from the proceeds of such sale, to retain the amount due for the advances so made and the expenses of execut- (105) ing this trust; but if McKinnon shall well and truly pay the advances aforesaid, or deliver the crop to Townsend before 1 November, 1886, then this deed shall be void, otherwise to remain in full force and effect. I hereby certify that said crop is unencumbered by any other lien, and that I will be due no rent to any one on said land. In witness whereof, etc., this 30 March, 1886.

(Signed and sealed by McKinnon.)

The question presented by the appeal is, Can the instrument above set forth be upheld under the statute (The Code, sec. 1799), as an agricultural lien?

That the parties to it intended it to be and to create such a lien is manifest from the nature of the things agreed to be done—the reference to the lands to be cultivated—the crops to be produced—the manner of disposing of the same when matured, and the laws allowing such liens to be created.

It appears from the face of the agreement that the defendant was engaged in the cultivation of the soil; that the advances of agricultural supplies were to be made after its execution, to enable the defendant to cultivate the land and produce the crops designated, during the year 1886, and that the maximum of such advances was fixed. There was in it a strict observance of the material requirements of the statute, and the latter operated to create the lien upon the crops to be produced, in favor of the plaintiffs.

There are words in the agreement that purport to convey the crops to the plaintiffs, coupled with a trust and a power of sale to be exercised in the contingency provided against, and it is insisted by the learned counsel for the appellant that these words create a chattel mortgage, containing a power of sale, and therefore no statutory lien arises to be enforced by the summary proceeding allowed by the statute.

It is clear, however, that notwithstanding the words of conveyance, that might have been omitted, the purpose was to create such a (106) lien as that contemplated by the statute. The agreement, after setting forth the requisites of an agricultural lien, proceeds: "Now, therefore, in consideration of the *premises and in pursuance of the law in such case made and provided,*" etc., thus plainly indicating a purpose to pursue, give effect to, and have the benefit of the statute. In effect, only a lien was created by the words of conveyance used. No particular form of agreement is prescribed whereby the lien is created; when, therefore, it embodies the requisites prescribed, and the intent of the parties to create the lien contemplated by the statute is clear, whatever the form, the lien at once arises. In such case, the agreement, though it have the form of a chattel mortgage, must be so treated as to effectuate the intent of the parties, and in connection with and under the statute, the latter becomes a part of it, directs the intent, and gives character to the lien.

The words of the conveyance, and those employed immediately in connection therewith, in substance and effect, create the lien contemplated by the statute, and the plain intent of the parties renders it identical therewith. We therefore are of opinion that the court properly reversed

the order of the clerk dismissing the proceeding. To the end that further action may be had therein, let this opinion be certified to the Superior Court. It is so ordered.

No error. Affirmed.

Cited: Knight v. Rountree, 99 N. C., 394; *Walton v. Davis,* 114 N. C., 106; *Meekins v. Walker,* 119 N. C., 48; *Jones v. McCormick,* 174 N. C., 88.

(107)

GEORGE ROUNTREE v. W. G. BRINSON.

Pleading—Usury—Contract—Assignment.

1. The facts relied upon as a defense to an action should be set out in the answer with the same precision as that required in a complaint.
2. If usury is pleaded, the facts which it is alleged constitute it must be specifically set forth so that the court may see that, if true, the transaction is illegal.
3. If a security, founded upon an antecedent lawful consideration, becomes void or tainted by an usurious element, the original demand will be revived and may be enforced.
4. The assignment of such an infected security to a purchaser carries with it the debt it represents, and the assignee will be entitled to it if necessary.

(*Byre v. Cooper,* 2 Murph., 282; *Moore v. Hobbs,* 79 N. C., 535; *Boyden v. Achenback,* 79 N. C., 539, cited and approved.)

CIVIL ACTION, tried before *Philips, J.,* at August Term, 1887, of LENOIR.

The action, commenced on 15 December, 1885, by the plaintiff, assignee of Robert H. Rountree, is to recover the amount due on the single bond of the defendant, as set out in the original complaint, and which became due on 22 December, 1875, subject to certain specified credits. The defendant answered, admitting the making of the bond, the partial payment mentioned, adding others, to which he claims to be entitled as set-offs, denying the alleged transfer to the plaintiffs, and setting up as a defense to the action an averment in general terms that the "bond was executed by this defendant to the said R. H. Rountree for an illegal and usurious consideration." Thereupon the complaint was amended, and as drawn, sets out the original consideration as a balance due on a running account between the defendant and R. H. Rountree and Lewis Webb, bankers and commission merchants, doing business in the partnership name of Rountree & Webb, at New Bern, in this (108) State; the giving two promissory notes therefor, and the renewal

of them; the dissolution of the firm, and the giving separate notes or bonds to each retiring partner for one moiety of what was due, the total being $871.11, and the renewal of the note given to the said Rountree—less certain credits—in the execution of the bond described in the first complaint, which was assigned to the plaintiff.

Judgment was demanded for the sums due on the several causes of action mentioned, with costs accruing thereon.

The answer to the amended complaint, and the first seven articles thereof, reiterates and adopts the allegations contained in the first answer, and further alleges as a defense "that it appears from the original and amended complaint in the action that the plaintiff, at the commencement of the action, was the assignee of no legal or equitable claim against the defendant, except the note referred to in the original complaint." To this answer the plaintiff demurs, and assigns as ground thereof that:

1. It fails to state what the illegal and usurious consideration and agreement were, its terms, and the nature of usury, etc.

2. It does not state the facts from which the court can see and decide whether there was any illegal or usurious consideration, nor is there any statement of facts, but merely conclusions of law.

3. For the insufficiency in not stating facts sufficient to constitute a defense.

Upon the issue thus joined between the parties, the court proceeded to consider the same, and entered up the following judgment:

"This cause coming on to be heard, and being heard upon the demurrer of the plaintiff to the answer of the defendant, it is ordered and adjudged by the court, that in the present state of the pleadings, the defendant relying upon his answer, which does not set out the facts and particulars showing usurious transactions and agreements
(109) which entitle him to relief, the demurrer to the answer is sustained.

"It further appearing to the court that the defendant admits the ownership of the note by the plaintiff, and its execution and delivery by the defendant, and the plaintiff admitting the payments on the note as alleged in the answer of the defendant—

"It is further ordered by the court, that upon the admissions of the parties in open court, and the pleadings in the cause, that the plaintiff George Rountree recover of the defendant W. G. Brinson the sum of $462.35, with interest thereon from 21 December, 1875, at 8 per cent till paid, subject to a credit of twenty-five dollars 15 November, 1885, another credit $25, another credit $25, and another credit for $15, and for the costs of this action."

From which the defendant appealed.

George Rountree (*A. J. Loftin was on the brief with him*) *for plaintiff.*

No counsel for defendant.

SMITH, C. J., after stating the case: 1. The defense to an action upon a contract based upon a usurious consideration must be made by setting out the facts, showing its infectious presence so that it may be seen by the court. *Brye v. Cooper,* 2 Murph., 286.

If not so before, this is plainly required under The Code, which declares that the answer must contain "a statement of any new matter constituting a defense or counterclaim." Sec. 243, par. 2.

There is no reason why the facts should not be stated with the same particularity in matters of defense as in stating the facts in the complaint out of which grows the cause of action, and the rule is explicitly laid down in *Moore v. Hobbs,* 79 N. C., 535, and recognized in *Boyden v. Achenback,* 79 N. C., 539.

The demurrer was properly sustained as to this attempted (110) defense of usury.

In the amended complaint, the plaintiff sets out the original dealing by which the defendant became indebted, in which it is not alleged any usury is found, and traces the debt, transmitted in successive securities, until it assumes the form in which it appears in the first complaint, and he insists upon his right to recover the antecedent indebtedness, if usury did enter into the bond sued on. The point is well taken, and we can see no reason, because the bond as such is void, why the true and uninfected debt may not be recovered, and so are the authorities.

In *Burnhesel v. Firman,* 22 Wall., 170, *Mr. Justice Swayne,* near the close of the opinion, says: "It is well settled that if a security founded upon a prior one be fatally tainted with that vice (usury), and the prior one was free from it, but given up and canceled, and the latter one be thereafter adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous," and reference is made to many at the first of page 173.

So, *Comstock, C. J.,* delivering the opinion of the Court, uses this language: "A note or a bond may be void for usury, but being founded on some antecedent claim or contract free from that defect, there may be a just and legal right to recover the original consideration. The note or bond may be sold, and it will be void even in the hands of an innocent purchaser. But will it be pretended that the purchaser gets absolutely nothing? *It is impossible to doubt that he will stand in the shoes of his vendor.*" *Oneida Bank v. Ontario Bank,* 21 N. Y., 495.

To the same purport are other cases cited in the elaborate and carefully prepared brief of plaintiff's counsel. *Gerring v. Sitterly,*
(111) 56 N. Y., 214; *Patterson v. Beardsall,* 64 N. Y., 294; *Russell v. Nelson,* 99 N. Y., 119.

The assignment carried with the bond the debt it represented, and which retained its force as an obligation through all the changes in form it has subsequently undergone, and the plaintiff's title to whatever sum was reasonable seems not to have been in controversy, as appears from recitals in the final judgment.

It must be declared there is no error in rendering judgment for the plaintiff for the sum demanded, and interest from 22 December, 1875, less the credits specified therein. Judgment affirmed.

No error. Affirmed.

Cited: Webb v. Bishop, 101 N. C., 103; *Montague v. Brown,* 104 N. C., 165; *Anderson v. Logan,* 105 N. C., 269; *Averitt v. Elliott,* 109 N. C., 563; *Ward v. Sugg,* 113 N. C., 490; *Lassiter v. Roper,* 114 N. C., 19; *Webb v. Hicks,* 116 N. C., 605; *Churchill v. Turnage,* 122 N. C., 426; *Printing Co. v. McAden,* 131 N. C., 184; *Goodman v. Robbins,* 180 N. C., 240; *Hunt v. Eure,* 189 N. C., 487.

ALFRED FORBES v. B. S. SHEPPARD AND WILLIAM WHITEHEAD.

Principal and Surety—Exoneration—Forbearance—Contract—Evidence.

1. It is competent upon the trial of an action upon a bond to show that one of the obligors was surety, and this fact was known to the obligee.

2. An agreement with a principal, on a sufficient consideration, to forbear to sue for a fixed period, without reserving the right to proceed against the surety, and made without his assent, will exonerate him from liability.

3. The exoneration grows out of the *agreement* to forbear, and is not affected by the creditor's breach of it.

(*Welfare v. Thompson,* 83 N. C., 276; *Cole v. Fox, ibid.,* 463; *Goodman v. Litaker,* 84 N. C., 8; *Williams v. Glenn,* 92 N. C., 203; *Carter v. Duncan,* 84 N. C., 679; *Scott v. Harriss,* 76 N. C., 205; *Bank v. Lineberger,* 83 N. C., 454, cited and approved.)

(112) CIVIL ACTION, tried before *Connor, J.,* at Fall Term, 1885, of PITT.

There was a verdict and judgment in favor of the defendant Whitehead, from which the plaintiff appealed.

The defendant Sheppard, as principal, and the defendant Whitehead, as surety, for money loaned to the former by the plaintiff on 12 March, 1881, to secure the same, executed to him their bond in the following form:

On or before 1 January, 1882, we, or either of us, promise to pay to Alfred Forbes, or order, eight hundred and eighty dollars, with interest at eight per cent from date, being for value received.

Witness our hands and seals.

B. S. SHEPPARD, (Seal)
WILLIAM WHITEHEAD. (Seal)

Several small sums, besides one of $240, are endorsed as credits, with their respective dates.

The present action was instituted in February, 1884, against both defendants, of whom the said Whitehead alone put in an answer.

In defense, he alleges that on a day not mentioned, the plaintiff and his codefendant, the principal debtor, entered into an agreement whereby for the consideration of $25, to be paid by defendant, and paid by him, the plaintiff promised to indulge and extend the time of payment for ten months thereafter, and that this was without the knowledge or consent of respondent, whereby he alleges he became and is exonerated from liability for the debt.

Upon this controverted matter of defense, issues were drawn up and passed on by the jury, who find in response:

1. That Whitehead signed the bond as surety, and this was known to the plaintiff; and

2. That the plaintiff did agree with Sheppard, in consideration of $25 paid him by the latter, to give him indulgence upon the bond, and not to sue thereon, until 1 January, 1885. (113)

On the trial, the defendant Sheppard was introduced as a witness for the contesting defendant, who testified that he borrowed the money, and the bond was executed by Whitehead as a surety, and this was understood by the plaintiff; that about the last of January, 1884, hearing that the latter wanted his money, witness saw him, and he agreed for the sum of $25 to indulge him till 1 January, 1885, and would not sue before that time; that afterwards he rode up to plaintiff's store, where he was standing, and handed him the money agreed on, saying: "Here is that money I promised you"; and the plaintiff then retired into his store, and witness left; that about two weeks later, and after the action was begun, plaintiff offered him the money, which was refused; and that Whitehead knew nothing of the arrangement.

The plaintiff, for himself, testified that when applied to for the loan of the money, nothing was said about the suretyship of Whitehead, but he supposed he was surety to the bond; that the bond was afterwards delivered by Sheppard, who received the money; that in February, 1884, Sheppard came to his store and said: "I will give you that $25 if you will give the indulgence"; that witness took the money, went back into the store, examined the bond, and finding that it would be out of date in a short time, as to the surety, determined not to give the indulgence; that returning to the front of his store, he found that Sheppard had left; that when he next met him, he tendered the money, which was refused, and it was then credited upon another account; that while he did not remember it, he would not swear that no previous conversation had taken place about forbearing to press the collection of the debt.

The suit was commenced on the same day that the money was received.

(114) The plaintiff did not object to the evidence relating to the suretyship when it was offered, but afterwards, before the testimony was closed, moved to have it withdrawn from the jury as incompetent, and asked the court to instruct the jury to this effect, because it was offered to vary or change the legal relations of the parties as shown upon the face of the bond.

The court declined both propositions, and the plaintiff excepted.

When about to address the jury, the plaintiff's counsel stated that he proposed to argue from the testimony, that the giving the $25 "was a trick calculated to throw plaintiff off his guard, and deprive him of due opportunity of deliberation," and if it had that effect, it was not accepted, and no contract made.

The court replied to the suggestion, that there was no evidence of trick or fraud, and in consequence, counsel declined to argue the case to the jury.

The plaintiff's counsel requested an instruction, which was in substance given in this form:

If when Sheppard handed the $25 to the plaintiff, the latter took the money, not in fulfillment of a previous contract, but to hold until he should examine the papers and determine whether or not he would accept the money, and upon examining the paper concluded not to accept it, or to complete a contract to indulge the bond, and so informed Sheppard as soon as he afterwards could, and offered to return the money, then the contract to give time was not complete and binding on the plaintiff.

W. B. Rodman, Jr., for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the case: 1. Exception. Aside from the fact that the evidence of suretyship was received without objection at the time, we concur in his Honor's ruling that it was competent, and is sustained by the following adjudications: *Welfare v. Thompson,* 83 N. C., 276; *Cole v. Fox, ibid.,* 463; *Goodman v. Litaker,* 84 N. C., (115) 8; *Williams v. Glenn,* 92 N. C., 253.

2. Exception. The effect of a contract for forbearance to sue for a fixed and limited period, founded on a sufficient consideration, with the principal, without reserving the right to proceed against the surety, and made without his assent, is too well settled to need further discussion. The exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid. We are content to cite some of our own adjudications. *Scott v. Harriss,* 76 N. C., 205; *Bank v. Lineberger,* 83 N. C., 454, modified in *Carter v. Duncan,* 84 N. C., 679; and to refer to some recent textbooks—Brant on Suretyships, sec. 304, and following; Baylies on Sureties, page 251, *et seq.*

3. Exception. We think there was no evidence of any trick or fraud practiced in bringing about the arrangement for indulging the debt. The transaction was entirely free from the imputation of unfairness, upon the defendant's testimony, nor does the plaintiff's statement vary its aspect in this respect.

Inasmuch as no indulgence was in fact given, as suit was brought on the very day when the money was paid, in disregard of the contract, it occurred to us that it was thus virtually annulled, and no disability imposed upon the surety to his disadvantage. But the authorities are to the contrary, and it is held that the exoneration grows out of the agreement to forbear, and is not affected by the creditor's breach of it after it was made.

We find no error in the record, and the judgment must be affirmed.

No error. Affirmed.

Cited: Hollingsworth v. Tomlinson, 108 N. C., 248; *Scott v. Fisher,* 110 N. C., 313; *Chemical Co. v. Pegram,* 112 N. C., 620; *Hinton v. Greenleaf,* 113 N. C., 8; *Sutton v. Walters,* 118 N. C., 502; *Bank v. Sumner,* 119 N. C., 595; *Fleming v. Barden,* 126 N. C., 455; *S. c.,* 127 N. C., 215; *Revell v. Thrash,* 132 N. C., 808; *Foster v. Davis,* 175 N. C., 544; *Trust Co. v. Boykin,* 192 N. C., 265.

(116)

J. R. BARNES, TRADING UNDER THE NAME OF J. R. BARNES & COMPANY, v. SALLIE S. EASTON.

Appeal—Recordari—Rules of Practice.

1. The decision of the judge upon a petition for *recordari* as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise, or excusable negligence.

2. If the writ is granted without notice, the opposing party may be heard upon the merits, or other sufficient grounds, upon the return thereof.

3. The Supreme Court has power to prescribe Rules of Practice for the subordinate courts.

(*Perry v. Morris*, 65 N. C., 221; *Rencher v. Anderson*, 93 N. C., 105, cited and approved.)

THIS was a petition for *recordari*, heard upon notice to the plaintiffs, before *Philips, J.*, at chambers, in Roxboro, in the county of PERSON, on 3 May, 1887.

The appellant applied by petition to a judge at chambers for writs of *recordari* and *supersedeas*, and gave notice of such application to the counsel of the appellees. Neither the latter nor their counsel appeared before the judge at the time and place designated in the notice. The judge, however, then and there proceeded to hear the application upon the merits, and directed the writ of *recordari* to be issued by the clerk of the Superior Court of the county of Granville, requiring the proceedings before a justice of the peace in that county, in the case of J. R. Barnes & Company, plaintiffs, against Sallie S. Easton, defendant, to be brought into the said Superior Court, at the spring term thereof of 1887, and also directed the writ of *supersedeas* to be issued as prayed for, and also requiring the petitioner to give proper undertakings, etc., in that behalf.

(117) In pursuance of such orders, the writs named were issued, and the proceedings in the case mentioned were duly certified and sent into the Superior Court mentioned, and there docketed.

At the term of that court mentioned, the counsel of the appellees, who are the plaintiffs in the case above named, moved the court to allow them to oppose the appellant's said application, and to file affidavits, etc., in opposition thereto, which motion the court granted, the appellants objecting and excepting.

The court allowed the application to be opened, affidavits to be filed, heard the application over, and gave judgment dismissing the same. The appellant, having excepted, appealed to this Court.

J. W. Hays for plaintiffs.
R. W. Winston filed a brief for defendant.

MERRIMON, J., after stating the case: The application by the appellant to the judge at chambers for the writ of *recordari,* as a substitute for an appeal from the judgment of a justice of the peace, and for the writ of *supersedeas* in that connection, was made upon notice to the appellees, and in strict observance of Rule 13 of the Rules of Practice prescribed by this Court, regulating the practice in the Superior Court in such matters. (See Rule 13, 92 N. C., 854.) This rule, among other things, provides that "The petition (in such applications) shall be verified, and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be *final,* subject to appeal, as in other cases."

This provision is applicable to this case.

The appellees, for some reason—negligently, so far as appears (118) —failed to appear before the judge in pursuance of the notice to them and oppose the application, and the court proceeded regularly to hear it upon its merits, as the same appeared, and gave his "decision thereupon," requiring proper undertakings of the petitioner, as required by the statute (The Code, sec. 545), and directing the writs to issue according to law. It was not essential to the validity of the application and proceedings therein that the appellees should have appeared and opposed it. They had the right to refuse or neglect to do so, but they did so at their peril, as to what the court might adjudge in that behalf.

The decision of the judge upon the application was *final* as to it, in the absence of an appeal or a substitute for the same. When the writs granted were executed and returned with the proceedings and judgment of the justice of the peace in the action before him, the latter was in the Superior Court to be heard and tried there, just as if an appeal had been regularly taken from the judgment of the justice of the peace. The writ of *recordari* was a substitute for the appeal, which had been lost. The court, therefore, erred in rehearing the application for the writ of *recordari,* and dismissing it.

As the application was thus at an end, if the appellees had any cause, as that notice was not served upon them although it appeared to be, accident, fraud, or the like, as against it, of which they could avail themselves, they should have proceeded by petition, setting forth such causes, and had the same heard. This was not done—the court proceeded to rehear, as if no decision had been made. This was very irregular, and as the appellants interposed their objections in apt time, they are entitled to have the order dismissing their application, and as a

consequence, the action in the Superior Court reversed, so that the case will stand for trial as if the order had not been made.

(119) The rule of practice mentioned and cited above was adopted in order to simplify and expedite the course of procedure and practice in such matters as it refers to. It is not in conflict with any statute, nor was it and other like rules made officiously. They are operative, and must be observed when they apply, unless there shall be some concurrent remedy invoked. The authority of this Court to make such rules is expressly conferred by the statute (The Code, sec. 961), and it has been exercised from time to time ever since the Court has been established. The first statute was enacted in 1818. *Perry v. Morris,* 65 N. C., 221; *Rencher v. Anderson,* 93 N. C., 105.

The view we have taken of the grounds of error assigned renders it unnecessary that we examine into the *merits* of the application of the appellant. Those were determined by the judge at chambers.

Let this opinion be certified to the Superior Court, to the end that further proceedings may be had in the action according to law. It is so ordered.

No error. Affirmed.

Cited: Walker v. Scott, 102 N. C., 490; *S. v. Edwards,* 110 N. C., 511; *Brinkley v. Smith,* 130 N. C., 225; *Colvert v. Carstarphen,* 133 N. C., 27; *Lee v. Baird,* 146 N. C., 363; *Hunter v. R. R.,* 161 N. C., 505; *Cooper v. Comrs.,* 184 N. C., 616; *S. v. Farmer,* 188 N. C., 245.

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(120)

MINTA ALLEN, ROBERT ALLEN, AND T. M. ALLEN v. FERNEY GRIFFIN.

Estoppel—Landlord and Tenant—Appeal—Assignment of Error.

1. An appeal will not be dismissed for absence of formal exceptions or assignment of error when the record or "the case" clearly discloses the ground of appeal.

2. The rule that a tenant is estopped from denying his landlord's title does not preclude him from showing an equitable title in himself, or such circumstances as will entitle him to equitable relief against the landlord's claims.

(Lytle v. Lytle, 94 N. C., 522; *Pleasants v. R. R.,* 95 N. C., 195; *Justice v. R. R.,* 96 N. C., 412; *Davis v. Davis,* 83 N. C., 71, and *Calloway v. Hamby,* 65 N. C., 631, cited and approved.)

CIVIL ACTION for the recovery of land, tried before *Sheppard, J.,* at February Term, 1887, of WAKE.

The plaintiffs are the heirs at law of one R. L. Allen, deceased, and as such claims the land in dispute.

The defendant claims under a deed executed to him by said R. L. Allen in November, 1879.

The following issues were submitted to the jury:

1. Is the land in controversy embraced in the deed from R. L. Allen to the defendant?

2. Did the defendant enter upon said land as the tenant of R. L. Allen?

3. What is the yearly value of the land?

It was admitted that R. L. Allen remained in possession of the land in controversy after the execution of the deed to the defendant. It was also admitted that R. L. Allen rented the said land in the year 1880, for that year to one W. C. Lassiter, and that said Lassiter *sublet* it for that year to the defendant, and that the defendant has been in possession thereof ever since, never having surrendered the possession to the said R. L. Allen, or to the plaintiffs herein. It was also conceded that the defendant never had actual possession until he rented the land (121) as aforesaid from said Lassiter.

The jury answered the first issue in the *negative* and the second in the *affirmative.*

"The court set aside the finding upon the first issue as being against the weight of testimony, but upon the second issue gave judgment for the plaintiffs, as set out in the record, because, although the plaintiffs (defendant) might have title to the *locus in quo,* it appeared that the defendant had entered the *locus in quo* after the execution of the deed from R. L. Allen, under which he claimed as the tenant of said R. L. Allen; and said tenancy having expired before the commencement of this action, the defendant was estopped to deny the plaintiffs' title to the *locus in quo* after accepting the said tenancy, until he had surrendered the possession to the lessor."

From the judgment set out in the record, the defendant appealed to the Supreme Court.

J. N. Holding for plaintiffs.
D. G. Fowle and A. Jones for defendant.

DAVIS, J., after stating the case as above: The plaintiffs move, in this Court, to affirm the judgment "upon the ground that no exception was taken by the defendant to the said judgment, and no errors are assigned in the statement of the case or in the record, for consideration and revision by the Court." The case was settled by the court "as upon disagreement, by consent." It was not stated by the appellant, and as stated by

his Honor, it presents concisely and clearly the matter in controversy, and the "ground of error is sufficiently assigned" within the ruling of *Lytle v. Lytle,* 94 N. C., 522. Neither by the authority of that case nor by *Pleasants v. R. R.,* 95 N. C., 195, nor *Justice v. R. R.,* 96
(122) N. C., 412, nor Rule 7, can the motion to affirm be sustained.

Was there error in the judgment? Two issues were submitted, one was set aside as against the weight of evidence, and upon the other, judgment was rendered for the plaintiffs. With this judgment the defendant was dissatisfied, and from it he appealed; and it is not necessary "to roam through the record" or to have a "chart and compass" to find the alleged ground of error.

Was the first issue necessary to a just determination of the action? If so, the finding of the jury upon that issue having been set aside as against the weight of evidence, the defendant was entitled to a new trial.

If the land in dispute was embraced in the deed from R. L. Allen to the defendant, might not the defendant, notwithstanding the lease to Lassiter and the sublease by Lassiter to himself, set up as against Allen or his heirs, after the expiration of the lease, the title which he himself had acquired from Allen? In a court of equity, would not Allen be estopped by his deed from asserting his right of possession?

No proposition is better settled as a rule of law than that a lessee is not permitted, while continuing in possession, to dispute the lessor's title. He must surrender the possession before he can contest the title. But as was said in the case of *Davis v. Davis,* 83 N. C., 71, *Chief Justice Smith* delivering the opinion: "The rule does not preclude the tenant from showing an equitable title in himself, or such circumstances as under our former system would call for an interposition of a court of equity for relief, and which relief may now be had in one action."

Now that law and equity "are administered by the same court, and without any distinction of form, the tenant can set up in his answer any equitable defense he may have to his landlord's claims."
(123) *"Calloway v. Hamby,* 65 N. C., 631," says *Rodman, J.,* "is a case in which that was successfully done, and the defendants were held entitled to a specific performance of the plaintiff's covenant to convey the land."

We think the first issue was a proper one, and the defendant is entitled to a new trial.

Error. Reversed.

Cited: Abernathy v. Withers, 99 N. C., 522; *Shew v. Call,* 119 N. C., 453.

THE CHEMICAL COMPANY OF CANTON v. D. T. JOHNSON AND C. M. BUSBEE, TRUSTEE.

Registration—Trust—Mortgage—Conditional Sale—Vendor and Vendee.

Where goods were sold and delivered under a contract in which it was stipulated that the vendee should deliver to the vendor the notes taken by the vendee from purchasers of such goods, to be held by the vendor "as collateral security for the payment of the purchase money to him," and further, that such "goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of the price to the vendor": *Held*,

1. That this agreement was not a mortgage, nor a conditional sale, but an absolute sale of the goods, and its registration was not necessary.

2. That by virtue of the contract, a trust was raised in the vendee as to the *proceeds* of the sale, in favor of the vendor, which would be enforced against creditors and purchasers, though the contract was not registered.

(MR. ASSOCIATE JUSTICE MERRIMON dissenting.)

THIS is a civil action, which was tried before *Merrimon, J.*, at August Term, 1887, of WAKE.

The plaintiff, a company formed under the laws of Maryland, and engaged in the manufacture and sale of an agricultural fertilizer known as Baker's Standard Guano, and the defendant Johnson, entered into the following agreement:

"BALTIMORE, 17 January, 1885.

"We have this day sold to Mr. D. T. Johnson, of Raleigh, N. C., (124) the following brands of fertilizer, on terms and conditions named below, viz.:

"40 tons of Baker's Standard Guano, at $29.50 per ton, 2,000 pounds, or as much additional as may be mutually satisfactory.

"We will deliver the above goods, free on board, at Raleigh, N. C., in bags. Settlement to be made by notes payable 15 November and 15 December, 1885, at Franklin Bank, Baltimore. On 1 May next, or sooner, if possible, D. T. Johnson agrees to deliver to us, or our order, notes of all purchasers to whom sales of these goods may have been made, whose notes shall have been taken, and a list of all accounts for the sale of such goods where they have been sold on open account and no notes shall have been taken, and for gross amount of the sales of the same, to be held by us as collateral security for payment of his notes as stated above, and all of the above mentioned goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of his notes to us. And all

proceeds of said goods as collected must be first applied to the payment of his notes due us, whether the same have matured or not.

"D. T. Johnson to pay for all goods shipped on his orders to amount mentioned in contract, and we to be at no expense whatever after delivery of goods as agreed.

"The collaterals will be returned in time for collection. In sending same to the company, place nominal value of $25 on each package.

"This contract subject to suspension by fire or unavoidable accidents at sellers' works or storage warehouses.

"The above contract subject to approval of home office.

"Relative to this contract, no agreement or provision outside of those embodied in the contract is recognized or confirmed, unless it is a matter of arrangement signed in writing.

(125) "Signed in duplicate. Chemical Co., of Canton.

"C. G. HEIM.

"I accept the terms and conditions of above contract.

"(Signed) D. T. JOHNSON."

This instrument was not registered.

The guano was delivered in pursuance of the contract, and has been sold by Johnson for notes and upon open account to various purchasers.

The latter finding himself embarrassed with debts, on 10 March, 1885, executed a deed to the defendant, Charles M. Busbee, wherein he assigns, among other property owned by him, the claims he then held against different persons who had bought portions of the fertilizer, in trust to secure various creditors, in the order of the priorities therein set out.

The present action is to assert a claim to this fund, and to compel the trustee to account for and pay over such of them, or of their proceeds, as passed into his hands.

Upon the trial, the above facts being in proof, the court intimated that the action could not be maintained, because the contract between the plaintiff and Johnson had not been registered. In deference thereto the plaintiff suffered a nonsuit, and appealed.

E. R. Stamps and A. W. Haywood for plaintiff.

C. M. Busbee and A. Jones for defendants.

SMITH, C. J., after stating the case as above: The only question before us is as to the character and construction of the agreement, and whether it is an instrument required to be registered, and inoperative and void unless and until so registered, against creditors and purchasers. The Code, sec. 1254.

We are unable to concur in the opinion of the court that the (126) contract is within the purview of the enactment cited, or of the mischiefs which were remedied by it, and the amendatory act which extends it to conditional sales of personal property. The Code, sec. 1275.

In form it is largely executory in its provisions, requiring the vendor to take and hold all securities received upon sales of the guano for payment of the original purchase money. This trust, at least as between the parties, attaches to this substituted fund, and it can only be conveyed (except in certain cases) in the same plight to another.

There are present none of the features and essential elements of "a deed of trust or mortgage," as there were none before the new statute in conditional sales of personal property. The statute was intended to meet this latter class of cases, because they were in legal effect of the nature of mortgages, the legal title being retained to secure payment of the price for which the property was sold.

Again, if it were otherwise, the want of registration (for the contract would be valid as between the parties without registration) would apply to the articles sold, and as this has all been disposed of, would not reach the choses in action taken in exchange. Can it be supposed that as soon as a sale is made, it must be put in writing, and so *toties quoties,* so that upon inspection of the registry the attaching trust to the fund substituted would appear?

In form and fact the property passes from the plaintiff to the defendant Johnson, and if the expression "all of the above-mentioned goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of his notes to us," creates a trust in the sense of the statute, it accompanies and attaches to the property conveyed, and hence the plaintiff would become mortgagor and Johnson mortgagee in their relations to each, and in such case the want of registration avoids the operation of the instrument "as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor," but (127) from the registration, etc., sec. 1254, but not creditors or purchasers of the mortgagee; in other words, for such creditors and purchasers as the statute refers to. The title does not pass, but remains in the mortgagor as if no such conveyance had been made. The effect then would be, to leave the property in the mortgagor for the benefit of his creditors or vendees for value, and none claiming under the Chemical Company are assailing the transfer as obstructing the enforcement of demands against it, and none others can, for the alleged defect. As then, the defendant, Johnson, transferred these claims clothed with the trust he had assumed, and which is valid and effectual as against him, they

pass into the hands of his assignee in the same plight and condition, and must be accounted for in like manner by the latter.

It is suggested that the contract may admit of a construction reversing the relations of the parties, and giving the character of mortgagor to Johnson, by virtue of his stipulations as to the holding and disposition to be made of the property. But in our opinion it will not bear this interpretation. There is but one transfer of property, and the trust declared and assumed is an incident to the conveyance. In most deeds of trust such is the case. The trust is declared by the bargainor, the estate accepted subordinate thereto, and the trusts are equally obligatory on the mortgagee, whether he in terms agrees to carry the trust into effect or not. His acceptance of the estate fixes upon him this duty. The stipulations therefore of Johnson do not alter the nature of the transaction, but it remains a transfer with the restrictions imposed by the company that made it, and they are not removed by his general assignment for the benefit of his creditors.

There is error and must be a new trial, to which end this will be certified to the Superior Court.

(128) MERRIMON, J., dissenting: I cannot concur in the construction my brethren have given the contract in writing between the plaintiff and the defendant Johnson. It seems to me obvious that the former sold and intended to sell to the latter forty tons of *guano* at the price mentioned, and he, in consideration thereof, was to execute to the plaintiff his promissory notes for the price, payable at the times and places specified. It appears that the *guano* was delivered. It does not appear affirmatively that Johnson executed his notes, but nothing to the contrary appearing, the inference is he did.

As a security for the payment of the notes, Johnson agreed, on his part, that the plaintiff should have a lien—in effect a chattel mortgage—upon the notes and accounts he might obtain for so much of the *guano* as he might be able to sell, and likewise, upon so much of the *guano* itself as he might fail to sell, and the notes and accounts, after the lapse of time specified, were to be delivered to and held by the plaintiff as "collateral security for the payment of" Johnson's notes to it. In effect the plaintiff sold Johnson the *guano* and took his promissory notes therefor, and at once took a mortgage of the property so sold to secure the payment of the notes.

The nature of the transaction, as well as the terms of the agreement, show that it was not the purpose of the plaintiff to place the *guano* in the possession and control of Johnson as its agent, charged with an express trust and power to sell the same and account to it for the pro-

ceeds of such sale. There is nothing appearing that reasonably implies such purpose. If this were so, then the words and phraseology which ordinarily plainly imply a contract of sale, must, it seems to me, be treated as meaningless, and the notes given by Johnson to the plaintiff were an empty and ridiculous sham.

If Johnson, having purchased the *guano,* had executed a formal mortgage of it or a deed of trust, conveying it to a trustee, to secure the payment of his notes to the plaintiff, then there could be no question that such mortgage or deed of trust would not be operative as (129) against creditors and subsequent purchasers for value.

The agreement in question was, in my judgment, in legal effect, though not in form, such a security, and it was not registered.

If the agreement could be treated as effectuating a conditional sale, and it cannot be so treated, the result would be the same, because in that case it would be ineffectual as against creditors and subsequent purchasers for value without registration.

Error. Reversed.

Cited: S. c., 101 N. C., 232; *Guano Co. v. Malloy,* 104 N. C., 678; *Travers v. Deaton,* 107 N. C., 504; *Boykin v. Maddrey,* 114 N. C., 99; *Guano Co. v. Bryan,* 118 N. C., 579; *Chemical Co. v. McNair,* 139 N. C., 335; *Chemical Co. v. Floyd,* 158 N. C., 459.

W. H. ROGERS, TREASURER OF THE TOWN OF DURHAM, v. W. A. JENKINS, TREASURER OF THE COUNTY OF DURHAM.

Mandamus—Jurisdiction.

1. In an application for a writ of *mandamus* to enforce the payment of a money demand, the summons must be returned to term time, and the cause conducted as in civil actions.

2. In applications for the writ to enforce other demands, the summons shall be returned before the judge at chambers, who may hear and determine both the law and the facts.

3. Want of jurisdiction cannot be waived, and may be taken advantage of at any stage of the action. The Code, sec. 623.

(*Belmont v. Reily,* 71 N. C., 260; *Steele v. Comrs.,* 70 N. C., 137; *Tucker v. Baker,* 86 N. C., 1; *Froelich v. Express Co.,* 67 N. C., 1; *S. v. Benthall,* 82 N. C., 664; *Long v. Jarratt,* 94 N. C., 443, cited and approved.)

ROGERS *v.* JENKINS.

THIS was an application for *mandamus,* which was heard before *Philips, J.,* at chambers at Pittsboro 26 May, 1887.

(130) *John Manning and John W. Graham for plaintiff.*
J. B. Batchelor and R. C. Strudwick for defendant.

DAVIS, J. William H. Rogers, the plaintiff, is the duly qualified treasurer of the town of Durham, and *ex-officio* the treasurer of the school committee of the said town, and the defendant, W. A. Jenkins, is the duly qualified treasurer of the county of Durham.

The plaintiff alleges that there is in the hands of the defendant the sum of $1,667.60, to which, by the provisions of chapter 86, Acts of 1887, "in relation to the public schools in the town of Durham," the plaintiff, as treasurer of said school committee, is entitled; that he has made demand therefor, and the defendant refused, and still refuses, to pay the same, and he "prays that the writ of *mandamus* issue to the defendant Jenkins, treasurer of Durham County, commanding him to pay the plaintiff the sum of $1,667.60, and for such other and further relief," etc.

The summons was issued by the clerk of the Superior Court of Durham County, on 13 May, 1887, returnable "before the judge, Fred. Philips, at chambers in Pittsboro" on the 25th day of said month.

The defendant demurred to the complaint, and the cause was heard 26 May, before Philips, J., at chambers in Pittsboro upon the complaint and demurrer, when the demurrer was overruled and judgment rendered in favor of the plaintiff, from which the defendant appealed.

In this Court the defendant moved to dismiss the action for want of jurisdiction. Section 623 of The Code provides that, "In all such applications (for writs of *mandamus*), when the plaintiff seeks to enforce a money demand, the summons, pleading and practice shall be the same as is provided for in civil actions." It further provides that when relief other than money demand is sought, the summons
(131) shall be made returnable before the judge at chambers or in term as specified in the section.

This action is to "enforce a money demand," and should have been brought to the Superior Court of Durham County in term.

The summons was improperly returnable before the judge at chambers. He had no jurisdiction. The action was not brought to Durham Superior Court in term—was never in that court—and the motion must be allowed. *Belmont v. Reily,* 71 N. C., 260; *Steele v. Comrs.,* 70 N. C., 137.

Want of jurisdiction cannot be waived, and the objection may be taken at any time. *Tucker v. Baker,* 86 N. C., 1; *Froelich v. Express Co.,* 67 N. C., 1; *S. v. Benthall,* 82 N. C., 664; *Long v. Jarratt,* 94 N. C., 443.

The action must be dismissed for want of jurisdiction.

Dismissed.

Cited: *Knowles v. R. R.,* 102 N. C., 63; *Hughes v. Comrs.,* 107 N. C., 605; *Ducker v. Venable,* 126 N. C., 449; *Board of Education v. Comrs.,* 189 N. C., 653.

HENRY W. HARRIS v. JOSEPH W. TERRY.

Slander—Infamous Crime—Evidence—Laws of Other Governments.

1. It is an infamous offense for a postmaster to unlawfully detain, suppress, or break open mail matter addressed to another, and an action for slander will lie for the false uttering of such a charge.
2. It is not necessary in such action to allege or prove that the acts charged are criminal under the laws of the United States. The courts of North Carolina take judicial notice of the acts of Congress. It is otherwise with respect to the statutes of the several states of the Union.
3. Where a witness is examined in chief in respect to an affidavit made by him, it is competent, on cross-examination, to ask him if he did not swear that the facts therein stated were true, without producing the affidavit.

(*McKee v. Wilson,* 87 N. C., 300; *Shipp v. McCraw,* 3 Murph., 463; *Wall v. Hoskins,* 5 Ired., 177, and *Sparrow v. Maynard,* 8 Jones, 195, cited and approved.)

THIS is a civil action, which was tried before *Shepherd, J.,* at (132) August Term, 1887, of ORANGE.

The plaintiff alleged in his complaint that he was postmaster of Caldwell Institute Postoffice, in the county of Orange in this State, in 1886; that while he was such postmaster the defendant, wickedly intending to slander him, subject him to the payment of sundry heavy penalties, and bring about his unjust removal from his office, etc., etc., "maliciously did speak of and concerning the plaintiff, the false and defamatory words following, that is to say, that on 11 August, 1883, in the presence and hearing of one George W. Glenn, the said defendant did say that the plaintiff had detained, broken open and destroyed the mail matter of him the said defendant which came to said postoffice, then kept in charge of the plaintiff; and that at another day and time in said county, and in the presence and hearing of John R. Wilson and Adolphus

Breeze, the defendant said that the plaintiff, then being postmaster as aforesaid, and in charge of said postoffice, had detained and broken open mail matter of him the said defendant that had come to said office, by reason of which speaking and defamatory words aforesaid the plaintiff, besides being exposed to prosecution under the criminal laws of the United States, and subjected to severe and infamous punishment, was injured in his reputation, to his damage," etc.

The defendant, in his answer, denied the above allegation, but alleged other culpatory matter not necessary to be stated here.

After the close of the testimony, and after one of the counsel had addressed the jury, the defendant moved that the action be dismissed, because the complaint did not set forth facts sufficient to constitute a cause of action, in that it did not charge the speaking of actionable words.

The court declined the motion, and defendant excepted.

(133) A witness was examined on the trial by the defendant in respect to an affidavit.

"Upon the cross-examination, the plaintiff asked witness if he did not sign the affidavit, and if he did not swear that the facts set forth therein were true. The defendant objected because the affidavit was the best evidence. The court admitted it, in view of the question asked in the examination-in-chief. Defendant excepted."

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

John W. Graham for plaintiff.
E. C. Smith for defendant.

MERRIMON, J., after stating the case: The words which the complaint alleges the defendant spoke of the plaintiff as postmaster while he held that office unquestionably imputed to him dishonest and corrupt acts done in his office, which in their nature imply moral turpitude and work social degradation. They charge acts to have been done by the plaintiff which, if done, constitute a gross breach of official faith and duty, and a degrading and infamous offense under the laws of the United States, punishable by fine and imprisonment at hard labor, and which renders the offender, if he be a postmaster, forever incapable after conviction of holding that office. Such imprisonment is infamous under the laws of the United States, and the disqualification to hold office is certainly a punishment that implies disgrace and infamy. It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive

of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not.

Here, generally, all honest men are eligible to office, and to share in the honors and emoluments incidental to it. How great the standing disgrace that one cannot, because of crime that imports cor- (134) ruption in office! *United States v. Waddell,* 112 U. S., 82; *Ex parte Wilson,* 114 U. S., 171; *Mackin v. United States,* 117 U. S., 348; *Ex parte Brown,* 121 U. S.; 1 Rev. Stats. U. S.; secs. 3890, 3891, 3892; *McKee v. Wilson,* 87 N. C., 300.

That the act done is a crime under the laws of the United States need not be alleged in the complaint, because these laws prevail throughout this State, and the courts take judicial notice of them. It would be otherwise, however, if the charge imputed a statutory offense under the laws of a State of the Union other than this State. The courts do not take such notice of the laws of other states, and hence, in such case, it would be necessary to allege and prove that by the laws of the State named, the acts charged to have been done constituted a crime infamous in its nature and in the nature of the punishment attached to it. *Shipp v. McCrow,* 3 Murph., 463; *Wall v. Hoskins,* 5 Ired., 177; *Sparrow v. Maynard,* 8 Jones, 195.

The exception as to the admission of evidence objected to is without merit. The plaintiff did not ask the witness what the affidavit contained, nor was it the purpose of the question propounded to him to give evidence of its contents. He was simply asked if he swore that which it contained was true.

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

No error. Judgment affirmed.

Cited: Beck v. Bank, 161 N. C., 206; *Elmore v. R. R.,* 189 N. C., 671.

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(135)

J. C. SCOGGINS, ADMINISTRATOR OF DICEY CRABTREE AND WILL CRABTREE, v. JOHN W. TURNER, REBECCA TURNER, AND ANTONIA MEDLIN.

Burden of Proof—Will—Presumption—Evidence.

1. It being shown that a will was once in existence and last heard of in possession of the testator, but it could not be found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it.

2. Such presumption is not conclusive, but it imposes upon the person asserting the will the burden of proving that it was not so destroyed, or that the testator was not of sound mind at the time of such presumed destruction.

3. Whether sufficient evidence has been furnished of the loss or destruction of an instrument to admit parol proof of its contents is a question upon which the finding of the court below is conclusive.

4. A new trial will not be granted because of the admission of irrelevant testimony, unless it appears that the party objecting was prejudiced.

(*Bennett v. Sherrod*, 3 Ired., 303, cited and approved.)

THIS was an issue of *devisavit vel non*, tried before *Philips, J.*, at Spring Term, 1887, of DURHAM.

There was a verdict and judgment in favor of the defendants, establishing the lost will of October, 1886, from which plaintiffs appealed. The facts are fully stated in the opinion.

John Manning for plaintiffs.
John W. Graham and R. C. Strudwick for defendants.

SMITH, C. J. Two scripts, each purporting to be the last will of Dicey Crabtree, both executed with the formalities prescribed by law, one on 18 January, 1876, the other on 1 October, 1886, a copy of an original alleged to be missing and lost, or destroyed, were exhibited before the clerk for probate at the same time, and thereupon an (136) issue of *devisavit vel non* as to each was framed, and the cause removed to the Superior Court of Durham for trial. The propounders of the last script, Rebecca A. Turner, a daughter, and Antonia Medlin, a granddaughter of the deceased, are the devisees to whom the land is given; and the said Antonia, the sole legatee to whom the personal estate is given, also assumes the relation of caveators to the first script. Upon the trial of the double issue, it was conceded that the deceased had a disposing mind and memory, nor was there any controversy as to the formal execution of both instruments by the testatrix. The last was drawn by R. C. Strudwick, Esquire, an attorney at law, in pursuance of her instructions and directions as to the manner in which she wished to dispose of her land and personal property, executed by her in the presence of two witnesses, whose names are subscribed, and in her presence attested by them. The testimony of the draughtsman is to the effect that the testatrix stated at the time that her granddaughter (the said Antonia, who came with her to Mr. Strudwick's office) had lived with her for a long time, had been very faithful, and she desired to

reward her; that Scoggins (the propounder of the first script, and to whose wife, Helen, the daughter of the testatrix, in that instrument her land is devised, but no mention made of the personal estate) had as much of her property as she proposed for them to have; that Antonia had never received any portion of her estate, and that thereupon the script was drawn and executed, read over to her, and her assent given to it. The deceased put the script in her pocket and left.

Helen Scoggins died on 8 October, 1886, and on the 16th day of the same month the testatrix became ill, and died on 22 November following. Search was made for the lost will, but it could not be found, nor had it been seen by anyone since it went into the possession of (137) the testatrix.

The propounder's counsel contended that, in the absence of any proof as to what became of the lost script, it being, when last seen, in the custody of the testatrix, the presumption is that it was destroyed by her with an intent to revoke, and such was the legal effect, and that this presumption prevails, even when the repository of the paper is equally accessible to a stranger as to the deceased, and so were the jury in substance charged by the court. *Bennett v. Sherrod,* 3 Ired., 303.

These further instructions were also asked for the propounders:

1. That the evidence offered by the caveators—the defendants—is not sufficient to rebut the presumption of law that the will of 1886 was destroyed by the testatrix, Dicey Crabtree, with the intent to revoke the same.

2. That the paper-writing of October, 1886, having been traced to the possession of the testatrix, and not having been found at her death, the law presumes that she destroyed it herself, and the burden of proof is on the defendants to repel this presumption by satisfactory proof—that is, by a preponderance of testimony.

3. That there is no evidence to go to the jury that the plaintiff J. C. Scoggins, or Will Crabtree, or any other person other than the testatrix herself, destroyed the paper-writing of October, 1886, or that they concealed the same.

4. There is no evidence to go to the jury to rebut the presumption of law that the testatrix destroyed the will with the intent to revoke the same.

5. That if the jury shall find that there is not sufficient evidence to rebut the presumption of law of the destruction of the will by the testatrix herself, they shall find that the will of 1876 is the last will and testament of Dicey Crabtree, provided they believe the testatrix had sufficient capacity then to execute a will. (138)

6. That there is no evidence of the accidental destruction or loss of the will of 1886, and therefore the presumption of law that the testatrix herself intentionally destroyed it is not repelled, and they (the jury) shall find that the will of 1876 is the last will and testament, provided they believe the testatrix had sufficient capacity then to execute a will.

The court gave the instructions numbered two and five, and refused to give the others.

The judge further charged the jury that if they are satisfied that Dicey Crabtree formally executed her will in 1886, and the same not being revoked, is lost or destroyed, or mislaid, either in the lifetime of the testatrix, without her knowledge, or after her death, then the jury will find in favor of said will, and that the substance of the same is contained in the copy presented, if they believe the evidence as to what said will contained. Evidence that a will was once in existence, and last heard of in the possession of the testatrix, and that it was not to be found at her death, raises a presumption that it was destroyed by her with intent to cancel it. This presumption is not conclusive, but it serves to throw upon the party relying on the will the burden of showing that it was not so destroyed, or that the testatrix was not of sound mind at the time.

The refused instructions may in substance be embodied in the single contention that there was no evidence in rebuttal of the presumption upon which the jury were at liberty to act. It hence became necessary to examine the testimony, to see if the contention is well founded. It does not appear how or when the script was lost or destroyed, and only that upon a search among the decedent's papers after her death that it could not be found; nor does it appear that she expressed any dissatisfaction with or wish to change any of its provisions.

(139) The said Rebecca testified that owing to her own sickness, she did not see her mother after the visit to Mr. Strudwick's office until the night before she died; that she sat up with her on Sunday night, and that she died about midnight; that she remained and sat up on Monday night until about 3 o'clock, when she went to sleep, there being but one room in the house, and waked up at light; that she then saw a sack of papers (shown and identified by her) lying on the floor by the chest, which was not there when she went to bed; that it was her mother's sack, in which she kept her valuable papers, and the chest had no lock upon it; that when she went to sleep there were in the room Sallie Scoggins, Scynthia Lumley, and her daughter, Antonia, and that she saw the propounder, J. C. Scoggins, there before she went to sleep.

Cynthia Sears testified to her being at the house during decedent's illness, and on Sunday and Monday night, leaving about day, and that

J. C. Scoggins came after Mrs. Turner retired, about 3 o'clock, and brought whiskey, and that he and several others remained when witness left.

Antonia Medlin testified that she stayed with her grandmother from the time of making the last will until her death; that J. C. Scoggins told witness that he had heard that her grandmother had made this last will, and inquired of her about it, and witness made no answer; that he said that France Lynn had told him, and after this his visits became more frequent; that said Scoggins and Will Crabtree (an illegitimate son of Helen Scoggins) said they wanted witness to have the personal property, and the former declared that "he was going to have the land or spend everything he had getting it; that he knew witness' father did not have any money, and he could get $300 before Christmas"; that he told her how the property was given in the last will; and this conversation took place the week after the decedent was taken sick.

She further testified that about three weeks before decedent's (140) death, Scoggins began to come and stay at night; that from the coming on of her illness the decedent could not walk across the floor, and for a week or ten days before her death she was helpless as an infant. Witness said that Scoggins was there when she died; that witness lay down about 4 or 5 o'clock in the morning, and the bag was not then by the chest; that she went out into the kitchen, and when she returned, after sunrise, the bag was on the floor, open, and her mother and Easter Carroll were in the room; that when she went out to get breakfast, Scoggins, his mother, Sally Scoggins, and Easter Carroll were in the room, and when she came back the two former had gone home.

Upon cross-examination, the witness said that a few days before her grandmother's death she searched in the bureau drawers for the will, but not in the bag, and did not find it; that she told of this search to Betsey Lumley, who asked why witness did not inquire of her grandmother, and witness said she had done so, and was told "that after she was dead was time enough to search for wills"; that she had two conversations with Scoggins, one a week after decedent was taken sick, and again on Friday before her death, about the will, and to witness inquiring as to the whereabouts of the instrument, he said he had not seen it; that after her death he repeated that "the land was all he wanted, and he was going to spend all he had in getting it."

On redirect examination the witness said her statement to Betsey Lumley, as to what deceased answered, was that "after she was dead and gone it would be time enough to have the will recorded," and that she looked in the bag on the floor, but did not find the will.

Upon being recalled, the witness Cynthia Sears testified to the decedent's telling her before being taken sick that she had her will written

like she wanted it for her daughter Rebecca, and her granddaughter Antonia, and said Mr. Strudwick wrote it for her. There was
(141) other evidence of unsuccessful searches for the missing paper.

We have found it necessary to recapitulate the evidence thus fully and in detail, because while there is no positive proof of the destruction of the will by anyone, the circumstances are numerous upon which the jury were left to find that it was not the act or with the assent of the testatrix, and this was the only material matter of inquiry. It is of no moment what became of the paper, if it was not destroyed or canceled by the testatrix or in her presence, and by her direction and consent (The Code, sec. 2176), from which the *animus revocandi* is conclusively inferable. In such case it never became a will, and had no revoking power upon wills previously made, but if abstracted or destroyed without her concurrence, it would remain in force still, and be susceptible of restoration upon parol proof of its contents.

Now, were the jury warranted in finding, upon the evidence offered in rebuttal, or rather, was there any evidence upon which they could find against the presumed revocation? We think there was, and we propose briefly to point out some of it.

1. There has been shown no discontent, express or implied, of the testatrix with the last will, or any of its provisions, while on the contrary, before she was taken sick, she reiterated her intention and wish to give her property as she had done in the instrument drawn by Mr. Strudwick.

2. It was in proof that the legatee, Antonia, spoke to decedent about the will, and received answer that it was time enough to look it up, or, as afterwards corrected by the witness, to have it recorded, after her death, and not an intimation is given of its having been destroyed.

3. The testatrix, when she became sick, was helpless and unable to walk over the floor, so as to get possession of the paper, and her granddaughter remained with her during her illness.

(142) 4. The bag in which her valuable papers were kept was found in the morning next after the night of her death, open on the floor, near the unfastened chest, and several persons were there that night, and among them Scoggins, to whose wife the land was given in the prior will.

5. The repeated declarations of the latter, before as well as after death, of his determination to have the land, and in a conversation before her death, after learning the contents of the last will, if he "spent everything he had getting it"—of which no explanation was offered.

We do not undertake to say by whom the instrument was taken possession and removed or destroyed, but the circumstances stated do furnish

evidence that the will had not been destroyed by the testatrix or with her consent, and this is the only essential finding to the reëstablishment of it as the last, and a testamentary disposal of the estate.

The remaining exceptions relate to rulings upon the evidence.

The three first are to the admissions of proof of the contents of the missing will for want of proof of its loss. This was addressed to the court, and the finding of the fact of such search is conclusive, and if open, is sustained by the evidence.

The fourth exception relates to proof of a falling out between the testatrix and Scoggins, his wife and her son, some two years before her death, and the fifth to the exclusion of evidence in denial of the testimony of one Fannie Turner, that Scoggins had, on one occasion, thrown a bucket of water on the deceased. This testimony tends only to show the reason why the deceased had revoked the first will and given the land to others, and these are wholly unimportant in presence of the undisputed fact that these testamentary changes were made. Whether she had any sufficient grounds for so doing is not an inquiry pertinent to the issue of her own act of revocation, as nothing transpired after the change was made to indicate a change of the purpose carried out in the last instrument after its execution. But an inquiry in the terms (143) used, "State whether or not the testimony of Fannie Turner as to the throwing a bucket of water upon Mrs. Crabtree is true," ought not to have been allowed in that form. It should have been so put as to elicit the witness' statement of facts, not merely to assail the veracity or truthfulness of the first witness, but to disprove her statement. But aside from this, the matter was apart from the issue, nor can we see that it tended to mislead the jury in determining the issue of the testatrix's voluntary agency in the cancellation of the last will, and thus reinstating the former. There is no error.

No error. Affirmed.

Cited: *S. v. Parker,* 106 N. C., 712; *Byrd v. Collins,* 159 N. C., 643.

I. A. SUGG AND WIFE, MITTIE E. SUGG, v. THE HARTFORD FIRE INSURANCE COMPANY.

Insurance—Forfeiture—Contract.

1. A policy of insurance, containing a stipulation that if there shall be any other insurance on the property, "whether valid or otherwise," at the time of its issuance, or at any other time during its continuance, without the

consent of the insurer, will be forfeited if the insured, in forgetfulness of the fact that such a policy has been issued, and in good faith procures other risks on the same property, without the consent of the insurer.

2. The fact that the other policies may be void will not prevent the forfeiture.

CIVIL ACTION, tried before *Merrimon, J.*, at June Term, 1887, of PITT.

The plaintiffs sue to recover the money alleged to be due to the *feme* plaintiff upon the policy of insurance of the defendant, made to
(144) her as specified in the complaint, which contains, among other provisions, conditions and stipulations, a clause in these words:

"Or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof at the time this policy is issued, or at any time during its continuance, without the consent of this company written hereon, or if the risk be increased by any means within the control of the assured, this policy shall be void," etc.

By consent of the parties, the court found the facts, the material part of which findings necessary to be set forth here is as follows:

"It is admitted by plaintiffs that subsequent to the issuing of the policy sued on, to wit, on 17 May, 1886, plaintiff Mittie E. Sugg took out policies of insurance in the Pamlico Banking and Insurance Company in the sum of $1,500, and in the Georgia Home Insurance Company in the sum of $1,500, and of these two latter policies, $1,000 each was placed on the two-story brick house described in complaint, and $500 each covering the piano, the household furniture, silver, glass, crockery, and wearing apparel. Defendant's policy covers $1,200 on said building, $650 on said household and kitchen furniture above mentioned, and $150 on the piano above mentioned, and contains three-fourths value clause. Plaintiffs further admit that defendant company, or its agents, had no notice of and did not consent to the said subsequent insurance above specified on the same property. The defendant admits that said subsequent insurance was taken out in forgetfulness of the existence of the policy sued upon, and with no intent to defraud defendant company."

Upon the facts found, the court was of the opinion that the plaintiffs could not recover, and gave judgment for the defendant. The plaintiffs appealed.

(145) *William B. Rodman, Jr., for plaintiffs.*

Geo. H. Brown, Jr., and John H. Small (by brief) for defendant.

MERRIMON, J., after stating the case: The contract of insurance embodied and set forth in the policy sued upon must receive a reasonable and just interpretation, and the intention of the parties to it, thus ascertained, must prevail. Contracts of this character, although in some

respects peculiar, are governed by the same principles that govern other contracts, and are not different from others as to the rules of interpretation applicable, in varying aspects of them. The purpose of courts in construing them is to ascertain what the parties mean and intend—what they have respectively agreed to do or not to do—how they have agreed to be affected—to be bound or not to be bound. It is not the province of the court to amend, modify or make a contract for the parties; or to reform their contract so as to render it reasonable, expedient and just, or, in the absence of fraud, accident, or mutual mistake, to relieve them from misadventure, inadvertence, hard bargains, disadvantage, loss and damage, occasioned by lack of foresight, forgetfulness, misfortune, and negligence. Contracts are serious things, and parties capable of contracting must be held by the courts, when properly called upon, to a due observance of their contracts, and those of insurance as well as others, however unfortunate, disadvantageous, or disastrous the results following from them may be to one side or the other. All lawful contracts must be binding upon those who make them, and as they make them.

Now the *feme* plaintiff expressly agreed with the defendant that the policy sued upon should be void if there should "be any other insurance, *whether valid or otherwise,* on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of this company (the defendant) (146) endorsed thereon."

It is admitted by the plaintiffs that subsequently to the execution of the policy, and "during its continuance, without the consent" of the defendant, written or otherwise, "other insurance" was taken and had by the *feme* plaintiff upon the property so insured, for very considerable sums of money, of which the defendant and its agents had no notice—it had no notice of, nor did it in any way consent to the same. There was therefore no waiver of its rights as to the forfeiture thus wrought, if it might under other circumstances have done so. The mere fact that the plaintiffs forgot "the existence of the policy sued upon, and with no intent to defraud the defendant" at the time the subsequent insurance was taken, cannot help them. The defendant was in no way or sense to blame for such forgetfulness, and cannot be prejudiced by it.

It appears that the two policies of "other insurance" each contained this provision: "Or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of this company endorsed hereon, this policy shall be void."

It is contended for the plaintiffs that inasmuch as there was other existing insurance of the property thus insured, at the time these policies

were executed, they were ineffectual and void—never took effect—and therefore the policy sued upon was unaffected by them, and remained valid.

This argument is without substantial force. The clause of the policy sued upon recited above expressly embraced "any other insurance, whether *valid or otherwise,*" and provided that the same should render the policy void.

The very purpose was to exclude and guard against, not only subsequent valid insurance, but all other, supposed or intended to be valid.

Else why were the words "or otherwise" used? Are these signifi-
(147) cant and apt words to be treated as meaningless? Did the parties intend that they should serve no purpose? Surely these questions cannot be answered in the affirmative. The terms employed are explicit, comprehensive, and exclusive, and they imply distinct, obvious purpose. The manifest purpose of the provision in question was to prevent possible motive—the creation of it—of the insured to obtain larger insurance of the property, and then burn it, with a view to get the money agreed to be paid by each and all the insurers, in case of loss. If the insured *believed* the subsequent insurance valid, as he might do, whether it were so or not, such belief would raise the motive intended to be guarded against as certainly as if it had been valid. To guard against such possibilities is not unlawful nor unreasonable; when parties choose to incorporate into their contracts provisions against them, it is the plain duty of the courts to give them effect.

That the plaintiffs acted in good faith in respect to the subsequent insurance, and the defendant suffered no injury, cannot prevent the latter from having the full benefit of the forfeiture occasioned by the violation of the clause in question of the policy, because the parties so agreed, and it may be but for this agreement the defendant would not have made the contract of insurance at all. It may be that as matter of grace, and liberal, fair dealing, the defendant ought to share in the loss sustained by the *feme* plaintiff; but with that we have nothing to do. Judgment affirmed.

No error. Affirmed.

Cited: Mace v. Life Association, 101 N. C., 133; *Grubbs v. Ins. Co.,* 108 N. C., 484; *Gerringer v. Ins. Co.,* 133 N. C., 412; *Black v. Ins. Co.,* 148 N. C., 171; *Bank v. Ins. Co.,* 187 N. C., 102.

(148)

JAMES ROYSTER v. THE BOARD OF COMMISSIONERS OF GRANVILLE COUNTY.

Limitations—Municipal Corporations—Counties—Statute—Estoppel.

1. The statute, The Code, sec. 756, requires all demands against municipal corporations, even where they may have once been ascertained and recognized, to be presented for payment to the proper officers within two years after maturity, otherwise they will be barred.

2. The issuing of a duplicate order by a county, "subject to exceptions for fraud or irregularity" in the original, and disclaiming any responsibility which did not attach to the said original, will not constitute a waiver of the right to the statute of limitations.

(SMITH, C. J., dissenting.)

(*Wharton v. Comrs.*, 82 N. C., 11, cited and distinguished; *Whitehurst v. Dey*, 90 N. C., 542, and *Strickland v. Draughan*, 91 N. C., 103, cited and approved.)

THIS is a civil action, originally commenced before a justice of the peace, by summons issued 10 September, 1883, to recover the sum of two hundred dollars, upon the following paper, to wit:

OFFICE BOARD COUNTY COMMISSIONERS,

$200.00. OXFORD, N. C., 2 January, 1877.

Ordered, That the county treasurer pay Wm. Horsefall two hundred dollars, for services as counsel to the board of commissioners to date.

A true copy. A. H. COOKE,

[L. S.] *Register of Deeds, Clerk Ex Officio to the Board.*

No. 326, "B."

Payment demanded. No funds on hand. 14 October, 1879.

ROBERT GARNER.

There was a judgment in favor of the plaintiff, from which the (149) defendant appealed, and the action was tried before *Clark, J.*, at the Spring Term, 1886, of GRANVILLE.

A jury trial was waived by agreement, and issues of fact, as well as of law, submitted to the finding of the court. There was a judgment for the defendant, from which the plaintiff appealed to this Court, and at the last term, upon motion of the plaintiff, the cause was remanded to the Superior Court of Granville, in order that additional facts be found.

At the Fall Term, 1887, of Granville Superior Court, before his Honor, Judge Shepherd, a jury was waived, and the additional facts were found, and have been certified to this Court.

There were numerous grounds of defense set out in the answer, but only two were relied on in the Superior Court, and these were:

"1. That the plaintiff's cause of action, if any he had or have, accrued more than three years before the commencement of this action, and is barred by the statute of limitations.

"2. That the supposed order or claim sued on was not presented to the chairman of the board of commissioners of the county of Granville within two years after the maturity thereof, and the plaintiff is barred of a recovery thereof."

The facts as they appear in the original record, and the additional finding certified to this Court, so far as they are material to the consideration of this appeal, are in substance as follows:

The order sued on was purchased for value by the plaintiff of William Horsefall, something more than a month after it was issued. It was presented for payment on 14 October, 1879, to Robert Garner,
(150) sheriff and treasurer, and had been previously presented for payment to James I. Moore, sheriff, who ceased to be such in 1877.

On 7 April, 1879, an action was commenced by the plaintiff against the defendant in a justice's court for the recovery of the amount due thereon. There was a judgment and an appeal to the Superior Court, when at the Fall Term, 1882, of said court (being the sixth Monday after the first Monday in September), a judgment of nonsuit was entered against the plaintiff; that the action now pending was commenced by the plaintiff against the same defendant on 10 September, 1883, and both actions were brought for the recovery of the sum due on the same county order, to wit, No. 326.

That on 2 September, 1878, the defendant issued a duplicate of said order in pursuance of the following resolution, to wit:

"*Ordered,* That a duplicate of county order No. 326, issued 2 January, 1877, payable to William Horsefall, be issued to James A. Royster, said order having been lost and duly advertised; but said duplicate of said county order No. 326 shall be subject to all exceptions for fraud or irregularity which might attach to the original, and that this board do not, in issuing said duplicate, assume any responsibility on behalf of the county, which would not attach to the county from the original order, and that the said Royster agrees to this in taking said duplicate."

The said duplicate was never taken out of the office by plaintiff, the original order having been found. On 7 January, 1879, the defendant ordered the cancellation of said order.

It was held:

"1. That the plaintiff's cause of action accrued more than three years before the commencement of the action, and is barred by the statute of limitations.

"2. That the order sued on was not presented to the board of commissioners of Granville County within two years after the maturity thereof, and that the plaintiff is barred of a recovery thereof, (151) and adjudged that the plaintiff take nothing by his writ, and that the defendant recover the costs of this action"; and therefore the plaintiff appealed.

E. C. Smith for plaintiff.
A. W. Haywood for defendants.

DAVIS, J., after stating the case as above: Was the plaintiff's claim barred? Section 756 of The Code, ch. 18, entitled "County Revenues," etc., provides that "all claims against the several counties, cities and towns of this State, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners, or to the chief officers of said cities and towns, as the case may be, within two years after the *maturity* of such claims, or the holders of such claims shall be forever barred from a recovery thereof."

It is found as a fact and the evidence shows that the order sued on was not presented within two years after *maturity,* and if the section referred to has any validity whatever, we are unable to see why it is not barred. It is said in *Wharton v. Comrs. of Currituck,* 82 N. C., 11, that the Act of 1874-75, ch. 243, the first section of which, without the proviso, is section 756 of The Code, "is not in strict terms an act limiting the time within which the action may be prosecuted, but it imposes upon the creditor the duty of presenting his claim within a defined period of time, and upon his failure to do so, forbids a recovery in any suit thereafter brought." That was an action originally commenced on 13 June, 1878, by D. M. Carter, the intestate of the plaintiff in that action, to recover the value of certain bonds, issued by the county of Currituck, which matured on 1 July, 1876. On 11 November, 1878, there was a nonsuit, and on 15 February, 1879, a new action for the same cause was commenced by the administrator of Carter. It was (152) held in that action that the statute did not bar.

The original action was brought within two years after the *maturity* of the bond, and the second action was brought within one year after the nonsuit, and was protected from the bar by what is now section 166 of The Code, which permits an action to be brought within one year after nonsuit, etc., if the original action was commenced within the prescribed time. Much of the opinion in *Wharton v. Comrs., supra,* has reference to other provisions in the Act of 1874-75, relating to outstanding obligations of counties, and designed to enable them, as was said by the *Chief Justice,* "to separate such as are spurious or tainted with

illegality and denounced in the Constitution"; but the section incorporated in The Code is of general application, not temporary in its character to meet a particular class of claims, but applies to all, and by its plain terms they must be presented within two years or be subjected to the bar of the statute. In the case before us, the claim was not presented within the time limited before the first action was commenced, and is not protected from the operation of the statute after the nonsuit by section 166 of The Code.

But it is insisted for the plaintiff that the defendant is concluded by what transpired on 2 September, 1878, in regard to the duplicate order. Among the numerous grounds of defense set out in the answer, it is alleged that the order was issued to Horsefall "without consideration"; that it "was procured to be issued by fraud and misrepresentations," and a number of other invalidating allegations, that tend to explain and account for the otherwise inexplicable reservations in the duplicate order, but that order was never delivered, was canceled, and cannot be fairly construed as an admission or recognition of the validity of the order in question. It may be said that the defendant did not
(153) rely upon any fraud or illegality, as indicated by the qualifications contained in the duplicate upon which the plaintiff relies as evidence. If the defendant had a perfect legal defense in the statute, it was not necessary that he should insist upon the others.

We think the right of recovery is barred by section 756 of The Code, and it is unnecessary for us to consider the other ground of defense relied on, or the power of the Legislature to pass the act requiring claims against counties, etc., to be presented as specified. We think the Legislature had the power. It interfered with no vested right and impaired no obligation. *Whitehurst v. Dey,* 90 N. C., 542; *Strickland v. Draughan,* 91 N. C., 103. There is no error.

SMITH, C. J., dissenting: I do not feel at liberty to put a construction on the Act of 1874-75, the first section of which, without the proviso, is introduced into The Code, section 756, that extends its operation to the facts in the present case. It was passed to meet an emergency in the financial affairs of the municipal bodies brought about by the late Civil War, and its results in their disturbed condition; and its essential purpose, as declared in the title, was to ascertain their true and real indebtedness by furnishing an opportunity of separating therefrom the illegal and spurious which were outstanding. Substantially it is thus declared in *Wharton v. Comrs. of Currituck, supra,* cited in the opinion of the other members of the Court.

In terms it does not embrace the asserted demand of the plaintiff. The debt for the payment of which the order issued had been presented

to the board and its correctness recognized, and the order was but a direction to the proper officer to pay it. It was therefore, as the statute required, presented and passed on favorably. Why should the debt be presented again after this action on the part of the board? Certainly the intention cannot be reasonably imputed to the General (154) Assembly of requiring a renewed presentation of a claim already adjudicated after its maturity, and so *toties quoties,* for every succeeding two years, under the penalty of forfeiture, when the delay in the payment was caused by the county treasurer. The statute, upon a fair construction of its terms and its obvious purposes, excludes, in my opinion, the plaintiff's demand thus already ascertained and adjudged from the requirements, and this, too, in the absence of any suggestion of unfair practice in bringing about the allowance of the claim, or other reason for a reëxamination of the debt itself.

No error. Affirmed.

Cited: Lanning v. Comrs., 106 N. C., 510; *R. R. v. Reidsville,* 109 N. C., 500; *School Directors v. Greenville,* 130 N. C., 88; *Dockery v. Hamlet,* 162 N. C., 120.

R. W. WILSON, A. J. PALMER, AND J. T. SASSER, TRADING AS WILSON, PALMER & COMPANY, v. HENRY SHEPHERD AND BENJAMIN BELCHER.

Appeal—Assignment of Error.

When the case on appeal does not show that exceptions were made, nor that errors were assigned, and none are apparent in the record, the Supreme Court will affirm the judgment below.

The facts are stated in the opinion.

No counsel for either party.

DAVIS, J. This action was originally commenced before a justice of the peace of PITT County, and carried by appeal to the Superior Court, and tried before *Philips, J.,* at the Spring Term, 1886, of said court.

The action was brought to recover the value of goods sold by the plaintiffs to Henry Shepherd & Company, and the sole question (155) presented was whether the defendant Benjamin Belcher was a partner in the firm of Henry Shepherd & Company. After the jury

were empaneled and the evidence taken, counsel on both sides agreed to withdraw a juror and submit it to the judge to find the facts upon the testimony and award judgment. The following was the finding of his Honor:

"Upon the proofs heard, the court finds upon the preponderance of the testimony that the defendant Benjamin Belcher was not a member of the firm of Henry Shepherd & Company, and the plaintiffs are not entitled to recover against him for the goods sold and delivered."

Upon the judgment of the court upon this finding, the plaintiffs appealed.

No exceptions were filed, no errors were assigned, and none are apparent upon the record. The judgment of the Superior Court must be affirmed.

No error. Affirmed.

L. R. WADDELL, CLERK OF THE SUPERIOR COURT OF JOHNSTON COUNTY, UPON THE RELATION AND TO THE USE OF KEDAR W. CREECH, v. EDWIN J. T. CREECH.

Apprentice—Bond—Damages—Clerk.

1. An action upon an apprentice's bond, executed in 1873 to M., "judge of probate and his successors in office," is properly brought in the name of the clerk of the Superior Court.

2. The general rule is that where no actual damages are shown, the jury can only give nominal damages, but there are exceptions to it.

3. So, where in an action upon an apprentice bond, evidence was offered tending to prove that the health of the apprentice had been impaired by the master's improper treatment, but no evidence was produced showing the extent of the damage, it was not error for the court to instruct the jury that they might inquire if there was damage from that cause, and fix the amount thereof.

(*Threadgill v. Jennings*, 3 Dev., 384, and *Bell v. Walker*, 5 Jones, 43, distinguished and approved, and *S. v. Skinner*, 3 Ired., 564, and *Scott v. Williams*, 1 Dev., 376, approved.)

(156) CIVIL ACTION, tried before *Shepherd, J.*, at Spring Term, 1887, of JOHNSTON.

By indenture made 11 January, 1873, "between P. T. Massey, probate judge of the county of Johnston, and his successors in office," and the defendant Edwin J. T. Creech, the relator, Kedar W. Creech, was bound as an apprentice to the said E. J. T. Creech, who covenanted and

agreed to teach and instruct the said apprentice, or cause him to be instructed, in the art and business of farming, etc., and to provide the said apprentice sufficient diet, washing, lodging and apparel fitting for an apprentice, and also provide for him education in reading, writing, and arithmetic, and also all other things necessary both in sickness and in health."

This action was instituted in the name of L. R. Waddell, clerk, etc., to the use of the plaintiff, against the defendant, to recover for alleged breaches of this bond by the defendant E. J. T. Creech.

The alleged breaches are as follows: That defendant failed to provide suitable diet for said apprentice; that he failed to provide suitable lodging, etc.; that he required of said apprentice work far beyond his capacity to perform, while he was a boy of twelve years of age; that by reason of insufficient diet, lodging, etc., and especially by reason of arduous labor required of the apprentice, K. W. Creech, both by day and night, which impaired his health, etc.

The allegations made in the complaint were denied by the de- (157) fendant's answer, and the following issues were submitted to the jury, the answers to which were as indicated:

1. Did defendant commit the breaches of the bond set out in the complaint, or any of them? Answer: Yes.

2. What damages has plaintiff sustained by reason of such breaches? Answer: $325.

3. Is plaintiff's cause of action, if any, barred by the statute of limitations? Answer: No.

The evidence at considerable length is sent up with the record, and is conflicting; that of the plaintiff tending to establish the alleged breaches, and that of the defendant tending to disprove the plaintiff's allegations.

There was no evidence of any actual damage.

The defendant requested the court to instruct the jury that this was not a case for punitive or exemplary damages, but that the plaintiff could recover only such actual damages as had been proven, and such as had resulted from any breach of the bond.

He further requested to charge that there was no evidence of any actual damage, and that nominal damages alone could be recovered.

The court, after instructing the jury upon the first issue, as to which there was no objection, charged that the plaintiff could not recover exemplary or punitive damages, and could recover, if anything, only the damages caused by a breach of the bond, if any. That it was for the jury to say whether the health of the plaintiff had been permanently impaired by any action or treatment of the defendant, in violation of the bond, and it was for them to determine what that treatment was.

That the testimony of plaintiff and defendant was conflicting, and the jury should determine from all the testimony how the facts were. If they should find that the plaintiff had suffered actual damage by permanent injury to his health, and the same was caused by insufficient
(158) food or clothes, or other treatment of the defendant in violation of his bond, as charged, they should say from the evidence what that damage was; but if they should, from all the testimony, find that the treatment by defendant of the plaintiff had not been in violation of the bond, or that the plaintiff was not endamaged thereby, they should say so.

To this instruction, and to the refusal of the court to instruct as requested, the defendant excepted. Judgment for plaintiff, and defendant appealed.

C. M. Busbee for plaintiff.
J. H. Flemming for defendant.

DAVIS, J., after stating the case: The objection suggested in this Court that the action cannot be maintained in the name of L. R. Waddell was not taken in the court below, but if it had been, it could be of no avail. L. R. Waddell is the successor in office to P. T. Massey, and the action may properly be brought in his name to the use of K. W. Creech, the apprentice. The Code, sec. 10. It was unquestionably an official bond or indenture, upon which an action might be instituted in the name of the successor to P. T. Massey, and is therefore easily distinguishable from the case of *Threadgill v. Jennings,* 3 Dev., 384, cited by counsel.

In the latter case, the bond was payable to "Thomas Threadgill, chairman, his executors, administrators," etc., instead of to "his successors in office." But even in that case, the bond was held to be sufficient, if the jury should find that it was intended that the bond should be delivered to the chairman of the county court, and "after its delivery, operate in law as an office bond, and not as an individual bond."

The first instruction asked for by the defendant was substantially given by the court, and as given, could present no ground for
(159) complaint by him. There was evidence tending to show that the apprentice was required to do work beyond his capacity to perform; that he had sometimes to work in the night to complete his task, and that he was whipped if he failed to perform it.

The charge of his Honor in regard to exemplary or punitive damages was as favorable to the defendant as could be justly asked. The case states that "there was no evidence of actual damage," and the defendant insists that there was error in the refusal of his Honor to instruct the

jury that nominal damages alone could be recovered," and that the charge as given upon the question of damages in inconsistent.

This presents a question not free from difficulty. The case is unlike that of *Bell v. Walker,* 5 Jones, 43, in which there was evidence that the apprentice (in that case slaves) would have had an enhanced value to their owner if the master had complied with his covenants to teach them "the ship carpenter and caulker's trades."

Undoubtedly the general rule is that where no actual damages are proved, the jury can only give nominal damages. As was said by *Judge Gaston,* in *S. v. Skinner,* 3 Ired., 568, "there must be a rule whereby to assess them, although the application of the rule is with great propriety confided to the jury."

From a review of the evidence, and the charge of his Honor, it is apparent that when it was said that "there was no evidence of actual damages," reference was had to such direct and immediate damages as could be fixed by evidence, and measured and weighed by the jury, and it was not meant that there was no evidence tending to show such damages or injury resulting to the plaintiff from the breaches complained of, as would entitle him to more than nominal damages, for the jury are told, "That if they should find that the plaintiff had suffered actual damages by permanent injury to his health, . . . they should say (160) from the evidence what that damage was," etc.

And there are exceptions to the general rule that when no actual damages are proved the jury can only give nominal damages, which would embrace the case before us. Southerland on Damages, Vol. 1, pp. 156-157 and 172.

In *Scott v. Williams,* 1 Dev., 376, which was an action brought by the plaintiff for an assault and battery and false imprisonment, the object of the suit being to ascertain whether the plaintiff in that action, who was held in slavery by the defendant, was not in truth free, the Court held that under the circumstances of the case the jury might give more than nominal damages, though there appears to have been no proof of the actual damages.

The evidence warranted the charge as given by the court, and there is no error.

No error. Affirmed.

Cited: *Davis v. Wallace,* 190 N. C., 547.

JOHN A. COBLE v. DANIEL B. BRANSON.

Trust and Trustee—Evidence—Mortgage—Contract.

1. A court of equity will enforce a parol contract whereby the mortgagee agrees to reconvey land purchased by him at a sale under a decree for foreclosure, upon the repayment by the mortgagor of the debt.

2. Evidence that the mortgagee instructed his agent at such sale to "bid until the land brought his debt and costs and then stop," was irrelevant and properly excluded.

(*Mulholland v. York*, 82 N. C., 510, cited and approved.)

CIVIL ACTION, removed from Randolph County, and tried before *Connor, J.*, at December Term, 1886, of GUILFORD.

(161) The complaint states that the tract of land in possession of the defendant Daniel B. Branson, and demanded in the action, formerly belonged to his wife, and was, under proceedings instituted in the proper court, sold under a decree foreclosing a mortgage thereof made by them, and conveyed to the plaintiff.

Upon the application of the wife of the said Daniel B., she was admitted a party to the action, and filed her answer, setting up an equitable defense and counterclaim, and therein, after denying the allegations contained in the several articles of the complaint, she alleged: That the mortgage was given by her husband and herself to the plaintiff in August, 1871, to indemnify him against loss by reason of his becoming surety upon a note given to one Hugh Wilson, on which was then due $74.00; that the plaintiff afterwards paid the note, and caused to be instituted the proceedings for foreclosure and sale of the land, at which he became the purchaser for the sum of $25.00; that previous to the bringing the action to foreclose, she entered into a contract with the plaintiff, in which he agreed to buy the land when sold, and hold as trustee, and reconvey to her on payment of the balance of the mortgage debt to him; that the plaintiff did accordingly bid off the land, and had title made to himself, and she has since paid him the residue of the debt, to wit, $25.00, and interest thereon—but that he refuses to execute a deed for the premises to her, and has brought the present suit to recover possession.

She demands relief in a decree declaring the plaintiff to hold as trustee, and commanding him to make her a deed for the land.

The plaintiff, in his replication, denied any agreement for purchasing and allowing the *feme* defendant to redeem, and averred that there was no trust assumed on his part towards her in the premises whatever.

Two issues were submitted to the jury:

1. Did plaintiff buy and take title to the land under promise to let the *feme* defendant have it back on repaying to him the (162) balance due on his mortgage? Answer: Yes.

2. Did the *feme* defendant pay back to plaintiff, after his purchase, the said balance and demand title? Answer: Yes.

Upon these findings judgment was rendered for the *feme* defendant as set out in the record, and the plaintiff appealed.

Both parties introduced evidence, without objection, tending to sustain their respective contentions as to the trust alleged and denied, and among others Joel Pike was examined for the plaintiff, who stated that he bid off the land for the plaintiff after obtaining from the clerk a statement of the costs. Plaintiff then proposed to prove by him, but was not allowed to do so, that the plaintiff had instructed him, when requested to attend to the matter, "to bid until the land brought enough to pay his debt and the costs, and then to stop bidding." This testimoney on objection was ruled out, and exception taken.

J. T. Morehead for plaintiff.
J. A. Barringer for defendant.

SMITH, C. J., after stating the case: Whether the testimony was intrinsically obnoxious to objection, it being but a limitation upon the authority conferred upon the agent or not, it is wholly irrelevant to the issue, and its rejection was harmless. It does not tend to disprove the arrangement by which the trust was created, nor impair the force of the other testimony upon the point. The previous contract is unaffected by the directions which restrict the amount which the agent was not at liberty to bid, and as a matter between them, ought not to be heard to the prejudice of the defendant.

That a trust was raised upon the agreement found by the jury, is established by the case of *Mulholland v. York,* 82 N. C., 510, and this is sufficient authority for the ruling.

There is no error, and the judgment is affirmed. (163)

No error. Affirmed.

THE BOARD OF COMMISSIONERS OF GREENVILLE v. THE OLD DOMINION STEAMSHIP COMPANY.

Appeal—Certiorari—Excusable Neglect—New Trial.

1. It is the duty of an appellant to have the transcript of the record on appeal docketed in the Supreme Court at the term thereof next after the rendition of the judgment from which he appealed.

2. If the appellant has been unable to perfect his appeal within the time required, through no fault of his own, but through that of the appellees or the court, or the clerk, he is entitled to the writ of *certiorari.*

3. If, through no fault or negligence of the appellant, it becomes impossible to settle the case on appeal, a new trial will be ordered.

(*Collins v. Faribault,* 92 N. C., 310; *Pittman v. Kimberly, ibid.,* 562; *Suiter v. Brittle,* 90 N. C., 19; *Isler v. Haddock,* 72 N. C., 119; *Mason v. Osgood, ibid.,* 120; *Simonton v. Simonton,* 80 N. C., 7; *Adams v. Reeves,* 74 N. C., 106; *Jones v. Holmes,* 83 N. C., 108; *Sanders v. Norris,* 82 N. C., 243; *S. v. Powers,* 3 Hawks, 376, and *Hamilton v. McCullock;* 2 Hawks, 29, cited and approved.)

THIS is a civil action, which was tried before *Philips, J.,* at June Term, 1886, of PITT.

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

At February Term, 1887, of the Supreme Court, the appellant made an application for a writ of *certiorari,* in aid of its appeal. The Court then delivered the following opinion:

(164) *No counsel for plaintiff.*
W. B. Rodman, Jr., for defendant.

DAVIS, J. This is an application for the writ of certiorari, as a substitute for a lost appeal. The adverse counsel accepted notice of it, but have failed to appear before us and oppose it.

It appears from the affidavits filed that the action of the *Commissioners of Greenville v. Old Dominion Steamship Company,* was tried at the June Term, 1886, of the Superior Court of the county of Pitt; that there was judgment in favor of the plaintiffs, from which the defendant appealed to this Court, and the case stated on appeal was duly prepared and served upon the counsel of the appellees. At their instance, and for their convenience, the time was extended—not for any fixed period within which they might make objections to the case stated on appeal—and they agreed that no objection should be taken on that account, if the appeal failed to reach this Court at the last October Term thereof. No such objections were made until 15 January of the present year, when the appellant's counsel were served with very material objections to the case as stated by them.

It also appears that the clerk of the court refused to send up a transcript of the record of appeal, although the appellant's counsel tendered him the fees due him in that respect.

The appeal ought regularly to have been brought to the last October Term of this Court. As it was not, it was lost, and we would be strongly

disposed to refuse to grant the writ of *certiorari* as a substitute for the appeal so lost, but for the fact that the delay was allowed at the request of the appellees, and for the ease and convenience of the counsel. It would not be just to allow them to have benefit of their own laches, and therefore we are of opinion that the failure to bring up the appeal regularly is excusable. It would be otherwise if the failure had been for the convenience of the appellant. That the appeal was not brought (165) up to the last October Term without the case settled on appeal, as ought to have been done, if need be, is excusable on the ground of the refusal of the clerk to furnish the transcript of the record, as plainly he ought to have done. *Collins v. Faribault,* 92 N. C., 310; *Pittman v. Kimberly, ibid.,* 562; *Suiter v. Brittle,* 90 N. C., 19.

The appellees were not allowed by the agreement to extend the time for making objections to the case stated on appeal, to have but a reasonable extension, as no definite period was fixed. They did not make objections until after the lapse of more than six months! Manifestly, they did not do so within a reasonable time, and they must have been held to have made none at all.

The writ of *certiorari* must issue, directed to the clerk of the Superior Court of the county of Pitt, commanding him to certify to this Court a true transcript of the record in the action in that court above mentioned, including the case stated on appeal by the appellant's counsel therein. Let the writ issue.

Upon the return of the writ of *certiorari* to this term the following opinion was delivered:

DAVIS, J. There was a judgment in favor of the plaintiff, from which the defendant appealed to this Court, of which he gave due notice, and filed the undertaking required. The clerk of the Superior Court refused to send up the transcript, for the reason given by him, that there was no case on appeal signed by the judge.

Upon affidavits filed, a *certiorari* was awarded at the last term of this Court, and in return thereto a transcript of the record has been sent up without any statement of the case.

It is shown by affidavits that a statement of the case, as re- (166) quired by the law regulating appeals, was made up in apt time by the counsel for the appellant, and duly served on the counsel for the appellee; that it was not returned within the time prescribed; that at the request of one of the counsel for the appellee, it was agreed that no advantage should be taken of any delay, and that if it did not get to the

Supreme Court in time for the October Term, it should be placed on the docket at the February Term, and that the appellee should have a reasonable length of time to file exceptions to appellant's statements. Counsel for the appellee retained the statement of the case till January, 1887, when it was returned by one of the counsel for the appellee to one of the counsel for the appellant, with a counter-statement, which was not agreed to; and on the second Saturday of the January Term, 1887, of Pitt Superior Court, the counsel gave the case on appeal, with the counter-statement, to one of the counsel for the appellee.

Repeated applications were made to appellee's counsel, and to each of them, for the case on appeal, with the response that they had been unable to find it, though they had looked therefor. It further appears from information, that owing to the lapse of time, the judge who tried the cause has forgotten the exceptions made, and that it would be impossible to get a new case on appeal correctly stated. It appears that the defendant has been active and vigilant in efforts to get the statement that was lost, as appears from the affidavits by some one of the counsel for the plaintiff, and that it is now impossible to prepare a substitute.

The defendant is entitled to his appeal—it was lost by no laches on his part of which the plaintiff can complain. Has he any remedy? To remand it would be in vain, for it appears that it would be impossible for the judge to settle it upon disagreement.

This Court has on several occasions awarded new trials when the judge below has gone out of office without settling the case on appeal, and the appellant was guilty of no laches. There is no other way (167) by which the appellant can have the benefit of an appeal. *Isler v. Haddock,* 72 N. C., 119; *Mason v. Osgood, ibid.,* 120; *Simonton v. Simonton,* 80 N. C., 7; *Adams v. Reeves,* 74 N. C., 106; *Jones v. Holmes,* 83 N. C., 108; *Sanders v. Norris,* 82 N. C., 243.

In *S. v. Powers,* 3 Hawks, 376, it appears that the notes of the trial had been lost, whereby the judge was unable to state the case, and a new trial was granted. See, also, *Hamilton v. McCullock,* 2 Hawks, 29.

In this case the appellant is entitled to a new trial.

Venire de novo.

Cited: Briggs v. Jervis, post, 457; *Graves v. Hines,* 106 N. C., 324, 327; *Owens v. Paxton, ibid.,* 481; *Clemmons v. Archbell,* 107 N. C., 654; *S. v. Robinson,* 143 N. C., 624.

SAMUEL H. PERRY v. WILLIAM T. ADAMS AND HIS WIFE, LUCY N. ADAMS.

Curative Acts—Sale of Land for Assets—Infants—Service—Subrogation—Judicial Sale—Lien.

1. A license to sell lands for assets is void and no title will pass thereunder if the heirs or devisees of the decedent have not been made parties to the proceedings in some sufficient way.

2. The curative act, The Code, sec. 387, does not embrace a case where there has been *no service at all*, but was intended to cover the case where personal service was omitted as to infants, but was had upon some one who apparently had a right to represent them.

3. One who purchases land sold for assets, upon the sale being declared invalid, is entitled to be subrogated to the rights of the creditors and have a lien declared upon the land as against the heirs and devisees to the extent of the application of the money he paid to the discharge of the debts of decedent and the costs of administration.

(*Stancill v. Gay*, 92 N. C., 462; *Williams v. Williams*, 2 Dev. Eq., 69; *Scott v. Dunn*, 1 D. & B. Eq., 425; *Springs v. Harven*, 3 Jones Eq., 96; *Palmer v. Thompson*, 4 Jones, 104, cited and approved.)

CIVIL ACTION tried before *Clark, J.*, at January Term, 1887, (168) of GRANVILLE.

It appeared that John R. Perry died intestate in the county of Granville some time in the year 1864, leaving surviving him as his only heir at law the *feme* defendant, then an infant of tender years, who has since intermarried with her codefendant.

At the February Term, 1866, of the late Court of Pleas and Quarter Sessions of the county named, Samuel D. Coley was duly appointed administrator of the estate of the intestate, and at the February Term, 1867, of that court, the *feme* defendant then being about five years of age, the administrator filed his petition, praying the court to grant to him a license to sell the land of his intestate, described in the complaint, to make assets to pay debts. A license was granted; the land was sold in pursuance of the order of the court by the administrator; the plaintiff became the purchaser thereof on 29 April, 1867, at the price of $700; the sale was confirmed by the court, and the purchase money having been paid in pursuance of the order of the court, the administrator executed a deed purporting to convey the title to the land to the plaintiff, and thus he claims to derive title to the same.

The *feme* defendant was named as defendant in the petition mentioned, and she then and thereafter, for a long while, had a general guardian, but there was no service of a summons, or any process on her,

she being an infant, nor was her general guardian named or made a defendant in the petition, nor was any summons or other process served on him in that respect, nor was any guardian *ad litem* appointed for her in that behalf, nor was any defense made for her, nor was the petition sworn, nor were there any affidavits filed or accounts taken, to prove the existence of necessity for selling the land to make assets.

(169) The defendants being in possession of the land, the plaintiff brought this action to recover possession thereof, claiming to derive title thereto by virtue of the deed executed to him by the administrator mentioned, and the proceedings, orders and decrees made by the said court authorizing him to make the same.

The defendants admitted that they were in possession of the land, but denied that the plaintiff was entitled to have possession thereof, and further, that he had any title thereto, and insisted that the proceedings mentioned, and the orders and decrees therein, and the sale of the land made in pursuance thereof, are, as to the *feme* defendant, null and void.

The plaintiff having alleged in the complaint the circumstances of his title, insisted that if it was not good and sufficient, then and in that case he would be entitled to be paid the money he so paid for the land, and the interest thereon, and to have the same declared to be a charge upon the land; and he demanded judgment accordingly, and asked for general relief.

On the trial, the jury found in response to issues submitted to them, that the plaintiff was not entitled to the possession, nor was he the owner of the land; that he paid for the same to the administrator named $700 on 29 April, 1867; that the plaintiff had had possession of the land under his supposed purchase for thirteen years, and that the fair rental therefor for each of these years was thirty-seven dollars.

The court adjudged that the plaintiff was not entitled to recover possession of the land, but gave judgment in his favor for the sum of $1,006.50, the money and interest thereon that he paid therefor, less the value of the rents thereof for thirteen years, and declared the same to be a lien upon the land in favor of the plaintiff.

The plaintiff appealed from the judgment to this Court, assigning several grounds of error, and the defendants did likewise; but

(170) the view the Court takes of the assignments of error in both appeals, considered together, renders it unnecessary to state or advert to them severally or in detail.

The administrator named was not made a party to the action. On the trial evidence was received tending to prove that he received from the plaintiff the purchase money of the land, and applied it properly in the payment of debts of his intestate, but there was no finding of the

facts in this respect, nor was any account of his administration taken in order to see if there was occasion to sell the land to make assets to pay debts, etc.

John Devereux, Jr., (Joseph B. Batchelor and E. C. Smith were with him) for plaintiff.

D. G. Fowle for defendants.

MERRIMON, J., after stating the case as above: The learned counsel for the plaintiff contended on the argument here, that inasmuch as the property, both personal and real, of the deceased debtor, in the order mentioned, is subject first and certainly to be applied to the payment of costs of administration and the debts of the decedent, the court had authority to direct a sale of the land to make assets for such purpose, and a proceeding and proper orders and decrees to that end would not be void, although the heir was not made a party thereto, and he cited several cases to support that contention. We cannot accept this view as correct in any aspect of it. The law thus administered might—no doubt would—very frequently work serious injury to the heir or devisee, and he would be left without any practical or efficient remedy. He should, as a matter of common justice, have just opportunity to see that the occasion had properly arisen for resort to the land described or devised to him, and to show the contrary if he could. But whatever may be the extent of the authority of appropriate courts in some States of the Union, to thus devote the land of deceased debtors to the payment of debts, without notice to the heir, in this State, the (171) statute (The Code, sec. 1438) expressly provides that, "No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by *service* of summons, either personally or by publication, as prescribed in the chapter entitled Code of Civil Procedure."

This provision embraces infants as well as adult persons. Hence, this Court has repeatedly and uniformly held that such proceedings, decrees and judgments are void and of no effect as against the heir not in some sufficient way made a party to the same, whether infant or adult. *Stancill v. Gay,* 92 N. C., 462, and the cases there cited.

It distinctly appears in the case before us that the *feme* defendant was not made a party, by service of process or notice in any way, to the proceeding in the Court of Pleas and Quarter Sessions in which a decree was made, directing a sale of the land in question, descended to her from her ancestor, to make assets to pay debts against his estate. During the whole time of the pendency of that proceeding, and for a long while afterwards, she was an infant; she was not served with process, nor was

her general guardian; nor was any guardian *ad litem* appointed to make defense, nor was any defense made for her. The court, therefore, did not obtain jurisdiction of her at all. The order of sale, indeed the whole proceeding, was as to her void and inoperative. Jurisdiction of the person was essential to a valid order. *Stancill v. Gay, supra.*

It was further insisted for the plaintiff that the proceeding and order of sale therein was cured and made effectual by the curative statute (The Code, sec. 387), making valid judgments and other proceedings against infants and certain other classes of persons in certain cases. This is a misapprehension of the true meaning of that statute. Neither by its terms nor by just interpretation of the meaning does it apply to
(172) or embrace cases where there *was no service of process at all.* It applies to civil actions and special proceedings, "wherein any or all of the defendants were infants, . . . on whom there was no *personal service* of the summons," etc. The statutory provision (The Code, secs. 181—214—217, par. 2) prescribing how the summons in civil actions and special proceedings shall be served on infants, requires, and required at and before the time of the enactment of the curative statute mentioned, *personal service* upon them, and likewise service upon the guardian, and where the infant is under the age of fourteen years, service must be made by delivering a copy of the summons to him *"personally,* and also to his father, mother, or guardian," etc. The *personal* service upon the infant is not regarded, nor has it been, as so important as that upon his guardian, by whom he defends, and who is required to make defense for him, and it not infrequently happened that there was no *personal* service on the infant, as the statute required. The object of the curative statute is to cure the judgment and proceeding, when such *personal* service was admitted, but it does not embrace cases where *no service* was made upon the infant or any other person in his behalf, as the statute requires to be done. *Stancill v. Gay, supra.*

The plaintiff, however, undertook to purchase the land, so far as appears, in good faith, and to the extent that the money he paid to the administrator was applied to the payment of debts of the intestate and the cost of administration that the personalty was insufficient to pay, to that extent he relieved the land in question, and is entitled to be subrogated to the rights of the creditors, whose debts and costs were so paid, and to have the sum of money due him charged upon the land. It would be unconscionable to allow the *feme* defendant in that case to have the land discharged of the debt due the plaintiff for money thus paid by him and applied to relieve the same. *Williams v. Williams,* 2 Dev.
(173) Eq., 69; *Sanders v. Sanders, ibid.,* 262; *Scott v. Dunn,* 1 D. & B. Eq., 425; *Spring v. Harven,* 3 Jones Eq., 96; *Palmer v. Thompson,* 4 Jones, 104.

The plaintiff must be charged with the rents of the land during the time he had possession of it.

So much of the judgment appealed from as declares that the plaintiff is not the owner of, nor entitled to the possession of the land, is affirmed. In other respects it must be set aside, the administrator made a party defendant, an account be taken, and judgment given in accordance with the rights of the parties, to be ascertained and settled as indicated herein. To that end let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

Cited: Houston v. Sledge, 101 N. C., 643; *Harrison v. Harrison,* 106 N. C., 284; *White v. Morris,* 107 N. C., 100; *Card v. Finch,* 142 N. C., 148; *Rich v. Morisey,* 149 N. C., 50; *Hughes v. Pritchard,* 153 N. C., 143; *Grantham v. Nunn,* 187 N. C., 398.

GEORGE H. CLIFTON ET AL. v. D. I. FORT.

Dower—Evidence—Lost Record—Possession.

1. Secondary evidence will be admitted to show the contents of a lost or destroyed record.
2. The petition and writ of dower endorsed "executed," is evidence to be submitted to the jury, in connection with other facts *dehors* the record, in determining an issue whether dower had been assigned, proof having been offered tending to show that the remaining part of the record had been destroyed.
3. The acts and declarations of persons in possession of land, and of those under whom they claim, are admissible against them to show the circumstances under which they entered, and in explanation of the estate claimed by them.
4. The fact that a widow resided on the land of her husband for some time after his death, and that others who entered under her spoke of and claimed it as her "dower," is evidence, in connection with other circumstances, to be considered by the jury in ascertaining if the dower had been actually allotted.

(Mobley v. Watts, post, 284, and *Nelson v. Whitfield,* 82 N. C., 46, cited and approved.)

THIS was a civil action for the recovery of land, tried before (174) *Shepherd, J.,* at the Spring Term, 1887, of WAKE.

The material issue was:

"Are the plaintiffs the owners and entitled to the possession of the land in question?"

It was conceded that they were the heirs at law of one Azel J. Clifton, called John Clifton, who died in 1827, seized of a tract of land in Wake County, which included the land in controversy, and that he left surviving him his wife Mary Clifton, who continued to reside upon the land for about a year after the death of her husband, when she, with the plaintiff, moved to Georgia, where they have resided, and where she died on 29 May, 1880. The plaintiffs are the heirs at law of Azel J. Clifton.

This action was commenced on 17 February, 1887, and the material question was whether the land mentioned in the complaint had ever been assigned to said Mary as dower.

For this purpose the plaintiffs introduced the petition of said Mary, made at the May Term of the County Court of Wake, 1827, praying that her dower be allotted her. Also a writ of dower ordered at said term, returnable to the August Term, on which writ there was endorsed the word "Executed" by the sheriff.

The plaintiff also introduced Charles D. Upchurch, who testifies that he is and has been clerk of the Superior Court of Wake County for ten years, and had been in the office as deputy clerk from 1874 to the
(175) time he went in as clerk; that the records of the County Court as found by him in the office, are incomplete; that he has frequently missed many papers; that during the war, when Sherman took possession of Raleigh, some Federal soldiers took all the papers and records to an old field near Raleigh and were about to burn them, when they were prevented by a passing Federal officer; that the papers and records were brought back in barrels and tumbled down on the floor in the courthouse, and were much exposed; that afterwards the county had the papers classified. Witness stated that he had made diligent search in his office and could find only these papers relating to the case; that the trial docket of said court, which included the entries for the year 1827, was lost, but witness produced the minute docket for that year. Witness testified that upon inspecting the records, he found that entries in dower proceedings appeared upon both dockets; that the trial docket would show that petitions were filed, writs ordered, reports made and confirmed, and that the minute docket also showed all these proceedings, but the entries in same proceedings do not always appear in both dockets, but no proceedings appertaining to the allotment of dower to the said John Clifton's widow appeared upon the said minute docket, or upon any other docket found in the clerk's office; that the general index of all dower proceedings were searched, but nothing relating to this proceeding was found; but no index was kept of dower proceedings until 1876.

W. S. Powell testified he was sixty-seven years old; that since the death of Azel J. Clifton he always heard those in possession of the *locus in quo* claim it as the dower of Mrs. Clifton, and it always went by that name; that he knew of Zack Smith being in possession after Mrs. Clifton left, probably about 1830; that he claimed it as the dower of Mrs. Clifton; that Wilson Etheridge succeeded Zack Smith (I think he bought it); that Lenton Etheridge succeeded Wilson Etheridge; that one Jordan succeeded him; that Jordan was suc- (176) ceeded by John C. Avera, who rented it to Jordan and some negroes; that John C. Avera sold that part of the dower land lying east of the Wilmington and Raleigh road to William C. Fort; the deed from Avera to Fort, dated 5 January, 1883, conveyed the land in dispute "during the lifetime of John Clifton's (deceased) widow," with warranty, "so long as said widow doth live," etc.; that all these persons spoke of and claimed it as the dower land of Mrs. Clifton, and that William L. Fort always kept the dower interest separate from his own land; that he cleared some of his adjoining land and left the line trees of the dower tract, and put his fence on his land, so, he said, the heirs could not get his fence; he claimed it as the dower land. Witness identified the land sued for as the land he had been speaking of, and testified as to the boundaries.

David Lewis, the administrator of William L. Fort, who died in 1876, testified that he was sixty-four years old, and had known the land all his life; that he had known the land pretty much since Clifton died; that he had worked for Zack Smith and Etheridge, and they called the land widow Clifton's dower; that when he sold as administrator in 1878 he stated that he sold only the dower interest.

There was other testimony corroborating the statement of these witnesses.

It was also in evidence that about forty years ago the heirs of Clifton offered to sell their interest to William L. Fort in the dower, and he said he did not want to buy it, as the widow was young and would live as long as he.

It was also in evidence that said administrator sold the land to D. I. Fort, the defendant, son of William L. Fort.

The defendant testified that he had been in possession of the land ever since, claiming it adversely and as his own. Upon cross-examination he said he knew it was called the dower land of Mrs. Clifton, and that he knew his father bought Mrs. Clifton's interest; that he did not know what her interest was; "I thought the heirs would (177) never be heard from, and it would be a good speculation."

The defendant objected to all of the foregoing evidence as incompetent and insufficient, because dower had not been shown by the record, and a sufficient foundation had not been laid for the introduction of parol testimony tending to establish it.

The court overruled the objection, and the defendant excepted.

The defendant asked the following instructions of the court:

1. There was no legal evidence to go to the jury showing that dower was laid off by metes and bounds or otherwise to Mary Clifton.

The court declined and defendant excepted.

2. That the petition for dower, the writ and the return of the sheriff, in the absence of a report and confirmation, are not legal evidence of the fact that any dower was laid off by metes and bounds.

The court gave this instruction, but stated that the jury might consider it in connection with the other testimony, as the loss of the records, the search for them, the occupancy of the various persons and their acts and declarations, and other circumstances tending to establish the dower.

The defendant excepted to this qualification.

3. That the recitals in the deed of John C. Avera to William L. Fort are not evidence against this defendant to show that the dower was laid off.

The court stated that if they believed that said Fort entered under this deed, that it was proper for the jury to consider it in connection with his acts and declarations.

The defendant excepted.

4. That there is no evidence to show that the widow has ever been in possession of the *locus in quo* since the death of A. J. Clifton, except for about one year after his death. And there is no evidence to
(178) show that the said widow was in possession of the *locus in quo* by metes and bounds, or that she was not in possession of the whole tract.

The court said there was no positive and direct evidence as to these matters, but that they might, if they chose, infer it from the evidence before them.

Defendant excepted.

5. That the evidence from the records and the witnesses is too vague, uncertain and indefinite to show that dower was ever laid off.

The court declined. Defendant excepted.

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

J. H. Flemming for plaintiffs.

Samuel Wilder for defendant.

DAVIS, J. If the land in question was not allotted to Mary Clifton, widow of the ancestor of the plaintiff, they cannot recover; if it was so allotted, there could be no adverse possession as against the plaintiffs till the death of the widow, and as she died 29 May, 1880, and this action was commenced 17 February, 1887, the question of the statute of limitations is not material.

1. We think the loss of the record was sufficiently shown by the testimony of the clerk, and that secondary evidence was admissible to supply the loss. The question raised by the objection to the competency of such evidence in cases of lost records is fully considered in the case of *Mobley v. Watts, post,* 284, and we refer to that case and the authorities there cited. This disposes of the exceptions to evidence, and to the first prayer for instructions, and also to the second, as qualified by his Honor.

2. The third exception is to the charge of his Honor in relation (179) to the deed from John C. Avera to William L. Fort. The deed from Avera to Fort, made 5 January, 1839, conveys the land in dispute, "during the lifetime of John Clifton's deceased widow, and warrants the right and title of said land to said Fort, his heirs and assigns, so long as the said widow doth live, against the lawful claims," etc.

William L. Fort, by this deed, took only an estate for the life of the widow of John Clifton, and when the land was sold in 1878 by David Lewis, administrator, etc., of William Fort, under a judgment of the Superior Court of Wake against the heirs at law of William L. Fort (David I. Fort, the present defendant, being one of them) it was stated by the said David Lewis that he sold only the dower interest, and both Lewis and Powell testify that the persons in possession always recognized the land in dispute as the dower of Mrs. Clifton. They spoke of it and claimed it as the widow's dower; and William L. Fort, who by his deed held only an estate for the life of the widow, recognized the title of the heirs and claimed only the dower, and it is in evidence that the defendant himself knew that his father bought only Mrs. Clifton's interest—that it was called her dower. These admissions of the parties in possession are admissible to qualify their title, and to show that they had an estate only for the life of the widow. *Nelson v. Whitfield,* 82 N. C., 46. There was no error in admitting the deed from Avera to Fort, as qualified in the charge of his Honor, and this disposes of the third exception.

3. The evidence shows a well defined tract of land, known and recognized as the widow's dower by successive purchasers, including the defendant himself, who claimed only the dower interest or life estate of the widow, none of them asserting any claim to the reversion; and there

was no error in telling the jury that they might, if they chose, infer from the evidence before them that the widow was in possession (180) of the *locus in quo* by metes and bounds, and not of the whole tract. In fact, the evidence tends clearly to show that she, and those claiming the dower interest under her, were in possession from the death of her husband to the time of her own death.

The fourth exception cannot be sustained.

4. There was evidence from the records and the witnesses tending to show, and from which the jury might be at liberty to find, that the dower had been allotted, and there was no error in refusing to give the fifth instruction asked for. There is no error.

No error. Affirmed.

Cited: Ellis v. Harris, 106 N. C., 399; *Bonds v. Smith, ibid.,* 565; *Gillis v. R. R.,* 108 N. C., 446; *Alexander v. Gibbon,* 118 N. C., 800; *Wells v. Harrell,* 152 N. C., 219; *Boyden v. Hagamen,* 169 N. C., 203.

MAULSEY A. ROGERS, EXECUTOR OF M. A. ROGERS, v. W. W. CLEMENTS AND A. K. CLEMENTS.

Payment—Presumption—Limitations—Bonds.

1. The statute, Rev. Code, ch. 65, sec. 18, declaring a presumption of payment after ten years, embraced bonds or "single bills," as well as promissory notes and other demands therein designated.

2. The admission by one obligor in a bond that the debt has not been paid, will not rebut the presumption of payment in favor of the other obligors; nor will the naked admission of the obligor sought to be charged have that effect, as the presumption of payment by the other obligors still remains.

3. The presumption against the obligor sought to be charged is not rebutted by the recovery of judgment by default against his coöbligor within ten years.

(Pearsall v. Houston, 3 Jones, 346; *Campbell v. Brown,* 86 N. C., 376; *Rogers v. Clements,* 92 N. C., 81, and *Lane v. Richardson,* 79 N. C., 159, cited and approved.)

(181) CIVIL ACTION, tried before *Shepherd, J.,* at April Term, 1887, of WAKE.

This action was begun 29 December, 1881, to recover the balance due on the single bond of W. W. Clements and A. K. Clements for the sum

of $900, dated 28 October, 1857, and due one day from date, made payable to G. H. Alford, and by him endorsed on 30 August, 1858, to the testator of the plaintiff. The interest then due, and the further sum of $193.80, was paid on 18 October, 1859, and a credit therefor was entered on the back of the bond.

The defendant, A. K. Clements, pleaded payment and relied on the statute of presumption of payment.

This issue, among others, was submitted to the jury:

"Has the said note been paid?"

On the trial the plaintiff introduced as a witness George W. Atkinson, and proposed to prove by him that in 1871 or 1872, W. W. Clements stated to him that the bond sued upon was then due and unpaid, and that he had not paid the bond and that it was unpaid as far as he was concerned.

This testimony was, upon objection by the defendant, excluded by the court, and plaintiff excepted.

The plaintiff also introduced H. C. Olive, who testified that in 1880 he asked defendant, A. K. Clements, if he had ever paid the note; that defendant said no, and that he never intended to pay it. This was in 1880, and since the death of John W. Rogers.

The plaintiff proposed to prove by this witness that in 1881 or 1882 W. W. Clements acknowledged to him that he had not paid the note.

Defendant objected to this and the testimony was excluded. Exception by plaintiff.

The plaintiff also read in evidence a judgment taken against W. W. Clements upon this very note at a former term, for want of answer, as follows:

"This action being tried before his Honor and a jury, and all (182) issues being found in favor of the plaintiff, it is considered by the court that the plaintiff recover of the defendant the sum of $1,740.78, with interest on $706.20 from 15 March, 1884, till paid, and for costs, to be taxed by the clerk.

It is further adjudged that the note upon which judgment is rendered was executed by the defendant on 28 October, 1857."

The plaintiff introduced no other testimony, and the court intimating an opinion that the presumption of payment had not been rebutted, the plaintiff submitted to a nonsuit and appealed.

D. G. Fowle for plaintiff.

A. M. Lewis and E. R. Stamps for defendants.

MERRIMON, J., after stating the case: It is too well settled to admit of further question, that when the single bond of coöbligors is pre-

sumed by the lapse of ten years next after its maturity to be paid, as provided by the statute (Revised Code, ch. 65, sec. 18), such presumption of payment cannot be rebutted so as to charge one of such obligors, by the naked admission of the other that the bond had not been paid, made in the absence of the obligor sought to be charged.

The simple admissions of the obligor sought to be charged is not sufficient to rebut the presumption of payment, because the bond may have been, and the presumption in such case is, that it was paid by the coöbligor, and the like admissions of the latter, made in the absence of the former, are insufficient to repel the presumption as to the former, because such admissions are mere hearsay, and therefore incompetent evidence and cannot be heard. The coöbligors do not stipulate by implication in the joint obligation—the bond—that each may bind the other by his admissions, made after the bond shall be due; if this ever (183) was so in principle, it certainly did not remain so after the enactment of the statute (Rev. Code, ch. 65, sec. 22), which provided that such admissions shall not rebut the presumption of payment created by the statute.

The learned counsel for the appellant contended earnestly on the argument here that this statute did not embrace single bonds, and the presumption of payment of them; that it extended only to promissory notes, and admissions of parties made after the dissolution of the partnership. This is a misapprehension of the meaning of the statute. Such bonds in this State are made negotiable, and they and promissory notes are put on the same footing with inland bills of exchange by the statute. (Rev. Code, ch. 65, sec. 22.) They are denominated in this statute "bonds or sealed notes," and are treated as promissory notes under seal. When, therefore, the statute (Rev. Code, ch. 65, sec. 22) embraces in terms, "suits to recover any debt or demand due from any firm after the dissolution thereof, or the makers of *any* promissory note," etc., it embraces suits to recover debts due from the makers of single bonds—*sealed notes*—to which the statute of presumption of payment applies, as well as the class of promissory notes that may be absolutely barred by the statute of limitation. It is insisted that section 22 applies only to the latter class of notes, because it employs the terms, "after the statute of limitation shall have barred the same," that is, the promissory note.

This is a very narrow interpretation, and one that does not remedy the evil intended to be suppressed. Why should such declarations and admissions of a partner, made after dissolution of the partnership, and the like admissions of one of two or more makers of a particular class of promissory notes, be rejected as incompetent evidence, and the like ad-

missions of a co-obligor in a single bond received as competent? We can conceive of no substantial reason for such distinctions, and the necessity for the application of this remedial provision is as great (184) in the one class as the other class of promissory notes. The words just recited are clearly used in a comprehensive and remedial sense, and apply generally, whenever pertinent, to the statute of limitations, of which the section of which they are part is a part. The presumption of payment provided for is embodied in section 18 of the statute of limitations, and it is construed to embrace single bonds, though they are not named in terms. This section, though not strictly a statute of limitations, is so denominated in a general sense, and hence it is made a part of the chapter denominated in the Revised Code *"Limitations."* And although it does not create an absolute bar, it does, in a sense, create a conditional bar, such as is embraced in section 22, referred to above.

This, we think, is a reasonable interpretation of the statutory provisions referred to, but if it were otherwise, it has been repeatedly decided expressly in several cases that such admissions and declarations of the co-obligor as those excluded on the trial were not competent evidence as against the co-obligor sought to be charged. We cannot, for a moment, think of disturbing these decisions. On the contrary, we again declare that they are founded in principle—are just and reasonable. *Pearsall v. Houston,* 3 Jones, 346; *Campbell v. Brown,* 86 N. C., 376; *Rogers v. Clements,* 92 N. C., 81.

The judgment taken against the co-obligor by default, or for want of an answer, put in evidence on the trial by the plaintiff, as to the defendant, could have no greater force or effect than his admissions or declarations—it could hardly be treated as an admission at all, not even by implication—it was not founded upon his admission or confession, but upon his default; it might be questioned whether the plaintiff in this judgment was entitled to have it for the debt by such default, as upon the face of the bond it appeared to be paid. *Lane v. Richardson,* 79 N. C., 159. This, however, is not material here. It is clear that the judgment, put in evidence, could not affect the present defend- (185) ant, as insisted by the plaintiff. *Rogers v. Clements, supra.*

We think the court properly excluded the declarations of the co-obligor. Judgment affirmed.

No error. Affirmed.

Cited: Cartwright v. Kerman, 105 N. C., 2.

SAMUEL V. SMILEY AND WIFE, MARY R. SMILEY, v. J. B. PEARCE AND WIFE, METTIE PEARCE, B. F. MONTAGUE AND J. W. LEE.

Exceptions—Trust—Evidence—Equity.

1. A general exception to the admission of testimony, unless the whole of it is incompetent, will not be considered. The objectionable portion must be specifically pointed out.

2. In an action to set up a trust in lands, declarations and admissions of the party charged, accompanying and contemporaneous with the transfer of the title to which the trust is alleged to be annexed, distinctly recognizing the trust, are sufficient to authorize the court to enforce the equity. It is otherwise when the admissions are in respect to a trust *antecedently* created.

(*Barnhardt v. Smith*, 86 N. C., 479, and *Shields v. Whitaker*, 82 N. C., 522, cited and approved.)

CIVIL ACTION, tried before *Shepherd, J.*, at Spring Term, 1887, of JOHNSTON.

The plaintiffs alleged that about the year 1883 or 1884 the defendant J. B. Pearce and his father, J. W. Pearce (who was the father also of the plaintiff Mary R. Smiley), purchased a tract of land jointly, but the conveyance was made to the son, upon the express trust that he should hold the title thereto for the joint and equal use of himself and his sister, the said Mary; that in pursuance of this understanding, and to avoid some family complications, Pearce conveyed the legal

(186) title to Thomas R. Purnell, who took the same with full knowledge of the trust; that subsequently Purnell, under the direction of the defendant J. B. Pearce, executed a deed to the plaintiff Mary for 110 acres of the land, that amount having been agreed upon as being equal in value to the remaining 119 acres of the tract; that at the same time, at the suggestion of the said J. B. Pearce, and upon his representation that it was necessary, in order to avoid the family embarrassments referred to before, she executed to him her note for $1,000 and a mortgage on the 110 acres to secure the same, with an assurance on his part that he would give them up to her husband; that said note and mortgage were wholly without consideration; that none of the deeds had been registered; that before the delivery of the deed from Purnell to the plaintiff Mary, J. B. Pearce, by false and fraudulent means and representations, procured Purnell to surrender the deed made by him to the said Purnell, as well as the deed made by the latter to the plaintiff Mary, and the mortgage and note up to him.

The plaintiffs further alleged that J. B. Pearce mortgaged the lands to the defendant Montague, and also assigned to him the note and mortgage made by the plaintiff Mary, who had notice of the said Mary's rights; that the money secured by this last mortgage not being paid, the lands were sold and purchased by the defendant Lee—the father-in-law of Montague—with notice.

The prayer was that the defendant Pearce convey the legal title to the 110 acres to the plaintiff Mary, for possession; that the mortgage and note executed by the plaintiff Mary be delivered up for cancellation, etc.

The defendants answered severally, denying the material averments—the defendants Montague and Lee alleging that they had purchased in good faith and without notice.

Numerous issues embracing the disputed facts were submitted to the jury, and were all found in favor of the plaintiffs. Thereupon, the court rendered judgment for the plaintiffs, as prayed for by them, and the defendants appealed. (187)

C. M. Cook for plaintiffs.
Charles M. Busbee and A. Jones for defendants.

SMITH, C. J. Exception 1. The *feme* plaintiff testified to repeated conversations with her brother, the defendant Pearce, in which he said their father paid for the land, and that they were to share it equally, adding that he would go to Raleigh, sell to Purnell, and he would sell witness' 110 acres, which seems to have been the division agreed upon; that witness afterwards, with Pearce, went to Raleigh, where Purnell sold half the land to witness, Pearce being present, and delivered a deed for the same to her. But as it was without signature of his wife, the deed was handed back to him that she might also execute it; that subsequently Purnell delivered the deed to witness, perfected as required, and demanded his fee of $50; that witness paid him $5, and said: "I have not the residue of the money; keep the deed until I can get it"; and this was assented to, and the deed placed with one Stronach, to be surrendered when the debt was paid.

The exception is to the "foregoing" testimony, without pointing out the objectionable parts, and unless it is all inadmissible, the exception must be overruled, as decided in *Barnhardt v. Smith,* 86 N. C., 479.

But we do not see the sufficiency of the reason given for the objection, nor any other reason for excluding the evidence.

It consists of a narrative of facts, which go to show a recognition of the attaching trust, and a step in the direction of giving it effect. They are relevant and significant to uphold the denied trust, and are matters *dehors* the admissions of the existence of the trust.

(188) Exception 2. The second exception is to the portion of the testimony of the same witness which is in these words:

"When the deed was written, in Purnell's office, J. B. Pearce said, 'Now give me a mortgage on the land for a thousand dollars, and I will give it to your wife, and you will not have to pay it'; I asked Purnell if that was all right; he said, 'Yes, if he would give it up it was all right'; I gave the mortgage and note, and afterwards asked Purnell for them; he said Pearce had them, but he would get them for me; he asked me for some money; I said I had it, the $45, but wanted the note and mortgage before I paid it; this was before Purnell had conveyed the land."

No ground is assigned for the objection to this evidence, nor does any occur to us. It gives the details of what transpired in presence of the defendant Pearce, and previous to the acquirement by Lee of any interest in the premises.

The third exception, immediately following, rests upon no better basis of support, and all the evidence is pertinent as showing a recognized and an executed trust attaching in favor of the plaintiff.

Thus disposing of the rulings upon questions of evidence, we come now to consider the charge.

The defendants requested the judge to charge that the declarations of the defendant J. B. Pearce to the plaintiffs were not evidence against the defendants Lee and Montague, of the existence of a parol trust in favor of Mary R. Smiley, and that taking all the evidence together, there was not sufficient evidence to be submitted to the jury as against Lee and Montague to establish the creation of a trust in favor of Mary R. Smiley, in 110 acres claimed at the time of the purchase of the land or the payment for the same, or the execution of the deed to J. B. Pearce by Whitley. His Honor declined to give the instructions as asked for, and charged as follows:

That if the jury believe that J. W. Pearce, at the time of the purchase of the lands from Whitley, furnished the money and had the land
(189) bought partly for his daughter, Mary R. Smiley, the circumstance of the execution of the deed to Purnell, and his deed to Mary R. Smiley (if the jury shall believe that the same was executed without consideration), may be taken into consideration by the jury upon the question of the existence of the parol trust claimed by the plaintiff, and it was for them to say how the matter was.

Defendants excepted to the refusal to give the instruction asked, and to the charge as given.

We are reluctant to entertain a complaint to the instructions refused when asked in such general terms, and the first portion of them is, in

substance, to rule out evidence already passed on and admitted. This we do not deem it necessary further to consider in review. But the essential point presented is the alleged absence of evidence of matters outside of the declarations of the original trustee to attach a valid trust to his estate. This allegation is without the support of facts, and the charge could not rightfully have been given. The declarations held to be insufficient themselves to show a trust which a court of equity will enforce, are such as are but admissions of a trust *antecedently* created, but do not include such as create and annex the trust to the legal estate.

These are not mere declarations, but acts which form and constitute the trust, and where the creation of them contemporary with the transfer of the legal estate is established, we do not see the need of proof of outside matters in corroboration.

But the declarations here proved are but admissions of the preëxisting trust, and do require such support, and in our opinion it is furnished.

What significance has the transfer to Purnell, and his transfer of 110 acres to the plaintiff, but as overt acts in furtherance of the trust, and looking to its execution? The subject is carefully considered in *Shields v. Whitaker,* 82 N. C., 522, where it was held that an agreement for a compromise, where one is offered 200 acres of land in settlement, was a sufficient outside fact to meet the requirements of the rule. The charge given in substitution is entirely pertinent, and obnoxious (190) to no just complaint.

There is no error. The judgment is affirmed.

No error. Affirmed.

Cited: Hemphill v. Hemphill, 99 N. C., 442; *Hammond v. Schiff,* 100 N. C., 175; *Summerlin v. Cowles,* 101 N. C., 476; *Harding v. Long,* 103 N. C., 9; *Pittman v. Pittman,* 107 N. C., 167; *Hinton v. Pritchard, ibid.,* 137; *Blount v. Washington,* 108 N. C., 232; *Luttrell v. Martin,* 112 N. C., 607; *Jones v. Emory,* 115 N. C., 166; *Cobb v. Edwards,* 117 N. C., 247; *S. v. Stanton,* 118 N. C., 1186; *S. v. Ledford,* 133 N. C., 722; *Faust v. Faust,* 144 N. C., 386; *Gaylord v. Gaylord,* 150 N. C., 237; *Taylor v. Wahab,* 154 N. C., 223; *Rollins v. Wicker, ibid.,* 563; *S. v. English,* 164 N. C., 508; *Phillips v. Land Co.,* 174 N. C., 545; *Dellinger v. Building Co.,* 187 N. C., 848; *Martin v. Hanes Co.,* 189 N. C., 645; *Michaux v. Rubber Co.,* 190 N. C., 619.

ISAAC F. DORTCH ET AL. v. JESSE S. BENTON AND WIFE, NANCY I., AND W. H. JOHNSON.

Fraud—Homestead—Personal Property Exemption—Conversion—Vendor and Vendee.

1. One who makes a conveyance of his lands with intent to defraud his creditors does not thereby forfeit his right to a homestead therein.
2. A purchaser of land under an executory contract, who has paid a portion of the price, at once becomes entitled to a homestead therein, subject to the lien for the unpaid purchase money.
3. Money or other personal property invested in the purchase of land is thereby converted into realty and the owner is not entitled to have it set apart to him as "personal property exemption."

(*Duval v. Rollins*, 71 N. C., 218; *Rankin v. Shaw*, 94 N. C., 405; *Mebane v. Layton*, 89 N. C., 396, and *Crummen v. Bennet*, 68 N. C., 494, cited and approved.)

CIVIL ACTION, tried before *Shepherd, J.*, at January Term, 1887, of WAYNE.

The plaintiffs are creditors of the husband defendant, and it appears that the latter being insolvent, purchased the tract of land described in the complaint at the price of $3,500; that of this price he paid the sum of $1,600, and with the view to defraud and in fraud of his creditors, he procured the title to the land to be made to his wife, the *feme* defendant,

(191) and he and she at once executed a mortgage of the same to the defendant W. H. Johnson to secure the balance of the purchase money mentioned. The husband and wife insisted that notwithstanding the fraud as ascertained by the verdict of the jury, they were entitled to a homestead in the land and personal property exemption, subject to the mortgage referred to. The court gave judgment for the plaintiffs, allowing a personal property exemption of $500 to the husband. The husband and wife having assigned error, appealed to this Court.

J. W. Bryan filed a brief for plaintiffs.
R. W. Allen and S. W. Isler for defendants.

MERRIMON, J., after stating the case: It was decided in *Crummen v. Bennet*, 68 N. C., 494, that a party who conveyed his lands to another in fraud of his creditors did not thereby forfeit his homestead, and leave it subject to be sold under execution to pay his debts, because as to it, the conveyance was not fraudulent—the creditor could not have sold it, if the conveyance had not been made—it was not subject to be sold under

execution; in that respect he suffered no detriment. The fraud consisted in conveying the land—that part of it not embraced by the homestead; this was subject to be sold under the execution, and the conveyance as to it was therefore fraudulent and void as to the creditor. The latter had no interest as to the homestead; that was a matter between the debtor and the person to whom he made the conveyance. *Duval v. Rollins,* 71 N. C., 218; *Rankin v. Shaw,* 94 N. C., 405, and cases there cited.

The husband defendant had the right to purchase the land in question, and having done so, and paid $1,600 of the purchase money, he at once became entitled to a homestead in it, subject to the charge of the balance of the purchase money remaining unpaid, and debts as to which the homestead is not exempt from execution or other final process, as pointed out in *Mebane v. Layton,* 89 N. C., 396. The homestead (192) in the land thus purchased was not subject to sale under the execution to satisfy the debts of the plaintiffs—they had no interest in it, and it was not, therefore, as to them, fraudulent for the husband to cause the title as to it to be conveyed to his wife. The conveyance was, however, fraudulent as to the excess above the homestead as to creditors, and to that extent the plaintiffs had the right to have the land sold to pay their debts, subject to the mortgage debt—the balance of the purchase money thereof.

If the husband defendant had not employed the money he had in the purchase of the land, he might have been entitled to the personal property exemption to be taken out of it, but he chose to employ the money in the purchase of the land—he thus turned it into real estate, and thereby precluded himself from the right to the personal property exemption to be assigned out of it. The money ceased to be personal property of the defendant—he turned it into land, as he had the right to do. He was therefore entitled to the homestead and not to the personal property exemption. And as to the homestead, that was a matter between the husband defendant and his wife, to whom he caused the conveyance to be made.

There is error. Let this opinion be certified to the Superior Court, to the end the judgment may be modified in conformity with it, and as thus modified, affirmed.

Error. Reversed.

Cited: McCanless v. Flinchum, post, 373; *Thurber v. LaRoque,* 105 N. C., 314; *Younger v. Ritchie,* 116 N. C., 783; *Marshburn v. Lashlie,* 122 N. C., 240; *Rose v. Bryan,* 157 N. C., 174; *Grocery Co. v. Bails,* 177 N. C., 300.

(193)

CHARLOTTE GRIMES v. ELIZABETH TAFT AND R. T. WILSON, ADMINISTRATOR OF H. A. BOYD.

Estoppel—Purchaser—Judicial Sale—Administration—Lien.

1. A creditor having a specific lien upon the real property of a deceased debtor, and who has been made a party to a proper proceeding by the personal representative to sell such lands to make assets, is estopped from enforcing his lien against a purchaser at a sale made under a decree in such proceedings.

2. A purchaser under a decree to sell land for assets is not required to see that the money arising therefrom is properly administered.

3. Purchasers at judicial sales are only required to see that the court has jurisdiction and the judgment authorizes the sale; and they will be protected against the errors and irregularities of the court, and laches of the parties which they cannot see.

(*England v. Garner*, 90 N. C., 199; *Fowler v. Poor*, 93 N. C., 466; *Edney v. Edney*, 80 N. C., 81; *Shields v. Allen*, 77 N. C., 375; *Hunt v. Bank*, 2 Dev. Eq., 60, and *Whitted v. Nash*, 66 N. C., 590, cited and approved.)

CIVIL ACTION to set aside an execution for owelty of partition, and restrain defendant perpetually from issuing an execution, tried at March Term, 1887, of PITT, before *Merrimon, J.*, upon the following facts agreed:

1. John Boyd, Sr., died intestate in the year 1854, seized and possessed of certain lands in Pitt County, which descended to his children, Mary, John F., Sarah E., Elizabeth, Henrietta, McDowell, and Henry Alonzo Boyd, who are his heirs at law.

2. In the year 1859, Mary and John F., having become of age, by decree of the County Court of Pitt, had their respective parts of their father's land allotted to them in severalty.

3. On 26 August, 1865, Elizabeth married one John S. Taft, and had her share of her father's land allotted to her in severalty. The commissioners who set apart the share of Elizabeth, charged on the lands of Sarah E., Henrietta, McDowell, and Henry Alonzo Boyd, the
(194) sum of $1,237 to make her share equal. One-fourth of this sum was to be paid to said Elizabeth by each of said parties, and was to be charged on the land, to be thereafter allotted to them in severalty. At Fall Term, 1865, of Pitt County Court, judgment was rendered on said report.

4. In 1868, the respective shares of Sarah E., Henrietta, McDowell, and Henry Alonzo Boyd in their father's land, being still held by them in common, were, upon petition, duly divided, lot No. 4 being assigned to Henry Alonzo Boyd.

5. John S. Taft duly qualified as guardian of Henry Alonzo Boyd in 1869, and the sum of $1,830.01, the property of his ward, went into his hands as guardian, which was accounted for to the said ward.

6. The said Henry Alonzo became of age in June, 1870, and on .... June, 1870, conveyed 100 acres of lot No. 4 to one R. T. Wilson, which land has since become the property of the defendant Julia Wilson.

7. Henry Alonzo died without issue, and intestate, in June, 1878, and all of lot No. 4, except the part sold to R. T. Wilson, as aforesaid, descended to Mary, John F., Sarah E., Elizabeth, Henrietta, and McDowell Boyd, who were his brothers and sisters, and his heirs at law.

8. On 13 November, 1879, Robert T. Wilson, as administrator of Henry Alonzo, filed his petition in the Superior Court against the defendant Elizabeth, and the others, as the heirs at law of his intestate, reciting that the personal estate of intestate was insufficient to pay the debts, and praying for a sale of the land to make assets.

9. All of lot No. 4, except the part sold to defendant Julia, was duly sold by R. T. Wilson as administrator, under a decree of court, at which sale Charlotte Grimes, the plaintiff in this action, became the purchaser, and upon payment of the purchase money, said land was duly conveyed to her.

10. The value of the part of lot No. 4, sold by Henry Alonzo, (195) and now owned by Julia Wilson, is $560; the part of lot No. 4, owned by Charlotte Grimes, is $2,700.

11. The defendant Elizabeth Taft, on 7 July, 1885, for a mere nominal consideration, made and duly executed to her codefendants, R. T. Wilson and Julia Wilson, a release from any and all claims that might arise against them by virtue of said judgment.

12. The defendant Elizabeth Taft, in May, 1885, caused an execution to issue on said judgment, directing the sheriff to sell the lands allotted to Henrietta, Sarah E., McDowell, and Henry Alonzo, to satisfy the said judgment of $1,237.

13. No execution had previously issued on the judgment, and no motion for leave to issue execution was made, and no notice of the issuing of the execution was served on plaintiff.

14. More than ten years elapsed from the time Henry Alonzo became of age until the issuing of the execution on the judgment, not counting the time when there was no administrator on his estate. John S. Taft, the husband of said Elizabeth, died more than three years before the execution issued on said judgment.

15. Plaintiff shows no other payment than that arising from presumption of time, or by statute of limitation, or by estoppel, or than otherwise arises from the facts stated.

16. R. T. Wilson, administrator, after paying the debts of his intestate, paid to Elizabeth Taft $615.27 as her portion of the estate of her brother, Henry Alonzo—Elizabeth being one of the distributees and heirs at law of said Alonzo and one of the parties defendant in the action to sell the land to make assets to pay the debts of said Alonzo.

17. John S. Taft died utterly insolvent 27 April, 1877.

18. The defendant Elizabeth Taft was born on 1 March, 1843, and was married to John S. Taft on 3 December, 1861.

19. Henry Alonzo Boyd was born some time in the year 1849, and died in November, 1877.

(196) Upon this state of facts as agreed, the court was of opinion that the plaintiff was entitled to the relief demanded in the complaint, and gave judgment in her favor, from which the defendant Elizabeth Taft appealed.

W. B. Rodman, Jr., for plaintiff.

A. W. Haywood for defendants.

DAVIS, J. Whether the charge on the land allotted in the partition to Alonzo was a judgment or simply a statutory lien; whether the execution was irregular and void; whether it could be issued at all, and if so, without notice to the heirs; whether there was a presumption of payment and satisfaction; the effect of the release executed by Elizabeth Taft to R. T. Wilson and Julia Wilson; whether the plaintiff is entitled to a judgment against the defendant R. T. Wilson, administrator of Alonzo Boyd; whether the funds belonging to the estate of Alonzo Boyd, a portion of which was paid to Elizabeth Taft, can be followed, and other points presented and argued at length in this Court, are, in the view which we take of this case, not material or necessary to its determination.

The partition was made in 1865, the execution was issued in 1885, and in the intermediate time Alonzo Boyd had died intestate and without issue, and the land allotted to him, except the portion previously sold to Wilson, descended to his heirs at law, one of whom was the defendant Elizabeth, subject, however, to the payment of his debts, if the personal property should not be sufficient for that purpose.

In 1879 the defendant R. T. Wilson, administrator of Alonzo Boyd, under a judgment of the Superior Court of Pitt County, rendered in special proceedings instituted against the heirs at law of his intestate, to make real estate assets to pay debts, sold the said land, when the (197) plaintiff became the purchaser, paid the purchase money, and the land was conveyed to her under the decree of the court.

It is not denied that the sum charged upon the share allotted to Alonzo to make the division equal in the partition of the lands of John Boyd

was a specific lien upon the land so charged, and if not paid, the land descended to the heirs of the said Alonzo, subject to this specific lien.

The proceedings under which the land was sold are not set out in full, but it is to be assumed that they were regular, and the judgment and sale in accordance with the requirements of the statute. At all events, the defendant Elizabeth was a party thereto, and cannot be heard to say that they were not. It was necessary, among other things, that the petition should set forth the amount of the outstanding debts, and "a description of all the legal and equitable real estate of the defendant, with the estimated value of the respective portions or lots."

It is insisted by the defendant that the plaintiff purchased with notice of the lien upon the land created by the report and judgment confirming the same, made in the proceeding for partition; that being of record, she was conclusively fixed with notice, and purchased subject to the encumbrance, and must now discharge it, or else it may be discharged by a sale of the land, and for this latter purpose the execution was issued.

So far from this being the correct view, when the petition for a sale of the land to make assets to pay debts was filed by the administrator against herself and others, heirs at law, etc., the defendant was obliged to know what debt, if any, was due to her from the deceased; whether the "legal and equitable real estate" of the decedent was truly described; whether she had any claim or lien upon the land sought to be sold; and if so, she was further obliged to take notice of the law which prescribes the order in which the administrator was required to pay debts, and which made it his duty, first of all, to pay "debts which by law" had a *specific* lien upon the property of his intestate, and as against the plaintiff, she is concluded by the sale, she cannot be heard to say (198) that the title of the purchaser was not good. Purchasers in good faith at judicial sales are protected, says *Merrimon, J.*, in *England v. Garner,* 90 N. C., 199, "against the errors and irregularities of the court, and the laches of parties which they cannot see, and of which they have no opportunity to inform themselves," and for this he cites many authorities. Purchasers at judicial sales are not required to do more than to see that the court has jurisdiction, and that the judgment authorizes the sale. *Fowler v. Poor,* 93 N. C., 466; *Edney v. Edney,* 80 N. C., 81; *Shields v. Allen,* 77 N. C., 375. As against the parties to the proceeding under which the plaintiff purchased, she acquired a perfect title to the whole of the land; there was nothing to indicate that less than the whole estate was sold, and they are estopped.

It was the duty of the administrator to pay the debts of his intestate in their respective order, and the purchaser was not required to see that the purchase money was properly applied by him, and if the defendant

failed to get what was due to her, it was, as against the purchaser, her own fault. *Hunt v. Bank,* 2 Dev. Eq., 60; *Whitted v. Nash,* 66 N. C., 590.

By the purchase and deed, made in pursuance of the judgment of the court, the plaintiff acquired a title to the land discharged of the lien, and is entitled to the relief demanded. It appears that after paying the debts of his intestate, there remained a considerable surplus from the proceeds of the sale of the land, of which $615.27 were paid to the defendant as one of the distributees and heirs at law of Alonzo Boyd. It does not appear from the case agreed what disposition was made of the remainder, and the judgment of the court below is affirmed, saving and reserving to the defendant all rights, if she shall be advised that she has any, against R. T. Wilson, administrator of Alonzo Boyd, or against her co-heirs and distributees of the said Alonzo.

No error. Affirmed.

Cited: McIver v. Stephens, 101 N. C., 260; *Williams v. Johnson,* 112 N. C., 437; *Kadis v. Weil,* 164 N. C., 87; *Denson v. Creamery Co.,* 191 N. C., 203.

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LEWIS McGLAWHORN v. LEVI A. WORTHINGTON.

Deed, Description in—Evidence—Judicial Sale—Irregularity in Judicial Proceedings—Curative Act.

1. A description in a deed as "*all* that tract of land situate in said county and bounded as follows: adjoining the lands of B., H., M., T., and others, containing 360 acres, more or less," is sufficiently definite to render it effectual, and parol testimony is competent to fit it to the land.

2. A description in a deed as "all that tract of land lying in the county of Pitt and State of North Carolina, and known as part of the John Tripp land, adjoining the lands of B., W., and others, containing 100 acres," is too vague—certainly in the absence of any proof that any particular tract was known as "part of the John Tripp land."

3. Judicial proceedings under which a sale is made cannot be collaterally assailed for irregularity. Those in this case seem to be cured by The Code, sec. 387.

(*Gay v. Stancill,* 92 N. C., 455; *Fowler v. Poor,* 93 N. C., 466; *Hare v. Holloman,* 94 N. C., 14; *Ward v. Lowndes,* 96 N. C., 376; *Brown v. Coble,* 76 N. C., 391, and *Wharton v. Eborn,* 88 N. C., 344, cited and approved.)

THIS is a civil action, which was tried before *Shepherd, J.,* at Fall Term, 1886, of PITT.

On the trial the plaintiff put in evidence a deed from Jeremiah Worthington, administrator of Susan Worthington, deceased, dated 28 January, 1877, which recited that the administrator was "licensed and empowered to sell and convey the real estate of said deceased hereinafter described"; that he did sell by public auction the real estate of the said deceased hereinafter described, etc., and the land is therein described as *"all* that tract or parcel of land situate in said county and bounded as follows: Adjoining the lands of Augustus Braxton, James Hines, T. N. Manning, Caleb Tripp and others, containing three hundred and sixty acres, more or less," etc.

The plaintiff further offered parol evidence to prove that the (200) land thus mentioned and described was "bounded by the lands of Augustus Braxton on the west, James Hines on the north, T. N. Manning on the east, and Caleb Tripp on the south, and by the lands of one Dail, and of the heirs of one Elias Blount, at other points, and then offered the deed as evidence, and witnesses to prove these facts, and that the description in said deed fitted the lands claimed by the plaintiff and described in the complaint, and no other tract in the county, and that they knew the land by this description; also that Susan died seized of no other land in the county. Testimony and deed objected to by defendant. Objection overruled and testimony received and defendant excepted.

The plaintiff also offered in evidence the record of special proceedings under which Jeremiah Worthington, administrator of Susan Worthington, obtained authority to sell her land. Objected to by defendant, because the same was irregular and void, in that the summons was issued and returnable in ten days after service instead of twenty days, and that the order of sale was made two days before the return day named in the summons; that no notice of confirmation of sale was given, and that the decree of confirmation was made on the day of sale; that the guardian *ad litem* was appointed without inquiry as to his fitness on notice of his appointment; that there was no answer or appearance in the action by any of the defendants of age. The court overruled the objection and the defendant excepted.

The defendant contended and requested the judge to declare that the deed from Jeremiah Worthington, administrator of Susan Worthington, to the plaintiff, was void for want of authority to sell the land, which the judge refused to do, and the defendant excepted.

The plaintiff having closed his case, the defendant offered in evidence deed from Andrew Worthington and his wife, Susan, to Elizabeth Butts, dated 1 January, 1870. It was objected by the (201) plaintiff that the description of the land attempted to be conveyed was too vague and uncertain.

The testimony of witnesses showed that the John Tripp land consisted of one tract of fifteen acres, one tract of one hundred and sixty acres, which together were known as the John Tripp land, included in the allotment by the commissioners to Susan Worthington, and there was no evidence showing that any particular portion of the John Tripp land was known as a part of the John Tripp land.

The defendant offered to prove that said John Tripp tract of land adjoined on the west the land known as Willis Weatherington's, and on the north by the lands of Richard H. Butts.

Upon this evidence his Honor held that the description of the land attempted to be conveyed by this deed was too indefinite and conveyed no title and the defendant excepted.

The last mentioned deed described the land therein mentioned as "all that tract or parcel of land lying and being in the county of Pitt and State of North Carolina, known as a part of the John Tripp land, adjoining the lands of Richard Butts, Willis Worthington and others, containing one hundred acres."

There was judgment for the plaintiff and the defendant appealed.

No counsel for plaintiff.
W. B. Rodman, Jr., for defendant.

MERRIMON, J., after stating the case: There is no assignment of error in the record as to the admission or effect of the report of the commissioners who made partition of the land of Spier Worthington, deceased, among his heirs at law, and this Court must confine its action to the correction of errors assigned. It is stated in the case settled upon appeal, that this report was put in evidence without objection.

(202) As to the first exception, we think the reference to and description of the land in the deed was sufficiently definite to render the deed effectual in this respect.

A particular tract—*all* of a particular tract owned by the intestate, adjoining the lands of certain persons named, is designated upon the face of the deed—it points to the tract intended. And obviously the evidence produced was pertinent and competent, as tending to prove that the land was that embraced by the deed and description specified in the complaint. *Brown v. Coble,* 76 N. C., 391; *Wharton v. Eborn,* 88 N. C., 344.

We are also of opinion that the objection to the special proceedings put in evidence cannot be sustained. There were irregularities and informalities in them, but not such as rendered it void.

The court had jurisdiction of the subject-matter and of the parties; it certainly so appears upon the face of the record. The summons was

served upon all the defendants except one, who was of age and accepted service. It seems that one or more of them may have been infants; this, however, appears only by inference. It seems that a guardian *ad litem,* for whom does not appear, was informally appointed, and he "accepted service" of the summons. Such irregularities do not render the proceedings void. They may afford ground for a motion in the proceedings themselves to set the judgment aside, but not for attacking them collaterally. Besides, such irregularities seem to be cured by the statute (The Code, sec. 387); *Gay v. Stancil,* 92 N. C., 455, 464; *Fowler v. Poor,* 93 N. C., 466; *Hare v. Holloman,* 94 N. C., 14; *Ward v. Lowndes,* 96 N. C., 376.

If it be granted that in any possible view of the deed offered in evidence by the appellant, it could be upheld as sufficiently designating a particular tract of land, no evidence was produced to prove that any particular portion of the John Tripp land was known as "a (203) part of the John Tripp land." There was an absence of proof to help the description in the deed. No error appears, and the judgment must be affirmed.

No error. Affirmed.

Cited: Edwards v. Bowden, 99 N. C., 81; *Blow v. Vaughan,* 105 N. C., 205, 207, 208; *Perry v. Scott,* 109 N. C., 382; *Wilson v. Deweese,* 114 N. C., 658; *Smith v. Gray,* 116 N. C., 314; *Rackley v. Roberts,* 147 N. C., 205; *Speed v. Perry,* 167 N. C., 126; *Patton v. Sluder, ibid.,* 503.

JAMES W. CUTHRELL, ADMINISTRATOR OF WRIGHT HAYS, AND JAMES T. ALSOP, v. JANE R. HAWKINS.

Estoppel—Evidence.

The maker of a deed is estopped to prove that, *at the time of the execution thereof,* he had no such estate or title in the property as it proposes to convey, but he is not debarred from showing that he has subsequently acquired another independent title consistent with the provisions of the deed.

(*Eddleman v. Carpenter,* 7 Jones, 616; *Reynolds v. Cathens,* 5 Jones, 437, and *Johnson v. Farlow,* 13 Ired., 84, cited and approved.)

CIVIL ACTION tried before *Shipp, J.,* at May Term, 1887, of HALIFAX. There was judgment for the plaintiffs, and defendant appealed.

The case made in the pleadings is as follows:

On 4 March, 1875, the plaintiff, John T. Alsop, agreed with the defendant to make advances in the sum of two hundred dollars in supplies required to make a crop, to secure the payment of which, when due on 1 December following, the defendant conveyed to him a tract of land now claimed. The supplies were accordingly furnished, and nothing has been paid for them, and the mortgage, as alleged, has been transferred to one Wright Hays, plaintiff Cuthrell's intestate.

(204) The demand is for the payment of the debt and the foreclosure and sale of the premises for that purpose.

The answer, among other defenses, states that the land belonged to Arthur McDaniel, who, at his death, devised it to the defendant for life with remainder for her children, except William D. Faucett, then living, and the issue of such as may have died leaving issue then living; that it becoming necessary to pay his debts, his administrator, with the will annexed, instituted proceedings to sell the same, and having obtained license in 1878 or 1879, sold and conveyed the same to William D. Faucett, to hold in trust for himself, and upon the trust mentioned in James McDaniel's will, the defendant being one of the *cestui que trusts* to the extent of a 25/34 interest in the whole. The jury, in response to the two issues as to the plaintiff's right to the property, and the bar of the statute of limitations, found them both in favor of the plaintiff.

Upon the trial the defendant proposed to prove by record and documentary evidence, the facts set out in her answer and relied on as a defense to the action on its merits, but the court refused to allow of its introduction, ruling that the mortgage deed of defendant operated as an estoppel upon her, and she was not permitted to controvert the plaintiff's title.

John A. Moore for plaintiff.
R. O. Burton, Jr., for defendant.

SMITH, C. J., after stating the case: The form of the deed under which the alleged estoppel arises, is not set out in the transcript, and we cannot see what estate it undertakes to pass, nor whether it has supporting covenants of warranty. It must be deemed to have intended to pass such estate as the defendant then had in the premises and no more, and this was an estate for her life, subject to the contingency of being

(205) sold by the personal representative, as in fact it was subsequently sold to meet the necessities of the estate. At this sale the land was bought with trust funds derived from another source as already stated.

Under such circumstances, does an estoppel intervene and exclude proof of the facts mentioned? The defendant does not attempt to deny the operation and effect of her deed in divesting her life estate under the testator's will and passing it to the mortgagee, and this the law does not leave her at liberty to do.

It is said in the notes of the American Edition to the Duchess of Kingston's Case, 2 Smith L. Cases, 625, to have been repeatedly decided "that no estate can be passed by deed either at common law or under the statute, which is not vested in interest at the time of the grant, and that a deed which fails as a conveyance, cannot be set up as an estoppel even as against the grantor and those claiming under him by descent or purchase." Yet the contrary is held in many States when there is a warranty, and the writer controverts this qualification as unsupported by principle.

In *Moore v. Willis,* 2 Hawks, 559, *Henderson, J.,* says, that if A sell to B by indenture, he thereby affirms that he has title when he makes his deed, and if he had not, and afterwards acquire one, in an action by him against B, the title of the latter prevails, "not because A passed to him any title by his deed, for he had none then to pass, but because A is precluded from showing the fact."

But this is not the case here presented. The evidence rejected was to prove that a life estate did pass under the deed, which had terminated, and consistently with this the acquirement of the land by another, the only interest of the defendants being in the trustee's distribution of its fruits. An estoppel, when resulting from the execution of a deed, disables the bargainor to prove that *at the time he possessed no estate in the land,* or such an estate and interest as it proposes to transfer, but it does not debar him from sharing an *after acquired* estate (206) consistent with the provisions of the deed.

In *Johnson v. Farlow,* 13 Ired., 84, a party conveyed the land, and afterwards remained in possession, holding adversely for more than seven years, but he had no color of title, except that under the deed of a former bargainor to himself. This he was not allowed to do, *Pearson, J.,* saying that "if McCracken had taken a deed from a third person, that would have been color of title, and seven years absolute possession under it would, in the language of the cases, have ripened it into a perfect title, thus originating what did not exist at the date of his deed, for the averment of this new title would not be inconsistent with the admission which he was bound to make, that his deed had passed the title to the lessor."

Again, under circumstances not dissimilar, the bargainor, while remaining in possession, made a deed to another, who entered and held adversely for seven years, title was held to have vested in the bargainee

under the second deed. *Reynolds v. Cathens,* 5 Jones, 437. The ruling is carried still further, as intimated in *Johnson v. Farlow, supra,* and it was held that the bargainor, who after such conveyance took a new deed from a stranger and entered and held possession adversely for seven years against the world, had acquired a new estate, which must prevail over that he previously undertook to pass. *Eddleman v. Carpenter,* 7 Jones, 616. Nor is the present case affected by these rulings. An estate for life, subject to the contingency of being put an end to by proceedings such as were adopted and were required by the exigencies of the testator's estate, was conveyed. It might have been undisturbed but for this necessity. The trust fund created under another will has been under direction of the court invested in the purchase of this land, and the terms of this trust forbid that the defendant should have any (207) control of it. The trustee is dead, and none substituted in his place, and made a party to the action. The defendant has been singled out, and a recovery of the land sought by virtue of a deed made when she had an estate which has run out.

We do not concur in the ruling that shuts the door of inquiry into all these essential facts, or that this is the legal result of the alleged estoppel.

We forbear to proceed with the other demand for a judgment for the debt, or to inquire into the sufficiency of the statutory bar thereto, or the claim to allow satisfaction out of the life interest of the defendant in the part of the proceeds of the sale of the land which has been deposited with the clerk, and this for the reason that the exclusion of the evidence offered by the defendant, is the only matter for review, brought up by the defendant's appeal. There is error, and must be a new trial.

Error. *Venire de novo.*

Cited: Hallyburton v. Slagle, 132 N. C., 950; *Weston v. Lumber Co.,* 162 N. C., 200.

ISAAC EIGENBRUN v. W. H. SMITH AND M. COHEN & SON.

Fraudulent Conveyance—Evidence—Purchaser—Trial—Judge's Charge.

1. A purchaser from a trustee under a conveyance containing upon its face evidence of a fraudulent purpose to defeat creditors takes with notice of such evidence.

2. Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors, his purchase will be void.

3. A conveyance to a trustee for use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide.

4. A provision in a conveyance for use of creditors, by which the vendors shall be allowed to retain from the property conveyed such exemptions as they may be entitled to, is not evidence of fraud; but a provision that the assignees shall be retained in the service of the trustee as salesmen, and that the trustee shall be exempt from liability for their conduct as such, is evidence of a fraudulent purpose.

5. It is no ground for a new trial that the plaintiff failed to introduce evidence which, by the permission of the court, he withheld for rebuttal, because the defendant offered no proof; he should have asked permission to continue his proofs when the defendant declined to introduce evidence.

6. It is not error for the court, in instructing the jury upon the *bona fides* of an alleged fraudulent sale, to use the terms "fair price" instead of the words "for value."

7. It is not competent to contradict a proposition made by a party in one action by a pleading prepared by his attorney involving the same facts, but in a different action.

(*Palmer v. Giles*, 5 Jones Eq., 75; *Frank v. Robinson*, 96 N. C., 28; *Davenport v. McKee*, 94 N. C., 325, cited.)

CIVIL ACTION, tried before *Merrimon, J.*, at May Term, 1887, (208) of VANCE.

The plaintiff claimed certain property mentioned in the pleadings, under a deed of trust, executed by Robinson & Holt, to H. T. Watkins, dated 17 March, 1886, and a bill of sale from the said trustee, and Robinson & Holt, to himself, dated 19 March, 1886.

The defendant Smith is the sheriff of the county of Vance, and as such, levied upon and took possession of said property under execution, in favor of his codefendants, M. Cohen and Charles Cohen, who alleged that the deeds under which the plaintiff claims, were made to defraud creditors, and void, as against them, they being creditors.

The issues submitted were:

1. Is the plaintiff the owner and entitled to the possession of the property claimed?

2. What was the value of the property?

The plaintiff offered in evidence the deed of trust and bill of sale, the execution of which was proved.

He then introduced G. W. Holt, who testified "that he was one (209) of the partners of Robinson & Holt, but did not sign the bill of sale; that he had relinquished to the plaintiff, Eigenbrun, his interest in the goods mentioned in the bill of sale, except his personal property exemptions." He testified further, that "he knew the goods which were seized by the sheriff, the defendant, and that they were part of the same

goods sold to plaintiff, and their cost price was $120; that the goods consisted of clothing and shoes; that they were winter goods; that they were seized in March, and were at that time in possession of H. T. Watkins, trustee; that the cost value of the whole stock of goods would have been about $2,000; that the value of the personal property assigned to him as personal property exemptions was not worth $500; that the stock of goods was worth $2,000, exclusive of the personal property exemptions; that his exemptions were appraised by Willie Britt, Lewis Barnes and Benjamin Smith; and that C. W. Cole, deputy sheriff, had charge of the appraisers; that Sam Davis, a clerk in the store, sued the firm of Robinson & Holt, and got a judgment, and had the personal property exemptions of himself and Robinson set apart; that an inventory of the goods was taken."

At this point in the examination of Holt, the court inquired of the plaintiff's counsel if it was their purpose to go into their entire case at this time, and the counsel replied that it was, and defendant's counsel stated that he had no objection. Whereupon the court stated, that as the Supreme Court had said in regard to the deed of trust that they were not prepared to say that the deed upon its face was void for fraud, but the evidence of fraud apparent upon the face of the deed might be considered by the jury in connection with other facts and circumstances in ascertaining whether the deed was made with a fraudulent intent,

(210) the court would, in the interest of time, require the defendants at this point to show such facts and circumstances outside of the deed as they relied upon to establish that the deed was made to defraud creditors.

The counsel for the defendants then cross-examined the witness at much length in regard to the time, manner and circumstances under which the bill of sale was executed, tending to impeach it by showing that it was in the night; that the door was closed; that the sheriff was at the door, and not permitted to enter; that the claim of the defendants, M. Cohen & Son, was resisted, and other facts and circumstances tending to show, as defendants insisted, that the transaction was not bona fide.

After the cross-examination, the witness was reëxamined by counsel for plaintiff, his testimony tending to show, as plaintiff alleges, the bona fides of the transaction.

The deed provided, among other things, that Robinson & Holt should be employed by the trustee as salesmen at $50 per month each.

Plaintiff then introduced C. B. Cole, who, on cross-examination, testified that he had in his hands the execution of M. Cohen & Son against Robinson & Holt, and that he couldn't get into the storehouse, because it was fastened up; that it was about midnight before he could get in;

that he saw Robinson & Holt; Robinson didn't have much to say; one time witness tried to get in the store and Robinson slammed the door; that witness got the execution after twelve o'clock in the day and was trying to get in the store from time to time until midnight and Eigenbrun claimed the goods and forbade the levy.

At this point the plaintiff, Eigenbrun, was sworn and called to the witness stand, but before he was examined, counsel for plaintiff agreed that certain witnesses who had been subpœnaed to testify as to character only, might be introduced and examined by the plaintiff. The plaintiff then introduced four witnesses who testified that the general character of Augustus Wright and the plaintiff, Eigen- (211) brun, was good.

Plaintiff then announced that he would close his case and introduce Wright, Eigenbrun and other witnesses in reply.

The defendants then said that they would introduce no testimony.

The court charged the jury as follows:

If the assignment by Robinson & Holt to H. T. Watkins on 17 March, 1886, was made with the intent on the part of the former to delay, hinder or defraud their creditors or any one of them, the assignment was void, and this was so whether Watkins participated in or knew of such intent or not.

The main question, with respect to the assignment is, was it a bona fide transaction or was it a trick or contrivance of Robinson & Holt to defeat their creditors or any one of them?

If the latter was their purpose, then the assignment, as to creditors, was void, no matter whether Watkins knew of such purpose or not.

Robinson & Holt, being unable to pay all their indebtedness in full, had the right to prefer the creditors named in the deed of assignment made by them to Watkins, if by this assignment the appropriation of the property assigned was absolutely made with no reservation for their own benefit to the injury of creditors unprovided for. The intent of Robinson & Holt in executing the assignment is a substantive fact which the jury must find as such, and a material element in the assignment.

The fact that Robinson & Holt, in making the assignment, reserved to themselves their personal property exemptions allowed by the Constitution and laws of the State, does not in any manner affect the validity of the deed, and is no evidence of a fraudulent intent or of a purpose to delay or hinder their creditors.

The provision of the deed for the benefit of Robinson & Holt (212) and for the exemption of the assignee from liability is evidence of a fraudulent purpose on the part both of Robinson & Holt and of

the assignee, without regard to the legal effect of such a provision in respect to the assignee's liability.

The plaintiff, Eigenbrun, if he knew of the deed of assignment from Robinson & Holt to Watkins, had notice of such evidences of a fraudulent intent as were apparent on the face of the deed. Did he know of the deed of assignment, and did he refuse to take a bill of sale from Watkins unless Robinson & Holt would also relinquish their claim to the goods? Was the bill of sale made by Watkins and Robinson & Holt with the intent to hinder, delay and defraud the creditors of Robinson & Holt, and did plaintiff know of and participate in such purpose? If there was collusion between Watkins, Robinson & Holt and Eigenbrun, to hinder, delay or defraud the creditors of Robinson & Holt or any one of such creditors, the bill of sale will be void, even though founded upon a valuable consideration.

The plaintiff's counsel requested the court to charge specially as follows:

1. That even though the jury should find that the deed of trust was fraudulent, yet if they find that the purchase by the plaintiff, Eigenbrun, from Robinson & Holt and the trustee, and their bill of sale to him was bona fide and for value, the plaintiff would be entitled to recover.

2. That if Eigenbrun paid for the property with his debt and those which he controlled, that would be a purchase for value.

The court gave the first instructions, adding only in lieu of the words "for value" the words "a fair price."

The second instruction was given, adding at the end of it the words "provided those debts were a fair price for the goods."

The court then said to the jury in connection with these special (213) instructions, they should consider all the court had previously said to them in regard to the assignment and whether or not Eigenbrun had notice of any fraudulent intent of Robinson & Holt in making the same, if any such intent shall be found.

The court then called the attention of the jury to the evidence bearing upon the several points of the charge. Plaintiff excepted to the entire charge.

There was a verdict for the defendants.

The plaintiff moved for a rule for a new trial upon the following grounds:

1. Because on the trial of the cause the plaintiff's counsel were proceeding to develop their entire case and insisted on so doing, but his Honor, being of a different opinion, ordered that, in the interest of time, said attorneys should only prove the allegations of their complaint, and not introduce any evidence tending to rebut fraud till after the

defendant had produced some proof of fraud other than the badges of fraud in the assignment, by which plaintiff's counsel understood they were to hold back said portion of evidence till defendant had introduced his evidence, but defendants introduced no evidence, and then plaintiff lost the evidence of his three most important witnesses.

2. That it being contended by defendant's attorney that witness Holt had stated that said plaintiff's debt alone had been accepted in full payment of the stock of goods conveyed in said bill of sale, one of the plaintiff's attorneys offered to show by the complaint in the case of *Frank & Aydlet v. Robinson & Holt* (which case, it had been agreed, should abide the result in this) that said defendant's attorney had himself charged that said sale was made for the benefit of all three of the creditors preferred in the second class, to wit, Eigenbrun, Wright and Jacob Cohen, but his Honor would not allow the pleading to be read.

3. Because his Honor, while giving the charge prayed for in reference to the bill of sale, nearly in the words asked for, added (214) "it is proper for the jury to consider what he had said in reference to fraud in assignment, and as to whether said Eigenbrun had notice of said fraud," whereas he should have charged that the bill of sale was good, if for a valuable consideration, even if the jury should find that the assignment was made with the actual intent to defraud, and that Eigenbrun had notice of such fraud—as all the title the trustee did not have was in Robinson & Holt, who joined in the bill of sale.

4. Because in the prayer for instructions asked for his Honor substituted the words "for a fair consideration" for the words "for value."

The court refused the motion for a new trial.

No request was made of the court by counsel for the plaintiff for leave to introduce as witnesses either the plaintiff himself or Augustus Wright, or any other witness or evidence. The counsel for plaintiff in their argument to the jury, insisted that their evidence abundantly established the bona fides, both of the deed of trust and the bill of sale, while the counsel for the defendant contended that in addition to the evidences of fraud apparent upon the face of the deed of trust, the evidence of the witness Holt, and of the deputy sheriff Cole, conclusively established that the deed of trust and the bill of sale were fraudulent and void.

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

E. C. Smith and H. T. Watkins for plaintiff.

T. M. Pittman for defendants.

DAVIS, J., after stating the case:

1. The first instruction to the jury asked for by the plaintiff was given, with a substitution of the words "a fair price" in lieu of the

words "for value," and there was no error in this of which the
(215) plaintiff could complain. It was as favorable as he could ask.

The evidence tended to show that the plaintiff knew that there were executions in the hands of the sheriff. In *Beals v. Guernsey,* 8 Johnson, 446, it is said: "The rule is, that the purchaser, knowing of the judgment, must purchase with the view and purpose to defeat the creditors' execution; and if he does it with that purpose it is fraudulent, notwithstanding he may give a *full* price. The question of fraud depends upon the motive. The purchase must be bona fide, as well as upon good consideration. This was the rule as declared by *Lord Mansfield* upon repeated occasions."

The knowledge of the fact that the sheriff was seeking to subject the property to the satisfaction of executions in his hands would not, of itself, invalidate the purchase by the plaintiff, but if he purchased with a view to defeat the remedy of creditors in relation to the goods purchased, even though he gave "a fair price," the validity of the sale may well be questioned. *Wickham v. Miller,* 12 Johnson, 320; *Palmer v. Giles,* 5 Jones' Eq., 75.

2. The second instruction asked for was given with the addition, "provided those debts were a fair price for the goods."

What has just been said applies equally to this exception, and there was no error in the modification of the prayer.

We only refer to the plaintiff's exception to the "entire charge" of his Honor (which is insufficient as an exception) to say that it was a plain, clear, fair and full exposition of the law as applicable to the evidence submitted to the jury, in which we can see no error.

As to the alleged grounds for a new trial:

1. When the case of *Frank v. Robinson* was before this Court at the last term (96 N. C., 28), referring to the provision in the deed in regard to the employment of the assignors at a compensation of $50
(216) each per month, the Court said that it furnished "evidence of a fraudulent intent, proper, with other facts attending the transaction, to be submitted to a jury."

It devolved upon the defendants, who were attacking the deed, to show the "facts and attending circumstances," if any, to satisfy the jury that the deed was fraudulent, and the suggestion of his Honor "in the interest of time" and the clear intimation that the laboring oar was upon the defendants, could in no way prejudice the plaintiff; at all events there was no objection interposed, and if, upon the cross-examination of the witnesses for the plaintiff, the defendants were satisfied that the facts and circumstances elicited were sufficient to establish the negative of the issue, they were not obliged to introduce testimony, and it was the mistake of the plaintiff, for which the court was in no wise

responsible, if he "lost the evidence of his three most important witnesses." He had a right "to prove his case, in his own way, and by his own evidence," and the defendants had an equal right to prove their case, if they could, by plaintiffs' witnesses, and the case of *Davenport v. McKee,* 94 N. C., 325, cited by counsel for plaintiff, has no application.

When upon the announcement of the plaintiff that he had closed his case, the defendants said they would introduce no testimony, if a request had been made by him for leave to introduce further testimony, it would, no doubt, have been granted, and he could have had the benefit of the important testimony which had been "held back," but no such request was made, and he seems to have been satisfied to go to the jury upon the testimony offered, and this presents no ground for a new trial.

2. The complaint in the case of *Frank & Aydlett v. Robinson & Holt* was not competent evidence, and was properly excluded.

3. The ground for a new trial, based upon alleged error in his (217) Honor's charge, has no foundation.

It was insisted on behalf of the trustee that the sale to the plaintiffs should be sustained, because it was a disposition of the goods advantageous to the *cestui qui trusts,* and we are referred to Burrill on Assignments, 459. His Honor charged the jury that it was not necessary that the trustee should participate in or know the intent with which the deed was made, and his bona fides could not affect it. There is

No error. Affirmed.

Cited: Bobbitt v. Rodwell, 105 N. C., 244; *Banking Co. v. Whitaker,* 110 N. C., 348; *Barber v. Buffaloe,* 111 N. C., 208; *Davis v. Smith,* 113 N. C., 100; *Stoneburner v. Jeffreys,* 116 N. C., 86; *Thomas v. Fulford,* 117 N. C., 689; *Cox v. Wall,* 132 N. C., 736.

JOHN BEAVANS AND JOHN ARRINGTON & SONS v. JOHN GOODRICH ET AL.

Appeal—Exception—Homestead and Exceptions—Issues of Fact—Trial by Jury.

1. An order of the court setting aside the allotment of a homestead, is not an order to which an exception may be made and reserved for the final hearing, but is one from which an appeal may be at once prosecuted.

2. The omission of appraisers to insert in their report the date of allotment is not sufficient ground for vacating it.

3. Questions of fact arising in the allotment of property exempt from execution are not such "issues of fact" as entitle the parties to a trial by jury.

4. Where the debtor designated the particular land which he desires to have allotted him as "an increase of exemption" (under chapter 347, laws 1885), and the creditors assent thereto, neither party can demand that the property shall be valued by a jury.

(Carr v. Askew, 94 N. C., 194, cited and approved, and *Hines v. Hines*, 84 N. C., 122, cited, distinguished and approved.)

(218) CIVIL ACTION tried before *Shipp, J.*, at May Term, 1887, of HALIFAX.

In 1873 the defendant, Goodrich, borrowed money of the plaintiff Beavans, and to secure the payment of it, he and his wife, the defendant Elizabeth, executed a mortgage on certain real and personal property mentioned in the complaint.

In 1879 the plaintiffs, Arrington & Sons, obtained judgments which were duly docketed, and became liens upon the defendants' land, subject to the mortgage executed to Beavans, and to the defendants' right of homestead.

Subsequently, in 1880, 1881 and 1882, the defendant became indebted to the defendant James W. Jenkins, and executed mortgages to secure the said indebtedness.

The plaintiffs brought this action to Fall Term, 1883, against Goodrich and wife, to foreclose the mortgage executed to the plaintiff Beavans, and for the payment of the judgment in favor of the plaintiffs, Arrington & Sons, out of the proceeds of the land, in excess of the amount necessary to discharge the mortgage to Beavans.

The defendants filed their answer, and among other things, insisted that James W. Jenkins was a necessary party to any proceeding for foreclosure. The said Jenkins was accordingly made a party defendant, and filed his answer at the Spring Term, 1884, and the defendants, Goodrich and wife, at the Fall Term, 1884, filed an answer to the allegation contained in the answer of defendant Jenkins.

At January Term, 1886, there was a judgment in favor of Beavans for foreclosure and sale for the payment of the debt due to him, and declaring the judgments in favor of Arrington & Sons a lien upon the lands from 17 March, 1879, subject to the right of the defendant to a homestead.

The judgment also declared the debt due to the defendant Jenkins, secured by mortgage executed 17 February, 1882, a lien upon the land conveyed by the mortgage deed from that date. It was further
(219) adjudged that if the debts due to the plaintiffs and to the defendant Jenkins were not paid off and discharged by the defendants Goodrich and wife within sixty days that the lands should be sold

upon the terms prescribed in the judgment, and a commissioner was appointed to make the sale. It was further ordered and adjudged, "that before selling the land hereinbefore mentioned, the said commissioner shall cause to be laid off to said Goodrich, by three disinterested persons qualified to serve as jurors, and having the other qualifications provided by the statute, the homestead of the said Goodrich; that in selling the said land the said commissioner shall first sell that portion of the said land not included in said homestead, and he shall not sell the said homestead nor any portion thereof, unless it becomes necessary to do so in order to satisfy the amounts herein declared to be due to the plaintiff, John Beavans, and the defendant, Joseph W. Jenkins." Thereupon appraisers were appointed, who made an allotment of the homestead in May, 1886, and filed their report, to which the defendants Goodrich and wife filed exceptions, in which they asked, in substance, that their homestead be increased, so as to make it $1,000 in value, by adding to the allotment already made, seven acres "adjoining and lying contiguous to that already allotted," and giving the boundaries of the tract from which the additional allotment is to be made, which additional allotment is to begin "at the southwest corner of the tract heretofore allotted to them, and running thence a straight line to the northern boundary of said unallotted tract, to a point which will include within said reallotment seven acres."

By consent of the plaintiffs and the defendant Jenkins, it was agreed that the commissioners may allot to the defendant, Goodrich, the seven acres of land asked for by him, in addition to the tract already allotted, and thereupon it was ordered that W. F. Parker, R. B. Butt and John W. Cherry lay off and allot the additional seven acres in (220) an adjoining tract of land, beginning at the "northwest corner," etc.

The commissioners make report on 18 October, 1886, that after a careful hearing and examination, they found that the defendant Goodrich had no other land "adjoining the tract of land heretofore allotted" to him as a homestead, but that he had other land not adjoining.

Thereupon, at November Term, 1886, another order was made, which, after reciting that the description of the land set out in the exceptions heretofore filed by the defendant Goodrich, is so vague and uncertain as to render it impossible for said commissioners to allot to him the additional seven acres, directs the commissioners "to lay off and set apart to the defendant Goodrich, as and for his homestead, in addition to the tract of land heretofore allotted to him, seven acres of land in the unallotted tract of land described in the complaint in this action, adjoining, etc., beginning at the southwest corner of the said unallotted tract, thence to the northern boundary of the said tract, to a point which will

include within said allotment seven acres, if so directed by the said Goodrich, and it is further ordered that the said commissioners shall set apart and allot to said Goodrich seven acres in said unallotted tract, in such manner and by such boundaries as the said Goodrich may direct, but if the said Goodrich shall fail to give such directions, then the said commissioners shall lay off the seven acres in said unallotted tract as to them may seem proper."

From this order an appeal was taken by the defendant to the Supreme Court, "and afterwards abandoned."

At the November Term, 1887, an additional order was made, which, after reciting that the commissioners heretofore appointed to allot, etc., "have wilfully refused to obey the order of this Court," made at November Term, 1886, removes said commissioners, and appoints J. J. Robertson, William Burnett and George B. Curtis in their stead, with
(221) the same powers and duties as those specified in the order of November Term, 1886.

The commissioners last named made an allotment, and reported the same to March Term, 1887, to which the defendant, Goodrich, filed numerous exceptions, upon the hearing of which an order was made setting aside the report, and ordering the commissioners to again proceed to make the allotment as provided in the order primarily made.

At May Term, 1887, the said commissioners made the following report:

The undersigned beg leave to report that, in obedience to the order of this Court, made in this action at its March Term, 1887, having met upon the premises, and having been duly sworn by the sheriff of Halifax County, we did on this ..... day of ....., 1887, with the assistance of a surveyor, allot to the defendant, John Goodrich, as a portion of his homestead, a certain part of the tract of land heretofore unallotted, and mentioned in the pleadings in this action as containing one hundred and forty-seven acres, accurately described as follows:

Beginning at a stake on the public road leading from the town of Enfield to Scotland Neck; thence running north 60½ east 40 poles to a stake on the north side of a ditch; thence north 16½ west 29 poles to a stake; thence south 60½ west 40 poles to a stake on north side of the public road; thence south 16½ east 29 poles to the beginning, containing seven (7) acres. The said beginning point is 116 poles and 14 links from the center of a ditch on the south side of the road that forks with the main road (or public road), the said Goodrich not being present in person or by attorney.

To this report the defendant, Goodrich, filed exceptions, "and demanded a jury trial upon the same."

His Honor overruled the motion for a jury trial, and heard the case on the exceptions, and rendered judgment in favor of the plaintiffs, "from which ruling and judgment, as well as those made (222) against him by Judge Gudger, the defendant, Goodrich, appealed:

1. Because his Honor, Judge Gudger, set aside a former order rendered in this cause without notice, and made said order whilst this case was pending in the Supreme Court.

2. Because the report of the commissioners to May Term, 1887, does not show when the said homestead was allotted.

3. Because his Honor, Judge Shipp, refused a jury trial of the issues raised between the parties.

4. (Abandoned in this Court.)

5. Because his Honor gave judgment against the defendant, not only for the costs of the last allotment of the homestead, but for one-half of the costs of the previous allotment.

Spier Whitaker for plaintiffs.
John A. Moore for defendants.

DAVIS, J., after stating the facts: The first ground of appeal cannot be sustained.

The defendant had filed exceptions to the first allotment, and had asked that seven acres additional should be allotted to him, and undertook to designate the particular part of the tract from which the seven acres should be taken, and this was assented to by the plaintiffs, but owing to the imperfect and erroneous description given by himself, it was impossible for the commissioners, with the aid of the surveyor, to make the allotment as requested, because he had no land adjoining the tract first allotted. As the defendant had no adjoining land from which the additional allotment, as designated by him, could be made, though the land designated was near to that allotted, a further order was necessary, and that order gave to the defendant the right to designate and select the additional seven acres.

From this order the defendant appealed, but he failed to per- (223) fect his appeal, and as the case states, abandoned it, and if there was anything in it, it cannot avail him now.

All the subsequent proceedings were heard upon that order. It was not a mere fragmentary order or ruling to which exception could be taken, and reserved to be passed upon on final judgment. It went to the merits of the case. It is not like the case of *Hines v. Hines,* 84 N. C., 122, and the cases which follow it, in which this Court dismissed appeals from interlocutory orders and rulings, which did not affect the merits or final determination of the case. The facts as found show that

the defendant not only had requested the seven acres additional to be allotted, which was assented to by plaintiffs, but he had every opportunity of locating the allotment. The facts show that the commissioners sought his aid in the allotment, but he would not give them any information or assistance.

The report leaves blank the date of the allotment, but it is found, as a fact that it was on 22 April, 1887. The defendant knew when it was done, and was urged to be present and give information and assistance in locating the seven acres. The omission to state the exact time in the report worked no injury to him, and the second exception cannot be sustained.

The third exception is to the refusal of his Honor to grant a jury trial of the issues raised between the parties.

The questions of fact which arise in the progress of the allotment by the commissioners are not such issues of fact as entitle the parties to a trial by jury; they are governed by the principle laid down in *Carr v. Askew,* 94 N. C., 194, in regard to questions of fact, and if they were not, the defendant by his own action in this case had waived the right.

But his counsel insists that under the amendment contained in chapter 347 of the laws of 1885, the defendant had a right to have the value of the property assessed by the jury and laid off by the
(224) commissioners, in accordance with their verdict. Having demanded "an increase of the exemption or allotment," undoubtedly the parties, both plaintiffs and defendants, or either, would have had the right to have the property valued by a jury, as provided in the amendatory statute of 1885; but in this case the defendant himself, in addition to specifying the property from which "the increase or re-allotment" was to be made, designated the quantity or number of acres which he wished to have added to the allotment previously made, and to this the plaintiffs assented, so there was no issue to be decided or difference to be settled by any one except the commissioners, whose simple duty it was to have measured and laid off to him the seven acres selected by himself and assented to by the plaintiffs. What possible necessity could there be for a jury? The objection looked very like a frivolous trifling with the plaintiffs and with justice. If he failed to have the lines run just as he wanted them, it was manifestly his own fault, because the facts found show not only that he had every opportunity to make definite the land specified by him, but he was requested by the commissioners to do so. It is true that in one of the exceptions filed, the defendant says that "the land allotted does not embrace seven acres," but this exception is not presented in the case on appeal, and the lines given in the report make a rectangular parallelogram, and a simple calculation will show that the area allotted embraces a fraction

more than seven acres. There was nothing in the third exception of which the defendant could complain, and it is not sustained.

The fourth exception presented in the case on appeal having been abandoned in this Court, the only remaining exception is to the judgment against the defendant for costs. The Code, sec. 510, provides that "the costs and expenses of appraising and laying off the homestead . . . when the same is made under execution, shall be charged and included in the officer's bill of fees, upon such execution or other final process, and when made upon the petition of the owner, (225) they shall be paid by such owner . . ."

Section 521 provides that if the Superior Court shall confirm the assessment or increase the exemption allowed, the creditor shall pay all the costs of the proceeding in court.

It may become necessary, under the judgment in this case, to sell the whole of the land, and this cannot be ascertained till after the sale of the unallotted land. The question of costs must await the sale and final judgment.

Thus modified the judgment of the Superior Court is affirmed, and the defendant Goodrich will pay the costs incurred by the appeal to this Court.

No error. Affirmed.

Cited: York v. McCall, 160 N. C., 279.

IN THE MATTER OF C. F. GRIFFIN.

Contempt—Judgment—Jurisdiction.

1. After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the Supreme Court, it becomes final, and the court below has no power to remit or modify it.
2. If the act which constitutes the contempt is an offense against the criminal law, it may be prosecuted as such notwithstanding the contempt has also been punished.

MOTION, heard by *Merrimon, J.,* at February Term, 1887, of WILSON.

The appellant, C. F. Griffin, was on 31 July, 1886, adjudged to be in contempt for disobeying an injunction issued in the case Green et al. *v.* Griffin et al., then pending in that court, and ordered to pay a fine of

two hundred and fifty dollars. From this judgment he appealed
(226) to the Supreme Court, where the judgment was affirmed. See 95 N. C., 50.

Subsequently, at February Term, 1887, of Wilson Superior Court, the appellant made an application to have the fine remitted.

The court was of opinion that it had no jurisdiction or authority to remit the fine, and therefore adjudged that the judgment be entered in accordance with that of the Supreme Court. The Court was inclined, and would have reduced the fine if it had conceived it had the authority to do so.

Griffin appealed from the refusal of the court to grant his application upon the ground that it had not jurisdiction to do so.

No counsel for appellant.
F. A. Woodard contra.

SMITH, C. J. When this cause in a different form was before us a year since, the sole point presented was whether an interlocutory order of restraint looking to a permanent injunction as the relief sought, from which an appeal had been taken to this Court, so effectually annulled and neutralized its operation as to leave the enjoined party as free to act as if no such order had been made. The court ruled against this contention, and sustained the action of the judge in proceeding to punish by imposing a fine for the contempt and *affirmed the judgment.*

The present appeal raised the question of the legal power of a subsequent court, after an affirmance of the judgment from which the first appeal was taken, to alter, modify or remove the imposed penalty.

When the matter was first presented the nature of the proceeding—wholly punitory in its object—suggested the analogy of a criminal action, by whose rules it would be governed. But upon considera-
(227) tion, it will be seen that the differences are marked and essential.

In the one case the guilt of the accused must be ascertained by a jury verdict, and the end is the suppression of crime by the infliction of the penalty incurred; in the other, the purpose is to secure obedience to a rightful judicial order, and for this purpose to coerce or to punish for a wilful disregard of the command. The one belongs to the general administration of the law, the other is an exercise of judicial authority inherent in the court, and indispensable in the exercise of its functions. If the act which shows the contempt constitutes also a criminal offense, it may be prosecuted and punished as such, notwithstanding the contempt has also been punished.

No cases have been cited in the argument to aid in the inquiry, nor have our own researches disclosed any. We do not undertake to say

how far a succeeding judge, in conducting the cause upon a proper application, may modify the terms of the order, or whether he may not possess the power under the general jurisdiction he is exercising, but we think after an appeal the action becomes final and conclusive. This is in harmony with the new enactment, Acts 1887, ch. 192, which in criminal and civil actions alike leaves in force from its rendition the judgment from which the appeal is taken, when there is found to be no error and the judgment is affirmed.

The judgment in this case is affirmed.

No error. Affirmed.

Cited: Black v. Black, 111 N. C., 304; *Banking Co. v. Morehead,* 126 N. C., 291; *S. v. Hooker,* 183 N. C., 768.

(228)

JOHN O. GARDNER ET AL. v. THE CITY OF NEW BERN.

Constitution—Municipal Corporations—Necessary Expenses—Cities and Towns.

1. Article VII, sec. 7, of the Constitution does not prohibit the appropriation of funds in the treasury of a municipal corporation to the necessary expenses thereof—this prohibition is confined to the contracting of debts for the objects there forbidden, without the sanction of a majority of the qualified voters.

2. The 29th section of the charter of the city of New Bern, which provides that "no appropriation" (of city funds) "shall be made except for the necessary expenses of the city, and but by a concurring vote of six-eighths of all the councilmen," does not prohibit an appropriation of such funds to the necessary expenses of the city by a majority of the votes of the councilmen.

(Southerland v. Goldsboro, 96 N. C., 49, cited and approved.)

THIS is a civil action for an injunction, heard by *Philips, J.,* in chambers, at Tarboro, on 22 June, 1887.

The charter granted to the city of New Bern on 14 March, 1879, contains in section 29 this provision:

"All moneys arising from taxation, donation or other sources, shall be paid to the treasurer of the city, and no appropriation thereof shall be made, except for the necessary expenses of the city, and but by a concurring vote of six-eighths (6/8) of all the councilmen."

The council consists of eight persons, of whom one is elected in each of the five wards into which the city is divided. The other three are

appointed, two by the second and third ward councilmen so elected, one by each, and the other by the councilmen of the second ward and fourth ward acting in concert.

The council thus constituted and charged with the municipal government, and subject to the responsibilities of its management, created the office of janitor, and affixed to it a salary of $20 per month for
(229) one year, as also salaries to the existing offices of mayor, treasurer, and city attorney, and made an appropriation of $24.90 for the expense of whitewashing trees, without the concurrence of six members, but by a majority, or through the vote of the mayor when there was a tie. The present action, instituted by the plaintiff on behalf of the taxpayers, is predicated upon an alleged disregard of the restraints put upon the council in its disposition of the public funds, and seeks a perpetual injunction against the future exercise of similar powers by the agreeing action of a less number than six of the members of the council.

Upon an application of the plaintiff, based upon the complaint, supported by the affidavit of one of the members of the board, a restraining order was issued by Shipp, J., forbidding the councilmen, by name, from issuing any voucher or to audit any account, to be paid out of the treasury, unless the same be concurred in by six-eighths of all the councilmen, and forbidding the treasurer from paying any claim unless so audited and allowed; and further ordering the defendant to show cause before Philips, J., at Tarboro, on 22 June, 1887, why the temporary injunction should not be made perpetual.

The matter was so heard upon additional affidavits, not necessary to consider, as the essential facts are not disputed, and the evidence relates to the past action of the board in recognizing the interpretation put upon the clause of the enactment by the plaintiff, and, all parties being present by counsel, it was ordered and adjudged "that the restraining order granted by his Honor, Judge Shipp, in this cause be continued, and that the defendant and all of its officers be enjoined and restrained from doing any act which is in conflict or which is prohibited by said restraining order until the final hearing of this cause."

From this ruling the defendant appealed.

(230) *O. W. Guion for plaintiffs.*
W. W. Clark for defendants.

SMITH, C. J., after stating the facts as above: The plaintiff insists that the charter wholly disables the members of the board from appropriating any moneys in the treasury, however derived, to pay any but the necessary expenses of the administration of the city government,

and as to these, the appropriation must be made by the concurring action of six of the number to be effectual and valid.

The defendant construes the section as excepting unconditionally what are termed "the necessary expenses of the city" from the operation of the previous sweeping provision, and as putting a limitation upon the prohibition, whereby on such vote of six members in favor of an expenditure, outside of the necessary expenses, the appropriation may be made.

It must be admitted that the phraseology used in the enactment is somewhat obscure, and its purpose difficult to arrive at satisfactorily, in other words, to tell whether the concluding words restrain action in regard to *necessary expenses* or qualify the extent of the preceding inhibitory clause.

Our reflections, aided by the able arguments of counsel, lead us to the adoption of the construction put upon the section by the defendant, which eliminates appropriations for necessary expenses from the previous prohibitory words, and attaches to the latter the qualification in the closing words.

This leaves the city in the precise condition and in the possession of the powers specified in section 7, Article VII, of the Constitution, which indirectly, but not less explicitly, permits the exercise by municipal bodies of the power of making provision for necessary expenses, free from the restraints in other cases. This conceded constitutional
right is denied in the charter when interpreted as contended by (231) the plaintiff. This places these provisions in harmony.

It is not entirely correct to say, as does the plaintiff's counsel, that the Constitution imposes the restraint upon outside expenditures, and therefore the restrictive words, if confined to them, would be without force and meaningless. The Constitution prohibits the contracting of a debt or the levying of any tax except for necessary municipal purposes without the sanction of a majority of the qualified voters, *Southerland v. Goldsboro,* 96 N. C., 49, but does not extend in terms to the disposition of funds in the treasury of the municipal corporation, while the charter has reference to the latter. The one antagonizes the contracting of debts for the forbidden objects, the other the improper appropriations of money without the assent of the specified number of members of the board. And further, when the popular vote approves the proposed expenditure and legalizes the borrowing of money and the levying of the tax, the charter does not permit the withdrawal of it unless on the conditions specified in it.

If the restriction was intended to be universal, why was it necessary to insert section 50, which specifically requires a contract for work and material for the city exceeding $200, to be made with concurrence of the

six members? If all contracts and all appropriations are forbidden even for the city's necessities, why are these contracts singled out and the disabling clause applied to them?

We think a free and reasonable construction of the charter is, that necessary expenses are wholly excepted, and the clause was intended to qualify the general restraint, and permit other expenditures not forbidden in the Constitution when six members should favor and sustain them.

A contrary view meets with numerous and almost insurmountable difficulties, for it might enable a minority well nigh to paralyze the operations of the city government, and totally obstruct the
(232) exercise of the functions of its officers in matters involving the public welfare.

It is needless to go into details and point out these possible embarrassments, which the General Assembly can hardly be presumed to have intended in passing the charter.

There is, therefore, error in the ruling of the judge and in the order for an issue of an injunction against making provision for necessary municipal expenses unless with the concurrence of six members of the council, and so far it must be reversed and the cause be allowed to proceed in the court below. Let this be certified.

Error. Reversed.

Cited: Swindell v. Belhaven, 173 N. C., 3; *Adams v. Durham,* 189 N. C., 233.

E. S. PARKER AND WIFE, JACKY ANN PARKER, v. L. V. MORRILL, ADMINISTRATOR D. B. N. OF L. P. BEARDSLEY.

Evidence—Correction of Contract.

1. If a written contract contains all the essential elements, and its terms are sufficiently comprehensive to embrace the subject-matter, parol evidence will not be admitted to contradict, extend or modify it.

2. If, by mutual mistake, accident, or fraud of a party, the contract does not express truly the agreement of the parties, the courts will give relief.

(Lawrence v. Hester, 93 N. C., 79; *Ray v. Blackwell,* 94 N. C., 10, and *Nickelson v. Reves, ibid.,* 559, cited and approved.)

THIS is a civil action, and was tried before *Merrimon, J.,* at Spring Term, 1887, of PITT.

The action was instituted against E. C. Yellowly, the executor of L. B. Beardsley, the father and guardian of the *feme* plaintiff, for a balance alleged to be due upon settlement and for an account.

The plaintiff alleged that the guardian had, or ought to have (233) had, in his hands about $2,500 belonging to his ward, but that he represented that he had only about $1,500; that upon the guardian's agreement to invest the funds admitted by him, in certain lands for the *feme* plaintiff, and that he would by his last will settle certain other property upon her, they agreed to release and discharge him; that he had not invested the entire fund as he agreed, and had died not having made the provision in his will as stipulated.

The answer controverted these allegations, and set up a settlement and release—the portions of which, material in the decision of the point presented, were as follows:

Whereas, in an accounting had between plaintiffs and Beardsley, guardian, it appears that there is now in the hands of Beardsley $1,494.15, which amount covers the entire indebtedness of Beardsley, as guardian, including interest to 1 January, 1878; and whereas, said Parker and wife desire to settle such guardianship, to discharge Beardsley and the sureties upon his guardian bond, and to have the said amount, subject to certain deductions to be hereinafter mentioned, invested by said Beardsley in Pitt County lands, with title in Beardsley as trustee, upon the trusts hereinafter declared. . . .

Second, that the balance of said fund after paying said debt and expenses (about $100), the said Beardsley shall invest in lands in Pitt County, taking title in the name of himself and his heirs, in trust to hold the same to the separate use of the said J. A. Parker (the *feme* plaintiff) during her life, and immediately after her death, in trust convey to such person as she may appoint by last will and testament, duly executed according to law, and in default of any such appointment by last will and testament, in trust to convey to the heirs at law of said J. A. Parker.

There was no reference in the contract to the alleged provision to be made by the will.

Plaintiffs then offered to show that, as an inducement to them (234) to enter into said agreement, the testator of defendant agreed with the plaintiffs that he would by his last will and testament give and devise to the said *feme* plaintiff, all of his interest, as it then existed, in certain mortgages known as the Anderson mortgages, and that only upon this promise and agreement did plaintiffs agree to sign the written agreement which had been prepared by counsel at the instance of Beardsley, the defendant's testator; and that plaintiffs would not have signed the same but for such a promise; and to follow up this proof by

showing the value of the property agreed to be settled upon *feme* plaintiff by will; and proof that Beardsley by his last will left the *feme* plaintiff only a set of furniture worth about $25.

The defendant objected to this evidence on the ground that it tended to contradict the written agreement. The court sustained the objection and the plaintiffs excepted, and appealed from the judgment rendered.

A. W. Haywood for plaintiff.
No counsel for defendant.

MERRIMON, J. The agreement in writing under seal, executed by the plaintiffs and the testator of the defendant, put in evidence on the trial by the plaintiffs, plainly upon its face, by its terms, scope and meaning, purports to set forth fully the grounds and considerations that prompted its execution. It is broad and comprehensive as to the matters embraced by it, and there is nothing in its terms or purpose that implies omission in any respect, and particularly the consideration is mentioned in like comprehensive terms.

When the parties to a contract in writing thus refer in it to matters constituent of it, it must be taken that the whole of the material parts of such matters are mentioned, nothing to the contrary appearing; and parol evidence will not be received to contradict, add to, take (235) from, or modify what the parties have thus put in writing. The reason for this is, that the parties having seriously put their contract in writing, have agreed to make the writing evidence of the same, and they are presumed to have set down how and to what extent they are willing to be bound and concluded as to the material matters and things mentioned therein, unless they provide otherwise in terms or by reasonable implication.

If by mutual mistake of the parties, accident, or the fraud of a party, the contract omitted something, or a part pertinent, or embraced something that ought to have been excluded, then a court of equity might give relief. *Lawrence v. Hester,* 93 N. C., 79; *Ray v. Blackwell,* 94 N. C., 10; *Nickelson v. Reves, ibid.,* 559.

The court therefore properly excluded the parol evidence, the obvious purpose of which was to prove consideration of the agreement omitted from and not mentioned or referred to in it. There is no error, and the judgment must be affirmed.

No error. Affirmed.

Cited: Meekins v. Newberry, 101 N. C., 19; *Bank v. McElwee,* 104 N. C., 308; *McGee v. Craven,* 106 N. C., 356; *Taylor v. Hunt,* 118 N. C., 172; *Quin v. Sexton,* 125 N. C., 453; *Cobb v. Clegg,* 137 N. C., 157; *Potato Co. v. Jenette,* 172 N. C., 5.

T. L. SANDERSON AND WIFE, FANNY SANDERSON, EXECUTRIX OF GEORGE W. CHARLES, v. MARY OVERMAN ET AL.

Devise—Administration—Sale of Land for Assets.

1. Where a testator devised all of his estate to his wife (who was appointed executrix) for life, and directed that she should "use and enjoy the same and every part thereof without any let, hindrance or interference by any of the persons hereinafter mentioned and provided for as remaindermen or any others, for and during the full end and term of her life": *Held*, that the life tenant and executrix is not entitled to have the estate of the remainderman in the lands devised subjected to the payment of the testator's liabilities until the personal estate has been applied to that purpose, although it may have been necessary for her maintenance.

THIS was a special proceeding, heard by *Shipp, J.*, upon ex- (236) ceptions to report at Fall Term, 1886, of PASQUOTANK.

There was judgment for defendants and plaintiffs appealed.

George W. Charles, residing in Pasquotank County, died in the year 1877, leaving a will which has been admitted to probate, and appointing therein as sole executrix the plaintiff Fanny, who afterwards intermarried with the plaintiff Sanderson.

In his will the testator devises and bequeaths to said Fanny all his "estate and property of every kind, real, personal and mixed, for and during her natural life," and directs that "she may use and enjoy the same without any let or hindrance, or interference by any of the persons hereafter mentioned or provided for as remaindermen or any others during the full end and term aforesaid," with limitations in remainder of the lands.

This special proceeding was instituted to obtain leave from the court to sell the real estate of the deceased and apply the proceeds to the outstanding indebtedness, upon an averment that the personal estate has been exhausted in the course of administration, and it is necessary to resort to the testator's lands against the devisees and heirs at law of the testator. Such answers as were put in by the very numerous defendants owning or having an interest in remainder in the several tracts or lots described in the petition, controvert the allegation that the personal estate had been exhausted in a due course of administration, and allege that there are assets applicable to, and more than sufficient to meet the unsatisfied demands against the testator, with costs of administration with which the executrix ought to be charged before re- (237) course is had upon the real estate.

After the removal of the cause by appeal from the ruling of the clerk, refusing to give the license asked for, to the judge, there was an order of

reference for a statement of the administration account and a report made thereof in August, 1885.

The report set out in detail the funds received of the personal estate and their expenditure, with a computation of interest on the several items at the rate of eight per cent from the date of each, from which it appeared the aggregate of receipts were $19,384.15, while the sums paid out amount to $14,112.07, which, with commissions allowed of five per cent on both, and deducted from the receipts, leave in the hands of the executrix the sum of $3,597.27.

In this account is not embraced the rents which the referee finds were consumed in paying taxes, keeping up the plantation and making improvements and otherwise, and with which she is not charged.

In a subsequent report the referee ascertained that the chattel property, other than notes, bonds and other evidences of debt which passed into her possession, was of the value of $1,692.46, all of which she has used and consumed, except certain articles worth $142.15 still on hand, which he concludes she is not to be charged with, but only with the value of what has been used and consumed, to wit, $1,550.31.

The referee further reported that "the executrix has held the assets which she considered liable for the debts of the estate of her testator, ready, and has been willing to pay, and has paid out of such the debts as they have been determined and presented."

Of the five exceptions taken to the report by the plaintiffs, all but the first were sustained by the court, and the first, in these words, overruled:

1. For that the referee erred in charging plaintiff in his (238) original report with $1,692.46 for chattel property, instead of $142.15. The evidence of both plaintiffs show all of the chattel property was consumed in the use, except $142.15, which is not contradicted, and the referee finds the fact, the amount being $1,550.31.

The court therefore gave judgment against the petitioners, dismissing the petition, and they appealed.

E. F. Aydlett for plaintiffs.
No counsel for defendants.

SMITH, C. J., after stating the case: The rulings upon the four exceptions sustained, require the interest which is computed on both sides of the account at eight per cent to be reduced to six per cent; that no interest be charged against the executrix upon a series of items enumerated in exception two, and this interest to be stricken out; the like reduction from eight to six per cent of the interest on a claim specified in exception three against F. L. Grandy—a difference stated to be

$136.42—and that the indebtedness of Esau Randall by notes, whose principal is $1,000, be also stricken out as a charge against her.

The correction required by the ruling on exception three, by which the executrix is released of interest on specified items, would necessitate the striking of an equal amount of interest from the list of expenditures, since, if not herself required to pay interest, she could not charge it on the moneys applied to the debts, and therefore the result would be the same as if the correction were not made.

But the change to be made in the general account by the corrections required in the rulings upon the exceptions, cannot be seen upon a mere inspection of the papers, nor whether any residue will be left in the hands of the executrix when the account is thus reformed, or an amount sufficient to meet the demands against the estate. To ascertain the result a reference is necessary.

While we do not hesitate to hold the executrix responsible for (239) what she has appropriated to her own use, as the debts must be paid before legacies, her responsibility depends upon the state of the general account when charged with these goods. The inquiry is important only to determine if she still has assets, or ought to have them, adequate to the present wants of the estate.

This reference ought to have been made and executed in the court below before disposing of the action by dismissing it. As it was not done, to avoid the delay of sending the cause back in order that the inquiry may be then made, we shall order a reference to our own clerk and await the result, and it is so ordered.

Since the foregoing part of the opinion was prepared, the clerk makes his report, and finds a residue in the hands of the executrix of $1,804.05 unexpended, which is more than is required to discharge the remaining liabilities. Thus a case for the sale of the lands is not presented, and the petitioners are not entitled to the relief demanded.

The judgment, therefore, dismissing the petition must be affirmed, and it is so ordered.

No error. Affirmed.

JAMES T. HODGES v. D. H. LATHAM.

Estoppel—Eviction—Warranty.

1. If A conveys land to B and subsequently to C, in an action by the latter for a breach of a covenant of warranty, the vendor is estopped from denying that B had obtained the title.

2. It is not necessary, in an action for a breach of warranty in a deed conveying lands, that the purchaser shall show an actual eviction under

legal process. If it appears that he yielded possession to the owner of the paramount title, or the lands being vacant, such owner entered into possession, it is such an eviction as will entitle him to recover.

3. If there has been no eviction by legal process, the burden of showing paramount title is upon the purchaser. Even then, the existence of such title in another, without actual possession, is not a breach of the covenant of warranty.

(Grist v. Hodges, 3 Dev., 198; *Herrin v. McEntire,* 1 Hawks, 410, cited and approved.)

(240) CIVIL ACTION, tried before *Avery, J.,* at June Term, 1887, of BEAUFORT, for an alleged breach of warranty and damages therefor.

The plaintiff offered in evidence a deed from D. H. Latham (the defendant) and Harriet L. Latham, his wife, dated 22 December, 1875, duly executed, proved and registered, conveying the land therein described to the plaintiff in fee, with warranty of title. He then testified that he purchased the land described in the deed and gave his notes of one hundred dollars each, payable one each for four successive years, and one payable on demand; that he paid the first and second notes, and on 3 December, 1878, he paid $25, for which he exhibited defendant's receipt. He further testified that he had paid in all $245, prior to 3 December, 1878, which sum he claimed, with interest from that date, as damages.

Plaintiff further testified that he worked on the land in 1876, and cultivated three crops; that the next year he rented it to William Mitchell, a colored man; that in October, 1879, being the October after the date of the twenty-five dollar receipt, he went to Pitt County and returned about Christmas of the same year and found that Willis Cherry had got possession of the land; that Cherry had married one of Crandall C. Little's daughters (said Little being the person to

(241) whom defendant had conveyed the land prior to the war, as was shown by the testimony); that he went to Latham and asked him to give up the notes that remained unpaid, and he refused to give them up. After plaintiff came back from Pitt County, he went with Colonel Wharton to defendant; Wharton told him that he could make the title good, and defendant said it was good and he was not going to bother any more about it. Witness stated on cross-examination that he did not abandon the land, but that his tenant, Mitchell, had lost possession when witness returned at Christmas, 1879; that Latham recovered two judgments against him, on 30 September, 1879, before a justice of the peace, one for two hundred and one for one hundred dollars, and had them docketed in the Superior Court. It was admitted that the said judg-

ments were rendered 30 September, 1879, for the three purchase money notes for said land, and that witness did not resist a recovery on such judgments. It was further admitted that Cherry took possession between the time when the plaintiff left the land in charge of his tenant Mitchell and went to Pitt County, and the date when the defendant issued the summons against the heirs at law of C. C. Little, which was 28 November, 1879. Plaintiff then introduced the record of a suit in behalf of D. H. Latham (the present defendant) against Willis Cherry and others, heirs at law of C. C. Little, commenced 28 November, 1879. By virtue of the various orders and decrees in this suit the land was sold and conveyed to W. A. Blount by the defendant on 1 November, 1886, and sale confirmed.

The record referred to and sent up as part of the transcript shows a summons originally issued 28 November, 1879, in the name of D. H. Latham v. Willis Cherry and others, and a petition representing that in 1861 the plaintiff in that proceeding (D. H. Latham) sold to Crandall C. Little a parcel of land, situated in Beaufort County, for the price of $700; that at the time of the purchase Little executed his note to said plaintiff (Latham) for the purchase money, (242) which was still unpaid, with the exception of $48.16 paid 11 September, 1861; that Little died in 1862, leaving the defendants (Cherry and wife and others) his heirs at law; that administration was taken out on the estate of Little shortly after his death by one Grey Little, who has since died, and that no personal property remained belonging to the estate, and that "the bond given by the said administrator is insolvent." He asks that a guardian *ad litem* be appointed for the infant defendant, and for a decree for a sale of the land for the payment of the purchase money. To this there was a demurrer, which was sustained, but subsequently D. H. Latham qualified as administrator *de bonis non* of Crandall C. Little, and by agreement of counsel an amended petition was filed in his name as administrator *de bonis non,* setting forth in substance among other things, the indebtedness of the said C. C. Little to the plaintiff in that proceeding (D. H. Latham); that the said indebtedness was the unpaid part of the purchase money for the land described in the petition. The petition further represented that the said Crandall C. Little "died seized in fee simple and possessed of the following tract or parcel of land" (describing it); that it is worth $500 or $600, and asks judgment that it may be sold for the purpose of paying the debts of his intestate.

The court intimated that the jury would be instructed that the plaintiff could not recover, and thereupon the plaintiff submitted to a judgment of *nonsuit,* and appealed to the Supreme Court.

George H. Brown, Jr., for plaintiff.
No counsel for defendant.

DAVIS, J., after stating the case as above: It was under and by virtue of the judgment in the special proceeding of D. H. Latham, administrator, etc., of C. C. Little v. Willis Cherry et al., that the land (243) in question was conveyed to W. A. Blount by the defendant Latham, and the proceeds of the sale, or so much thereof as was applicable to that purpose, applied in discharge of the balance of the purchase money due upon the sale of the land made to C. C. Little in 1861. The paramount title was in the heirs of Little, claiming under the sale made to their ancestor in 1861, by the defendant Latham. He cannot be heard to say that their title was not good and paramount to that acquired by the plaintiff from him.

One of the heirs of Little had acquired possession in the manner stated in the case. Was that such an eviction, actual or constructive, as to entitle the plaintiff to recover upon the warranty in the deed from Latham to him? We think it was.

"The existence of a better title, with an actual possession under it, is of itself a breach of the covenant." The purchaser is not required to bring an unnecessary action in which he must fail to recover the possession. *Grist v. Hodges,* 3 Dev., 198; *Herrin v. McEntyre,* 1 Hawks, 410; *Duvall v. Craig,* 2 Wheaton, 45.

If there has been no eviction by legal process the burden of showing that there was a better or paramount title is upon the purchaser, and even then the mere existence of a superior title in another is not a breach of the covenant, but the purchaser need not be actually evicted by legal process. "It is enough that he has yielded possession to the rightful owner, or the premises being vacant that the rightful owner has taken possession." Washburn on Real Property, Vol. 3, 406, 3 ed.

In *Sprague v. Baker,* 17 Mass., 586, there was a valid prior encumbrance by mortgage, which, upon demand, the purchaser discharged. This was held to be such an eviction constructively as entitled him to recover upon the warranty. So in *Norman v. Lee,* 2 Black, 507, (244) it is said that an adverse possession by virtue of a paramount title is regarded as an eviction, and involves a breach of the covenant of warranty.

There was error, and the plaintiff is entitled to a new trial.

Error. Reversed.

Cited: Hodges v. Wilkinson, 111 N. C., 58; *Mizzell v. Ruffin,* 118 N. C., 72; *Shankle v. Ingram,* 133 N. C., 258; *Cover v. McAden,* 183 N. C., 647.

E. F. PRITCHARD v. J. C. MEEKINS, SR.

Usury—Limitations.

1. The statute, The Code, sec. 2836, barring actions for the recovery of the penalty for taking usury, begins to run from the time of the *payment* or *receiving* of the usurious interest, and not from the date of the contract from which it arose.

2. The acceptance of any consideration, as here notes on other parties in payment of the usurious interest, is in violation of the statute, and will subject the payee to the penalty.

(Symington v. McLin, 1 D. & B., 291; *Godfrey v. Leigh*, 6 Ired., 396; *Ligon v. Dunn, ibid.*, 133; *Dawson v. Taylor, ibid.*, 225; *Stedman v. Bland*, 4 Ired., 296; *Mills v. Building Association*, 75 N. C., 292, and *Shober v. Hauser*, 4 D. & B., 91, cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, at June Term, 1887, of PASQUOTANK County.

In August, 1883, the plaintiff and his wife Emily borrowed of the defendant Meekins $2,500, and at the same time executed their notes amounting to $2,772 (the same set out in the complaint), which were secured by mortgage upon the lands of Emily, containing power of sale.

The plaintiff claimed that the excess of the notes above $2,500, to wit, $272, was to cover and provide for usurious interest. The defendant, on the other hand, alleged that the plaintiff had agreed to pay in addition to the eight per cent all costs and expenses, including attorney's fees, expenses of defendant in coming to Elizabeth City from his home in Columbia, his time, etc., and that the said excess was to (245) cover those expenses and costs.

Upon the issue thus raised evidence was introduced by the parties in support of their claims, and the jury found against the defendant.

No part of the principal or interest of the notes was paid at maturity, and on 17 November, 1885, after the lands had been twice advertised for sale, the following settlement was had, to wit: part of the land described in the mortgage was sold to one Joshua Davis, by consent of the parties, at the price of $2,000, and his notes for that amount, due 1 January, 1887, 1 January, 1888, and 1 January, 1889, payable to E. F. Pritchard and Emily Pritchard, were assigned by them to the defendant—and received by defendant at their face value of two thousand dollars—as follows: "Pay within note to J. C. Meekins without recourse.

(Signed) E. F. PRITCHARD.
EMILY PRITCHARD."

And in addition thereto they paid him in cash $1,400, whereupon the notes of 21 August, 1883, were surrendered to the makers, marked across their face "settled 17 November, 1885." This action was begun 19 November, 1885.

The defendant contended: 1. That the action is barred by the statute of limitations. 2. That the assignment of the notes as aforesaid and the payment of the money, are not, under a proper construction of the statute, section 3836 of The Code, a payment so as to subject the defendant in this action to the penalty for usury.

The court held against the defendant on both points, and he excepted. The court rendered judgment for the plaintiff for the sum of $450. From this judgment defendant appealed to the Supreme Court.

(246) *Ernest Haywood for plaintiff.*
John Gatling for defendant.

DAVIS, J. The jury having found that it was no part of the agreement and consideration that the plaintiff was to pay in addition to the sum loaned all costs and expenses, attorney's fees, etc., two questions only are presented for our consideration.

First. Is the action barred by the statute of limitations?

The sum of $2,500 was borrowed and notes in the aggregate for $2,772 were given, in August, 1883; the payments were made and the notes settled and surrendered on 17 November, 1885, and the action commenced on 19 November, 1885.

The learned counsel for the defendant insisted that the usurious transaction, if any, *occurred* when the notes were given in August, 1883, and that two years from that time having elapsed before the action was commenced the statute barred, and for this position he relied upon the language of The Code, sec. 3836. That section provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed . . . shall be deemed a forfeiture of the entire interest . . . and in case a greater rate of interest has been paid, the person by whom it has been paid . . . may recover back in an action in the nature of an action of debt twice the amount of interest paid: *Provided,* such action shall be commenced within two years from the time the usurious transaction occurred."

No such construction as is insisted upon by the defendant's counsel can be placed upon this statute. A *usurious transaction* occurred when the defendant received a greater rate of interest than was allowed by law. It was the usurious transaction of *taking or receiving* that entitled the person by whom the usurious interest was paid to recover it back, and in this case the transaction *occurred* only two days before the action

was commenced. The statute did not bar. *Godfrey v. Leigh,* (247) 6 Ired., 396; *Stedman v. Bland,* 4 Ired., 296.

Second. It was inisted that the assignment of the notes of Joshua Davis and the payment of the money were not, under a proper construction of section 3836 of The Code, such a payment as would subject the defendant in this action to the penalty for usury.

The payment of $1,400 in money and the acceptance of the notes of Joshua Davis for $2,000, endorsed by the plaintiff "without recourse," and the surrender of the note of August, 1883, were in full payment, and the plaintiff ceased to be a debtor or in any way liable to the defendant.

It was a payment in money and money's worth, and when received by the defendant in payment subjected him to the penalty. The notes of Joshua Davis were accepted by the defendant in payment *pro tanto,* and that was a discharge in the same manner as if he received money. *Ligon v. Dunn,* 6 Ired., 133; *Symington v. McLin,* 1 D. & B., 291; *Godfrey v. Leigh,* and *Stedman v. Bland, supra; Mills v. Building and Loan Association,* 75 N. C., 292; *Dawson v. Taylor,* 6 Ired., 225; *Shober v. Hauser,* 4 D. & B., 91.

There is no error and the judgment is affirmed.

No error. Affirmed.

Cited: Meroney v. Loan Asso., 116 N. C., 910; *Whitehead v. Hale,* 118 N. C., 603; *Rushing v. Bivens,* 132 N. C., 276; *Corey v. Hooker,* 171 N. C., 231; *Ragan v. Stevens,* 178 N. C., 101.

R. N. MORGAN v. NORFOLK SOUTHERN RAILROAD COMPANY.

Negligence—Judge's Charge.

1. Where the plaintiff alleged that he was injured by the faulty construction and negligent management of the defendant's road, but there being no evidence offered in support of the alleged defective construction, and that in reference to the negligent management was conflicting: *Held,*

1. That it was not error in the court to instruct the jury that it should only consider the question of the alleged negligent management.

2. It is the duty of the court to confine its instructions and the deliberations of the jury to the material disputed facts involved in the controversy.

3. That injury resulting from the movement and noises produced by operating a railway at the crossing of a street, unless they are wantonly and unnecessarily produced, is *damnum absque injuria.*

(248) THIS is a civil action, which was tried before *Avery, J.*, at Spring Term, 1887, of PASQUOTANK.

The plaintiff alleged that by reason of the faulty construction of its road at the crossing of Pennsylvania Avenue, a street in the town of Elizabeth City, and also by reason of the negligent and reckless conduct of its agents in the management of its trains, his horse was frightened and ran away, whereby he and his wife were seriously injured, and the horse and buggy damaged.

The defendant denied that its road was improperly constructed, or that its agents were guilty of negligence; and averred that the accident was due to the plaintiff's own negligence.

The issues submitted were:

1. Was the injury caused by the negligence of the defendant?
2. Did the plaintiff by his negligence contribute to the injury?
3. What is the plaintiff's damage?

The plaintiff testified: "On 22 March, 1886, I was coming from Camden to my home, with my wife and a child in a buggy. When in 300 or 400 yards of the crossing, I saw the engine and train backing in, and after running a portion of the cars across Pennsylvania Avenue, along which I was driving, it pulled forward. I decreased my speed and drove slowly when I first saw it. When it pulled up I drove up within seventy-five yards of the crossing and stopped. An engine
(249) then crossed and afterwards pulled away from the crossing towards the depot, which was 150 to 200 yards from the crossing, and I thought was going to back to the depot. It went in that direction 30 or 40 yards from the crossing, when I made an attempt to cross the track and got within fifteen or twenty yards of the track, when the engine, tender and a coal box attached ran back and ahead of me across the street. My horse became frightened and tried to turn; I jumped out over the spatter-board, caught it, and tried to prevent it, but it turned with me and ran.

When opposite me the engine blowed and the bell was rung, and that frightened my horse; it turned and ran, threw out my wife, who was in the buggy with me and broke her collar-bone. There was nothing to obstruct the view of me from the parties on the engine. When I first saw the engine and train I was 300 or 400 yards from it, and when it came out from the depot I was about seventy-five yards from it. It is not possible to change cars at the switch without crossing the Avenue. There is room off the street inside defendant's inclosure to make a switch.

Cross-examined: When I stopped 75 yards away there was no train in the avenue, but one was approaching it. When the engine slowed

down I started and went about 60 yards; I saw the engine start back and took up my horse, and as soon as I could, stopped it after seeing it start back. The engine when in front of my horse made a hissing sound, which was not the sound usually made by an engine in passing. As the accident happened, train stopped opposite or nearly opposite my buggy in the avenue. My horse was a gentle one. My getting out did not frighten it."

Cannon testified for the defendant: That he was engineer of the defendant's train. "In looking out I saw the horse and buggy 80 to 100 feet off, and saw the horse shy; the gentleman dropped his reins and jumped out over the spatter-board, which frightened the horse; it wheeled to the left, upset the buggy and hurt Mrs. Morgan. The fireman and conductor went to his relief. There was no unusual noise (250) being made by the engine, except the ringing of the bell. The horse seemed more frightened by the jumping of the plaintiff than by the engine. He was 80 to 100 feet from the track. I stopped the engine in the avenue by reversing and letting on a little steam; that would make no noise like hissing. In crossing highways it is the custom at slow speed to ring, and at full speed to blow. Everything that could be was done to avoid the injury. I had moved back but once, and had four or five cars attached to the engine. I looked out, as it was my duty to do, and saw no obstructions on or near the track."

Conductor Waddy testified to the same facts stated by Cannon as to the shifting of the trains, and, in addition, that he was standing at the switch and looking at Morgan when the accident occurred; that the horse was frightened by the plaintiff's jumping, and that no unusual noise was being made; the engine was going slow; was not letting off steam nor under full headway.

Allen Williams testified: "Witnessed the accident; saw the horse and buggy on the avenue, thirty or forty feet from the crossing. The engine approached the crossing slowly; the horse reared up and turned the buggy over, but before doing so the driver jumped out over the spatter-board. The engineer was ringing the bell, and when he saw the horse was scared he stopped ringing and stopped the engine on the crossing. No whistle was blown, no steam escaping."

The general manager of the defendant's road testified to the necessity for the location of its tracks and their proper construction.

The plaintiff prayed the following instructions, which were refused, and he excepted:

If the plaintiff, while the defendant's train was crossing and re-crossing the street, stopped his horse sufficiently far from the track to avoid danger from fright or otherwise, and there waited till the (251)

train had crossed over going in the direction of the depot, he had the right then to drive on in the direction he was going, and he was not negligent in doing so; and if when he was in fifteen or twenty yards of the track, and in full view of the defendant's servants, the course of the engine was suddenly changed and run across the street in front of the plaintiff so as to frighten his horse and cause the injury complained of, the defendant is guilty of negligence.

If the defendant, while the plaintiff with his horse was near the track at the crossing and in full view of the servants of the company, needlessly let off steam or caused the whizzing sound described by the plaintiff, or needlessly caused other noise by which the horse was frightened and the accident produced, the defendant is guilty of negligence.

Because of the crossing, and of the location of the switch near the same, greater caution and watchfulness were required of the defendant than at points where there was no crossing, and at crossings where there was no switch; and if the defendant failed to exercise such caution and watchfulness it was guilty of negligence.

The plaintiff also excepted to the instructions given, which are set out in the opinion. The jury found the first issue in favor of the defendant. The others were not considered.

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

John Gatling for plaintiff.
L. D. Stark for defendant.

MERRIMON, J. The court, among other things, said to the jury on the trial that:

"1. There is only one view presented by the evidence, in which the jury can find that the injury was caused by the negligence of the
(252) defendant. If the engine and tender of the defendant company were crossing and re-crossing the street of the town at a public crossing, and when the plaintiff, approaching the crossing, reached a point from fifteen to thirty yards from the crossing, the engineer saw the plaintiff, and caused the engine, then on or partly on the crossing, to make an unnecessary noise, and thereby frightened the plaintiff's horse as to cause the horse to turn suddenly and injure the plaintiff's wife by upsetting the buggy, then the jury will respond to the first issue 'Yes.' It is not negligence to ring the bell when the engine is passing over, or about to pass over crossings, unless it is done wantonly, or for the purpose of frightening the horse. If it was done for the purpose of warning persons to avoid danger, it would not be an unnecessary noise.

"2. The defendant company had a right to make such noises as were necessarily incident to running or reversing the engine, and if only such noise as is used and necessarily incident to moving the engine and cars attached was made, then the defendant was not negligent, and the jury would respond to the first issue 'No.' The burden is on the plaintiff to satisfy by a preponderance of testimony that the injury was caused by defendant's negligence."

The appellant contends that this instruction is erroneous, to his prejudice. We think otherwise.

On the trial there was no evidence to prove that the defendant's railroad, its shifting tracks near its depot, and the street over which the plaintiff was passing in his buggy at the time he suffered the injury complained of, was negligently, badly or improperly located or constructed, as alleged in the complaint; nor to prove that the plaintiff was injured by the defendant or its agents or servants, otherwise than by making such unusual, unnecessary, sudden and loud noises by ringing its bell, sounding its steam whistle, the escape of steam making a hissing, fearful sound, and the swift movement of its locomotive with cars attached, as greatly frightened the horse of the plaintiff while (253) hitched to his buggy in the street, and rendered him unmanageable. There was evidence of the plaintiff tending to prove that the horse, though gentle, was so frightened, and as a consequence, upset the buggy, doing serious injury to the wife of the plaintiff and incidentally to himself. There was also evidence of the defendant to the contrary, and tending to prove a total absence of negligence on its part and that of its servants. So that the first and principal issue submitted to the jury was as to the alleged negligence on the part of the defendant, done in the way indicated.

The court, therefore, properly directed the attention of the jury to the single view of the evidence that went to prove negligence.

The instruction as to the character of noise that would constitute negligence was very general—perhaps too indefinite, but this was not to the prejudice of the appellant—it was rather in his favor—it implied broadly any "unnecessary" noise, and left the jury quite at large in this respect.

Nor was the instruction objectionable in other respects. The defendant certainly had the right on its roadway to move its locomotive, with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, detaching cars from one already formed, and shifting them from one train or place to another. The noises ordinarily—naturally—incident to this work when done where it may lawfully be done, do not constitute negligence or nuisance. Railroads are

lawful things, useful and highly important to the well being and prosperity of society, and must be tolerated and encouraged, notwithstanding the annoyance and fearful noises sometimes naturally incident to their use in particular places that frighten horses and other animals, and thus occasion accident and injury to individuals. Harm thus sustained is *damnum absque injuria.*

(254) The defendant had the right, indeed it was its duty, at appropriate times to ring its bell and sound its steam whistle, particularly at and near to where its road crossed the street and other roads, to give notice of the approach of moving trains and possible danger. It is not to be understood, however, that a railroad company has the right to make unnecessary, unreasonable, furious and fearful noises that serve no practical and useful purpose, particularly in the immediate neighborhood of where persons are constantly passing and repassing with their horses and vehicles. The noises tolerated are only such as are reasonably incident and necessary to the proper use of the railroad and the machinery appropriate to it.

So much of the special instructions asked for by the appellant as he was entitled to have was plainly embraced by those given. It is not necessary, indeed not proper, to give instructions not pertinent to any reasonable view of the evidence before the jury.

The very purpose of instructions is to direct the attention of the jury to the law applicable as it bears upon the evidence. Any instructions beyond that only tends to mislead and confuse.

The attention of the jury was fairly directed to the principal issue, and the law bearing upon it was stated, certainly not to the prejudice of the appellant. His assignment of error cannot be sustained. Accepting the finding of the jury as correct, the injury sustained by the appellant was the result of accident and misfortune.

No error. Affirmed.

Cited: Harrell v. R. R., 110 N. C., 218; *Adams v. R. R., ibid.,* 332; *Everett v. Receivers,* 121 N. C., 522; *Miller v. R. R.,* 128 N. C., 37; *Thomason v. R. R.,* 142 N. C., 329; *Duffy v. R. R.,* 144 N. C., 27; *R. R. v. Goldsboro,* 155 N. C., 370; *Barnes v. Public-Service Corporation,* 163 N. C., 365.

(255)

W. H. WEATHERSBEE AND WIFE, SALLIE F., AND H. L. STATON, JR., *v.* O. C. FARRAR.

New Trial—Petition to Rehear.

While the Supreme Court may grant a new trial for newly discovered evidence, and will grant a rehearing because of error in law committed by it, or when it is made to appear that it has overlooked or misapprehended some material fact apparent in the record, it will not do so for any error or mistake of *fact*, nor error of law not assigned in the case on appeal.

(McDonald v. Carson, 95 N. C., 377; *Mason v. Pelletier*, 80 N. C., 66; *Wilson v. Lineberger*, 90 N. C., 180; *Lockhart v. Bell, ibid.*, 502; *Barcroft v. Roberts*, 92 N. C., 249, cited and approved.)

THIS is a petition by defendant to rehear a case on appeal, determined at February Term, 1887.

J. B. Batchelor and John Devereux, Jr., for plaintiffs.
E. R. Stamps for defendant.

MERRIMON, J. This is an application to *rehear,* upon the alleged ground that the opinion of the Court is erroneously founded upon the material fact that the crop was embraced in the mortgage in question executed in favor of the *feme* plaintiff by her husband, her co-plaintiff in the action, whereas, in fact, as is alleged in the petition, it sufficiently appears by the record that the crop was not embraced by it.

Upon a careful reëxamination of the record, we are constrained to still declare that it appears in it that the crop referred to was embraced by the mortgage mentioned, however the fact apart from the record may be.

In the course of the action it was referred to a referee to take and state the account, and he found as a fact that the mortgage in favor of the *feme* plaintiff embraced "all the chattel property named in the mortgage to the defendant (the present petitioner) of 18 Feb- (256) ruary, 1882," and he further found by his report as one of his conclusions of law: "1. It being the fact that W. H. Weathersbee had mortgaged the cotton crop by second mortgage, dated 4 March, 1882 (that in favor of *feme* plaintiff), he had no right to authorize the application of the proceeds of the 13 bales of cotton delivered 14 October, 1882, to any other than the first mortgage debt, and he holds that the proceeds must be applied to the $3,500 note," that is, the note of the petitioner secured by the mortgage in his favor, and not to his unsecured debt.

Moreover, the whole account, as stated and reported by the referee, is based in all respects (where it became material) upon this important finding, and as a consequence, he charged the defendant in the action (the present petitioner) with the proceeds of the whole crop, to be applied to his debt secured by the first mortgage and not to his unsecured debt—money supplied by agreement with the husband plaintiff.

Nor did the defendant except to the findings of fact and law made by the referee, upon the ground that he had so found the fact to be. Nor did the court, in reviewing the findings of fact and law of the referee upon the exceptions of the defendant to his report, find that the fact in question had been improperly found, and find it to be otherwise. It is true, the Court found, in paragraph six of its findings, "That there is error in charging the defendant with cotton and cotton seed *sold at the sale,* the same not being covered by Mrs. Weatherbee's mortgage." But this cotton and cotton seed do not appear to have been a part of the cotton crop embraced by the mortgages referred to, or either of them, or that the court so found. If it had done so, and if it had reversed or intended to reverse the finding of fact by the referee, that the crop was embraced by the mortgage in favor of the *feme* plaintiff, then it
(257) would have changed the basis of the whole account, and given a far different final judgment from that given.

Clearly the fact appeared in the record as we accepted and acted upon it, and we could only take action upon the record and be governed by the facts as they appeared in it. This is too manifest to admit of question.

The counsel for the petitioner insists earnestly that the fact was otherwise than as it appears. If so, we regret that the truth did not appear as it should have done, but it was the laches or misfortune of the petitioner that he did not make it appear, as he might have done, in apt time. He had his day in court, and the largest opportunity to do so. We are not now at liberty to set aside the judgment, open the case anew, resettle the facts, and give a new judgment. This is what we are in effect asked to do. Reason, justice, uniform practice, and precedent forbid such a course of procedure. It is the well settled rule of practice in this Court that it will not *rehear* upon the ground of mistake or error of fact. Rule 12; *Wilson v. Lineberger,* 90 N. C., 180; *Lockhart v. Bell, ibid.,* 502; *Barcroft v. Roberts,* 92 N. C., 249. It would be otherwise if the Court overlooked or misapprehended a fact or facts appearing in the record. *Mason v. Pelletier,* 80 N. C., 66.

Nor will this Court rehear upon errors alleged in the petition that were not assigned in the case stated or settled upon appeal. Only alleged errors in law will be reviewed upon such rehearing, or a rehearing may be had for newly discovered evidence. Rule 12, *supra; McDonald v. Carson,* 95 N. C., 377. Generally, the purpose of a *rehearing* is to have

corrected some error of this Court in passing upon errors of law assigned in the record of the appeal, whether such error arose from a misapprehension of the law or a misapplication of it to the pertinent facts appearing in the record in connection with the errors assigned.

What remedy, if any, the petitioner has, if the fact in question be as he alleges, we are not called upon, nor would it be proper for us to suggest. That is the office of counsel. The petition must be (258) dismissed.

Dismissed.

Cited: *Farrar v. Staton,* 101 N. C., 79.

A. M. QUARLES v. JOSEPH W. JENKINS.

Account—Reference—Issues—Final Settlement.

1. In an action for an account, if the defendant pleads final settlement, it is the duty of the court to have this issue determined before ordering a reference for account.
2. If a settlement is conditional, upon the performance of certain things thereafter to be done by one of the parties thereto, but which have never been performed, it is not necessary, in an action for account, to allege the specific errors therein.
3. Issues which arise from the pleading should only be submitted. The court may, in its discretion, submit questions of fact as allowed by the statute.

(Clements v. Rogers, 95 N. C., 248, and *Porter v. R. R.,* 97 N. C., 66, cited and approved.)

THIS was an issue in a civil action, tried before *Shipp, J.,* at Spring Term, 1887, of HALIFAX.

The plaintiff alleged that during the years 1879 and 1880 he and defendant had large business transactions, to the amount of one thousand dollars, the items in said account being composed of money and supplies advanced by the defendant to him and of cotton delivered by him to defendant and sold by said defendant; that he is unable to produce said account; and although he has repeatedly demanded an account of said transactions from the defendant, which he can easily furnish, he has refused and does still refuse to render the same to the plaintiff; that on 29 July, 1882, the plaintiff and defendant had a pretended settlement of said transactions, on which day the plaintiff paid to (259) defendant thereon one hundred and fifty dollars more than he justly owed him, and also on said day paid the defendant, who knowingly

received the same, on said account, one hundred and ten dollars as interest on said advancements; that said interest was charged and received by the defendant at the rate of more than ten and one-half per cent on said advancement.

Wherefore the plaintiff demanded judgment against the defendant:

1. For one hundred and fifty dollars for money had and received by the defendant to the plaintiff's use, on account of cotton sold by him for the plaintiff, with interest from 29 July, 1882.

2. For the recovery of the two hundred and twenty dollars penalty for usury received by the defendant from the plaintiff on money and supplies furnished by the defendant to the plaintiff, with interest from 29 July, 1882.

3. For an account and settlement of the dealings between plaintiff and defendant from 1 January, 1879, up to and including 29 July, 1882, and such relief as may be just.

The defendant set up the defense that on 25 July, 1882, the plaintiff and defendant had a final agreement as to what was due defendant by plaintiff, and the amount due was adjusted, and thereupon one W. M. Perkins paid to defendant the amount thus acknowledged to be due by plaintiff, and the defendant delivered up to said Perkins all his notes, accounts and mortgages against plaintiff, and that plaintiff is not entitled to an account.

At November Term, 1886, his Honor, Judge Gudger, made an order that the issue of settlement should be tried before the main action, and the defendant excepted.

At May Term, 1887, the following issue was submitted to the jury:

Has there been a full settlement between the plaintiff and (260) defendant?

The defendant asked for an issue as to whether Perkins had paid off the plaintiff's debt, and whether defendant had turned over all their papers to him. Refused, and defendant excepted.

The defendant introduced the mortgage of 1880, given by plaintiff and wife to defendant, which was canceled on the margin of the register's book. Defendant then introduced a mortgage from Quarles and wife to Perkins. Then he introduced the deposition of Bell, agent of Jenkins, who testified that he came to a final settlement with plaintiff in 1881, when plaintiff gave his bond for the balance due; that in July, 1882, by agreement, he went to Quarles' house, and after some controversy as to the amount of the bond, they settled finally, and Quarles paid off the bond through Perkins.

The plaintiff testified: That in 1881 he executed the bond of which a copy is attached. This was to close up preceding dealings, but Bell, the defendant's agent, did not present his accounts, but promised to get them

and correct any errors. He never did so, though witness often requested it. In July, 1882, Bell came to witness' house to settle, but did not bring the account; witness asked for it, and Bell said if he would pay the note he would get the accounts and send them to him. He has never got them. Witness paid the bond that day; got Perkins to take it up and gave him a mortgage; the bond was surrendered that day and Perkins was authorized to cancel the Jenkins mortgage. If the bond was correct, the settlement was correct; otherwise, not; and offered other testimony tending to sustain his version of the transaction.

Defendant asked the court to charge the jury:

1. That if the jury believed there was a settlement in July, 1882, Bell then agreeing that he would correct any errors or mistakes, that would be merely a condition subsequent, which would not deprive the transaction of its character of settlement, and they should find the issue in the affirmative. Refused, and defendant excepted. (261)

2. That in order for the plaintiff to go behind the settlement, he must allege in his pleadings and prove specific errors; and having failed to do so, he cannot now attack said settlement, and the jury should find the issue in the affirmative. Refused, and defendant excepted.

The court charged the jury that if the settlement in July, 1882, was a conditional settlement, if Bell agreed to furnish an account thereafter, and correct any errors, then plaintiff is not precluded by said settlement, and the jury should find the issue in the negative. Defendant excepted.

The jury found the issue in the negative, and the court ordered a reference to take an account. From this order the defendant appealed.

John A. Moore for plaintiff.
R. O. Burton, Jr., for defendant.

MERRIMON, J. The proceedings are informal and confused. In effect the complaint alleges two distinct causes of action—the first for money had and received, growing out of transactions that render an account necessary; the second for usury.

No question was made as to whether these causes of action could be united in the same action. As to the first, the defendant pleaded a final settlement and mutual discharges as to sundry dealings, including the first cause of action between the plaintiff and himself, on 25 July, 1882. This the plaintiff denies, and thus an issue was raised which the court properly held must be tried before ordering the account to be taken incident to the first cause of action. *Clements v. Rogers,* 95 N. C., 248.

The plaintiff did not allege a settlement which he sought to attack for sufficient cause and have canceled or set aside by this action; he denies broadly that there was a final settlement, as alleged by the (262) defendant. It was not therefore necessary that he should allege

specific errors, fraud, or the like, in a settlement he sought to overturn. The simple question raised was, Was there a final settlement, as alleged by the defendant, or not?

The evidence as to whether there was or was not was conflicting; it tended to prove in one aspect of it that the parties essayed a settlement which was not consummated; that what was done in that respect was not to be treated as final, unless certain conditions were observed and performed on the part of the defendant.

The court therefore properly instructed the jury, in effect, that if the settlement alleged was to be final, on conditions to be observed and performed on the part of the defendant, and he failed to observe and perform the same according to the terms as agreed upon between the parties, then there was no such settlement and discharge.

The court properly refused to submit to the jury an issue as to whether or not a person named had paid the debt due from the plaintiff to the defendant, and "turned over all the papers to him."

This was evidential matter to be offered in evidence on the trial of issues raised by the pleadings to which it might be pertinent. Only the issues raised by the pleadings should be submitted to the jury, except that the court may in its discretion submit questions of fact as allowed by the statute. *Porter v. R. R.*, 97 N. C., 66.

As to the second cause of action, the defendant denied the allegations of the complaint. The issue thus raised was not tried. Any question, therefore, as to how far the defendant can be compelled to testify as to facts tending to charge him with liability for the usury alleged is not before us, and we express no opinion in that respect.

No error. Affirmed.

Cited: *Bridgers v. Bridgers*, 101 N. C., 75; *Stancill v. Spain*, 133 N. C., 79; *Martin v. R. R.*, 148 N. C., 262; *Wacksmuth v. R. R.*, 157 N. C., 43.

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(263)

A. M. WILLEY v. NORFOLK SOUTHERN RAILROAD COMPANY.

Condemnation of Land—Eminent Domain—Easement.

1. A railroad company acquires, with the lands condemned for the purposes of the construction and operation of its road, all the rights and privileges which appertained to it at the time of condemnation.

2. Therefore, where the land condemned to the use of a railroad company was crossed by a ditch which drained the water from it, as well as from

an adjacent tract belonging to a third party, and the company by conducting the water from its land prevented the flow from the adjacent tract: *Held*, that the owner of the latter was not entitled to recover damages for injuries sustained thereby, he failing to show that he had any title to the use of the said ditch.

THIS is a civil action, which was tried before *Avery, J.*, at Spring Term, 1887, of HERTFORD.

There was judgment for the defendant and plaintiff appealed.

The facts are stated in the opinion.

A. W. Haywood for plaintiff.
L. D. Starke for defendant.

SMITH, C. J. The plaintiff owns, and at the time of the grievances mentioned in his complaint, was in possession of and cultivating a tract of land, between which and that upon which the defendant's railway was constructed, intervened a tract belonging to one B. C. Bell. Across these adjoining tracts passes a "lead ditch," through which are conveyed the surplus waters that fall upon both tracts. In constructing the defendant's road in 1881, a portion of the land of Bell, with a section of the ditch through which flow the waters in drainage of the plaintiff's land as they pass away in the opposite direction, was condemned to the use of the defendant company, and in relieving its road of excessive surface waters, it found it necessary to make excavations and (264) conduct the waters into the same ditch upon its own land, whence they are carried away in a direction opposite the plaintiff's land. The alleged injury does not arise from diverting the course of the flow, or pouring it in larger quantities upon the plaintiff's premises, or with increased force, for this is not the result of the defendant's act, but from an alleged increase of volume, beyond the capacity of the ditch to remove it as before, so that the water falling on his land, not having sufficient outlet, is ponded back upon his land. This is the gravamen of the complaint and the cause of action set out in it.

Upon the trial of the issues made in the pleadings "there was no evidence of title in the plaintiff to the ditch," as is stated in the case made up on the appeal, and which we understand to mean that no easement in the ditch or right to use it for drainage purposes was shown to vest in the plaintiff; and though the company claimed and exercised the right to use the ditch in the manner set forth, from the time of its acquiring the land from Bell, no suit, so far as appears, was instituted by the plaintiff contesting the claim until the present action was brought on 15 February, 1886.

Upon this state of the evidence, the court intimated that the jury would be instructed that the plaintiff had not made out his case, whereupon he submitted to a nonsuit and appealed.

This summary statement of facts seems to us to dispose of the controversy and to dispense with any inquiry into the relative rights and responsibilities of the owners of upper and lower contiguous tenements in the disposition of accumulated surface water to which most if not all of the cases cited in argument have reference. The defendant has not thrown upon the plaintiff's land the waters that fell upon its own, but has used a mode of drainage necessary for the road and the public
(265) convenience and safety upon its own premises, and at most has deprived the plaintiff of facilities for his own drainage which he before possessed and used, but without any vested right so to do. This is the sole consequence of its own use in a legitimate manner of the same ditch by the defendant.

By the condemnation, all the rights of Bell, the owner of the lower and servient land, passed to defendant, and if no vested interest in the easement had been acquired by the plaintiff previous thereto, so that the use of the ditch was permissive, and Bell could have recalled his permission, so could the defendant, who succeeded him in the title. But there has been no direct obstruction in the way of the plaintiff's enjoyment of his privilege. He can use it as before, and the grievance is, that the defendant also uses the ditch, and it is not sufficient for both proprietors, and hence the suit proceeds upon the idea of a superior and paramount title in the plaintiff, when in fact he shows none at all.

We do not enter upon the consideration of the public interest in having the roadbed kept in safe condition for the transportation of passengers and freight as a feature distinguishing this case from one in which the contesting claimants are private persons, further than to say that in the condemnation everything necessary and incident to the original making and subsequent operating the road must be intended to have passed as against the owner of the condemned land, and as before he could have run a collateral ditch into the lead ditch, for his more effectual protection against accumulating surface water. So we can see no reason, in the absence of any vested right to the easement, why it may not do the same thing upon its acquired land.

We think, therefore, that the judge ruled correctly, and the judgment of nonsuit must be affirmed.

No error. Affirmed.

Cited: *Bell v. R. R.*, 101 N. C., 23; *Parks v. R. R.*, 143 N. C., 295.

(266)

S. M. BEASLEY v. W. H. BRAY ET AL.

Evidence—Fraud—Fraudulent Conveyances—Issues.

1. An insolvent owner of property may dispose of it by sale or conveyance to secure a present indebtedness, if such disposition is not made with intent to hinder, delay or defraud his creditors. The presence of such intent in the *vendor* alone is sufficient to avoid the transaction.

2. If the conveyance be *absolute* the fraudulent intent must be known to and participated in by the *vendee* as well as the vendor.

3. Where the fraudulent purpose is apparent in the conveyance itself, the court adjudges the fact without the intervention of the jury; but where it is to be deduced from surrounding circumstances, it must be ascertained by the jury upon a proper issue submitted to them.

4. An absolute conveyance by an insolvent debtor to an insolvent vendee, who has no knowledge of the vendor's embarrassments and is not fixed with a fraudulent intent, upon a long credit, is not *per se* void, though these facts may be evidence of fraud to be considered by the jury.

(Savage v. Knight, 92 N. C., 497; *Lassiter v. Davis*, 64 N. C., 500; *Reiger v. Davis*, 67 N. C., 190; *Hodges v. Lassiter*, 96 N. C., 351; *Moore v. Hinnant*, 89 N. C., 459, cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, at Spring Term, 1887, of CURRITUCK.

One A. B. Williams, conducting a mercantile business at Poplar Branch, in Currituck County, in February, 1885, sold his remaining stock of goods to the plaintiff, then just become of age, and who had been for three years preceding in his service as clerk, at the price of three thousand three hundred and fifty dollars. As a means of payment the plaintiff executed three notes, two in the sum of one thousand dollars each, payable in one and two years, and the other for the residue of the purchase money at three years, all bearing interest from date. At this time the plaintiff's entire property consisted in a horse and dog-cart, worth $215, and a balance of $65 due for services as clerk, (267) which was credited upon the first maturing note. No other money was paid at the time, but the plaintiff made payments during the period preceding the committing of the alleged trespasses by the defendants, amounting in the aggregate to about $500.

The said Williams had become indebted to the defendants Adelsdorf & Bros. and Washington, Taylor & Co., as well as to others, and had, after the sale, no more personal property than would be required to be exempt, and had a tract of land under mortgage beyond its value, as was ascertained by a subsequent sale.

The defendant Bray, sheriff, with executions in his hands in favor of the other defendants, at their instance and under an indemnity given by them, in May following the sale, the plaintiff having been meanwhile in possession and disposing of the goods as his own, entered the store against the will of the plaintiff and in disregard of his protest, seized and removed the goods on hand, which he afterwards sold, and applied the proceeds to said executions.

The present action was instituted on the first day of the succeeding month against Bray and three others, as to whom a *nol. pros.* (not a *nonsuit* as the record erroneously calls it) was afterwards entered, and the creditor defendants were permitted, on their own application, to become associate parties and defend in the action.

The action is to recover in damages the goods so seized and converted to the defendants' use, and the answers allege the sale to the plaintiff to have been fraudulent and void as against themselves as creditors, and thus the validity of the conveyance is the sole matter in controversy.

At the close of the testimony the court caused eight issues to be submitted to the jury (to all of which, except the first, second and eighth, the plaintiff objected), which issues, with the responses thereto, are as follows:

(268) 1. Was A. B. Williams insolvent at the time of the sale of the goods in controversy by him to S. M. Beasley? Answer: Yes.

2. If Williams was insolvent, did Beasley know he was insolvent at the time of the sale? Answer: No.

3. Was Williams then embarrassed with debts, and had he been sued or threatened with suits by creditors? Answer: Yes.

4. Did the plaintiff at the time of the sale know of Williams' embarrassment from debts and his being threatened with suits? Answer: No.

5. Did plaintiff have reasonable grounds to believe or suspect that Williams was so embarrassed and threatened when he bought, and could he by inquiry have ascertained the truth in reference to Williams' financial condition? Answer: Yes.

6. Was plaintiff insolvent at the time of sale? Answer: Yes.

7. Did Williams know this fact? Answer: Yes.

8. What is plaintiff's damages? Answer: $200.

In place of the five issues to which exception was taken, the plaintiff proposed one in these words:

"Did A. B. Williams sell his stock of goods to S. M. Beasley (the plaintiff) with the fraudulent intent to hinder, delay and defeat his creditors, and did the plaintiff purchase, knowing the facts, and participating in the fraudulent intent?"

This was refused, and exception taken to the ruling.

The plaintiff further asked that instructions be given to the jury in these terms:

"1. If Williams was insolvent at the time of the sale to Beasley, and intended to hinder, delay or defraud his creditors in the sale, still if the latter knew nothing of such intent at the time and bought the stock of goods in good faith, then he would not be guilty of any fraud, and the sale would be valid, notwithstanding he paid no cash, but gave (269) his individual note for the purchase money."

"2. If the jury find the conveyance was absolute and for a valuable consideration, it is valid, and operates to pass the title, unless it was the fraudulent intent and purpose of Williams, in its execution, to defeat his creditors in the collection of their claims, or to hinder or delay them in the same, the plaintiff knowing the facts and participating in the fraudulent intent."

"3. There is no evidence that Williams was threatened with suit until after the sale in February."

These instructions were also refused and exception taken to the ruling.

The court, after verdict, refused the plaintiff's motion for judgment on the finding in his favor, and adjudged that the defendants go without day and recover their costs.

After an ineffectual motion for a new trial, the plaintiff appealed.

E. F. Aydlett for plaintiff.
John Gatling for defendant.

SMITH, C. J., after stating the case: There is no finding of a fraudulent intent in the making the sale, as there is none apparent in the transaction considered by itself and divested of attending incidents.

An insolvent owner of property has the same right as one who is solvent to dispose of it by a sale or conveyance to secure a present indebtedness, in the absence of an operating bankrupt act, when done *bona fide* and not with the covinous purpose of hindering or defrauding creditors, and the presence of such purpose alike vitiates and avoids the conveyance made by either. When the vitiating intent appears in the instrument itself, the court ascertains and adjudges the fact, and no jury finding is necessary. But when the fraud is to be inferred from surrounding circumstances, and is not an element in the trans- (270) action, it must be found by a jury, and upon a proper issue framed to raise the inquiry. This is the settled construction of the statute of the 13th Elizabeth, whose terms ours essentially pursues, as will be seen by some adjudications of late date to which we shall refer.

"It is the intent and purpose existing in the mind of the insolvent debtor," remarks *Ashe, J.*, in *Savage v. Knight,* 92 N. C., 497, "at the

time of making the assignment, to delay, hinder, defraud and defeat his creditors that vitiates his assignment and makes it void," to which we subjoin the qualification that if the conveyance be absolute the vendee must participate in the fraud, for the contract is the act, not of one, but of both the parties. *Reade, J.,* in *Lassiter v. Davis,* 64 N. C., 500, and *Boyden, J.,* in *Reiger v. Davis,* 67 N. C., 190, so in *Hodges v. Lassiter,* 96 N. C., 266, the Court say: "As the question of the presence of an infecting element of fraudulent intent in making the assignment is *one of fact,* it was properly left to the jury to find upon the evidence and to deduce from it. What constitutes fraud is matter of law; what is sufficient evidence of the facts required to establish it, it is for *the jury to find.* When the fraud appears upon the face of the assignment, it is so declared by the court. When dependent upon external proofs, it is to be found by the jury."

But the subject is more fully discussed and the true principle announced in *Moore v. Hinnant,* 89 N. C., 459, 460, in a quotation from Burrill on Assignments, sec. 332, in these words: "It is clear, however, from the language of the statute, 13 Elizabeth, that its provisions were directed exclusively against *conveyances made with an* actual intent on the part of the debtors to hinder, delay or defraud creditors, as distinguished from the mere effect or operation of such conveyances. The expression in the preamble, *'devised and contrived,* to the end, (271) purpose and intent,' etc., leave no room for doubt on this point."

Hence, it has been sometimes very expressively designated as the statute against "fraudulent intents in alienations."

The court therefore committed error in not submitting an issue as to the intent to the jury, which they, not the court, must draw in ascertaining the presence of fraud.

The court seems to have acted upon the idea that the law deduced the fraud from the insolvency of the parties and the indulgence allowed for the payments, and that in face of the finding that the plaintiff did not know of Williams' insolvent condition, nor that he was pressed by debts when the sale was made.

We see no reason in law why an insolvent debtor may not sell to another, who, if he has not present means to pay for his purchase, is also free from other debts, the vendor relying upon the integrity and capacity of the vendee to provide those means in time to meet his liabilities. Indeed, it seems he did, in managing the business, in the course of three months pay half the principal of the first maturing obligation.

But upon these matters it was the province of the jury to pass, and they have not passed nor been permitted to pass upon the material element upon which the validity of the assignment depends. The case

may present strong evidence of fraud, from which the jury might find its existence, but the effect of the evidence itself should have been left to them to determine. There is error, and the verdict must be set aside and a *venire de novo* awarded.

Error. *Venire de novo.*

Cited: *Phifer v. Erwin,* 100 N. C., 73; *Battle v. Mayo,* 102 N. C., 440; *Woodruff v. Bowles,* 104 N. C., 207; *Bobbitt v. Rodwell,* 105 N. C., 245; *Booth v. Carstarphen,* 107 N. C., 401; *Haynes v. Rogers,* 111 N. C., 231; *Wolf v. Arthur,* 112 N. C., 693; *Arrington v. Arrington,* 114 N. C., 168; *Stoneburner v. Jeffreys,* 116 N. C., 86; *Bank v. Gilmer, ibid.,* 702; *Wolf v. Arthur,* 118 N. C., 899; *Goldberg v. Cohen,* 119 N. C., 65; *Bank v. Hollingsworth,* 135 N. C., 582.

(272)

GEORGE P. THOMAS & COMPANY v. M. J. WRIGHT.

Deceit—Guaranty—Pleading.

Where the complaint contained two causes of action: (1) that the defendant was liable as a guarantor upon a letter written to the plaintiff in reply to an inquiry as to the solvency of an applicant for credit, in which it was stated that "I have no fear in becoming responsible for the goods, but dislike to be troubled with the settlement of other merchants' bills. . . . I see no reason you should doubt him and ask for security. I recommend him as being a safe man to sell to, and I think you ought to allow him credit. . . . His credit is good here, as I furnish him with all his groceries and supplies. I hope you will ship his goods at once. . . . I will look to your interest in this matter"; and (2) that the statements contained in the said letter were false and so known to the defendant, and were fraudulently made with the intent to deceive plaintiff and did deceive him, and thereby he suffered damage: *Held,*

1. That the facts stated in the first cause of action did not constitute the defendant a guarantor.

2. That the facts alleged in the second cause of action were sufficient to entitle the plaintiff to damages for deceit.

(*Stafford v. Newsom,* 9 Ired., 507, and *Erwin v. Sherrill,* Tay., 1, cited and approved.)

CIVIL ACTION, tried before *Avery, J.,* at Spring Term, 1887, of BEAUFORT.

The plaintiff, G. P. Thomas, doing a mercantile business in Baltimore in the firm name of G. P. Thomas & Co., in October, 1885, sold and sent

to Marion Scott Wright, residing in Beaufort County, in this State, upon his application, a lot of spirituous liquors, for the recovery of the value of which the present action was brought against the defendant, brother of said Marion Scott Wright, on 8 April, 1886.

The complaint presents the claim in a twofold aspect and in separate causes of action. The first alleges that the goods were sent under a guaranty contained in a letter written by defendant in answer to
(273) an inquiry by the plaintiff as to the means and credit of Marion Scott Wright, which letter is in these words:

WASHINGTON, N. C., 7 October, 1885.

MESSRS. G. P. THOMAS & Co.

DEAR SIRS:—Yours of the 2d at hand and contents noted. In reply should say that I have no fear in becoming responsible for the goods, but dislike to be troubled with the settlement of other merchants' bills. I know he has bought a great many liquors from you and has paid you up promptly. I see no reason why you should doubt him and ask for security. I recommend him as being a safe man to sell to, and I think you ought to allow him some credit, as he has never deceived you. His credit is good here, as I furnish him all his groceries and supplies. I hope you will ship his goods at once, as I see no good reason why you should not. I will look to your interest in this matter.

Yours respectfully,

M. J. WRIGHT.

This communication, it is alleged, acted upon by the plaintiff, imposed the obligation of a guaranty in terms, but if not, they were so understood by the plaintiff, who, upon the goods being sent, advised the defendant by letter of his understanding of their import, to which no response was made, and thereby such became their import and legal effect.

The second cause of action alleges the statements contained in the letter to be false and fraudulent within the defendant's knowledge, and intended to mislead and deceive the plaintiff, and that he was thereby misled and deceived in giving the desired credit to the said Marion Scott Wright, who is and then was insolvent and irresponsible.

(274) The answer controverts the material averments of the complaint, and while no issues were framed for the jury, they were empaneled to try the matters in controversy between the parties.

The court having intimated an opinion that neither of the causes of action set out facts sufficient to entitle the plaintiff to relief, he suffered a nonsuit and appealed to this Court.

W. B. Rodman, Jr., for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the case: While we are disposed to concur in the opinion that the letter is not itself a guaranty, and is not made such in law by the plaintiff's communication of his own misconstruction of its import, so that an action can be maintained upon it as a contract, we think the second count does show facts sufficient to constitute a cause of action. It contains every essential element entering into the action for deceit, resulting in damage to the trusting and defrauded creditor.

Information was sought before the goods were sold by the plaintiff; and the facts stated in answer, and upon the faith of which the goods were parted with, were untrue, *known to the defendant to be untrue,* and were so falsely set forth as that they were calculated and intended to deceive and mislead, and to induce the plaintiff, through misplaced confidence, to trust the applicant, and that he was thus misled through falsehood and fraud, and induced to part with his property to his hurt and damage. When these conditions exist, the legal liability results. 2 Greenl. Ev., sec. 227; *Thompson v. Bond,* 1 Camp., 4; *Stafford v. Newsom,* 9 Ired., 507, and numerous rulings in the different states to this effect, enumerated in 6 U. S. Dig., Title Fraud, sec. 130; *Irwin v. Sherrill,* Tay., 1.

There was, therefore, error in the ruling upon the second (275) count, for which there must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

JOHN WILSON v. EDWARD TAYLOR ET AL.

Action to Recover Land—Execution Sale—Homestead—Issues—Recitals in Sheriff's Deed—Variance.

1. On the trial of actions, the testimony offered by the parties and the instructions of the court to the jury, should be confined to the issues raised by the pleadings.
2. In an action to recover land, if the defendant desires to claim a homestead therein, he should assert his right by proper averment in the answer.
3. The recitals in a sheriff's deed, of the execution, levy and sale are prima facie evidence of those facts.
4. As against the defendant in the execution, no judgment need be shown.

5. Where the sheriff's deed recited a judgment in favor of N. against T., and the judgment docket showed a judgment in favor of N., *guardian*, against T., the variance is not material.

(*Hinson v. Adrian*, 92 N. C., 121; *Rutherford v. Raburn*, 10 Ired., 144; *Hardin v. Cheek*, 3 Jones, 135; *Miller v. Miller*, 89 N. C., 402, and *Green v. Cole*, 13 Ired., 425, cited and approved.)

CIVIL ACTION, tried before *Avery, J.*, at Spring Term, 1887, of HERTFORD.

The action was originally commenced against Edward Taylor, who died before it was determined, and the present defendants (his widow and heirs at law) were made parties, against whom an amended complaint was filed, in which it is alleged, in substance, that the plaintiff is the owner and entitled to the possession of the land mentioned
(276) in the complaint, by virtue of a sale and deed made by the sheriff of Hertford County in September, 1869, under an execution in favor of one Seth Nowell against Edward Taylor; that just before the sale of said land Taylor came to him, informed him that the land was about to be sold, and requested him to buy it; that he purchased the land upon the representation and at the earnest request of Taylor, and discharged the execution by paying the amount to the sheriff; that it was agreed with Taylor that the latter should "buy the place back at the same sum and interest," and that the plaintiff would convey to him upon the payment of the same, and in the meantime Taylor occupied the land as tenant of plaintiff till just before the bringing of this action, and that the defendants are now in possession.

The defendants admit that they are the heirs at law of Taylor, and are in possession, but deny all the other allegations of the complaint.

Issues were submitted which, with the answers thereto, were as follows:

1. Did plaintiff buy the land in controversy at execution sale at request of Edward Taylor, ancestor of defendants, and for the benefit of said Taylor? Answer: Yes.

2. What was the date of payment and amount actually paid by plaintiff for said Taylor to the sheriff? Answer: 18 October, 1869—$166.

3. What is the annual rental value of the land? Answer: $40.

Judgment was rendered for the plaintiff, giving him a lien on the land, and subjecting the same to the payment of the debt due the plaintiff, and the defendant appealed.

The deed from the sheriff to the plaintiff, dated 23 September, 1869, and which recited an execution in favor of Seth Nowell v. Edward Taylor, was read in evidence.

(277) The clerk of the court testified: "I have searched in my office for the execution recited in the deed, in the file where executions

are kept, and find no execution in Seth Nowell v. Taylor. He produced the judgment docket, from which it appeared that there was a judgment entered in favor of Seth Nowell, guardian, v. Edward Taylor and others, for $93.80, with interest from 3 January, 1866, till paid; it further appeared from entry on said docket that a *venditioni exponas* issued 21 November, 1868, on said judgment, and was returned "Stayed," by an order of the convention. When the same judgment was brought forward, it appeared that execution was issued on it 3 November, 1869, and returned with endorsement: "Satisfied and paid into the clerk's office $11. Signed, Isaac Pipkin, sheriff, by Hillory Taylor, Dep., and endorsed as follows: "Received of Hillory Taylor, $133.84, in full of this judgment, 6 May, 1872." (Signed Seth Nowell, guardian.)

The clerk further testified: "I have found no judgment on the docket in favor of Seth Nowell v. Edward Taylor and others; I have examined the judgment docket from 1868 to 1872, and find no judgment taken in favor of Seth Nowell, individually, against Edward Taylor; I do not find the names except in this judgment of Seth Nowell, guardian, against Edward Taylor and others."

Mr. Sharpe, examined for plaintiff, testified: "I knew Edward Taylor and had a conversation with him about the sale of this land; I was collecting the tax and noticed that this land was listed as the property of John Wilson; I asked Taylor why he was paying the tax on the land, and Taylor said he had got Wilson to buy the land for him; he said that he, Taylor, owed Seth Nowell and could not pay him, and he got Wilson to buy the land for him; the land was listed in Wilson's name then; Taylor did not say when and where Wilson bought the land; this was after the date of the deed."

John Wilson, the plaintiff, recalled, and testified: "The land was sold by Deputy Sheriff Hillory Taylor, acting for Sheriff Pipkin; it was sold by him on ..... September, 1869, and knocked off to (278) me; I paid $166 and some cents, the amount of a debt held by the sheriff against Taylor, and the costs, to said deputy sheriff then; I was not present at the sale, but got another to bid off the land for me; he bid four hundred dollars; I did not pay the residue of the purchase money, because I could not get possession; I was willing to pay that and take possession, or to take what I paid and give up all claim to it; the land is worth about $500.

The defendants requested the court to charge the jury:

1. That if they believe the whole evidence in the case the plaintiff is not entitled to recover.

2. That the defendants are not estopped from claiming the land in question, unless Edward Taylor, the former defendant, procured the plaintiff to buy the same with intent to defraud the plaintiff.

3. That the sale of the sheriff was void.

4. That if the defendant's ancestor, Edward Taylor, requested the plaintiff to buy the land, that will not entitle the plaintiff to recover, unless he was ignorant of the want of authority on the part of the sheriff to sell the land, and that the said Edward Taylor fraudulently represented to plaintiff that the sheriff had authority to sell, and the plaintiff relied on said false representation.

The court refused the instructions, holding that they did not bear upon the issues or tend to aid the jury in arriving at a conclusion; but, if material at all, raised questions that could be considered by the court as well after as before the verdict should be rendered.

The court called the attention of the jury to the evidence relating to the issues submitted. No exception was taken to the charge given. The defendants excepted to the refusal of the court to give the instructions asked.

(279) After verdict the defendants moved for judgment on the ground:

1. That the plaintiff, claiming land by virtue of a sale, must show affirmatively that the homestead of the debtor in execution was regularly laid off; that this was true in all cases.

2. That it must certainly be shown, unless there is something in the judgment or execution showing that the judgment was rendered on a debt contracted prior to 1868, and the date of the contract does not appear in this case.

John Gatling for plaintiff.

D. A. Barnes and B. B. Winbourne for defendants.

DAVIS, J., after stating the facts: No issue in regard to the homestead was raised by the pleadings, and there was no question in relation thereto, as appears from the record, till after the verdict. The issues are raised by the pleadings, and whether by any act, however fraudulent and misleading, the owner can be estopped from claiming a homestead, except by deed with the consent of the wife, evidenced by her privy examination, as prescribed by Art. X, sec. 8, of the Constitution, it is not necessary for us now to consider, and if it were, Edward Taylor, as appears from the evidence and verdict of the jury, having invoked the kindness and friendship of the plaintiff, and procured the purchase of the land for his own benefit, and for which, at his solicitation, the plaintiff had paid the claim of the defendants, does not present a very meritorious consideration. *Hinson v. Adrian,* 92 N. C., 121.

In all the cases cited by counsel for the defendants, the claim to the homestead was presented by the pleadings.

The instructions asked for were properly refused. "They did not bear upon the issues or tend to aid the jury in arriving at a (280) conclusion."

The deed from the sheriff to the plaintiff contains a recital of the execution, levy and sale, and being the act of a public officer in discharge of his official duties, reciting how and by what authority he had made the conveyance, was prima facie evidence of the facts recited. *Rutherford v. Raburn,* 10 Ired., 144; *Hardin v. Cheek,* 3 Jones, 135; *Miller v. Miller,* 89 N. C., 402.

In the first cited case *Chief Justice Ruffin* said: "In effect, no judgment need be shown in a suit between the defendant in the execution, or one bound by its *teste,* and the officer or purchaser; at all events, if the latter be not the plaintiff in the execution." "Undoubtedly," says the *Chief Justice,* "the court would, at the instance of the defendant, set aside the execution if there were no judgment." And so, if the execution and return did not conform to the judgment, and any prejudice to the defendant resulted therefrom, the court would undoubtedly set it aside. In the case before us there was a judgment shown, but it did not exactly correspond with that recited in the deed, and there was also a conflict in the dates, but this variance was not fatal. *Green v. Cole,* 13 Ired., 425.

In *Rutherford v. Raburn, Hardin v. Cheek,* and *Green v. Cole,* a broad and liberal construction has been placed upon the Act of 1848, to be found in section 1347 of The Code.

The judgment declares that the plaintiff is entitled to a lien upon the land for the payment of the purchase money paid by him for Taylor, with the interest thereon, and that said lien be discharged upon the payment of the same by the defendants, or any one of them, by 1 January, 1888, and if not paid by that day, then the land is to be sold upon the terms and by the commissioners named in the judgment, and the proceeds applied, first, to the satisfaction of the judgment, and the surplus to the defendants.

The judgment must be modified so as to allow the defendants a (281) reasonable time to pay, and thus modified is affirmed.

No error. Affirmed.

Cited: Mobley v. Griffin, 104 N. C., 117; *Dickens v. Long,* 109 N. C., 169; *S. c.,* 112 N. C., 315; *Marshburn v. Lashlie,* 122 N. C., 240; *Wainwright v. Bobbitt,* 127 N. C., 280; *Caudle v. Morris,* 160 N. C., 171.

G. A. PEARSON AND WIFE, M. A. PEARSON, v. WARNER SIMMONS.

Action to Recover Land—Color of Title—Possession—Privity.

1. In an action to recover land, the plaintiff may establish his title to the *locus in quo:* (1) by showing a grant from the State, and a regular chain to himself; (2) by showing that he and those under whom he claims have had possession under known and visible boundaries for thirty years; (3) by showing a possession of twenty-one years under color of title (which would be good against the State), and (4) by showing title out of the State and continuous adverse possession under color.

2. Therefore, where the plaintiff showed possession in himself and those under whom he claimed, from 1820 to 1886, and a deed to himself, under a judicial sale, dated in December, 1872, but did not show title out of the State; it was *held* that he was entitled to recover—the defendant showing no title whatever.

3. In order to divest the title from the State by thirty years' possession, it is not necessary that there should be privity between the several successive tenants.

(Candler v. Lunsford, 4 D. & B., 407; *Melvin v. Waddell,* 75 N. C., 361; *Davis v. McArthur,* 78 N. C., 357; *Hill v. Overton,* 81 N. C., 393; *Christenbury v. King,* 85 N. C., 229; *Cowles v. Hall,* 90 N. C., 330; *Taylor v. Gooch,* 3 Jones, 467; *Ray v. Lipscombe, ibid.,* 185, and *Lewis v. Sloan,* 68 N. C., 557, cited and approved.)

THIS action was tried before *Shipp, J.,* at Spring Term, 1887, of HALIFAX.

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

(282) The facts are sufficiently stated in the opinion.

W. E. Daniels for plaintiffs.
No counsel for defendant.

SMITH, C. J. The complaint, in the usual form, alleged a seizin and right of possession in the *feme* plaintiff to the land mentioned therein and its wrongful occupation by the defendant, both of which allegations the latter denied. Issues were accordingly submitted to the jury, who find for the plaintiffs and assess damages at seventy-five dollars. The evidence of title offered consisted in a long, but not connected, adverse possession, commencing in 1818, and the occupation of the premises from about 1819 or 1820 by Benjamin Edwards until his death between 1840 and 1850.

It was shown that after his death his heirs in 1854 sold the premises to John A. Simmons, who entered into and continued in possession until

his death in 1859. Under a proceeding instituted in the late Court of Equity, at Fall Term, 1859, by the guardian of the infant and sole heir at law of the deceased, the land was sold in December, 1872, by the commissioner acting under orders in the cause, and by his deed conveyed to the *feme* plaintiff.

The defendant introduced no testimony, and his counsel, in arguing the case before the jury, contended and asked an instruction to the effect "that no sale of land so as to pass title could be valid without a deed, registration," etc.

The court did not so charge in direct terms, but gave this direction to the jury:

"In all actions of ejectment or actions to recover land, the plaintiff must prove his case and establish his title. There are several ways of so doing. One way is to show a grant from the State, and thence a regular chain of title. Another mode is to show that the plaintiff, or those under whom he claims, has had a possession under known and visible boundaries for thirty years. A third mode was to show a possession of twenty-one years under color of title, which would (283) be good against the State. Another mode is to show title out of the State, and an adverse possession continuously, under color of title in the party claiming the land. Further, that the defendant has shown no title, but the plaintiff cannot rely upon that fact."

The court repeated the proposition that the plaintiff must rely "as generally expressed" upon the strength of his own title.

These directions cover the whole ground, and involve so much of the instructions asked as the defendant was entitled to.

The exposition of the ways in which an estate in land may be acquired, as applicable to the case made in the proofs, is explicit and ample, and free from objection.

The cases cited by plaintiffs fully sustain the ruling, except as to so much as contemplates a privity in the possession of the different occupants maintained for thirty years, which is not required to divest title out of the State, and is not unfavorable to the defendant.

The presumption thus arising is conclusive and not open to rebuttal. *Candler v. Lunsford,* 4 D. & B., 407; *Melvin v. Waddell,* 75 N. C., 361; *Davis v. McArthur,* 78 N. C., 357; *Hill v. Overton,* 81 N. C., 393; *Christenburg v. King,* 85 N. C., 229; *Cowles v. Hall,* 90 N. C., 330; *Taylor v. Gooch,* 3 Jones, 467.

That the charge is sufficiently responsive to the prayer is apparent upon its face, and is sustained by the cases of *Ray v. Lipscombe,* 3 Jones, 185, and *Lewis v. Sloan,* 68 N. C., 557.

There is no error and the judgment is affirmed.

No error. Affirmed.

(284)

SAMUEL MOBLEY v. PAUL WATTS.

Appeal—Evidence—Lost Records—Nonsuit.

1. Parol evidence is admissible to prove the contents of lost or destroyed records. The statutory method of restoring such records, The Code, sec. 55 *et seq.*, does not have the effect to exclude such proof.

2. Whenever, in the progress of a trial, the plaintiff offers evidence to prove facts necessary to establish his case, and it is excluded by the court, he may voluntarily submit to a nonsuit and appeal, and have the ruling reviewed.

(Foster v. Woodfin, 65 N. C., 29; *S. v. McAlpin*, 4 Ired., 140; *Wade v. Odeneal*, 3 Dev., 423; *Drake v. Merrill*, 2 Jones, 368; *Sutton v. Westcott*, 3 Jones, 283; *Barwick v. Wood, ibid.*, 306; *Spencer v. Cohoon*, 1 D. & B., 27, and 4 Dev., 226, and *Hedrick v. Pratt*, 94 N. C., 101, distinguished and approved; *Dail v. Sugg*, 85 N. C., 104; *Yount v. Miller*, 91 N. C., 336; *Stewart v. Fitzgerald*, 2 Murph., 255; *Nelson v. Whitfield*, 82 N. C., 46; *Graham v. Tate*, 77 N. C., 120, approved, and *Hargett v.* ------, 2 Hay., 76 (243), overruled.)

THIS is a civil action to recover damages for trespass on land, and was tried before *Merrimon, J.*, at Spring Term, 1887, of MARTIN.

It was admitted that the *locus in quo* was owned in fee by Otis Andrews at the time of his death, and descended to his children.

The plaintiff claims title through a partition among the heirs at law of said Andrews, and successive conveyances to himself of a share allotted to one of said heirs, and put in evidence a deed from said heir to John L. Mobley, and a deed from said John L. to himself.

This deed, after a general description of the lands conveyed, referred for a more definite description to the report of the commissioners making the division between the heirs of said Andrews.

The plaintiff then offered, and was permitted by the court to prove, the destruction of all the court records of the county of Martin, by the burning of the courthouse in December, 1884, and further offered
(285) to prove by parol that a petition for the partition of the lands of Otis Andrews was filed by his heirs at law at January Term, 1858, of the County Court of Martin, and that a decree for partition was made in said cause, and partition duly made in accordance therewith, and reported and confirmed by the court, and that the same was recorded in a book containing the records of the land divisions of the county, and which book was in the office of the clerk of the Superior Court, and was, with the papers, proceedings and orders in said action, destroyed by the burning of the courthouse; and further to show the contents of said proceeding by parol.

To this offer of parol proof the defendant objected, upon the ground that said records could not be proved in this action by parol, but must be set up under the statute for the restoration of burnt and lost records, or other proper proceeding. Objection sustained by the court, and plaintiff excepted.

The plaintiff then offered in evidence the deed from one of the heirs of Otis Andrews to the defendant, describing the land conveyed therein as the tract which the grantor drew in the division of the Otis Andrews' tract of land, numbered in said division as No. ....., which will fully appear by reference to said division now on the records of Martin County, and then offered to show the destruction of said records by the burning of the courthouse, and to show by parol the contents of said records, and to show the boundaries and contents of said records by parol. Objection by defendant. Objection sustained and plaintiff excepted.

The plaintiff submitted to a nonsuit and appealed to the Supreme Court.

J. E. Moore filed a brief for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

DAVIS, J., after stating the case: The record having once (286) existed, and having been destroyed by fire, the question presented is, can secondary evidence be admitted to prove facts of which the lost or destroyed record furnished the primary and best evidence?

The defendant insists that it cannot, and that the loss can only be supplied and the evidence made available by the mode prescribed in The Code, sec. 55 *et seq.*, for the restoration of *"burnt* and *lost records,"* and for this numerous authorities are cited, which we have examined with care, and the more so because of the confidence and earnestness with which the very able counsel who represented the defendant relied on the correctness of the position.

Foster v. Woodfin, 65 N. C., 29, relied on, was a motion to amend the record, and it was said that "whenever by any accident there has been an omission by the proper officer to record any proceeding of a court of record, the court has the power, and it is its duty, on the application of any person interested, to have such proceeding recorded as of its proper date."

This is only the assertion of the power inherent in every court of record to make its records speak the truth, and has no reference to *lost* records, and the same may be said of *S. v. McAlpin,* 4 Ired., 140, cited. The cases of *Wade v. Odeneal,* 3 Dev., 423; *Drake v. Merrill,* 2 Jones, 368; *Sutton v. Westcott,* 3 Jones, 283; *Borwick v. Wood, ibid.,*

306, and *Spencer v. Cohoon,* 1 D. & B., 27, and 4 Dev., 226, were none of them cases of lost record, but only refer to parol evidence offered to explain or prove existing records. *Glass v. Stinson,* 2 Sumner, 605, cited also in Myers' Fed. Dec., sec. 914, vol. 17, was a case in which it was sought to establish by depositions the fact that there had been an indictment, trial, conviction and sentence, "which," said *Story, J.,* who delivered the opinion, "should be proved by a production of the record itself." The record in that case was not lost, and, as was said
(287) by the judge, "the best evidence was the original or a certified copy."

Gridley v. Phillips, 5 Kansas, 349, simply declared that under a sale made by an administrator under judicial proceedings in which the administrator was ordered to execute a deed to the purchaser, a deed made by the agent of the administrator was not valid. The record *existed,* but it did not give validity to a deed not executed in accordance with its directions, but by one not authorized by law to make it.

Freeman on Void Judicial Sales, 88 and 89, relied upon by the defendant, only goes to the extent of declaring that an essential statutory requisite in a judicial sale cannot be dispensed with even in a Court of Equity.

In Illinois certain heirs recovered judgment in ejectment for land purchased at a guardian's sale. There was no report made by the guardian of his proceedings under the order of sale, and, of course, no confirmation.

The purchaser filed a bill to enjoin the execution of the judgment and for general relief. This was denied in *Young v. Dowling,* 15 Ill., 481, cited by Freeman.

It was put upon the ground, pure and simple, that the requirement of the statute had not been complied with, and that "the purchaser at these statutory sales gets no imperfect equitable title which may be perfected in chancery; he gets the whole title which the infant had, or he gets no title whatever." There was and had been no record.

In *Weatherhead v. Baskerville,* 11 Howard, 360, cited in defendant's brief, also in 17 Myers' Federal Decisions, sec. 916, it is said: "The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence."

Instead of sustaining the position of the defendant it clearly admits the contrary view, that the record having once existed and been lost, secondary evidence is permitted to supply the loss, and we find abundant authority for this latter position. We have seen no decision to
(288) the contrary. The nearest approach to it is a short opinion of *Moore, J., in Hargett and wife v.* ....., reported in 2 Hay-

wood, 76 (243 of Martin and 2 Haywood Law and Equity, by *Battle, J.*), to which our attention has been called by *Merrimon, J.*, and which is as follows: "The contents of a record, lost or destroyed, cannot be proved otherwise than by a copy. It is better to suffer private mischief than a public inconvenience, especially one of such magnitude as the introducing of parol testimony to supply a record."

The eminent judge does not exclude *all secondary* evidence, but limits it to copies. He cites no authority, and the ruling is questioned by the reporter, Judge Haywood, himself a jurist of great learning and ability, in a full note, in which he says, "all former decisions are at variance with this decision," and in which he shows, by forceful reasoning and high authority, that the contents of a lost record may be proved by parol, when better evidence cannot be had. He cites a number of authorities, among them *Lord Mansfield,* who, in Cowper, 109, says: "If a foundation can be laid that a record or deed existed and was afterwards lost, it may be supplied by the next best evidence to be had."

In the note referred to it is said: "Parol testimony may misrepresent facts, and so may deeds and records; but as because in the latter there is a greater probability of truth than in parol testimony, and for that reason the law requires them, so because there is no record nor deed, nor any copy, parol evidence will in general relate the fact truly, and is as much better than no evidence at all, as records and deeds are superior to itself, it ought to be received upon the same principle as they are, not because there is absolute certainty either in the one or the other (for a record or deed may be altered or corrupted, substituted or the like) but because in choosing probabilities, it is wise to take the best that offers. To require the production of a record or deed when there is undoubted proof of its destruction, is to require an impossibility, (289) and *lex neminem cogit ad impossibilia;* to say his right shall be lost with the record or deed that forms it, though destroyed by invincible calamity, is to inflict punishment for the acts of heaven and *actus dei nemini facit injuria,"* etc., . . . "all other rights not required to be evidenced by records or deeds, are at all times capable of proof by some circumstance or other, sufficient to evince their existence." And why should rights which, because of their superior value and importance are required to be evidenced by deed or record, be irretrievably lost by the loss or destruction of the higher evidence upon which they vest, and which higher evidence, we know from experience, may be frequently lost or destroyed?

We think the admissibility of secondary evidence to supply the loss is sustained both by reason and authority.

If the *record is lost* and is ancient, its existence and contents may sometimes be presumed, but whether it be ancient or recent, after proof

of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence." 1 Greenleaf, sec. 509, and the cases referred to in the note. See also Wharton on Evidence, sec. 135; *Clark v. Tindle,* 52 Pa. St., 492; *Gore v. Elwell,* 22 Maine, 442; *Nason v. Jordan,* 62 Maine, 480; *Kershaw v. Kershaw,* 36 Maryland, 309; *Dail v. Sugg,* 85 N. C., 104; *Yount v. Miller,* 91 N. C., 336; *Stuart v. Fitzgerald,* 2 Murph., 255; *Nelson v. Whitfield,* 82 N. C., 46.

These and the cases cited in them clearly show that secondary evidence is admissible in case like that before us.

But it is insisted that the statutory mode of restoring lost or burnt records excludes any other mode of proof. We think not. It was not a repeal of the common law rules of evidence, but in aid of them, so as to enable those "whose evidences of title to real property had been destroyed, instead of relying upon the slippery memory of wit-
(290) nesses whose testimony may be lost in a few years in the course of nature, to have the means of perpetuating the muniments of their titles." *Cowles v. Hardin,* 91 N. C., 231, and the cases there cited.

The counsel for the defendant says that if this Court shall be of opinion that there was error in the ruling of his Honor below, still the plaintiff is not entitled to a new trial, because the appeal is not properly in this Court, and he moves to dismiss it upon the ground that the judgment of nonsuit was at the instance of the plaintiff—was the judgment asked for by him—and that he could not appeal unless and until after all the evidence was in, and there was an intimation of the Court that, upon the *whole* evidence he was not entitled to recover, and upon the further ground that the appeal was premature and fragmentary.

For the first ground he relies upon *Hedrick v. Pratt,* 94 N. C., 101. In that case there was a verdict for the plaintiff, and "the Court, upon consideration of all the law bearing upon the case, being of opinion with the defendant, directs the verdict to be stricken out," the necessary effect of which was a new trial. As was said by the Court, "for some singular reason that does not appear, the plaintiff took a nonsuit and appealed." He could not assign ground of error to be reviewed and corrected by this Court, for as to the judgment of nonsuit demanded and obtained by him, the Court had made no adverse decision, it had allowed him just what he asked for. He could not be allowed the absurd thing of asking this Court to correct alleged error in a judgment in his own favor, granted at his instance, and in no sense at that of the defendant, nor at the suggestion, or under any adverse ruling as to it. "If the plaintiff could have appealed, as he undertook to do, this Court could not do more than grant a new trial. Why, therefore, did he desire to appeal?" That is unlike the case before us, which comes within

the well settled rule laid down in that very case, "that when (291) on the trial the court intimates an opinion that the plaintiff cannot maintain the action, he may, in deference to the opinion of the court, submit to a judgment of nonsuit, assign ground of error, and appeal to this Court. In such cases the judgment is not regarded as entered simply at the instance of the plaintiff, he submits to it with the understanding on the part of the court that he shall have the right to except and appeal." In *Graham v. Tate,* 77 N. C., 120, *Pearson, C. J.,* says: "Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. *This is every day practice.*" And the *Chief Justice* gives the reasons for it. But, says the learned counsel, there was in this case no intimation that the charge of the court would be against the plaintiff, and there could be no such intimation until the whole case was before the court. We cannot take this narrow view of the case; it is "sticking in the bark." In the progress of the trial the plaintiff offers evidence to establish necessary links in his chain of title, without which he cannot make out his case. This evidence is excluded. Can he go any further? He submits to a nonsuit. Is not the irresistible inference that he does so because, not under the intimation simply, but under the ruling of the court, if correct, he must fail?

It presents a case in which he has the right to have his Honor's opinion reviewed by appeal, or it is the end of his case. It is not an appeal from a mere interlocutory ruling or judgment, which brings up only a "fragment" of the case. It goes to the merits and existence of the case, and upon neither ground relied on can the motion to dismiss be allowed. (292)

There is error and a new trial is awarded.

Error. *Venire de novo.*

Cited: Clifton v. Fort, ante, 178; *Jennings v. Reeves,* 101 N. C., 451; *Bonds v. Smith,* 106 N. C., 565; *Gillis v. R. R.,* 108 N. C., 446; *Isley v. Boon,* 109 N. C., 559; *Asbury v. Fair,* 111 N. C., 258; *Hopper v. Justice, ibid.,* 420; *Varner v. Johnston,* 112 N. C., 576; *Williams v. Kerr,* 113 N. C., 310; *Cox v. Lumber Co.,* 124 N. C., 78, 81; *Aiken v. Lyon,* 127 N. C., 175; *Jones v. Ballou,* 139 N. C., 527; *Hayes v. R. R.,* 140 N. C., 134; *Hughes v. Pritchard,* 153 N. C., 25; *Nowell v. Basnight,* 185 N. C., 148.

NOTE.—The same point was presented and determined in like manner in *Robertson v. Council,* from Martin County, at the present term.—REPORTER.

CHARLES MILLHISER v. E. ERDMAN, A. M. ERDMAN AND JOHN SCHISSLER.

Contract—Delivery—Claim and Delivery—Assignment—Conditional Sale—Registration—Vendor and Vendee.

Where the vendor shipped goods to the vendee under a contract in which it was stipulated that the latter should at the same time execute and send the former his notes for the price, but the vendee, having received the goods, failed to carry out the agreement with reference to the notes: *Held,*

1. That the execution and delivery of the notes was an essential part of the contract, and no title passed until it was performed.
2. That such an agreement is not a conditional sale and does not require registration.
3. That an assignment of the goods to a trustee for the benefit of creditors does not pass the title as against the original vendor, and he may recover possession.

(Brem v. Lockhart, 93 N. C., 191; *Empire Drill Co. v. Allison,* 94 N. C., 548, cited and approved.)

CIVIL ACTION, tried before *Shipp, J.,* at Spring Term, 1887, of CRAVEN.

The plaintiff testified that during the year 1885, and since, he was doing business in Richmond, Va., as dealer in leaf tobacco for the manufacturing of cigars, and that during said time the defendant was
(293) doing business in New Bern, N. C., that on or about 28 November, 1885, he received from defendant a postal card, as follows:

"NEW BERN, 27 November, '85.

"DEAR SIR: Are you still in the leaf business? If so, send me sample of some binders, good stock, and sample of Havana and Havana wrappers; if you have some real nice stock on hand you may also send me sample of Hustorick wrapper if you have nice goods."

To which he replied by letter, as follows:

"1 DECEMBER, 1885.

"DEAR SIR: In reply to yours of 27th, I have sent you the following samples, per express:

. . . . . .

"Terms 3, 4 and 5 mos. notes. I have put these goods down very low, and hope to receive your order, as I feel sure the goods will give you entire satisfaction. Awaiting your prompt reply, I remain," etc.;

that not hearing from Erdman in the meantime, he, on 13 December, 1885, sent to him a letter as follows:

"Please let me hear from you in regard to samples 'leaf,' sent you 1 December, from which I hope you have been able to make a selection. Yours," etc.;

that Erdman had received samples in due course and also the letter above set out; and on 27 December, 1885, he received from him a letter, as follows:

"NEW BERN, 25 December, 1885.

"DEAR SIR: You can send me the following goods, case 242 and 151; the two best bales Havana No. 16 and 6, the binders I don't like; I must have better ones, if you have better you may send me one case, and I would like to have a nice case of cheap cigars, at about $10 per thousand, put up 50 in a box. I am," etc.

"P. S. You send the tobacco; be sure and give me weight for (294) government book";

that on 28 December, 1885, he mailed to Erdman the following letter, which contained the invoice and the three promissory notes therein mentioned, all of which Erdman received:

"DEAR SIR: Your favor 25th received, and I hand you enclosed invoice of two cases of wrappers, and two bales Havana shipped by steamer as per your order.

"Enclosed I hand you three notes, at three, four and five months, which please make payable at your bank and return signed in settlement at earliest convenience, and oblige,

"Yours truly."

On the same day the plaintiff shipped by steamboat the tobacco as set forth in the letter, and it was admitted that the same was duly received by Erdman, and that the value thereof was four hundred dollars.

The defendant Erdman did not execute and send to plaintiff his note; and on 16 January, 1886, plaintiff received from him a postal card, as follows:

"DEAR SIR: I just received the goods, send drafts to acceptance as long time on them as possible, I will accept and return; that is the way I do with the rest of the dealers.

"Yours truly."

And on the same day the plaintiff replied as follows, and Erdman received the letter:

"DEAR SIR: Your favor of the 15th is received, and in reply will say, that when I sent you samples I wrote you on 1 December, giving you

price and terms, notes at three, four and five months. It was with this understanding you ordered the goods, and on these terms I shipped the goods; but you can either send me the notes at three, four and five months, or if you prefer you may make five notes at two, three, four, five and six months from date of shipment, 28 December.

(295) "This is the best I can do; I cannot regulate my business by what some other houses do. I gave you prices and terms as per my letter of 1 December, at three, four and five months notes, and it was on these terms you bought the goods, and you should make settlement accordingly, but I enclose you five notes at two, three, four, five and six months and you can take your choice, either send the first three notes or these five notes, which I trust will be satisfactory; but if you are not satisfied you will please return me the entire lot of goods at once, and send me shipping receipts and oblige, Yours," etc.

Erdman did not reply to this letter and did not send his notes as therein requested, nor any notes. Plaintiff failing to get the notes or a return of the tobacco, came to New Bern on 7 February, 1886, made a demand on W. W. Clark, Esq., and all the defendants for the tobacco aforesaid, the delivery of which was refused.

It was admitted that the lot of tobacco was in the actual possession of the defendant John Schissler at the time of demand.

Plaintiff further testified that he had contracted to sell the tobacco aforesaid for the negotiable promissory notes of the defendant Erdman, as set forth in the correspondence above, and only on the terms as therein stated, and that said defendant had not complied with said contract; that said notes, such as taken in the course of trade, are of value to the plaintiff as commercial paper.

The defendants introduced the following evidence: An assignment of the defendant Erdman of stock of goods which included the said lot of tobacco to W. W. Clark for the benefit of creditors, recorded on 28 January, 1886; that said assignee at once took charge of said stock and placed it in the hands of defendant John Schissler as his agent.

(296) It was admitted that no part of the contract for the purchase of said tobacco was ever registered.

The court instructed the jury that on this evidence the plaintiff was not entitled to recover and directed a verdict for defendants, which was accordingly entered. Rule for new trial on the ground that the court improperly instructed the jury. Rule discharged. Judgment and appeal by plaintiff.

Clement Manly for plaintiff.
W. W. Clark for defendant.

MERRIMON, J. In our judgment the court misinterpreted the contract of sale, and misapprehended the legal effect of what the plaintiff did towards its execution.

The intention of the parties to the contract must prevail, and this must, in this case, be ascertained from the correspondence set forth as above, and the attending circumstances, as these appear from the facts admitted, and in order to determine the meaning and purpose intended, the whole must receive a reasonable and just interpretation.

Unquestionably, if the plaintiff had not shipped the tobacco in controversy to the defendant Erdman, the latter would have had no title to, nor indeed, any right in respect to it, unless he had first tendered to the plaintiff the promissory notes which he had agreed to give for it. This is so because a material and essential part of the contract was that the delivery of the notes, on the part of Erdman to the plaintiff, was to be done concurrently, simultaneously, with the delivery of the tobacco to him on the part of the plaintiff. The latter proposed to sell the tobacco to Erdman, in consideration of his three promissory notes, running respectively to maturity at three, four and five months, and the latter, by sending his order for it, obviously accepted the terms. The parties agreed to do material concurrent acts necessary to effectuate the sale, each dependent on the other, and neither effectual without (297) the other. It was not contemplated that the tobacco should be delivered, and the notes given at a future day thereafter, nor was it agreed expressly or by reasonable implication that the title to the tobacco should pass to any extent for any purpose, until the concurrent, dependent acts should be done. As no particular time for the delivery of the notes was agreed upon, the implication is that they should be delivered concurrently with the delivery of the tobacco, as much so as if the parties had been in the presence of each other and dealing across the counter. This plainly appears from the terms of the proposition to sell, and the acceptance of the same, as well as from the letter enclosing the invoices of the tobacco shipped, and the notes to be executed, and sent to the plaintiff by Erdman.

But the contracting parties were not in the presence of each other, so that the things to be done in pursuance of the contract could be presently done; one of them was in Richmond, the other in New Bern, hundreds of miles intervening between them. The plaintiff, in pursuance of the agreement to sell, shipped the tobacco to the buyer, not intending to part with his title to it until the notes should be sent to him, and the buyer was bound to so understand from the terms of sale so proposed and accepted by him, as well as from the invoices and notes prepared for execution sent to him and the subsequent letter proposing to modify the terms as to the time the notes should become due. When, therefore, the

buyer got possession of the tobacco, this was not for the purpose of passing the title to him until he did the concurrent act of sending the notes to the seller. Such shipment and possession were only steps in the way of the execution of the contract, and ineffectual as against the seller, until the concurrent act should be done on the part of the buyer. The possession thus coming about was of and for the plaintiff until the notes should be sent to him. Erdman got no title to the tobacco, be-
(298) cause he faithlessly failed to *send* his notes to the plaintiff as he agreed to do, and as he had not title, had a mere naked possession, and that for the plaintiff, without any right, he could not pass any title to the trustee for creditors, as he undertook by the deed of assignment to do. No sale of the tobacco was consummated or made effectual under the contract. There was only an agreement to sell, which was not perfected. The plaintiff did not agree or intend to part with the title to his tobacco until he received the notes, and Erdman had no right to expect to get title to it until he sent the notes. 3 Kent's Com., 497; Story on Contract, secs. 800, 803; 1 Par. on Con., 528 (5 ed.); Benj. on Sales, secs. 325, 334, 366, 425, 541, 550, 570, 582, 583 (4 Am. Ed.); *Haggerty v. Palmer,* 6 Johns., ch. 437; *Palmer v. Hand,* 13 Johns., 434.

The statute (The Code, sec. 1275), which requires "all conditional sales of personal property, in which the title is retained by the bargainer," to be reduced to writing and registered to make the same effectual as against creditors and purchasers, has no application here. There was, as we have seen, no sale consummated, conditional or otherwise.

This statute applies to cases where the bargainer sells and delivers the personal property to the bargainee, retaining the title thereto as a security for the purchase money until paid, while the latter has possession of, uses and controls it for his own benefit. *Brem v. Lockhart,* 93 N. C., 191; *Empire Drill Co. v. Allison,* 94 N. C., 548.

There is error. 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.

Error. *Venire de novo.*

Cited: Munds v. Cassidey, 98 N. C., 565; *Millhiser v. Erdman,* 103 N. C., 33; *Guano Co. v. Malloy,* 104 N. C., 679; *Richardson v. Insurance Co.,* 136 N. C., 315; *McCullers v. Cheatham,* 163 N. C., 64; *Land Co. v. Bostic,* 168 N. C., 100; *Harvester Co. v. Parham,* 172 N. C., 392; *Davidson v. Furniture Co.,* 176 N. C., 570.

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LOWDERMILK BROS. v. HENRY BOSTICK.

Deed, Construction of—Evidence.

1. In the construction of deeds the first rule is, that the intention of the parties will be effectuated if possible; and the second is, that this intention is to be ascertained from all its terms considered together.

2. As a general rule, no expression in a deed can be contradicted or explained by extrinsic evidence.

(Dismukes v. Wright, 4 Dev. & Bat., 206, cited and approved.)

CIVIL ACTION tried before *Boykin, J.*, at February Term, 1886, of RICHMOND.

This was a claim and delivery proceeding, in which the plaintiff alleged that he was the owner of a certain horse and other personal property.

The plaintiff introduced in evidence the following lien, which was executed by the defendant Bostick, to wit:

"Whereas, Henry Bostick, of Richmond County in said State, proposes to cultivate and farm about forty acres of land on the tract of land in said county known as Mary J. Powell's, for the purpose of raising a crop on said land during the year 1882; and whereas, Macon & Lowdermilk Bros., of said county, have agreed to make advances to said Henry Bostick for purposes of agriculture, raising a crop and farming on said land during the year A.D. 1882, to the value and amount of one hundred dollars, and such further sums as said Macon & Lowdermilk Bros. may deem necessary, not exceeding in all three hundred and seventy-five dollars; and whereas, said Henry Bostick desires to secure to said Macon & Lowdermilk Bros. the sum so agreed to be advanced in accordance with the provisions of the act of Assembly in such cases made and provided: Now, therefore, in consideration of said advances to be made as aforesaid, Henry Bostick, by these presents, does sell, transfer and agree to deliver to said Macon & Lowdermilk Bros., on or before the first day of October next, so much corn, cotton and (300) other products, raised during the present year by said Henry Bostick, as shall be sufficient to pay for the supplies to be furnished as aforesaid, which conveyance and transfer shall create a lien in favor of said Macon & Lowdermilk Bros. to the extent of the advances made, or to be made, upon all the crops said Henry Bostick may raise, be interested in, or in anywise control during the present year on the above mentioned land, or on any other lands in said county. It is further agreed that the claims for the advances aforesaid shall be due and owing at the date of the delivery of said advances, or any part thereof, and that the lien hereby created shall arise, exist and take effect on said crop or parts

thereof as the same shall be gathered to the extent of the advances then made. And for further security, said Henry Bostick bargains and sells to the said Macon & Lowdermilk Bros. the following articles of personal property, to wit: One bay mule, 11 years old; one sorrel horse, 10 years old; one two-horse wagon; 11 head of hogs unmarked; with the understanding that if said Henry Bostick shall well and truly pay said Macon & Lowdermilk Bros. for the advances aforesaid on or before the first day of October next, the said lien and mortgage shall be discharged and the said property revert to said Henry Bostick, otherwise said Macon & Lowdermilk Bros. shall have power to take into possession all of said crops and property on the farm or elsewhere, if removed, and to sell the same for cash, or so much thereof as may be necessary to pay for the advances aforesaid, attorney's fees, registration and other expenses incurred by said Macon & Lowdermilk Bros. in executing this provision, first advertising said sale for ten days in three public places in said county. Said Henry Bostick does hereby certify that no other lien or mortgage has been given on said property. If this claim is not
(301) paid at maturity, to bear interest at the rate of 8 per cent per annum from date thereof until payment.

"In witness whereof said Henry Bostick has hereunto set his hand and seal, this 9 February, A.D. 1882." (Signed by Bostick.)

The defendant was indebted to plaintiffs for the year 1881 forty dollars, and before the execution of the lien agreed to trade with them in the year 1882 if they would permit him to retain certain corn raised by him in 1881, and upon which they had a lien made by defendant to plaintiffs in 1881. This agreement was entered into on 27 December, 1881.

Z. F. Lowdermilk, one of the plaintiffs, testified that they, the plaintiffs, advanced under the lien of 9 February, 1882, to the defendant to the amount of $309. Before the execution of the last named lien the defendant was indebted to them in the amount of fifty dollars. Of this sum $40 was for the corn retained in 1881, upon which plaintiffs charged 10 per cent per annum, aggregating $44. They sold defendant a barrel of flour at $9 on 14 January, 1882. The witness further testified that to recover possession of the property conveyed in the lien of 9 February, 1882, he caused a writ to issue for the seizure thereof; that he paid the costs of the same, including the attorney's fee. He insisted that under the said lien the plaintiffs were entitled to recover said expenditures from the defendant, he never having repaid the same to them according to plaintiff's testimony.

It was admitted that all the advances made at the time of the execution of the lien of 9 February, 1882, and those made thereafter, were paid for by the defendant. There was conflicting testimony as to the payment of

the costs by the defendant. The plaintiffs are the surviving members of the firm of Macon & Lowdermilk Bros.

The court charged the jury that the lien of 9 February, 1882, secured only the advances made at or after its execution, and that the property therein conveyed could not be subject to the satisfac- (302) tion of any indebtedness existing prior to the execution thereof; and, that if the jury believed that the defendant had satisfied plaintiff for all advances made under the said lien of 9 February at and subsequent to the date of the execution thereof, the defendant would be entitled to their verdict; otherwise, they would assess the balance due thereunder, if any, and find to that extent for the plaintiffs.

Verdict and judgment for the defendant. Appeal by plaintiffs.

No counsel for plaintiffs.
Platt D. Walker and Frank McNeil for defendant.

SMITH, C. J. The plaintiff's right of action depends upon the construction of the terms of the deed, and preliminary thereto its efficacy in giving the lien under the statute, the determination of the latter being unnecessary if its terms do not take in the demand for the debt of the preceding year.

We coincide with the judge in the opinion that the deed provides for advances then or thereafter to be made in cultivating and bringing to maturity the crops of that year and not to such as were made before its execution. Its terms very plainly indicate this, as a brief reference will show, and they cannot be varied by parol evidence of understandings outside of it.

Nearly fifty years ago, *Daniel, J.,* speaking for the Court, said: "In the construction of deeds the first rule is that the intention of the parties is, if possible, to be supported. And the second is that this intention is to be ascertained from the deed itself, that is, from all parts of it taken together. In general, no expression can be contradicted or explained by extrinsic evidence, and the intention collected from the four corners of the deed is to govern the construction of every passage in (303) it." *Dismukes v. Wright,* 4 Dev. and Bat., 206.

Guided by this rule, the instrument itself shows clearly the intention of the parties as to the extent of its operation, limiting it to the securing such moneys or advances as were to be used in making the contemplated crops of that year.

It recites the defendant's purpose of raising a crop on the land *during the year* 1882, and the agreement of the firm "to make advances to said Henry Bostick," for the purpose of enabling him to go on "in raising a crop and farming on the land *during the year 1882*" within defined limits.

Again, it says that "in consideration of said advances to be made as aforesaid, Henry Bostick, by these presents, does sell," etc., "so much corn, cotton and other products raised during the present year . . . as shall be sufficient to pay for the supplies to be furnished as aforesaid," etc., and such conveyance "shall create a lien in favor of said Macon & Lowdermilk Bros. to the extent of the advances made or to be made upon all the crops said Henry Bostick may raise, be interested in or in any wise control during the present year on the above mentioned land," etc.

Without quoting further provisions contained, it is quite apparent that no preëxistent debt was intended to be secured in giving the lien, and not less than the parties so meant, and such is the legal effect of the deed to create the statutory lien.

We therefore concur in the ruling of the court, brought up by appeal for review, that if all the advances made during 1882 were paid, the plaintiff must fail in his action.

There is no error.

No error. Affirmed.

Cited: Munds v. Cassidey, post, 563; *Strouse v. Cohen,* 113 N. C., 454; *Bargain House v. Watson,* 148 N. C., 298.

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M. A. BAKER v. BRYANT LEGGET.

Attachment—Constitution—Homestead—Mortgage.

1. The right to a homestead depends upon residence in the State.
2. Where a debtor, a resident of the State, mortgaged property to which he would have been entitled as homestead, and then removed from the State, and afterwards, but prior to the registration of the mortgage, the judgment creditor had it levied upon and sold under an attachment: *Held,* that the judgment creditor obtained a good title.

(*Adrian v. Shaw,* 82 N. C., 474; *S. c.,* 84 N. C., 832, and *Watkins v. Overby,* 83 N. C., 165, cited.)

CIVIL ACTION, tried before *Clark, J.,* at January Term, 1887, of ROBESON.

It appeared that on 26 December, 1877, Addison Regan owned, and he and his family resided upon the tract of land in question, situate in the county of Robeson; that it was all he had, and of value less than $500; that he was at that time indebted to the plaintiff by notes for consider-

able sums of money, and to secure the payment of such notes, on the day mentioned, he and his wife executed to the plaintiff a mortgage of this land, which was not registered until 23 January, 1878; that before the registration of this mortgage, the said Reagan and his family removed from and ceased to be residents and citizens of this State, going to the State of Georgia, where they became citizens; that after they so removed, on 17 January, 1878, the defendant in this action began his action against the said Reagan before a justice of the peace, and therein duly obtained a warrant of attachment, which, on the same day was levied upon the land mentioned; that on 21 February, 1878, the plaintiff in that action—the present defendant—obtained judgment, which was regularly docketed in the Superior Court of the county named; that thereupon a *venditioni exponas* was issued, and the land so levied upon (305) was sold by the sheriff of the county mentioned, the present defendant becoming the purchaser, and taking from the sheriff a proper deed of conveyance therefor.

The defendant is in possession of the land, claiming title thereto by virtue of the sheriff's deed mentioned; the plaintiff claims title to the same by virtue of the said deed of mortgage. He contends that the land was the homestead of the mortgagor, Regan; that he might execute a mortgage of the same, as he did; that the land was not subject to be levied upon to pay the defendant's judgment, because it was such homestead.

The facts were agreed upon and submitted to the court for its judgment. The court, upon consideration, gave judgment for the defendant, and the plaintiff appealed to this Court.

T. A. McNeil and F. McNeil for plaintiff.
W. F. French for defendant.

MERRIMON, J., after stating the case: The right of *homestead* provided and secured by the Constitution (Art. X, secs. 2, 5, 8) is incident to residence in this State. Only residents have and are entitled to it. A nonresident has no such right, although he may be the owner of real property situate in the State. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to exempt the homes of those who have or can acquire them "from sale under execution or other final process obtained on any debt." He has no home for himself or his family, and the reason for the exemption as to him does not exist.

And when a resident removes from the State and becomes a resident elsewhere, he thereby abandons—relinquishes his right of homestead—as to him it becomes suspended—he ceases to be within the terms, the purpose or spirit of the constitutional provision, and all the prop-

(306) erty, both real and personal, that he may leave behind him becomes at once subject to the satisfaction of his debts; there is in that case no longer any exemption in his favor. No doubt he might, before removing from the State, in good faith sell or part with his homestead in any lawful way, and the purchaser would get a good title for the land, and having turned the same into cash or other personal property, he might take so much of it as would be exempt from sale with him, but as to such as he might leave behind no exemption would prevail.

The plaintiff contends that while the land in question constituted the homestead of his debtor Regan, he took a mortgage upon it to secure his debt, as he might lawfully do. But, unfortunately for him, he failed to have that mortgage registered; if he had done so, then he had been secure as to it. While Regan remained in this State the homestead right helped the plaintiff, because the homestead itself was exempt from sale under execution or other final process, and his mortgage was effectual between the mortgagor and mortgagee without registration, but as soon as the mortgagor removed from the State, he left the land—his late homestead—relieved from the quality of exemption, and exposed to the right of his creditors to have the same sold to pay their debts. The plaintiff's mortgage, unregistered, was not effectual as against creditors of the mortgagor, and hence at once upon his removal from the State, any creditor of his might levy his attachment upon it, or sell it under any other proper process for the purpose. The plaintiff's unregistered mortgage did not place him upon any better footing after the removal than any other creditor. It was his folly or his misfortune that he failed to promptly register his mortgage. The defendant, seeing his opportunity, levied his attachment on the land, and thereby secured a special lien that preceded that created by the plaintiff's mortgage, which was not registered until after the levy of the attachment, when it

(307) first became effectual as against creditors. The lien of the attachment was precedent to it, and when the defendant bought the land at the sale of the sheriff, made under and in pursuance of the writ of *venditioni exponas,* founded upon the judgment and levy of the attachment mentioned, he got a good title. *Adrian v. Shaw,* 82 N. C., 474; *S. c.,* 84 N. C., 832; *Watkins v. Overby,* 83 N. C., 165.

There is no error and the judgment must be affirmed.

Affirmed.

Cited: Lee v. Moseley, 101 N. C., 315; *Burgwyn v. Hall,* 108 N. C., 496; *Vanstory v. Thornton,* 112 N. C., 214; *Fulton v. Roberts,* 113 N. C., 427; *Stern v. Lee,* 115 N. C., 444; *Thomas v. Fulford,* 117 N. C., 693; *Chitty v. Chitty,* 118 N. C., 653.

T. J. BREEDEN ET AL. v. DUNCAN McLAURIN.

Evidence—Tenants in Common—Adverse Possession.

1. Upon the trial of an issue of sole seizin in a proceeding for partition, it appeared that the defendant claimed under a deed purporting to convey the entire estate, and which contained general covenants of warranty. The plaintiffs offered to show that after the suit was commenced they proposed to the defendant that if they recovered against him, they would let him keep the land if he would transfer to them his right of action upon the warranty, and he assented: *Held*, that the admission of such evidence was not error.

2. The bare occupation of one tenant in common of lands, and the undisturbed use thereof by him under a title proposing to convey the entire estate for seven years, is not such an adverse possession as will bar the other tenants. To have such an effect the possession must be for twenty years. If the tenants, not in possession, had asserted their claim and been resisted and thereafter the occupant had been permitted to remain in possession for seven years, his possession would be deemed adverse and his title would have ripened against his co-tenants.

(*Hicks v. Bullock*, 96 N. C., 164, cited.)

ISSUES joined in a special proceeding, tried before *Clark, J.*, at (308) February Term, 1887, of RICHMOND.

In this action, begun before the clerk for partition of the tract of land described in this petition, the petitioners alleged that they were tenants in common with the defendant, each being entitled to one-fifth part thereof. The defendant denied the alleged tenancy, and asserted a sole seizin in himself. The issue thus formed was transferred to the Superior Court for trial and was passed on by the jury, who found the tenancy to exist, and from the judgment thereon the defendant appealed.

It appeared on the trial that in 1828 the estate in the land vested in one Archibald Fairley, who died leaving two children, daughters, of whom one died at the age of sixteen unmarried, and the other married one Alexander Malloy, of whom was born Alexander Malloy, Jr., their only offspring. The said Malloy, Sr., died in 1846, and his widow afterwards intermarried with one Archibald Patterson, and the *feme* petitioners and their brother, A. F. Patterson, were the issue of this marriage. She died in 1864, and her husband in 1871. Of the petitioners, Elizabeth McLean was born in May, 1855, Mary James in 1859, and they, as well as their sister Catherine, were married after attaining full age. The said Archibald F. was born on 1 January, 1857. Pending the action the said Catherine died leaving two infant children, Archie and Thomas M., to whom her estate descended, and the court having ap-

pointed their father next friend to prosecute the suit in their behalf, they have been made coplaintiffs with the others in the cause.

On 30 September, 1871, Alexander Malloy, Jr., the tenant in common, executed to the defendant a deed purporting to convey, and sufficient in form to convey, an entire undivided estate in the land, with covenants for quiet enjoyment and warranty against the claims of all persons whomsoever. The defendant thereupon entered into possession, and has since used it as his own property, without accountability to or inter-
(309) ruption from anyone, until the institution of the present suit on 19 June, 1883.

On cross-examination of the defendant, a witness on his own behalf, he was asked "if after the suit was brought the petitioners offered him, if they recovered, to let him keep the lands, and they to take his recovery on the warranty, and if this was not verbally agreed to by him?"

The witness answered that there was some such proposition made, and he had expressed his willingness to accept it. Objection was made by his counsel both to the question and the answer, and exception to the ruling of the court thereon.

Frank McNeil for plaintiffs.
Platt D. Walker for defendant.

SMITH, C. J., after stating the case: We do not see the force of the objection to the reception of what passed between the parties. It amounted to no more than an arrangement that if the petitioners established their claims to four-fifths of the land, and the defendant would sue upon his covenant, and let them have what he might recover, that would be accepted in payment of their shares, and defendant should have an absolute estate in severalty in the lands. Nor do we see any harm to the defendant that could ensue from admission of the evidence.

The remaining exception is to the refusal of the court to give an instruction asked, to the effect that if the defendant took and held possession under his deed, openly, continuously and adversely, claiming as his own from 1871 to the bringing of this action without paying rent, and disclaiming the right of any other person to a share therein, the jury should respond to the issue in the negative.

(310) The proofs do not go to show any resistance offered to an assertion of their rights on the part of the petitioners, nor indeed any action on their part to warrant the use of the word adversely, other than such as results from defendant's undisturbed and continuous use of the premises as his own during the interval of twelve years preceding the suit. Had there been any interference from the other tenants, resisted by the occupant, the possession would then have become hostile, and the

lapse of seven years thereafter would have interposed an effectual barrier to the claims of the other tenants. This not being so, the sole question presented is whether such a possession with color of title for twelve years forms a bar to the plaintiffs' recovery of their shares of the estate. Of this it is only necessary to state that at the last term an able and learned argument in the case of *Hicks v. Bullock,* 96 N. C., 164, was addressed to us to induce the Court to review its later rulings as to the period of exclusive enjoyment by one tenant of lands held in common, whether with a deed purporting to pass the entirety or not, required to bar the other tenants, in which argument most of the cases in this State were examined and criticised with much skill, as is done on the present occasion.

We declined to reverse our later decisions, appreciating the importance of adhering to rulings which have settled the law, unless in *palpable cases of error* or where most mischievous consequences may follow.

We are content to reproduce what is said in the case referred to: "Granting that the appellant had such possession (of seven years), and that it was adverse to his cotenants in common, and whatever differences of opinion there may have been on this subject in this State in the distant past, it is now well settled that it does not in such case have such effect. It requires such a possession continued for at least twenty years to defeat the estate of the cotenants in common," citing numerous cases.

Nor has the warranty any additional force in modifying the rule, for the form of the conveyance is as effectual with as without (311) covenants.

There is no error and the judgment is affirmed.

Cited: Hampton v. Wheeler, 99 N. C., 226; *Ellington v. Ellington,* 103 N. C., 58; *McMillan v. Gambill,* 106 N. C., 362; *Ferguson v. Wright,* 113 N. C., 545; *Shannon v. Lamb,* 126 N. C., 46; *Thorpe v. Holcomb, ibid.,* 367; *Allred v. Smith,* 135 N. C., 452; *Bullin v. Hancock,* 138 N. C., 202; *Lumber Co. v. Cedar Works,* 168 N. C., 350; *Alexander v. Cedar Works,* 177 N. C., 142; *Crews v. Crews,* 192 N. C., 686.

C. C. FOREMAN v. ANN E. DRAKE, J. F. DRAKE AND E. M. ANDREWS.

Bailment—Contract—Conditional Sale—Hiring.

1. A conditional sale must be in writing and registered before it can operate against creditors or purchasers for value.

2. A contract for hiring need not be in writing.

3. Where A entered into a contract with D, whereby the latter "agreed to hire" and receive certain personal property for a fixed period, agreeing to pay for the use thereof a certain sum, in installments, and whereby it was also stipulated that D might purchase the property at any time during the said period at a price identical with the sums of the installments: *Held*, that this was not a conditional sale, but a bailment—a contract of hiring, and was valid without registration.

CIVIL ACTION, tried before *Gilmer, J.*, at Spring Term, 1887, of STANLY.

This action was brought against Drake and his wife, the *feme* defendant, to recover the possession of certain personal property—furniture—mentioned and described in the complaint.

The defendant Andrews suggested to the court that he was the owner of the property mentioned, and upon proper application, was made a party defendant, and in his answer set up his title to the property.

(312) It appeared that in February of 1886 the plaintiff leased to the defendant Drake a hotel building, including the furniture therein, and the land on which the same was situate, for the term of three years, for certain rents to be paid from time to time, and to secure the payment thereof the following clause was inserted in the contract of lease:

"The said party of the second part, as a part of this whole agreement and transaction, covenants and agrees to purchase such furniture for the hotel and cottages connected therewith as may be necessary to put the room thereof and therein in good habitable and comfortable condition, said furniture to include such as sitting room, parlor, bedroom, dining room and kitchen furniture; said furniture to be at least of the value of five hundred dollars, said value to be determined by cost of putting the same in, the same to be put on the premises by 15 July, 1886. All such furniture, of whatever kind and description, is hereby bargained and sold and conveyed to C. C. Foreman, in trust for and as security to him for the payment to him of the amount stipulated for as aforesaid, and of such and any damages which may accrue to him as arising out of this contract."

The contract of lease was duly proven and registered, and on the trial the plaintiff put the same in evidence. Likewise, on the trial, the defendant Andrews offered in evidence a paper-writing, of which the following is a copy:

"FURNITURE LEASE."

"This certifies that I, A. E. Drake, now residing at Rocky River Springs, N. C., have received of E. M. Andrews, of Charlotte, N. C., twenty No. 2 beds, twenty mixed mattresses, twenty 3 (row) springs,

twenty 3 ft. w. stands, six upholstered cots, five doz. oak chairs, one doz. perf. seat chairs, one doz. perf. seat chairs, thirty-six shades, one bureau, one glass, twelve 10 x 17 A. M. glass, six table chairs, valued at $296.25, which I am at liberty to use with care, keeping the same in good order. I have agreed to hire said furniture for the term of 4½ (313) months from this date, and pay the sum of $296.25 as rent therefor, in the following manner, viz.: $100 on 1 July, $100 on 1 August, $96.25 on 1 September, 1886, at his store in Charlotte, N. C., until the end and expiration of said time, without notice or demand. But if default be made in either of said payments, or of notes which I may have given in lieu thereof, or if I shall sell or offer for sale, or remove the said furniture from the house at Rocky River Springs, in Stanly County, N. C., without the written consent of said E. M. Andrews or his agent, then and in that case the said E. M. Andrews, or his agent, may assume actual possession; and I hereby authorize and empower the said E. M. Andrews, or his agent, to enter the premises wherever said furniture may be, and take and carry the same away. It is also further understood that I may at any time within said time purchase the said furniture by paying for the same the sum of $296.25 as the price thereof, and if I do so purchase and pay for the same, then, and in that case only, the rent therefor paid shall be deducted from the price thereof. Said renting may be terminated at the option of the said E. M. Andrews, or his agent, at any time if the rent is not paid as above agreed.

"I hereby waive all benefit from homestead and exemption laws.

"Signed by A. E. Drake on 14 April, 1886."

The plaintiff objected to the admission of the same upon the ground that it had not been proven and registered.

The defendant Andrews contended that this writing was only evidence of a contract of *hiring* that the law did not require to be registered.

The court sustained the objection, and the defendant assigned this as error.

There was a verdict and judgment for the plaintiff, and the defendant Andrews appealed. (314)

R. H. Battle and S. F. Mordecai for plaintiff.

Platt D. Walker and A. Burwell, by brief, for defendant.

MERRIMON, J., after stating the case: It is unnecessary that we shall consider what effect the clause of the contract of lease set forth above, under which the plaintiff claims title to the property mentioned in the complaint, would have as between the plaintiff and the defendants, the

Drakes, if the latter had obtained the title to the property subsequent to the execution of the contract, because, in our judgment, they had no such title, so far as appears, to the same, as enabled them to sell it to the plaintiff, or any other person.

There was no objection to the agreement in writing between the *feme* defendant and the defendant Andrews, offered by the latter in evidence on the trial, except that it was not registered, and we must therefore interpret it simply with a view to determine whether or not it is such an instrument as requires registration to render it operative for all proper purposes.

The important words of it, taken in their connection, do not imply a sale, absolute or conditional, of the property therein mentioned; it does not purport by its terms or nature to be a contract of sale, nor is it such in legal effect. It plainly appears from its terms and purpose to be a contract of hiring for compensation, stipulated to be paid at the time specified. The contract is one of bailment of the class denominated *locatio rei,* by which the hirer gets the temporary use of the thing hired. The leading distinguishing words employed in the contract are: "I have agreed to hire said furniture for the term of," etc. The mere fact that it is stipulated that the defendant Andrews might put an end to the term of hiring, if the compensation should not be paid at the several
(315) times specified, or for the causes mentioned, could not change the nature of the contract, nor does such a stipulation have the effect to render the transaction a conditional sale of the property. There is no reason why the contract of hiring may not have conditions, upon the happening of which it shall or may be terminated. Nor does the stipulation that the *feme* defendant might purchase the furniture during the term of the hiring effect the nature of the contract. We can see no reason why it should. It might be that the course or fortunes of her business would lead or enable her to do so—it might be otherwise.

Moreover, this stipulation goes to show that the parties did not contemplate a sale by contract of any kind or nature.

By the terms of the agreement the *feme* defendant had the right at any time during the term of hiring to purchase the property for a price, substantially the sum of money agreed to be paid as compensation for the use of the property. This seems to be a singular stipulation, and suggests a want of good faith in some way, but of itself it cannot change the nature and defeat the purpose of the contract. There may be some reason for it that we do not see. It is not suggested nor does it appear that the whole transaction was a sham and a fraud. We pass upon the instrument as it appears by its face. A contract of "conditional sale," and a contract of hiring, conditional in its provisions, are essentially different in their respective natures and purposes. The latter need not

be in writing, and when it is, it need not be registered. The former, to be effectual against creditors and subsequent purchasers for value, must be in writing and registered. (The Code, sec. 1275.)

There is therefore error, and the appellant is entitled to a new trial. *Venire de novo.*

Cited: *Puffer v. Lucas,* 112 N. C., 384; *Crinkley v. Egerton,* 113 N. C., 447; *Wilcox v. Cherry,* 123 N. C., 82; *Thomas v. Cooksey,* 130 N. C., 151; *Hamilton v. Highlands,* 144 N. C., 286.

(316)

EDMUND L. CARPENTER v. ALFRED T. TUCKER, ADMINISTRATOR OF GEORGE TUCKER.

Evidence—Arbitration, Witness—Delivery—Endorsement—Trial.

1. The delivery of unindorsed promissory notes passes an equitable title.
2. A person who took full notes of the testimony of a witness, since deceased, on a former trial, and testified, that by refreshing his recollection by reference to those notes he could state the substance of the testimony, is competent to testify as to what the deceased witness swore.
3. It is not error to permit parol proof of the execution and delivery of a deed as a collateral fact, where the contents of the deed are not in issue.
4. An agreement to submit the matters involved in an action pending to arbitration, not made under the sanction of the court, cannot be pleaded as defense to the action. The remedy for a breach of such an agreement is by an independent action for damages.
5. The court should not submit an issue not raised by the pleadings, nor should it give instructions to the jury upon a view not presented by the testimony.

(*Jones v. Ward,* 3 Jones, 24; *Wright v. Stowe,* 4 Jones, 516; *Ashe v. DeRosset,* 5 Jones, 299, cited.)

CIVIL ACTION, tried before *Gilmer, J.,* at Fall Term, 1886, of ANSON.

This action was brought to recover the price which it was alleged the intestate of the defendant had agreed to pay plaintiff for certain notes (given by one Preslar, a son-in-law of the intestate, for the purchase of a tract of land), and which had been delivered, unendorsed, to the intestate.

The plaintiff alleged that at the time of the sale it was agreed that he should execute a deed to the land, for which the notes were given, to Preslar, and give it to the intestate, who expressed a purpose to provide for his son-in-law, and that he did so execute and deliver the deed.

(317) The defendant denied the contract, and among other facts alleged that at the time of the pretended contract the intestate was quite ill, and the plaintiff induced him to accept the notes upon a false representation that the deed was made to him, and upon this point requested the court to instruct the jury that "if at the time the plaintiff delivered the deed he represented to the intestate that the deed was made to him, and if at that time the intestate was unable, by reason of sickness, to read the deed and the same was not read to him, and he was induced to make the contract for the purchase of the notes by such representation, the plaintiff cannot recover." The court refused to give this instruction upon the ground that there was no evidence to support it.

The other facts necessary to an understanding of the questions decided are stated in the opinion.

There was judgment for plaintiff and defendant appealed.

J. A. Lockhart for plaintiff.
No counsel for defendant.

MERRIMON, J. On the trial the plaintiff offered in evidence certain notes, under seal, which it was alleged he had sold to the intestate of the defendant, and the latter objected to their admission "because they were not assigned or transferred or endorsed in writing by the plaintiff." The court admitted them, and this is assigned as error. It is true the legal title to the notes did not pass without endorsement, but it is just as true that the equitable title may have passed without it, and it was competent to show this fact. The notes may have been introduced for the purpose of identification or other purpose than to show the legal title to them, and they were obviously competent, unendorsed, for any pertinent purpose.

On a former trial of this action, which resulted in a mistrial, T. I. Polk was examined as a witness for the plaintiff, and he died (318) before the last trial. At the first trial the counsel for the plaintiff "took full notes of the evidence offered," including that of the deceased witness mentioned. On the last trial this counsel was examined as a witness for the plaintiff, and he stated that by refreshing his recollection from the notes of evidence taken by him on the former trial, he could and did remember the substance of the testimony given on the former trial by the deceased witness Polk. The defendant objected. The court allowed the witness to so testify and this is assigned as error.

The objection is groundless. The witness might refresh his recollection by the notes of evidence mentioned, and when he declared that he remembered the substance of what the deceased witness had testified to on the former trial in this action between the same parties, he qualified

himself to testify as he was allowed to do, and any objection went to the weight, not to the competency of the evidence thus elicited. *Jones v. Ward*, 3 Jones, 24; *Wright v. Stowe*, 4 Jones, 516; *Ashe v. DeRosset*, 5 Jones, 299.

A witness for the plaintiff was examined as to what the intestate of the defendant had said to him in respect to the purchase of the plaintiff's interest in a certain mill, the deed therefor, the price paid for it, and what he intended to do with the mill, etc. The defendant objected to the admission of such evidence "because incompetent under the statute of frauds and irrelevant." What the appellant intends by this exception is not at all clear, but we suppose it implies that it was not competent for the witness to speak of a sale of real estate that must be evidenced by a proper deed of conveyance without producing the deed. If so, the objection is untenable, because the deed and its contents were not at all in question; the purpose was to give evidence of a transaction in respect to the mill that did not involve the title to it. The evidence was relevant because it went to prove that the plaintiff had delivered the notes to the intestate of the defendant as the plaintiff alleged. (319)

The defendant was introduced as a witness in his own behalf, and was asked to "repeat a conversation between himself and his intestate" in respect to the notes and the deed of conveyance in question.

Upon objection of the plaintiff to the proposed evidence, the court sustained the objection, and properly, because it was simply hearsay.

The defendant alleges in his answer that the plaintiff and himself had agreed in writing "to arbitrate" the matters in controversy in this action, that this agreement was current at the time the action was begun, and he avers his readiness to abide the result of such arbitration. This agreement was not made an order of the court in this action, nor with the sanction of the court, and it was executory, independent of and apart from the action.

On the trial the defendant requested the court to submit to the jury this issue, "Did the plaintiff and defendant, before the commencement of this action, agree to arbitrate the matters in controversy, and if so, did the plaintiff refuse to comply?" The court properly declined to submit it. The pleadings raised no such issue. The agreement to arbitrate was not a defense in this action. If the plaintiff, having agreed to arbitrate as alleged, afterwards refused to comply with the agreement, such breach thereof might be a cause of action, but not one to be set up as a defense in this action—it was foreign to and had no connection with the latter as a litigation.

The appellant was not in any view of the evidence entitled to have the special instruction given to the jury which the court declined to give.

There was clearly no evidence that warranted it, and the court should never present to the jury a view of the case, or an important part, or branch of it, when there is the absence of evidence that might reasonably lead them to adopt and act upon it. To do so could serve no
(320) just purpose, while it would almost certainly mislead, or tend to do so.

The errors assigned are unfounded, and the judgment must be affirmed.

No error. Affirmed.

Cited: *McAdoo v. R. R.*, 105 N. C., 151; *Jenkins v. Wilkinson*, 113 N. C., 535; *Bresee v. Crumpton*, 121 N. C., 123; *Smith v. Moore*, 149 N. C., 190; *Williams v. Mfg. Co.*, 153 N. C., 10; *S. c.*, 154 N. C., 209; *Grant v. Mitchell*, 156 N. C., 19; *Cooper v. R. R.*, 170 N. C., 494.

E. PORTER v. J. H. DURHAM ET AL.

Draining Low Lands—Easement—Notice—Estoppel.

1. The mode of procedure prescribed by sec. 3, ch. 39, Bat. Rev., in relation to condemning lands and assessing damages arising from the construction and maintenance of canals for draining lowlands, should be strictly enforced.

2. The bare presence of one of the owners of servient lands at the time of the appraisement will not preclude him from subsequently assailing collaterally the proceedings, upon the ground that he was not a party, or that he did not have the notice required to be given by the statute.

CIVIL ACTION, heard by *Philips, J.*, at Fall Term, 1887, of PENDER.

From the judgment of the court dismissing the action the plaintiff appealed.

The complaint alleges title in the plaintiff to an easement or right of draining the excessive waters upon his own lands through a ditch opened upon the defendants' adjacent lands into a canal used by them in common as a means of directing the overflow and relieving both tracts. The canal is also on defendant's land.

It states further that the easement has been acquired in one of two ways, and has been in use for more than seventeen years:

(321) 1. Under an agreement entered into in 1858 between Levin Lane, from whom the defendants derive title, and one Berry, under whom the plaintiff claims, they being at the time the respective owners, and the continual use and enjoyment of the privilege during the

lifetime of said Berry, who, before his death, conveyed the tract held by him to the plaintiff.

2. Under and by virtue of certain proceedings instituted in 1874, before the county commissioners, according to the laws then in force, and contained in chapter 39 of Battle's Revisal, wherein appraisers were appointed, who entered upon the tract to ascertain and report the benefits and damages (there being no damages), and apportioned the expenses of enlarging the canal to make the drainage sufficient for both tracts, whereof one-third was imposed on D. T. Durham, ancestor of defendant, and two-thirds upon the plaintiff.

The present action is under section 1310 of The Code, and assuming a common property and right to use the canal, seeks to have the expense of removing the accumulated rubbish, and permitting the former free current of water to run, apportioned between the parties.

After several amendments, none of which entirely relieve the case of obscurity, the cause came on for hearing before the clerk to whom jurisdiction is committed, and he dismissed the proceeding, as did the judge, upon the plaintiff's appeal.

No proof in writing other than the proceeding taken in 1874, nor of any final agreement, except that alleged to have been made between Lane and Berry, and this, so far as shown, was permissive merely, and gave but a revocable license for the time being, was offered. The proceedings, which took place in 1874, are set out in full, and show that a petition was presented to the county commissioners, who appointed three appraisers to go upon the premises and assess the value of the benefits to be conferred and damages to result to defendants' land from the proposed plan of enlarging the canal to the required extent, and (322) ordered that the "clerk of the board serve notice as required by law, and that all matters required by chapter 39, Bat. Rev., be performed as by law required." This was on 6 April, 1874, and after the application had been received and allowed; and it nowhere appears that the defendants' ancestor, Dawson T. Durham, had such notice, except from the fact that he was present on the premises with the appraisers when they were executing the order of the board.

The report was made some time thereafter, to wit, on 24 May, and confirmed, declaring that "the law in the case of Elisha Porter *v.* D. T. Durham, draining lands, having been complied with as provided by law, summons having been issued, the premises examined by the jury appointed, their report herewith approved having been received, is hereby confirmed," and ordering that the clerk of their board file the papers and notify the parties interested, etc. The appraisers also apportioned the cost of the work between the parties, but failed to make any provision for future repairs and cleaning out obstructions.

J. D. Bellamy for plaintiffs.
M. Bellamy for defendants.

SMITH, C. J., after stating the case: The underlying element in the present controversy is the contested validity of the *ex parte* action taken in 1874 by the plaintiff and its efficacy in vesting an easement in him, and this again depends upon the question whether the memoranda in regard to notice, accompanied with the further fact of the presence of Durham with the appraisers when they were acting, is in law an appearance dispensing with the service of notice or summons. The section of the law applicable to this inquiry is found in ch. 39, sec. 3, of Bat. (323) Rev., and is in these words:

"The owners of such land (through which the drainage is to be had) shall, if in the county in which said lands or some part thereof is situated, and known to such applicant, have ten days notice of the time and place of meeting to make such assessment, and may attend before the appraisers, and be heard on the subject of the proposed assessment. Such notice shall be given personally by such applicant in writing, by reading or leaving a copy at last place of residence if the party to be notified resides in the county where said land or any part thereof are situated," with provision for publication, otherwise "said notice, whether personal or made in person or by publication, shall state the time and place of making such assessment, and shall contain a clear description of the proposed work," etc. The proofs so made in case of personal notice must be by *affidavit of the applicant,* attached to a copy of the notice "stating the time, place and mode of service, whether by reading or by true copy left at the last and usual place of residence," and they must be filed with the other papers in the case in the office of the county register. As the proceeding is summary and special, and results in appropriating one man's property to the use of another without the assent of the former, these minute and particular directions are prescribed as essential to the efficacy of the action of the appraisers, and the plaintiff's contention is that they are dispensed with by the presence of the then owner of the premises when they undertook to perform the assigned duty.

We do not think all these safeguards thus thrown around the exercise of this special power can be thus disregarded and a legal result reached in so doing.

The defendant Durham does not appear on the record as a party, and that he was with the appraisers only appears from their own report to the board. He may have offered no direct resistance to what the (324) appraisers were doing, as, under license from a preceding pro-

prietor, he had been using this method of drainage, and, as we understand the complaint, the cost of the enlargement, $225, was borne by the plaintiff.

It is quite a different proposition to ask for a judgment against the defendants, compelling them to pay a proportion of the expenses of clearing out obstructions, when, as the answer avers, the former widening was alone for the plaintiff's advantage and not of theirs, the canal being sufficient for the drainage of their land before being enlarged.

We therefore concur in the judgment dismissing the proceeding.

No error. Affirmed.

Cited: *Porter v. Armstrong,* 129 N. C., 103.

J. N. PEACOCK v. GEORGE W. WILLIAMS.

Contract—Indemnity.

Where W. contracted with L., upon a sufficient consideration, that he would surrender to L. "full and free possession" of a house (then being constructed and for which the plaintiff had furnished material and had a lien) "free from all liens and encumbrances whatever": *Held,* that this amounted only to an agreement to indemnify L., and would not support an action against W. for the value of the materials furnished by the plaintiff.

(*Morehead v. Wriston,* 73 N. C., 398; *Parker v. Shuford,* 76 N. C., 219; *Draughan v. Bunting,* 9 Ired., 10; *Carroway v. Cox,* Bus., 173; *Dixon v. Pace,* 63 N. C., 603; *Strayhorn v. Webb,* 2 Jones, 199, and *White v. Hunt,* 64 N. C., 496, cited.)

THIS is a civil action, which was tried, on appeal from a justice of the peace, before *Montgomery, J.,* at Fall Term, 1887, of HAYWOOD.

The plaintiff alleged:

1. That during 1886 he furnished lumber to be used in con- (325) structing a house in the town of Waynesville, on a lot belonging to Mrs. Mary F. Luke.

2. That said lumber was furnished to A. L. Melton, who was contractor for erecting said house.

3. That a portion of the price of the said lumber was paid to plaintiff, but that there now remained due the sum of $54.91, with interest from 30 April, 1886.

4. That on or about 19 July, 1886, the defendant, for and on the part of the firm of Williams & Buchanan (of which firm the defendant was a member), contracted with the said Mary F. Luke, for valuable considera-

tion, that they, said Williams & Buchanan, would pay off and discharge "all liens and encumbrances *whatever*" upon the said property.

5. The plaintiff had a lien on the said house and lot for the material (lumber) furnished as aforesaid to the said contractor, registered in the office of the clerk of the Superior Court of Haywood County, and filed therein on 27 December, 1886.

6. That due notice of plaintiff's claim was given to said Mary F. Luke before settlement with said Melton for said building.

He demanded judgment against the defendant for the balance alleged to be due.

The defendant made a general denial.

The plaintiff offered in evidence the following agreement:

Memoranda of agreement between George W. Williams, on the part of Williams & Buchanan, and Mrs. Mary F. Luke, all of the town of Waynesville, N. C.:

Mrs. Mary F. Luke agrees to make a promissory note for eight hundred dollars ($800), payable one year after date and bearing interest at the rate of 10 per cent per annum, secured by mortgage on certain property of Mrs. Mary F. Luke, in the town of Waynesville, N. C.,
(326) said note payable to the order of Williams & Buchanan, on this condition, that said Williams & Buchanan shall receipt and deliver all bills and accounts now due them by Mrs. Mary F. Luke, and pay over to her in cash all balance between the amount of their said bills and accounts and the face value of said note, and surrender to the said Mrs. Mary F. Luke full and free possession of the house lately erected on the lot of Mrs. Mary F. Luke, in the town of Waynesville, N. C., free from all liens and encumbrances whatever. Mrs. Mary F. Luke reserves to herself the right to redeem said note at any time before maturity, by payment of the face of said note, with the accrued interest. Mrs. Mary F. Luke further agrees to place an insurance of twelve hundred dollars ($1,200) upon the said property, for the term of three years, assignable to said Williams & Buchanan, as further security on said note. In case the said note is paid before or at maturity, the insurance is to be transferred to Mrs. Mary F. Luke, for her sole benefit, and subject to her own disposal.

Witness our hands, this 19 July, 1886.

The plaintiff offered evidence tending to prove his allegations, and that the defendant had in his hands funds of Mrs. Luke, which should be applied to the payment of his claim.

There was evidence on the part of defendant that at the time he had notice of the plaintiff's claim, he had paid the contractor, in full, for building the house, and that he had no funds of Mrs. Luke to pay this debt.

The court instructed the jury that they would ascertain from the evidence whether the plaintiff had furnished the lumber and material, and if so, they would ascertain what was its value or price, and whether the plaintiff had been paid for the same; and if they found that plaintiff had furnished the lumber and had not been paid for it, then they would ascertain whether he had given notice of his lien, and if they found this in plaintiff's favor, they would find whether the defendant had funds sufficient in his hands, of Mrs. Luke's, for the purpose of (327) paying this debt, and had contracted with her to pay it; and if they found that he had such funds sufficient in amount, and had contracted with her to pay it, they would, in answer to the issue, say how much was due to the plaintiff from the defendant.

The defendant's counsel moved to dismiss the action, because the complaint did not state a cause of action against the defendant, which was refused by the court, and the defendant excepted.

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

W. L. Norwood for plaintiff.
G. S. Ferguson for defendant.

SMITH, C. J. It will be seen from the fourth allegation of the complaint and its plain and distinct reference to this agreement, and from its introduction in support of the demand that the plaintiff's right of action against the defendant rests entirely upon the undertaking on the part of Williams & Buchanan to surrender the house to the owner of the lot, "free from all liens and encumbrances whatever." It is also apparent that the fund provided for this purpose is the note executed by the owner of the lot and secured in the manner specified in the contract. This security must be understood, as meant in the charge, that if "they (the jurors) found that he (the defendant) had such funds, sufficient in amount, and had contracted with her (Mary F. Luke) to pay it, then they would, in answer to the issue, say how much was due the plaintiff from the defendant."

In our opinion the point is well taken that the defendant incurred, under his agreement and from his possession of the note, no personal liability which the plaintiff can enforce in this form of action, *ex contractu*. The agreement is in substance one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is *solely between the parties to it, with whom the plain-* (328) *tiff is not in privity.*

In *Morehead v. Wriston*, 73 N. C., 398, an incoming partner agreed with the others that the new firm should assume and become liable for

the debts due by the old firm, and this upon a sufficient consideration; and it was held that a creditor of the old firm could not sue on the contract, *Reade, J.*, remarking "that the agreement must be between the new partner and the *creditor*, and upon a *consideration moving* from the *creditor*." See, also, *Parker v. Shuford*, 76 N. C., 219.

The case does not come within that class wherein when money or an article of agreed money's worth, as money, is deposited with one person to be paid to another, and the action is permitted for a recovery as of money received for his use under an implied contract to pay it according to numerous rulings. *Draughan v. Bunting*, 9 Ired., 10; *Carroway v. Cox*, Busb., 173.

Yet there are qualifications of the principle, even in case of such reception of money. Thus, when an agent received money from his principal with instructions to pay it to a certain creditor, and the agent made a different disposition of it, and no demand was made by such creditor until after the agent had accounted with his principal, it was decided that the creditor could not look to the agent for such money. *Dixon v. Pace*, 63 N. C., 603.

So, again, in *Strayhorn v. Webb*, 2 Jones, 199, it is ruled that until the creditor for whose use the deposit is made does some act whereby he ratifies the receiving "so as to extinguish the debt and make the money his own," he cannot maintain an action against the party receiving. *White v. Hunt*, 64 N. C., 496.

Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment, but only a note secured from the party by which they might be derived, and the undertaking is
(329) to exonerate the property from liens and encumbrances, and it can be enforced, as it can be released by the party with whom the contract is made, and her liability for the materials furnished, not personal, but by reason of the liens, remains as before unaffected by the provision made for relieving the premises therefrom.

The plaintiff vindicates his claim to follow the fund, and cites numerous cases in its support decided in the courts of equity. But this is not the case presented in the complaint, which is one that under our former practice would have been an action at law, and depends not upon an equity, but upon contract. An immediate judgment is demanded, and this because the defendant holds a personal security of the owner of the lot and may have realized nothing under it wherewith to make the payment. In no point of view can the plaintiff maintain his action, and there is error in refusing to dismiss it.

The judgment must, therefore, be reversed.

Error. Reversed.

Cited: *Woodcock v. Bostic,* 118 N. C., 827; *Gastonia v. Engineering Co.,* 131 N. C., 369; *Voorhees v. Porter,* 134 N. C., 591; *Wood v. Kincaid,* 144 N. C., 395; *Supply Co. v. Lumber Co.,* 160 N. C., 431; *Baber v. Hanie,* 163 N. C., 593; *Withers v. Poe,* 167 N. C., 375; *Scheflow v. Pierce,* 176 N. C., 92; *Rector v. Lyda,* 180 N. C., 579.

G. P. FORNEY v. BENJAMIN WILLIAMSON ET AL.

Procession.

The provisions of The Code, secs. 1924-1931, prescribing the procedure in the processioning of lands, must be strictly observed in all material respects.

(*Miller v. Heart,* 4 Ired., 23; *Hoyle v. Wilson,* 7 Ired., 466; *Britt v. Benton,* 79 N. C., 177; *Porter v. Durham,* 90 N. C., 55, cited.)

THIS was a proceeding to have certain lands processioned, heard upon exceptions to the report of a jury of freeholders. The clerk confirmed the report, from which the defendants appealed, and the appeal was tried before *Gilmer, J.,* at Fall Term, 1886, of BRUNSWICK, (330) when the judgment of the clerk was affirmed. Thereupon the defendants appealed to the Supreme Court.

The facts necessary to an understanding of the case are fully stated in the opinion.

A. W. Haywood for plaintiff.
C. M. Busbee for defendants.

MERRIMON, J. This proceeding is very informal and imperfect in many material respects, and cannot be upheld in its present shape and condition, notwithstanding the appellant is the petitioner, and ought, therefore, to have conducted it on his part according to the course prescribed by the statute.

This method of settling the boundaries and disputed lines of tracts of land is out of the ordinary course of civil procedure, and, at best, not a very satisfactory one.

The statutory provisions and regulations respecting it must be strictly observed in all material respects. Otherwise, it will settle nothing, but on the contrary, will give rise to confusion and complicated litigation.

Such proceedings have always been cautiously watched and strictly construed by the courts; indeed, they have been seldom sustained.

The present one purports to be under and in pursuance of the statute (The Code, secs. 1924-1931). On 23 March, 1885, the plaintiff filed his petition in the Superior Court of the county in which the land therein mentioned lay, describing it and setting forth rather indefinitely the lines thereof in dispute, without stating the grounds of dispute, and very informally designating as defendants therein sundry persons, whose lands adjoined the tract of the petitioner; but the clerk of the court failed to "issue a summons to the defendants" thus named, as the statute expressly required him to do. It seems from the case stated on appeal, and recitals in an order that he at once issued, an order to a pro-
(331) cessioner to procession the land, but such order does not appear in the record.

Nor does it appear that the petitioner gave any written notice to such defendants of the time when the processioner would attend on the land to procession the same; nor was there any service of such notice as the statute required. Nor does any report of the processioner that he was forbidden by any person interested in the event of the processioning to run and mark a disputed line, the name of the person so forbidding and all the circumstances of the case appear, as it should do, if he was so forbidden. Nor does any report of the processioner appear to which exception was filed. A report of the processioner, in one or the other of the respects mentioned, was necessary to warrant the appointment of five respectable freeholders to join the processioner and aid in establishing a disputed line (The Code, sec. 1928). Nevertheless, the clerk, acting for the court, appointed five freeholders as if such report had been made. The freeholders thus appointed proceeded to establish the disputed lines—what lines does not certainly appear—nor does the ground of dispute at all appear—and made report of their action to the court, signing the same, but neither this nor any report was signed by the processioner, nor does it appear that he was present when the jury undertook to ascertain and establish the disputed lines; nor did he make any plot of the land which it is contended was processioned, nor make any report whatsoever. A surveyor, other than the processioner, it seems, selected by the defendant, made a plot of the land surveyed by him, but it does not appear, except by uncertain inference, that he acted with the freeholders; nor did he sign their report, or make any formal report of the survey made by him. Manifestly the whole proceeding is irregular, and so informal, indefinite, and imperfect that it settles nothing. There is no report to be recorded, such as that contem-
(332) plated by the statute (The Code, secs. 1927-1928). Some of these numerous imperfections might be treated as cured or waived by the parties, particularly by the appellant, but the real matter in dispute —the contested lines—and the ground of contest not appearing at all in

any report of the processioner, appear so imperfectly in the petition, and also in the report of the freeholders, that the latter does not serve any intelligent purpose. Indeed, the real matter in controversy can scarcely be said to be stated or appear at all in the report or elsewhere. *Miller v. Heart,* 4 Ired., 23; *Matthews v. Matthews, ibid.,* 155; *Hoyle v. Wilson,* 7 Ired., 466; *Britt v. Benton,* 79 N. C., 177; *Porter v. Durham,* 90 N. C., 55.

The exception of the appellant to the report, based upon the ground of such defects and imperfections, should have been sustained.

There is error. The judgment must be reversed and the report set aside, and further action taken in the proceeding according to law.

Let this opinion be certified to the Superior Court to that end.

Error. Reversed.

Cited: Euliss v. McAdams, 101 N. C., 398; *Roberts v. Dickey,* 110 N. C., 69.

J. T. WILLIAMS ET AL. v. JOHN MCNAIR, ADMINISTRATOR, ET AL.

Guardian and Ward—Surety—Limitations—Creditor's Bill.

1. Under the Revised Code, the delay of a ward for three years after attaining majority to have a final settlement with his guardian, or to bring suit for any amount claimed to be due, or a failure to notify the sureties to a guardian bond of the condition of the estate, absolved the sureties from liability. If the right of action accrued since the adoption of the Code of Civil Procedure, it is subject to the limitation therein provided.

2. The death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian.

3. The real estate of deceased surety on a guardian bond cannot be subjected, under section 1436 of The Code, to the satisfaction of a claim founded upon an alleged breach of the bond, until the damages have been ascertained in some proper method. Until this is done, the relation of "creditor" to the estate, required as a prerequisite to the institution of such proceedings, does not exist.

(*Johnson v. Taylor,* 1 Hawks, 271, and *Carmichael v. Moore,* 88 N. C., 29, cited.)

THIS is a civil action, which was tried before *Clark, J.,* at (333) January Term, 1887, of ROBESON.

There was judgment against all the plaintiffs (except McNeill and wife, Caroline), from which they appealed; and the jury, under instruc-

tions from the court, having found that the said Caroline was not barred of her right to recover, the court directed a reference to ascertain the amount to which she was entitled, and from this order the defendants appealed.

In the year 1855 James P. Hodges became the guardian of the plaintiffs, then infants, and executed his bond with Henry Elliott and Archibald S. McKay, his sureties, in the form and with the conditions prescribed by law for the security of their several estates. Archibald S. McKay died intestate in 1865, and no administrator on his estate was appointed until 17 March, 1879, when letters issued to the defendant John McNair. The other defendants are the heirs at law of the said Archibald S., to whom certain lands are alleged to have descended from him.

The plaintiffs severally arrived at full age, as follows: Mary L. Williams, on 11 June, 1859; J. L. Smith, on 26 January, 1866; S. C. Robinson, on 13 July, 1868, and Caroline, who intermarried with the plaintiff, Thomas A. McNeill, on 8 February, 1871. There has been no settlement by either with the guardian, who is still living, nor did it appear (334) that any one of the wards within three years after attaining majority, by suit or otherwise, called on him *"for a full settlement of his guardianship,"* by suit or otherwise, in pursuance of section 4, ch. 65, of the Revised Code.

The present suit, instituted on 26 July, 1881, by the plaintiffs, on behalf of themselves and all other creditors of said Archibald S., has for its object the subjection of the lands which he owned at his death to the payment of his indebtedness; and to the demand, among other defenses to the action, the answers of the administrator and the defendants, D. D. McBride and wife Fannie, set up the bar of the statute of limitations and the presumption of payment or satisfaction arising from the lapse of time since the execution of the bond raised under the Revised Code, ch. 65, sec. 18.

Under instructions of the court, and in response to the issues upon this point, the jury found that the right of action is barred as to all the plaintiffs except the said Caroline C., and that no presumption of payment has arisen under the statute.

Frank McNeill for plaintiff.
P. D. Walker, N. W. Ray and N. A. McLean for defendants.

SMITH, C. J., after stating the case: By the law in force when the three several plaintiffs' cause of action accrued, whose recovery is thus held to be obstructed, they were each required to call on the guardian for a settlement on arriving at full age, and this is interpreted by

Daniel, J., delivering the opinion in *Johnson v. Taylor*, 1 Hawks, 271, to require more than a mere demand for such settlement. "I think," he remarks, "it is incumbent on the infant, after arriving at full age, not only to call for a full settlement, but *to have a final adjustment of all accounts, matters and things with his guardian in three years,* and either sue for any balance that may be due him, or notify the (335) securities to the guardian bond of the true situation in which he stands to the guardian."

There was no evidence that the plaintiffs had ever taken any other action to bring the guardian to settlement, as is stated in the case on appeal, and as the right of action accrued to each as he or she attained full age, and while the guardian was, as he still is, living, and no such effort as the statute contemplates was made to get the estate out of his hands, the sureties are absolved, unless the fact of the previous death of the surety now sued, and the long interval of fourteen years, during which there was no administration, exempts these plaintiffs from the operation of the statute.

We do not give such restricted force to it, for evidently reasonable efforts to get possession of the trust estate are required to be made for the protection of the sureties and to prevent the loss from falling on them, and the death of this surety did not interfere with the infants' action in the premises. As this was not done, and was the condition of a continued liability so that the default could be communicated to him, even if living, the default would be equally operative in securing his exoneration in case of his death, for it might be that the estate could have been obtained from the guardian.

If, however, such attempt to get the trust estate from him had been made and proved unsuccessful, the inability to give information of the fact, rendered impossible by the death of the surety and the want of a representative, would perhaps have dispensed with this requirement of the law and left the liability of the surety unimpaired. There is, therefore, no error in the ruling of the court upon this defense.

There is another objection taken in the answers not less fatal to the maintenance of the action.

The liability of the intestate's surety is upon his undertaking to make good any loss to the infants resulting from the mismanagement of the trust estate by the guardian and sounds in damages. The only indebtedness is found in the penalty of the bond, and the real (336) object of a suit upon it is to ascertain the amount of damages and to have judgment for them. Until ascertained they do not constitute a debt, nor does the plaintiff assume, in the sense of the statute, the relation of a creditor towards the estate, so as to have access to the real property of the deceased. This is apparent from the provisions of the statute,

which gives the remedy when the personal assets are "insufficient to pay *all the debts*" (The Code, sec. 1436), and which requires an oath to be made of "the amount of debts outstanding against the estate" (The Code, sec. 1437), and from the very nature of the proceeding itself.

The indebtedness ought to be ascertained, proximately at least, to show the necessity of a resort to the land, and in the present case, unless the parties agree on the amount, the intervention of a jury to assess the damages becomes necessary before instituting such a proceeding. This could only be by an action on the bond, because the surety's liability rests solely upon his covenant obligations contained therein.

But such action must be brought in the name of the State for the benefit of the interested party, secured by the bond, as has been expressly decided in this Court. *Carmichael v. Moore,* 88 N. C., 29.

We sustain the ruling that the plaintiff cannot recover, and affirm the judgment.

DEFENDANT'S APPEAL.

This appeal, taken by the defendant from the judgment in favor of the plaintiff Caroline McNeill, presents the same general facts as those contained in the record of the plaintiffs' appeal. But the claim (337) of the plaintiffs McNeill and wife rests upon different ground, and as the rights of action accrued to her in February, 1871, it is governed by the limitations contained in The Code, sec. 136.

This statute bars an action against the personal or real representative unless begun within seven years after his qualification and advertising as required by law (sec. 153), or if brought on the official bond of the guardian, within six years after the auditing of his final accounts by the proper authority and the filing such audited account (sec. 154, par. 2).

In this case the action is brought in a little more than two years after qualification of the administrator, and none of the preliminary conditions necessary to put the statute in operation have been complied with.

While, then, we concur in the opinion of the court, that the statutory bar is not in the way of the plaintiffs' recovery, the same fatal obstacle exists as in the plaintiffs' appeal against the maintenance of this action, and without further enlarging upon it, we refer to that opinion.

There is error, and the judgment below must be reversed.

Error. Reversed.

Cited: Norman v. Walker, 101 N. C., 25; *McNeill v. McBryde,* 112 N. C., 411; *McNeill v. Currie,* 117 N. C., 345, 347; *Self v. Shugart,* 135 N. C., 186, 188.

D. KINCAID, ADMINISTRATOR OF SAMUEL BEATTY, v. ROBERT A. BEATTY ET AL.

Devise—Application for Advice by Executor.

1. In an action by the personal representative of a deceased person for advice and direction as to the execution of his trust, the court will not consider any matter other than that involved in the administration of the trust estate.

2. A devise in the second clause of a will, "that my lands, after the death of my wife, be divided into four lots equal in value. The lot on which is my homestead I will and devise to my daughters C. and E."; and in the following clause devised: "After the death of my wife, all my property to be equally divided between my children," naming them, nine in number, including C. and E.: *Held*, that C. and E. took an estate in fee in the remainder in the one-fourth devised to them in the second clause, and an equal share with the other children in the estate embraced in the third clause.

(*Howerton v. Henderson*, 88 N. C., 597; *Edwards v. Warren*, 90 N. C., 604; *Pitman v. Ashley*, *ibid.*, 612, and *Alsbrook v. Reid*, 89 N. C., 151, cited.)

THIS is a civil action which was heard by *McRae, J.*, upon (338) exceptions to a referee's report, at Fall Term, 1887, of GASTON.

The defendants, other than those representing the shares of the devisees Caroline and Elmina, appealed from the judgment of the court.

The facts are fully stated in the opinion.

No counsel for plaintiffs.

W. P. Bynum, R. W. Sandifer and C. W. Tillett for defendants.

SMITH, C. J. This action is brought by the plaintiff as administrator *de bonis non, cum testamento annexo* of Samuel Beatty, against the defendants, who claim as devisees and legatees, or as representing such as have died, for advice as to the settlement of the trust estate, and in order thereto, for a construction of the testator's will, and a declaration of the rights of the parties under it. For no other purpose could the action be entertained, and so much set out in the complaint as seeks a partition and sale of the land devised, and would, if objection were made to the introduction of this element in the cause, subject it to the imputation of being multifarious, must be eliminated, so as to put it within the jurisdiction of the court, as an application from the administrator for advice and direction. *Edwards v. Warren*, 90 N. C., 604; *Pitman v. Ashley*, *ibid.*, 612; *Alsbrook v. Reid*, 89 N. C., 151.

Owing to the long interval that has elapsed since the testator's (339) death up to that of his wife, to whom for her own life all the

estate was given, and the numerous changes that have taken place among those to whom it was given in remainder, by deaths and other causes, the number interested has vastly increased of those entitled, and the problem has become more complex in tracing out the beneficiaries.

The will is in this form:

First. I will and bequeath to my beloved wife, Sarah, all my property, both real and personal, during her natural life.

Second. My will is that my lands, after the death of my wife, be divided into four lots equal in value. The lot on which is my homestead I will and devise to my two daughters, Caroline and Elmina.

Third. After the death of my wife, all my property I will to be divided equally between my children, viz.: Mary Sloan, William, Nancy Porter, Rufus, John W., Jane Rutledge, Lanira McFadden, Caroline and Elmina.

Fourth. And lastly, I appoint and ordain my wife, Sarah Beattie, my executrix, to execute the above will to the true intent and meaning of the same. (Signed, sealed and witnessed.)

The conflicting contentions are these:

The one party among the defendants (for the controversy is confined to them) insists that the one-fourth in remainder, devised to the daughters Caroline and Elmina, must be brought into the account, in the distribution, directed among the nine children named in the third and next clause, and they charged with its value in receiving their respective shares with the others; while the other party contends for a construction which gives the two sisters mentioned the part of the land named independently, and admits them to an equal share with their brothers and sisters in the apportionment of the rest of the
(340) estate. The solution of this question is necessary, to enable the administrator to know how to divide the funds of the estate, and this, as the discussion in this Court indicates, was the only matter intended to be presented in the appeal.

The action was commenced before the clerk, and the pleadings being in, from which it appeared that a question of law was raised, it was transferred for trial at a term of the court, and there referred to Frank I. Osborne to take and state the administration account, and put a construction upon the will, in order to a full determination of the rights of parties thereunder, and a distribution of the estate among the claimants. This the referee proceeded to do, and in his report he finds, as a conclusion of law, that the said Caroline and Elmina took an estate in fee in the remainder in the one-fourth devised to them in the second clause of the will, and an equal share with the others in what is given in the third clause of the will, and such was the ruling of the court.

The referee finds further, that Caroline, having married and given birth to a child, who survived her, the real estate of said Caroline descended to such child, and the latter having died and having no brother or sister of the blood of her mother, the estate in fee vested in her father, Richard Rankin, and that the like moiety in Elmina, at her death, descended to O. Lee Kincaid, her heir at law. In these the court concurred, and thus this portion of the real estate did not go into the general property for division, and the administrator is wholly disconnected from the controversy in respect to its disposition. The inquiry recurs as to the correctness of this rendering of the will, and whether the distribution to be made by the administrator should or should not exclude this fractional part of the land of the testator.

We concur in the interpretation, and think that the testator intended, as in words he has said, to give these two daughters an additional share in his estate, as a homestead for them, and an equal share in the residue. Argument can scarcely make it plainer. The third (341) clause evidently means, though the expression "all my property" is used, all such as had not been before disposed of, and not to interfere with what had been.

It is seldom that precedents can be found to guide in the construction of testamentary dispositions of property, and they are mostly where words of technical import are employed and their frequent use has affixed a meaning to them. Had the intention been different, it would have been easy to make it apparent by adding that the two daughters were to account for what was previously given. Instead of this, he inserts their names among the other children, and as to that fund, puts all upon the same footing.

The interpolation of the words "which is left," or others of equivalent import, would remove all obscurity, and this at most was an ellipsis which may be supplied, as was the word "sold," to get at the testator's meaning in understanding his will in *Howerton v. Henderson,* 88 N. C., 597.

There is no error and the judgment must be affirmed, and the cause proceed to a full and final determination in the court below.

Affirmed.

Cited: Weeks v. Quinn, 135 N. C., 426.

J. C. HARMON v. HENRY TAYLOR.

Evidence—Judge's Charge—Burden of Proof.

In an action upon a note, the execution of which is admitted, but payment is pleaded, it is not error in the court to instruct the jury that the burden is upon the defendant, and if they are in doubt, they should find for the plaintiff.

(342) CIVIL ACTION, tried before *Boykin, J.*, at Fall Term, 1887, of WATAUGA.

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

The facts are fully stated in the opinion.

C. H. Armfield and W. N. Scales for plaintiff.
J. F. Morphew and W. B. Council for defendants.

SMITH, C. J. This action, removed by the defendant's appeal from a judgment of a justice of the peace to the Superior Court of Watauga, is upon a promissory note of the defendant, made in February, 1878, under seal, to J. M. Stokes, and transferred to the plaintiff, in the sum of $91.00, with interest, to which the defense of payment, in whole or in part, is set up.

The averment in the answer is, that in 1881 there was a settlement between the parties, in which the plaintiff agreed that a counter demand, in an account upon defendant's books in the aggregate of $104.03, should be received in satisfaction of the present claim. This was denied, and upon the trial of the issues before the jury the defendant and the payee gave conflicting testimony, the former testifying to the allegations in his answer, and the latter stating that these demands were not thus adjusted, but were satisfied out of wages earned by him while in the defendant's service after the note was executed, and in this he was supported by the plaintiff's testimony.

The court in charging the jury instructed them "that the execution of the bond sued upon being admitted, the plaintiff was entitled to recover, unless the defendant established to the satisfaction of the jury that the debt had been paid, and that if the jury, upon consideration of all the evidence, were left in doubt as to the payment, they should find for the plaintiff."

(343) Upon the two inquiries, has the defendant paid the note and how much remains unpaid, the response to the first was in the negative, and to the second, one hundred and fifty-two dollars and forty-four cents.

The defendant excepted to the charge.

We find no error in what the court told the jury. The burden of showing payment rested upon the defendant, and in saying that he must establish this to the satisfaction of the jury, he but laid down a clear proposition of law, that the party alleging a fact must prove it.

There is no error and the judgment must be affirmed.

No error. Affirmed.

J. HERBERT SMITH ET AL. v. THE CITY OF WILMINGTON ET AL.

Election—Registration—Voters.

1. A "qualified voter" is one who is not only eligible to vote, but one who is duly registered.
2. The statutes of North Carolina prescribe registration as an essential qualification of a voter and are mandatory; the authorities charged with their enforcement have no discretion to dispense with any of their directions.
3. A voter who has been duly registered cannot be deprived of his right to vote, nor will he lose his character as a "qualified voter" by a failure to re-register, unless a new registration is made in pursuance of the plain requirements of the law.
4. An election to ascertain the will of the qualified voters of the city of Wilmington upon a proposition to subscribe to the capital stock of the Wilmington, Onslow and Eastern Carolina Railroad Company (authorized by ch. 233, Laws 1885), should be held and determined by the registration, properly revised, made biennially as prescribed in its charter for city elections. The mayor and aldermen have no power, either under the charter of the company or of the city, or of the general law of the State, to cause a new registration to be made.

SMITH, C. J., dissenting.

(*Perry v. Whitaker*, 71 N. C., 475; *Southerland v. Goldsboro*, 96 N. C., 49; *Duke v. Brown, ibid.*, 127; *McDowell v. Construction Co., ibid.*, 514, and *Wood v. Oxford*, 97 N. C., 227, cited.)

THIS was a civil action, heard by *Philips, J.*, at chambers in (344) NEW HANOVER, on 24 October, 1887.

The action is brought by the plaintiffs, taxpayers of the city of Wilmington, and all other like taxpayers who shall join in the same and contribute to the costs thereof, against that city and the other defendants, who are the mayor and aldermen thereof, to contest the validity of an election held on 11 August, 1887, in pursuance of an order made by the said last mentioned parties, in the said city "for the purpose of ascertaining the will of the qualified voters of this city upon the ques-

tion of a subscription of $100,000 (one hundred thousand dollars) by the city to the capital stock of the Wilmington, Onslow and East Carolina Railroad Company," as provided and allowed by the charter of that company, the statute (Acts 1885, ch. 233, secs. 13, 14).

This statute allows "any county, township, city or town," as therein provided, "to subscribe to the capital stock of said company," if a majority of the qualified voters thereof shall vote in favor of a proposition to be voted upon, specifying a fixed amount of such stock to be subscribed for, at an election to be held as prescribed in this statute "by persons appointed in the manner that persons are appointed for holding other elections in said county, township, city or town, and the returns thereof shall be made, and the results declared and certified as prescribed by law in such other elections." It is further provided by section 14 of the same act, "That if the result of said election shall show that a majority of the qualified voters of the said county, town-
(345) ship, city or town favor subscription to the capital stock of the said railroad to the amount voted for in such election, then said county commissioners, or the proper authorities of said city or town, shall immediately make such subscription to the capital stock of said railroad, payable in cash or the bonds authorized to be issued under this act."

The charter of the city of Wilmington, the statute (Acts 1876-77, ch. 192, secs. 3, 5) provides as follows:

SEC. 3. That before the first election of aldermen to be held under the provisions of this act, and biennially thereafter before every such election, there shall be a new registration in each of the said wards of the persons qualified to vote in the same, and the first election for aldermen shall be held on the fourth Thursday in March, one thousand eight hundred and seventy-seven, and subsequent elections therefor shall be held biennially thereafter on the fourth Thursday of March, of the respective years on which the same occurs.

SEC. 5. Every duly registered person in any ward, continuing to be a resident, bona fide, of such ward up to and on the day of any such election, shall be entitled to vote in such ward at any election therein, and no other person shall be entitled.

It appears that in pursuance of application made to them as allowed by the provision of the charter of the railroad company above named, the mayor and aldermen, defendants, on 5 July, 1887, made an order whereof the following is a copy:

"Be it ordained by the mayor and board of aldermen of the city of Wilmington, that an election be held on Thursday, 11 August, 1887, at the usual polling places of the city, for the purpose of ascertaining the will of the qualified voters of this city upon the question of a subscrip-

tion of $100,000 (one hundred thousand dollars) by the city to the capital stock of the Wilmington, Onslow and East Carolina Railroad Company. Every person qualified on the day of election (346) under existing laws, to vote for aldermen of the city of Wilmington, shall be deemed a qualified elector. All ballots must contain the words 'Subscription' or 'No Subscription.' *That books be opened for a new registration of the voters of the city at the following places,"* etc.

It further appears, "That an entirely new registration of voters was had according to the said ordinance, and on the day of election only sixteen hundred and seventy-six voters had registered," and an election was held as therein directed.

It also appears, "That on 12 August, 1887, the said board of aldermen met and passed the following resolutions, to wit:

"Whereas, at an election held in this city on Thursday, 11 August, 1887, in pursuance of an application of the Wilmington, Onslow and East Carolina Railroad Company, and a petition of one-fifth of the qualified voters of this city, and under an ordinance of the mayor and board of aldermen of this city on the question of a subscription of one hundred thousand dollars to the capital stock of said railroad company by this city, it is ascertained and hereby declared, that at said election there were cast for subscription 1,049 votes, against subscription 301 votes, and the registration lists show an aggregate of 1,676 registered voters in this city; therefore,

"Resolved, That the proposition has been adopted by a majority of the registered voters of this city.

"Resolved, That the finance committee of the board of aldermen are authorized to confer with the proper authorities of the Wilmington, Onslow and East Carolina Railroad Company, to the end that the conditions, terms and stipulations contained in the letter of application of said company by this board shall be carried out, the bonds not to be delivered except at the rate of twenty-five hundred dollars a (347) mile as the road is completed mile by mile."

It further appears, "That the registration under which the election in question was held was 1,676, and there were cast for subscription 1,049, which is a majority of said registration, but is not a majority of the whole number of persons residing in the city, who, by law, were entitled to register and vote; on the fourth Monday of March, 1887, less than five months prior to the said election, an election was held according to law for aldermen of the said city, and that immediately before said election, and preparatory thereto, a new registration of the qualified voters of the said city was duly had according to the requirement of the third section of the Act of 1877, to organize a government for the city of Wilmington, above recited; and the number of qualified voters then

registered was two thousand seven hundred and thirty-five, as appears by the registration books; that in the year 1880, preparatory to the general elections of that year, a registration of the qualified voters of New Hanover County was had, and the number of qualified voters then registered for Wilmington Township, which comprise precisely the same territory as the city of Wilmington, was four thousand two hundred and seventy-five, as appears by the said registry. And that since the year 1880 the population of the said city has been continually increasing."

The plaintiffs and other taxpayers appeared before the mayor and aldermen on 12 August, 1887, when they declared the result of the election in question as above stated, and insisted that a majority of the qualified voters of the city had not voted in favor of "Subscription," and they protested against their action.

The plaintiffs in their complaint demand judgment:

"1. That the said election held upon 11 August, 1887, and all actings and doings under the same, be adjudged and declared to be null and void.

(348) "2. That the defendants be perpetually enjoined and restrained from making any subscription on the part of the city of Wilmington to the capital stock of the Wilmington, Onslow and East Carolina Railroad Company, and from issuing any bonds of the said city in payment of the same," and for general relief.

The facts stated above, including others not deemed material to an understanding of the opinion of the court, were agreed upon by the parties, and submitted to the court for its judgment.

Upon consideration, the court "adjudged and decreed that the plaintiffs are not entitled to the relief asked for in the complaint, and that judgment be rendered against them for costs."

The plaintiffs appealed.

George Davis and T. N. Strange for plaintiffs.
D. L. Russell for defendants.

MERRIMON, J., after stating the case: It is not questioned, that in order to authorize the city of Wilmington, by its proper authorities, to subscribe for one hundred thousand dollars of the capital stock of the railroad company mentioned, the proposition to subscribe therefor must have received in its favor at the election in question, a majority of the votes of the qualified voters of that city.

By the terms "qualified voter" is implied, not simply that the person is eligible to be a voter, but as well and necessarily that he is registered as such in the way and manner prescribed by law.

A "qualified voter" is one duly registered. *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown, ibid.,* 127; *McDowell v. The Construction Co., ibid.,* 514; *Wood v. Oxford,* 97 N. C., 227.

The registration of voters is essential and very important.

As was said in *McDowell v. The Construction Co., supra,* the (349) purpose of it is, "to ascertain who is entitled to vote, and to facilitate the exercise of the elective franchise by citizens so entitled, and to prevent unlawful voting, fraud and confusion in all elections by the people." To render it effectual—to make it serve the purpose of the law—it must be made by the proper officers, in the way and manner and at the times prescribed by the law. The statutory regulations in such respects are not simply directory; they are in their substance mandatory as well; they do not imply discretion in those authorities charged with the execution of them, and moreover, to allow the exercise of such discretion in respect to a matter essential, affecting the rights of individuals and the public of great moment, might—would no doubt oftentimes—lead to private and public wrong, and serious confusion.

Whenever a person eligible to become a qualified voter has been duly registered as such, he at once possesses the right to vote at all public elections as allowed by and at the time and place prescribed by law, until in some way he loses such right, and his right must be recognized and he must be treated and counted as a voter, whenever under and in pursuance of the law, it becomes necessary to have regard to him as such. Particularly, for the present purpose, he cannot be required to reregister, or register a second time, at the same voting place, as a prerequisite to the right to vote then, unless the law allows or requires such reregistration. He continues to have the right to vote as a qualified voter and be treated as such in all respects, until he loses or is dispossessed of such right by virtue of the law, or as it allows.

Now, applying what we have said, we are of opinion that the election in question was ineffectual and void, because the mayor and aldermen had no authority to order a new registration of the voters of the city of Wilmington just before that election, as they undertook to do, ignoring and paying no regard to the regular registration of (350) March of the present year, as they should have done, but, on the contrary, declaring in effect by their action, that the registered voters of the last mentioned registration could not vote at the election in August unless they registered anew, under their order. The election was held, the result thereof ascertained and declared—the whole based upon and having reference and regard only to the new registration mentioned. By it, there were at the election 1,676 registered voters. Of these 1,049 voted in favor of subscription, a large majority of the whole

number of voters registered. But at the regular registration of voters in March of the present year, there were 2,735 registered voters, and this does not include such persons as became eligible to register after that time. The regularly registered voters in the city in 1881 for the general election was 4,275. The facts tend strongly to show that the votes cast at the election in August was much short of a majority of the qualified voters, if regard be had to the regular registration in March last, and very far short of it if there had been a full registration. This is not denied.

The learned counsel of the appellees, in his able argument before us, contended that the mayor and aldermen had authority to order the new registration, and therefore, the election based upon it, and the result ascertained from reference to it, was valid.

We are very sure that this construction is not well founded and cannot be sustained. They derive their authority in respect to registration from the charter of the city; the charter of the railroad company mentioned does not, nor does it purport, to enlarge it, further than, in the case provided for to order an election and take such further action as the result of it may render necessary.

The city charter provides, "that before the first election of aldermen to be held under the provisions of this act, and *biennially thereafter, before every such election, there shall be a new registration in* (351) *each of the said wards, of the persons qualified to vote in the same,*" etc. Thus, and thus only, is the power to order or provide for a "new registration" conferred; it is plainly to be exercised biennially, and there are no words, phraseology, provision, or things required to be done, that imply, or from which it can be reasonably inferred, that new registrations at other times might be required to be made.

It was further insisted, that inasmuch as before the regular biennial city election, there must be a like new registration, one before the election in question, was necessary, because the charter of the railroad company named required that this election should be held "in the manner prescribed by law for holding other elections" in the city. This is a misapprehension of the clause of the charter referred to. It provides that "such election shall be held after thirty days' notice, specifying the amount of subscription to be voted for, and to what company it is proposed to subscribe, posted at the courthouse door and three other public places in said county, township, city or town, at the several voting places, and by persons appointed in the manner that persons are appointed for holding other elections in said county, township, city or town, and returns thereof shall be made, and the results declared and

certified, as prescribed by law in such other elections." This, it seems to us, in plain terms, refers only to holding the election, ascertaining its result and certifying the same—not a word is used as implying or pointing to registration; the omission to mention or refer to it in some way, is singular, if the purpose was to require a new registration. Registration is one thing—to hold the election, ascertain and certify the result, is essentially a very different one. Registration precedes the holding of an election. Such inference of authority is too remote and strained to be allowed, especially in the absence of necessity justifying it. The admitted facts go to show that there was a total absence of necessity for such new registration; indeed, they more than hint at a pur- (352) pose to take undue advantage of it by some persons friendly to the subscription.

It was also contended, that authority to order and require such new registration might be derived from the statute (The Code, sec. 2675), which authorizes the board of county commissioners to direct a new registration of voters as prescribed, first giving thirty days' notice, etc.; and the statute (The Code, sec. 3795), which requires the corporate authorities of every city and town to cause a registration to be made of all the qualified voters residing therein, "under the rules and regulations prescribed for registration of voters for general elections," and the statute (The Code, sec. 3827), which makes the general statutory provisions as to "towns and cities" applicable to all incorporated cities and towns, when the same are not inconsistent with special acts of incorporation or special laws in reference thereto. This cannot be allowed. The mayor and aldermen did not profess to exercise authority thus derived—they did not direct that thirty days' notice be given of such new registration, nor does it appear that such notice was given—they simply ordered "that books be opened for a new registration of voters of the city" at places designated. It may well be questioned whether, if they had given proper notice, they could thus derive such authority, because the charter of the city expressly provides that new registration of voters shall be made biennially, but we need not decide this question, as the general statute was not observed—it does not so appear.

The registration of March, 1887, should have been scrutinized—purged of the names of persons who for any cause had ceased to be voters—and observed, and opportunity afforded to persons who became eligible to register and become qualified voters at the time of the election, and the result of the election should have been ascertained by the number of qualified voters thus appearing.

Authority to provide for the registration of persons who be- (353) come eligible as voters after the last preceding election, is given by the statute (The Code, secs. 2675-3795). As to this there is no pro-

vision in the city charter, and hence the general statutory provision cited applies. *McDowell v. The Construction Co., supra; Perry v. Whitaker,* 71 N. C., 475.

There is error. The judgment must be reversed, and the judgment declaring the election void and granting an injunction as prayed for in the complaint, entered in favor of the plaintiffs.

To that end let this opinion be certified to the Superior Court.

Reversed.

SMITH, C. J., dissenting: It is conceded that the election held 11 August, 1887, by the authority of the mayor and board of aldermen of the city of Wilmington, was in all respects regular and in conformity with the provisions of the statute, except that a new registration of voters was both unnecessary and unauthorized, so that while upon the last registry, a majority of the votes were cast in favor of the proposed subscription, upon the former there was not such majority. In one case the subscription was sustained; in the other rejected.

The city charter *commands* a biennial registration to be made just preceding the election of aldermen, which is required to take place on the fourth Thursday in March, 1877, and for the alternate successive years thereafter, to meet and provide for changes that may take place in the interval, while it does not forbid other registrations, but rather indicates the propriety of them on occasions of deep and unusual interest, in which an expression of the popular will is to be ascertained upon an inquiry submitted. The phraseology of section 13 of the charter of the road, seems intended to assimilate this in its gene-
(354) eral provisions to ordinary State and county elections, for it must be held "at the usual voting places and by *persons appointed in the manner* that persons are appointed for holding other elections in said county, township, city or town, and the returns thereof shall be made and the results declared and certified as *prescribed by law in such other elections.*"

The general law regulating elections (section 2075 of The Code) gives express authority to the county commissioners to direct "an *entirely new registration of voters before any election,* instead of the revision of the registration list as above prescribed."

Registration, being preliminary and yet part of the process of taking a popular vote, seems to be contemplated in the references made in the referred to section of the incorporating act.

There is a priority, moreover, in having a full and correct list of persons competent to vote on the eve of an election, so as to avoid the inconvenience and mischiefs of a purgation afterwards, as is seen in the case of *Rigsbee v. Durham, ante,* 81, where a number short of a

majority of the number on the registry, is made a majority by striking out the names of 180 voters and reducing them from 980 to 800. It is far better to have the correction made before the election, by officers appointed to revise, and who have ample time to do so, instead of when the heat of the contest is felt, and efforts are made to reverse the result by the disappointed party. Peculiarly must this frequent revision be made in a city so much of whose population have transient homes in the different wards.

The falling off in the registration may be ascribed to an indifference to the result, but for whatever cause it may happen, the result will be the same. All have had an opportunity to register and thus secure the right to vote on the pending proposal, and if they fail to do so, it is their own fault, and must be regarded as an acquiescence in (355) the result. I am, therefore, of opinion that the ruling should be affirmed.

Cited: Rigsbee v. Durham, 99 N. C., 348; *R. R. v. Comrs.,* 116 N. C., 565; *Hill v. Skinner,* 169 N. C., 414.

C. L. HINTON v. GRIFFIN PRITCHARD.

Evidence—Witness.

1. Where a witness testified that the true consideration of note given for the purchase of land was $2,400, and his testimony was impeached, it was competent, for the purpose of corroborating him, to admit in evidence a deed made not many years before, to a person under whom the plaintiff claimed, in which the consideration was stated to be $2,400.

2. The defendant having testified that he had paid a bond prior to September, 1882, it was not competent to prove that he was insolvent in 1884 and 1885, for the purpose of contradicting him.

3. The defendant having denied that at a certain time and place he had stated that he was insolvent, it was not competent to contradict him by showing he had made such statement. The inquiry was collateral and the plaintiff was bound by the answer.

(*Kramer v. Electric Light Co.,* 95 N. C., 277; *Nichols v. Pool,* 2 Jones, 29; *Warren v. Makeley,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361, and *Smith v. McKee,* 87 N. C., 389, cited.)

THIS was a civil action for the recovery of land, tried before *Avery, J.,* at June Term, 1887, of PASQUOTANK.

Plaintiff introduced a deed from J. L. Hinton to defendant for the lands in controversy, reciting a consideration of $5,500; a mortgage from defendant to J. L. Hinton, trustee, securing the payment of a bond for the recited consideration of $5,500, and a deed from J. L. Hinton, trustee, to plaintiff, reciting a sale of said lands under said mortgage. Plaintiff next introduced J. L. Hinton, who testified
(356) that defendant had paid nothing on said bond prior to said sale; that he had lost the bond in July or August, 1885; that at the time of its loss it had a credit on it of $1,000, less $50.00 commission, expenses of sale and taxes, and that he had it in his possession on day of sale, 30 September, 1880, and was owner of the same.

Defendant, in his own behalf, testified that he was to pay J. L. Hinton only $2,400 for the land in controversy, and that the consideration of the bond of $5,500 was the $2,400 purchase money, a balance of $100 interest on same, and $2,000 J. L. Hinton agreed to furnish him for the purpose of getting timber off a farm in Hertford County, and a $1,000 bonus; and the bond had been paid and released prior to 30 September, 1880.

The other facts necessary to an understanding of the points decided are stated in the opinion.

E. F. Aydlett for plaintiff.
John Gatling for defendant.

MERRIMON, J. The defendant testified on the trial, in his own behalf, that a part of the consideration of the note executed by him in question, dated 19 May, 1871, was $2,400, the price given by him for the tract of land in controversy, and this evidence was material.

The plaintiff sought to impeach this witness.

As corroboratory of what he had testified to, the latter put in evidence a deed dated 21 August, 1868, made by one Leigh to the person from whom the plaintiff purported to purchase the same land, in which it was recited that $2,400 was the price thereof. The court received this evidence for the purpose mentioned, and the defendant excepted.
(357) The evidence was properly received. It tended somewhat to prove the value of the land, and that the defendant had paid the price he testified he had paid for it. *Smith v. McKee,* 87 N. C., 389. It would have been different if it had been proposed to prove the value of the tract in question by showing the value of an adjoining tract. *Warren v. Makeley,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361.

The defendant had also testified that he had paid the note mentioned above before 30 September, 1880, and had produced other evidence tending to prove that he had paid the same. The plaintiff offered evi-

dence to prove that the defendant was insolvent in the years 1884 and 1885, and that he told a person named at a particular time and place that he was then insolvent, he having testified on cross-examination that he did not so tell that person.

The court refused to receive the proposed evidence, and we think properly. That the defendant was insolvent during the years mentioned did not tend—certainly not with sufficient directness—to make it evidence to prove that he was insolvent before 1880, especially in the absence of other evidence going to show insolvency prior to that time. *Nichols v. Pool,* 2 Jones, 29.

The defendant was asked the question if he had not told the person named that he was insolvent at the time and place named, for the purpose of contradicting him. This inquiry was as to a fact purely collateral, and the plaintiff was bound by the answer to it. *Kramer v. The Electric Light Co.,* 95 N. C., 277.

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

No error. Affirmed.

Cited: Credle v. Ayers, 126 N. C., 17; *Rice v. R. R.,* 130 N. C., 380.

(358)

W. W. McCANLESS v. JAMES FLINCHUM, SR., AND JACOB FLINCHUM.

Constitution—Homestead—Appeal—Record and Case—Void and Voidable Execution Sales—Demurrer—Trial by Jury—Issues—New Trial.

M., in 1870, recovered judgment against F. upon a debt contracted in 1862, and caused several tracts of land, which he alleged belonged to the debtor, but which the latter had fraudulently conveyed, to be levied upon and sold *en masse,* and he became the purchaser. No homestead was allotted. On the trial of an action to recover the land, a jury having been empaneled, the *record proper* stated "there was no response from the jury," but that "judgment was rendered for the defendant upon demurrer to the evidence"; the *case on appeal* stated that the court instructed the jury that the plaintiff could not recover, and a verdict was rendered accordingly: *Held* (SMITH, C. J., dissenting):

1. That the statement contained in the record proper must prevail, and as it appeared therefrom that the judge had, in effect, assumed certain facts which were in issue, and which should have been submitted to the jury—trial by jury not having been waived—a new trial must be granted.

2. (DAVIS, J., dissenting.) That a sale of land under execution upon a judgment founded upon a debt contracted prior to the adoption of the Constitution of 1868, without first allotting the debtor's homestead, unless it distinctly appears there can be no excess, is void, and the purchaser will acquire no title.

3. The distinction between the demurrer to the complaint and a demurrer to the evidence discussed by SMITH, C. J.

4. Void and voidable execution sales discussed and the authorities reviewed by SMITH, C. J., and DAVIS, J.

5. The practice with respect to the allotment of homestead under process to enforce judgments founded upon "old debts" discussed by MERRIMON, J.

(*Farmer v. Willard*, 75 N. C., 401; *Morrison v. Watson*, 95 N. C., 479; *Mitchell v. Brown*, 88 N. C., 156; *Turrentine v. R. R.*, 92 N. C., 638; *S. v. Locke*, 77 N. C., 481; *S. v. Sykes*, 79 N. C., 618; *Isler v. Murphy*, 71 N. C., 436; *Bernheim v. Waring*, 79 N. C., 56; *Jones v. Call*, 93 N. C., 170; *Brown v. Kinsey*, 81 N. C., 245; *Jones v. Lewis*, 8 Ired., 70; *Anderson v. Pritchett*, 72 N. C., 135; *Hollowell v. Skinner*, 4 Ired., 165; *Nixon v. Harrell*, 5 Jones, 76; *Bank v. Graham*, 82 N. C., 489; *Beckwith v. Mining Co.*, 87 N. C., 155; *Huggins v. Ketchum*, 4 D. & B., 414; *Wilson v. Twitty*, 3 Hawks, 44; *Thompson v. Hodges*, *ibid.*, 51; *Durham v. Bostwick*, 72 N. C., 353; *Arnold v. Estes*, 92 N. C., 162; *Mebane v. Layton*, 89 N. C., 396; *Miller v. Miller*, 89 N. C., 402; *Albright v. Albright*, 88 N. C., 238; *Gaster v. Hardie*, 75 N. C., 462; *Spoon v. Reid*, 78 N. C., 245; *Bank v. Green*, *ibid.*, 247; *Gheen v. Summey*, 80 N. C., 187; *Earle v. Hardie*, *ibid.*, 177; *Richardson v. Wicker*, *ibid.*, 172; *Crummen v. Bennett*, 68 N. C., 494; *Currie v. Clark*, 90 N. C., 355; *Burton v. Spiers*, 92 N. C., 503; *Hinton v. Roach*, 95 N. C., 106; *S. v. Rives*, 5 Ired., 297; *Wilson v. Patton*, 87 N. C., 318; *Dortch v. Benton*, *ante*, 90; *Cheatham v. Jones*, 68 N. C., 153, cited and commented upon.)

(359) CIVIL ACTION tried before *Gilmer, J.*, at August Term, 1887, of STOKES.

The complaint alleges that the plaintiff is the owner in fee and entitled to the possession of the land described therein, and that the defendants unlawfully withheld the possession from him.

The answer denies the allegations of the complaint, and asserts that the defendants are "in truth and fact owners in fee simple of said land."

The record sets out that "at August Term, 1887, the case came on for hearing before his Honor, *Gilmer, J.*, and a jury upon the following issues:

"1. Is the plaintiff the owner and entitled to the lands sued for?

"Answer: . . .

"2. What damage, if any, is the plaintiff entitled to receive for the wrongful detention thereof?

"Answer: . . .

"There being no response from the jury, judgment upon demurrer to the evidence for defendants; appeal by plaintiff to the Supreme Court in open court. Undertaking on appeal fixed at $50."

(360) The parties disagreeing, the case on appeal settled by the court is as follows:

"The plaintiff claimed the land in controversy under a deed, executed to him by the sheriff of Stokes County, on 6 February, 1871, conveying

to him four separate tracts of land in Stokes County, one tract on the north side of Dan River and three on the south side, not contiguous, one tract containing fifty acres, being the land in controversy in this action. A judgment in favor of the plaintiff and against the defendant, James Flinchum, for $205.09, and docketed in Stokes County 6 October, 1870, together with the summons and sheriff's return duly served, and justice's judgment, was put in evidence; and it was admitted that the debt on which the judgment was rendered bore date 10 March, 1862; also execution duly issued to satisfy said judgment with the return of the sheriff showing a levy upon all four of the tracts of land belonging to defendant James Flinchum, and a sale on 6 February, 1871, and purchased by plaintiff at the price of $200 for all of the tracts.

"W. H. Gentry, a witness for plaintiff, testified that he put up and sold all four of the tracts together, when plaintiff bought them, and that he was acting under the direction of plaintiff.

"Plaintiff offered in evidence a deed from James Flinchum to defendant, Jacob Flinchum, a son, for fifty acres (the land in controversy) at the stated price of $70, a deed from James Flinchum, Sr., to James Flinchum, Jr., a son, for a seventy-acre tract at $110, and from James Flinchum to James Rierson (a son-in-law) another tract, seventy acres, at $70.00, and to Pleasant Tilley (another son-in-law) 125 acres at $170, the four tracts included in the sheriff's deed to plaintiff, and all bearing date 1 March, 1870, and embracing 315 acres.

"It was proven by plaintiff that the land bought by him was worth at the time of the sale by the sheriff $5 per acre, or (361) $1,575.

The land was sold without allotting to the defendant, James Flinchum, his homestead.

"The plaintiff contended that the deeds from James Flinchum, the father, to his respective sons and sons-in-law, were made to defraud his creditors and were void, and introduced much testimony tending to show such fraudulent intent.

"The defendant introduced no testimony, but insisted before the court, as upon demurrer to the testimony, that upon the plaintiff's own showing there was a sufficiency of land belonging to defendant James Flinchum, at the time of the sale, in excess of a homestead, of the value of $1,000 to satisfy the plaintiff's debt, and that the sale by the sheriff in bulk, and his deed to plaintiff, was contrary to law and void, and passed no title to purchaser. This was the only contention before the court and jury. His Honor being of opinion with defendants, instructed the jury that the plaintiff's deed was void and conveyed no title to plaintiff, and that he could not recover, and plaintiff excepted.

"There was a verdict for the defendants. Motion by plaintiff for a new trial on the ground of error in instructions above specified. Motion overruled. Judgment against plaintiff for costs. Appeal by plaintiff to Supreme Court, in open court."

James T. Morehead for plaintiff.
C. B. Watson and W. B. Glenn for defendant.

DAVIS, J. The record proper states that certain issues were submitted to the jury, and that "there being no response from the jury, judgment upon demurrer to the evidence for the defendant, and appeal by plaintiff."

This, though in conflict with the statement of the case on ap-
(362) peal, must be taken as true. The statement of the case is no part of the record proper, and when in conflict with it the latter must prevail, because it imports absolute verity. *Farmer v. Willard,* 75 N. C., 401.

We must take it then, as appears from the record, that there was *no verdict* upon the issues.

The Code, sec. 957, makes it the duty of the Supreme Court to render such judgment, "as on inspection of the whole record it shall appear to them ought in law to be rendered thereon," or, as now the Act of 1887 directs, and when the judgment is not supported by the record (in this case the record shows that there was *no verdict*), or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded, as was done in *Morrison v. Watson,* 95 N. C., 479; *Mitchell v. Brown,* 88 N. C., 156, and *Turrentine v. R. R.,* 92 N. C., 638.

If it be said that in this case the judgment of the court was based upon facts *proved,* and that they were just such as the jury ought to have found upon the evidence as applied to the issues submitted, and it is "sticking in the bark" to say that judgment shall not be rendered because the *facts proved* were not found by the jury, the answer is, that under our Constitution, Art. IV, sec. 13, unless a jury trial be waived, the judge has no right to find the issue of fact joined, however clear the proof may be; it is an invasion of the exclusive and true office and province of the jury. It is his duty to "state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon," but he can give no opinion even whether a fact is fully or sufficiently proven. The Code, sec. 413; *S. v. Locke,* 77 N. C., 481; *S. v. Sykes,* 79 N. C., 618.

Proof is the result or conclusion usually reached by evidence. If there was evidence upon the issues, the jury alone could determine and weigh its effect, and find the *fact* to be deduced from it; if there is no

evidence, or if it is alleged to be insufficient and so held, the court may withhold it from the jury, but the court cannot say (363) upon the evidence what is or is not proven. This, unless by consent, is for the jury alone. If an *issue of fact* arises, even upon a motion in a cause affecting materially the judgment and rights of the parties, either has a right to have it decided by a jury. *Isler v. Murphy,* 71 N. C., 436.

When the court instructs the jury that there is no evidence, or insufficient evidence, the party excepting has a right to have the evidence set out in the record, so as to enable this Court to review the ruling in the court below.

The case before us states that: "It was proven by plaintiff that the land sold by the sheriff as aforesaid and bought by him, was worth at the time of the sale by the sheriff $5 per acre, or $1,575." This may or may not be the effect of the plaintiff's testimony—it may or may not have been the conclusion which the jury would have deduced from it, but what that testimony was, does not appear in the record, but it does appear that there was other evidence tending to show that the land was worth much less. It appears that it was sold at public auction—it is not alleged that there was any fraud or collusion on the part of the plaintiff or sheriff by which its value was affected, and if such allegation had been made, the plaintiff would have had a right to have had it passed upon by the jury.

The land was worth what a prudent, discreet person, wishing to buy and able to buy would give for it, and the only act of the *sheriff* or of the *plaintiff* in conducting the sale, of which the defendants complain, which could affect the price, is that it was sold *en masse;* this fact, if it had been found by the jury, does not exclude from the consideration of the jury, as evidence of the value of the land, the price at which it sold at public auction, nor the fact which appeared, that the plaintiff himself had sold the land a short time before at much less than $1,000. What effect the alleged fraudulent acts of the defendants, of which, so the case states, there "was much testimony," may have had upon the price, (364) or how and to what extent they may have affected the value of the land by beclouding the title, does not appear, and whether, in this respect, the defendants could take advantage of their own alleged fraudulent acts or not, there was evidence tending to show that the land was worth less than $1,000; and the plaintiff had a right to have it passed upon by the jury. This was his constitutional right. *Bernheim v. Waring,* 79 N. C., 56; *Jones v. Call,* 93 N. C., 170; *Brown v. Kinsey,* 81 N. C., 245.

The defendants say the sale was made by the sheriff in bulk, and they insist that his deed to the plaintiff was void for that reason. It is un-

doubtedly the duty of the sheriff to sell in such way as to realize, so far as he may be able to do so, a fair price for the property sold under execution, and if he fails to do so, the sale is voidable, and, upon objection, may be set aside; but this is a question of fact which ought to be submitted to a jury. *Jones v. Lewis,* 8 Ired., 70.

It is said in *Andrews v. Pritchett,* 72 N. C., 135, that if a sale is not made by the sheriff in a fair and just manner it is voidable. Voidable by whom? The general answer is, voidable by any person injured thereby—by the defendant in the execution—by any creditor of the execution debtor. But it is equally clear, that no matter how irregular *soever* the sale may have been, no one could complain of it who was assenting to it. Only a person injured can complain, and as against him it is voidable, not void. It is valid against every one except the party *injured,* and he must show how he was injured, in order to avoid the sale—if made with his own assent, or if the insufficient price was caused by his own neglect or fraud, as to him it was *damnum absque injuria. Andrews v. Pritchett, supra; Hollowell v. Skinner,* 4 Ired., 165.

(365) For an improper discharge of his duty in selling property under execution, the party injured has his remedy against the sheriff, and, as we have seen, the sale may be set aside, but it does not make the sale void. *Nixon v. Harrell,* 5 Jones, 76. In the absence of fraud (and none is alleged against the plaintiff) the sale will not be set aside. *Bank v. Graham,* 82 N. C., 489.

A sale will not be set aside for inadequate price, unless undue advantage or fraud is suggested, and this is a fact to be found. *Beckwith v. Mining Co.,* 87 N. C., 155. A sale *en masse* is not void, but will be supported where no fraud is shown either in the sheriff or purchaser. *Huggins v. Ketchum,* 4 Dev. & Bat., 414; *Wilson v. Twitty,* 3 Hawks, 44; *Thompson v. Hodges,* 3 Hawks, 51.

In *Durham v. Bostwick & Martin,* 72 N. C., 353, the plaintiff claimed under a sheriff's deed; the defendants alleged that the land was exempt from sale under execution as a homestead, and that the sale by the sheriff was void. It was found by the jury that the deed from Bostwick was made to defraud creditors; that Martin, who became the purchaser, had notice of the fraud when he purchased, and that the consideration of the note sued on was for a *balance* due on the purchase of the land. No homestead was laid off by the sheriff. Upon the verdict of the jury, Judgment was given for the plaintiffs, and it was held good.

The case before us, as alleged by the plaintiff, is almost an exact parallel.

It is alleged that the defendant James Flinchum, Sr., sold to his co-defendant, Jacob Flinchum, to defraud creditors—that Jacob Flinchum, the purchaser, was a party to the fraud, and that the consideration of

the judgment upon which the execution issued, under which the land was sold and purchased by the plaintiff, was an old debt. If the jury should find these facts as alleged (and the plaintiff had a right to have them passed upon by the jury), it is difficult to perceive how, upon the authority of the last cited case, the first issue presented in the record should not be found in favor of the plaintiff.

It was upon that issue that the defendants insisted that the (366) sale under which the plaintiff claimed was void, because the land was sold in bulk and without laying off the homestead. The execution under which the plaintiff purchased was issued on an old debt, against which no homestead exemption interposed. As settled by this Court, though the deed from James Flinchum, Sr., to Jacob Flinchum, may have been fraudulent and void as against an old debt, yet he was entitled to a homestead in any excess to the extent of $1,000.

In *Morrison v. Watson,* 95 N. C., 479, there was no question of fraud affecting the rights of the parties to the land. The execution was upon an old debt. There was a verdict upon issues submitted, and the judgment, after reciting that the judgment was for a debt contracted prior to 1868, concludes thus: "And it appearing from the verdict and the said *admitted* fact, that the land was of sufficient value to constitute the defendant a homestead, as well as to satisfy said execution, it is ordered and adjudged by the court that the plaintiff take nothing," etc.

It appeared from the case that one of the findings of the jury was in conflict with one of the *admitted* facts, and this Court granted a new trial. The Court could not render in such a case a judgment *non obstante veredicto.*

It would be singular if the court could not render a judgment upon an *admitted* fact that was in conflict with the fact found by the jury, and yet should have the power to take the question of fact entirely from the jury and assume that any fact was proven.

In *Arnold v. Estes,* 92 N. C., 162, the execution under which the sheriff sold, was upon a judgment rendered on an account, a part of which had been contracted prior to the adoption of the present Constitution and a part after. It was held to be the duty of the sheriff to lay off the homestead before sale, to the end that the debtor (367) might get the benefit of his exemption against "subsequent and subordinate liabilities incurred." The *Chief Justice,* quoting *Mebane v. Layton,* 89 N. C., 396, said, "it is in emphatic terms declared that a sale without laying off the homestead, unless in case of the several exceptions mentioned, is unlawful and void." The exceptions are: (1) for taxes, (2) for payment of money due on the purchase of the property; (3) laborer's lien, and (4) debts contracted prior to the adoption of the present constitution, and as to these, it may be declared

in equally emphatic terms, that the sale is not void, simply because of a failure of the sheriff to lay off the homestead.

Not only was this so in *Miller v. Miller,* 89 N. C., 402, immediately following *Mebane v. Layton,* but it is said, "where the homestead prevails, the creditor gets what is over and above the exemption, and the law requires it to be laid off, to the end that what remains may be sold, and the sheriff cannot sell without first laying off," etc., and the execution creditor cannot require the sheriff to sell without first paying or tendering his fees and having the homestead allotted; "but where the homestead does not prevail, the debtor takes what is left, after the debt is paid," and in the latter case, the sheriff has no right to require execution creditors to pay the fees for laying off the homestead, and the execution debtor cannot require it without paying the fees. In such cases the application must come from the debtor.

In *Albright v. Albright,* 88 N. C., 238, there were judgments against the plaintiff on both old and new debts. As against the new debts, he was entitled to his homestead; as against the old, he was not, and he asked the intercession of the court, to have his property sold to the best advantage, so as, if possible, to secure a homestead for himself in the excess above the old debts, and this was upon his application,
(368) and the court directed the sale to be suspended until the priorities of the rights of parties could be adjusted, so that the land could be so sold as to command a fair price, after all conflicting incumbrances were settled, and all clouds removed from the title. It was held that he was entitled to this relief, and similar relief was afforded upon the application of the debtor in *Gaster v. Hardie,* 75 N. C., 462.

In *Spoon v. Reid,* 78 N. C., 245, it was said: "The sheriff is not obliged to lay off to the defendant the house in which he lives, if it is not his property. . . . All of a man's property was and is held subject to the payment of his debts, except in so far, and to the extent only, that it has been specifically exempted."

As against debts contracted prior to 1868, there is no homestead exemption. If the debtor has more property than will pay such debts, he is entitled to his homestead in the excess, but it is no part of the duty of the creditor holding such debt, nor of the sheriff with an execution in his hands, issued upon a judgment on such a debt, to investigate and find out without the aid of the debtor, who makes no claim to a homestead, who professes to have no interest in the property, whether there is an excess or not. *Bank v. Green,* 78 N. C., 247.

Upon the payment of his fees, it is the duty of the sheriff to lay off the homestead, but this applies, and can only apply, to cases in which the party is *entitled,* as against the execution creditor, to the homestead, and it will be found that in all cases where the sales have been held

void by reason of his failure, it was either where the homestead was valid against the execution debtor, or if in the excess, after satisfying a debt of the excepted classes, when he refused to do so when requested by the execution debtor or some one succeeding to his rights.

In *Edwards v. Kearsey,* 6 Otto., 595, the Supreme Court of the United States, reversing the judgment of this Court, said: "The claim for the retrospective efficacy of the Constitution, or the laws cannot be supported," and the Constitution of 1868, as expounded by this (369) Court, "had the laws passed to carry out its provisions," impaired the obligation of the contracts in question—that is, contracts made anterior to the adoption of the Constitution.

At an early day, after the decision in *Edwards v. Kearney,* this Court in *Gheen v. Summey,* 80 N. C., 187, said the Act of 1869, Battle's Revisal, ch. 55 (The Code, sec. 510 to 524), "so far as it provides the machinery for laying off and allotting the homestead against debts contracted prior to the adoption of the Constitution of 1868, is void," . . . "and there is no obstacle to the levy and sale under their executions," etc. "The second section of Article X of our Constitution of 1868 having been declared void as against debts previously contracted, the act of the Legislature passed (Bat. Rev., ch. 55), to carry its provisions into effect, is also void as against the same debts." *Earle v. Hardie,* 80 N. C., 177.

In *Richardson v. Wicker,* 80 N. C., 172, which was a motion to amerce the sheriff for failure to have in the court the amount of an execution issued upon a judgment on a debt contracted prior to 1868, this Court said: "The imposition of a penalty for a want of official diligence is a matter of State regulation, and it would be no impairment of the plaintiff's right to collect his debt if the Legislature should repeal the amercement law altogether"; but it was not only said in that case that the sheriff had substantially the right under executions on old debts to sell the real and personal property of the debtor without any exemption whatever, except the personal property exempt under legislation in existence at the time of the contract, but that his failure to sell would give to the plaintiff in such execution "a right by action on the case against the sheriff alone, or by a suit on his official bond, to recover such damages as he could prove he had sustained"; "and there is," says the Court, "no doubt he could have maintained such (370) action."

It was the duty of the sheriff to sell without laying off the homestead, and his return that the "plaintiff neither pays nor tenders fees to lay off same (the homestead), and therefore no action" would not protect him.

Crummen v. Bennett, and all that class of cases were with *Edwards v. Kearney,* overruled by the Supreme Court of the United States in the last named case, and since that decision I have not been able to find a case in conflict with *Gheen v. Summey, Earle v. Hardie* and *Richardson v. Wicker, supra,* and *Crummen v. Bennett* and the like cases are, I think, no more authority by which we can be guided than *Edwards v. Kearney.*

They have been overruled and cease to be authority.

In perfect harmony with the decision of the Supreme Court of the United States is *Edwards v. Kearney,* as against creditors holding debts contracted since the adoption of the Constitution, a sale under execution, without laying off the homestead is void, and as against such debts no sale of the homestead by the debtor is fraudulent and void, because, as to such debts there are no rights against the homestead; yet a sale made by a debtor with intent to defraud a creditor holding a debt against which the homestead does not avail, is *fraudulent* and *void* as against such creditor, and it can be no part of the duty of such creditor or of the sheriff to investigate and sift the acts of the fraudulent execution debtor and his fraudulent vendee, and find just at what point the fraud ends, and the saving and purifying efficacy of the homestead begins, and, I think, with still less reason can the courts be called on to aid them, when the alleged fraudulent vendee is claiming under the deed of the vendor, paramount to, and in denial of, the creditor's right altogether.

This Court has held that a deed, though made by a debtor to defraud his creditors, and valid as between the parties, and void as to creditors, does not defeat the fraudulent vendor's right to his homestead,
(371) "for," says *Pearson, C. J.,* "the creditor could not have reached that by his execution had the debtor retained his homestead, but his fraud was in conveying the other part of the land. That the creditor can reach by his execution. As to the homestead he has no concern; that matter will rest between the fraudulent donor and donee." *Crummen v. Bennett,* 68 N. C., 494.

It rests, briefly, upon the proposition that, as the creditor has no right to have his debt paid by a sale of the homestead under execution, therefore the *fraudulent* sale of the homestead is, as to him, no fraud.

This reasoning cannot apply to creditors within the four excepted classes. Adhering to the rule of *stare decisis,* and without questioning the soundness of the reasoning upon which the decision rests, it cannot apply to debts of the excepted class, because as against them the sale is *fraudulent* and *void.* To hold differently, and permit the fraudulent vendor and vendee—after having, by a sale, fraudulent and void, as against the plaintiff's debt, sought to defraud him of payment, and, without

having asserted any claim to the homestead, and after having by their own fraudulent acts and claim of title and denial of plaintiff's right to have his debt satisfied by a sale of the land in dispute, thrown such a cloud upon the title as to affect its value and make it unsafe for any prudent person to buy it at a full and fair price (for only the interest of the execution debtor is sold under execution, there is no warranty of title, and the fraudulent vendee, who alone verifies the answer, is, in this very action, claiming the land), to permit parties under such circumstances to come into court and ask immunity and protection from the consequences of their own fraudulent acts, claiming all the benefits without any offer to pay or secure the debt which it was their fraudulent purpose to defeat, would be to invest the homestead with a purity and sanctity which cannot be stained by fraud; it would, in fact, make it one place where fraud can safely dwell, and though de- (372) tected and exposed, be still protected and secure, naked and unblushing in the very face of the court. If such can be the law, honesty and justice might well blush for shame, and dishonesty and fraud glory in their triumph. It may be that in this case, if the land was sold under such circumstances as prevented a fair price, upon a proper application, as was done in *Currie v. Clarke,* 90 N. C., 355, and suggested in *Andrews v. Pritchett,* 72 N. C., 135, the sale may be set aside, "restoring the parties to the *status* they occupied previously thereto, and without prejudice to the plaintiff's remedies, from the lapse of time." There is error.

MERRIMON, J., concurring in the judgment granting a new trial: I concur with my brother *Davis,* in the conclusion that there must be a new trial, but I cannot concur in what he says in respect to the right of the execution debtor to have homestead.

In my judgment the court ought to have instructed the jury to inquire particularly whether or not the land in question was worth more than the debt of the execution creditor, and the costs, including the costs of laying off the homestead of the execution debtor, and if they found that it was, then the plaintiff could not recover, because it appeared that the homestead had not been laid off as the law required, and in that case the sheriff had no sufficient authority to sell the land, and therefore his deed to the plaintiff was void.

It has been oftentimes said, and it is settled by express decision, that the law favors the homestead—will give and help to give it, when the debtor can have it, and this is so although the debt is of the classes of debts as to which the right of the homestead does not prevail, if the debt can be paid without the sale of it. Hence, it was said in *Miller v. Miller,* 89 N. C., 402, that, "if the debt that may, if need be, prevail

(373) against it, can be paid without selling it, this must be done. The classes of debts that prevail against the homestead do not so prevail necessarily and at all events, but they do so only when it is necessary to pay them."

It is true that the debt must be paid, at all events, if the property is sufficient for that purpose, but the debtor must have the homestead, if the debt can be paid without selling it, and if the debtor cannot have the benefit of the full measure of it, he is entitled to have the same in such measure as the circumstances will allow. *Wilson v. Patton,* 87 N. C., 318; *Albright v. Albright,* 88 N. C., 238; *Arnold v. Estes,* 92 N. C., 162; *Miller v. Miller, supra.*

If the debt is of the class that prevails against the homestead, because it was contracted anterior to the present Constitution, then, if need be, the creditor must as in other cases, pay the costs of laying off the homestead, but he will be entitled to be reimbursed in this respect out of the proceeds of the sale of the land, and this is so, because it has been held that such creditor is entitled to be reimbursed the costs of collecting his debt.

The fact that the execution debtor in this case may have sold the land to his sons and sons-in-law, in fraud of his creditors, does not deprive him of the right of homestead—he is entitled to have the homestead, notwithstanding, and as if there had been no fraud as has been frequently decided. *Crummen v. Bennett,* 68 N. C., 494; *Dortch v. Benton, ante,* 190, and cases there cited. As to that, the sale was not fraudulent—the sale of it did not affect or abridge the rights of creditors—they had no right to or interest in, and they were not concerned to know what might become of it—any question in that respect was between the debtor and those to whom he undertook fraudulently to sell his land.

It is said, how can the homestead in such case be laid off with any degree of accuracy or certainty as to quantity or value? It is insisted that the appraisers cannot know how much of the land will be (374) necessary or sufficient to be sold to pay the debt. It must be conceded that there is more or less practical difficulty in the way, as suggested. But this must be overcome as far as possible. All that can be done, it seems to me, is to approximate as nearly as practicable the purpose of the law. The appraisers, seeing the amount of the debt and costs to be paid and the land—its quantity and reasonable value—must lay off the homestead in such measure, less than one thousand dollars, as will probably leave land sufficient to pay the debt and costs, and the sheriff will proceed to sell the same. If it turns out that the land so left to be sold is insufficient for the purpose, then he must sell the homestead so laid off, pay the balance of the debt, and any surplus to the execution debtor, or the person entitled to have it. Thus will be

done for the debtor all that the law contemplates. The course of procedure thus indicated, though not satisfactory, seems to me, to be that implied and required by the law, in the absence of any express statutory provision on the subject. *Cheatham v. Jones,* 68 N. C., 153; *Wilson v. Patton, supra.*

I do not mean to intimate by what I have said, that in a proper case, the party entitled to homestead might not apply to the court, in a proper proceeding for the purpose, to have the land sold as a whole, the debt paid from the proceeds of the sale, and the surplus paid to him, in lieu of homestead. It seems to me that such a course would be practicable and expedient in many cases that may arise. *Wilson v. Patton, supra.*

What the value of the land sold and purchased by the plaintiff was does not appear by the verdict of the jury, as it should do, in terms or effect. There was evidence on the trial tending to prove that it was worth greatly more than the debt to be paid. It was sold for less than that sum—why is left to conjecture.

The question was not tried and settled, certainly not satis- (375) factorily, and I therefore concur in deciding that the plaintiff is entitled to a new trial.

SMITH, C. J., dissenting from the judgment granting a new trial: I fully concur in the opinion of *Merrimon, J.,* that without regard to the date of the debt the insolvent debtor is entitled to have his homestead ascertained and laid off, to the end that the excess be first applied to its payment, when sold under execution, so that the proceeds, if sufficient to discharge the demand, may exonerate the exempted part, or reduce its amount. The only difference between debts contracted before and after the adoption of the Constitution in 1868, is, that those of the former class, if the proceeds of sale of the excess be inadequate, must be satisfied out of the land set apart as the homestead, while those of the latter class cannot be. The laying off the exemption part is the plain duty of the officer in every case where it does not distinctly appear that there can be no excess in order that the fact may be determined in the manner and by the persons designated by law, as a guide to his further action under the execution. The validity of the sale is only supported when upon a trial of the title to the land it is manifest that the whole was required to meet the claim, and no detriment has come to the debtor by reason of the sale of the entirety. This view of the law is fully sustained by the authorities, and in the reasoning contained in the opinion, and meets my approval, while in another aspect of the case, I think the judgment ought to be affirmed.

There were four tracts of land distinct one from the other, which under the plaintiff's directions were put up and sold together, himself

becoming the purchaser at the price of $200. In his own testimony he estimated them to be worth $5 per acre, and in the aggregate $1,575, if sold with no cloud upon the title.

(376) The debt was contracted in March, 1862, and no homestead was allotted to the owner before the sale.

The defendant demurred to the evidence produced before the jury, as insufficient to sustain the action in two respects:

1. The manner of selling vitiated the sale, and the plaintiff acquired no title.

2. The homestead not having been set apart to the debtor, and the plaintiff's own proof being that, had this been done, the excess would have been sufficient to pay the debt ($205.09), the sale was illegal and inoperative.

The court ruling the sale to be void, sustained the demurrer, and from the judgment the plaintiff appealed.

Under the former practice a demurrer to the declaration, *overruled,* was followed by a final judgment, as thereby the facts were admitted for the purposes of the action. A demurrer to the evidence, when it was all in (not unlike a motion for a nonsuit at this stage of the trial, except that the one was compulsory and the other voluntary, and the latter left the plaintiff free to bring a new action for the same cause); *if upheld,* alike disposed of the action and operated as a discharge of the jury. Stephen Pleading, 13; Black. Com., 372; Sellon's Prac., 470.

It is otherwise under the present system, for if, interposed in good faith, the demurrer to the pleading be sustained, the party may plead over on such terms as may be prescribed, as if that defense had not been made. The Code, sec. 272.

In analogy, if not upon a fair construction of the act, the legal effect of overruling a demurrer to the evidence would be to proceed with the trial, the jury being retained, while if it were sustained, the action would be terminated, unless the plaintiff obtained leave to introduce further evidence in support of his case.

While ordinarily a demurrer of this kind requires the setting out of the evidence in full, and the more so when no special defect is pointed out, yet it is otherwise if there is *a fact shown which is itself an*

(377) *element in the complaint fatal to the cause,* or is adjudged to be, I can see no good reason for stating in full evidence wholly irrelevant to the point involved in the adjudication, and which cannot affect the result. Such in the present case is all that introduced and heard upon the question of the fraudulent intent imputed to the debtor in making the deeds to his two sons and sons-in-law, inasmuch as the inquiry, however answered, does not bear upon the ruling in the cause. The decision turns upon the point, whether there is ground for believing

that the homestead, or some part of it, might not have been secured to the debtor after leaving out a part of the land sufficient to discharge the debt, and this affirmatively appears from the plaintiff's own statement of the value of the tracts of land.

Certainly he cannot complain if his own statement is accepted as a correct valuation of the property; and so the mandate of the statute has been disregarded by the sheriff at the instance of the plaintiff and purchaser, one and the same person.

When a sale is made contrary to the requirements of the law, and the purchaser knows of and shares in the violation, he can acquire no title, such as a sale made *not* at the courthouse, or not on a *day authorized;* while the mere compliance of the officer with some prescribed duty imposed on himself, and not so known, such as a due advertisement of sale, will not invalidate the sale. In such cases the sale is voidable, as decided in *Burton v. Spiers,* 92 N. C., 503; *Hinton v. Roach,* 95 N. C., 106, and other authorities.

But it is void if the sale is not made at the time and place prescribed by law. *S. v. Rives,* 5 Ired., 297.

The plaintiff insists, and in this he is sustained in the opinion of *Davis, J.,* that as the sale was to satisfy a debt contracted before the homestead law was in force, it was not void, but voidable only, even if, when laying off the exempted part, there would be an excess sufficient to discharge the claim, and this upon the authority of (378) the ruling in the *Kearsey case* by the Supreme Court of the United States, and of this Court in *Gheen v. Summey,* 80 N. C., 187, and made two and a half years later. The latter case in general terms gives some countenance to the idea that the provisions for exemption are inoperative against process to enforce old debts.

But the declarations in that case have been since explained and corrected, and the true principle announced and vindicated, as shown in the opinion of *Merrimon, J.* The statute cannot violate the obligation of contracts, when it leaves all the debtor's property, before liable to execution, still so liable, and simply regulates the manner in which it is to be subjected. It withdraws nothing of the debtor's property from the creditor, for, if need be, all can be sold and applied to his debt, but it directs primarily the excess above the exemption to be taken, and the exempt part only to be taken when the excess proves deficient. Cannot the State regulate the manner in which the property of debtors may be reached, and what portions shall be first applied? Does the creditor lose anything when he can exhaust all the debtor possesses until his demand is satisfied, because priorities of liability are declared? The decision in the *Kearsey case* goes no further than to declare void enactments that screen some of the property from liability to process, and in

this way impairs the contract by preventing the application of a part withheld to its discharges.

It is all important that the law be settled and understood, and I am unwilling to disturb the adjudications heretofore made.

In my opinion, it appearing upon the plaintiff's own showing, that the value of the tracts exceed in value both the debt and the full measure of the homestead, the sale is void, and the judgment ought to be affirmed.

PER CURIAM. Error.

Cited: Morrison v. Watson, 101 N. C., 336; *Brown v. Mitchell,* 102 N. C., 370, 371, 372; *Baker v. Brem,* 103 N. C., 78; *Long v. Walker,* 105 N. C., 102; *S. v. Carlton,* 107 N. C., 957; *Kelly v. Fleming,* 113 N. C., 141; *S. v. Truesdale,* 125 N. C., 701; *Williams v. Dunn,* 163 N. C., 219; *S. v. Windley,* 178 N. C., 675; *Moore v. Moore,* 185 N. C., 335; *S. v. Wheeler, ibid.,* 672.

(379)

JOHN M. SMITH v. JACOB KISER.

Contract—Indemnity—Surety.

The plaintiff deposited with defendant a fund to indemnify the latter against any loss incurred as surety upon a recognizance to answer an indictment against the former and two other persons. Plaintiff forfeited the recognizance and fled the State, and judgment *ni si* was rendered on the recognizance, for a sum greater than that deposited. Under advice of plaintiff's attorneys, defendant made an arrangement whereby all the parties in the indictment were allowed to submit and judgment suspended on payment of costs, and he paid the money in his hands into the clerk's office in pursuance of that arrangement. After paying plaintiff's share of costs, the balance of the money was applied by the clerk on the costs of plaintiff's codefendants in the indictment: *Held,* that this arrangement was within the scope of the contract of indemnity, and the plaintiff was not entitled to recover the balance of the fund from his surety.

CIVIL ACTION, tried before *MacRae, J.,* at Fall Term, 1887, of GASTON.

The plaintiff brought this action before a justice of the peace in the county of Gaston to recover $93.30 from the defendant, and it went by appeal to the Superior Court of that county.

The following is so much of the case stated on appeal as need be set forth here:

"The plaintiff testified that at the Fall Term, 1885, of said Superior Court an indictment was pending and tried against himself, J. B. Carpenter and Bill Sneed, for disturbing public worship, resulting in a mistrial; plaintiff and the other codefendants were required to give bond

in the sum of $200 each for his appearance at the next term of court, and he gave bond with the defendant, J. Kiser and J. S. Carpenter, as sureties; after Fall Term, 1885, and before the term to which he was bound to appear, witness left the State and went to Texas, without notifying defendant Kizer that he intended to leave, when and where he was going, nor when he proposed to return, and, in (380) fact, did not return to the State until February, 1887; that before leaving he had turned over to J. S. Carpenter, the other surety on his bond, with instructions to deliver the same to defendant Kiser, a promissory note made by one ..... Carpenter and the said J. S. Carpenter, payable to witness, and upon which there was due witness a balance of about $140; that this note was so placed for the purpose of indemnifying Kiser against any loss he might incur by reason of his said suretyship; that Kiser collected on this note $140, no part of which had been paid to witness; that he had not communicated with Kiser during the time of his absence; that T. H. Cobb and G. F. Bason were his attorneys in that indictment; that he had demanded the amount sued for from Kiser before this suit was brought, and he refused to pay him anything.

The clerk of said Superior Court produced the dockets of the Spring Term, 1886, and showed that defendant Smith at that term had been called and failed, and a judgment *ni si* entered against him and the said sureties on his bond; that afterwards, during the term, a submission was entered for all the defendants, and the judgment suspended on the payment of the costs, one-third of said costs to be paid by each; that the whole amount of costs was $242.45, one-third of which was $80.81 2/3; that the defendant Smith's entire costs, as taxed against him, was $155.60; that Smith had more witnesses summoned than the other defendants, and hence he taxed the larger part thereof against him; that defendant paid to him $140, of which he credited $98.80 on the bill of costs of Smith, and the balance, $41.20, he credited on bill of costs of Smith's codefendant, Burt Carpenter. The amount of State costs against Smith in said criminal action was $53.25, and the remainder of the $98.90 was applied by witness to the payment in part of said Smith's own witnesses' fees in said case. Defendant Sneed paid all his part of State costs in said prosecution.

The judgment docket of said court was introduced by plaintiff, (381) showing the judgment in said criminal action. Defendant admitted the collection of the $140 on said note, and the application thereof to the bill of costs, and claimed that he did it under the advice of the attorneys for Smith.

The attorneys testified that they so advised Kiser because the case had been pending a long time; there had been two mistrials of the same, both occupying a long time; that their client had already judgment

ni si entered on the $200 bond, and the solicitor had offered to them not to prosecute the *sci. fa.* to final judgment, and to suspend judgment in the main cause, provided they would submit their client and apply the $140 in Kiser's hands to the satisfaction of the costs; that seeing they could, by pursuing this course, certainly save their client the difference between $140 and $200, and also end the prosecution of the indictment, they accepted the offer. They admitted that they were not authorized by Smith to apply the $140 to the satisfaction of the bill of costs.

The court—the facts not being controverted—directed the jury to render a verdict in favor of the plaintiff for $41.20, being of opinion, as the case states, that the defendant was liable for so much money as was paid on account of the costs of the prosecution mentioned as was taxed against the defendant Carpenter therein. A verdict was so entered; there was a judgment for the plaintiff accordingly and the defendant appealed.

R. W. Sandifer for plaintiff.
Platt D. Walker for defendant.

MERRIMON, J., after stating the case: The defendant was the plaintiff's surety for the latter's appearance to answer a criminal charge against him at a particular term of the court mentioned. He (382) knew that if he failed to appear in court, as he was bound to do, and offered no lawful excuse for such failure, his surety, the defendant, would be liable and compelled to pay the State two hundred dollars.

Knowing this, he placed in the hands of the defendant a note upon which was due about one hundred and forty dollars, to indemnify him "against any loss he might incur by reason of his suretyship." How indemnify him against loss? Did he intend that the defendant should wait until judgment absolute should be entered against him and he was compelled to pay two hundred dollars and costs, and then apply the money collected upon the note as far as it would serve the purpose to indemnify? We think not. To say that he did, is not, it seems to us, a fair interpretation of his meaning and purpose. It is more reasonable to say that he meant and intended that the defendant should collect the note and apply it to the best advantage to prevent liability as far as practicable, that "he might incur by reason of his said suretyship," and thus indemnify himself. This is a reasonable and just view of his purpose and one that harmonizes with his duty to the defendant. It is strengthened by the fact that he did not return to the State until months after in the order of such things the judgment against the defendant would have been made absolute and he would have been compelled to pay the same, as well as costs.

The defendant so interpreted and acted upon the plaintiff's instructions to him as to the application of the note. The compromise he made with the solicitor for the State under the wise advice of the plaintiff's counsel was fortunate and advantageous for him as well as the defendant. The money collected upon the note was faithfully applied for the plaintiff's benefit—his liability made much less by the compromise—and in effect, as he directed it to be.

The fact that a part of it was applied to pay costs of one of (383) the defendants in the criminal action other than the plaintiff cannot to any extent alter the case—the compromise embraced such application of that much. The plaintiff's remedy, if he has any as to the money, is against the party for whose benefit it was applied—certainly not against the present defendant.

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

Venire de novo.

TOBIAS KESLER v. GEORGE F. CORNELISON.

Emblements—Crops—Execution Sale—Landlord and Tenant.

1. Crops are personal property and, upon the death of the owner, go to his personal representative. Before maturity they are not subject to sale under execution, and therefore a purchaser of land at an execution sale acquires thereby no title to the crops then growing thereon.

2. The Code, sec. 1754, only vests the possession of the crop in the landlord in order to secure a compliance with the terms in the lease; as against all other persons the title is in the tenant or his assignees.

(Walston v. Bryan, 64 N. C., 764; *Gordon v. Armstrong*, 5 Ired., 410; *Walton v. Jordan*, 65 N. C., 172; *Shannon v. Jones*, 12 Ired., 206, and *Brittain v. McKay*, 1 Ired., 265, cited.)

CIVIL ACTION, originally commenced in a justice's court, and carried by appeal to the Superior Court and tried before *Clark, J.*, a jury trial being waived, upon the following statement of facts agreed, at August Term, 1887, of ROWAN:

1. That plaintiff purchased on 24 August, 1885, at sheriff's (384) sale, under execution issuing out of Rowan Superior Court, upon a judgment docketed therein in favor of Luke Blackmer against Louisa Mason, all the right, title and interest of said Louisa in and to the lands described in the complaint.

2. That the levy of said execution was in the following words and figures, to wit: "Levied this execution this 27 June, 1885, on the right,

title and interest of the defendant in and to 211 acres of land in Rowan County, adjoining the lands of James A. Craige, Peter Hairston, R. Krider and others, there being found no personal property in my county to satisfy this execution.

"C. C. KRIDDER,
"Sheriff Rowan County."

3. That at the time of the levy and sale the lands were rented to one Hubbard Parker as tenant of Louisa Mason, who then and there had upon said lands a crop of cotton growing and ungathered.

4. That the defendant Cornelison was the agent of Louisa Mason, and as such had rented the lands to Parker, and that after levy and sale, to wit, in November, 1885, Cornelison collected from Parker the sum of $13.70, being the net proceeds of the rent arising from said crop of cotton growing and ungathered at the time of the sale and levy, promising Parker at the time that he would pay the same over to the plaintiff Kesler if he was entitled thereto.

5. That Louisa Mason had by parol contracted and agreed with defendant Cornelison that he should be paid for his services as such agent out of the said crop, and that she was at the time of levy and sale indebted to him in a sum in excess of $13.70 for such service.

6. The plaintiff contended that he was entitled to the proceeds of the sale of the cotton by virtue of the levy and sale, and the defendant insisted that the plaintiff acquired no title to the crop by virtue (385) of said levy on the land; and also insisted that he was entitled to the crop by virtue of the contract mentioned in paragraph five (5) of this case.

Upon the foregoing facts his Honor was of the opinion the plaintiff was not entitled to recover, and gave judgment accordingly, and plaintiff appealed.

J. M. Mauney for plaintiff.
Kerr Craig and L. Clement (by brief) for defendant.

DAVIS, J. The plaintiff acquired no title to the crop by his purchase of the land under execution.

Prior to 1844 growing crops were the subject of levy and sale under execution as personal property. Since the act of 1844 (The Code, sec. 453), they are not subject to levy till matured, but they are none the less personal property, and upon the death of the owner go to the executor or administrator as personal assets.

In the present case the defendant, as the agent of Louisa Mason, had rented the land to one Parker for the year 1885, and though by section 1754 of The Code, the crops are deemed and held to be vested in pos-

session of the lessor, this is only for the purpose of securing compliance with the stipulations in the lease; and as against every one else the title to the crop is in the lessee or his assigns. The estate in the land during the term of the lease was in him, and there was no levy, and could be no levy, upon the growing crop. The Code, sec. 453; *Walston v. Bryan,* 64 N. C., 764; *Gordon v. Armstrong,* 5 Ired., 410; and the title to the crop did not pass by a levy and sale of the land. *Walton v. Jordan,* 65 N. C., 172; *Shannon v. Jones,* 12 Ired., 206; *Brittain v. McKay,* 1 Ired., 265. There is

No error. Affirmed.

(386)

C. C. FOREMAN v. HEZEKIAH HOUGH ET AL.

Jurisdiction—Partition—Deed—Special Proceeding—Irregularities.

1. Where issues are made before the clerk in a special proceeding and transferred to the civil issue docket, the judge may now, under ch. 276, Laws 1887, hear and determine all the matters in controversy and make a final decree.

2. After the transfer of the cause to the civil issue docket, an agreement that the judge may find the facts, or the facts being agreed, may pronounce judgment, cures all irregularities.

3. A deed conveying a tract of land (describing it) upon which there was a mineral spring, to several persons, "one-eighth share of said mineral waters" each, and containing a provision that one of the vendees and his "heirs and assigns are to have free access to said springs," creates a simple estate in common, of which partition may be made.

(*Trull v. Rice,* 85 N. C., 327; *Capps v. Capps, ibid.,* 408, and *Brittain v. Mull,* 91 N. C., 498, cited.)

ISSUES joined in a special proceeding tried before *Clark, J.,* at Fall Term, 1887, of STANLY.

This is a special proceeding to sell the land described in the petition for partition. The answers of the defendants raised issues of fact to be tried by a jury, and the clerk transferred the case to the civil issue docket, to the end these issues might be tried according to law.

Before the judge in term the parties agreed upon the facts, and submitted the case to the court for its judgment. The court, upon consideration, gave judgment directing the sale of the land, from which the defendants appealed to this Court, assigning errors as follows:

"1. That the clerk of the Superior Court had no jurisdiction; and,

"2. That in addition to their being owners of three-eighths of the land described in the said deed, they own and possess ease- (387)

ments in, to, and over said land, springs and mineral water, which cannot be sold for partition."

The following is a copy of the deed upon which the controversy arose:

This indenture, made and entered into this 29 January, 1877, by and between Elizabeth Green of the first part, and W. H. D. Green, M. C. Underwood, Lafayette Green, M. J. Biles, Daniel D. Green and R. B. Smith of the second part, all of the county of Stanly and State of North Carolina: Witnesseth, That whereas, the said Elizabeth Green, being desirous to secure to each of her children as above stated as being of the second part, one-eighth share in the Rocky River Springs Mineral Waters, located on the Alligator branch in said county, do by these presents agree for one acre of land to be measured off so as to include said mineral waters and to constitute eight shares in the said acre of land, reserving one of said shares both as to the water and one-eighth part of said land for her individual use or otherwise, as she may see fit, and also with a special understanding that any person or persons she might choose to sell the said land to have the right of using said mineral waters as private citizens, also their heirs and assigns are to have free access to said springs, and it is further understood that a share in said water is to justify one boarding establishment for each owner. Said acre of land is bounded as follows: Commencing, etc., to the beginning, containing one acre of land, and the said Elizabeth Green, on the first part, do hereby agree to give and grant and convey to each one that has been named respectively as being of the second part, one-eighth share of said mineral waters, to use for any and all purposes, to them, their heirs and assigns in fee simple forever, with the understanding, should the last named of the second part not surviving her husband, then the aforesaid one-eighth of said land and waters is to go into the (388) hands of her nearest blood kin as the law in such cases may direct, to them and their heirs and assigns forever; and the said Elizabeth Green of the first part, in witness to the aforesaid agreement, hereto set my hand and seal, dated as first written.

E. GREEN. [Seal.]

R. H. Battle and S. F. Mordecai for plaintiff.
J. M. Mauney for defendants.

MERRIMON, J. This is a simple application for the sale of land for partition.

The petition alleged that the petitioner and the defendants were tenants in common of the land described therein, and that for causes alleged, actual partition thereof could not be made, etc. The special proceeding was therefore properly begun in the Superior Court before

the clerk representing the court, and when issues of fact were raised he properly transferred the case to the civil issue docket. The Code, secs. 256, 1892, 1903, 1904; *Trull v. Rice,* 85 N. C., 327; *Capps v. Capps, ibid.,* 508; *Brittain v. Mull,* 91 N. C., 498.

But as the court had general jurisdiction of the whole subject of partition, when the case came before the judge in term, and the parties agreed upon the facts and submitted the case to the court for its judgment, this certainly had the effect to cure any possible irregularities as to the bringing of the proceeding, and the pleadings and proceedings therein.

If ordinarily in the past, after the trial of issues of fact by the jury, and the decisions of questions of law by the court, in special proceedings, the clerk, acting for the court, should regularly have proceeded to make further orders and judgments in the course of the proceeding, the statute (Acts 1887, ch. 276), gives the judge, when the case comes before him, complete authority, upon the request of either party, "to proceed to hear and determine all matters in controversy in such action, unless it shall appear to him that justice would be more cheaply (389) and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

The deed in question is very informal and confused in its provisions. It recites the desire of the maker to give those—several in number—to whom it is made, particular rights and privileges as to the use of the water in a valuable mineral spring, situate on the land (one acre) conveyed. This was unnecessary—merely superfluous—because the deed conveyed to the grantees the absolute estate in the land, and the right to use the water was incident to the estate. They were tenants in common, having the fee simple, and the deed conferred upon them severally no right other than such as belonged to such tenants; they had the whole, and could have no more. The deed does not purport to give one of the grantees a larger estate, or right, or privilege in any respect than another. The parties to the proceeding are simply tenants in common of the land, and there is nothing peculiar in the rights of all or any one or more of them in respect to it, that prevents a sale of it, for the purpose of partition.

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

No error. Affirmed.

Cited: Early v. Early, 134 N. C., 260; *Coltrane v. Laughlin,* 157 N. C., 288; *Bank v. Leverette,* 187 N. C., 747.

(390)

LEWIS CLICK ET AL. V. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Condemnation of Land—Appraisement—Jurisdiction—Clerk—Judge—Irregularities.

1. An application for assessment of damages caused by the taking of lands in the construction of railroads is not, strictly speaking, either a civil action or special proceeding, but is a summary proceeding, of which the Superior Court has jurisdiction in vacation or at term. The judge of the court may appoint the appraisers either in term or vacation, while the clerk can do so only in vacation, and then only as representing the court.

2. Where, in such a proceeding, it was agreed that issues raised upon the petition and answer should be transferred to the civil issue docket for trial: *Held*, that whatever irregularities there may have been in the conduct of the cause were cured, and the court had jurisdiction to proceed with and finally determine it.

(*Brittain v. Mull*, 91 N. C., 498; *Strayhorn v. Blalock*, 92 N. C., 292; *Jones v. Desern*, 94 N. C., 32; *Warden v. McKinnon, ibid.*, 378; *Edwards v. Cobb*, 95 N. C., 5; *Capps v. Capps*, 85 N. C., 408, and *Peoples v. Norwood*, 94 N. C., 167, cited.)

THIS was a summary proceeding for assessment of damages caused by the construction of a railroad through certain lands, tried before *Montgomery, J.*, at November Term, 1887, of MADISON.

On 12 August, 1882, the plaintiffs served notice upon the defendant that on 6 September following they would "apply by petition to the Superior Court for Madison County for the appointment of five freeholders to assess the damages done us by the construction and operation of your road through our lands," etc.; and on the day thus fixed—the Superior Court then being in session—they presented their petition "to the Honorable James E. Shepherd, judge of the Superior Court, now presiding and holding said courts in the Ninth Judicial District," alleging their ownership of the lands—describing them by metes and
(391) bounds—upon which the damages were asserted to have been committed by the defendant; that the defendant had refused to make or offer any compensation therefor, and praying for the appointment of duly qualified appraisers to make an assessment.

Thereupon the judge appointed appraisers, the parties agreeing that the defendant might, upon the coming in of the report, "plead as upon exception, any plea in bar of the plaintiffs' right to compensation, including the statute of limitations."

The appraisers made a report, to which defendant filed exceptions, when it was, by consent, ordered that the report be set aside, the defend-

ant permitted to file answer and the cause transferred to the civil issue docket for trial upon the issues, "it being the object of this agreement to secure a trial of all the matters in dispute between the parties upon one trial."

After the jury was empaneled the defendant moved to dismiss for want of jurisdiction. The motion was allowed and judgment rendered accordingly, from which the plaintiffs appealed.

Theo. F. Davidson for plaintiffs.
C. M. Busbee for defendant.

MERRIMON, J. This is strictly neither a special proceeding nor a civil action, as prescribed and defined by The Code. It is a summary proceeding, allowed in favor of persons owning land claiming against railroad corporations for damages to their land, occasioned by the construction of the railroads of the latter across and over the lands of the former, as allowed in this case by the defendant's charter. (Private Acts 1854-55, ch. 228, sec. 29; Private Acts 1848-49, ch. 82, secs. 26-29, and The Code, secs. 1943-1949.)

It is begun by an application to the Superior Court of the (392) proper county—not by summons, but by serving the opposing party with petition, setting forth the grounds of claim, accompanied by "a notice of the time and place when and where the same shall be heard by the Superior Court, . . . at least ten days prior to the hearing of the same by the court," etc. (The Code, sec. 1944.)

By the express terms of the statute the Superior Court has jurisdiction of the matter or proceeding, but it is not provided that it shall be begun by summons, returnable before the clerk of the court in vacation time, as in case of special proceedings, or in term time. It may be begun at any time, in or out of term, and if begun in term, then it is proper and necessary that the judge of the court shall grant the order appointing commissioners, as was done in this case, because the statute (The Code, secs. 132-251) so expressly provides.

In this case the application to the court was made in term time, and the court had authority to make, and properly made, so far as appears, the order appointing commissioners, and thus obtained jurisdiction of the proceeding; including the subject-matter thereof, and the parties thereto. It would not have been otherwise as to the jurisdiction if the proceeding had begun in vacation time, because the jurisdiction in any case was that of the court; not that of the clerk; the latter in that case would simply have represented and acted for the court, and his action would have been that of the court, until at the instance of a dissatisfied party the judge should have reversed or modified it. *Brittain v. Mull,*

91 N. C., 498; *Strayhorn v. Blalock,* 92 N. C., 292; *Jones v. Desern,* 94 N. C., 32; *Warden v. McKinnon, ibid.,* 378; *Edwards v. Cobb,* 95 N. C., 4.

It appears that the court in term appointed commissioners; that they acted and made report of their action to the court; that the defendant filed exceptions thereto, which the court sustained, and the report (393) was set aside. Thereupon, "by consent of parties the defendant was permitted to file answer, and the cause transferred to the civil issue docket for trial, upon issues made in the pleadings to ascertain damages, it being the object of this agreement to secure a trial of all matters in dispute." Issues of fact were raised and the jury were empaneled to try the same, but before trial the defendant moved to dismiss the proceeding, suggesting that the same had not been properly begun in vacation time before the clerk, and therefore the court had not jurisdiction. The court allowed this motion. For the reasons stated above this was erroneous. The court had jurisdiction and obtained the same regularly.

But as the court—not the clerk—had jurisdiction of the matter, even if the proceeding regularly ought to have been begun before the clerk in vacation, the agreement to proceed above set forth would have been a waiver of and cured such and like irregularity. *Capps v. Capps,* 85 N. C., 408; *Peoples v. Norwood,* 94 N. C., 167.

There is error; the judgment must be reversed and the case tried and determined according to law. To that end let this opinion be certified to the Superior Court.

Error. Reversed.

Cited: Hendrick v. R. R., post, 432; *R. R. v. R. R.,* 106 N. C., 22; *R. R. v. Lumber Co.,* 132 N. C., 652.

D. D. SUTTLE v. JOHN Z. FALLS.

Evidence—Market Price of Goods.

Evidence of a dealer as to the price of goods sold at a distant market, whose information is derived in the course of business and from prices current sent him, is admissible, upon trial of an action to recover the price, as some evidence of the value of the article at the place of production—less the expense of transportation and sale.

(394) CIVIL ACTION, tried at August Term, 1887, of CLEVELAND, before *McRae, J.*

The plaintiff sues to recover the price of certain *mica,* sold by the defendant as agent for the plaintiff in 1883. On the trial, a witness for the plaintiff testified, "that he dealt in mica in 1883—bought and sold it." The plaintiff objecting, he was allowed to testify further, "that the price of mica 3½ by 4 in 1883 was, he thought, $2.50 per pound; that he sold in Utica, New York, to one house, and they sent him the quotations of prices; that was where mica was sold, and they were general dealers."

There was evidence to prove that the mica sold, in size, "run from 2 by 2½ inches, and from 6 and 7 by 3 and 3½ inches, and (witness) thinks it would average 3 to 3½ to 4 and 3½ inches."

The appellant excepted generally, to "the charge of the court" to the jury, and especially to so much thereof as had reference to interest to be allowed. Judgment for plaintiff. Appeal by defendant.

J. F. Hoke for plaintiff.
W. P. Bynum for defendant.

MERRIMON, J., after stating the case: It is unnecessary to decide any question presented by the assignment of error as to the instruction of the court to the jury in respect to interest, because the counsel for the appellees agree here, that the interest allowed up to the date of the judgment shall be abated, and a proper order to that effect will be entered. But the principal money of the judgment will bear interest from the date of the latter until the same shall be paid.

We cannot take notice of the general exception to the whole charge of the court; it is so indefinite and vague as to imply nothing. This has been decided many times.

The assignment of error in respect to the evidence admitted on (395) the trial as to the price of mica in the year 1883, cannot be sustained. The witness so testifying, said that he was a dealer in that article—bought and sold it in that year. He, therefore, had knowledge, and was qualified to testify as to the current price of it.

Nor was the evidence objectionable on the ground that the witness obtained his information in the course of his trade and business as such dealer from merchants—general dealers in mica in Utica, where there was a market for the same; nor was it objectionable because he derived his information in part from "the quotations of prices" sent to him by the merchants with whom he had such dealings. It is from such sources and by such means merchants and business men generally come to have information and knowledge as to the methods, customs and courses of trade and business, and the market value and current prices of classes of goods, articles, and things put upon and sold in the markets

of the country. Such knowledge is important and useful. It is acted and relied upon to a greater or less extent, according to circumstances, in buying and selling in the markets, and in business transactions generally. Such information, in appropriate cases, is evidence of greater or less value, in proportion as the witness testifying is more or less trustworthy and well or ill informed. It is of the nature of hearsay evidence, that comes within well settled exceptions to the general rule, that hearsay is not ordinarily evidence. The subject is well discussed and numerous cases cited and commented upon by the *Chief Justice* in *Fairly v. Smith,* 87 N. C., 367; and also by *Rodman, J.,* in *Smith v. R. R.,* 68 N. C., 107.

It seems, that at first it was expected by the parties that the mica would be sold in the city of Philadelphia. It did not, so far as appears to us, appear on the trial where it was in fact sold. Hence, it (396) was contended on the argument here that the price should be that of the place of the contract of bailment. The court was not requested to give such particular instruction, but we think it did so instruct the jury in effect. It said, among other things, "You can consider the testimony as to the quotations of the market, at the place where there is a market, in order to enable you to reach its value here. Its value at the place of production would be less than at the market where it was sold by the expense of transportation and sale." It then directed the attention of the jury to the evidence objected to. The price in Utica—a market for mica—was some evidence of the price at the place of production, and, with the explanation given by the court as to the expense of transfer and cost of sale, was unobjectionable. It helped the jury to settle a fair price.

There is no error.

No error. Affirmed.

Cited: Ferebee v. Berry, 168 N. C., 282; *Commander v. Smith,* 192 N. C., 160.

THOMAS BOWEN v. EMMA FOX, EXECUTRIX.

Appeal—Notice.

A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days notice, as provided by the Act of 1887, ch. 121.

(MR. JUSTICE DAVIS dissenting.)

BOWEN *v.* FOX.

CIVIL ACTION, tried at May Term, 1887, of VANCE, before *Merrimon, J.*, to recover damages for the seduction of plaintiff's daughter, by the defendant's testator. Defendant appealed.

H. T. Watkins, E. C. Smith and George H. Snow for plaintiff. (397)
A. C. Zollicoffer and L. C. Edwards for defendant.

SMITH, C. J. This action, begun in February, 1886, is to recover damages for the seduction and debauchment of the plaintiff's daughter by the defendant William Fox, on whom service of process was made, and who dying before the trial, his executrix, Emma Fox, was brought in by summons to defend in his stead. The averments in the complaint are explicitly denied in the answer of the original defendant, and both pleadings are supported by oath.

The cause was tried, and upon the findings of the damages upon the only issue submitted to the jury, judgment was rendered for the plaintiff in June, 1887, for the recovery of said damages, and the defendant appealed.

By consent of plaintiff's counsel the time for filing the undertaking was extended, and the defendant allowed until the first day of the next month (July) to put it in. The undertaking was not in fact executed until 22 August, and has been transmitted with the transcript of the record. Upon calling the cause in this Court the plaintiff moves to dismiss the appeal, for that the undertaking was not executed and filed within the enlarged time for doing so agreed upon by counsel at the time of trial.

The appellant insists that the appeal is barred by the Act of 1887, ch. 121, which provides that in appeals to this Court "before the appellee shall be permitted to move to dismiss said appeal, *either for any irregularity in the undertaking* on appeal, or for failure of the securities to justify, as prescribed in sec. 560 of The Code, he shall give written notice to the appellant of such motion to dismiss at least twenty days before the district from which the cause is sent up shall be called," and that such "notice shall state the grounds upon which (398) the motion is based."

The second section authorizes in all such cases the appellant at least five days before the district is called to file with the clerk of the Supreme Court a new bond (undertaking), justified as required in said section 560.

The appellant contrues the words "irregularity in the undertaking" as including the delays in the execution of the undertaking, as well as defects in its form and structure, and hence the motion to dismiss cannot be entertained.

It must be remembered, however, that in a series of rulings we enforced the statutory mandate in requiring a compliance with those conditions, without which the appeal was unavailing. In limiting the extent to which our rulings had gone, the General Assembly did not restore the old practice, which admitted the filing of a new appeal bond, with leave of the court at the hearing when none had been given before, but had confined this remedial legislation to cases of *irregularity* in the instrument, such as an insufficient penal sum, and a deviation in other particulars of its provisions from the statute, and for want of a verification.

We do not feel at liberty to give the act a wider operation than its terms fairly interpreted will warrant, and more especially when, as here, the time has been prolonged by the counsel, and more than seven weeks beyond its limits were allowed to elapse before any action in that direction was taken by appellants.

In our opinion the difficulty is not obviated by the statute, but stands upon the footing of the law as it before existed.

The appeal must therefore be dismissed, and it is so ordered.

DAVIS, J., dissenting: I do not concur. I think chapter 121 of the Acts of 1887 should be liberally construed, and it would require no strained construction to bring this case within its remedial pro-
(399) visions. The bond was filed and sent up with the record of the case more than twenty days before the district from which it was sent up was called, and more than twenty days before the beginning of the term of the Supreme Court. It was here in ample time to allow the appellee to give twenty days notice of his motion to dismiss, and if a failure to file it within the time prescribed is not such an *irregularity* as to bring it within the very letter of the statute which, I think, is by no means certain. I think the clear purpose and spirit of the act was to give the appellant an opportunity to be heard before his appeal should be dismissed for want of a sufficient bond, where there was any bond filed by him within time to enable the appellee to give twenty days notice.

If the bond is a good and sufficient one, the appellee is fully protected against any possibility of injury if the merits of the case are with him, and it seems to me to have been the purpose of the legislature, by this statute, to remedy the evil of having cases on appeal dismissed without a hearing upon the merits, and without notice of the motion to dismiss, when a bond is filed within time to allow the twenty days notice. It may be, that if notice had been given, the appellant would have had a full and satisfactory answer to the motion.

At all events, I think the legislative intent is so apparent that one might adopt such a construction without incurring the criticism of *judicially legislating,* or of exercising unwarranted discretion.

Great wrong may result to the appellant, and none can result to the appellee by a failure to have the appeal heard on its merits, and as the bond was filed in ample time to allow the appellee to give the notice required by the act of 1887, and no such notice was given, I think the notice to dismiss ought not to be allowed.

Dismissed.

Cited: S. c., 99 N. C., 128; *Harmon v. Herndon, ibid.,* 478; *Allison v. Whittier,* 101 N. C., 492; *Lackey v. Pearson, ibid.,* 653; *Griffin v. Nelson,* 106 N. C., 238.

(400)

ROBERT Q. McCRACKEN v. ALBERT ADLER ET AL.

Homestead—Execution Sale—Action Against Sheriff for Failure to Lay Off Homestead.

1. Where plaintiff, in an action to recover land, claims title under execution sale of debtor's land in which the sheriff had neglected to lay off homestead, the sale is void, and the purchaser, whether he be plaintiff in the execution or a stranger, acquires no title.

2. The sale in such case being void, the debtor can maintain a suit upon the sheriff's bond (under The Code, sec. 516) only for costs and damages sustained—not for the value of the homestead.

CIVIL ACTION to recover land, tried at Fall Term, 1887, of HAYWOOD, before *Montgomery, J.*

A judgment creditor of J. C. Smathers had his judgment duly docketed in the Superior Court of Haywood County, and execution thereon issued to the sheriff of that county, who levied the same upon and sold the land of this debtor, without first having the homestead of the latter therein laid off to him according to law, or at all, and the plaintiff became the purchaser thereof, and took the sheriff's deed therefor. On the trial he put in evidence the judgment, execution and deed mentioned, and relied upon the same as evidence of title to the land in him.

The defendant contended that the deed mentioned was void, because the homestead of the judgment debtor in the land was not laid off to him as the law required should be done before levy upon and sale of the land. As to this:

"It was admitted that the said J. C. Smathers has continued to reside in this State at the same place, near the line of Buncombe and Haywood counties, and that no homestead has ever been allotted or laid off to him, either before or under the said execution of *Gurgenheimer v. J. C. Smathers,* and that no homestead has ever been allotted or laid off to him.

(401) "There was no evidence as to the value of the lands owned by said J. C. Smathers. The court instructed the jury that upon the proof and admission the plaintiff was not entitled to recover. Plaintiff excepted," and appealed.

G. S. Ferguson for plaintiff.
W. L. Norwood and G. H. Smathers for defendants.

Merrimon, J. Accepting the facts as they appear in the record, the judgment debtor was plainly entitled to have his homestead in the land which the sheriff undertook and purported to sell, laid off to him as the law directs. Until this was done, the sheriff had no sufficient authority to levy upon and sell it. The law favors the right of homestead, and the statute (The Code, secs. 502-506) prescribes in detail and plain terms, leaving little to implication and inference, how it shall be laid off in cases like the present one, and expressly authorizes a levy upon and sale only of the excess of it.

The Constitution (Art. X, secs. 2, 5 and 8), and the statutory provisions in execution and aid of it, in respect to the right of homestead, strongly indicates a settled purpose to secure and give complete effect to it, and the uniform decisions of the court have been in harmony with that purpose. The homestead shall not be sold "under execution, or other final process obtained on any debt," except in the cases allowed by the Constitution, and these are well defined and settled. Neither the Constitution nor the statute applicable contemplates a sale of the land subject to the homestead until the latter shall be laid off to the debtor. Moreover, such a sale cannot generally be made intelligently, fairly and justly, until the homestead shall have been ascertained. Then, and not till then, the sheriff can see what may be sold, and persons desiring to purchase what may certainly be bought. The course thus indicated is essential to justice and fair dealing and, as well, important to

(402) creditors and debtors. No sensible man will buy at a fair price, when he cannot know what and how much he buys. To uphold such sales, would be to encourage and establish a vicious practice and absolute wrong, and as well afford opportunity in many cases for fraud and injustice.

These and like considerations led us in deciding the case of *Mebane v. Layton,* 89 N. C., 396, to declare that generally a sale of the land of a

person entitled to have homestead in the same, without first laying it off to him, was with certain exemptions specified, unlawful and void. What we have heard, our observation and further reflection on the subject since that decision, do not incline us to recede from or modify what we said and decided in that case. *Arnold v. Estes,* 92 N. C., 162; *Durham v. Bostwick,* 72 N. C., 353; *Andrews v. Pritchett, ibid.,* 135.

The counsel for the appellant, in his able argument before us, among other things suggested that it is unfair, if not unjust to purchasers at such sales, to treat them as void, and contended that the owner of the homestead had his remedy against the sheriff, as allowed by the statute (The Code, sec. 516). We cannot accept this view as correct. Persons desiring to purchase and purchasers of land at execution sales, are presumed to know the law, and they ought in justice to themselves, as well as others, before bidding for the property to inquire whether or not the homestead has been laid off to the debtor. Thus they can easily protect themselves and encourage a due observance of the law. Such sales are not light and trifling, but serious matters, and require deliberation and scrutiny. The right of action given by the statute just cited is in no sense a substitute for the right of homestead. It only makes it indictable for the sheriff to fail to observe the statute first above cited, and further provides, that "he and his sureties shall be liable to the owner of the homestead for all costs and damages in a civil action" that he may sustain by reason of the neglect of the sheriff in failing (403) to lay off to him his homestead—not for the value of the homestead lost. He might be annoyed and injured in a variety of ways by such neglect, and still be able to assert his right at his cost and expense.

It was further insisted that in any case such deed of the sheriff ought to be void only in case the plaintiff in the execution became the purchaser, as in *Mebane v. Layton, supra.*

It is otherwise, because the defect, imperfection or irregularity in the sale is not simply such as the plaintiff in the execution particularly is presumed to have knowledge of, but the irregularity in failing to lay off the homestead is patent—one that every person can readily and must take notice of.

The rule thus stated is general and applicable where the execution debtor is entitled to have his homestead laid off to him in the land sold, but there are exceptions to it as pointed out in *Miller v. Miller,* 89 N. C., 402; *Wilson v. Patton,* 87 N. C., 318, and other like cases.

Nor does the rule apply where the land sold is not of the tract or parcels of land to which the execution debtor's right of homestead attaches, as prescribed in the provisions of the Constitution and statutes cited above—as where it is separate and distinct from the homestead property and not necessary to make the homestead complete, as allowed

by the statute (The Code, sec. 509). But if the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there be no dwelling-house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provision of the Constitution. *Flora v. Robbins,* 93 N. C., 38; *Murchison v. Plyler,* 87 N. C., 79; *Spoon v. Reid,* 78 N. C., 244.

In the case before us, the land which the sheriff undertook to sell was the homestead tract of the execution debtor—it embraced his dwelling-house and other buildings used in connection therewith. The (404) mere fact that the county line separated some of these buildings from others could not impair, much less destroy, the debtor's right. It was the plain duty of the sheriff to have the debtor's homestead laid off to him; and it was the folly or misfortune of the plaintiff to bid for, undertake to purchase, pay for, and take the sheriff's deed for the land, until the law in respect to the debtor's homestead had been properly observed.

The view we have taken of the assignment of error above considered, renders it unnecessary to consider other questions presented by the record. Judgment affirmed.

No error. Affirmed.

Cited: Mobley v. Griffin, 104 N. C., 117; *Long v. Walker,* 105 N. C., 119; *Buie v. Scott,* 107 N. C., 182; *Dickens v. Long,* 109 N. C., 169; *McMillan v. Williams, ibid.,* 254; *Dickens v. Long,* 112 N. C., 315.

J. H. HUTCHINS v. J. F. HODGES.

Contract of Lease—Rent.

Defendant leased land for two years, agreeing to pay one-fourth of the crop for *each* year as rent. Plaintiff sues (before the expiration of the term) to recover amount of rent for the first year, and the defense is an alleged breach of contract on the part of plaintiff, and, also, that the agreement to pay rent for the first year was dependent upon the stipulation that defendant was to have the land for the second year: *Held,* that plaintiff is entitled to recover the rent sued for. The defendant failed to show that he had sustained any damage by reason of the alleged breach of contract.

CIVIL ACTION, commenced before a justice of the peace and tried on appeal at September Term, 1887, of STOKES, before *Gilmer, J.*

"The plaintiff complained that the defendant was due him the fourth rent of the tobacco raised on his land in the year 1884, the value of

which was admitted on the trial to be forty-five dollars. The defendant denied plaintiff's right to recover *that amount,* for the (405) reason that he was to have the land two years.

"On the trial the defendant testified that he rented the land from the plaintiff for two years, agreeing to pay him one-fourth of the tobacco for each year, the plaintiff to furnish one-fourth of the guano, and that he refused to take and clear the land unless he got it two years; that he proceeded to clear the land, which was timbered like the ordinary woodland in that section, and made tobacco on it in 1884 that brought $180; that in the fall plaintiff entered on said land and sowed it in grain; that he carried the tobacco to market, but never paid the plaintiff any rent; that the land was much more valuable for tobacco the second year than the first; that after he failed to get the land for the second year, he rented from one James Shelton, who lived in the neighborhood.

"On cross-examination defendant testified that the plaintiff did furnish the one-fourth of the guano, and that on one occasion he offered plaintiff the one-sixth part as the rent of the land, which plaintiff refused to take except as a credit on the one-fourth rent; that while he only got tobacco land from plaintiff and had to get land for his grain crops from other persons, that when he went to Shelton's he got land for all his purposes.

"The defendant introduced other witnesses tending to corroborate him, but showed by no witness that he was damaged, or how he was damaged by his failure to get the described lands.

"The plaintiff denied that he rented the land to the defendant for more than one year; that the defendant left a great deal of timber on the land, and had refused to pay him the one-fourth rent.

"The plaintiff introduced other testimony tending to corroborate him. The defendant contended before the court that if his evidence was to be believed, that the plaintiff had made a special contract, and could not recover anything in the action because of his failure (406) and refusal to perform his part of the contract, and that in any event under the pleadings as shown by the justice's return, he was entitled to have the jury pass upon the question of damages, by way of recoupment, by reason of the breach of the contract by the plaintiff.

"His Honor held that the plaintiff had declared on a single renting for one year for one-fourth, he to furnish one-fourth of the guano, and that in the essentials of said contract the plaintiff and defendant were agreed, both saying the one-fourth rent was to be paid a year, and that the defendant had failed to show any damages, by way of recoupment, by plaintiff's failing to let him stay on the land two years, as there was nothing before the jury from which they could estimate said damages,

and that the plaintiff, on the defendant's own showing, was entitled to recover $45, the amount agreed as one-fourth rent of the land." Judgment for plaintiff. Appeal by defendant.

Glenn & Glenn for plaintiff.
Watson & Buxton for defendant.

DAVIS, J. It appears from the testimony of the defendant himself that he leased the land for two years, agreeing to pay one-fourth of the tobacco for each year as rent. When was the rent for the first year due? Clearly, the plaintiff was not required to wait till the end of the second year for the rent of the first. But the defendant says that the plaintiff entered in the fall and sowed grain; that the land was more valuable for tobacco the second year than it was the first, and that he refused to rent the land unless he was to have it for two years. It is admitted that the one-fourth of the crop of tobacco for 1884 (the stipulated rent) was worth $45, but the defendant says the plaintiff is not entitled to
(407) recover because he entered and sowed wheat, and this deprived him (the defendant) of the advantage of cultivating the land the second year according to his contract; that the agreement to pay rent for the first year was dependent upon the stipulation that he was to have the land for cultivation the second year; and as he was deprived of this by the plaintiff, there was a breach of the contract, and the plaintiff is not entitled to recover.

It does not appear that the defendant objected to the entry by the plaintiff; but assuming that the contract was as the defendant insists it was, and that he was deprived, by the act of the plaintiff, of the benefit to be derived from the cultivation of the land the second year, he was entitled to such damages for this breach as he could show that he had sustained, but having failed to show that he had sustained any damage, his recovery, if he were bringing an independent action, would be nominal damages only, and there was no error in the ruling of his Honor that the plaintiff was entitled to recover the rent for 1884 without abatement.

There was no evidence upon the question of damages to go to the jury—there was no evidence of loss.

The doctrine in regard to mutual dependent stipulations stated in the cases of *Braswell v. Pope,* 82 N. C., 57, and *McMahon v. Miller, ibid.,* 318, relied on by the defendant, have no application to this case. There is no error.

No error. Affirmed.

Cited: Brewington v. Loughran, 183 N. C., 562.

(408)

P. W. AUSTIN AND WIFE v. R. G. D. PICKLER, AND ANOTHER, ADMINISTRATORS.

Contract—Burden of Proof of Nonperformance.

The burden of proving nonperformance of conditions in an instrument rests upon him who seeks to enforce it; and hence, as here, there being no evidence to show that the stipulations contained in the bonds sued upon were not performed, the defendant administrators are not chargeable and plaintiff cannot recover.

CIVIL ACTION tried upon exceptions to a referee's report, at Fall Term, 1887, of STANLY, before *Clark, J.*

This action is brought upon the administration bond of the defendants, R. G. D. Pickler and D. F. Pickler, to whom letters had been issued, and their surety, I. M. Redwine, for an account and settlement of the estate of R. G. D. Pickler, Sr., deceased.

The complaint charges various derelictions in official duty, their failure to return a full and correct inventory of the estate, and especially the omission to return certain specified notes under seal—the indirect purchase for his own benefit by said R. G. D. Pickler, and an under value of land sold by the administrators under an order of court for conversion into personal assets—and their neglect to render a final account and pay to the relators the share of the funds which the administrators have or ought to have in their hands.

The defendants in their answer deny most of the relators' allegations, aver that the intestate's estate is insolvent, and the assets are insufficient to meet its liabilities; they further set up a small counterclaim.

The court ordered a reference under The Code to the clerk to take and state the administration account.

The referee's report shows a balance of $268.77 in the hands of the administrators, and a still outstanding indebtedness of (409) $1,311.46.

The referee finds that there are four several promissory notes, under seal, each dated 28 February, 1883, executed respectively by the defendants R. G. D. Pickler and D. F. Pickler, and W. C. Pickler and J. P. Pickler, substantially in the same form, and one of which is as follows:

One day after date, I promise to pay R. G. D. Pickler, Sr., three hundred and seventy-five dollars, value received, eight per cent interest, and this note to be void at my death on the following conditions, that is: I, R. G. D. Pickler, Jr., agrees to pay me some money as I stand in

need of it, and help me cultivate my farm for the benefit of my living my lifetime, and if the above obligations are not complied with this note is to be in full force and effect.

R. G. D. PICKLER, JR. (Seal.)

28 February, 1883.

The administrators are charged with the amounts due on the four notes with interest, which reduced by the application of so much as was required to discharge the debts for which the estate was liable, left in their hands the sum of $767.09, to one-fifth part of which the referee finds the relators to be entitled.

The defendants except to the action of the referee in charging them with these notes, and to their being charged with the counterclaim, because it is upon an indebtedness of the whole estate, and not of the relators' share therein.

Upon the trial before the court the exceptions were sustained, the account ordered to be reformed and when reformed confirmed, and judgment rendered for the defendants against the relator and the sureties to his prosecution bond for costs, including an allowance of $25 for the report.

Thereupon the relators appealed to this Court from the ruling
(410) in reference to the notes, assenting to the correctness of the exception in reference to the counterclaim.

J. W. Mauney for plaintiff.
No counsel contra.

SMITH, C. J., after stating the case: The grounds of exception to the ruling of the judge brought up for review are stated to be:

1. That there was no evidence that the notes were given for the tract of land in Davie County.

2. That no sufficient reason why the notes might not be collected has been shown.

3. That it does not appear upon the face of the notes that the relators could have no interest in them; and

4. That the relators do not seek to subject the lands in Davie County to sale.

The controversy concentrates upon the single question of the liability of the administrators upon the notes thus produced, and the solution of this inquiry disposes of the appeal.

The notes are carelessly drawn, and evidently the words "to be void at my death" have reference to the death of the obligee, as does the expression "help me cultivate my farm," as they proceed from the

obligee, and are words improperly interjected into the instrument in which the obligor speaks, who alone executes it.

But enough remains to give it a legal character and effect as a penal bond with conditions of avoidance. If the money was furnished the testator as he needed and required, and the stipulated assistance given him in cultivating his farm, then the obligation running through his lifetime became void and inoperative.

Now, upon whom devolves the burden of proving a compliance or non-compliance with the conditions? In our opinion, in analogy to the practice in suits upon bonds strictly penal, the plaintiff being required to assign breaches in the conditions, the validity of the (411) bond should be shown by those seeking to enforce it.

"In an action on a penal bond, execution not being denied but performance pleaded on oyer and assignment of breach, the onus is with the plaintiff to show the breach." Bailey *Onus Probandi,* 272, citing 1 Sel. N. Pri., 485 and 437.

But the case is stronger than if upon a bond strictly penal and defeasible, for the party insisting upon its being in force to charge the administrators should show every fact necessary therefor. Assuming the conditions to have been fulfilled, and there is no proof or suggestion that any complaint of neglect was ever made by the deceased, the bonds became inoperative at his death by their very terms, and the court, in the absence of any proof of conditions broken, or of any explanations, properly refused to charge the administrators with them.

The judgment must be affirmed and it is so ordered.

No error. Affirmed.

JAMES A. CAUDLE v. WILLIAM L. FALLEN.

Fraud—Exception to Charge.

1. It was alleged in the complaint that the plaintiff obtained a judgment against a party, and after the death of the debtor the administrator paid $90 on the same into the clerk's office; that plaintiff sold the judgment for $25 to the defendant upon an alleged false representation of the latter, to the effect that he did not know how the claim could be collected—it was a doubtful one, etc.: *Held,* that the judgment being of record and the money paid into office and credited thereon, the plaintiff was fixed with knowledge of the facts relating to the alleged fraud, and was not entitled to recover if the defendant did not know that the amount so paid was more than he paid plaintiff.

2. A general exception to the charge of the judge will not be entertained.

(*Bost v. Bost,* cited and approved.)

(412) CIVIL ACTION, tried before *MacRae, J.*, at August Term, 1886, of STOKES.

The plaintiff alleges that he obtained a judgment before a justice of the peace of Rockingham County against one Mrs. Ingram, which was duly docketed in the Superior Court of that county; that Mrs. Ingram died, and her administrator, one Wilson, paid into the office of the Superior Court clerk of said county the sum of $90, to be credited on said judgment. That by reason of false and fraudulent representations of the defendant, the plaintiff was induced to sell and transfer said judgment to the defendant for the price of $25, and this action is brought to recover $65, alleged damages sustained by reason of the said transfer so induced by the "trick and contrivance" of the defendant.

The defendant denies that he made any false or fraudulent representations in regard to the said judgment, or that he induced the plaintiff to sell as alleged, or that the plaintiff relied on his opinion as to the value of said judgment, but made inquiries of others having opportunity to know the facts, and that he had the same opportunity to ascertain the value of the judgment which the defendant had.

Testimony was offered on each side tending to establish the contentions of the parties as set out in the pleadings, and no exceptions were taken to the evidence.

The following issues were agreed upon and submitted to the jury:

1. Did the defendant, by false and fraudulent representations, induce plaintiff to sell to defendant the judgment named in the complaint?

2. What damage has plaintiff sustained thereby?

The presiding judge instructed the jury as follows:

(413) If defendant knew that there was more than enough money in the clerk's office for plaintiff than would pay his note against Caudle and the $5 which he paid plaintiff, and if defendant went to plaintiff and represented to him that the Ingram claim or judgment was doubtful, and he would probably never collect his claim, and that he (defendant) did not know how the money could be made, and induced the plaintiff to make the trade with him, by which defendant would receive a much larger amount than plaintiff owed him, you will respond to the issue, "Yes."

And as to damages, the damage would be the difference between the note ($17.50) and interest on it, and the $5 which defendant paid plaintiff, and the amount received by defendant, $90.30. Plaintiff says that it is $65, and you cannot give damages for more than $65, and you may give interest if you choose.

But if defendant did not know that there was more money in office than would pay on the Ingram debt a larger sum than sufficient to settle his debt and the $5; or if he did not make the false representa-

tions charged, you will answer the first issue, "No," and that settles it. The burden is on the plaintiff. Plaintiff excepted.

The jury responded to the first issue, "No."

Judgment was rendered for the defendant. Plaintiff appealed to the Supreme Court, and assigned as grounds of appeal a general exception to the charge of the presiding judge to the jury.

W. B. Glenn for plaintiff.
J. T. Morehead for defendant.

DAVIS, J. The judgment being of record, and the money to be credited thereon having been paid into the office, the plaintiff in law was fixed with a knowledge of the facts in relation to which the alleged false and fraudulent representations were made, and if the plain- (414) tiff's complaint were true, it seems by no means certain that he would be entitled to recover, but the allegations were denied, and we infer from the charge of his Honor that it was a controverted question whether there was more money in the clerk's office than would repay the defendant the amount he had paid the plaintiff.

We have no statement of the evidence, but the case states that there was no exception to it, and we can see no error in the charge of his Honor, which as set out, is brief, and we must assume, was warranted by the evidence. The burden was upon the plaintiff, and it is certain that there was no erroneous proposition of the law contained in the charge.

The appellant "assigned as ground of appeal a general exception to the charge of the presiding judge to the jury."

When we say *this will not do,* we are but abbreviating what has often been said by this Court. *Bost v. Bost,* 87 N. C., 481, and many other cases. There is no error.

No error. Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 362.

SARAH HOUSTON v. LAURA SLEDGE ET AL.

Pleading—Specific Performance.

Action for specific performance of contract for sale of land; defendant set up a rescission of contract by agreement, and plaintiff admitted the agreement, but alleged that the same was made on condition that defendant was to pay a sum of money, which had not been paid, and demanded judg-

ment for the amount; defendant demurred for that the plaintiff's reply was not consistent with the complaint: *Held*, that there was error in refusing to overrule the demurrer, since neither the alleged unperformed condition of rescission nor the money demand is inconsistent with the pleading.

(415) CIVIL ACTION, tried at Spring Term, 1887, of MCDOWELL, before *MacRae, J.*

The plaintiff alleges, and the answer admits, that John W. Houston, on 15 May, 1876, contracted with R. D. Wilson for the purchase of a certain town lot in Marion, and in pursuance thereof the former executed his three several notes, under seal, for parts of the purchase money, the aggregate being $750, payable respectively on 15 May of the three following years; and the latter gave a title bond covenanting to convey the lot when the price thereof was paid. It is further conceded that Houston died before any of the notes became due, having in his lifetime begun the erection of a house on the premises, without having paid any part of the purchase money, and that Wilson died in January, 1883, leaving a will, wherein he appoints the defendants, M. L. Sledge and Joshua McCurry, executrix and executor, both of whom qualified as such. The defense set up to the action for specific performance is, that the vendee, and those succeeding to his rights, were wholly unable to comply with the contract; that after his death, his estate being insolvent and unable to pay its indebtedness, the said Wilson and his co-administrator, to whom letters of administration on the intestate's estate had issued, filed a petition in the proper court with the widow, father and brother of the deceased, for leave to sell his equitable interest in the lot, and, they assenting thereto, obtained an order granting such license to convert the same into assets, and by virtue thereof the sale was made at the price of five dollars; that thereupon the said Wilson, with full notice to and without objection from others, entered upon the premises, and proceeded to complete the structure begun by the vendee, at an expenditure of more than $2,000; that no complaint was made by the plaintiff, who claims to be sole owner, by purchase from those entitled, of the whole estate, real and personal, of the intestate, nor by others, until, after an acquiescence for a period of six years, in

(416) 1883, and after the death of said Wilson, when the value of the lot from improvements put on it had been increased to $2,500 or $3,000.

The plaintiff thereupon brought suit.

Plaintiff replying, by leave of the court, to the answer filed herein, alleges:

That it is true that this plaintiff and R. Don Wilson, deceased, did agree to a rescission and recantation of the contract herein complained

of, and avers that said R. Don Wilson agreed then and there to take back the land at the contract price, and to pay the plaintiff the value of the improvement that J. W. Houston had already put on the land, and agreed to take and use all material on hand or contracted for by said Houston, and to pay the plaintiff the costs of the same, which improvement and material amount to a large sum of money, to wit, to the sum of six hundred and fifty dollars; that plaintiff has demanded payment, and defendants have refused; wherefore plaintiff asks for judgment for six hundred and fifty dollars and costs on same from the date of said rescission, about 1 January, 1878, and costs of suit.

The defendants by their attorney demur to the reply of plaintiff herein, and says that the several matters set up by Sarah Houston in her said reply are not sufficient to enable her, the said plaintiff, to maintain her action aforesaid against these defendants, for that the cause of action is based upon a right to have specific performance of a contract to convey land, and the reply of plaintiff seeks to enforce a claim based upon an alleged rescission of said contract before the bringing of this action.

For that the said reply is a total departure from the original cause of action, and wholly inconsistent therewith.

Wherefore, defendants demand judgment for their costs, etc.

The court sustained the demurrer and on defendants' motion, dismissed the action and gave judgment against plaintiff for (417) costs, from which the plaintiff appeals.

James M. Gudger for plaintiff.
P. J. Sinclair for defendant.

SMITH, C. J., after stating the case: The replication is not such a departure from the complaint as to warrant the action of the court in making this sudden and final determination of the cause. The replication was not essential to its further progress, unless required by the court, since only matters in avoidance are brought forward in the answer. The Code, sec. 248.

The pleadings present this case: The plaintiff demands specific performance of a contract made in the intestate's lifetime. The defendants admit that it was made as mentioned in the complaint, and say that it was afterwards rescinded and annulled, and this acquiesced in for many years as a disposition of the original claim. The plaintiff says it is true that the plaintiff and the testator did come to an agreement for a rescission of the contract, but it was on the terms of the exoneration of the intestate from the obligations and the payment to him of the value of the improvements put upon the lot, which he estimates at

$650; and in this the testator has failed to comply with the conditions of the rescission. The plaintiff acquiesces in this, and demands payment of said sum.

Assuming, as the demurrer does, the unfulfilled terms of the contract to rescind on the part of the vendor, it cannot be enforced as such against the vendee of the plaintiff, who has succeeded to his rights, and hence does not constitute a bar to the action against the will of the other contracting party. But the plaintiff may waive the delay and take the money to be paid in reimbursement of the expenditure put upon the premises, and the offer to do this is the substance of the (418) replication. It is but the upholding of the controversy, its identity remaining, and if the demurrer was properly sustained, the effect would be to strike it out of the pleadings and leave the parties to proceed upon the complaint and answer as if the replication had not been filed, it perhaps furnishing evidence upon the trial of issues that may be formed. The new matter in avoidance would then require proof in their support from the defendants.

But we think there is error in sustaining the demurrer, and that the replication does strike directly at the defense in averring conditions to the rescission, not complied with and which render it ineffectual as an obstruction to the remedy. Nor does the demand for the money, which may be considered but a proposition to abide by that agreement, essentially change the nature and legal effect of the pleading.

We, of course, express no opinion of the effect of the delay in the assertion of the claim, while, meantime, large expenditures were made by the testator, if true, in denying the relief sought. But for the error assigned the judgment must be reversed, and the cause left to proceed in the court below.

Error. Reversed.

Cited: Mfg. Co. v. Blythe, 127 N. C., 326; *White v. Carroll,* 146 N. C., 234.

L. W. CARROLL ET AL. v. J. B. HODGES ET AL.

Deposition, Objection to, When Made.

A deposition on file in the clerk's office two or three months before the trial, and opened by the clerk in presence of counsel of both parties, cannot be quashed on oral objection made at the trial. The Code, sec. 1361.

CIVIL ACTION to recover land, tried at Fall Term, 1887, of WATAUGA, before *Boykin, J.*

So much of the case stated on appeal as is necessary to a proper understanding of the opinion of the court, is as follows: (419)

"Upon the trial the defendants introduced the deposition of one David Simmons. The plaintiffs objected to the questions marked 6 and 7 and the answers thereto.

The court, upon the admissions of the parties, found the following facts:

The deposition was filed in the cause in the clerk's office in June, 1886. No objection thereto has been filed or entered by the plaintiffs. The attorneys of both parties were duly notified by the clerk to appear on a day named, when the deposition would be opened and passed upon by him. Said attorneys appeared; the deposition opened and passed upon by him, and ordered to be read as evidence in the cause. There was no exception to the adjudication of the clerk and no appeal by the plaintiffs. There was no notice in writing or otherwise filed or given by plaintiffs prior to the trial to suppress the deposition or parts thereof. Upon these facts the court admitted the deposition and the plaintiffs excepted and appealed."

J. F. Morphew for plaintiff.
Folk & Councill for defendants.

MERRIMON, J. It is well settled that a deposition will not be quashed or rejected in whole or in part on objection first made after a trial has begun, because of irregularity in taking the same, if the objecting party had notice and it appears that the deposition had been taken and was on file long enough before the trial to enable him to present his objection. The Code, sec. 1360; *Carson v. Mills,* 69 N. C., 32; *Kerchner v. Reilly,* 72 N. C., 171; *Katzenstein v. R. R.,* 78 N. C., 286; *Wasson v. Linster,* 83 N. C., 575.

Here the deposition must have been on file two or three months before the trial, the appellants made no objection to it, their (420) counsel had notice, were present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they made no objection to it then or at any time before the trial.

It seems that the objection may have been to the competency of the questions and answers to them designated. Granting that they were incompetent, objection should have been made before the judge or clerk of the court and before the trial, and as there was fair and just opportunity afforded the appellant to make objection and he did not, it must be taken that he waived his right to object on any account, except as to the competency of the witness. The statute (The Code, sec. 1361), provides that any party to an action or proceeding may at any time before

the trial or hearing "make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, *the incompetency of the testimony,* for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing," the purpose being to settle the depositions as evidence before the trial or hearing, and thus prevent surprise, misapprehension, confusion and delay on the trial. Such provision is expedient, convenient, and not at all unjust. Fair opportunity is afforded every litigant to make objection to the deposition in every aspect of it, not in the hurry of a trial or hearing, but upon deliberation and scrutiny. Unless such objection is made in apt time the statute makes the deposition evidence, and provides (The Code, sec. 1357), among other things, that "all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, shall be deemed legal evidence, if the witness be competent."

It will be observed that such objections are required to be put in writing, and any error in the rulings of the judge in respect to the deposition, in any view of it, may be corrected upon appeal to (421) this Court, just as erroneous rulings in respect to other questions arising in the course of the trial may be. For this purpose the rulings in respect to the exceptions and the exceptions themselves pass into and become a part of the record. Thus the party excepting will have opportunity to have such errors corrected.

No error in other respects is assigned in the record, and we are not at liberty to consider other questions that might possibly have been presented. It is well settled that error must be assigned in the record, else it cannot be considered and corrected here. Judgment affirmed.

No error. Affirmed.

Cited: Glover v. Flowers, 101 N. C., 144; *Bank v. Burgwyn,* 116 N. C., 124; *Womack v. Gross,* 135 N. C., 379; *Ivey v. Cotton Mills,* 143 N. C., 197; *Steel Co. v. Ford,* 173 N. C., 196.

W. H. CLARK ET AL. v. SARAH R. HAY.

Husband and Wife—Separate Estate of Married Woman.

The separate estate of a married woman is not liable for goods supplied her without the written consent of the husband, unless the same are "for her necessary personal expenses or the support of the family." Goods supplied

to enable her to keep a boarding-house are not within the meaning of section 1826 of The Code, though the family be supported from the profits of the business.

(Dougherty v. Sprinkle, 88 N. C., 300; *Webster v. Laws*, 89 N. C., 225; *S. v. Lanier, ibid.*, 517, cited.)

CIVIL ACTION, tried at February Term, 1887, of FORSYTH, before *Boykin, J.*

This action is prosecuted against the defendant, a *feme covert* when it was instituted, but whose husband died soon after, to recover the balance due on account for goods sold and delivered to her. On the trial, the plaintiff testified that the defendant, a married woman, on 31 March, 1884, came to his store and stated to him that she (422) was intending to open a boarding-house in town, and made arrangements with the plaintiff to open an account with him to purchase supplies for her table. The plaintiff further testified that the defendant promised to pay for the articles furnished, and that she from time to time made payments upon the account; that the defendant previous to that time had been engaged in running a boarding-house, and the articles mentioned in the complaint were sold to the defendant to supply the table of her boarding-house, by means of which to support herself and family. There was testimony showing that her husband, Dr. R. D. Hay, was a practicing physician with a lucrative practice; that he had no property and paid no taxes, but that all the property occupied by the family, as well as all the other town property, was owned by the defendant; that she took out license to run a boarding-house in her own name; that her property was very valuable, and that her husband was at the time of her purchase of plaintiff's goods insolvent, and that his estate, he being dead, is now insolvent, which facts were known to the plaintiffs at the time the debt was contracted.

On cross-examination the plaintiff testified that the husband of defendant paid accounts of the defendant, which were kept separate from the boarding-house account.

The plaintiff further testified that the account against the defendant was rendered to her from time to time, and that she made payments thereon herself, and that the articles purchased were such as were used in supporting the table at which she and her family ate their meals with their boarders.

There was other evidence tending to establish the affirmative of the issues submitted. The plaintiff admitted two payments were made on the account by the sister of defendant, but receipted (423) for in name of defendant.

The defendant testified, and denied making the contract for goods and merchandise as alleged by the plaintiff, and denied that she was running

a boarding-house, but that the same was operated by her sister; she denied that the articles were purchased or used by her for the support of herself and family, and the articles that were purchased from the plaintiff were used by her sister in running the boarding-house. It was in proof that the sister of defendant was wholly insolvent. There was other evidence on the part of defendant tending to establish her defense.

There was evidence that, prior to the contracting of the debt sued on, the defendant had been keeping boarders in her family, running an account with the plaintiffs in her own name, in which account articles purchased for the boarding-house were charged, and also owed the account. Articles not used in the boarding-house were charged. There was no evidence that the defendant, at the time of opening the account with the plaintiffs, in so many words expressly charged her separate property with the payment of the account. The defendant asked the court to charge and instruct the jury that before they could find the first issue in favor of the plaintiffs, that they must be satisfied that the goods were sold to the defendant for necessary and direct consumption by the defendant and her family; that if the same were sold to her for the purpose of running a boarding-house, and for the profits arising from the boarding house to support her family, that the plaintiffs could not recover.

The court declined to give the instruction as asked for, but instructed the jury that if they found that the defendant was running the house, and that she and her family boarded there, and the goods bought to run the boarding-house for the supporting herself and family, that they should find that issue for the plaintiff. Defendants excepted.

(424) The defendant asked the judge to charge on the second issue, that before they could find that issue in favor of the plaintiffs, they must be satisfied that at the time of making the contract the defendant agreed with the plaintiffs that her separate estate should be responsible for the debt. The court declined so to charge the jury, but charged them that if they were satisfied from the evidence that the defendant bought the goods, and that the facts and circumstances attending the transaction were such that it could be reasonably implied that the plaintiffs, on the one hand, relied upon her separate estate for payment, and that defendant, on the other hand, intended to charge her separate estate, then they must find that issue for the plaintiffs. Defendant excepts.

The jury rendered their verdict, finding both issues in favor of plaintiffs. There was a motion for a new trial. Motion overruled; judgment for plaintiffs; appeal by defendant.

C. B. Watson for plaintiffs.
W. B. Glenn for defendant.

SMITH, C. J., after stating the case: The sole question presented in the appeal, growing out of the refusal of the instructions asked, and those given in substitution to the jury, is as to the binding force of the defendant's alleged contract. Was the liability incurred "for the support of the family" within the meaning of the clause of section 1826 of The Code? Were family supplies procured to keep up a boarding-house, from which the family derived their support, embraced in the words quoted? We think it has a more strict meaning, and is confined to goods bought for the direct benefit of the members of the family, such as food, clothing, and other necessaries, and not for the successful prosecution of a business, from the profits of which such support is to be obtained, whether by keeping a boarding-house or a hotel, (425) or by engaging in any other general occupation. For these larger outside operations, whose results are speculative, the written consent of the husband, whose advice should be sought, must be obtained, and this is the protection secured to her by the statute. Unless this distinction prevails, where is the limit to liabilities she may incur, by which her separate estate may be exhausted?

The preceding words, "except her necessary *personal expenses,*" clearly indicate the extent and limit to which she may go in binding her separate property by her own individual independent act and without her husband's concurrence. A wider latitude of construction would take away the protection which the law gives to women under the disability of marriage, and imperil their estates. She may become a free-trader with her husband's approval, and thus emancipate herself from the restraints of her coverture. The Code, sec. 1827. But otherwise she can only exercise the power given her by the act over her separate estate in entering into an executory contract with others. The subject is discussed by *Ruffin, J.*, in *Dougherty v. Sprinkle,* 88 N. C., 300. See, also, *Webster v. Laws,* 89 N. C., 225, and *S. v. Lanier, ibid.,* 517.

In this view of the law, pertinent to the facts of the case, the defendant was entitled to have the jury instructed as she requested, and in the refusal of the court to so charge, and in the charge given in place of it, there is error, and there must be a *venire de novo,* and it is so ordered.

Error. *Venire de novo.*

Cited: Thurber v. LaRoque, 105 N. C., 313; *Sanderlin v. Sanderlin,* 122 N. C., 4; *S. v. Rabinson,* 143 N. C., 623.

(426)

J. M. POWELL ET AL. v. J. K. MORISEY ET AL.

Equity—Mistake in Deed, When Corrected—Practice.

1. Equity will not correct a mistake in a voluntary deed—*e. g.*, by inserting the word "heirs," which was omitted by the inadvertence of the draughtsman; but otherwise, where the deed is supported by a valuable or meritorious consideration.

2. The fact that the consideration in the voluntary deed in this case is "natural love and affection and the sum of one dollar," is not sufficient to establish an intention of the grantor (grandfather) to place himself *in loco parentis* to the grantees (grandchildren), and raise a meritorious consideration.

3. Where an issue of fact is raised before the clerk, no *judgment* can be rendered, but the case must be transferred to the court for trial. The Code, sec. 116. It is only upon questions of law where the clerk must give judgment, from which an appeal may be taken.

(Day v. Day, 84 N. C., 408; *Hunt v. Frazier*, 6 Jones Eq., 90; *Dawson v. Dawson*, 1 Dev. Eq., 101; *Mordecai v. Boylan*, 6 Jones Eq., 365; *Scott v. Moore*, Winst. Eq., 98, and *Taylor v. Bostic*, 93 N. C., 415, cited.)

SPECIAL PROCEEDING for the sale of land for partition, commenced before the clerk and tried at February Term, 1886, of SAMPSON, before *Gilmer, J.*

The petitioners allege that James Vann, their ancestor, by deed made in 1860, which is set out in full in the pleadings, conveyed to his grandsons, James N., Harman H., Gibson S., John R., and Edward N. Register, the lands mentioned in the petition, for life, and that the said grandsons are dead and the petitioners are entitled to partition of said land.

The defendants claim the entire interest in the land. They "admit that the deed appears from its face to convey only a life estate, but say that the intention of the grantor was to convey a fee simple estate in said lands to the Registers, and that the word "heirs" was omitted from said deed by mistake, through the inadvertence of the draughts-
(427) man. It appeared to the Probate Court that an issue of fact was raised by the pleadings, and the case was sent up to the Superior Court to be tried by a jury upon the following issue:

"Was it the intention of James Vann, deceased, in making the deed to his grandchildren, James M. Register and others, of 10 April, 1860, to convey a fee simple interest to the grantees therein named in the lands described in the said deed, and were the words of inheritance omitted in said deed by reason of the mistake and inadvertence of the draughtsman?"

To which the jury answered, "Yes."

The plaintiffs contended that a court of equity could not correct a mistake in a voluntary deed of conveyance, unless by consent of all parties.

The defendants insisted that a court of equity could correct such a mistake in a voluntary deed.

Judgment was rendered for the defendants, from which the plaintiffs appealed.

M. C. Richardson and Haywood & Haywood for plaintiffs.
J. L. Stewart for defendants.

DAVIS, J. The consideration mentioned in the deed is the "natural love and affection" of the grantor for the grantees, his grandchildren, and the sum of "one dollar"; and the deed recites that "the said James Vann, Sr., has bargained and sold, given, granted, aliened, enfeoffed and conveyed, and does by these presents give, grant, alien, enfeoff and convey (reserving his life estate, or estate during his life, in the following lands): all that lot of land, etc. (describing it) . . . To have and to hold the above described lands and premises to the said James N. Register, Harman H. Register, Gibson S. Register, John R. Register and Edmund N. Register, saving and reserving the life (428) estate of the said James Vann in the aforesaid lands."

The record is voluminous, but the foregoing is the case on appeal, as settled and signed by counsel for both sides, and present the single question: Could the court correct the mistake mentioned? "All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of these causes: a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promissor to enforce the obligation against the obligor. . . . The third constitutes the meritorious or imperfect consideration of equity, and is recognized as affected by it, within very narrow limits, although not at all by law. While this species of consideration does not render an agreement enforcible against the promissor himself, nor against any one in whose favor he has altered his original intention, yet if an intended gift, based upon such a meritorious consideration, has been partially and *imperfectly* executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed as against a third person, claiming by operation of law, who has no equally meritorious foundation for his claim. The equity thus described, as based upon a meritorious consideration, only extends to cases involving the duties

either of charity, of paying creditors, or of maintaining a wife and children. This last duty of maintaining children includes persons to whom the promissor stands *in loco parentis.*" Pomeroy's Equity Jurisprudence, Vol. 2, sec. 588.

Upon a review of the authorities, this, we think, is as far as equity has gone, and it will only perfect or correct mistakes in deeds supported by valuable or meritorious consideration.

In *Day v. Day,* 84 N. C., 408, the *Chief Justice,* citing *Hunt v.*
(429) *Frazier,* 6 Jones' Eq., 90, says, "The jurisdiction to reform deeds is not exercised unless the transaction is based on a *valuable* or *meritorious* consideration."

In the latter case of *Hunt v. Frazier,* the Court refused to reform a deed executed in favor of the wife and children of the brother of the grantor.

"It is," says *Hall, J.,* in *Dawson v. Dawson,* 1 Dev. Eq., 101, "the old beaten ground, long since occupied by the courts of equity, *not to aid voluntary conveyances.*"

All the cases cited by the counsel for the defendant, in which the mistakes were corrected and the deeds reformed were based upon valuable considerations.

The deed from James Vann to his grandsons was voluntary and without valuable consideration. Was the consideration *meritorious?* Did James Vann stand *in loco parentis* to the grandchildren?

"The proper definition of a person *in loco parentis* to a child, is that of a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office in and duty of making provision for the child." Chitty's Equity Digest—title, "Parties *in Loco Parentis,*" and the cases there cited.

The simple fact that the grandfather voluntarily conveyed to the grandchildren is not proof that he intended to assume the office and duty of the father in making provision for them, and in the absence of other evidence the court cannot assume that he had taken or intended to take upon himself such relation. Upon proof of such relation the consideration becomes meritorious, and courts of equity will lend their aid, as in favor of children, but in the absence of proof, they will not. In this case no such proof appears, and the court cannot reform the deed. A defective execution cannot be supplied in favor of the grandchild. Adams' Equity, 101.

It does not come within the class of cases represented in *Mor-*
(430) *decai v. Boylan,* 6 Jones' Eq., 365, and *Scott v. Moore,* Winston's Eq., 98 (Hinsdale's Edition, 641).

This disposes of the only question presented in the case on appeal.

The special proceeding was originally commenced in 1879, and the case was before this Court at January Term, 1881, upon appeal of plaintiffs, which appeal was dismissed upon the ground then stated, 84 N. C., 421. The counsel for the appellants now insist that it should have been remanded by the court below to the clerk of the Superior Court; that there was no judgment rendered by the clerk, and that it could only get properly into the Superior Court in term by an appeal from his judgment. For this he cites *Taylor v. Bostic,* 93 N. C., 415.

This is a misapprehension, and if it were not, we do not see how it could avail the appellants. It is only upon questions of law that there must be a *judgment* of the clerk from which an appeal may be taken; but "all issues of fact joined before the clerk shall be transmitted to the Superior Court for trial at the next succeeding term of said court." The Code, sec. 116.

The appellants claim title under the will of James Vann, deceased, which is set out in the petition. We pass no judgment upon the sufficiency of that title, but only declare that the plaintiffs are not entitled to a reformation of the deed stated in the case.

Error.

Cited: Stewart v. Register, 108 N. C., 590; *McLamb v. McPhail,* 126 N. C., 222; *Pickett v. Gerrard,* 131 N. C., 197; *Stevens v. Wooten,* 190 N. C., 380.

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(431)

C. HENDRICK v. CAROLINA CENTRAL RAILROAD COMPANY.

Appeal.

An order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners.

(Telegraph Co. v. R. R., 83 N. C., 420; *Comrs. v. Cook,* 86 N. C., 18; *R. R. v. Warren,* 92 N. C., 620; cited and approved. *Click v. R. R., ante,* 390, cited and distinguished.)

PROCEEDING for damages, tried at August Term, 1887, of CLEVELAND, before *MacRae, J.*

This is a summary application of the plaintiff claiming damages from the defendant railroad company, occasioned by the location and construction of the railroad of the latter over and across the lands of the former, as allowed by the statute (Acts 1854-55, ch. 225, sec. 26; Acts

1872-73, ch. 75, secs. 9, 10, 15; The Code, secs. 1943-1946), in which the plaintiff prays that the court appoint commissioners to assess damages to him, etc. The defendant filed its answer to the petition, denying the plaintiff's alleged rights, etc.

In term time the parties agreed upon and submitted the facts of the matter of the proceeding to the court for its judgment. Upon consideration, it made its order appointing commissioners to assess the damages, etc., to which defendant excepted and appealed to this Court.

W. P. Bynum for plaintiff.
Platt D. Walker for defendant.

MERRIMON, J. The order appealed from is interlocutory, and no appeal lay at this stage of the proceeding from it. Upon the coming in of the report of the commissioners, appropriate exceptions thereto
(432) may be filed by either or both parties, raising all questions affecting their respective rights involved, and upon the settlement of the same and final judgment of the court, either or both parties may assign error, and then appeal to this Court, bringing up for review all errors assigned in the record at any stage of the proceeding after it began.

This case is in all material respects like *Telegraph Co. v. R. R.*, 83 N. C., 420; *Comrs. v. Cook*, 86 N. C., 18; *R. R. v. Warren*, 92 N. C., 620. They settle the course of practice in such proceeding as the present one, and sufficiently state the reasons for it.

That the defendant broadly denies the plaintiff's alleged rights and grievances, and the parties agreed upon the facts, could not give the right of appeal at the present stage of the proceeding, because the order appealed from was nevertheless interlocutory, and an appeal from the final judgment would bring up all questions arising in the course of the proceeding, without denying or impairing any substantial rights of the defendant.

The order appealed from is very different from that in the similar case of *Click v. R. R., ante*, 390; in the latter the court denied the motion for an order appointing commissioners, and dismissed the proceeding, thus putting an end to the right of the plaintiff therein, and therefore an appeal lay in that case. Appeal dismissed.

Cited: R. R. v. King, 125 N. C., 455; *Navigation v. Worrell*, 133 N. C., 94; *R. R. v. Newton, ibid.*, 133, 140; *R. R. v. R. R.*, 148 N. C., 64; *School Trustees v. Hinton*, 156 N. C., 587; *Bradshaw v. Bank*, 172 N. C., 633.

(433)

WILLIAM W. SIMONTON ET AL. v. JESSE CORNELIUS ET AL.

Husband and Wife—Wills—Action to Recover Land.

1. Where land is given by will to husband and wife, they hold by entireties, and the right of survivorship will prevail over any attempted alienation by the husband.

2. An action by a remainderman to recover land cannot be brought during the existence of the particular estate.

3. Where, under the former law, land was left to husband and wife jointly, the husband was entitled to all the products of the land, when severed, *jure mariti.*

4. Where land was devised to a wife, with a proviso that it should remain in the possession of the wife and her husband during their natural lives, and then to descend to the children of the wife: *Held*, that the husband and wife each took a life estate, and the children a remainder, and that the remaindermen had no right to bring an action to recover the possession until the death of both husband and wife.

(*Motley v. Whitemore*, 2 Dev. and Bat., 537; *Todd v. Zachary*, Bus. Eq., 286; *Long v. Barnes*, 87 N. C., 329, cited and approved.)

CIVIL ACTION, tried at February Term, 1887, of IREDELL, before *Gilmer, J.*, and a jury.

This action, begun on 20 January, 1886, by the plaintiffs against the defendants, is to impeach certain proceedings heretofore had in the court of Equity of Iredell County, under the final decree in which, and the deed made by the clerk and master pursuant thereto, the defendant, Joseph Simonton, derived title to the land in controversy.

The answer meets all the allegations of fraud and unfair practices in the institution and conducting of the suit to a final determination by a direct denial, and asserts that everything was done regularly and according to the course of the court in such cases, and that a good title was acquired by the said Cornelius.

The record speaks of issues drawn from the conflicting aver- (434) ments, upon which the jury were empaneled to pass, and in reference to which evidence of opposing tendencies was introduced, while none such are found in the record to enable us to see precisely the matters in dispute. After the testimony was all in, and the argument had progressed to some extent, the court intimated that the action would not lie during the lifetime of said Joseph C., and in submission thereto, the plaintiffs suffered a nonsuit and appealed.

Scott & Caldwell filed a brief for plaintiffs.
C. H. Armfield for defendants.

SMITH, C. J., after stating the facts: The land in controversy belonged to one Joseph Byers, who died in 1844, leaving a will, wherein he appoints his two sons-in-law executors, of whom the said Joseph C. alone qualified.

In one of the clauses of the will the testator makes the following disposition of real and personal estate:

"1st. I give and bequeath to my daughter, Jane Julia Simonton, the land I now live upon, composed of two tracts, to wit, the McKee tract, and the other a State grant, supposed, when united, to contain 440 acres; also the tracts of land called the Kerr tracts, supposed, when united, to contain 301 acres"; also certain slaves and other personal articles specified, concluding the clause thus: "All of which land and negroes and other property mentioned, to remain in the possession of the said Julia Simonton and her husband during their natural lives, and then to descend to the children of the said Julia equally."

In very similar terms the testator gives to his daughter, Margaret Narcissa Smith Irvin, lands, slaves, and other personalty, with a concluding clause of limitation which, *mutatis mutandis,* is in the same words.

The plaintiffs, the children of said Julia, deceased, with the
(435) husbands of the *femes,* sue to vacate and rescind the proceeding in the court of equity for fraud, and to recover the possession, and to be adjudged the owners of the land thus attempted to be alienated, and rents and profits accrued since the death of said Julia; while her administrator demands such as accrued before and during the alleged unlawful occupation by the defendant, Jesse Cornelius. Joseph C., the father, is also made a party defendant.

The solution of the controversy seemed to be regarded by the judge as depending on the construction of the devise quoted, and the title vesting under it, according to its legal interpretation.

Such was his intimation, and as such it was accepted and acted on by the appellants, without reference to the character of the action, as assailing the validity of the suit in which the defendant Jesse claims to have derived the title to the land, at least so far as the plaintiffs parties thereto are concerned.

The ruling in this particular is the only error assigned of which we can take notice in the record.

What, then, is the legal effect of the terms of the devise? The lands are given directly to the daughter Julia, while it is *"to remain in the*

possession of the said Julia Simonton and her husband during their natural lives, and then to descend to the children of the said Julia equally."

This language admits of but two possible interpretations, either as giving the full legal estate to the devisee, with trusts in favor of herself and her husband during their respective lives, and then in trust for her own children; or, as giving the estate to the said Julia and her husband (the subsequent being explanatory of and restricting the previous words) with a direct remainder after the death of the survivor, to her children.

The latter is, in our view, the true meaning of the testator, and this benevolence, as reaching the sons-in-law, will be more ap- (436) parent from other provisions of the will.

It is manifest, that an equal division of his estate was intended to be made by the testator between his daughters, and in his contemplation the sons-in-law were to share in the benefits.

In furtherance of this object, in the residuary clause, the testator, to bring about an equality, requires that his son-in-law, Joseph Simonton, pay over to John Francis Irvin (his other son-in-law) the sum of four hundred dollars; and further, should there be found gold mines on any of the devised tracts, that his "two sons-in-law, Simonton and Irvin, be equally sharers in the expenses and profits of the same." None of this burden is put upon the daughters, nor are they to participate in the possible profits to be derived from gold mining, but these provisions are personal to the husbands, and rest upon the community of interest subsisting between them and their wives.

Again, if the husbands are not within the benevolent purview of the testator, and no direct interest is secured to them, it may be asked, as is done in the argument of appellee's counsel with pertenacity and force, why was the name of a son-in-law mentioned at all in connection with the gift? The land and other property was to descend to the children only when *both were dead,* for the possession and use were to be in each when both were living, and necessarily in the survivor during his or her life afterwards for the property could only pass to the children when both lives were terminated.

Treated, then, as a gift to husband and wife, the law declares that they shall hold by entireties, and the right of survivorship will prevail over any attempted alienation by the husband. *Motley v. Whitemore,* 2 D. & B., 537; *Todd v. Zachary,* Bus. Eq., 286; *Long v. Barnes,* 87 N. C., 329.

The husband being still alive, the action of the remainderman (437) is premature in seeking possession.

So, too, the fruits accruing during their joint lives would belong to the husband, when, by separation from the land, they become personal property, *jure mariti,* as when personal goods reduced into possession become his, even when the wife was sole owner, under the law as it then was.

As the plaintiffs have taken a nonsuit in deference to the judge's opinion as to the present state of the title—and in this we approve his ruling—they must abide by the result, and go out of court. There is no error, and the judgment is affirmed.

Affirmed.

Cited: Harrison v. Ray, 108 N. C., 216; *Bruce v. Nicholson,* 109 N. C., 204; *Phillips v. Hodges, ibid.,* 250; *Stamper v. Stamper,* 121 N. C., 254; *Ray v. Long,* 132 N. C., 896; *West v. R. R.,* 140 N. C., 621; *Bynum v. Wicker,* 141 N. C., 96; *Bank v. McEwen,* 160 N. C., 419; *Greenville v. Gornto,* 161 N. C., 343; *Freeman v. Belfer,* 173 N. C., 582; *Dorsey v. Kirkland,* 177 N. C., 523; *Moore v. Trust Co.,* 178 N. C., 123; *Jernigan v. Evans,* 180 N. C., 89; *Turlington v. Lucas,* 186 N. C., 285; *Davis v. Bass,* 188 N. C., 205; *Johnson v. Leavitt, ibid.,* 683.

JOHN F. IRVIN ET AL. v. ALEXANDER CLARK ET AL.

Pleading—Deed—Burnt and Lost Records—Evidence—Devise—Remainder—Judicial Sales.

1. An objection to a pleading on the ground that it is vague, or because it does not conform to an order of the court under which it is filed, should be made at the time of filing, and ought not to be entertained if it is delayed until the action is called for trial.

2. The recitals contained in a deed purporting to have been made by authority of a decree of the courts, whose records have been destroyed, are prima facie evidence of the facts and authority therein set forth.

3. Where it appeared that I. had been appointed guardian of certain infant parties to a suit in equity, in which certain lands were directed to be sold, and he was authorized and directed to convey their interest; and it further appeared that he had executed a deed, but bearing a date prior to the said decree, but professing to convey the lands by virtue of it: *Held,* that it was a question of fact for the jury to determine whether the deed was made in pursuance of the power conferred by the decree, and if so, the discrepancy in the date did not vitiate it.

4. A devise of lands "to remain in possession of my daughter for her life and to descend to her children equally," creates a life estate in the daughter and a remainder in such of her children as are *in esse* at the date of her death.

5. If, however, before her death the lands are sold under the direction of the courts in a proceeding in which the children *then living* are parties, they represent a class, and a purchaser at such sale will obtain a good title against after-born children of the life tenant.

(Hare v. Holloman, 94 N. C., 14; *Simms v. Garrot*, 1 D. and B. Eq., 393; *Hawkins v. Everett*, 5 Jones Eq., 42; *Fleetwood v. Fleetwood*, 2 Dev. Eq., 222; *Sanderlin v. Deford*, 2 Jones Eq., 74; *Watson v. Watson*, 3 Jones Eq., 400; *Williams v. Hassell*, 74 N. C., 434; *Miller, ex parte*, 90 N. C., 625; *Overman v. Sims*, 96 N. C., 451; *Young v. Young*, 97 N. C., 132, and *Ex parte Dodd*, Phil. Eq., 97, cited.)

THIS was an action for the recovery of land, tried before (438) *Clark, J.*, and a jury, at August Term, 1887, of IREDELL.

When the case was called for trial, plaintiffs' counsel moved the court to strike from the amended answer so much thereof as purported to set up an equitable defense, or a demand for equitable relief, on the ground that the same was not pleaded as required in the order made by Judge Montgomery, appearing in the record.

It appeared that this amended answer was filed at February Term, and at that term plaintiffs obtained leave to reply to the same, and that at May Term the case was continued by consent of both parties.

His Honor refused this motion, and plaintiffs excepted.

The land in controversy belonged to one Joseph Byers, who, in the second item of his will, after enumerating other property, devised it in these words: "All of which land . . . to remain in possession of my said daughter, Margaret N. S. Irvin, and her husband, during their natural lives, and to descend to the children of the said Margaret N. S. Irvin equally."

John F. Irvin, the husband, died in 1871, several years after the testator, and said Margaret N. S., in March, 1885, leaving (439) four children, who, with the husbands of the daughters, are plaintiffs in this action. Several children died during their mother's life, and without issue, of whom Francis was living in 1846, and he and the plaintiff Martha were the only children who were born previous to the year 1848. To divest title out of those to whom is devised the remainder, the defendants offered in evidence: 1. A deed executed on 5 September, 1846, by Joseph C. Simonton and John F. Irvin, as executors of said testator, Joseph Byers, to defendant Alexander Clark, purporting to convey the tracts therein described, for the sum of twenty-five hundred dollars. 2. A deed from said John F. Irvin and wife to the same, executed on the same day, and for the same consideration, for the same

lands. 3. A deed of same date, and for the same sum, from said John F. Irvin to Clark, for the same lands, which is as follows:

"This indenture, made this 5 September, 1846, between John F. Irvin, guardian, Francis and Martha A. Irvin, acting under a decree of the court of equity of Iredell County, of the one part, and Alexander Clark of the other part, witnesseth: That the said party of the first part, for and in consideration of the sum of twenty-five hundred dollars, the receipt of which is hereby acknowledged, has sold and conveyed, and does sell and convey, all that tract or parcel of land," etc. (describing it as in the preceeding deeds, with covenants of seizin and warranty). "In witness whereof the said party of the first part hath hereunto set his hand and seal, on the day and year above written. John F. Irvin. [Seal]." Attested by two witnesses.

The plaintiffs objected to the admission in evidence of this deed, but the objection was overruled and the deed received, it having been proved by one of the subscribing witnesses.

(440) The defendants examined as witnesses the clerk of the court and the former register of deeds, who testified to the burning of the courthouse and its records since 1847, and that after careful search they had been unable to find any papers relating to the cause mentioned in the amended answer, or any papers relating to the plaintiffs or any of them; but the clerk produced a book which he stated was the docket of the court of equity for the year 1846, and for some years prior and subsequent thereto. Certain entries therein, after objection made and overruled, were read, to wit:

"At Fall Term, 1846.

"J. C. SIMONTON *v.* T. J. and M. A. IRVIN.

"O. B. Answer Filed.

"This cause coming on to be heard on the bill and answer, and the report of the clerk and master, it is ordered, adjudged and decreed, that the sale of the lands described in the bill of complaint made by complainants to Alexander Clark, be confirmed, and that the defendants, J. F. Irvin, guardian of Francis J. and Martha A. Irvin, convey the interest of said infants to said Clark, and that said infants, as they come of age respectively, convey to said Clark, or such persons as he may direct. It is ordered, adjudged and decreed, that John F. Irvin be appointed guardian *pendente lite* of Francis J. and Martha A. Irvin."

The plaintiffs objected to the introduction of this entry, for the reason, amongst others, that it did not relate to the suit or proceeding set out in the defendant's answer, and that nothing appeared therein connecting this entry with the subject of this controversy.

His Honor stated that if plaintiffs' counsel would say that they were taken by surprise by the introduction of this entry he would withdraw a juror and make a mistrial. The counsel failed to make such statement. Their objection was overruled, and they excepted.

The defendants then introduced the following entry on said (441) docket at Spring Term, 1847, of the Court:

"Jos. W. SIMONTON *v.* T. J. and M. A. IRVIN.

"Original Bill—Answer Filed—Decree Filed.

"This cause coming on to be heard on the bill and answer and the report of the clerk and master, it is ordered, adjudged and decreed, that the sale of the land described in complainants' bill, made by complainants to Clark, be confirmed, and that the defendant J. F. Irvin, guardian of Francis J. and Martha A. Irvin, convey the interest of said infants to said Clark, and said infants, as they come of age respectively, convey to said Clark, or such persons as he may direct. It is ordered, adjudged and decreed, that J. F. Irvin be appointed guardian of Francis J. and Martha A. Irvin, infant children of J. F. Irvin."

The plaintiffs also objected to the introduction of this entry. Objection was overruled, and plaintiffs excepted.

The clerk produced another book, which he testified was one of the books of the late court of equity, in which was transcribed a copy of the entry first above set forth, and also a certified copy of said entry, which defendants have caused to be registered in the register's office during this term of the court.

The plaintiffs objected to these documents. Objection overruled, and plaintiffs excepted.

There was no further testimony in the case.

During the argument, counsel for plaintiffs stated that the second Monday after the fourth Monday in August, 1846, the date of the Superior Court, was the seventh day of September, 1846, and objection being made, the court said it would take judicial notice that such was the fact.

The plaintiffs asked that instructions be given to the jury in substance:

I. The defendants have failed to show title in themselves, to prevail against those to whom the remainder, now becomes an (442) estate in possession, is limited under the will of Joseph Byers.

II. There is no connection shown between the deed purporting to be made under a decree, and the entries on the docket, which were at a time posterior to the date of the deed.

III. If the title of the plaintiff Martha A. has been divested under the proceedings in the court of equity, that of the other plaintiffs has not been, they not being *in esse* at the time.

The court charged the jury (we do not produce in full and only so far as to illustrate the exceptions) as follows:

I. Under the will the testator's daughter, Margaret N. S., took an estate for life with remainder to her children, and the plaintiffs, since her death, are entitled to the possession of the land.

II. The deed purporting to be made by the executors, there being no power given in the will to them to make such conveyance, is inoperative.

III. The deed of Irvin and wife only transferred a life estate, which expired at the latter's death in 1885.

IV. The recital in the deed of John F. Irvin, that in making it he was "acting under a decree of the court of equity of Iredell County," is prima facie evidence that such decree was regularly made in a cause properly constituted in said court and authorizing the making such conveyance, the courthouse having been burned and its record and papers (most of them) destroyed.

V. The said Francis and the plaintiff Martha A., being shown by the plaintiffs to be the only children of said Margaret N. S. living at the time of the proceeding in the court of equity, were representatives of their class, so that the estate of those afterwards born, as well as their own, passed to the purchaser.

(443) VI. The deed, bearing date prior to the sitting of the court and registered afterwards, may have been erroneously dated, as the defendants contend, and this is a question of fact for the jury to pass upon.

There was verdict and judgment for the defendants, from which the plaintiffs appealed.

Burwell & Walker filed a brief for plaintiffs.
C. H. Armfield for defendants.

SMITH, C. J., after stating the case: We shall not repeat the assignment of errors that follows the charge, for they are embodied in what has been already set out in the foregoing recitals.

I. Exception: The equitable defense is not pleaded as required by the decretal order, and the motion to strike out so much as relates to this defense in the amended answer was denied.

We are not willing to admit the insufficiency of the response to the order, inasmuch as it may not have been practicable to be more specific in regard to the contents of destroyed papers, but an answer to the complaint of the plaintiffs in this regard is, that the objection to the answer should have been made when it was filed, in order to afford the defend-

ants an opportunity to make it, if they could, more definite and certain. Instead of this, it is put in as a compliance with the order at February Term, 1887, when the plaintiffs obtained leave to reply. Another term passes, the cause being continued by consent, and the motion is first made when the cause comes on for trial. Certainly, under these circumstances, the refusal was proper, if indeed the action of the court was not the exercise of an unreviewable discretion.

II. The second exception is to the introduction of the deed, purporting to have been made under the direction of the court.

This objection, as we have recently had occasion to remark, is (444) directed, if it has force, not so much to the admission of the deed, except for irrelevancy, as to the effect to be given to it as a muniment of title.

This and the preserved entries found on the docket are offered as fragmentary parts of an equitable suit, the original papers in which have been burned, which was regularly begun and prosecuted to its termination, in an order for title to the lands of the infants to be made, and made by their guardian, acting as commissioner. The ruling of the court as to the recitals in the deed and the decretal orders found in the docket, the terms of which show their relations to a single and the same cause, is sustained by the statute. (The Code, ch. 8, entitled Burnt and Lost Records, secs. 69-70 and 71), and by the decision in *Hare v. Hollomon,* 94 N. C., 14, so as not to need further elaboration.

Exceptions to the charge, as well that refused as that given, remain to be considered.

1. Those instructions asked were all properly rejected. The defendants had not failed to show, but by force of the statute had produced prima facie proof of the divesting of the estate in remainder and its transfer to the defendant Clark, and no rebutting evidence had been offered to remove the presumption.

There is evidence in the decretal orders of a suit in which, and as its consummation, the deed was executed. They show that a bill was filed and answered, and upon the hearing a decree entered directing the said Irvin to make the deed and convey the interests of the infants in the lands described in the complaint to the purchaser. The variance of this proof from the statements in the amended answer is not such as can be allowed to defeat the action, and the court, if necessary, would allow such further amendments as would produce conformity. The Code, sec. 269. It is true that several plaintiffs have been born (445) since those proceedings, but their interests were represented in such of them as were parties. The will lets in all after-born children who fulfil the description at the life-tenant's death—the period fixed for the vesting of their estate in possession. *Simms v. Garrot,* 1 D. &

B. Eq., 393; *Hawkins v. Everett,* 5 Ired. Eq., 42; *Fleetwood v. Fleetwood,* 2 Dev. Eq., 222; *Sanderlin v. Deford,* 2 Jones, 74.

If the devise had been to those children *living at the death* of their mother, there would have been a contingent and not a vested interest in either, for until that event occurred it could not be known who would take, and in such case the contingent interest could not be sold by a court of equity. *Watson v. Watson,* 3 Jones Equity, 400; *Williams v. Hassell,* 74 N. C., 434; *Miller, Ex parte,* 90 N. C., 625; *Overman v. Sims,* 96 N. C., 451; *Young v. Young,* 97 N. C., 132.

But when the gift is general, not being confined to survivors, when to take effect, it is otherwise, and by representation, those who may afterwards come into being are concluded by the action of the court upon those whose interests are vested, but whose possession is in the future.

The distinction is pointed out by *Battle, J.,* delivering the opinion in *Ex parte Dodd,* Phil. Eq., 97.

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

Affirmed.

Cited: Aydlett v. Pendleton, 111 N. C., 31; *Whitesides v. Cooper,* 115 N. C., 576, 578; *Yancey's case,* 124 N. C., 153; *Hodges v. Lipscomb,* 128 N. C., 63; *Wise v. Leonhardt, ibid.,* 291; *Pender v. Pender,* 129 N. C., 59; *Springs v. Scott,* 132 N. C., 554; *Bowen v. Hackney,* 136 N. C., 191; *Latham v. Lumber Co.,* 139 N. C., 11; *Bullock v. Oil Co.,* 165 N. C., 66; *Pinnell v. Burroughs,* 168 N. C., 321; *Cooley v. Lee,* 170 N. C., 21; *James v. Hooker,* 172 N. C., 782; *University v. Markham,* 174 N. C., 343; *Alexander v. Cedar Works,* 177 N. C., 148; *Baggett v. Lanier,* 178 N. C., 131; *Smith v. Moore, ibid.,* 376; *Thompson v. Humphrey,* 179 N. C., 55; *Malloy x. Acheson, ibid.,* 99; *Lumber Co. v. Herrington,* 183 N. C., 89; *Mercer v. Downs,* 191 N. C., 206.

(446)

W. M. HARVEY v. A. F. HAMBRIGHT ET AL.

Jurisdiction—Justices of the Peace.

1. Justices of the peace have concurrent jurisdiction with the Superior Courts of actions for torts where the value of the property in controversy does not exceed fifty dollars.

2. Where the plaintiff paid fifty dollars to the defendant upon fraudulent representations: *Held,* that a justice of the peace had jurisdiction of an action for the recovery of the money.

(*Bullinger v. Marshall,* 70 N. C., 520; *Ashe v. Gray,* 88 N. C., 190, and 90 N. C., 137, and *Barneycastle v. Walker,* 92 N. C., 198, cited:)

HARVEY *v.* HAMBRIGHT.

CIVIL ACTION, commenced before a justice of the peace in the county of CLEVELAND, and tried upon appeal in the Superior Court, before *Philips, J.*, at the Spring Term, 1885.

The plaintiff alleges in substance that, in November, 1882, a suit was pending against him in South Carolina, instituted by J. G. Black; that while he was confined in bed by sickness, the defendant Hambright told him that he had lost his suit, but that the plaintiff therein was willing to compromise for $50, and not harass him further, as he sympathized with him; that acting under the belief that the representations made by Hambright were true, he paid him the $50, who gave a receipt for the same, signed by James Black for J. B. Black—the said James Black professing to act for said J. G. Black.

The $50 was paid on 10 November, 1882, and on 11 November he was informed that the suit pending in South Carolina had been decided in his favor, that by reason of his illness he had no means of informing himself of the truth of the matter till the following day, whereupon he demanded payment of the $50, which had been so paid by him under the representations made by Hambright.

The defendant moved to dismiss the action for want of juris- (447) diction, which motion was allowed, and the plaintiff appealed.

John F. Hoke for plaintiff.
W. P. Bynum (Gidney & Webb filed a brief) for defendants.

DAVIS, J., after stating the case: Section 887 of The Code provides that "justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars." The *property* in controversy here is the fifty dollars, which, the plaintiff alleges, he was induced to pay by the representations made by the defendant, and which were untrue, and is clearly within the section referred to.

Bullinger v. Marshall, 70 N. C., 520, cited by counsel for the defendant, was before the Act of 1876-77 (sec. 887 of The Code), and is not applicable to this case, and the point in *Ashe v. Gray,* 88 N. C., 190, reaffirmed in 90 N. C., 137, is misapprehended. The complaint in the latter case contained causes of action for direct and fraudulent representations, associated with a cause of action for a false warranty in an exchange of horses, and laid the damages at $50. The jury found upon issues submitted, that there was a warranty, and assessed damages at $50, and the court below refused to give judgment for the plaintiff, holding that the action was founded exclusively on contract and was cognizable only in the court of a justice of the peace. Upon appeal, this

was reversed, because the real character of the action was *ex delicto,* and the jurisdiction of the Superior Court fully appeared in the complaint.

That case is authority for the position that the Superior Court (448) has jurisdiction of torts *not* exceeding $50, but it does not decide, as insisted by defendant, that the justices of the peace have not *concurrent* jurisdiction in actions where the sum does not exceed $50; on the contrary, in *Barneycastle v. Walker,* 92 N. C., 198, it is said that prior to the Act of 1876, justices of the peace had no jurisdiction in actions of tort, but since that act they have "only a *concurrent* jurisdiction with the Superior Court, when the damages claimed do not exceed fifty dollars."

Error.

Cited: Long v. Fields, 104 N. C., 224; *Bowers v. R. R.,* 107 N. C., 722; *Malloy v. Fayetteville,* 122 N. C., 484; *Fields v. Brown,* 160 N. C., 300.

L. M. GENTRY v. A. B. CALLAHAN.

Deed—Execution Sale—Estoppel.

1. A sheriff's deed passes only such interest as the execution debtor had at the time of the sale, and such debtor will not be estopped thereby to assert a title subsequently acquired.

2. Where the sheriff's deed recited a sale under execution prior to the acquisition of title by the judgment debtor, the purchaser acquired no title.

(*Flynn v. Williams,* 1 Ired., 509; *Badham v. Cox,* 11 Ired., 456; *Frey v. Ramsour,* 66 N. C., 466, and *Dail v. Freeman,* 92 N. C., 351, cited.)

CIVIL ACTION, tried before *Shipp, J.,* at Fall Term, 1885, of RUTHERFORD.

The plaintiff brought this action to recover the land described in the complaint, and on the trial produced and relied upon evidence of title in him as follows:

1. A grant for the land in controversy from the State to Jonathan Pell, dated 28 November, 1792.

2. A deed from A. Irvin, sheriff of Rutherford County, to Jonathan Hampton, purporting on its face to be dated 15 April, 1793, and (449) reciting that the land was sold under execution against Jonathan Pell on 11 October, 1792, and also showed the execution.

3. The plaintiff then proved the heirs of Jonathan Hampton, and introduced a deed from them to William Idler, and *mesne* conveyances to himself, proved the defendant in possession, and closed his case.

The defendant introduced no testimony.

The court held that the grant being dated 28 November, 1792, and the sale under execution having taken place 11 October, 1792, and the recital in the deed being to that effect, as appears on its face, and the sheriff's deed being executed 15 April, 1793, that still the plaintiff could not recover, for that the sheriff's deed did not pass title to Jonathan Hampton. In deference to the intimation of the court as above, the plaintiff submitted to a judgment of nonsuit, and appealed.

J. B. Batchelor, John Devereux, Jr., (and M. H. Justice by brief) for plaintiff.

W. P. Bynum and J. A. Forney for defendant.

MERRIMON, J., after stating the case: At the time the sheriff named sold the land in question to Hampton, Pell, the defendant in the execution, had no title thereto—so far as appears, he had a mere naked possession, and the deed of the sheriff only passed such interests in the land to the purchaser as Pell then had. It is well settled, that a sheriff's deed operates to pass only such interest as the defendant in the execution under which the land is sold, had at the time of the sale thereof. Title acquired by him afterwards does not pass by the deed, nor is he estopped to assert his title subsequently acquired. *Flynn v. Williams,* 1 Ired., 509; *Badham v. Cox,* 11 Ired., 456; *Frey v. Ransom,* 66 N. C., 466; *Dail v. Freeman,* 92 N. C., 351.

The execution debtor, Pell, obtained a grant from the State (450) after the sale, and before the deed of the sheriff was in fact executed; but this could not help the purchaser, because his deed had operative effect only as of the date of the sale. The *fieri facias* and levy of the same only related to the sale recited in the deed, and there is not the slightest evidence going to show that it was used for any purpose thereafter other than to return it to the office of the clerk of the court according to law. *Badham v. Cox, supra.* Judgment affirmed.

Cited: Eaton v. Doub, 190 N. C., 21.

JOHN W. LAWSON v. EPPY PRINGLE.

Estoppel—Homestead—Novation—Contract.

The plaintiff, as administrator, sold lands under a decree, in order to raise assets. The defendant became the purchaser. When the purchase money became due, in pursuance of an agreement then made the administrator made a deed to the purchaser, reciting the receipt of the purchase money, charging himself with and accounting for the same, and the purchaser promised to pay him the amount: *Held*,

1. That the acknowledgment of the receipt of the purchase money was not a bar to plaintiff's claim for payment.

2. That the effect of the arrangement was not to discharge the original indebtedness, but to assign it to the plaintiff; and that the defendant was not entitled to have the land exempted as a homestead from sale under process to enforce a judgment rendered thereon.

(*Lowe v. Weatherley*, 4 D. and B., 212; *Mendenhall v. Parish*, 8 Jones, 105; *Hudson v. Critcher, ibid.*, 485; *Wesson v. Stephens*, 2 Ired. Eq., 557; *Whitaker v. Elliott*, 73 N. C., 186; *Fox v. Brooks*, 88 N. C., 234; *Brodie v. Batchelor*, 75 N. C., 51, and *Ponton v. Griffin*, 72 N. C., 362, cited.)

(451) CIVIL ACTION, begun before a justice of the peace and tried upon appeal before *Gilmer, J.*, at Fall Term, 1887, of STOKES.

The plaintiff, as administrator of Pleasant Pringle, and under license from the proper court, sold a tract of land to the defendant, in order to make assets, for the sum of two hundred and sixty dollars. He took no note or security therefor, inasmuch as the purchaser held a claim against the intestate's estate for two hundred and twenty dollars, and was further, as distributee, entitled to a share therein of the value of ten dollars and sixty-four cents, the balance whereof, to wit, eighty-four dollars and twenty cents, was claimed by the plaintiff as the residue on the land. At the expiration of the credit, on 10 June, 1886, the plaintiff demanded payment, and the defendant being unable to meet his obligation, directed the plaintiff to proceed and close up his administration, and he should be paid out of the land. This the plaintiff did, charging himself with the proceeds of sale of the land, and crediting himself with all due by the defendant; and on 15 September, 1887, he made a deed conveying title to the defendant, and therein reciting that the purchase money had been paid, both recognizing the fact that a part of the purchase money had not been paid. Such was the case made out on the plaintiff's proofs, while the defendant denied any indebtedness to him.

The plaintiff contended:

1. That the money due him was purchase money for the land described in the pleadings, for which he could sell defendant's interest without laying off homestead.

2. That when the plaintiff settled with the estate of his intestate, and took the debt against the defendant, it was a verbal assignment of the debt to him as an individual, and he held it against the defendant as a debt for the purchase money.

3. That the plaintiff having paid off and settled with his intestate's estate a debt due by the defendant for purchase money (he (452) being heir at law and distributee), was entitled to all and the same rights against the defendant as an individual that he had as administrator.

4. That if defendant told plaintiff to settle with the estate, and he did so, and that if he would make him a deed he should be paid the purchase money out of the land, and he did make him a deed, the plaintiff had an equitable right to sell said land for the purchase money.

His Honor being of the opinion that, according to the plaintiff's own showing, he having charged himself with the purchase money of the land, and having settled the estate and made a deed to the defendant, his claim for the said balance was not a debt for the purchase money.

Upon this intimation the plaintiff submitted to a nonsuit and appealed.

William B. Glenn for plaintiff.
W. N. Mebane for defendant.

SMITH, C. J., after stating the case: In a court of law an acknowledgment of payment of the consideration by the bargainor in his deed, is a bar to a recovery of any part of it, as decided in *Lowe v. Weatherby,* 4 D. & B., 212; *Mendenhall v. Parish,* 8 Jones, 105; *Hudson v. Critcher, ibid.,* 485, and in other cases.

But in equity the estoppel may be put out of the way upon clear proof of mutual mistake, and the money due decreed to be paid. *Wesson v. Stephens,* 2 Ired. Eq., 557.

The only question brought up by the appeal is as to the correctness of the ruling of the court that the plaintiff's claim, upon the evidence given in, was not a debt for the purchase money, so that execution could go against the land, superseding the homestead exemption, and that, as such, it had been extinguished by the arrangement between (453) the parties.

We do not attribute this effect to what was done in the premises. The defendant has never paid this portion of the purchase money to any one, and he still owes it. The debt was not discharged, but still subsists in full force against the defendant, and the only change produced, so far as he is concerned, is to substitute an assignee in place of the former creditor, but without in any way affecting the character of the indebted-

ness, as contracted in the purchase of the land. Most unquestionably the provision in the Constitution that "no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises" (Article 10, sec. 2), does not relieve the land from liability to sale under execution for the residue of purchase money still owing by the debtor and simply passing from the plaintiff in his capacity as administrator to himself personally. The cases cited in the brief of the defendant's counsel do not support his contention that a new debt has been contracted, the consideration of which was the extinguishment of the former.

In *Whitaker v. Elliott,* 73 N. C., 186, notes against a third person were transferred by the vendee's endorsement, and accepted as payment of the purchase money. This was held by the court to be an obligation for which the land could be levied on and sold, free from the homestead exemption.

In *Fox v. Brooks,* 88 N. C., 234, the defendant agreed, in paying for the land, to take up a note on which the vendor was bound, and failed to do so. It was declared that the sum so to be paid remained as purchase money, and was paramount to the homestead in its claim to be satisfied, under final process, out of the land.

In *Brodie v. Batchelor,* 75 N. C., 51, the decision was, that a loan of money to the vendee to enable him to pay for the lot bought, and which was so used, did not subrogate the lender to the position and to the possession of the rights of the vendor, who had been paid, and the
(454) debt could in no proper sense constitute an obligation for unpaid purchase money.

The true test is this: Does the vendee owe the purchase money, or any part of it? and if so, the debt comes within the constitutional provision, and it is immaterial to whom the money is due. The assignee, when it is assigned, becomes the owner of the debt, but it is still a debt incurred in making the purchase. Nor is it material whether the debt exists in the form of a note or bond or in a verbal contract it is equally capable of being transferred. *Ponton v. Griffin,* 72 N. C., 362.

The transaction is simply this: The defendant agreed to pay the plaintiff personally the debt he owed him as administrator, if the latter would advance the amount due in settling the administration account, and the legal effect was an assignment of the debt—not its satisfaction. There is error. The nonsuit must be set aside and a new trial awarded.

Error.

Cited: Godwin v. Bank, 145 N. C., 328.

LUCINDA BRIGGS ET AL. v. JAMES A. JERVIS.

Appeal—Certiorari—Printing Record.

1. Where the appellant is prevented from preparing and docketing his appeal within the time prescribed by the Rules of the Supreme Court, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of *certiorari* to bring up the case.

2. When a motion to dismiss an appeal, because not prosecuted in apt time, is allowed, but subsequently the case is reinstated, a failure to print within the time prescribed will not be deemed a sufficient ground for a dismissal, but further time will be granted.

(*Walton v. Pearson*, 83 N. C., 309; *Syme v. Broughton*, 84 N. C., 114; *Wiley v. Lineberry*, 88 N. C., 68, and *Greenville v. Steamship Co.*, *ante*, 163.)

PETITION for the writ of *certiorari*, filed at February Term, (455) 1887, of the Supreme Court.

The action was brought to recover land, was tried upon issues by a jury at August Term, 1886, of the Superior Court of Madison, and judgment rendered for the plaintiffs. The appeal taken by the defendant was not prosecuted to the term of this Court next following, but the transcript, on 15 April, 1887, was filed in this Court, and on motion of counsel of the appellees, on various grounds the appeal was dismissed. The defendant now applies for a writ of *certiorari* to bring up the record as a substitute for an appeal, and in his petition, supported by his own oath and the affidavit of one of his counsel, as an explanation of the delay, states as follows:

That the appeal was taken after the trial and at the same term upon a waiver of notice and undertaking with security at the sum fixed by the court then entered into, which in open court the plaintiffs accepted;

That at the same time his counsel notified counsel of plaintiffs that the case on appeal would be served on the latter at Asheville within the time allowed by law, and at the place named; an agreement in writing was entered into by which the time for this was extended to the November Term of Madison Superior Court, with a *proviso* that this was not to effect a continuance or failure to have the appeal at Fall Term of this Court. This agreement has the signatures of A. T. Davidson and J. H. Merrimon, plaintiff's counsel:

That upon information and belief the said A. T. Davidson, at Asheville, took from defendant's counsel the papers in the cause, for the purpose of insisting on an enlargement of the undertaking to stay execution on the appeal, of which he had given notice;

That at November Term, 1886, the petitioner learned from his counsel and the clerk that the papers could not be found and were not in the

office, whereupon he called upon plaintiff's counsel and was answered that they knew nothing of them;

(456) That at Spring Term, 1887, one of his counsel, J. S. McElroy, came into possession of the file, as stated in his accompanying affidavit, the papers having been sent up to that term by said Davidson through another attorney resident in Asheville and unconnected with the cause;

That at said term his counsel made out and served the case on appeal, and no notice of any exceptions thereto being taken, it was filed and a transcript of the record sent to this Court and filed as already stated;

That in consequence of the absence of the papers, petitioner was unable sooner to perfect his appeal, and that, as advised, there are erroneous rulings in matters of law, as set out in the case.

The affidavit of said J. S. McElroy sustains the client's statements, some of the facts being within his personal knowledge, and among other things, says that, at said November Term he made inquiry of said Davidson to ascertain whether the missing file was in his possession, and was answered by the latter that he did not think he had them, but he would examine on his return to his office in Asheville, and if found, he would send them to affiant during said November Term, and they were in fact sent and delivered to affiant, during Spring Term following, by the hands of M. E. Carter, who said he had been requested to deliver them to some one of defendant's counsel; and in consequence, affiant could not prepare the case on appeal nor furnish a full and proper transcript.

Theo. F. Davidson for plaintiffs.
J. M. Gudger for defendant.

SMITH, C. J., after stating the case: There was no denial or explanation of these statements favorable to the appellees, and we must act upon an assumption of their truth.

(457) In our opinion, the delay in bringing up the appeal is fully and satisfactorily accounted for, and no laches can be imputed to the appellant. The papers were not in the office where they belonged, so as to be accessible, but in possession of one of the plaintiffs' counsel, who had lost sight of the fact, and just as soon as they were returned, the defendant's counsel proceeded to make up the case and serve a copy on the other party. What more could be done? What more could be required? It was surely the detention of the papers that caused the delay, and the default was in the appellees' counsel, of which he ought not now to be allowed to take advantage.

The case is clearly within the scope of the rulings in *Walton v. Pearson,* 83 N. C., 309; *Syme v. Broughton,* 84 N. C., 114; *Wiley v. Lineberry,* 88 N. C., 68, and *Greenville v. The Steamship Co., ante,* 163, where, in consequence of the loss of the papers, a new trial was granted.

The grounds upon which the motion to dismiss was made at the last term and allowed are all removed upon the facts now shown in evidence, except that the record had not been printed.

1. The appeal has been diligently prosecuted, and docketed as early as it could be done and at the proper term, under the circumstances.

2. The case was served on the appellees, or their counsel.

3. The undertaking is drawn in accordance with the order of the court, and was justified by the surety on 11 August, 1886, and was moreover tendered and accepted in open court during the term.

The only difficulty that remains is the failure to print. The case was not tried, and the motion to dismiss prevailed, so as to have rendered the printing useless. Indeed, exception was taken to the case to be printed, which prevailed, and intercepted the hearing upon its merits. The rule permits an appeal, dismissed for this reason, to be reinstated during the term, on good cause shown for the omission, upon five days' notice, and this will avail in suing out the writ of (458) *certiorari* when good cause for the neglect is shown. Rule 2, sec. 11, par. 7.

The application is allowed, and the clerk will issue the writ, unless counsel accept as an answer to it the record filed.

J. A. DULA ET AL. v. W. L. SEAGLE.

Judicial Sale—Execution Sale—Purchaser.

1. A decree directing a commissioner to sell lands, receive the purchase money and make title, without requiring a report and confirmation of the sale by the court, is irregular.

2. A properly secured proposition, made before confirmation of sale, to increase the price ten per cent, is sufficient to reopen the bidding.

3. A bidder at a judicial sale acquires no rights until his proposition is accepted by the court.

4. A purchaser at execution sale will acquire a good title although there may not have been due advertisement, if he had no notice of such irregularity; but it would be otherwise if he had notice, or if the sale was made at a place or time not warranted by law.

(*Mebane v. Mebane*, 80 N. C., 34; *Miller v. Feezor*, 82 N. C., 192; *Foushee v. Durham*, 84 N. C., 56; *Blue v. Blue*, 79 N. C., 69; *Pritchard v. Askew*, 80 N. C., 86; *Attorney-General v. Roanoke Nav. Co.*, 86 N. C., 408; *Lord v. Beard*, 79 N. C., 5; *Lord v. Meroney, ibid.*, 14; *Murrill v. Murrill*, 84 N. C., 182; *Wilson v. Sykes, ibid.*, 215; *S. v. Rives*, 5 Ired., 297, and *Mayers v. Carter*, 87 N. C., 146, cited.)

THIS was a motion to set aside a sale, heard by *Boykin, J.*, at Fall Term, 1887, of CALDWELL.

The plaintiffs, at Spring Term, 1887, of Caldwell Superior Court, recovered judgment, for want of an answer, against the defendant for $973.48, residue of the purchase money contracted to be paid for
(459) land, and a decree for the sale thereof, unless payment should be made in ninety days. The decree appointed C. A. Cilley a commissioner, and directed him, after thirty days advertisement in the *Topic*, a newspaper published at Lenoir, to make public sale "at the courthouse door for cash, and convey the title to the purchaser"; and that "out of the purchase money he first pay off this judgment and costs; then all cost of advertisement and sale, and pay the balance, if any, to the *purchaser"*; (intended for the defendant), to whom alone it would belong.

The advertised day of sale was meant to be on the first day of August, but through some inadvertence was to be on the 12th day of that month. The sale was made on 1 August, and the plaintiff, J. A. Dula's wife, bid off the land at the price of $1,020.

Upon notice previously served, and upon an offer to increase the bid by an additional ten per cent, the defendant's counsel at the next term moved the court to set aside the sale, and order a resale of the premises, upon the hearing of which the court found the following facts: The thirty days notice was given, and by mistake of the printer the 12th instead of the 1st day of August designated as the time of sale.

The sale took place on the last-mentioned day. The defendant was present, and conferred with one of the plaintiffs in reference to the best manner of selling, whether in bulk or by the acre, and directed him to announce to the commissioner to put it up as a whole, and to say to those assembled that the debt must be paid in money, but the purchaser could have time as to the excess. The defendant spoke to some of those present to bid, but they did not bid. No objection was made to the selling. The purchaser paid the sum bid and demanded title. A bond in the penal sum of $1,500 was given to raise the bid upon a resale to ten per cent additional.

(460) The court denied the motion, and the defendant excepted and appealed.

C. A. Cilley (by brief) for plaintiffs.
G. N. Folk (Scott & Erwin filed a brief) for defendant.

SMITH, C. J., after stating the case: In *Mebane v. Mebane,* 80 N. C., 34, this language is used: "No report of the sale is required to be made to the court in order that it may be set aside or confirmed and title ordered, but this is left to the uncontrolled discretion of the commissioner. This is entirely at variance with the nature of judicial sales. The commissioner acts as the agent of the court, and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed. This power will not be delegated to the agent who exposes the property to public biddings."

To the same effect are *Miller v. Feezor,* 82 N. C., 192; *Foushee v. Durham,* 84 N. C., 56.

2. Again, and aside from the irregularity in the form of the decree in the particular mentioned, it is well settled that an advance bid of ten per cent before confirmation is sufficient ground for reopening the biddings, when the performance of the offer is properly secured. *Blue v. Blue,* 79 N. C., 69; *Pritchett v. Askew,* 80 N. C., 86; *Attorney-General v. Roanoke Navigation Co.,* 86 N. C., 408.

The defense of the ruling of the court is put on the ground that the decree directs the commissioner to make title, and to distribute the money produced by the sale, without reporting for confirmation and without retaining the cause. This view would be forcible, and perhaps unassailable, if the judgment had been regular, accord- (461) ing to the course of the court. But this irregularity is the subject-matter of complaint, and its consequences sought to be averted before they pass beyond the correcting and reforming hand of the court. The decree was not by consent, but rendered at the end of the term, for want of an answer. The remedy by motion is open until the decree is fully executed. *Lord v. Beard,* 79 N. C., 5; *Lord v. Meroney, ibid.,* 14; *Murrill v. Murrill,* 84 N. C., 182; *Wilson v. Sykes, ibid.,* 215.

The sale by a commissioner, acting under the order of the court and subject to its supervision and control, finds little analogy in, or support from, a sheriff's sale. That officer acts under the law that prescribes his duties, with a proper responsibility to those affected by what he does. If he sells under execution, without advertising, as required by law, and the purchaser has no notice of this dereliction of duty, he acquires title; but it would be otherwise if the sale was at a time or place not warranted

by law, because the purchaser is charged with knowledge of this legal requirement, and does not buy in good faith. *S. v. Rives,* 5 Ired., 297; *Mayers v. Carter,* 87 N. C., 146.

We pass other objections, among which is the very serious one arising out of the fact that the sale was made, not according to the public notice, but eleven days before, which may have caused the absence of bidders, since the previous objections called for the interposition of the court and its ordering another sale.

There is error in the refusal to set aside the sale, and the Superior Court will proceed according to this opinion, and restore the purchase money to the bidder.

Error.

Cited: In re Dickerson, 111 N. C., 114; *Shaffer v. Bledsoe,* 118 N. C., 281; *Clement v. Ireland,* 129 N. C., 222; *Thompson v. Rospigliosi,* 162 N. C., 161; *Williams v. Dunn,* 163 N. C., 212; *Upchurch v. Upchurch,* 173 N. C., 91; *Sutton v. Craddock,* 174 N. C., 277.

(462)

A. W. FINLEY v. E. A. SAUNDERS.

Homestead—Action Against Married Women—Husband and Wife.

1. The person claiming a homestead must be a resident of the State. If he voluntarily removes therefrom with a purpose to make his home elsewhere he forfeits his right in this respect.

2. The wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal from the State, though they may remain.

3. An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife.

THIS was a civil action, tried at March Term, 1887, of WILKES, before *Boykin, J.,* upon the following case agreed:

The defendant is the wife of W. A. Saunders. Plaintiff obtained judgment in the Superior Court at Fall Term, 1885, against said Saunders for $748.12, in an action in which a warrant of attachment regularly issued from said Superior Court at the time of issuing of the summons, and was levied upon the land described in the complaint.

The defendant, William A. Saunders, was at the time of the commencement of that action, and still is, a nonresident of this State, and is now a citizen of the State of Kansas. The land in controversy was sold under execution on said judgment, and the plaintiff became the purchaser at execution sale, for the sum of $100. The defendant in this action lived in this State with her said husband, W. A. Saunders, for five years next immediately preceding three months before the bringing of this action, and did not leave the State when her husband left (three months before the issuing of the said attachment), and has remained since and still lives here, and the defendant, "as widow," asserts a right to hold the land in controversy, under her husband, claim- (463) ing a homestead in the same. No homestead has ever been laid off in the land, and the defendant has no homestead in her own right, and the land in controversy is not worth one thousand dollars.

Upon this state of facts judgment was rendered for the defendant, E. A. Saunders (wife of W. A. Saunders), the court adjudging that she was entitled to the land in controversy as a homestead for the benefit of herself and children. From this judgment the plaintiff appealed.

J. B. Batchelor and E. C. Smith (T. B. Finley filed a brief) for plaintiff.

No counsel for defendant.

SMITH, C. J. The Constitution exempts from execution, and secures a homestead, not exceeding one thousand dollars in value, to every insolvent debtor who is a resident of the State (Article X), and the statute provides how it may be ascertained and set apart to him. The Code, sec. 502 *et seq.* The exemption endures during the lifetime of the debtor, and then of his widow, for her benefit, unless she be the owner of a homestead in her own right, or if there be infant children, for their benefit, until the youngest attains full age. But there is no provision for those who succeed to the prolonged exemption, except in case the owner of the land be dead. If not set apart to him when living, it may be set apart to those entitled, after his death. The Code, sec. 514.

By the removal of the debtor out of the State, with a view to a permanent residence elsewhere (as we understand the fact to be in the present case), although his family do not follow him to his new abode, he forfeits this constitutional right, as he is not within its provisions, and as he cannot claim an exemption of his land from liability from debt, neither can his wife nor his infant children, for their right is derived from his, and springs up after the debtor's death. It (464) may be that the debtor has acquired a homestead in the State to

which he has gone, and the law does not contemplate a twofold homestead. If a similar law exists in Kansas, his wife and children may, by going there and making his home theirs, acquire an interest in the homestead, secured there to the husband and father.

The present case may be one of hardship, as an abandonment of wife and children, whose support he is bound to provide for, to poverty and want and without a home, but still the law is such as not to meet the situation, and his property, no longer shielded, becomes exposed to the creditors' demands.

Most clearly, in our opinion, the defendant cannot claim the exemption, nor is the case bettered that it speaks of her as a "widow," when she is not such. There is error in the ruling of the court, and the judgment must be reversed.

It has not escaped our notice, though no point is made on the fact, that the wife who is in possession is alone sued, her husband being still alive but beyond the reach of personal service. If his presence in the action were indispensable to its prosecution, it is manifest the plaintiff would be without remedy, and the tortious withholding could not be disturbed.

Chancellor Kent says that, where the husband was a foreigner, or an alien enemy and resided abroad, the wife is in some degree and from necessity restored to a *feme sole,* and he adds that "though the husband be not an alien, yet if he deserts his wife and resides abroad permanently, the necessity that the wife should be competent to obtain credit and acquire and recover property and act as a *feme sole,* exists in full force"; and further, that the "distinction between husbands who are aliens and who are not aliens cannot long be maintained in practice, because there is no solid foundation in principle for the distinction."

2 Kent Com., 157.

(465) This opinion is sustained by the rulings in *Gregory v. Paul,* 15 Mass., 31; *Abbot v. Bailey,* 6 Pick., 89; *Bran v. Morgan,* 4 McCord, 148, and *Chapman v. Lemon,* 11 How. Prac., 235.

In the last case, decided in the Supreme Court of New York, the doctrine is thus concisely stated by *Harris, J.*: "In this country it has been held that where a husband absolutely deserts his wife, and renounces his marital rights and duties and leaves the State, the wife may be regarded as a *feme sole.*"

But the question, aside from what has been said, is settled by statute in this State, which declares that "every woman whose husband shall abandon her or shall maliciously turn her out of doors, shall be *deemed a free-trader,* so far as to be competent to contract and be contracted with," etc. The Code, sec. 1832.

If liable upon contracts, so must she be in actions for her own torts, and the action will be against herself alone.

Judgment reversed, and a *venire de novo* must be awarded in the court below.

Error.

Cited: Burgwyn v. Hall, 108 N. C., 496; *Vanstory v. Thornton,* 112 N. C., 214; *Heath v. Morgan,* 117 N. C., 508; *Chitty v. Chitty,* 118 N. C., 649; *Brown v. Brown,* 121 N. C., 10.

D. C. SALISBURY v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Damages—Cancellation of Deed—Possession.

The plaintiff conveyed a tract of land to a trustee, in trust for his wife and son, but continued to reside upon it with his family. Subsequently the defendant committed the trespasses for which this action was brought, pending which the conveyance in trust was adjudged to be canceled, having been executed under a mistake: *Held,*

1. The deed was operative until the decree for cancellation was made.
2. That the plaintiff was not entitled to recover the full measure of damages sustained, but only those which affected his possession or were consistent with his interest in the premises at the time the action was begun. If he had a mere naked possession his damages would be nominal.
3. That the decree directing the cancellation of the deed did not restore to plaintiff his right to recover the full measure of the damages sustained while the deed was in operation.
4. The ruling in this case on former appeal (91 N. C., 490), reaffirmed.

THIS is a civil action, and was tried before *MacRae, J.,* at (466) Spring Term, 1887, of BURKE.

The plaintiff alleges in the complaint that he is the owner of a valuable grist-mill, situate at the foot of the Blue Ridge Mountains, near to a bold stream that descends rapidly from the side of that mountain, called Mill Creek.

The machinery of this mill is moved by the application of power of water, accumulated in a pond produced by a dam across that stream.

About six miles above the mill the railroad of the defendant stretches along the steep side of the mountain. At a point on it called "Mud-Cut," an area of six or seven acres of earth slipped down from the side

of the mountain, towards and upon the defendant's road, obstructing and rendering the same useless until such earth should be removed. This the defendant did by a process of powerful sluicing, which carried the earth, including mud, sand and rocks, into the stream mentioned, which swept much of the same into the plaintiff's pond, nearly filling it, and thus obstructing the use of the water in moving the machinery of his mill.

The plaintiff brought this action to recover damages from the defendant, thus occasioned, sustained by him.

The defendant, in its answer, denied most of the material allegations of the complaint and, particularly for the present purpose, that the plaintiff was the owner of the mill and the land on which the same was situate, including the pond.

(467) On the trial, the evidence produced tended strongly to prove that on 12 June, 1879, before the time of the injury complained of, the plaintiff had conveyed the land mentioned, including the mill, to a trustee, for the benefit of his wife and son, as in the deed provided; that during the continuance of the alleged injury this deed continued operative, and had full force and effect until 12 October, 1885, when it was declared inoperative and void by a judicial decree, the ground of the decree being, that the deed had been executed by mistake and misapprehension of the draftsman thereof as to the purpose of the plaintiff in executing the same as to the extent of the estate intended to be conveyed; that the plaintiff had only the naked possession of the land, and the mill, certainly until the date of the decree mentioned.

Among other things, the counsel for the defendant requested the court to instruct the jury:

"That the proceeding of record, offered by plaintiff, to cancel the deed of D. C. Salisbury to Reid is irregular and void; that it cannot vest a title in Salisbury by relation back so as to sustain this action as owner of said land; therefore, you should find the first issue, 'No,' that is, that D. C. Salisbury is not the owner of the land."

This the court declined to give, but on the contrary, said to them: "If you believe the testimony, your response to the first and second issues should be, 'Yes.'" The second issue submitted was: "Is plaintiff in possession of a certain merchant mill in McDowell County, on Mill Creek?"

Under the instruction given, the jury found both issues in the affirmative.

As to damages, the court gave this instruction:

"If you have been satisfied by the testimony that the defendant, by the process of sluicing, unlawfully washed the soil into Mill Creek, and so on down into plaintiff's pond, so as to injure its capacity, and so impair the value of plaintiff's mill, you will proceed to the fifth issue

and inquire what damage has resulted to the plaintiff by (468) reason thereof; what is the difference between the property as it was before and as it became by reason of the sluicing of Mud-Cut; and in reaching your conclusion on this point you may consider the continuance or the permanency of the injury, if the testimony satisfies you to that effect, and, on the other hand, the probable cost of cleaning out the pond and putting it in condition to afford as good a flow of water as before the sluicing."

The jury, in rendering their verdict, gave the plaintiff the full measure of damages; there was judgment in his favor for the same, and the defendant appealed to this Court.

P. J. Sinclair for plaintiff.
D. Schenck and C. M. Busbee for defendant.

MERRIMON, J., after stating the case: When this case was before us by a former appeal *(Salisbury v. R. R.,* 91 N. C., 490), the facts appearing then substantially as they do now, except that the deed of conveyance executed by the plaintiff to the trustee mentioned, has been decreed to be inoperative, we then decided that the possession and use of the mill by the plaintiff were such as entitled him to maintain his action against the defendant, and recover such damages as he sustained by reason of the injury complained of by him, although the trustee might also sue the defendant in a separate action, and recover like damages for such injury as might affect the land, including the mill, to the detriment of the owners thereof—that is, the trustees and the *cestui que trust.* The right and the cause of action of the plaintiff, and the same of the trustee as against the defendant, arising out of the alleged injury, were plainly pointed out as separate and distinct, each from the other. Exactly what was the character and extent of the plaintiff's possession did not then appear, and now it is left largely to con- (469) jecture. It seems that confusion and misapprehension on the first trial of the action grew out of the fact that he regarded himself as the absolute owner of the mill and the land on which it was situate, and the same to a large extent prevailed at the last trial. Indeed, it seems that he was at the latter trial regarded as the owner of the mill, as having sustained damages as such owner, and therefore was allowed to recover damages for the whole injury done to the property. This was not in harmony with what we decided and said in the former appeal. What we then said is pertinent and applicable here in material respects, except in so far as it may be modified by the fact that the deed of conveyance to the trustee was decreed to be inoperative. It was a serious mistake to treat the plaintiff as the owner of the mill. While ordinarily,

in a case like this, the plaintiff in possession is presumed to be the owner of the property injured, it becomes otherwise when his title to the land is put in issue and the evidence proves that he is not the owner, but has a naked possession, or a possession coupled with a particular interest. In this case he can only recover damage to the extent his possession, whatever its nature, has sustained injury; and the owner may do likewise as to the injury sustained by him, in a separate action. A party cannot be allowed to recover damages for injury to the property of another person as to which he is not interested. Accepting the deed of conveyance executed by him to the trustee mentioned, as having been properly executed, proven and registered, he was not the owner thereof next thereafter until that deed was decreed to be inoperative and void. It appears that it was so decreed to be inoperative, only because of mistake, it was not, in any view of it, absolutely void—it was only voidable. The plaintiff might at any time have ratified it—indeed, he did not seek to avoid it for more than six years after he executed it. While it continued operative, and at the time of
(470) the injury complained of, the legal title to the mill was in the trustee, and accepting the evidence of the plaintiff as true, the former had a distinct cause of action against the defendant arising out of the injury alleged, as certainly as the plaintiff had. He might have brought and maintained his action, and if he had made proof of his cause of action he would have recovered damages done to the property to the extent he sustained injury as the owner of it. The plaintiff was not interested in, and had no right to this damage; he was only entitled to damages to the extent that his possession was injured, and the measure of his damage depended upon the character of his possession. If he had a mere naked possession, the measure of his damage would be nominal; if he had a possession coupled with an interest, it would be greater and substantial, more or less, as that interest might be more or less important and affected to a greater or less degree. We cannot conceive of a just reason why the plaintiff should be allowed to recover damages sustained by the trustee, the owner of the property; and if this were allowed, the defendant would not be protected against a recovery by the trustee as to his separate cause of action. It would be manifestly unjust and iniquitous to allow such results to happen.

But it is contended that, inasmuch as the deed mentioned was annulled by a judicial decree, the plaintiff is in no wise affected by it—that the annulment relates back to the time of its execution, and the plaintiff stands, in relation to the injury complained of, just as if he had never executed the deed.

This view cannot be sustained. The deed was not void—it was only voidable, as indicated above, and without reference to how and to what

extent the rights of the parties to it may be affected by the decree of annulment, as among themselves, it could not affect third parties without notice, to their prejudice as to rights and advantages that they acquired under and by virtue of it. If, for example, the trustee, as indicated above, had a cause of action against the defendant and (471) recovered judgment for damages, as he might have done, and the defendant paid the same, surely, in that case, the plaintiff, after the annulment of the deed, could not again recover the same damages. And if the trustee had such cause of action, and the defendant had amicably paid the damages agreed upon, and taken a proper acquittance, the plaintiff could not, after the deed was declared inoperative, receive the same in this or any action, because it would be grossly unjust to allow innocent third parties to be prejudiced by the acts of parties to the advantage of the latter, over which acts the former had and could have no control.

Nor could the decree of annulment have the effect to incorporate into the plaintiff's cause of action, sued upon, another cause of action that he did not possess at the time his action began, but acquired afterwards. The plaintiff's cause of action must generally exist and be his at the time he brings his action—otherwise, he might enlarge its compass indefinitely and impair the integrity and order of procedure. The course of procedure must be observed and upheld, however convenient it might be in this and like peculiar cases to depart from it.

While the defendant was not entitled to have the special instruction indicated, given precisely as prayed for, we think the court should have given so much of it as was material and pertinent. If the deed was proven and registered, as it seems it was, the court ought to have instructed the jury, in substance, that under the circumstances and for the purposes of this action the plaintiff was not the owner of the mill and the land on which it was situate; that, if they believed the evidence, he had possession of the land and mill and used the same; and to have directed their attention to the character, extent and purpose of his possession, and the injury done to the same, occasioned by the acts of the defendant through its agents, as developed by the evidence.

There must be a new trial. To that end let this opinion be (472) certified to the Superior Court.

Error.

Cited: Staton v. R. R., 111 N. C., 288; *Beach v. R. R.*, 120 N. C., 507.

JAMES L. MOORING v. W. G. LITTLE, N. L. LITTLE, AND HARRY SKINNER.

Fraud—Evidence—Estoppel.

L., being indebted to M. by bond, executed a mortgage, conveying certain lands as security. The bond was assigned to S., who controlled judgments against L., having lien subsequent to the mortgage. The lands were advertised to be sold under the mortgage, when L. applied for an extension of time, which S. refused, unless a portion of the mortgage debt was paid and the judgments under his control secured; and he thereupon proposed that the sale should proceed, L.'s wife should become the purchaser and give a mortgage to secure the balance of the purchase money and the said judgments, suggesting that thereby the land would be relieved from subsequent judgments and placed beyond the reach of L.'s creditors. This arrangement was carried out, and under the last mortgage the land was sold, when the plaintiff became a purchaser with knowledge of the facts. The sales were fairly made in the ordinary method, and the price was a fair one: *Held*,

1. That while these facts might, in connection with others, be evidence of fraud, they are not fraudulent *per se*, nor do they raise a presumption of fraud.
2. That it would have been otherwise had the arrangement been made with the debtor—the husband—for the purpose of hindering and delaying his creditors and the wife's name had been used to that end.
3. That in an action by the purchaser against L. and wife to recover possession of the land, they were estopped by their deeds from denying his title.
4. *It seems*, that a purchaser under a junior judgment, who acquired his title after the action against L. and wife was begun, will not be allowed to make himself a party defendant and assert his title in that cause.

(473) THIS is a civil action, which was tried upon exceptions to referee's report before *Connor, J.*, at September Term, 1885, of PITT.

The action was brought by the ancestor of the present plaintiff, to the Spring Term, 1879, of the Superior Court of the county of Pitt, against the defendants, the Littles—husband and wife—to recover the land described in the complaint. At the return term of the court they filed their answer, denying the allegations of the complaint, except that they admitted themselves to be in possession of the land.

At the same term the defendant Skinner, by leave of the court, became a party defendant, and filed an answer to the complaint, denying that the plaintiff was the owner of the land, and alleging that he was the owner and in possession thereof, and that the other defendants named were his tenants.

Afterwards the defendant, Skinner, at Spring Term, 1880, of the court, filed an amended answer, alleging that the deeds of conveyance

under which the plaintiff claimed title were fraudulent and void, to which the plaintiff filed a reply. The defendants, the Littles, adopted the amended answer of their codefendant. The pleadings raised issues of fact and law.

Afterwards, at Spring Term, 1882, the court entered this order: "It is, by consent, ordered that this cause be referred to Charles F. Warren, Esq., who shall try all questions and issues of law and facts, and his findings of the facts shall have the effect of a special verdict."

The referee made a report, whereof the following is a copy:

"1. On 4 January, 1876, W. G. Little, being indebted to James L. Mooring, executed to him his bond for $1,057.60, pay- (474) able 1 January, 1877, with eight per cent interest from date. To secure the payment of the bond, Little and his wife, Nicy, executed a mortgage upon the land in controversy, with the usual thirty days' power of sale in case of default. The mortgage was duly recorded. The mortgage bond was assigned before maturity, and for value, by Mooring to I. A. Sugg and William Whitehead. After the maturity of the bond, the assignees, in the name of the mortgagee Mooring, and by direction, advertised the land for sale on 3 February, 1877. The land was sold on that day, and Nicy Little was declared the purchaser, at $1,155.

"2. At the date of the sale, and for some time prior thereto, the defendant, W. G. Little, was largely indebted, and was insolvent. That the homestead of W. G. Little has been allotted to him in lands not included in the mortgage.

"3. After the land was advertised, and before the defendant Little applied to Sugg for an extension of time, which Sugg refused to grant, unless Little should pay him on the bond $500, and either pay him a bonus for the indulgence, or secure six judgments, docketed in Pitt Superior Court, amounting to $366, on 20 February, 1877. The said judgments are specified in the testimony of I. A. Sugg. They were all docketed subsequent to the registration of the mortgage to James L. Mooring, and prior to the judgment of Vaughn, Barnes & Co., and Lewis Webb, under which the defendant Skinner claims title. All of said judgments were prior liens to those under which Skinner purchased.

"4. It was thereupon suggested by Sugg that the better course would be to sell the land and let Mrs. Little buy, and secure the unpaid part of the mortgage and judgments held by him. Sugg stated to Little that by pursuing this course it would rid the land of subsequent judgments, and place it beyond the reach of his creditors. Little consented to the arrangement with this object in view. James L. Mooring (475) knew the agreement between Sugg and W. G. Little before the sale of 3 February, 1877.

"5. Nicy L. Little had no separate estate, and paid no money or other thing of value for the conveyance of said land.

"6. That upon 20 February, 1879, a deed was executed by James L. Mooring, read to the said Nicy, and delivered to her by the grantor. That at the same time and place Nicy Little and her husband executed two mortgages, one to I. A. Sugg, to secure two notes of $601.20 and $386.00, and payable 1 December, 1877, and 1 December, 1878, with eight per cent interest from date, and one to James L. Mooring for $400.00, payable 1 January, 1878, with eight per cent interest from date, both mortgages being upon said land.

"7. That upon 20 February, 1877, W. G. Little, in pursuance of the agreement previously had with Sugg, paid $100 upon the original mortgage debt, and James L. Mooring paid for the said Little $400, making the sum $500, required by Sugg as a payment on his debt.

"8. That the $601 note, the balance due upon the mortgage debt, after crediting the $500 payment, and the $386 note was the amount of the six judgments controlled by Sugg, with $20 added therein as a fee. The consideration of the $400 note to Mooring was the money advanced by him for Little, and paid to Sugg. By agreement between Mooring and Sugg, the mortgage to Sugg was registered first. This agreement was made the day of the execution of the mortgage.

(Paragraphs 9 to 16 of referee's report were inadvertently omitted.)

"17. On 4 January, 1879, a *fi. fa.* issuing upon the Vaughn, Barnes & Co. judgment was levied upon said lands, and upon 24 July, 1879, a *ven. ex.* upon the same judgment was received by the sheriff. On 15 September, 1879, the land in controversy was sold thereunder,
(476) and upon execution issuing upon the Lewis Webb judgment, and purchased by Harry Skinner for $176.08.

"*Conclusion of Law.*—Upon this state of facts, the referee is of the opinion:

"1. That the sale of 3 February, 1877, under the mortgage to James L. Mooring, of 4 January, 1876, was fraudulent as to creditors, and void.

"2. That the $400 paid by James L. Mooring to I. A Sugg, at the instance of W. G. Little, was a payment upon the mortgage debt of $1,057.60; that it was not equivalent to splitting that debt, and the $400 note taken therefor did not attach to the mortgage of 4 January, 1876, or its security.

"3. That plaintiffs are not entitled as to the balance of the $1,057.60 after applying the payment of $100, and $183.54 made by Little, and $400 made by Mooring for Little, to be remitted to the security of the mortgage of 4 January, 1876; that the said mortgage having been canceled of record, and the bond secured surrendered and destroyed in pur-

suance of a fraudulent agreement, plaintiff has no equity to demand that the satisfaction be stricken out.

"4. This is also true as to the satisfaction of the Sugg judgment.

"5. That the deed from Allen Warren, sheriff, to Harry Skinner, executed 15 September, 1879, related back to the date of the docketing of the Vaughn, Barnes & Co. judgment, 25 January, 1876, and of the Lewis Webb judgment, 13 March, 1876.

"6. That Harry Skinner is the owner of the land."

From the judgment confirming the report the plaintiff appealed.

W. B. Rodman, Jr., for plaintiff. (477)
Ernest Haywood for defendants.

MERRIMON, J., after stating the case: By consent of the parties, the findings of fact by the referee have the effect of a special verdict, and must be so treated. It is not found that the sale of the land in controversy under the first mortgage mentioned in the pleadings and the report of the referee, or any transaction in connection therewith or growing out of the same, was fraudulent in fact.

The referee found as a conclusion of law arising upon the facts, that the sale first mentioned was fraudulent and void, and upon exception thereto, the court sustained this principal finding. So that the main question before us is as to the correctness of this decision.

We cannot concur in the view the court took of the law arising upon the facts found. In our judgment, they do not of themselves necessarily imply fraud, nor do they raise a presumption of fraud that may be rebutted, nor does the law draw the conclusion that the debts secured by the mortgages and the sales of the land under and in pursuance of them were fraudulent and void.

The debt secured by the first mortgage, the mortgage itself, the assignment thereof to the persons named, and the right of the latter, in the exercise of the power of sale contained in it, to advertise and sell the land embraced by it—that in controversy—are not questioned in any respect. The assignees of the mortgage did advertise and sell. The sale, so far as appears, was duly advertised; it was fairly open to all persons who, for any reason desired to do so, to bid for or purchase the land. There was neither shift, nor subterfuge, nor device to prevent the creditors of the mortgagee or others from doing so. They had fair opportunity to make the purchaser, whoever he might be, pay the full value of the land—indeed, it seems it was sold for nearly, if not quite, its reasonable value.

The mortgagor, Little, though largely in debt and insolvent, (478) had the right in good faith to ask the owner of the mortgage,

Sugg, to delay the sale for a reasonable period; and the latter had the right, in good faith, to grant such indulgence, and also to require the payment of a part of the mortgage debt and, as well, security for the docketed judgments he controlled as counsel. That Sugg, under the circumstances, suggested to Little that it would be wiser to sell the land—not covertly—but at open, fair sale—at such fair sale as was made, so far as appears, let the latter's wife buy it and secure the debts due Sugg and the docketed judgments of his clients by a fresh mortgage of the land, was not of itself dishonest; and if the suggestion was acted upon in good faith, this was not dishonest or fraudulent. Such fair sale to the wife of Little did not—certainly of itself—deprive the creditors of Little of any right or remedy they had, or might justly have, against him in respect to the land. They had fair opportunity to make the land pay the debts of Sugg and his clients (these were prior liens) and their own, if the lands were, in their judgment, worth so much. The wife of Little had the right to buy the land, although she had no property, if Sugg were willing to take her note, secured by a mortgage of the land, in payment and discharge of his debt; and although she was not present at the sale, and did not direct that the land be purchased for her, yet, if she afterwards ratified the bid for her, took a deed for the land, executed her note for the purchase money and a mortgage of the land to secure it, as she did, this rendered the sale to her effectual. Nor did the fact that Mooring supplied four hundred dollars of the money, which Sugg required to be presently paid, and took the note of the wife of Little and a second mortgage of the land to secure it, necessarily render the transaction fraudulent as to creditors of Little, the husband. These facts might be evidence of a fraudulent pur-
(479) pose, but of themselves they do not constitute fraud—they may well consist with honesty and fair dealing; their weight, as such evidence, would be greatly impaired by the fact that the sale of the land at which the wife purchased was fair, and the two debts—not questioned—secured by the two mortgages of the land by her, amounted to more than thirteen hundred dollars, a sum not much short of the reasonable value of the land at the time she purchased it.

Much stress is laid on the suggestion of Sugg to Little, the husband debtor, that it would be wise to let the land be sold and his wife buy it, as indicated—that to do so, "would rid the land of subsequent judgments and put it beyond the reach of his creditors." While this suggestion, in connection with other facts, might be some evidence of a fraudulent purpose, it might, in view of the circumstances, be perfectly consistent with an honest purpose. It might be said, not unfairly, that he meant no more than that the land was not worth more than the debts he controlled, that constituted prior liens upon it; that it would be expedi-

ent to let it go to sale, the wife of the debtor buy it, and he would take her note secured by a mortgage of the land for the purchase money, and thus put it beyond the reach of creditors of the husband; that, however, he did not mean that this should be done covertly and fraudulently, but openly and fairly. The sale, as made, so far as appears, did not contravene this view—it appears that it was fair and open to every person. If the suggestion was intended as a contrivance to enable the husband debtor himself to pay the debts so due to and controlled by Sugg, and have the title pass to the wife, and thus shield the land from his creditors, then it was not honest; and if the sale and conveyances to and from the wife were in execution of such purpose, then they and the whole transaction were fraudulent and void as to creditors, because the purpose was to prevent, hinder and delay the creditors of the debtor, Little, from reaching and subjecting to the payment of (480) their debts such of his property as ought justly to be applied to the payment of the same, and Sugg would be affected, because he was a party to the fraudulent contrivance.

But it was not found as a fact that there was such fraudulent purpose; and the findings of fact do not disclose such relations of the parties or such transactions as in their nature necessarily imply fraud—they are not such of themselves as the law treats as fraudulent, and the court must so declare whenever its authority is invoked. The court will not declare a transaction to be fraudulent in law, unless it be such as in its nature, or necessary relations, implies fraud; nor does the legal presumption of fraud arise, unless the act or acts complained of are prima facie fraudulent. When the acts done, and their purpose are fraudulent but are not such in their nature, the fraudulent purpose must be found as a fact, and the law will be applied declaring the transaction void.

We are therefore of opinion that the defendants, husband and wife, are estopped by their deeds respectively, and that the defendant Skinner, as appears by the findings of fact, got no title by his purchase at the sheriff's sale, under which he claims. We may add, that if he had obtained title as he alleges, long after the action began, he could not avail himself of it in this action—certainly, not without a proper pleading, allowed upon just terms.

There is error. The judgment must be reversed and judgment entered in favor of the plaintiff for the possession of the land, and for rents, according to the report of the referee.

To that end let this opinion be certified to the Superior Court.

Error.

Cited: Bobbitt v. Rodwell, 105 N. C., 244.

(481)

MARSHALL PARKS ET AL. v. AMERICA C. DAVIS.

Appeal—Assignment of Error—Trial by the Court.

1. When a trial by jury is waived, the court should find the facts and state its conclusions separately, in writing, and then enter judgment in accordance therewith.

2. But where the court simply responded formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment will be affirmed.

CIVIL ACTION, tried at Spring Term, 1887, of ASHE, before *MacRae, J.*

The parties agreed "by oral consent, entered on the minutes" of the court, as allowed by the statute (The Code, sec. 416, par. 3), to waive a trial by jury.

Thereupon three issues were settled, and the court, having heard and considered the evidence, responded formally to each, without stating a summary of the facts found or stating them in detail, and upon its findings gave judgment directing an account to be taken, etc., from which the defendant appealed.

C. H. Armfield and W. N. Scales for plaintiffs.

J. W. Hinsdale, R. H. Battle and G. N. Folk for defendant.

MERRIMON, J. This procedure was not regular, but sufficient, in the absence of objection, to serve the purposes of the action. Regularly, the court should have heard the evidence and given its decision in writing, which should have contained a statement of the facts found and the conclusions of law—the facts and conclusions of law stated separately—and judgment upon this decision should have been entered accordingly, as were the findings. The Code, sec. 417.

(482) But no exception was taken to the findings of fact or law or the judgment, as specially provided and allowed in such cases by the statute (The Code, sec. 418), or at all, and there is no assignment of error in terms or by reasonable implication, from anything that appears in the record.

The judgment must therefore be affirmed. To the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court.

Affirmed.

WINGO, ELLIOTT & CRUMP v. WATSON & HOOPER.

Arrest and Bail—Res Adjudicata—Trial by Jury—Insolvent Debtors.

1. A motion to vacate an order of arrest, having been once heard and refused, is *res adjudicata.*
2. A party, under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised.
3. If an order of arrest has not been vacated, the party in custody may seek his discharge in the manner provided for insolvent debtors. The Code, Vol. II, ch. 27.

(*Roulhac v. Brown*, 87 N. C., 1; *Pasour v. Lineberger*, 90 N. C., 159, and *Claflin v. Underwood*, 75 N. C., 485, cited.)

CIVIL ACTION, tried before *Montgomery, J.*, at Fall Term, 1887, of JACKSON.

The plaintiffs in their complaint allege, in substance, that in March, 1886, they sold and delivered to the defendants goods amounting to the sum of $475.19, which the defendants promised to pay, and that no part of it has been paid.

After the summons was issued, upon an affidavit, charging that defendants had disposed of their property with intent to (483) defraud their creditors, the plaintiffs obtained an order of arrest.

A motion to *vacate* and set aside this order, heard upon affidavits before Avery, J., at Fall Term, 1886, was disallowed, from which no appeal was taken.

The defendant Hooper, in answer to the complaint, says, in substance, that he, with the other defendant, J. W. Watson, did purchase goods from one C. E. Lee, who professed to be agent for the plaintiffs' firm, and that payment therefor has not been made.

He then, in his answer, alleges in substance, that the plaintiffs "have caused an attachment to issue and an order of arrest to be sued out," upon which he has been arrested and held to bail, upon the charge of having concealed and disposed of his property, with intent to defraud, etc.; the said charge is not true, and that by reason of the said false charge he has been restrained of his liberty and his credit broken and impaired, to his damage $2,000, for which he asks judgment, by way of counterclaim.

To so much of the answer as alleged a defense by way of counterclaim the plaintiffs demurred, and upon trial before Montgomery, J., at Fall Term, 1887, the demurrer was sustained. There was no exception to the judgment sustaining the demurrer, and no appeal therefrom.

Upon calling the case before Montgomery, J., the defendant moved, upon the same affidavits and for the same reasons, as before Avery, J., to vacate the order of arrest, which was refused, and the defendant excepted. The defendant then asked the court for an issue to be submitted to the jury upon the allegations in plaintiffs' affidavits and denied in defendant's affidavit, which was also refused, and the defendant excepted. Defendant then consented that plaintiff might take judgment. Appeal by the defendant.

(484) *No counsel for plaintiffs.*
G. S. Ferguson for defendant.

DAVIS, J., after stating the facts: Two questions are presented for our consideration:

1. The refusal to vacate the order of arrest; and,

2. The refusal to submit the issue of fraud, raised by the allegation in the plaintiffs' affidavits and denied in the defendant's affidavits, to the jury.

Both questions have been judicially settled, adversely to the appellant.

In *Roulhac v. Brown,* 87 N. C., 1, it was held, in a case similar to this, that the judge properly declined to entertain a motion to vacate an order of arrest, when the same motion had been made at the previous term and refused. *Ashe, J.,* said: "The decision upon the first motion was made by a court of competent jurisdiction, upon a substantial right, was reviewable by appeal, but no appeal was taken, and must therefore govern this case as *res adjudicata";* and it governs this also. Upon the first question we need only refer to the foregoing case and the authorities there cited.

Upon the second question the case of *Pasour v. Lineberger,* 90 N. C., 159, and the authorities there cited, are equally conclusive.

The defendant submitted his motion to the court upon affidavits, and it was competent for the court to pass upon and find the facts and allow or refuse the motion, as the facts required. "It is not contemplated that *questions* of fact arising in such matters shall be tried by a jury."

Counsel for the defendant relied upon *Claflin & Co. v. Underwood,* 75 N. C., 485.

In that case the complaint contained specific allegations of fraud, which were denied in the defendant's answer, and when the judgment was entered, it was in these words: "By consent, judgment for the debt only; issues of fraud not tried"; and upon this judgment it was
(485) held that the defendant was entitled to his discharge from arrest. That is unlike the case before us. Under the old prac-

tice, defendants (with certain exceptions) were required to give bail for their appearance to answer, etc., and if unable to give bail, they could only procure their discharge by filing an accurate schedule of their property, and, in the language of the times, "swearing out."

Under The Code, we think parties arrested and in custody, in pursuance of the provisions contained in section 290 *et seq.*, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in chapter 27, sec. 2942 *et seq.*, of The Code. That chapter provides, in detail, the method by which every insolvent debtor may "be exempt from arrest or imprisonment, on account of any judgment previously rendered, or of any debts previously contracted"; and the suggestion that if the motion to vacate the order of arrest, when once passed upon and disallowed, is final, the defendant may be improperly and unjustly deprived of his liberty, is fully met by the provisions of that chapter, and "every person taken or charged on any order of arrest for default of bail, or on surrender of bail, in any action, and every person taken or charged in execution of arrest for any debt or damage rendered in any action whatever," may procure his discharge by a compliance with the requirements of that chapter.

Affirmed.

Cited: Patton v. Gash, 99 N. C., 285; *Ashby v. Page,* 108 N. C., 9; *Baker v. Garris, ibid.,* 226; *Herndon v. Insurance Co., ibid.,* 650; *Preiss v. Cohen,* 117 N. C., 58; *Ledford v. Emerson,* 143 N. C., 534.

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(486)

M. H. RHYNE v. R. C. G. LOVE.

Appeal—Exceptions—Partnership—Reference—Settlement—Account.

1. The Supreme Court will review only the exceptions to the rulings of the trial court upon matters of law arising upon a referee's report.

2. Where, in an action for the settlement of a partnership, the defendant pleaded settlement and statute of limitations, but on the trial of those issues the court intimated an opinion that the evidence offered by defendant did not sustain the pleas, whereupon, by consent, a mistrial was had and a reference ordered "to take an account of all the partnership transactions" between the parties: *Held,* that it was the duty of the referee to inquire into all the matters connected with the partnership and correct any errors which may have been made, in any particular.

3. Where the books of the firm showed frequent statements of account and entries of settlement, from time to time, and there was evidence of a

partial division of assets, but there had been no final accounting: *Held*, that there was not such settlement as constituted a bar to a revision of the accounts.

(*Lynch v. Bitting*, 6 Jones Eq., 238; *Bank v. Mfg. Co.*, 96 N. C., 298, cited.)

THIS is a civil action, which was tried before *Montgomery, J.*, upon exceptions to referee's report, at Spring Term, 1887, of the Superior Court of GASTON.

The action is by one partner against the other for an account and settlement of the firm business, which, in general merchandise, commenced in the Spring of 1871 and terminated early in February, 1874, and in the ginning and pressing of cotton, afterwards superadded, which was dissolved in the summer of 1877.

The complaint alleges that the defendant was the active member during the existence of the partnership, and that he undertook to close up the affairs of the firm, and took all its effects into his possession, which are specifically mentioned.

(487) The defendant, in his answer, does not controvert the general averments in the complaint, but sets up as a defense to the action, "a full and complete settlement of their individual accounts with said partnership and with each other" of the mercantile business, except some small accounts left in defendant's hands to collect, made on 27 May, 1874; and he further alleges, that afterwards, on 25 January, 1878, a full and final settlement took place of the entire business, "both individual and on account of the partnership," except as to a claim preferred by the plaintiff for a difference in value of the parts "of some cotton-gin machinery, buildings and machinery," which had passed into the possession of each.

The defendant further relies upon the lapse of time, more than three years thereafter before the commencement of the action, as a bar to a recovery therein.

At Spring Term, 1883, of the Superior Court of Gaston, a jury was empaneled to try the issue raised in the pleadings (in what form the record does not show, if any were drawn up), and the defendant having given in his testimony, the court intimated an opinion that if it be accepted as correct, an instruction will be given to the jury that there had been no settlement of either of the partnership matters and it was then agreed by defendant's counsel, in deference to what was said by the court, that a juror might be withdrawn and the case referred. Thereupon, an order of reference, without objection, was entered, in these words: "It is therefore considered by the court that this cause be and the same is hereby referred to W. A. Hoke, Esq., to take an account of the partnership transactions between M. H. Rhyne and R. C. G. Love:

1. In the first place, that he take an account of all the partnership transactions between them as partners in the mercantile business.

2. In the second place, of all the partnership transactions and partnership accounts existing between them in the ginning (488) business.

And it is further ordered by the court, that said referee report all the facts connected with the foregoing partnership, and the testimony therein taken, and his conclusions of law thereon, to the next term of this Court."

The referee made his report accordingly, with his findings of fact and conclusions of law drawn from them, as follows:

1. The firm of Rhyne & Love was composed of plaintiff, M. H. Rhyne, and defendant, R. G. C. Love, and was organized in January, 1871, with a capital of about $2,600, each owning one-half interest therein. The defendant, Love, was the active partner of the firm, kept the books, and had the general management of the business.

The firm did a general merchandise business, and also erected and conducted a cotton-gin and press in the summer of 1873.

2. The mercantile business was dissolved on or about 12 February, 1874, from which date the mercantile business was continued and carried on by a new firm, styled Love & Rhyne, in which the plaintiff in this cause had no interest.

3. The ginning business of Rhyne & Love was carried on from its commencement in 1873, till August, 1877. There are no entries, exhibits or data from which a separate account of the operations of the ginning business can be made, and only the final division of the property used in said business has been or can be given.

No final or complete settlement was ever had or made between the parties, though the individual accounts of the partners, plaintiff and defendant, were marked in the ledger of the firm as settled, at several different times, as shown in account of plaintiff, Rhyne (ledger, pages 2, 119 and 229), and account of defendant (pages ledger, 78 and 217). These entries were made by defendant more for information as to how the parties stood, and were not, nor intended to be, final and complete settlement and adjustment of the partnership business. (489)

4. After the dissolution of the mercantile business in February, 1874, the assets of the old firm, consisting of cotton, peas, etc., together with the books and accounts, were left in the hands of the defendant for the purpose of winding up the business. The interest in the ginning business was stopped soon afterwards. There was a division of the property connected with and used in the ginning business. The gin, a belt and pair of scales were taken by plaintiff, and were worth $125.

The rest of the gin machinery was taken by defendant, consisting of a water-wheel, screw, shaft, gin-house, etc., and were worth $420.

There was no positive agreement made between the parties as to the division of the ginning property. A proposition to divide was made by plaintiff after the ginning was stopped, but was not accepted by the defendant at the time, and no notice of such acceptance was received by plaintiff. Some time after the proposition was made, plaintiff heard that defendant had moved most of the gin property away and left the gin for himself, and plaintiff then moved the gin away and the other property with which he is charged.

5. There are a good many mistakes and errors in the accounts of both plaintiff and defendant, as shown by an examination of their books, both for and against each of the parties, as follows:

There are errors in plaintiffs accounts with the firm, and in his favor, to the amount of $126.87.

There are also errors in account of the defendant with the firm, and same make a balance against defendant to amount of $812.55.

6. Since the dissolution of the mercantile firm the defendant has collected and received amounts which were due the firm, and constituted part of the firm assets, and for which he has rendered no account, aggregating, with interest, $1,270.16.

(490) 7. That the amount of gin property taken by plaintiff, and for which he is still accountable, is, including interest, $178.75. And the amount so taken by defendant, and for which defendant is still liable, inclusive of interest, is $600.60.

8. That with the exceptions above pointed out, the assets of the firm have been accounted for between the parties, and the defendant, in winding up the firm assets, collected and disbursed, as near as can be ascertained, the sum of $5,402.87.

9. A large amount of testimony was taken in reference to damage to plaintiff's land by ponding water; ..... amount of damages to defendant by delay of the plaintiff in removal of his crop.

This evidence is considered irrelevant to the issue between the parties, and not within the scope and purpose of the reference, and has not been passed upon.

Upon the foregoing facts I find, as conclusions of law:

1. That no final settlement of the partnership account has been made, and the parties are liable to account. *Lynch v. Bitting,* 6 Jones Eq., 238.

2. That no settlement or adjustment of the gin property has been had, and the parties are liable to account for the amount received by each.

3. That plaintiff is chargeable with errors heretofore made.

4. That defendant is chargeable with errors heretofore made in his favor, inclusive of interest thereon from the dissolution of the firm.

5. That defendant is chargeable with amount collected by him since the dissolution of the firm, and unaccounted for, with interest thereon from the time same were collected.

6. That each party is chargeable with, and should account for the value, of gin property received by each, with interest on same.

6(*a*). That defendant is entitled to commissions on amounts (491) collected and disbursed by him since the dissolution of the firm, and 2½ per cent, amount charged, is not excessive; also, interest on same from time of service rendered.

7. Defendant is indebted to plaintiff on balance of account in the sum of $1,078.88, with interest thereon from 1 November, 1884.

In the exhibits there are errors pointed out and corrected in the separate accounts of the partners, and the balance, with interest on that of the plaintiff, put at $305.62, and on that of defendant at $2,463.38, due the firm, leaving to be paid by the latter to the former, in order to an equal final settlement, the sum of $1,078.88.

Upon a re-reference, and after argument, a second report was made, reaffirming the first, and to them were numerous exceptions, taken by defendant, all of which were overruled, the report confirmed, and from the judgment rendered in favor of the plaintiff, the defendant appealed.

R. W. Sandifer for plaintiff.
C. W. Tillett for defendant.

SMITH, C. J., after stating the case: The record, like many others brought up for a review of rulings of the Court, in one of which, *Bank v. The Law. Man. Co.,* 96 N. C., 298, we took occasion to state the proper practice in cases of appeal, when the exceptions were solely to the referee's report, shows no *exceptions to the rulings of the Court,* which alone, upon matters of law, can be reviewed on appeal.

Of these exceptions, such as relate to the referee's findings of fact, are conclusively disposed of by the judge in the court below, and are not cognizable here; and this included alleged errors in specific items mentioned.

The essential matters of complaint, and to which the reviewable exceptions have reference, are:

1. That the referee did not regard the alleged settlements as final and conclusive up to their respective dates, and undertook, (492) in the absence of any charge of falsification or omissions of items, to go behind them for correction and reformation.

2. That he did not find that the parties, by an agreement, divided the partnership property of the ginning business themselves, and adjusted it; and

3. That he did not report that more than three years having elapsed since such alleged settlements, the action was barred by the statute of limitations.

The disposition of these exceptions, as understood by us, will dispose of the appeal.

These settlements were relied on in the answer as a full and complete defense to the action, and this was the subject of inquiry before the jury, when, upon an expression of opinion from the judge that the defendant's own evidence did not sustain the defense, the jury were discharged without rendering a verdict, and the reference by consent was made the scope of which embraces the full account of both partnerships. It was therefore the duty of the referee to inquire into all the matters connected with them, and, accepting what had passed between the parties when examining their individual accounts, as prima facie evidence of the correctness of the results reached, to correct any errors which might be detected in either. These were not settlements in truth, but simply statements of the condition of the accounts at the respective dates. The entry is in one case: "Settled in full 27 May, 1874," and yet this was but a construction put upon the calling over items and an assent to them as correct.

Had a witness been present and testified to what occurred, it would have been quite as effectual to bar an inquiry into the accuracy and completeness of the account as is the entry upon the book, but in neither case does such a consequence follow. It is simply evidence open to correction of errors, if any exist.

(493) The complaint could not "surcharge and falsify," for it proceeds upon the idea that both partnerships were open and unadjusted, and does not recognize a settlement of either. This is a defense set up in the answer, and calling for proof in its support as such, without requiring a replication from the plaintiff.

Moreover, its insufficiency is admitted in the consent reference under its broad, comprehensive terms.

There is therefore no error in the action of the referee in this particular, and in holding that there is no statutory bar to the action, which is dependent upon the alleged settlement as to the time when it is put in motion.

The case of *Lynch v. Bitting,* 6 Jones Eq., 238, sustains the referee in his ruling, that what occurred in summing up results was not of such a conclusive nature as to bar an account wherein *Manly, J.,* says:

"There has been an occasional calculation of interest and summing up of results, as they appeared upon the books of the partnership, and a division of profit balances; but inasmuch as there has been no *final* account at any time stated between them, our inference is, that none of the transactions referred to were considered conclusive, *even as to the matters embraced, but were stages in their books to guide them in partial settlements.*"

The referee finds, and is sustained by the court in the finding, that of the ginning property, the gin, a belt and pair of scales, worth $125, went into possession of the plaintiff, and the rest of the gin machinery, of the value of $420, was taken by the defendant and appropriated to his own use, and this without any agreement that this partition was to be a settlement. They are accordingly charged with these respective values.

Upon a careful examination of the case we discover no error (494) subject to correction here, if requiring it, and the judgment must be, and is, affirmed.

Affirmed.

Cited: Howerton v. Sexton, 104 N. C., 83; *Nissen v. Mining Co., ibid.,* 310; *Miller v. Cox,* 133 N. C., 579; *Baker v. Brown,* 151 N. C., 16; *Battle v. Mercer,* 187 N. C., 449.

W. J. WALLACE v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Negligence—Evidence.

1. Where the facts are ascertained, what is contributory negligence is a question for the court; where they are disputed, it is the duty of the court to explain the law and direct the jury to apply it to the facts.

2. A person who takes passage on a freight train, knowing the risks and inconveniences incidental thereto, is bound to exercise more care with respect to his own safety and comfort than is required of him upon ordinary passenger trains.

3. Where the plaintiff was a passenger on a freight train, riding in a "caboose," there being seats provided for him, was thrown down and received injuries by the sudden starting or jerking of the train: *Held,* to be some evidence of contributory negligence, which ought to have been submitted to the jury.

(*Smith v. R. R.*, 64 N. C., 235, cited.)

CIVIL ACTION, tried before *MacRae, J.*, at Spring Term, 1887, of McDOWELL.

In November, 1885, the plaintiff was a passenger on a freight train of the defendant company, going from the town of Old Fort to the town of Marion, and he alleges, substantially, that for want of due care and attention, the locomotive to which the train was attached was overloaded, causing it to "stall," and by the careless, unskillful and negligent management of the servants and agents of the defendant company, it was driven with such terrible force against the cars of the defendant (495) as to cause the car in which the plaintiff was, to be jerked and jarred with such force as to violently throw him down within said car, whereby he was greatly cut, bruised and wounded, and had his leg badly fractured and broken, etc.; and for his said injuries he claims $8,000 damages.

The defendant company answers, denying the material allegations of the complaint, and for a further defense, says plaintiff by his own negligent conduct contributed to his injury; that he was a passenger on a second-class car, on a freight train, and knew it was not as safe and comfortable, or as easily managed and controlled as a passenger train, and consented to the ordinary risk incident thereto, such as sudden jerks and starts or stops, etc.; that he knew the inconveniences of the seats and their condition, and assumed such risks as necessarily grow out of such appurtenances, and was bound to exercise more than ordinary care for his own safety, and that he failed to care for himself as he ought under the circumstances.

There was evidence on behalf of the plaintiff tending to show that the train was behind time and overloaded; that at an up-grade it stalled and stopped; that attached to the train was a caboose for passengers, with seats running along the sides—one bench on each side; that a passenger in the caboose named Clinard, with his arm in a sling, had a coat and bottle of liniment, which upon a sudden jerk of the car had fallen to the floor, and the plaintiff had picked it up, and was standing; that the train had jerked a number of times, and by a sudden and severe jerk—"crash," one of the witnesses termed it—the plaintiff was thrown to the floor, and had a bone of the thigh broken.

It was also in evidence that the plaintiff knew that it was a freight train; had lived on the line of the road; had seen long freight trains, and "the engineers starting them"; that there was plenty of room to sit down, and the plaintiff was near a seat, and that the other pas- (496) sengers were seated. One of them, W. H. Murphy, a witness for the plaintiff, testified that "the train had stalled and jerked several times; he kept his seat; was afraid of their running back to get a start, and knew they were pretty rough about starting."

There was also evidence as to the nature and extent of plaintiff's injury, and of want of proper care and attention on the part of the conductor.

There was evidence on behalf of the defendant tending to show that the conductor and engineer were careful and skillful; that the engine was in perfect order; that there were no defective cars, and that the hands were competent, prudent and reliable; the track was in good order, but wet, and that the "stall" resulted from a wet rail; that the engine was not overloaded, and that "the running back of a car, and slipping and jerking in running of freight trains is not unusual—it happens every day"; that there is a difference in the coupling of freight trains from that of passenger trains that causes the difference in the jerking; on the freight trains there is a "space or slack" of six or eight inches between each car; the advantage of this is "that if it is all tight, you have the full weight of the train at the start, with the slack you get the engine in motion before you get the full weight of the train."

The evidence is set out in full, and sent up with the record, but in the view we take of the case, it is not necessary to state it fully here.

The following issues were submitted, without objection:

1. Was the plaintiff injured by the neglect of the defendant, as alleged in the complaint?

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

3. What damage has plaintiff sutained?

The defendant asked the court to charge the jury:

1. That a passenger on a freight train accepts it, and takes it, and travels on it, acquiescing in the usual incidents and conduct of a freight train, if managed by prudent, competent men; (497)

2. That in the movements of freight trains, the jerking is inevitable, and is not ascribable to negligence or want of skill or improper management on the part of the agents of the company;

3. That it is not to be expected a company will provide its freight trains with all the conveniences and safeguards against danger that are required in the operation of passenger trains;

4. It is the duty of a passenger in a train to take ordinary care of himself. If danger is apparent, or expected, he is to see and know it;

5. It is usual and proper for a passenger to remain in his seat, and especially so on freight trains, when he has reason to believe there is danger in any other position than being seated;

6. That there is no evidence that the engine or locomotive was overloaded;

7. That there is no evidence of careless management of the locomotive or cars on the part of agents of defendant on this occasion;

8. That in review of, and in the light of the evidence in this case, the injury was an accident, and not the result of negligence.

The jury found the issues in favor of the plaintiff, and from the judgment thereon the defendant appealed.

The defendant assigned as errors:

1. The refusal of his Honor to charge as requested; and

2. That his Honor erred in instructing the jury that there was no evidence of contributory negligence on the part of the plaintiff, and that they must respond to the second issue, "No."

(498) *P. J. Sinclair and W. H. Malone for plaintiff.*
D. Schenck and C. M. Busbee for defendant.

DAVIS, J., after stating the case: The charge of his Honor is set out in full, but as we think there was error in instructing the jury that there was no evidence of contributory negligence, it is not necessary for us to consider how far the prayer for instructions, though not given in the form requested, was substantially met by the charge as given, or whether the charge did not cover the instructions asked for to the full extent to which the defendant was entitled; and we may say that the defendant was not entitled to the sixth, seventh, and eighth instructions at all.

In *Smith v. R. R.*, 64 N. C., 235, it is said: "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court. When the facts are in dispute, the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts, as they find them." The same rule applies to negligence and to contributory negligence. If there is *any evidence* from which the jury may find facts constituting contributory negligence, it should go to the jury.

Was there any evidence tending to show contributory negligence in this case?

We think there was.

A "caboose" attached to a freight train does not furnish all the appliances and conveniences for the safety and comfort of passengers that are provided for passenger trains, and while it is the duty of the company carrying passengers on such a train to exercise every reasonable care, and take every precaution against injury or danger to the life of such passengers, which the appliances for that mode of transportation will admit of, it is also the duty of the passenger who travels on such a train with a full knowledge of the increased risk incidental
(499) thereto, to be correspondingly careful in guarding against injury, by reason of the risk incidental to such a mode of travel.

An act may be negligent or not, according to the attendant circumstances. An act on a regular passenger train, with air brakes and other appliances to secure smooth and comfortable, as well as safer travel, may not be at all negligent in the passenger, while the same act in a "caboose" attached to a freight train might be careless and negligent. It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of jar and jerk incident to the starting and stopping of trains, and it is in evidence in this case that such jars and jerks are much greater on freight trains, and necessarily so, by reason of their character. The passenger on such a train assumes the ordinary risk and discomfort incident thereto, and if the train is managed with such care and prudence, by skillful and competent employees, as to subject him only to the discomfort and risk thus incident, the company would not be liable for any *accident* resulting therefrom, by reason of the failure of the passenger to show usual and ordinary precaution. There is evidence tending to show that the plaintiff did not do this. It is in evidence that the jerks and jars incident to the freight train were known to him; that on this occasion the train was a long one, and the locomotive was moving it with difficulty, and there had been frequent jerks, more or less severe, and such as seem to have suggested to other passengers the propriety of retaining their seats, for one of the plaintiff's witnesses testified that "he kept his seat," knowing "that they were pretty rough about starting."

It was in evidence that there were seats for all the passengers, and the fact that others in the "caboose" kept their seats, and none of them were hurt, constitute some evidence tending to show that it was careless and negligent in the plaintiff, under the circumstances, to be standing. We think there was error in withholding from the jury the second issue, and the defendant is entitled to a new trial. (500)

Error.

Cited: Smith v. R. R., 99 N. C., 245; *Wallace v. R. R.*, 101 N. C., 458; *S. c.*, 104 N. C., 449; *Emry v. R. R.*, 109 N. C., 592; *Miller v. R. R.*, 128 N. C., 27; *Graves v. R. R.*, 136 N. C., 4; *Marable v. R. R.*, 142 N. C., 564.

STATE OF NORTH CAROLINA, ON RELATION OF J. A. DAVENPORT, TREASURER OF GASTON COUNTY, v. G. W. MCKEE ET AL.

New Trial in Supreme Court—Evidence—Depositions—Abatement—Judgment—Penalty—Official Bonds—Interest.

1. The jurisdiction of the Supreme Court to grant new trials is confined to those cases where the motion is based upon the discovery of new and material evidence, and does not extend to those cases where irregularities or misconduct of the parties or jurors is charged.
2. The record of settlements made by the persons authorized to audit the accounts of sheriffs and other county officers, under ch. 177, Laws 1881, and ch. 137, Laws 1887, is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of the statement therein made.
3. Where the adverse party had notice of the taking of a deposition long enough before the trial to allow him to file any objections, it will not, after the trial has commenced, be quashed for irregularity in the manner of taking.
4. If the relator in an action brought by the State upon an official bond dies or goes out of office the action does not abate.
5. It is not erroneous, in an action against the sureties upon several bonds of a public officer, to enter judgment against the defendants for the penalties of their respective bonds.
6. The penalty of $2,500 imposed upon sheriffs and tax collectors for failure to settle with the county treasurer does not bear interest.

(*Devereux v. Burgwyn*, 11 Ired., 490; *Katzenstein v. R. R.*, 78 N. C., 286; *Barnhardt v. Smith*, 86 N. C., 473; *Bridgers v. Bridgers*, 69 N. C., 451; *Sparrow v. Blount*, 90 N. C., 514; *Johnson v. Patterson*, 2 Hawks, 183; *Badger v. Daniel*, 79 N. C., 372; *S. v. Voight*, 90 N. C., 741, and *S. v. Starnes*, 94 N. C., 973, cited.)

(501) THIS action was begun in the county of Gaston and removed to CLEVELAND, where it was tried before *MacRae, J.*, at Fall Term, 1887, of the Superior Court.

The defendant was sheriff of Gaston County for the term of two years, beginning on 6 December, 1880, and ending on the 4th day of the same month in 1882. During this period he gave three bonds, one of twelve thousand dollars on the day of his entering into office, a second on 3 September, 1881, of seventeen thousand dollars, the last on 23 September, 1882, of thirteen thousand dollars, all payable to the State, and with a condition in each to account for and pay over the county taxes as required by law; and the other defendants are the sureties to one or other of said bonds. These are annexed to the complaint as exhibits, and form part of it. The relator, who, at the time of bringing the

action on 23 August, 1883, was the county treasurer, alleges that an account and settlement was had on 14 July, 1883, between them of the county taxes of 1882, when it was found he was indebted in the sum of $2,216.14, and this he has refused to pay, whereby, in addition thereto, he has incurred the penalty of $2,500, imposed by the statute. By an amendment afterwards allowed the sheriff is charged with interest, at the rate of two per cent a month on all unpaid indebtedness.

Judgment is demanded for the penal sums of the several bonds against the sheriff and the sureties to them, respectively, to be discharged on payment of said sums of $2,216.14, the measure of his official delinquency in the payment of taxes due the county and the said penalty of $2,500 thereby incurred.

The defendants who were served with process, answering, deny that there was any accounting on 14 July, 1883, and say that the sum mentioned in the complaint as a debit is correct, but that the sheriff claimed a further credit of seventeen hundred dollars, for which he produced the relator's receipt for moneys paid him, and which he refused to allow in the reduction of the sum so demanded, and the differ- (502) ence, to wit, five hundred and sixteen dollars and fourteen cents is due, to the entering of judgment, for which, with interest since 14 July, 1883, no objection is made.

After many continuances, and the setting aside a verdict rendered for the defendants on a previous trial, the cause again came on to be tried at August Term, 1887, as before, upon a single issue, as follows:

"Did the defendant, G. W. McKee, as sheriff of Gaston County, pay to the plaintiff, J. A. Davenport, treasurer of said county, seventeen hundred dollars as set forth in the answer, and is he entitled to credit therefor?"

The jury responded "No."

Thereupon, after a motion for a new trial and then in arrest of judgment, made and denied, judgment was entered against the defendant, which, omitting the recital of the action of the jury, proceeds in these words: "It is now, on motion, adjudged that the plaintiff recover of the defendant, G. W. McKee, and the other sureties to the first bond seventeen thousand dollars, the penal sum mentioned in their bond, as set out in the complaint, and of the defendant, G. W. McKee, as principal, and the others, sureties, the sum of twelve thousand dollars, the penal sum mentioned in their bond, as set out in the complaint, and of the defendant, G. W. McKee, as principal, and the others, sureties, the sum of thirteen thousand dollars, the penal sum of their bond, as set out in the complaint (separately designating by name the sureties to the respective bonds), all of which are to be discharged upon the payment to the plaintiff of the sum of $2,216.14 with interest on the

same from 14 July, 1883, at two per cent per month and the further sum of $2,500, the penalty prescribed by law and demanded in the complaint, with interest thereon from 14 July, 1883, until paid, together with the costs of this action, to be taxed by the clerk of this court."

(503) From the rulings upon the trial and from the final judgment the defendants appealed.

J. B. Batchelor, John Devereux, P. D. Walker and C. W. Tillett for plaintiff.

R. W. Sandifer, W. P. Bynum and J. F. Hoke for defendants.

SMITH, C. J., after stating the case: Upon the hearing in this Court and preliminary to entering upon the merits, the defendant asked for a new trial upon evidence discovered since the transfer of the cause to this Court by the appeal, and when by the adjournment of the Superior Court it had passed out of its jurisdiction, so that no relief could there be obtained. The application is based upon the alleged misconduct of a juror in swearing that he had formed and expressed no opinion adverse to the defendants, when soon after the former trial, which the juror had heard, he declared that if he had been on the jury he would have hung it until doomsday, and would have rendered a verdict for the plaintiff, or words to that effect.

This is alleged by the defendant G. W. McKee, in his affidavit, made on information and belief, and the other affidavit was made upon a knowledge of what the juror said in reference to the previous trial, and it is to the effect that he was present at it, and if a juror he would have been in favor of the plaintiff; that the conduct of the sheriff in not bringing up the $1,700 receipt on the first settlement showed fraud.

We should not be at liberty to act upon such *ex parte* evidence and vacate a judgment rendered without notice to the appellee, if any sufficient grounds had been given to warrant such action in a court having a discretion in the matter, but we know of no precedent for such interference upon the facts set out, if they were even stronger, for the

(504) only case in which a new trial will be granted in this Court is the discovery of such new evidence as was proper to be heard by the jury, a judge, or a referee, in passing upon and finding the facts, and not for irregularities occurring in the trial, and for which the judge, in his discretion, may set aside the verdict or finding and reopen the case. And the circumstances must be stringent to annul what has been judicially done and deprive the successful party of the fruits of the adjudication. It is more than questionable whether the application, if made in the Superior Court before removal, would have been allowed, as there was a challenge to the juror made for favor, and

upon it the court decided the fact against the challenger, and it is therefore a case of *res adjudicata.* But however this may be, the application, as that made in *S. v. Starnes,* 94 N. C., 973, has no support in the law and practice in this Court as a Court for the correction of errors, and is without any precedent in its support.

The allegations in the complaint are none of them controverted, except in so far as it denies and repudiates the alleged payment of $1,700 mentioned in the receipt, and this was the only matter in contention between the parties. The receipt was in this form:

"Received of George W. McKee, sheriff, ($1,700) seventeen hundred dollars of the general county fund for this year, 1882.

"This, 4 December, 1882. J. A. DAVENPORT,
"County Treasurer."

"Witness: R. W. QUERY."

In the progress of the trial one John F. Luper, the register of deeds of Gaston County, stated, in answer to an inquiry as to the amount of the tax-list put in the sheriff's hands in 1882, that, not including the school tax, the county tax was $6,041.20¾.

To ascertain the amount the witness read from the book of (505) official reports of the county the record of settlement which, he said, was made with the sheriff by the finance committee on 15 March, 1883.

The defendants' counsel objected, on the ground that this was not the best evidence, the tax-list being primary.

The defendant McKee being shown to have been present at the settlement, the evidence was received, and defendants excepted.

The evidence was competent, under the authority of the case of *S. v. Voight,* 90 N. C., 741, and the record of such settlement is, by the express terms of the statute, made "prima facie evidence of their correctness, and impeachable only for fraud or special error." Acts of 1881, ch. 117, sec. 46, and Acts of 1887, ch. 137, sec. 132.

But if it were otherwise, the presence and concurring agency of the sheriff in making the settlement would render it competent against him and his sureties as well. The Code, sec. 1345; *Badger v. Daniel,* 79 N. C., 372.

We do not interpret the case to be that the evidence lies in the oral statement by the witness of the contents of the record, but the record is before the court, and, as such, is read for information.

Aside from this, we do not see the pertinency of the evidence to the matter in controversy, which is not as to the amount of county taxes due on the delivered list of 1882, but whether upon the admitted balance the sheriff shall have a further credit upon the receipt.

The next exception is to the admission of proof of a declaration made by the plaintiff to a witness under these circumstances: One Kiser, chairman of the board of county commissioners, testified that on 3 January, 1883, the plaintiff reported that he had received from the sheriff only $500 of the county fund; and further, that in the sheriff's absence the plaintiff was asked if this was all he had received,
(506) and he answered that it was all received on the county fund. This latter declaration, made in the absence of McKee, was objected to, but the testimony was admitted as corroboration of the statement before made by the plaintiff in his examination as a witness without objection. The defendant excepted.

The testimony of confirmatory statement, as sustaining what the witness swears to on the trial, has been admitted to support his credit, when and however impeached, by a series of decisions which establish the law. The cases to this effect are numerous and the rulings uniform, from *Johnson v. Pattison,* 2 Hawks, 183, to the present time.

The defendants except also to the reading in evidence the deposition of one M. J. Nelson, taken at Danville, Virginia, then her place of residence, under a commission, on 22 April, 1885. The witness was shown to have been living in the county of Mecklenburg at the time of the court next preceding the trial, from which place she had removed to Winston, a place more than seventy-five miles distant from the place of trial, and had been summoned on 11 July, 1887, to be present as a witness for the plaintiff.

Upon this evidence as to the residence of the witness being more than seventy-five miles distant, the deposition was received and read.

It was pressed with great earnestness in the argument for the appellants that it was not shown that the statutory requirements had been observed necessary to the admission of the deposition, and that this was an essential condition of its admissibility.

The witness had been summoned, and by the adjudication, he was more than seventy-five miles distant from the place of trial, and this latter is the only ruling upon the preliminary inquiry, and seems to have been the ground of objection to the competency of the deposition made by a resident of the State. The additional qualification of a service of a summons upon such a witness was not in the enact-
(507) ment when the case of *Sparrow v. Blount,* 90 N. C., 514, was decided, but is found in The Code, sec. 1358, par. 9.

While the form of the objection is general, it immediately follows the ruling as to the distance, and a fair construction of the record would confine the exception to the reading of the deposition upon this particular point, for in case of other grounds, if alleged, the plaintiff may have been able to remove them also.

"Nor ought he, the judge, to have rejected it (the evidence), although objected to by the defendant, unless the objection was put upon the proper ground." *Reade, J.*, in *Bridgers v. Bridgers,* 69 N. C., 451.

But a full answer to the alleged erroneous ruling is made in sections 1360 and 1361 of The Code, the first of which declares that "no deposition shall be quashed or rejected on objection first made after trial began, because of an irregularity in taking the same, provided it shall appear that the party had notice that it had been taken and it was on file long enough before the trial to enable him to present his objections." The other section provides how, before the trial, the party may proceed to have the deposition rejected, and it is required that the exceptions shall be in writing. *Katzenstein v. R. R.,* 78 N. C., 286; *Barnhardt v. Smith,* 86 N. C., 473.

It is no answer to the statute to say that it was not known to the appellants before the trial that the deposition would be read, and hence the course pointed out was not pursued. The evidence was taken in April, 1885, and the cause was tried more than two years afterwards. It was in the clerk's office, and was competent to be read, under the circumstances existing at the time, and therefore it was the neglect of the defendant that no steps were taken for the quashing or the rejection, when and in the manner it could alone be done, and thus put the evidence out of the way.

After verdict, there being no complaint of the instructions given to the jury, the counsel for appellants insisted, and asked (508) the court so to adjudge, that the action had abated by reason of the going out of office of the treasurer, who brought the suit, and the induction of a successor in office while it was depending.

The action is brought by the State on bonds executed to it, and the relator is but an agent in seeking to recover the moneys due; and besides, a contingency of a transfer of interest pending a suit is provided for in section 188 of The Code, which declares how a cause may be continued, except a suit for penalties and vindictive damages, in case of the death, marriage, or other disability of a party, and that "in case of any other transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." The motion was properly refused.

The motion in arrest of judgment has no better ground to rest upon, nor the exception to the entering up of judgment, the only matter in dispute being disposed of by the verdict.

No error is assigned in the judgment, except that it includes the penalty. The bonds are liable under the statute for the amount of the

delinquency and the two per cent monthly interest and the penal sum demanded, and covering the same term of office, and with condition to account for and pay over the county taxes. The judgment was rendered as it should have been on each, leaving to the sureties the adjustment of their respective equities among themselves. But there is error in charging interest on the penalty, for as such it cannot be thus enlarged beyond its full amount. With this correction, the judgment below is affirmed. *Devereux v. Burgwin,* 11 Ired., 490.

Modified and affirmed.

Cited: Croom v. Sugg, 110 N. C., 260; *S. v. Ostwalt,* 118 N. C., 1219; *Williamson v. Jones,* 127 N. C., 180; *Willeford v. Bailey,* 132 N. C., 403; *Ivey v. Cotton Mills,* 143 N. C., 197; *Moseley v. Johnson,* 144 N. C., 275; *McMahan v. Spruce Co.,* 180 N. C., 642; *S. v. Gentry,* 183 N. C., 829.

(509)

WILLIAM RICHARDS AND WIFE ET AL. v. JOHN B. SMITH.

Action to Recover Land—Amendment—Parties—Evidence—Pleading.

1. In an action to recover land, if the complaint allege, generally, title and right of possession, the plaintiff, on the trial, may offer evidence of any title which may entitle him to recover; but if he set out his title specifically, *it seems* he will be required to prove it as alleged.
2. Unless with the consent of the parties, the pleadings cannot be so amended by the introduction of new parties or cause of action as to constitute a new or different action.
3. Where an amendment was allowed, without objection, by which new parties were made to the complaint, and subsequently the names of the original parties were stricken from the record, but no change was made in the allegations in the complaint: *Held,* that the action might be prosecuted to judgment in the name of the new parties, as if they had been original parties.

(*Kitchen v. Wilson,* 80 N. C., 191; *Johnson v. Pate,* 83 N. C., 110; *Fitzgerald v. Shelton,* 95 N. C., 519; *Clendenin v. Turner,* 96 N. C., 416, cited.)

THE following is so much of the case settled upon appeal as need be stated here:

"The action was brought and complaint filed in the name of William Richards and wife, Mary A., as plaintiffs, alleging that they are the owners in fee and entitled to the possession of the following lands in

Gaston County: One tract (describing it by metes and bounds), containing 200 acres and 73 poles; and another tract (describing it by metes and bounds), containing 14 acres, more or less.

"At a subsequent term of said court the complaint was amended as follows: 'Plaintiffs amending their complaint by leave of the court, made parties plaintiffs thereto of John B. Richards, George F. Richards, Sarah Summerow and her husband, H. M. Summerow, Eliza J. Richards, Fannie Rutledge and J. L. Rutledge, her husband, William Richards, an infant, by his next friend—William Richards, Sr.,' and no further amendment was ever made of the complaint.

During the argument the presiding judge intimated an opinion (510) that the plaintiffs who had come in by amendment could not recover in this action upon a claim adverse to their co-plaintiffs, and that the presence of the last made plaintiffs served only to complicate the case. Thereupon the plaintiffs' counsel entered a *nol. pros.* as to William and Mary Richards, the original plaintiffs.

The presiding judge then held that the remaining plaintiffs, the children of William and Mary Richards, not having set up in the complaint any title in themselves to either of the tracts described in the complaint, and only claiming now to recover, by possession under color of title, that portion of the land in dispute which lies north of the pine and lower persimmon, and *this* under a deed for a tract not named in the complaint, are not entitled to recover; that the defendant was entitled to be informed by the complaint of the plaintiffs' claim, and of any claim under the 67-acre deed; the complaint gave him no notice.

"Thereupon the plaintiffs, other than William Richards and Mary Richards, who had already entered a *nol. pros.*, submitted to a nonsuit and appealed to the Supreme Court."

W. P. Bynum for plaintiffs.
W. L. McCorkle for defendant.

MERRIMON, J. The complaint, as filed by the original parties plaintiff to the action, alleges in general terms, "that they are the owners in fee simple, and entitled to the immediate possession of the following land," describing specifically two tracts.

This allegation of title is ordinarily sufficiently definite, in an action to recover land, and when it is denied by the answer, thus raising an issue of fact, the plaintiff has the right to produce on the trial such pertinent and competent evidence as he can, to prove title in himself. *Kitchen v. Wilson,* 80 N. C., 191; *Johnson v. Pate,* 83 (511) N. C., 110; *Fitzgerald v. Shelton,* 95 N. C., 519.

If the plaintiff should allege title in him, derived in a specified way, it may be that he would be compelled to prove it substantially as alleged, unless he should, upon application to the court, be allowed to amend the complaint.

It seems, from the case settled on appeal, that the present plaintiffs were not properly made, or entitled to become such, because they were not necessary to a proper determination of the action or cause of action alleged, nor were they necessary in any sense to the completion of the action begun. Regularly, amendments as to the parties to the action and the cause of action can be made only for such purpose, and it would be error to allow such amendments otherwise, unless by consent of the parties; because, the effect of them is to change and make the action, or the cause of action, alleged in the complaint, practically a new one, and this the law does not contemplate. *Clendenin v. Turner,* 96 N. C., 416.

But the court allowed them to be made parties to the action and to the complaint as well as plaintiffs; they became such a certainty as if they had been originally named therein. By the amendment the complaint, in legal effect, alleged title in them and the original plaintiffs to the two tracts therein described; the language of it is, the "plaintiffs amending their complaint, by leave of the court made parties plaintiff thereto," etc.

The defendants did not object to the amendment, and the implication is, that they assented to the same and its legal effect. If they were not content, they should have said so and excepted. The parties to the action might, by consent, with the sanction of the court, change the character thereof to any action of which the court had jurisdiction. *Clendenin v. Turner, supra.*

(512) In the course of the trial the court "intimated an opinion that the plaintiffs who had come in by amendment could not recover in this action upon a claim adverse to their co-plaintiffs," for reasons assigned by it. To obviate the difficulty suggested, the case states, that "the plaintiffs' counsel entered a *nolle prosequi* as to William and Mary Richards, the original plaintiffs."

The terms *nolle prosequi* were inadvertently improperly applied; they are appropriately used when the plaintiff in a civil action, or the prosecuting officer in a criminal action, abandons of record the action as to one or more or all of the defendants; that is, he declares, by an appropriate entry in the record, that he will not further prosecute the action against the party defendant named.

The original parties could not thus go out of this action, without the permission of the court. It must be taken that the court allowed the

plaintiffs to amend, by striking their names out of the action and the pleadings. This was the legal effect of what was done, and as there was no objection on the part of any of the plaintiffs or defendants, the presumption is, that the order was made by consent of the parties. They might so consent with the sanction of the court—we can see no reason why they might not—as the court had complete jurisdiction of the parties and the cause of action.

The original parties to the action having thus gone out of it—entirely disappeared—it now appears from the record that the present plaintiffs allege in their complaint, "that they are the owners in fee simple," etc., of the land specified therein, just as if they had brought this action. The amendments so made by consent of the parties, with the sanction of the court, rendered the action completely that of the present plaintiffs. The court therefore erred in holding that the present plaintiffs—the appellants—had not "set up in the complaint any title in themselves to either of the tracts described" therein—on the contrary, they alleged title in themselves to both tracts, and they might prove title in them to, and recover, both or one, or a part of one, however (513) small that part. The plaintiff is not bound, ordinarily, to prove title in him, to the whole of the land claimed and described in his complaint, or fail in his action; he may prove title in him to so much thereof as he can, and recover that much.

There is error. The judgment of nonsuit must be reversed, and a new trial granted. To that end let this opinion be certified to the Superior Court.

Error.

Cited: Speight v. Jenkins, 99 N. C., 145; *Glover v. Flowers,* 101 N. C., 141; *Mizzell v. Ruffin,* 118 N. C., 71; *McCollum v. Chisholm,* 146 N. C., 22.

M. V. TUTTLE ET AL. v. THOMAS RAINEY ET AL.

Evidence—Handwriting—Presumption.

1. While it is not competent to prove handwriting by comparison, it is not necessary that the witness shall have seen the person, whose writing is the subject of controversy, write—it is sufficient if he shall have acquired by other means, as by receiving letters or handling papers of admitted genuineness, knowledge to enable him to identify the writing.

2. In an action to set up a lost deed, it was not error to permit a witness to repeat the remark, "Now you know whose land it is," made at the close of the reading of the deed by the vendee a short time before its loss or destruction—proof of the contents having been previously given.

3. Possession of an unregistered deed does not raise a presumption of its delivery, but it is a fact from which the jury may infer a delivery in the absence of rebutting evidence.

(*S. v. Harris*, 5 Ired., 287; *Gordon v. Price*, 10 Ired., 385; *McKonkey v. Gaylord*, 1 Jones, 94, and *Pope v. Askew*, 1 Ired., 16, cited.)

(514) THIS is a civil action, which was tried before *Boykin, J.*, at February Term, 1887, of FORSYTH.

Patrick Rainey died intestate in November, 1884, in possession of a tract of land in Forsyth County, without issue, and the parties to this action are his heirs at law.

The complaint states that the land belonged to one Thomas Rainey, a brother of the intestate, and that he conveyed it to the latter by a deed, in form to pass an estate in fee, which has not been registered, and is lost or destroyed, if not suppressed by the defendant Virgil Rainey, into whose hands, as administrator, the effects of the deceased passed. The object of the action is to procure its production, if in existence, or if not, to reëstablish the deed in order to perfect the title derived under it.

There was a single issue presented to the jury: "Did the defendant, Thomas Rainey, prior to the death of James P. Rainey, execute and deliver to him a deed in fee simple to the lands in controversy?" To this inquiry the jury responded in the affirmative.

On the trial the plaintiff, E. A. Rainey, testified that in April, 1884, he saw a deed for the land from his uncle, Thomas Rainey, to the intestate, and read it. That was a conveyance in fee simple, recited a consideration of $6,400, and bore the signature of said Thomas Rainey;

That he knew the handwriting of his uncle though he had never seen him write;

That he lived in New York, and witness had seen many letters from him to the father of witness, about family matters and family business, concerning which no one else was familiar;

That almost every day came newspapers to his father directed in the same hand, and for years a photograph of his uncle was hanging on the wall of the sitting-room with an under-written message of presentation, concluding with the words: "From your affectionate brother, Thomas Rainey."

Objection was made to the witness speaking of the handwriting, on the ground that his acquaintance with it had not been sufficiently shown,

but it was overruled and the testimony received, and exception (515) to the ruling noted.

The witness further stated that at the time referred to, the deceased took the deed from his trunk, and brought it into the room where himself and sister, Mrs. Moore, were, and read it in their hearing, witness at the time holding one side of the deed, and following him in the reading; that after the reading was finished, witness said to his sister: "Now you know whose land it is; we have seen the deed, and there is no use talking about it any more."

There was judgment for the plaintiffs, and defendants appealed.

C. B. Watson and W. B. Glenn for plaintiffs.
James T. Morehead for defendants.

SMITH, C. J., after stating the case: The admission of this declaration was resisted, as not constituting a part of the *res gestæ,* but was allowed, and defendants excepted.

An exception similar to that first adverted to was made to the testimony of the plaintiff E. H. Rainey, as to the authenticity of a letter purporting to come from Thomas Rainey, based upon the same alleged want of qualification in the former witness, and whose knowledge of the handwriting was acquired in like manner. It was again objected to that Mrs. Moore, present when the remark was made, was allowed to repeat the language of the first witness, E. A. Rainey, made then and repeated afterwards: "Now we know whose land it is."

While it is true, a witness will not be allowed to testify to handwriting when his knowledge is acquired from a comparison of hands—that is, when the genuineness of one writing is proved *aliunde*—and he proposes to identify another as proceeding from the same source, from their resemblance, as is decided in *Pope v. Askew,* 1 Ired., 16— (516) it is not necessary in all cases that the witness should have seen the party write to enable him to identify the disputed writing. Thus, a cashier of a bank, who had for ten years received and passed away a great many bills of the bank, from which were issued bills of the kind of that alleged to be spurious, and for passing which the defendant was indicted and was then on his trial, was permitted to testify to its being a counterfeit. *S. v. Harris,* 5 Ired., 287.

Evidence of the same kind, based on knowledge similarly acquired, was received in *Gordon v. Price,* 10 Ired., 385.

But a precedent more in point, and in our opinion not distinguishable from that before us, is found in *McKonkey v. Gaylord,* 1 Jones, 94. In this case the witness had obtained a knowledge of the writing from other transactions between them, but had never seen the party write.

The witness was allowed to testify to the handwriting.

The objection to what was said when the deed was read, and repeated afterwards, and to its reproduction by the sister, is equally without support.

It was indeed but a summary restatement of the contents of the deed, which had just been read, and corroborates the witness as to the accuracy of his memory, and for the same reason its repetition afterwards was competent.

The remaining exception is to the charge given to the jury to this effect: "If they believed, from all the testimony, that James P. Rainey had in his possession, prior to his death, a paper-writing containing all the matters testified to by E. A. Rainey, and that it was a deed, from the fact of his possession the law presumed a delivery under all the circumstances, but it devolved upon the plaintiff to establish this by clear and convincing proofs, and if the jury, upon a consideration of the whole, were left in doubt about the matter, then they should answer the issue in the negative."

(517) If it was intended to say that the law presumed a delivery from the possession of the deed, instead of that the law authorizes the jury from that fact to infer a delivery, and in the absence of rebutting evidence, to act upon it, it would be error. But the language, in connection with what follows, will not require so rigid a construction, and it should rather be understood in the other sense. The instruction proceeds to say that it devolved on the plaintiffs to establish this—that is, the facts upon which his cause of action rests, and, certainly, the delivery *by clear and convincing proofs.* There was nothing to contravene or weaken the force of the presumption, and in the way the case went to the jury the defendants have nothing of which to complain. Most clearly the instruction required proof of the delivery, and with this was the presumption.

There is no error, and the judgment is affirmed.

Affirmed.

Cited: Fuller v. Fox, 101 N. C., 121; *Tunstall v. Cobb,* 109 N. C., 320; *Jones v. Ballou,* 139 N. C., 526; *Nicholson v. Lumber Co.,* 156 N. C., 67; *Carroll v. Smith,* 163 N. C., 206; *Boyd v. Leatherwood,* 165 N. C., 616; *Morgan v. Fraternal Association,* 170 N. C., 82; *Oil Co. v. Burney,* 174 N. C., 384.

SARAH A. SMITH v. B. H. FITE.

Appeal—Transcript—Verdict.

1. It is the duty of the appellant to have so much of the record sent up as may be necessary to present clearly the matters which he desires to have reviewed, and he cannot take advantage of any defect in the transcript for failure to set out the case intelligently.

2. A verdict of a jury may be made intelligible and operative by a reference to a plat of a survey offered in evidence on the trial.

CIVIL ACTION for the recovery of land, tried before *Graves, J.*, at Fall Term, 1886, of GASTON.

The following issues were submitted, which were answered as (518) indicated:

"1. Is the plaintiff the owner of the land in dispute or of any part thereof?

"Response: Yes, up to the red line upon our plat.

"2. Was the defendant Fite in possession of any part of the land, to which Smith had title, at the commencement of this suit?

"Response: Yes, up to the red line on our plat."

The defendant moved for a new trial, for error in the charge of the court, which was overruled.

Defendant then moved to vacate and set aside the verdict for uncertainty, which was disallowed.

He then "moved for judgment for himself upon the verdict," which was disallowed, and the court gave the following judgment:

"This cause coming on for trial, and the jury, in response to the issues submitted to them and the facts admitted on trial, having found—

"1. That the plaintiff is the owner of that portion of the disputed land designated in the plat hereto attached and made a part of this judgment, in the area colored green, up to and south and southwest of the red line crossing the same, which is known as the Jingles line; and

"2. That at the commencement of this action defendant was in possession of said land above described wrongfully:

"Therefore, it is considered and adjudged by the court that plaintiff have and recover possession of the said land above described, and that a writ of possession issue accordingly, and for costs."

From said judgment the defendant appealed.

John F. Hoke for plaintiff.

W. P. Bynum for defendant.

(519) DAVIS, J. No case on appeal is sent up, and what the error in the charge of the court was, on account of which the defendant moved for a new trial, does not appear, and we can only consider errors assigned or apparent upon the record.

The motion to vacate and set aside the verdict for uncertainty is alone relied upon in this Court, and the appellant insists that it ought to have been set aside, and complains that the plat referred to does not accompany the case. It is the appellant's duty, as it is his right, to have so much of the record sent up as he thinks necessary to the proper adjudication of all questions material to his rights, and if he fails to have it so sent up he cannot avail himself of the omission. The verdict refers to the plat which, it is manifest, was before the jury and the court, and which had, as the record shows, been prepared under an order of survey previously made in the cause, and we must assume that the reference to the plat rendered the verdict intelligible and certain, upon which the court could render judgment; this is made plain by the reference to the verdict contained in the judgment. There is no error.

Affirmed.

Cited: Allen v. Sallinger, 105 N. C., 339; *Stephens v. McDonald,* 132 N. C., 135; *Grove v. Baker,* 174 N. C., 747.

SOLOMON HOUCK ET AL. V. M. V. ADAMS.

Presumptions—Limitations—Mortgages—Disabilities.

1. The statute (Rev. Code, ch. 65, sec. 19) providing that "the presumption of payment or abandonment of the right of redemption of mortgages and other equitable interests shall arise within ten years after forfeiture," etc., contains no saving clause in favor of persons under disabilities.

2. When the facts are ascertained, the presumption becomes a conclusion of law, to be enforced by the court and not left to the jury.

(McDonald v. Carson, 94 N. C., 497; *Campbell v. Brown,* 86 N. C., 376; *Headen v. Womack,* 88 N. C., 468, and *Perry v. Jackson, ibid.,* 103, cited.)

(520) CIVIL ACTION, tried before *MacRae, J.,* at Spring Term, 1887, of ASHE.

Plaintiffs and defendant each claimed the land in dispute through one David Houck, Sr.—the plaintiffs as his heirs at law; the defendant as heir at law of James Calloway, under a deed dated 22 February, 1845, executed by David Houck, Sr., to said Calloway.

The deed from Houck to Calloway was made to secure the payment of the sum of money therein mentioned within four years from its date, and provided that: "If the said David Houck, Sr., fails to pay and satisfy to the said James Calloway, his heirs or legal representatives, the said sum, . . . then he shall in that case lose his equity of redemption, and no need of foreclosing the mortgage."

It was in evidence that David Houck, Sr., died in 1847, 1848, 1849, or 1850, and that David Houck, Jr., leased the land of James Calloway, the ancestor of the defendant, under whom she claims, in 1855, which lease was in writing, and by renewal, in writing, was continued to the end of the year 1858.

That one of the plaintiffs, Sol. Houck, was in possession of part of the land for about three years, 1867, '68 and '69, when he and David Houck, Jr., were turned out of possession by James Calloway, "who and the defendant have remained in possession till the commencement of this action." (Evidently meaning that the former remained till his death, and after that the defendant.)

The only testimony as to the time of the death of David Houck, Sr., was that it occurred in 1847, or 1848, or 1849, or 1850.

There was evidence tending to show that defendant, and those (521) under whom she claimed, were in possession of the land in controversy more than ten years after the execution of the mortgage and after the debt became due (exclusive of the period between 20 May, 1861, and 1 January, 1870).

It was also in evidence that one of the *feme* plaintiffs, Sally Miller, was married at the age of eighteen years, is now sixty-one years of age, and she and her husband are still living; that another of the plaintiffs, Milly Ray, is six or seven years younger than Sally Miller; that she was married during the war, at the age of nineteen, and her husband has been dead six or seven years.

As affecting the question of the disability of these plaintiffs during the period of the alleged possession of the land by the mortgagee, they asked that an issue be submitted as to the time when David Houck, Sr., died. This was refused by his Honor, who said the only evidence as to the time of his death was that it was in 1847, or 1848, or 1849, and if submitted, he should instruct the jury to take it most strongly against the plaintiffs, and this would fix the time of his death in 1849.

There was no exception to the evidence or to the charge of his Honor, though both are set out at length, and the refusal to submit the issue as to when David Houck, Sr., died is the only error assigned in the progress of the trial.

There was judgment for the defendant, and plaintiffs appealed.

J. F. Morphew for plaintiffs.
G. N. Folk for defendant.

DAVIS, J., after stating the case: The case is governed, not by the statute of limitations, but by the statute of presumptions, in force prior to 24 August, 1868. That statute (Rev. Code, ch. 65, sec. 19) (522) provides that "the presumption of payment or abandonment of the right of redemption of mortgages, and of other equitable interests, shall arise within ten years after the forfeiture of said mortgage," etc. "The statute," says *Ruffin, J.*, in *Headen v. Womack,* 88 N. C., 468, "is so emphatically a statute of repose that no saving is made in it of the rights of infants, *femes covert,* or persons *non compos mentis,*" and the *provisos* in behalf of infants and certain other classes of persons contained in sections 9 and 10 of that chapter have no application. *Campbell v. Brown,* 86 N. C., 376, and the cases there cited.

When the facts are admitted or proved, the presumption "becomes a conclusion of *law from facts,* to be applied by the court, and not left to the discretion of the jury."

The cases above cited, and the authorities by which they are supported, leave no doubt as to the construction to be placed on sec. 19, ch. 65, of the Revised Code. It was a statute of *repose,* and whether his Honor was correct or not—in holding that the death of David Houck, Sr., must be taken from the evidence to have occurred in 1849—the issue was immaterial, and whether answered one way or the other, could not affect the legal result.

The refusal to submit an immaterial issue, which can in no way affect the merits of the case, cannot be assigned as error. *Perry v. Jackson,* 88 N. C., 103; *McDonald v. Carson,* 94 N. C., 497.

In the latter case it was said that a needless issue submitted to the jury, which could in no way be prejudicial, was not assignable as error; much less can the refusal to submit an immaterial or unnecessary issue be assigned as error.

After the trial there was a motion for a new trial, supported by an affidavit, on the ground of newly discovered testimony, which was refused. This was a matter of discretion, which cannot be reviewed by this Court, and from which, as has been often held, no appeal lies.

Affirmed.

Cited: Summerlin v. Cowles, 101 N. C., 478; *Alston v. Hawkins,* 105 N. C., 9; *Ferrell v. Thompson,* 107 N. C., 426; *Gregory v. Bullock,* 120 N. C., 263; *Faggart v. Bost,* 122 N. C., 522.

(523)

T. W. VENABLE ET AL. v. SAMUEL H. SMITH ET AL.

Injunction—Receiver.

It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties; and it ought not to interpose unless it is manifest that the property is being mismanaged and in danger of being lost, or that it is in the possession of an insolvent or unfit trustee.

(*Levenson v. Elson*, 88 N. C., 182, and *Hanna v. Hanna*, 89 N. C., 68, cited.)

MOTION for the appointment of a receiver, heard before *Boykin, J.*, at May Term, 1887, of FORSYTH.

The plaintiffs, creditors of the defendant Samuel H. Smith, who have reduced their claims to judgment, and caused them to be docketed in the Superior Court of Forsyth, on behalf of themselves and other creditors seek to pursue and subject to their demands certain goods and a lot of land, which they allege were bought and paid for by the debtor, and by his direction title made to the defendant Maggie H., his wife, with intent to place them beyond the reach of final process.

The complaint alleges that the said Samuel H. is insolvent, and that, to evade payment of his indebtedness, in the year 1883 he assigned his interest in a drug store, which business he was then conducting, to his wife, who subsequently admitted the defendant N. C. Brown as a partner, and it was thereafter carried on in the name of Smith & Brown, the whole fund having been furnished by the said Samuel H.

The answer of the defendants Smith and wife denies the imputation of fraud, and says that the lot sold to one Allen, and from which the plaintiffs charge that a large sum of money, $2,700, was derived and invested in the drug business, was the separate estate of the (524) said Maggie H., and while a portion of the proceeds were so appropriated, most of it was expended in releasing the property from liens.

The defendant N. C. Brown, not originally in the action, but made a party after objection taken in the answer of the other defendants, answers and says that he contributed one thousand dollars to the business, and has a corresponding interest in the store fixtures and stock of goods.

The plaintiff moved the court to appoint a receiver to take charge of the goods, and read in support of the application the affidavit of the plaintiff James F. Newbold and an examination of the defendant Samuel H., taken before the clerk, while in opposition were read affidavits of each of the defendants and one from F. C. Brown, who, with

his brother, W. C. Brown, bought out the share of the said Maggie H. after the commencement of the suit. The motion was denied, and the plaintiffs appealed.

J. L. Patterson for plaintiffs.
C. B. Watson for defendants.

SMITH, C. J., after stating the case: The case comes before us in a form that requires us to examine the evidence and deduce the facts material in passing upon the interlocutory action of the court:

1. It sufficiently appears from the proofs taken that the real estate is of value more than sufficient to satisfy all the claims set out in the complaint, nor is there any evidence of others to be provided for.

2. That the copartners, Brown & Brown, now in possession of the goods, are carrying on the business in the usual way, disposing of and replenishing the stock as is needed, and that one, if not both of them, is solvent, and able to meet any recovery the plaintiffs may be (525) able to effect in the action.

3. That as there is no present necessity for the withdrawal of the goods from the custody of the possessors, for the security of the plaintiffs, the change might be attended with very injurious consequences to others and damage to the property itself.

4. That there is an unpaid residue of the purchase money for the share of the goods of the said Maggie H. bought by the said Browns, and for which they gave their note, to wit, $997, which may be withheld as security for the plaintiffs' claims, and all the parties assented thereto.

While, then, the evidence is quite strong as to the *mala fides* of the dealings between the debtor and his wife (a point upon which we express no opinion upon the case presented and heard only upon *ex parte* proofs, and leave it to be passed upon by the jury untrammeled by an expression of our own), we see no adequate reasons for taking the goods and the business out of the hands of the firm and committing them to an appointee of the court.

In *Leverson v. Elson,* 88 N. C., 182, where a similar application was made and refused, this Court said: "We are not called upon to pass on the validity of the assignment," assailed as are the transactions in this case for fraud, "in this collateral inquiry, and upon mere *ex parte* affidavits; we interpose only when it is manifest that the fund is mismanaged and in danger of being lost, or when the insolvency of an unfit trustee is present or imminent."

So it is said in *Hanna v. Hanna,* 89 N. C., 68: "We cannot see why an injunction against the sale or injurious use of the property would not adequately secure the fruits of an adjudication in favor of the plaintiff,

without disturbing the defendants in their possession, while the latter might suffer serious loss, and prevent inconvenience, if the goods should be withdrawn and converted into money. It is the duty of the judge, in passing upon such a question, to *consider the consequences of the proposed action to both parties, and not to needlessly injure the one for the purpose of obviating some slight disadvantage to the* (526) *other.*"

These considerations prevail in full force in the case before us, and guide us to the conclusion to sustain the ruling of the judge in refusing to make the appointment, but without reference to his findings of fact. There is no error, and the judgment is

Affirmed.

THE CAROLINA CENTRAL RAILROAD COMPANY v. JOHN C. McCASKILL.

Betterments—Improvements—Railroads—Evidence—Notice—Burden of Proof.

1. In a proceeding to ascertain the value of betterments under the statute (The Code, secs. 473-480), the burden is upon the petitioner to show, not only that he believed, but that he had good reason to believe, his title to the premises was good (at least until he made out a prima facie case, when the burden shifted), and of the reasonableness of this belief the jury must be the judge; and, *it seems*, the petitioner is competent to testify to his belief in the validity of his title.

2. The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his particular business.

3. The notice prescribed by the statute as a bar to the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title.

4. The statutory remedy is available against an incorporated railroad company which has recovered possession of lands within its "right of way."

(*Justice v. Baxter*, 93 N. C., 405; *Reed v. Exum*, 84 N. C., 430; *Scott v. Battle*, 85 N. C., 184; *Merritt v. Scott*, 81 N. C., 385; *Wetherell v. Gorman*, 74 N. C., 603; *Daniel v. Crumpler*, 75 N. C., 184, and *Smith v. Stewart*, 83 N. C., 406, cited.)

Issues joined upon a petition for betterments, tried before (527) *Clark, J.*, at January Term, 1887, of Robeson.

This action was brought to recover possession of a specified parcel of land, part of the right of way of the plaintiff company, situate in the town of Shoe Heel. The pleadings raised issues of fact. There was a trial, and the plaintiff obtained judgment, whereupon the defendant filed his petition in the action, as allowed by the statute (The Code, sec. 473), alleging that he, while holding the premises under color of title, believed by him to be good, made permanent improvements thereon by erecting a large brick storehouse, at the cost of about thirty-five hundred dollars, and praying that he be allowed for the same over and above the value of the use and occupation of such land by him, etc. The plaintiff filed its answer thereto, denying the material allegations thereof, the right of the defendant to the relief demanded, or any such relief, etc., thus raising issues of fact.

Afterwards, the court submitted issues to the jury, which, with the responses thereto, are as follows:

"1. Did McCaskill, while erecting the store, have reason to believe the title good under which he was holding the premises? Answer: 'Yes.'

"2. How much is the value of the premises at this time, enhanced by such improvements? Answer: '$3,000.'

"3. How much is the value of the use and occupation of the lot? Answer: '$50 per year.' "

The plaintiff requested the court to submit the following issue, also, which it declined to do, and the refusal is assigned as error:

(528) "Does the building erected by the defendant meliorate and improve the premises for the purposes of the plaintiff railroad?"

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

"The defendant introduced a grant from the State to David Allison, dated 27 June, 1795; deed from McCoy to Robert Hughes, dated 11 August, 1851; deed from McCoy to Robert Hughes, dated 1 July, 1834; deed from Caroline Gordon to John Patterson, dated 19 January, 1866; deed from R. McMillan, sheriff, to Giles Leitch, 27 May, 1877; deed from A. Leitch and wife to J. C. McCaskill, dated 9 May, 1883; deed from Robinson to J. C. McCaskill, dated 11 June, 1883.

"It was proved that Giles Leitch was dead, and Mrs. Robinson and A. Leitch were his heirs.

"The defendant testified that the deeds introduced cover the land recovered by plaintiff in this action; that he built the store; that the value of the land was enhanced by it $3,500; he began building in the fall of 1883 and finished in the spring of 1884; bought the land to build on it; built to edge of street, not knowing he would ever be troubled; the street between store and railroad track is a public street, and is fifty feet wide; there was an agent of railroad at depot, within a hundred

yards of store; saw this agent every day; saw superintendent of railroad after, and talked with him before and while building store; no objection from either of them or anyone else; ran his line by his deeds and it went to railroad ditch, within a few feet of track. Witness said he built the store, believing his title to be good (exception by plaintiff; overruled); that John Patterson and those under whom he claimed have been in possession ever since 1868 up to the time defendant took possession. There is a public street in front of store, which crosses (529) railroad at right angles. It is a brick store, 91 feet by 20 feet; store below and eight rooms above; what the store and lot would sell for now he cannot say; he thought deed ran to railroad ditch; did not disclaim title in this suit to land between store and railroad; did not deny being in possession of this lot; did take a deed in 1870 for a lot of land on opposite side of railroad, conveying the land up to edge of track; in that deed the railroad right of way was excepted in the warranty clause; no definite amount was excepted; understood that under that deed he did not have any claim for what plaintiff would condemn under its claims for right of way; always understood that on the opposite side of railroad, because the depot was located on that side, the right of way was a hundred feet and on this side thirty feet; built a house on opposite side within one hundred feet; could not find anywhere that the right of way had been condemned or otherwise acquired by railroad company; that he consulted counsel as to whether railroad company had any claim on the land, and in consequence of his conversation with counsel he believed that the railroad company, not having condemned the land, have no right to it; thought that railroad company only had the right to enough land to run on, except when it had been condemned; counsel consulted was attorney for Leitch, his vendor, and he said there was no record of condemning the land; there was a shanty five or six feet further off than store; did not try to get the land shanty was on from Jones; this shanty was used and claimed by railroad when he bought the land, and was on the same side of railroad as the store; does not remember, while building store, he was told by Sharpe, in presence of Parham, that he was building on right of way; never had any notice till suit was brought; building was then all complete, except painting inside; don't remember any conversation before roof was put on; did not offer other land to railroad for land this shanty was on; went to Rowland, attorney, because he (witness) wanted possession of shanty, (530) and to know if there would be any trouble about it; shanty embraced in his deed; fair rental value of land on which store is located, not including rental of store, is $25 or $30 per year; Patterson's store was on land where my store is and was also nearer railroad than this store; the actual cost of brick store is $3,000.

"Plaintiff introduced: former case on appeal to Supreme Court; judgment of Superior Court and judgment of Supreme Court; act incorporating Wilmington, Charlotte and Rutherford Railroad Company, 13 February, 1855; acts incorporating Carolina Central Railroad Company, 20 February, 1873 and 1881; deed from J. H. Pollar to Carolina Central Railroad, 17 May, 1873; deed from Stedman and Davis to French and others, 25 June, 1880.

"Sharpe, a witness for plaintiff, testified that he told McCaskill he gave him notice that he was building on the right of way, and that McCaskill offered to give another piece of land for railroad right of way on this tract; the house was not then roofed and no floors.

"S. W. Parham, witness for plaintiff, testified: Heard Sharpe tell McCaskill he was unfortunate that he had put his house on right of way; the walls were then up, but store not finished—no roof or floors; there were nine windows on side of store next to railroad; this was in February or March, 1884.

"Jones, the superintendent, and witness for plaintiff, testified: McCaskill's store is on right of way of railroad company; the railroad has no use for it; the store is about fifty feet from track and within the hundred feet right of way, and it cannot be used for any railroad purpose; the store obstructs the view of track from persons traveling the street in front of the store, which street crosses the railroad.

"Plaintiff then asked the following instructions:

"1. That if the jury believe the evidence, they will respond to the first issue, No.

(531) "2. That if the jury believe the testimony, they will respond to the second issue, Nothing.

"3. That if the Carolina Central Railroad had a house on the land and in actual possession of the same at the time he took his deeds, then he is presumed to know the extent and nature of the claim of the railroad to the same.

"4. That if the jury believe the testimony, the house built by McCaskill was an obstruction and not an improvement.

"5. That if the jury believe the evidence, McCaskill had no color of title to the premises.

"His Honor gave plaintiff's third prayer for instructions, and charged the jury that if they found from the evidence that McCaskill, while erecting the store, had color of title, and that he not only believed, but had reason to believe, the title good, under which he was holding said premises, they would respond to the first issue, Yes; otherwise, No, as the burden was on the defendant to make out his claim by a preponderance of the evidence; that it was not what McCaskill believed, but what there was reason to believe; that McCaskill must not only believe his

title good, but that, under the statute, he must have reason to believe it good; and that the jury must determine this from the evidence; that if the jury find the first issue Yes, then they would say from the evidence how much, if any, the value of the premises at this time was enhanced by such improvements; that they should only estimate such improvements as were made before notice given, if notice was given, and that such improvements should not be estimated by the actual cost in making the same, but by the enhanced value they gave to the premises; that if they found the first issue, No, then they need not consider the other issues; that if they found the first issue, Yes, then, after determining the second issue, they would pass to the third, and would determine from the evidence the clear annual value of the premises, exclusive of the addition to the rental value by reason of improvements put upon the same by defendant *from 9 May, 1883, to date.* (532)

"For the refusal to charge as requested and to the charge as given, the plaintiff excepted.

"Motion for judgment upon the evidence *non obstante veredicto*, refused. Motion for new trial overruled; judgment for defendant; appeal by plaintiff."

P. D. Walker and J. B. Batchelor for plaintiff.
F. McNeill and William Black for defendant.

Merrimon, J., after stating the case: The assignment of error in that the court refused to submit to the jury the issue proposed by the defendant cannot be sustained, because the second issue submitted by the court, in substance and effect, embraced the same inquiry proposed. The jury might have responded to the latter issue, that the alleged improvement did not enhance the value of the premises in any degree; the counsel for the defendant might, perhaps did, so argue to them, and the court so, in effect, instructed them, in saying "that they should only estimate such improvements as were made before notice given, if notice was given, and such improvements should not be estimated by the actual cost in making the same, but by the enhanced value they gave to the premises." It is sufficient to submit the issue raised by the pleadings in such intelligent shape as will elicit the finding of the constituent fact or facts to be ascertained by it.

Nor has the objection that the defendant was allowed, in testifying on the trial in his own behalf, to say that "he built the store, believing his title to be good," substantial force. The latter part of the expression was rather incidental; and moreover, it would seem that where the belief of a party in a particular respect is directly in question, he being a competent witness in his own behalf, he might say what his belief

was—his evidence in this respect to be heard and weighed by the
(533) jury just as other evidence. But if this were not so, the court, we think, obviated so slight an objection by instructing the jury "that it was not what McCaskill (the defendant) believed, but what there was reason to believe; that McCaskill must not only believe his title good, but, under the statute, he must have reason to believe it good, and the jury must determine this from the evidence." This was strongly cautionary and explanatory.

The statute (The Code, secs. 473, 476) provides, among other things, that "any defendant against whom a judgment shall be rendered for land may, at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title, believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land, etc. . . . If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the said premises, permanent and valuable improvements, they shall estimate in his favor the value of such improvements as were so made before notice, in writing of the title under which plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment."

Now, applying this statutory provision, it was properly conceded on the argument by the counsel of the plaintiff, that the defendant, on the trial, showed color of title while holding the premises "and constructing the alleged improvement"; but they earnestly contended that the latter had reason to believe that the title, under which he and those under whom he claimed, were holding the premises while erecting the alleged permanent improvement thereon, was not good, and therefore
(534) he was not entitled to any allowance for supposed betterments.

On the trial, the defendant, by evidence not controverted, showed title in himself prima facie, to and his possession of the land in question, and nothing to the contrary appearing, he had reason and the right to believe, and it must be taken that he did believe, his title was good while he constructed the alleged improvement.

Thus much having been shown, the burden was on the plaintiff to show otherwise and to the contrary. There was no positive evidence to prove that the defendant had actual knowledge, affording reason to believe his title was not good; on the contrary, it was in evidence that

he was advised by counsel, in whom he might confide as to such matter, that his title was good. But it is insisted that he was charged sufficiently with constructive notice; that there was evidence, not controverted, of matters, things and transactions, of which he at least had constructive knowledge, which from the beginning of his supposed title constituted reason to believe his title was not good.

In view of the evidence produced on the trial, and a proper interpretation of the statutory provision cited, we cannot accept that view as tenable. This provision is highly remedial—not intended to favor one party to the prejudice or disadvantage of another—but to place the parties interested, as nearly as may be justly, as they would have been, but for the honest, not unreasonable, misapprehension and mistake of the claimant in placing permanent and valuable improvements on land he had possession of and color of title for, really believing he had a good title for it. By the words "reason to believe the title good," etc., is not meant that the party claiming the allowance has merely constructive notice, or that by diligent scrutiny he might have learned of defects in his title, or by such notice and scrutiny a better title in some other person, but facts and circumstances, such as would and (535) ought reasonably to suggest to the particular claimant defects in his title. Hence, the *Chief Justice* said with pertinent force in *Justice v. Baxter,* 93 N. C., 405, that "the beneficent provisions of the statute would be defeated by a construction which charges the bona fide claimant, under a deed in form and purpose purporting to convey a perfect title, with a knowledge of imperfections which might be met with in deduction of his own title." This remark applies with increased force when the defect is found, not in deducing the party's own title, but in the fact of a better title in some other person, not suggested by anything in the deed or evidence of title on which he relies, as in the case before us. Comparatively few persons are familiar with the titles to their lands and fully advised as to the goodness or badness of them, although the evidences of title adverse to them may be regularly registered. It not infrequently happens that persons are wholly unconscious for years of latent defects in the title to their lands, which, when they become known, completely overthrow such titles; and this is none the less true because the evidence of the better title in some form is registered, thus giving constructive notice of it. The statute under consideration is intended to help the party thus suffering prejudice. It would serve such purpose to a very limited extent if the construction insisted upon were adopted. *Reed v. Exum,* 84 N. C., 430; *Scott v. Battle,* 85 N. C., 184; *Merritt v. Scott,* 81 N. C., 385.

The inquiry in each particular case is, was the misapprehension and mistake one that might, under the circumstances, be reasonably made?

This must depend upon the facts and circumstances of each case presented. Hence, the statute leaves it to the jury, under appropriate instructions from the court, to determine whether or not "there was reason to believe the title good."

(536) The plaintiff's title to the land in question was not acquired in the ordinary way; how it derived its title, and what land it embraced, was not known to most people along the line of its road—indeed, this case has shown that able and intelligent lawyers have differed widely as to its extent and character. The land—the right of way—was not laid off and ascertained by metes and bounds, nor did the plaintiff have actual possession of or occasion to assert its authority actively over much of it outside of the roadway. The evidence went to prove that the plaintiff's agents saw for months the defendant building the house in question, without suggesting its right to the land. The ordinary citizen knew very little of the plaintiff's charter, or the rights, privileges and advantages it conferred, nor were they interested sufficiently to induce them to examine, much less scrutinize, the mortgage in evidence. The other evidence of the plaintiff, tending to show the nature of defect of title in the defendant, was not by any means conclusive. Accepting the whole evidence as true, the ordinary citizen might honestly, not unreasonably, be ignorant of the plaintiff's title to the land in question, and what land it embraced. The jury might find, as they did, in view of all the facts under the instruction of the court, that "there was reason to believe the title was good" in the defendant.

The court instructed them that "the burden was on the defendant to make out his claim by a preponderance of the evidence; that it was not what McCaskill believed, but what there was reason to believe; that McCaskill must not only believe his title good, but that under the statute he must have reason to believe it good, and that the jury must determine this from the evidence." It was not asked to make its instructions more definite. The evidence did not necessarily, and as matter of law, imply that the defendant had reason to believe his title not good; it was, therefore, a question for the jury to determine whether there was or not, and they settled that question in his favor.

(537) There was evidence of an improvement placed on the land by the defendant, permanent in its nature; and whether it was of any value, and if so, what—not exceeding what it cost, and not exceeding what it enhanced the value of the land—were questions for the jury, so made by the statute.

The plaintiff cannot complain of the instructions of the court to the jury in this respect. Indeed, there was error, if at all, in its favor, because there was no evidence of notice in writing of the title under which the plaintiff claimed, as there must have been, to preclude the

defendant from having the value of the whole improvement limited only as above indicated.

The court expressly told the jury that they should not estimate the value of the improvement "by the actual cost in making the same, but by the enhanced value they gave the premises."

This instruction conforms to the rule prescribed by the statute, recognized and settled in *Wetherell v. Gorman,* 74 N. C., 603; *Daniel v. Crumpler,* 75 N. C., 184; *Smith v. Stewart,* 83 N. C., 406.

The court might have gone further, and said that in so estimating the value of the improvement they should have in view the nature and location of the land as well as the house, and also the reasonable uses to which the whole might be devoted, but it was not requested to do so, and as the general rule was stated, that the court did not go further into details, is not error. When the rule of law applicable is stated clearly, this is sufficient—certainly, unless the party complaining asked for more explicit instruction in some particular respect.

It is further contended that the statutory provision, the benefit of which the defendant seeks, does not apply to and embrace the plaintiff, and therefore it is entitled to have judgment in its favor *non obstante veredicto.* We can see no just or adequate reason why it does not so apply. The plaintiff is the sole and exclusive owner of the land—a part of its right of way—for the purposes of its charter. The (538) defendant had possession of and color of title to it, having reason, as the jury have found, to believe his title good, and while he so had possession and color of title, he made, as appears, permanent improvements on it of value. Why shall he not have relief—justice—as in other cases? The statute (The Code, sec. 479), provides that the balance ascertained to be due the defendant in cases like this "shall constitute a lien upon the land, recovered by the plaintiff, until the same shall be paid." It is said such lien cannot attach in this case, because the land, being part of the plaintiff's right of way for its road, cannot be sold to discharge the lien. This may, on account of public considerations, be so, but we need not now, and do not decide, that it is or is not, because the statute (The Code, sec. 478) provides that the defendant shall have judgment for such balance of the allowance in his favor, as well as the lien, and such judgment may be enforced by execution against the property of the plaintiff without regard to the lien.

It is said the plaintiff does not want the house in question—that it cannot serve its purposes, and it would rather it were off its land. But any other plaintiff might, on his similar case, say just as much and as truly. The jury have found that the improvement is valuable, just as they do in other like cases—that it enhances the value of the land in question, without regard to the particular convenience, preferences or

wants of the plaintiff. The objection in this and like cases, that the permanent improvement does not serve the plaintiff's particular convenience or wants is not a valid one, if there is an enhancement of the value of the land. The remedy is allowed for the sake of justice, although in some cases, in one way or another, it may work more or less hardship.

It is complained that the allowance was, in any view of the (539) case, much greater than the enhanced value of the property.

With that we have nothing to do—that was a matter for the jury, unless the allowance was manifestly too great, in which case the judge of the Superior Court might, and ought in such cases, to set the verdict aside. But this high discretion is his, not ours, and not reviewable by us. The judgment must be

Affirmed.

Cited: Johnson v. Allen, 100 N. C., 139; *Gudger v. R. R.,* 106 N. C., 484; *Purifoy v. R. R.,* 108 N. C., 106; *Faison v. Kelly,* 149 N. C., 285.

J. A. N. BRENDLE v. A. L. HERREN AND A. J. HERREN.

Assignment of Error.

No specific errors being assigned in the record, the judgment below will be affirmed.

(See same case reported in 97 N. C., 257.)

MOTION heard before *Montgomery, J.,* at Fall Term, 1887, of HAYWOOD.

In the progress of this cause, and after a response from the jury to an issue submitted to them, it was adjudged by the court as follows:

1. That the defendant, A. L. Herren, had a charge and lien upon the land sued for, for the sum of $300, with interest on the same from 12 October, 1870, and that he hold said land until the same is satisfied and paid;

2. That upon the 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;

3. That upon his death, and subject to the right of dower of Selina Welch therein, which lands the defendant acquired by the deed of

12 October, 1870, the said defendant is hereby declared to be trustee for the plaintiff of an absolute estate in fee simple in the (540) remainder, and that he convey the same by sufficient deed.

The plaintiff now seeks to enforce the performance of the judgment, alleging in his petition, that he had deposited in the clerk's office the money required, to wit, $601.50, with a deed properly drawn, in accordance with the judgment, to be executed by the defendant, notifying him thereof, and that the sum so paid in was at his disposal when he executed the deed. He then demanded the execution of a deed from the defendant and a writ of assistance to put him in possession. The defendants answer, admitting the deposits as alleged, says that the deed was not in proper form, and he deposited another, of which we have a copy before us, properly executed for delivery to the plaintiff when he placed the required sum in the office for his use, he having, on the very day of giving notice to defendant of what he had done, withdrawn his said deposit.

Upon this presentation of the matter the court reaffirmed the judgment in general terms, and ordered the defendant to make the deed, without passing upon that in the office, and refused the writ of assistance asked for. From this ruling the plaintiff appeals.

No counsel for plaintiff.
G. S. Ferguson for defendants.

SMITH, C. J., after stating the case: No specific errors are pointed out, and we are at a loss to know of what the appellant complains. The judgment, perhaps unnecessary to be reviewed in terms, is in strict conformity to that previously rendered, and which, on account of differences between them as to the form of the deed required, remains unperformed. We have not that prepared by the plaintiff before us, and cannot pass upon its sufficiency. But in examining the (541) other, we think its provisions conform in substance to the requirements of the order, and should be accepted by the plaintiff, and the judgment should be so modified as to declare its sufficiency and require the unconditional payment of the money due the defendant in the office.

There is no error in the ruling of which the appellant can complain, and the judgment as modified is affirmed.

Modified and affirmed.

Cited: Christian v. R. R., 136 N. C., 322.

J. D. LOCKMAN ET AL. v. M. D. HOBBS.

Devise—"Children"—Remainder.

S. devised lands to D. as trustee for B. "to her use during her natural life; after her decease to the use of the lawful begotten heirs of her body, each one to share and share alike. . . . In case of the death of B. and all her children, all the property willed to her to revert to my nephew" (the trustee). At the death of the testator, B. had two children living, both of whom, however, died before B., one of them leaving children, who survived her: *Held*, that upon B.'s death the entire estate became vested in the nephew.

THIS is a civil action, heard by *MacRae, J.*, upon a case agreed at Fall Term, 1887, of LINCOLN.

The controversy between the parties to the action arises out of the will of Mahala Sherrill, who died in the year 1863, and is as to the proper construction of certain clauses contained in it. These clauses are as follows:

Item 7th. I give and bequeath unto Middleton D. Hobbs, as trustee, for the use of Belza Avaline James, one negro man named Allen, and one girl named Catherine, one negro girl named Mary Jane, one
(542) negro girl named Little Catharine—during her natural life, and after decease to the use of the lawful begotten heirs of her body, each child share and share alike.

Item 8th. I give and bequeath unto Middleton D. Hobbs, as trustee, for the use of Belza A. James, all my lands lying below the line running from the High Shoals and Ball's Creek, on which my house stands, to her use during her natural life; after her decease to the use of the lawful begotten heirs of her body, each one to share and share alike.

Item 9th. I give and bequeath to Mahala Elenora James one bed and furniture.

Item 10th. I give and bequeath unto Middleton D. Hobbs, as trustee, for the use of Belza A. James, the rest of my beds not disposed of, also the one-half of my household and kitchen furniture.

Item 11th. I give and bequeath to Logan Wilson and Middleton D. Hobbs, as trustees, for the use of Elizabeth M. Wilson and Belza A. James, my wheat-threshing machine—each one-half of it. In case of the death of Belza A. James and all her children, all the property willed to her revert to my nephew, Middleton D. Hobbs.

The cause was submitted to the court upon a "case agreed," the material facts whereof, in connection with the construction of the will, are thus stated:

"3d. It is further agreed, that at the time of the execution of said last will and testament and at the death of the testatrix, Belza A. James had only two children living and never had any others; that these two children were Nora James, who intermarried with the plaintiff J. D. Lockman, and died in the lifetime of her mother, Belza A. James, to wit, in July, 1883, leaving her surviving only two children, who were the plaintiffs, Mandy Lockman and William Lockman; and the other child of Belza A. James was a son of A. G. James, who died intestate and leaving no wife or child in the lifetime of his mother, Belza A. James, to wit, in August, 1883, but leaving him, the said A. G. (543) James, two children of his sister, to wit, said Mandy and William Lockman, him surviving, and that the plaintiff J. D. Lockman is his administrator and also is administrator of Belza A. James, who died in February, 1887, and also administrator of said Nora Lockman, deceased.

"4th. It is further agreed that the defendant, Middleton D. Hobbs, entered upon and exercised his office as trustee for said Belza A. James, up to the time of her death, and took into his possession the personal property given in trust for her, and exercised control over the real estate so given in trust for her, and that he was a nephew of the testatrix, Mahala Sherrill, and that Belza A. James was her niece.

These facts herein stated and agreed upon as the material facts necessary for the construction of the will of Mahala Sherrill as to defendant M. D. Hobbs' claim thereunder, which is, that he is entitled to the property bequeathed and devised to Belza A. James at the date of her death as hereinbefore stated; which property is also claimed by plaintiffs under said will—this agreement is made without prejudice to any of the other claims and charges made in plaintiffs' complaint, or as to other facts therein alleged."

Thereupon was entered the following judgment:

"It is adjudged that under the will of Mahala Sherrill, deceased, the property therein and thereby bequeathed and devised to M. D. Hobbs, in trust for Belza A. James, at the death of said Belza A. James belongs to the plaintiffs, Manda Lockman and William Lockman, and that said property so devised and bequeathed does not revert to the defendant, M. D. Hobbs; and therefore, on motion of plaintiffs, it is ordered further that this cause be and the same is hereby referred to C. E. Childs, clerk of this court, to take and state an account as to all matters in controversy between the parties, as the same are set forth in the pleadings, and he make due report of his findings of fact and of his conclusions of law separately, as required by the (544) Code of Civil procedure. And it is further ordered that the

referee do also take and state an account of the rents and profits that have accrued since the death of Belza A. James."

From this judgment the defendant appealed.

No counsel for plaintiffs.
M. L. McCorkle and R. F. Armfield for defendant.

SMITH, C. J., after stating the case: The only point presented in the appeal, as will be thus seen, is as to the legal effect of the 8th and 11th clauses construed in connection, and in whom, among the contesting claimants, the equitable estate in the land therein described is vested.

We do not find any difficulty in arriving at the intention of the testatrix in the devise, and it is different from that deduced by the judge, from the words employed to express it.

1. "The lawfully begotten heirs of her body" refer most obviously to the children of the devisee for life, Belza A. James, of whom there were only two, and this without the aid of the Act of 1856, which declares that a limitation "to the heirs of a living person" shall be construed to mean "the children of such person, unless a contrary intention appear by the deed or will." Rev. Code, ch. 43, sec. 5.

So far from the indication of a different intent, found in other provisions of the will, that put upon the expression by the statute is shown to have been in the mind of the testatrix by the use of the same words in the clause next preceding, when, in directing the manner of apportioning the shares among the legatees, she says, *"each child* share and share alike," thus defining the meaning of the term, "heirs of her body," used just before.

2. The limitation to the two children then living when the will
(545) took effect vested in them a present estate in remainder, which, except for clause 11th, would have been in fee, and but for the devise over, which reduces it to an estate in each for life, while it left not less a vested remainder in each for life, and terminating at his and her death. The life estate in the mother, however, continued, notwithstanding that the intervening estate in her children was, by their deaths in her lifetime put out of the way of the ultimate remainder given in the 11th clause to the trustee, the defendant, Middleton D. Hobbs, for his own use when the said Belza A. should die.

The contingency, when this last remainder in fee was to rest in possession, having occurred—a contingency not attaching to the estate itself, but to the time of its enjoyment only, the defendant became the owner of the equitable as he had been of the legal estate, and this was thus freed from the trusts for others.

There is, therefore, error in the ruling that the plaintiffs were entitled to the equitable estate held by the defendant upon the trusts declared in the will, upon the death of said Belza A., and that he is accountable for the rents since accruing, and it must be reversed and the order of reference so amended as to strike out an inquiry as to such.

Error.

THOS. J. MAGRUDER ET AL. v. S. J. SHELTON AND J. M. DAVIS.

Affidavit—Execution—Supplementary Proceedings.

1. It is not necessary that the affidavit, upon which proceedings supplementary to execution are based, should specify the property, owned by the debtor, which he refuses to apply to the satisfaction of the judgment.
2. The affidavit must show three facts: (1) The want of known property liable to execution; (2) the non-existence of any equitable interest subject to the lien of the judgment, and (3) the existence of property unaffected by lien and incapable of seizure on execution.

(Hinsdale v. Sinclair, 83 N. C., 338, cited.)

THIS is an appeal from an order made by *Montgomery, J.*, at (546) Fall Term, 1887, of HAYWOOD, requiring the defendants to answer concerning their property in a supplemental proceeding under section 488 of The Code, based upon the following affidavit:

"W. L. Norwood, attorney for plaintiffs above named, being first duly sworn, deposes and says: That the defendants, S. J. Shelton and J. M. Davis, are indebted to the plaintiffs in the sum of $262.09, with interest on $256.79 thereof from 19 May, 1879, by virtue of a judgment duly obtained and recorded in the Superior Court clerk's office of Haywood County, in Judgment Docket 'F,' on page 20, together with costs of suit;

"That on 14 March, A.D. 1881, an execution was issued against the property of the defendants in favor of plaintiffs, which was duly returned on 3 May, 1881, wholly unsatisfied; that on the respective days, to wit, 28 June, 1881, 16 January, 1882, 10 March, 1883, 17 December, 1883, 28 October, 1884, alias executions issued to the sheriff of Haywood County against the property of defendants in favor of plaintiffs, each and every one of which were duly returned wholly unsatisfied, as appears by record on the judgment docket aforesaid; that on 16 February, A.D. 1886, an alias execution was again issued to the sheriff of Haywood County against the property of defendants and in

favor of plaintiffs, which said execution was on 5 April, A.D. 1886, duly returned wholly unsatisfied. Affiant believes, on information, that the defendants, S. J. Shelton and J. M. Davis, have property, choses in action or things of value, which ought to be subjected to the pay-
(547) ment of the judgment. To this affiant's knowledge there is not any equitable estates in lands within the lien of the judgment. Affiant further states that said judgment is wholly unpaid and satisfied.

"Amended by consent thus: Affiant is informed and believes that defendants have no property, real or personal, that is subject to execution."

Upon this affidavit an order was issued by the clerk, requiring the defendants to appear, etc. Upon the return of the order a motion was made before the clerk to dismiss the proceedings because of the insufficiency of the affidavit. The clerk adjudged the affidavit to be insufficient, and dismissed the proceeding, from which the plaintiffs appealed to the judge of the Superior Court, and upon the hearing of the appeal the following order was made:

"This cause coming before me on appeal of plaintiffs from the order of the clerk of the Superior Court of Haywood County, dismissing the proceedings on the ground that the plaintiffs' affidavit, upon which the same issued, is insufficient, upon hearing the record in the cause and the argument of counsel—

"It is considered by the court here that said affidavit is sufficient in law; and it is ordered by the court that the defendants answer, as required in the original order, concerning their property, before the clerk of the Superior Court at a time and place to be fixed by said clerk:"

From this order the defendants appealed to this Court, and the only question presented for consideration is whether the affidavit is sufficient in law to warrant the order.

No counsel for plaintiffs.
George H. Smathers for defendants.

DAVIS, J., after stating the case: The defendants say that the affidavit fails to specify the property, choses in action, or other thing of value owned by the defendants, which they refuse to apply towards
(548) the satisfaction of plaintiffs' judgment, and for this failure the affidavit is insufficient.

Subsection 1 of section 488 of The Code, authorizes an order requiring defendants to answer concerning their property, upon the return of an execution unsatisfied, and subsection 2 authorizes an order to issue, before the return of the execution, "upon proof by affidavit" that the

judgment debtor "has property which he unjustly refuses to apply towards the satisfaction of the judgment."

Under the old practice, a suit in the County or Superior Court was commenced by a writ, issued by the clerk, which commanded the sheriff "to take the body of the defendant," etc., and the defendant was required to give bail for his appearance, etc., and if the sheriff in executing the process failed to require bail, he himself became special bail. The bail was responsible for the appearance of the defendant to satisfy the judgment of the court; and if he failed to appear, the bail became liable. The liability of the bail, however, did not become final or absolute until after notice, and he might, at any time before final judgment against him, discharge his liability in certain modes, the most usual of which was by a surrender of his principal. The *scire facias* could be issued to notify the bail after a return of the execution by the sheriff, *unsatisfied, without affidavit,* and the defendant, being in custody, could only discharge himself by giving notice to the creditor, and filing a schedule containing "an exact account of his estate, and all circumstances relating thereto."

This schedule had to be on oath, and if sufficient, entitled the defendant to his discharge, and he could not get his discharge until it appeared that he had rendered an accurate schedule of all his property, the title to which (except such as was exempt) vested in the sheriff for the satisfaction of the judgment. No *capias ad satisfaciendum* could issue, except upon affidavit that the debtor had no property, which could be reached by *fieri facias,* sufficient to satisfy the judg- (549) ment, and that he had property, money, or effects which could not be reached, or had fraudulently concealed his property, etc., or was about to remove from the State.

The supplementary proceeding is designed to enable the creditor to reach the same result as was attained by the *ca. sa.* under the old practice, and in analogy to that practice, it may be that the absence of the requirement of the affidavit to procure the order *after* the return of the execution unsatisfied, in subsection 1 of section 488, was because it was thought unnecessary. But this Court, in a carefully considered opinion, delivered by *Dillard, J.,* in *Hinsdale v. Sinclair,* 83 N. C., 338, has put a different construction upon the statute, and we accept it as now settled, that in order to obtain the order "three facts must be made to appear by affidavit or otherwise: (1) the want of *known* property liable to execution, which is proved by the sheriff's return of *'unsatisfied';* (2) the *non existence* of any equitable estate in land within the lien of the judgment, and (3) the existence of property, choses in action, and things of value, unaffected by any lien and incapable of levy."

Each of these requirements is met by the affidavit in this case. The very purpose of the proceeding is to compel a *discovery* by an examination of the defendant; and if the scope of the examination were confined, as is insisted, to such "property, choses in action or other things of value" as the plaintiff might be able to specify in his affidavit, the supplementary proceeding would be shorn of its chief value.

The affidavit is sufficient, and there is no error.

Affirmed.

Cited: Hackney v. Arrington, 99 N. C., 113.

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(550)

JAMES F. PORTER v. JAMES M. GRIMSLEY.

Demurrer—Interest—Judgment.

1. Where the complaint charged the defendant with having received money, as an agent, and his refusal to pay it over, "though often requested to do so," and the defendant demurred, assigning grounds therefor, (1) that the complaint did not show the parties were citizens of the United States, and (2) that there was no allegation of a demand: *Held*, that the demurrer was frivolous.
2. Interest will run against an agent who has received money for his principal and fails to pay it over, from demand.
3. Where interest has been erroneously computed in a judgment, and it can be separated from the principal, the Supreme Court will not direct a new trial, but that the proper correction shall be made.

(Hyman v. Gray, 4 Jones, 155; *Neal v. Freeman,* 85 N. C., 441, cited.)

CIVIL ACTION, tried before *MacRae, J.,* at Spring Term, 1887, of ASHE.

The complaint alleged:

"1. That in April, 1885, the defendant, as agent of the plaintiff, received of the Valley Mutual Life Insurance Company, for the plaintiff, the sum of five hundred dollars, and paid over to the plaintiff the sum of two hundred dollars.

"2. That the defendant neglects and refuses to pay over the balance of said money to the plaintiff, though often requested so to do."

The judgment demanded was "for the sum of three hundred dollars, with interest thereon from April, 1885, first deducting from such sum reasonable commissions for the collection thereof, and for such other and further relief as to the court may seem just."

The defendant demurred to the complaint, and assigned the following causes:

"1. It does not appear that either the plaintiff or defendant are citizens of the United States of America, or that the Valley Mutual Insurance Company has any existence in the United States or elsewhere. (551)

"2. That the complaint shows that the defendant 'neglects and refuses to pay over the said money to the plaintiff, though often requested so to do,' and does not show that the same has been demanded by the plaintiff or any one authorized to do so."

His Honor rendered the following judgment:

"This cause coming on to be heard on complaint and demurrer filed, it is considered by the court that the demurrer be overruled, being adjudged frivolous," and it was "adjudged by the court that the plaintiff recover of the defendant the sum of three hundred dollars, principal money, and interest from 15 April, 1885, to wit, the sum of $40.50, to 30 May, 1887, and costs of suit to be taxed by the clerk. It is further adjudged that the defendant is liable to the plaintiff for the above amount as agent of the plaintiff, and holds the same in trust for the plaintiff."

The defendant appealed.

G. W. Bower and E. R. Stamps for plaintiff.

R. H. Battle, J. W. Hinsdale and G. N. Folk for defendant.

DAVIS, J., after stating the case: The defendant may demur:

1. When the court has no jurisdiction of the person of the defendant, or of the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly joined; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

No one of these grounds of demurrer can be found in the com- (552) plaint, and the demurrer was properly overruled as frivolous.

But the defendant says that the complaint does not show when the demand was made, and that the judgment is erroneous, in that it gave interest from 15 April, 1885.

It is conceded that interest can be charged only from demand, and in *Hyman v. Gray,* 4 Jones, 155, cited by counsel for defendant, a new trial was granted because this Court was unable to enter judgment for

the proper amount; but in *Neal v. Freeman,* 85 N. C., 441, in which it did not appear when the demand was made, and, therefore, when interest commenced, the court said: "As the sum allowed as interest was distinguished, in the judgment rendered, from the principal sum due, it is not necessary that we should direct a new trial, as the correction can be made here." It was accordingly adjudged that the plaintiff recover the principal sum, "with interest from the date of the summons, and that the clerk made the correction," etc. In this case the counsel for the plaintiff expresses his willingness to the correction of the judgment, in conformity to this decision, and the clerk will make the correction, and the judgment in favor of the plaintiff will be for $300, with interest from the date of the summons.

If the attention of the court below had been directed to the matter, the modification would, no doubt, have been made then, and as it was not done, the appellant (defendant) will be taxed with the cost.

Modified and affirmed.

Cited: *Morgan v. Harris,* 141 N. C., 360; *Bond v. Cotton Mills,* 166 N. C., 22.

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(553)

A. F. ABERNATHY v. JOSEPH SEAGLE AND MARGARET SEAGLE.

Amendment—Variance—Pleading.

1. Proof without allegation is as ineffective as allegation without proof.
2. Where there is a variance between the proofs and the allegations in the pleadings, the latter should be amended—if the amendment does not substantially change the action—to conform to the evidence, or an issue should be submitted corresponding to the facts proved, so that the pleadings may be properly amended, on such terms as the Court may prescribe.

(McKee v. Lineberger, 69 N. C., 217; *Shelton v. David, ibid.,* 324; *McLaurin v. Cronly,* 90 N. C., 50, cited.)

CIVIL ACTION, tried before *MacRae, J.,* at Fall Term, 1887, of CATAWBA.

The allegations of the complaint, as amended, summarily expressed, are:

1. The land in dispute belonged to one Jacob Jarrett, who contracted with Joseph Seagle to sell the same to him, and gave bond to make title on payment of the purchase money, and the vendee did pay most of what was due.

2. The plaintiff afterwards recovered judgment against Seagle before a justice of the peace, which was docketed in the Superior Court, and at a sale under execution issuing thereon, bought the land at the price of $75—a sum more than sufficient to satisfy the execution, and took the sheriff's deed thereon.

3. Seagle, having paid the residue of what he was owing for the land, or it having been paid by the defendant Margaret or one Ella Seagle out of his money or effects, instead of having the land conveyed to himself, caused the deed to be made to the said Margaret, she and Ella being his daughters, with intent to place it beyond the reach of his creditors, and to defraud the plaintiff.

The demand is to have the said Margaret declared a trustee to the amount of plaintiff's debt, and to subject the land to its payment.

The answer of the defendant Margaret denies the material (554) allegations of the complaint, or avers a want of knowledge or information sufficient to form a belief of their truth; and thereupon certain issues were made up, to be passed upon by the jury, which, with the responses to each, are as follows:

1. Did plaintiff recover judgment against defendant Joseph Seagle, as set out in the complaint? Answer: Yes.

2. Had the defendant Joseph Seagle, before the rendition of said judgment, entered into a contract for the purchase of the land described in the complaint with one Jacob Jarrett? Answer: Yes.

3. Was the purchase money for said land paid by defendant Joseph Seagle, or by the other defendant, or by anyone else out of the money, property and effects of the said Joseph Seagle? Answer: Yes.

4. Did Joseph Seagle procure a deed to be made by Jacob Jarrett to Margaret Seagle for the purpose of hindering and delaying the creditors of Joseph Seagle, and did Margaret receive the same for that purpose, or without consideration? Answer: No.

5. Did plaintiff Abernathy purchase the land described in the complaint at execution sale upon said judgment, and bid the full amount of his judgment, or what amount? Answer: Yes, full amount of his judgment.

It was in evidence that in 1869 Jacob Jarrett gave his bond for title for the land in question to Joseph Seagle; that about $50 was paid in cash, and two or three notes given for the balance, payable in separate installments.

That Seagle had very little property, but had $50 in money when the trade was made; the purchase price of the land was about $125 or $130.

It was also in evidence that Seagle said he would not pay the judgment, but would *fix* the land so that it could not be sold under the judgment; that he would divide it among his children. (555)

It was also in evidence that in 1866 or 1867, Jarrett had given a bond for title for the same land to one Stallings, a son-in-law of Seagle, prior to the bond which he had given to Seagle, and that this bond to Stallings was in possession of Seagle for several years, while Seagle claimed the land, and while Seagle held the bond for title which Jarratt had made to him (Seagle).

It was in evidence that after the death of Jacob Jarrett, his heirs, all being of age, made a deed to Stallings for the land in controversy, upon payment by Margaret Seagle to them of $20 in cash and the giving of her notes to said heirs for the remainder of purchase money, which notes were subsequently paid, and that the arrangement was that, upon payment by Margaret of the amounts stated, she was to have fifty acres of said land; and that on 27 January, 1879, Stallings made a deed for the whole tract to said Margaret, though Stallings kept 20 acres.

It was in evidence that Stallings was a very poor man, unable to pay the purchase money of the land, but lived upon the land; that Margaret was of age and worked for herself, and made some money from 1875; that Joseph Seagle and his family lived upon the land with his daughter Margaret and another.

There was no evidence of any deed from Jacob Jarrett to Margaret Seagle.

Upon the fourth issue the presiding judge instructed the jury that there was no evidence that a deed was made by Jacob Jarrett to Margaret Seagle for this land, and that the response to this issue should be "No." Plaintiff excepted.

There was no motion by plaintiff to amend the complaint.

The plaintiff's counsel contended that the variance between the allegations and proofs, upon the fourth issue, was immaterial, and moved for judgment for plaintiff.

Motion denied, and plaintiff excepted; judgment for defendant.

(556) Plaintiff appealed.

M. L. McCorkle for plaintiff.

John F. Hoke for defendants.

SMITH, C. J., after stating the case: The only exception presented is to the instruction given to the jury, that there was no evidence of the execution of any deed from Jacob Jarrett to Margaret Seagle for this land, and that their response to the fourth issue should be "No."

There certainly was none offered to sustain it in its present form, and while the title did reach her in the circuitous manner stated, it did not, as alleged in the complaint and as embodied in the issue, and no amendment was asked to adapt the issue to the facts in proof, and thus avoid a

variance, as perhaps would have been allowed under section 269 of The Code. There was then a failure to establish a material fact alleged and necessary to the plaintiff's relief in the premises. "There must be," in the words of the late *Chief Justice, "allegata et probata,* and under the new system, as under the old, the Court cannot take notice of any proof unless there be a corresponding allegation."

Proof without allegation is as ineffective as allegation without proof. *McKee v. Lineberger,* 69 N. C., 217.

The same eminent judge, speaking in reference to a want of correspondence between the allegations and the evidence, says that under sections 128, 129, 132 of C. C. P., a plaintiff may sue for a horse and recover a cow (which Blackstone treats as an absurdity); but in order to that, when the variance appears, the plaintiff *must obtain leave to amend* by striking out "horse" and inserting "cow," or else the party must find the facts specially, or the case must be submitted to the jury on issues, so that the *pleadings may be amended and be made to conform to the facts proved* on such terms as the judge may deem (557) proper, "unless the amendment affects the merits and substantially changes the claim or defense." *Shelton v. David, ibid.,* 328. To the same effect is *McLaurin v. Cronly,* 90 N. C., 50.

The variance was material. The complaint (and the issue conforms to it) avers that Seagle, instead of causing the deed to be made to himself, according to the contract, caused it "to be made by said Jarrett directly to said Margaret Seagle," and this "for the purpose of hindering the said Seagle's creditors and defrauding them of their debts."

The proof is that the heirs of Jarrett, after his death, made the deed to Stallings, pursuant to a title bond the deceased had given to him before that given to Seagle, and that upon the terms stated in the case on appeal. An amendment thus became necessary, and as the appellant would not ask it, but preferred to stand upon his complaint, judgment was rightfully given against him.

We have not considered, because not necessary in determining the appeal, the other point made by counsel of appellee, that the debt was extinguished by the sale and purchase by the plaintiff under his execution, and the taking the sheriff's deed therefor, as alleged in the complaint, the statutory remedy, if applicable to the case, having the effect of reinstating the claim in another form to the purchasing plaintiff.

There is no error, and the judgment is affirmed.

Affirmed.

Cited: Wills v. Fisher, 112 N. C., 541; *Hunt v. Vanderbilt,* 115 N. C., 563; *Smith v. Loan Asso.,* 116 N. C., 109; *Locklear v. Bullard,* 133 N. C., 263; *Talley v. Granite Quarries Co.,* 174 N. C., 447; *Bullard v. Ins. Co.,* 189 N. C., 38.

(558)

J. C. MUNDS v. H. C. CASSIDEY.

Deed—Description—Seal—Proceedings Supplemental to Execution—Homestead and Exemptions.

1. Proceedings supplemental to execution are in the nature of a creditor's bill, and it being the policy of the law to settle the entire controversy in one action, it is not error to permit a third party to interplead and assert title to the property which is sought to be subjected.

2. An error in the final settlement of an executor may be shown and corrected, in an action in which it collaterally comes in question, wherein the persons affected are parties.

3. A deed conveying "all the right, title and interest devised by the will of the late J. C. (to the vendor) in and to the undivided property, of whatever nature, situated in blocks 99 and 165," in a plan of the city of Wilmington, passes all the estate which the vendor took as *devisees*, but not such as descended to him as *heir at law*.

4. A deed purporting to convey the estate of the vendors in certain city lots, "being the property devised by J. C., deceased, to F. and H., in his will," does not pass pecuniary legacies provided for them in the will.

5. An instrument having the form of a deed, but executed without seal, is not a deed: but where it appears that it was made with the intent to pass an estate, and is otherwise sufficient for that purpose, it will be enforced in equity.

6. The person claiming the exemptions from execution must be an actual and not a constructive resident. Therefore, one who has been a resident, but has removed from the State with the expectation of returning at some uncertain time, is not entitled to the exemptions.

(Downey v. Smith, 2 Dev. Eq., 535; *Ponton v. Griffin*, 72 N. C., 362; *Millhiser v. Erdman, ante*, 292; *Lowdermilk v. Bostick, ante*, 299; *Ferebee v. Proctor*, 2 D. & B., 439; *McLeran v. McKethan*, 7 Ired. Eq., 70; *Beaver v. Jennings*, 89 N. C., 451; *Rand v. Rand*, 78 N. C., 12; *Hinsdale v. Sinclair*, 83 N. C., 338, cited.)

EXCEPTIONS to referee's report, made in proceedings supplementary to execution, heard by *Connor, J.*, at Fall Term, 1887, of NEW HANOVER.

From the judgment confirming the report, both parties ap-
(559) pealed.

James Cassidey died in December, 1866, leaving a will, which has been admitted to probate, and among other dispositions of his property contains a clause in the words following:

"After the death of my wife I desire and direct that my dwelling-house and lot, or homestead, as above described, and also my said brick house and lot on Market Street, shall be sold by my executor, in such manner and on such terms as he may deem best and most advantageous,

and from the proceeds of such sales I give to my son, Francis A. L. Cassidey, the sum of two thousand dollars, and to my son Henry Clay Cassidey the sum of one thousand dollars, and all the residue of the proceeds of the said sales I give to be generally divided among all of my children, including Frank and Henry."

In January, 1882, the testator's wife having died, the executor, Robert Henning, in pursuance of the will, sold the homestead, brick house and lot on Market Street, and distributed the proceeds as directed, appropriating to the two sons the sums respectively given to each, increased by the addition of their shares one-seventh of the surplus, to wit, seven hundred and fourteen dollars and fourteen cents.

In April, 1884, the executor rendered and filed in the clerk's office his final account of administration of the estate, and also an account stated with the said Francis A. L. and Henry C., in which is shown to be jointly due them the sum of nine hundred and nineteen dollars and eighty-two cents, which he then paid into the office.

On 9 December, 1870, the said Francis A. L. executed a deed to said Henry C., the operative words in which undertake to convey certain property therein thus described: "all the right, title and interest devised by the will of the late James Cassidey to Francis A. L. Cassidey, in and to the undivided property of whatever nature, situated in (560) blocks 99 and 165, according to Turner's plan of the city of Wilmington, to have and to hold," etc., and the land thus referred to is conceded to be that sold by the executor.

The plaintiff, under supplemental proceedings, pursues and seeks to subject to the payment of his judgment against said Henry C. so much of the fund in the hands of the clerk as may be necessary for its satisfaction, insisting that by virtue of said deed it had become and was exclusively the property of the debtor.

At January Term, 1887, of the Superior Court of New Hanover, the said Francis A. L., for himself and as trustee for his wife, Henrietta Bell, and others, under deeds theretofore executed, is allowed to file an interplea, which he does at great length, detailing the financial relations between himself and said Henry C., and other matters pertinent and explanatory, denying that the debtor is entitled to any of said moneys, and demanding that a restraining order, previously issued, detaining them in the clerk's office, be dissolved, and that the clerk be directed to pay over said moneys to him. At the same time a reference was made to Eugene S. Martin, Esq., "to find all the facts and the law in the case," and that he report at the next term.

The referee made his report accordingly, in which he finds that the debtor was entitled to no part of the moneys deposited with the clerk by the executor, and that they belonged wholly to said Francis A. L.;

and further, that the deed of 9 December, 1870, from said Francis A. L. to his brother Henry C., by reason of insufficient words of description of the subject-matter, was inoperative to transfer the fund.

To the report the plaintiff filed sundry exceptions, which, summarily stated, are:

1. To the finding that the deed of 9 December, 1870, was ineffectual as an assignment of the fund.

(561) 2. To the finding that the executor's account is wrongly stated, and in correcting the same; and

3. To his considering the claim by interpleader in the causes.

These exceptions were overruled, the report confirmed and judgment rendered against the plaintiff, and he appealed.

J. D. Bellamy for plaintiff.
C. M. Busbee for defendant.

SMITH, C. J., after stating the case: The first inquiry arising upon the exceptions is as to the regularity of the action of the court in admitting the claim to the fund made in the interplea.

Proceedings supplementary to execution is but a prolongation of a pending action, and as full redress, both in law and equity, may now be obtained by a resort to this statutory remedy, it is but a substitute for the former creditor's bill, and partakes of its essential nature as a new and independent, though subsidiary suit, as held in *Rand v. Rand,* 78 N. C., 12; *Hinsdale v. Sinclair,* 83 N. C., 338. Hence, the right to sue out the process rests upon the same general conditions and limitations as the creditor's bill in the former practice, and it is in accord with the policy of the new system to settle all controversies about the right to property in litigation, where the nature of the action will admit, to allow a new claimant to come in and interplead. The Code, sec. 189.

2. The executor having stated his account with said Francis and Henry as a joint account and as equally interested in the fund, when in fact they were not, it was entirely competent for the referee to adjust it properly between them, a matter in no way injurious to the executor, for the amount remains unchanged, thus showing that none of it belonged to the judgment debtor, and that the said Francis was entitled to it all.

(562) 3. The next exception is to the finding that the deed conveyed no interest in the fund subject to the plaintiff's process.

The exception, in our view, is well taken, and there is error in overruling it. When the assignment was made the land remained as it was when the testator died. The terms of the devise and the description of what was intended to be transferred in the deed from the one to the

other of the parties to it have been already set out and need not be repeated. The estate in remainder during the wife's life descended to the heirs at law, of whom the said Frank and Henry were two, and these latter had only a fractional share, unless there is some other clause in the will by which it is devised, and their interest was only in the proceeds of sale when the property was sold. *Ferebee v. Proctor,* 2 D. and B., 439; *McLeran v. McKethan,* 7 Ired. Eq., 70; *Beam v. Jennings,* 89 N. C., 451.

Now, the conveyance of the property in this condition is of "all the right, title and interest of the assignor devised by the testator," in and to the undivided property of *whatever nature,* situated in blocks designated by numbers in the plan of the city.

In the absence of other dispositive words in the will to interrupt the descent, the fractional shares so descending to all the testator's children are not embraced in the deed, which is confined to such interest as these brothers derive under the will, and not to such as come to them as heirs at law. The legal estate does not pass, and consequently nothing can but what is given in the will. The instrument is unmeaning unless the construction put upon it embraces the moneys to which the assignors would become entitled when the conversion is made by the executor.

Again, this interest is in the undivided property, of whatever nature, in the specified lots, that is, in what may be derived from the sale of the lots. In our opinion, such is the manifest intent of the parties, and it is sufficiently defined in the terms employed to give it full effect. *Lowdermilk v. Bostick, ante,* 299. (563)

There is error, and the judgment must be reversed, to the end that the cause may proceed in the court below.

Error.

Cited: Perkins v. Presnell, 100 N. C., 224; *Lee v. Moseley,* 101 N. C., 316; *Wilson v. Chichester,* 107 N. C., 389; *Vanstory v. Thornton,* 112 N. C., 214; *Jones v. Alsbrook,* 115 N. C., 51; *Chitty v. Chitty,* 118 N. C., 653; *Wool v. Fleetwood,* 136 N. C., 467; *Speed v. Perry,* 167 N. C., 129; *Barbee v. Cannady,* 191 N. C., 533.

THE DEFENDANT'S APPEAL

The facts are stated in the opinion.

SMITH, C. J. After disposing of the plaintiff's appeal it was declared that the judgment debtor had no interest in and was entitled to no part of the moneys paid into the clerk's office by the executor, as devised under the testator's will, and further, that there was error in the ruling

of the court that words descriptive of the subject-matter of the conveyance from Francis A. L. to the said Henry C., of date 9 December, 1870, do not embrace any interest given him in the proceeds of the lots sold. The present appeal brings before us certain other antecedent deeds passing between the parties, and raises an inquiry as to the title of the said Francis A. L. to the fund to be derived from the sale, when made, and his right to dispose of it at the time when he executed the deed.

The descriptive words used in these deeds and in an instrument made on 30 January, 1871, in the form of a deed, but without a seal to make it such in law, relating to the same subject, are essentially alike, sufficient, in our opinion, to embrace the pecuniary legacies to be raised by the sale of the lots.

The two deeds reciprocally passing between the said legatees bear the same date, 14 April, 1870, without evidence as to priority of execution, are upon the consideration of the natural love and affection borne by the respective donors towards Henrietta, wife of said Francis, and a (564) small sum to give effect to the conveyance paid by the donees.

The object of both deeds is to provide for the *feme covert,* and accordingly her husband conveys his interest under the will upon a trust declared to be for her use and benefit during life, with power in her to direct a change of investment when deemed proper. At the same time the said Henry C. conveys, for the like consideration of his natural love and affection for the said Henrietta and her son (his nephew), Henry Cassidey, his interest in the same property, designating it in similar terms, and omitting some of that mentioned in his brother's deed, which, if not a repetition of that already mentioned, has no material bearing upon the present controversy.

To the description of the property in general terms as lots, found in both deeds, is subjoined in this the further words: "being the property *devised by James Cassidey, deceased, to Francis A. L. and Henry Cassidey in his will,*" thus distinctly pointing to the lots as the source from which the legacies are to be drawn, and designating the interest intended to be transferred. The trusts declared are, that the said Francis A. L. shall permit the said Henry C. to possess and employ (enjoy clearly intended) during his life, and thereafter for the use and benefit of Henry, son of the trustee, and said Henrietta, his wife.

Following these in time comes the deed of 9 December, 1870, upon which we have commented in the other appeal, which is in form an absolute sale and conveyance for the sum of six hundred dollars.

The last of the series is what is denominated an indenture, but which, for want of seals to the signatures, is not such, and in it the donor, for his natural love and affection for the wife of his brother, Francis A. L., and the small consideration coming from the latter, assumes to convey

the property to said Francis A. L. upon like trusts as those de- (565) clared in the last preceding deed.

We are now prepared to consider the defendant's exceptions:

1. We sustain the first exception, that the money interest given in the will are not within the terms of the two first deeds, and for reasons not necessary to be repeated.

2. The exception is well taken to so much of the ruling as relates to the descriptive words found in the unsealed instrument. It is true, a pure gift can be made effectual, as against the donor, either by an actual or a symbolical delivery of the personal article given, and this was impossible, for the land had not been sold; or by a deed which operates *proprio vigore,* in law or equity, as the subject-matter may admit. The present writing does not show a mere gratuity or indulged impulse of benevolence, but contains in form a contract for money paid. As such a recital sufficiently shows a contract to pass the title to real estate under the statute of uses, no sufficient reason occurs to us why it may not be available to carry into effect the intent of the parties to it. If it be a contract it passes not the fund as a legacy, but the right of the legatees to demand it when it comes into *esse. Downey v. Smith,* 2 Dev. Eq., 535; *Ponton v. Griffin,* 72 N. C., 362; *Millhiser v. Erdman, ante,* 292.

3. We are of opinion that the said Henry C. is not entitled to a personal property exemption. The referee finds that he has been absent from the State for seven or eight years, and is employed upon a steamboat plying on the waters of Florida, and that he expects in the future to return to Wilmington.

Our Constitution and statute do not extend to such a case. The person must be a resident, actual and not constructive, to be entitled to the exemption. This is made clear by the section securing the homestead to insolvent debtors, when "owned and occupied by any resident of this State." Const., Art. X, secs. 1 and 2. (566)

The benevolent provision is for our own citizens—those who have a residence among us—and must be construed as not embracing cases of mere domicil, where the rights incident to domicil may be retained until a domicil is obtained elsewhere.

There is error in the rulings pointed out, which, as was said in the appeal, requires the judgment to be reversed and a new trial had. It is so ordered.

Error.

Cited: Fulton v. Roberts, 113 N. C., 427.

N. B. RAY, EXECUTOR OF WILLIAM RAY, v. JOHN HENRY RAY ET AL.

Will—Evidence—Expert—Judge's Charge.

1. Where, upon the trial of an issue *devisavit vel non*, a hypothetical question propounded to an expert witness embraced some facts of which no proof had been produced, and in reply to which the witness gave an opinion, but the court instructed the jury that "if the facts assumed were not substantially proved to their satisfaction the answer should not be considered by them": *Held*, that any error committed in admitting the answer was cured by the charge.
2. The rejection of evidence, offered to show that the testator had been appointed to and performed the duties of important public offices after the execution of the will, unaccompanied by an offer to show that these duties were discharged with intelligence, is not error.
3. Where testimony was offered tending to show that the testator was an old man, enfeebled in body and mind by disease; that he was easily influenced by those who possessed his confidence; that he had made a large provision in his will for an illegitimate son who lived near him, and had also made him executor; that he reposed great trust in this son; that the latter had stated that he had induced the testator to send away his wife, and had made other declarations expressive of his belief in his influence over the testator; and the will stated the reasons which moved the testator to include the said son in his bounty, together with a declaration that if any of the other legatees or devisees should contest it they should forfeit their interest therein: *Held*, competent evidence to be submitted to the jury, to be weighed by them in determining whether the will was executed under undue influence.

(567) THIS was an issue of *devisavit vel non*, tried before *Graves, J.*, at Spring Term, 1887, of BUNCOMBE.

There was a verdict and judgment in accordance therewith for the caveators, from which the propounder appealed.

The facts are stated in the opinion.

J. M. Gudger and Theo. F. Davidson for the propounder.
Joseph S. Adams for the caveators.

SMITH, C. J. Upon the propounding of the script which purports to be the will, with a codicil thereto, of William Ray, deceased, before the clerk for probate, as such, by Nathan B. Ray, one of the executors therein named, the coexecutor, Nathan Henderson, declining the trust, a caveat was entered by certain of the heirs at law and next of kin, and an issue framed and sent to the Superior Court of Yancey, for trial at term time, in these words: "Is the paper-writing offered the will of William Ray, deceased, or any part of it?"

Upon affidavit of a caveator, the cause was removed from Yancey to Buncombe County, and came on for trial at March Term, 1887, of the Superior Court of the last-named county, before a jury, who responded in the negative as to the script and every part of it. It was thereupon adjudged by the court that it was not the will of the deceased, and the clerk was ordered to transmit a copy of the record of proceedings to the Superior Court of Yancey, in order for further action therein according to law. The propounder appealed, after asking for and being refused a new trial for errors in the charge, wherein it differs (568) from the instructions prayed.

There was no controversy about the formal execution of the script, but the caveators denied the testamentary capacity of the alleged testator, or his volition in making the instrument, from the exercise of undue and fraudulent influence on a feeble and unresisting mind, weakened by age and excessive indulgence of sensual gratifications for a long period.

The testimony is very voluminous, and is set out at length in the transcript, which we do not propose to rehearse, except as it bears upon and illustrates the exceptions taken by the propounder during the trial.

Dr. Hilliard, a witness for the propounder, an admitted expert, and who had been a resident physician in an insane asylum, was asked to answer this hypothetical question:

"If the jury shall find as a fact that for a long series of years the alleged testator had kept his blood warm with spirituous liquors, brandy or whiskey, and has so far indulged himself in venereal excesses as to have brought upon himself a disease called spermatorrhea, and in the fall of 1882 had lost the faculty which theretofore he had of multiplying 3½ by 2, and that in the spring of 1879 he was stricken with paralysis, what then is your opinion as to the condition of his mind in the fall of 1879?

"In your opinion, would he have the will-power to resist the influence of one upon whom he had long depended for advice?" Answer: "No."

The propounders objected to the hypothetical question asked Dr. Hilliard on the grounds:

1. The evidence did not support the supposed hypothesis.

The second question asked by the caveators of Dr. Hilliard was objected to on the ground that it was incompetent to give such an opinion.

The objection to the hypothesis upon which the opinion was sought is that, if it contained statements of which no evidence had been offered in proof, and in assuming that they had been, the effect (569) was misleading and prejudicial.

Now, while the testimony as to the mental and physical condition may have been in some particulars too strongly stated, it was shown that the deceased was addicted to excessive drinking and venereal indulgences

to a degree that brought on involuntary seminal emissions, known as spermatorrhea, and about 1879 was stricken with paralysis, and was unable to multiply 3½ by 2, to all of which there was more or less evidence. The answer was pertinent.

We do not understand, as counsel contended, that separate answers were made in the negative, which would be insensible if applied to the first inquiry. The latter clause is but explanatory, and puts the inquiry in a more specific form as to the will-power capable to being called into exercise in resistance to influence brought to bear by one upon whom he had been accustomed to depend for advice. To this inquiry the response is intelligent and pertinent.

But if there were some unproved matter inserted in the supposition, and there was error in allowing the response to be given, it is cured by what is said in the charge when an instruction was asked and given in these words:

"Experts have been examined, and what is called a hypothetical question is allowed to be asked such experts. It is for the jury to decide the truth of the facts upon which the hypothetical question is asked, and if the facts assumed are not substantially proved to the satisfaction of the jury, the answer to such hypothetical question will not be considered by the jury."

The propounder proposed to prove that after the execution of the will the deceased acted as foreman of the grand jury in Yancey, and that he held office in that county. On objection, the question was disallowed, and to this ruling the propounder excepted.

(570) It does not appear, unless inferentially, for what purpose the information was sought to be elicited, or that a favorable response was to be followed by an inquiry as to the intelligence with which the duties thus imposed were performed. The question would be pertinent only in this view, and its purpose ought to have been stated. It may be that the witness had no personal knowledge on this point, and only knew that the deceased had occupied these places. It was due to the presiding judge to be thus informed, if the object was to proceed further in the examination, as well as conducive to a fair trial, and not leave the ruling to rest upon the naked facts of official service, in which the evidence would have been restricted to showing mental capacity. We do not, therefore, reverse the ruling of the court under the circumstances.

Of the series of instructions prayed, nine in number, those numbered 1 and 3 (the last already set out) were given; those numbered 2, 4, 5, 6, 7, 8, and 9 were, the judge states, given in substance, though not in very words; and a precedent, not numbered in the series, to the effect that formal execution of the will having been shown, the verdict should be that the instrument was the deceased's will, unless the caveators have

proved either that the deceased was insane, or incapable, by imbecility, or had been unduly influenced, was, as we understand, also given; but the further charge prayed that there was no evidence of any such influence having been practiced by anyone was refused. This exception has been elaborately and earnestly pressed in the argument for the appellant, and rquires us to look back and see if there be such evidence as to warrant the finding of the jury.

Barnett Ray, a daughter of the deceased, speaking of the propounder, Nathan, an illegitimate son, and as such fully recognized in the script, says: "He did not live more than six or seven miles away; frequently stayed all night at my father's. At first he called him (my father) the old man; later called him 'pap.' *Nath. never failed to get anything he wanted.*" "He (the deceased) was easily influenced by (571) a man he placed confidence in." "He was weak-minded, and easily influenced. First attack of paralysis not severe; second attack worse."

T. B. Ray testified to a declaration of the appellant, in which the latter said: "I could have patted him (uncle) on the shoulder and said, not do it, and said he had cried about it."

C. W. Edwards swore that in his estimate the property disposed of in the will was worth from $18,000 to $20,000; that given to N. B. Ray, $3,000.

James Radford testified as follows: "I know Nath. Boon Ray. Had conversation with him in reference to Wm. Ray's wife. Nath. and John Henry said they were going to get his wife away. Afterwards they said they done just what they had intended, and they had got it fixed. Nath. Boon Ray said he wanted to get her away so she could not hear anything. He said he had the old man turned against her; said they told Wm. Ray they had found some liquor there, and he was sure some one was running after her. Nath. B. Ray and John Henry said they wanted to get her away. They told me they were going to put her away. Nath. said the old man was turned against her."

The testimony of Dr. B. B. Whittington, who lived in a mile of deceased, and had known him since 1849, was, that after hearing from a statement of his physical condition and its symptoms, it was to the effect that he was suffering from spermatorrhea, and he expressed the opinion that the disease under which he was laboring "had the effect to reduce brain power, and made him more liable to depression, and tended to impair the will-power and ability to control his will."

These are a few of the excerpts taken from the mouths of witnesses, and there are many more in the examinations, to the same purport, that tend to show that deceased's susceptibility to undue outside influence

(572) from those who possessed his confidence, and the will itself indicates in some degree the source from which it emanates.

The instrument seems to recognize in its provisions an equal claim of all the children of the deceased and of the issue of such as have lived upon his bounty, and a disposition to deal justly with them in making an apportionment of his property. Those to whom nothing is given are left out, because of former donations, supposed to be equal in value to the parts given to the others. In such a case had an intestacy intervened, the result would be a redistribution, those advanced accounting for their several advancements; thus all, in the view of the deceased, sharing equally in the estate left. But the propounder would receive nothing, and hence he had the deepest interest in having the will made. After the donations made in the 14th clause to this recognized natural son—about one-sixth in value of the whole estate possessed at his death—the deceased proceeds to assign reasons why he should make them, and says: "These services" (referring to what had been done by the devisee) "have been very valuable to me, and should be ever remembered by all the children of their dead mother," etc.

Again, in the 19th clause, as if to assume submission to his expressed wishes, he declares that "if any of the heirs or parties of this will *shall enter a dissent to the same to prevent its probate,* that any or all who do this shall *forfeit all right and devise, gift, and devises made in the same to them,*" and concluded by placing in the hands of his executors the execution of his will, with large discretionary powers in the premises.

We cannot say, then, that there was no evidence of the exercise of the vitiating influence which, upon his own declarations, the propounder possessed over the mind and will of an old man who, by a long course of vicious practices, resulting in paralysis, had brought his mental faculties to great feebleness, and had so much impaired the strength of
(573) his will. The jury have found against the script, and we think the evidence warranted the adverse verdict, and of the weight due the evidence it was for them, not the court, to determine.

There is no error, and this will be certified to the court below for its further action in the premises.

No error.

Cited: S. v. Keene, 100 N. C., 511; *Burnett v. R. R.,* 120 N. C., 520; *In re Will of Amelia Everett,* 153 N. C., 86.

THE STATE ON THE RELATION OF W. J. GATLING v. THOMAS D. BOONE.

Elections—County—Canvassers—Jurisdiction—Office.

1. The power conferred upon boards of county canvassers of elections, by The Code, sec. 2694, is confined to an examination and determination of the regularity and authenticity of the returns, and does not extend to inquiries into any facts which it may be claimed made the election invalid, as fraud, intimidation, etc.
2. The declaration of the result of an election by the board of canvassers establishes a prima facie right in favor of the persons thereby ascertained to be elected, and is conclusive only of the right to be inducted into the office, but it does not exclude the jurisdiction of the proper courts to examine and determine the correctness and sufficiency of the returns and the true results of the election.
3. The Supreme Court will not direct a final judgment until all the material issues of fact are settled, either by verdict or admissions of record.

(*Peebles v. Commissioners*, 82 N. C., 385; *Moore v. Jones*, 76 N. C., 182, and *Swain v. McRae*, 80 N. C., 111, cited.)

THIS is a civil action, which was tried before *Avery, J.*, at Spring Term, 1887, of HERTFORD.

The relator alleges that he received a majority of the votes cast for clerk of the Superior Court of the county of Hertford at the (574) regular election held in the year 1886, and was then lawfully elected to that office for the term thereof then next ensuing; that, nevertheless, the board of county canvassers of the votes so cast unlawfully rejected and refused to count the votes cast for the relator for such clerk at two voting places in that county at the said election, and falsely pretended to ascertain and determine that the defendant received a majority of the votes cast for such clerk at said election, when, in fact and in truth, he did not; and in pursuance of such ascertainment the county commissioners of that county, on 6 December, 1886, permitted him to give bond and qualify as such clerk and take possession of the office in that respect, and on that day and ever next thereafter he has held and exercised the said office and received the emoluments thereof to his own use.

The relator demands judgment that the defendant was not elected to be, and is not such, clerk, and that he was duly elected as he alleges, and is entitled, etc.

The defendant denies the material allegations of the complaint, and pleads:

"That the board of canvassers are invested with judicial power to open, canvass and declare the result of all elections, and that in the

exercise of that judicial power the board of canvassers mentioned in the complaint opened and counted all the votes cast in said election, except certain votes purporting to be the votes cast at St. John's and Winton precincts, and excluded these because the election held at said two precincts was null and void, and that the returns from those precincts were invalid and void.

"That the questions presented in the complaint have already been tried and determined by the said board of county canvassers and are *res adjudicata,* and that the Superior Court has no jurisdiction of this action."

(575) The court gave judgment, whereof the following is a copy:

"This cause coming on to be heard and it appearing that the questions presented have already been adjudicated by the board of county canvassers on 4 November, 1886, and that the same cannot be reheard in this action, it is adjudged that the defendant go without day and recover his costs."

The relator appealed.

D. A. Barnes and B. B. Winborne (W. R. Winborne filed a brief) for plaintiff.

E. C. Smith (Blount & Blount filed a brief) for defendant.

MERRIMON, J., after stating the case: We are of the opinion that the court below misapprehended the purpose and scope of the effect of the statute (The Code, sec. 2694), which provides that "the board of county canvassers shall, at their said meeting, in the presence of the sheriff and such electors as choose to attend, open and canvass and *judicially determine* the returns, and make abstracts stating the number of legal ballots cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office, and shall sign the same."

Power is thus conferred to "canvass and judicially determine the returns"—that is, to examine, scrutinize and enquire about them—to ascertain and declare that what purports to be such returns are or are not such, whether they are defective, if at all, and what their meaning is, and from such as are accepted as true and proper ones, what number of votes was cast, for whom they were cast, and the result of the election in the county, as prescribed by the statute. Power, however, is not thus conferred to make, alter or amend returns. The board must accept and act upon them, if they are sufficient, as they come from the judges

(576) of the election at the voting places. It is the province of this board to ascertain the results of the election in the county from

the returns and only from them, and to declare and proclaim that result. *Peebles v. Comrs.*, 82 N. C., 385.

It will be seen from what has been said that the duty of the board of county commissioners, when assembled, is not simply to "proceed to add the number of votes returned" together, as formerly the board of county commissioners were required to do under the statute (Acts 1871-72, ch. 185, sec. 19), but they have authority, judicial in its nature, to examine the returns and decide upon their regularity, correctness and sufficiency, and to accept or reject them as above indicated.

This Court held, in *Moore v. Jones,* 76 N. C., 182, that the county commissioners, under the statute just cited, possessed only ministerial authority, and hence could not examine and decide upon the correctness and sufficiency of the returns; that they could only "add the number of votes returned" together. In view of this decision, and to enlarge the powers of the board of county canvassers, the Legislature afterwards enacted (Acts 1876-77, ch. 275, sec. 25) that they, when assembled as prescribed, should "open and canvass the returns and make abstracts," etc. This provision was considered in *Swain v. McRae,* 80 N. C., 111, but the Court expressly declined to decide that it did or did not confer judicial power, and in *Peebles v. Comrs., supra,* subsequently decided, although its meaning is to some extent interpreted, the nature of the power is left in some doubt.

Afterwards the Legislature enacted the statute first above cited, which makes the legislative intent more explicit, and confers upon the board, in express terms, authority to "open and canvass and *judicially* determine the returns and make abstracts," etc. The authority conferred by this provision is largely judicial in its nature, and would be so in the absence of the word "judicially" embraced in it, which it (577) seems was inserted to remove and preclude any possible doubt in the minds of courts as to the nature of the power the Legislature intended to confer.

The use of it was probably suggested by the seeming hesitancy of the Court to define the nature of the power in the cases above referred to. The employment of the term was really unnecessary. It only served the purpose to indicate, in terms, what the Legislature had in legal effect done, if it had been omitted from the statute.

The power in question clearly extends only to the returns. It does not go beyond them and embrace authority of the board of canvassers to inquire, ascertain and determine whether or not votes cast at the election were legal or illegal—whether unlawful votes were cast for one candidate and against another—whether lawful votes were rejected, and like questions arising at the polls. The terms of the statute embrace only "returns," and the nature of the authority conferred does not

embrace such further jurisdiction, nor is any method, nor are there any means provided, for deciding fairly and justly such questions as those suggested, and the settlement of serious legal controversies to which they would oftentimes give rise, and which would in many instances be very complicated and protracted, requiring much time and legal skill in their solution.

Nor is there any provision made, summary or otherwise, whereby one person, claiming to have received a majority of the votes cast at the election and to have been elected, notwithstanding the face of the returns, can contest the right of a person claiming adversely to him. No such jurisdiction is conferred, and the board of canvassers is not adapted to such a purpose. Such rights are frequently of the greatest moment and consequence, not only to the parties claiming, but the people as well; and it cannot be supposed that the Legislature intended, by re-
(578) mote possible implication, that such right should be finally and conclusively determined by a tribunal charged with special duties composed of persons generally unskilled in the law, and not clothed with means adequate or suited to the administration of public justice. Such jurisdiction and authority cannot arise by remote implication and mere inference. Moreover, the brief time within which the board of canvassers must discharge their official duties goes to show that it is not their province to exercise such jurisdictional functions. They are expected to complete their whole service in one or two days. The general statutory provisions and regulations in respect to contesting the right to office likewise clearly indicate that their action in respect to returns is not conclusive upon individuals or the public as to the election, and the whole course of judicial decisions is to the like effect.

The result of the election, as determined by the board of county canvassers upon the returns is important, because it conclusively settles prima facie the right of the person so ascertained to be elected to have, be inducted into and exercise the office and receive the emoluments thereof to which he was so ascertained to be elected; but this determination has only this limited effect. It is not final and conclusive upon any person interested, nor does it affect the jurisdiction of the proper court, in a proper action for the purpose, to examine and pass upon the correctness and sufficiency of the returns and to settle and determine the true and lawful result of the election as it affects the right of the parties before the court.

The sole purpose of the statute is to confer authority to examine and scrutinize the "returns," as already indicated, to the end that the true result of the election, as it appears from the lawful returns so determined to be by the board, shall be ascertained.

The board, for this purpose, is clothed with power to decide all (579) questions arising upon the returns—not as a court possessed of jurisdiction to settle legal rights between contending litigants, but for the purpose specified in the statute.

It is a mistaken notion that such limited exercise of judicial power is conclusive. It only has effect in that way to the extent and for the purpose contemplated by the statute creating it and authorizing its exercise. The registrar and judges of election, within their several voting precincts, exercise judicial power and decide many important questions in respect to the election they hold and the rights of persons claiming the right to vote; but these decisions are not final nor generally are they conclusive. Thus they have authority to decide that a particular person has the right to vote, but this decision in no way affects the jurisdiction of a proper court, in a proper action, to decide that such person had no right to vote. This is so in respect to the exercise of judicial power, in many respects, by many officers whose duties are mixed in their legal nature. In such matters, the decision is not conclusive, nor is it intended to be. The purpose is to leave the matter so decided open, to be contested by any parties interested regularly before the proper courts when need be. So that the court erred in holding that the decision of the board of county canvassers in question was final and conclusive upon the relator.

Numerous issues of fact, some of them not raised by the pleadings, were submitted to the jury, to which they responded; and the relator contends that, upon the admissions in the answer and the finding of fact, he is entitled now to have judgment upon the whole matter in controversy. We do not think so.

All pleadings should have definiteness and precision, certainly in respect to matters material. The pleadings here are not so. The relator alleges in general terms that he was elected clerk of the Superior Court. The defendant denies that he received a majority of the (580) lawful votes cast at the election. No issue of fact involving this question directly was submitted to the jury. The facts admitted in the answer, and found, do not settle that question. It was the principal one, and only facts incident to and bearing upon it strongly it must be concluded are settled. The counsel of the relator insisted earnestly before us that he did not offer evidence in respect to the number of votes cast at the election, or at all, because the court did not consider, much less pass upon, the merits in this respect.

It appears that the court decided only the single question decided adversely to the relator, and the principal issue raised by the pleadings was not submitted to the jury.

We therefore think that the appellant is entitled only to a new trial, and we so adjudge.

To that end let this opinion be certified to the Superior Court according to law.

Error.

Cited: *Roberts v. Calvert, post,* 583; *Hancock v. Hubbs, post,* 590; *Oden v. Bates, post,* 594; *Gatling v. Boone,* 101 N. C., 64; *S. v. Cooper, ibid.,* 688; *Harrington v. King,* 117 N. C., 118; *Cozart v. Fleming,* 123 N. C., 556; *Barnett v. Midgett,* 151 N. C., 3; *Jones v. Flynt,* 159 N. C., 97; *S. v. Jackson,* 183 N. C., 701.

THE STATE OF NORTH CAROLINA ON THE RELATION OF E. EXUM ROBERTS v. SAMUEL J. CALVERT.

Elections—Evidence—Office—Canvassing Boards.

1. The returns of an election properly certified by the persons authorized to hold it, are evidence of the votes then and there cast, and throw the burden on him who alleges the contrary to prove it.
2. To invalidate an election, upon the ground of intimidation, the burden is upon the assailant to show that voters were kept from voting or compelled to vote otherwise than they would. Mere noise, confusion, or threats, will not suffice.
3. While it is irregular to permit other persons than the officers of election to count the ballots, yet, unless it appears affirmatively that the count was not correct, that fact will not be allowed to vitiate the election, especially when the judges accepted and certified the result thus ascertained as true.
4. Where the board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party: *Held,* that this could not in anywise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts.
5. The ruling in *Gatling v. Boone, ante,* 573, in respect to the powers of canvassing boards, reaffirmed.

(581) THIS is a civil action, in the nature of *quo warranto,* and was tried before *Shipp, J.,* at January Term, 1887, of NORTHAMPTON.

It is alleged in the complaint that the relator was duly elected at the general election in November of 1886 to be the register of deeds for the county of Northampton for the term of office then next ensuing; that the

board of county canvassers of that county falsely ascertained that the defendant was elected to be that officer at that election, by rejecting the return of the election from Harding's Store precinct, in Occoneechee Township, and refusing to count the vote cast there, etc., which vote so rejected, if it had been counted, as it ought to have been, would have elected him by a plurality.

The defendant denied the allegations, and most of those in the complaint material, and, among other things, pleaded as follows:

"5. That he is advised and believes, and so alleges, that the said canvassing board, on the aforesaid day, duly, lawfully and judicially passed upon the question as to how many legal votes were cast for the office of register of deeds at said election, and then and there determined that there were cast at said election for said office 2,890 votes, and that of that number the defendant S. J. Calvert received 1,406, and (582) that the relator E. Exum Roberts received only 1,364 votes, being a plurality of 42 votes for the said S. J. Calvert, and that he is advised and believes that the said determination and judgment is binding and conclusive upon the relator and the rest of mankind, until the same is reversed by the judge of the Superior Court in a proceeding properly constituted for that purpose."

The following issues were submitted to the jury, and the responses to each were as indicated at the end of each:

"1. Were the returns of the votes for register of deeds in Occoneechee Township, Harding's store, properly rejected by the board of canvassers? No.

"2. Were the returns of the votes for register of deeds in North Wiccacanee Township properly accepted by the board of canvassers? Yes.

"3. Did the relator receive a plurality of the votes cast at said election in November, 1886, in Northampton County, for register of deeds? Yes.

"4. Did the county commissioners properly declare the office of register of deeds vacant? Yes."

On the trial there were numerous exceptions and assignments of error, as set forth in the case settled on appeal, but these are sufficiently adverted to in the opinion of the court to understand them and their respective legal bearings.

The court "adjudged and decreed that upon the allegations and admissions in the pleadings and verdict of the jury, the relator, E. Exum Roberts, is not entitled to the office of register of deeds for the county of Northampton, and that the respondent, S. J. Calvert, is entitled to said office and is rightfully in possession of the same"; and from this judgment both parties appealed to this Court.

(583) *R. O. Burton for plaintiff.*
C. M. Busbee for defendant.

MERRIMON, J., after stating the case: We find it convenient to consider both appeals together and dispose of them by the same opinion.

The relator produced evidence on the trial tending to show that the board of county canvassers had erroneously rejected the return from and failed to count the vote cast at the "Harding's Store" voting place, and falsely ascertained that the defendant received a plurality of the votes cast at the election in the county.

The defendant, having pleaded in his answer that the determination of the board mentioned, and its ascertainment of his election, was conclusive—certainly in an action like this, objected to the admission of all such evidence as irrelevant and incompetent to prove the material facts. The court refused to sustain the objection, and this is assigned as error.

The question thus presented has been decided at the present term in *Gatling v. Boone, ante,* 573. Since the argument in that case, we have heard elaborate arguments in this and other cases involving the same question, and have heard nothing, nor can we see any reason, that prompts us to change or modify the opinion we have heretofore expressed. On the contrary, we are satisfied that it is correct. The provision empowering the board of county canvassers to "open and canvass, and *judicially determine* the returns, and make abstracts," etc., cannot be construed as creating a jurisdiction to determine finally and conclusively the result of an election in any case, whether the same be for a county or other officer; nor does it contemplate that the decision of the board of canvassers shall be reviewed and affirmed, or corrected upon appeal, or by the writ of *certiorari,* as a substitute for an appeal to the Superior Court or this Court. Surely, if the Legislature in-
(584) tended to create such a jurisdiction—one so unusual and so novel —so important—affecting not only the rights of individuals, but very important rights of the public as well, it would have said so in terms that left little to implication and inference, and would have conferred authority and prescribed a course of procedure reasonably adequate for the purpose contemplated. No such statutory provision exists; there is a total absence of authority in the board of county canvassers to entertain an action—to regulate a litigation—a contest of the election —a proceeding of any kind, before them, to settle and determine the regularity, result and validity of the election at the voting places, to be begun and prosecuted on the part of any official or other person representing the public, or individuals claiming, as against each other, to have been elected, and to have rights growing out of the election. In

the absence of such authority, expressly conferred or arising by necessary implication, the nature of the matter in every aspect of it forbids such interpretation of the clause of the statute, cited above, as that contended for by the counsel for the defendant. Nor is there the slightest provision in the statute regulating elections that any person dissatisfied with the determination of the board mentioned shall have the right of appeal from the same to any court; nor does it in terms or by the remotest implication repeal, alter or modify the statute (The Code, secs. 603-616) prescribing the remedy in favor of persons claiming to have been elected to any office. It seems to us manifestly unreasonable to infer or presume that by the words to "open and canvass and judicially determine the returns, and make abstracts," etc., the Legislature intended to make the determination of the board "final and conclusive," and thus deprive the public and individuals of the right to contest the result and validity of an election before the Superior Court; and it is quite as unreasonable to infer from them that it intended that the board should have authority to devise a summary proceeding to settle rights of so much importance. The purpose of the statute is simply what we have indicated in the case above cited, and of this we have not (585) the slightest doubt.

The court properly admitted in evidence the paper-writing purporting to be the return of the election at "Harding's Store" voting place. It purported on its face to be a regular and proper return, showing, among other things, the number of votes cast there for the relator and the number cast for the defendant. The evidence in respect to it went directly to prove that the election was held; that the return was signed by the judges and registrar of the election there, and was delivered to one of their number appointed to attend the meeting of the board of county canvassers as a member thereof; that he took and delivered the return to the canvassing board, at the county-seat, and acted as a member of the board "until after the rejection by said board of said paper aforesaid, when he got mad and left, and had nothing further to do with said canvass." It was an official document, having legal import and effect; it was authorized and required by the statute (The Code, secs. 2678-2690), of officers charged with authority to hold the election, the purpose being to furnish evidence of the election and the vote cast as stated in it. It was not conclusive, but it was official and strong evidence; it appearing to be regular, proved the pertinent facts stated in it prima facie. It put the burden on him who alleged the contrary to prove it clearly. Cooley Const. Lim., 625; *Howard v. Shields,* 16 Ohio, Sh. R., 184; Brightly's L. E. C., 378, 384, 288; McCrary on El., secs. 290-292.

The defendant contended that the election at the voting place in question was attended with such irregularities and confusion as rendered it

void. There was evidence "that there were threats and intimidations used by relator's friends," and one witness testified "that he was
(586) satisfied that but for the threats and intimidations respondent would have received a larger number of votes"; but there was no evidence that a single voter did not vote, or that one voted otherwise than as he desired to do, or that the vote cast was less—materially, or at all less—than the number of registered voters. Mere noise, confusion and empty threats cannot, of themselves, destroy the integrity of the election; to have that effect they must at least deter electors of reasonable firmness from voting, or drive them to vote through such fear and intimidation—otherwise than as they intended and desired to do, and this ought clearly to appear.

The evidence only tended to show confusion and threats; there was no evidence of violence nor display of arms or other implements of force—so far as appeared, no one left the voting place, no one failed to vote who desired to do so, and one of the judges of election said that he thought it was a fair one. Accepting the evidence as true, there was no such confusion, or threats, or violence, as rendered the election void, and the court properly so decided. Cooley Const. Lim., 621; McCrary on El., sec. 416 *et seq.*

It seems that the defendant intended to contend that the election at "Harding's Store" was not held at the proper place. If so, the objection is so obscurely stated in the record that we cannot pass upon its merits. The evidence—the return and the testimony of the witnesses—went to prove that it was properly held at "Harding's Store," in another store-house so near to it as that all the electors who desired to vote had fair opportunity to do so. The burden was on the defendant to prove the contrary, not by evidence and circumstances that could give rise to mere conjecture or remote inference, but by such evidence as reasonably proved the fact alleged, and destroyed the effect prima facie of the return and the evidence offered in support of it.

There was evidence tending to prove that persons not sworn, other than the judges of the election, counted, or assisted in counting, the ballots as they were taken from the ballot-box. This was cer-
(587) tainly irregular and a practice that ought not to be encouraged, but if the ballots were truly counted it would not of itself destroy the election at the particular voting place. There was no affirmative evidence to prove that the ballots were not fairly and truly counted—it was left to vague inference that it might have been otherwise. There was evidence, however, that they were truly counted, in that the judges and registrar accepted the count as true, and certified the return. *People v. Cook,* 8 N. Y., 67; Brightly Lead. El. Cases, 423-454; *ibid.,* 328-333.

The board of county canvassers rejected the return in question, and ascertained that the defendant was elected to be register of deeds of the county named, and so declared in accordance with the forms of law. Afterwards he failed, for some reason not stated, to appear before the county commissioners and qualify as register of deeds, in pursuance of such his ascertained election.

Thereupon the county commissioners declared this office vacant, and at once proceeded to elect the defendant to be such officer, to fill the vacancy thus declared to exist. It is contended that the relator was present at such last mentioned election, and did not claim the office, and thus waived any right he had to it. It appears, however, that the relator was present with his counsel, and moved the commissioners to reconsider the vote by which they elected the defendant, and to declare that he was elected and that he be allowed to qualify as such officer, but he did not tender any official bond.

We do not deem it necessary to inquire into the propriety of the action of the county commissioners, or to consider any exceptions or assignment of error in respect thereto, because they could only induct into the office of register of deeds such person elect as the board of county canvassers ascertained to be elected. They had no authority to induct the relator into the office because the board of commissioners did not ascertain that he was elected, but, on the contrary, they determined that he was not. The commissioners had no authority to institute an inquiry as to the election, and determine that the relator was (588) or was not elected. There was no necessity prompting him to do the vain thing of asking them to do what they had no authority to do. Nor could they destroy or deprive him of his right to the office in question, acquired by his election, by declaring the office vacant, as was done, and appointing the defendant to fill the vacancy so declared. The latter, or any other person so appointed and taking the office, did so subject to the right of the relator thereto, to be asserted and enforced through the proper courts. The mere fact that the relator knew that the county commissioners declared such vacancy, and appointed the defendant to fill the same, could not conclude him as to his right. He had no power to prevent their action, and they could not afford him a remedy. Moreover, it is very certain, from what appears, that he and his counsel did not intend that he should waive or abandon his right. If he was elected, as he alleges, and as it appears he was, he is entitled to the office, no matter how the defendant came to be the present incumbent of it.

The fourth issue, to wit, "Did the county commissioners properly declare the office of register of deeds vacant?" submitted to the jury

was, therefore, wholly immaterial. Whether the county commissioners properly or improperly declared the office vacant could not affect the relator's right to it, and the issue, in this respect, ought not to have been submitted. His right was paramount to that of the defendant, notwithstanding the action mentioned or any action of the county commissioners. The court ought, therefore, to have disregarded the verdict of the jury upon the first issue.

It appeared that the relator received a plurality of the votes cast at the election mentioned for the office in controversy, and that he was elected thereto. The court ought, therefore, to have given judgment accordingly in his favor.

(589) There is error. The judgment must be reversed, and judgment entered in favor of the relator. To that end let this opinion be certified to the Superior Court.

Error.

Cited: Gatling v. Boone, 101 N. C., 64; *Hampton v. Waldrop,* 104 N. C., 457; *Jones v. Flynt,* 159 N. C., 97; *Davis v. Board of Education,* 186 N. C., 233; *Plott v. Comrs.,* 187 N. C., 132.

THE STATE ON THE RELATION OF ROBERT HANCOCK, JR., v. ORLANDO HUBBS.

Elections—Pleading.

Where the complaint set forth the whole number of votes cast at an election, and alleged that the relator received a specific number of those votes—being a majority—and "was duly elected": *Held,* that a demurrer to the complaint, upon the ground that it did not sufficiently allege that the relator received a majority of the said votes, was bad.

CIVIL ACTION, tried before *Shipp, J.,* at February Term, 1887, of CRAVEN, upon demurrer to the complaint.

The relator alleged that at the election held in November, 1886, in Craven County, there had been cast for register of deeds "three thousand six hundred and twenty-nine votes, of which number nineteen hundred and fifty-eight were voted for relator, sixteen hundred and sixty-four for the defendant," and seven for another party, and that the relator "was duly elected register of deeds at said election," but that the board of county canvassers illegally rejected certain returns and

certified that the defendant had been duly elected and that the defendant had been inducted into and was then exercising the functions of the office.

The defendant demurred, and assigned, among other grounds:

"*Third.* In that it appears from the complaint that, according to the returns of the precinct board of elections from all the (590) precincts in the county, the relator did not receive a majority of the votes cast at said election."

There was judgment overruling the demurrer, from which the defendant appealed.

H. R. Bryan and M. D'W. Stevenson for plaintiff.
W. W. Clark and C. M. Busbee for defendant.

MERRIMON, J. The complaint sufficiently alleges a cause of action, but it certainly contains much unnecessary redundant matter, including evidential facts. This is all surplusage, and to be disregarded as part of the pleadings. The demurrer applies only to the constituent and material allegations of the complaint, and, for the purposes of deciding the questions of law presented by the record, these must be accepted as true. It is distinctly alleged that the whole number of votes cast at the election was a number designated; that of them the relator received a number mentioned—a majority of the whole number; that other persons received votes less than a majority, and that the relator, having received such majority, was duly elected. This is a constituent allegation to which the demurrer properly applies. So that the complaint does allege that the relator received "a majority of the votes cast at said election," and the cause of demurrer cannot be sustained.

In other respects this case is fully embraced by what was decided in *Gatling v. Boone, ante,* 573; *Hahn v. Stinson, ante,* 591; and *Kilburn v. Patterson, post,* 593. There is no error.

Affirmed.

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(591)

THE STATE ON THE RELATION OF MAYER HAHN v. DANIEL STINSON.

Election—Evidence—Burden of Proof—Pleading.

1. The presumption is that all votes received by the proper officers at an election are legal, and the burden is on him who alleges the contrary to prove it.

2. Where the complaint alleged that the relator was duly elected by a majority over the defendant, a demurrer, for that the complaint did not allege that he received a majority of the "*legal* votes cast," is bad.

3. The other questions presented in the record are governed by the rulings of *Gatling v. Boone, ante,* 573.

CIVIL ACTION, tried before *Shipp, J.,* at February Term, 1887, of CRAVEN, upon complaint and demurrer.

The relator alleged that he had been elected sheriff of Craven County, over the defendant, "by a majority of three hundred and twenty votes, and by a large majority over other persons voted for," at the election held in November, 1886, but that the board of county canvassers had unlawfully rejected certain returns and declared the defendant elected, and that the latter had been inducted into and was performing the duties and receiving the emoluments of the office.

The defendant demurred, assigning among other grounds:

"*Third.* In that the complaint does not allege that the relator received a majority of the legal votes cast at said election."

The court overruled the demurrer and the defendant appealed.

H. R. Bryan and M. D'W. Stevenson for plaintiff.

W. W. Clark and C. M. Busbee for defendant.

(592) MERRIMON, J. The third ground of demurrer assigned is that it is not alleged in the complaint that the relator received a majority of the "legal votes" cast at the election, the result of which is in question.

The law does not allow any but such votes to be cast; and when the proper officers receive a vote in the way prescribed by law the presumption is that it is legal, and it must be so regarded and treated until the contrary shall be shown by some person who shall, in a proper action or proceeding for the purpose, allege its illegality. The relator alleges expressly, among other material things, that he received a majority of over two hundred of the votes cast in the county named, at the election. This is sufficient. The allegation that he received such majority implies a majority of the "legal votes," because, nothing to the contrary appearing, the votes cast were legal, and it is not necessary to do more than allege the vote cast according to its prima facie legal effect. On the trial, if an issue of fact shall be raised, it will be sufficient for the relator to show that he received a majority of the votes cast, and the burden will then be on the defendant to show that such votes, or any number of them, were for any cause illegal.

The allegation is appropriate to raise a proper issue, if the defendant shall see fit to raise it. It is always sufficient in pleading to allege

matters and things according to their legal quality and effect, unless there shall be special reason for superadding something otherwise.

The law, as settled in *Gatling v. Boone, ante,* 573, is applicable to and must be conclusive of this case adversely to the appellant. There is no error.

Affirmed.

Cited: Hancock v. Hubbs, ante, 590; *Oden v. Bates, post,* 594.

(593)

THE STATE ON THE RELATION OF DAVID N. KILBURN v. ISAAC PATTERSON.

Elections—Pleading.

In an action to recover possession of an office to which the relator alleges he was duly chosen, but was excluded therefrom by the illegal action of the board of canvassers in rejecting certain returns, it is not necessary to set forth in the complaint, specifically, the errors which the board committed; an averment that the relator was duly elected and is unlawfully prevented from the enjoyment of the office, is sufficient.

THE relator alleged that he had been duly elected treasurer of Craven County, at an election held in November, 1886, but that the county canvassers had illegally rejected certain returns and declared the defendant elected, who had been inducted into the office and was exercising its functions, etc.

The defendant demurred. There was judgment overruling the demurrer, and defendant appealed.

H. R. Bryan and M. D'W. Stevenson for plaintiff.
W. W. Clark and C. M. Busbee for defendant.

MERRIMON, J. This case is substantially like that of *Gatling v. Boone, ante,* 573, and must be governed by it.

The second ground of demurrer assigned is, that the complaint does not allege specifically in what respects the board of county canvassers erred in rejecting the returns from certain voting places mentioned. Such allegations were not necessary, because the decision of the board was not conclusive, and the purpose of this action is not to have the court below, as a court of errors, correct particular errors of the board,

but to ascertain and determine the result of the election in ques-
(594) tion, and whether the relator was elected, as he alleges he was, and if so, to require that he be inducted into the office, according to law.

There is no error, and the judgment must be

Affirmed.

Cited: Hancock v. Hubbs, ante, 590.

THE STATE ON THE RELATION OF ALLEN G. ODEN v. HENRY G. BATES.

Elections.

THIS was an action to recover possession of the office of coroner for Craven County, to which the relator alleged he had been duly elected in November, 1886. It was tried before *Shipp, J.,* on demurrer to the complaint, at February Term, 1887, when the demurrer was overruled, and defendant appealed.

H. R. Bryan and M. D'W. Stevenson for plaintiff.
W. W. Clark and C. M. Busbee for defendant.

MERRIMON, J. The questions presented by the record in this case for our decision are, in all material respects, like those decided in *Gatling v. Boone, ante,* 573, and *Hahn v. Stinson, ante,* 591, and it must be governed by them.

Affirmed.

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(595)

THE STATE v. MARY JANE CROWSON.

Evidence—Confessions—Judge's Finding of Preliminary Facts.

1. The rule which excludes evidence of the confessions of persons charged with crimes, induced by the influence of hope or fear, embraces the *acts* of the parties as well as their declarations.

2. Whether the confession was obtained by such influences is a question preliminary to its admission, addressed to the judge; and while his ruling, which undertakes to define the influence that controls its admission, and does so erroneously, may be reviewed upon appeal, his finding of the *fact* that it was or was not so obtained is conclusive.

3. If the case on appeal is silent on the point whether the judge determined the preliminary question, in favor of life, it will not be presumed that he found the fact that the confession was not obtained by the influence of hope or fear.

(*S. v. Vann*, 82 N. C., 631; *S. v. Sanders*, 84 N. C., 728; *S. v. Efler*, 85 N. C., 585, and *S. v. Burgwyn*, 87 N. C., 572, cited.)

INDICTMENT for murder, tried before *MacRae, J.*, at Spring Term, 1887, of MITCHELL.

The jury found the prisoner guilty of murder, and from the judgment thereon pronounced she appealed.

The prisoner is charged in the indictment with the murder, by drowning, of her infant son, of about the age of four years, and was found by the jury guilty of the crime. The testimony, in substance, was that about the middle of the .... day in January, 1887, the prisoner was seen with her child in her arms going down the public road, from which, at a point further on, tracks were afterwards found diverging towards the stream in which, some days later, the dead body was found. She returned the same day and was at the house of a witness, McKinney, without the child. To an inquiry as to what she had done with it, she replied that she had given it to Mr. Woods, whom she saw at Major Keene's with some cattle; that she had taken it down to give to the latter, but it was too small, and he did not want it, and Mr. (596) Woods said he would take it. The prisoner remained that night at the house of the witness, and her mother coming next morning, they left together.

The witness met prisoner a short time afterwards and told her that Mr. Woods did not have the child, and "if she could not show what she had done with it they would get after her about it." She then said that "she had not given it to Woods, but to a darkey from Virginia that used to work at Woods'," and that she did not know the darkey's name.

To this testimony the prisoner's counsel objected, and the objection was overruled and an exception entered.

On the next Sunday the witness and another, who had been watching the movements of the prisoner and her mother, fell in company with two others, Green and Phillips—Green being a deputy of the sheriff—when a conversation again took place about the missing child, when witness said: "We told her (the prisoner) she had better show up what she had done with it." Four men besides witness were present. "We told her she had done something with the child, and she had *better show up* what she had done with it." He further testified as follows: "We told her at last that she *had to tell* what she had done with the child; and the deputy sheriff, Green, told her if she would take him to the place where she had lost the child he could tell with a crooked stick

what she had done with him. Then we told her it *would be best for her to tell* what she had done with him," adding, *"come out and tell the truth about it and confess it all."*

To this prisoner's counsel objected, and to its reception excepted.

The witness Green, after corroborating what the last witness said of the conversation with the prisoner, testified that she at first refused, but afterwards carried him to the river; that "she seemed very brave at first, but when she got to the river become *much agitated* and (597) *looked guilty"*; that he was acting as a detective, and believed that he could effect his purpose by the crooked stick; and the prisoner said: "If anybody wanted their negroes drowned to bring them to her."

There was much evidence offered of her feeble and low grade of mind, and of her capacity to distinguish between right and wrong, which it is not necessary to reproduce, since the question has been eliminated by the finding of the jury, under instructions of which no complaint was made.

Attorney-General for the State.
W. B. Council for prisoner.

SMITH, C. J., after stating the case: The only point upon which stress is laid in the argument of prisoner's counsel, and upon which the record calls on us to decide, is the competency of the evidence of the prisoner's act in conducting the officer to the brink of the stream where she last had the child, and to her remark about the drowning of negroes by herself.

These are most clearly confessions—the act as expressive as words could be—of her having carried her boy to the place whence it seems to have been cast into the water and there disposed of it.

It is not less apparent that these self-criminating facts were important elements in the proof of her guilt. The confessions, too, seem to be responsive, directly so, to the menace "that she *had to tell* what she had done with the child," and to what had been previously said to her, that "if she could not show what she had done with it *they would get* after her about it."

The confession, to be admissible, must be voluntary, and not obtained by the influence of hope or fear applied by a third person to the prisoner's mind, and this being, in its nature, preliminary to its being heard, is addressed to the judge, who admits or rejects as he may find (598) the confession to have been superinduced by these motives. 1 Greenl. Ev., sec. 219. To the same effect are our own decisions.

S. v. Vann, 82 N. C., 631; *S. v. Sanders,* 84 N. C., 728; *S. v. Efler,* 85 N. C., 585; *S. v. Burgwyn,* 87 N. C., 572.

These cases establish the doctrine also that while a ruling which undertakes to define the influence that excludes the confession, and does so erroneously, is the subject of an appellate revision, its exercise in bringing about the confession in a particular instance being a fact, is not subject to the corrective power of this Court.

Now, the reception of the testimony in response to the question objected to (and the objection must extend to the evidence which it elicits) may admit of two interpretations—one, that the receiving the evidence presupposes a ruling that it did not come from the influence brought to bear upon the prisoner; the other, that it was received without any determination of the preliminary question, actual or by implication.

In a matter so serious, involving human life, we feel constrained to adopt the latter construction of the action of the court, and to consider this duty of the judge to have been overlooked. He might have ruled out the confession, so damaging to the prisoner in its influence upon the jurors in conducting them to their verdict.

It is the well-merited commendation of our law that in its administration the same securities are provided for all who are accused of crime, and that all its requirements must be observed and a conviction had in subservience to them. Shocking as may be the act imputed, the guilt of the prisoner must be proved in accordance with the rules of evidence and upon a fair trial. This, in our opinion, she has not had, and she is entitled to a *venire de novo.*

There is error in the particulars pointed out, and the prisoner (599) must have a new trial, and to this end the verdict must be set aside.

Error.

Cited: S. v. Page, 127 N. C., 513; *S. v. Whitener,* 191 N. C., 662.

STATE v. JAMES THOMAS.

Evidence—Witness—Burden of Proof—Judge's Charge.

1. If a person charged with a crime voluntarily offers himself as a witness in his own behalf he waives his constitutional privilege of refusing to answer a question because the answer may tend to criminate him.

2. Upon the trial of an indictment for murder, the killing being admitted or proven, it is not error for the court to charge the jury that, if the testimony does not satisfy them that the offense is manslaughter, it is their duty to convict of murder.

(S. v. Efler, 85 N. C., 585; *S. v. Garrett*, Busb., 357; *S. v. Patterson*, 2 Ired., 346; *S. v. Murray*, 63 N. C., 31; *S. v. March*, 1 Jones, 526; *S. v. Bowman*, 80 N. C., 432; *S. v. Brittain*, 89 N. C., 481; *S. v. Jones*, 87 N. C., 547; *S. v. Neville*, 6 Jones, 423; *S. v. Boon*, 82 N. C., 637; *Rencher v. Wynne*, 86 N. C., 268, cited.)

THIS was an indictment for murder, tried before *Boykin, J.*, at Fall Term, 1887, of HENDERSON.

There was a verdict of guilty of murder, and from the judgment thereupon pronounced against him the prisoner appealed.

The prisoner is charged with the crime of murder committed upon the body of one Joseph R. Barnett.

Upon the trial the prisoner was examined as a witness on his own behalf, and gave evidence tending to reduce the crime to the grade of manslaughter.

(600) Upon his cross-examination the solicitor, prosecuting for the State, put to him the following interrogatory:

"1. Were you accused of the commission of any offense in Alabama?"

The prisoner, who had recently removed from that State to this, hesitated to make answer until he was instructed by his counsel to do so, and then said, "Yes."

Thereupon the solicitor propounded this further question:

"2. What offense were you accused of committing in that State?"

The prisoner objected to being required to answer the question for the reasons:

1. That the answer would tend to criminate him;
2. For that it was irrelevant; and
3. For that he cannot be compelled to give evidence against himself.

The court overruled the objection, and the prisoner, in response, said he had been accused of murder in Alabama, and the prisoner excepted.

In admitting the testimony the judge remarked, and repeated the remark in the charge to the jury, that the evidence could only be considered as affecting the credibility of the prisoner as a witness in the cause.

The prisoner's testimony tended to reduce the grade of the homicide to that of manslaughter, while he admitted the killing to have been done with a pistol.

The court charged the jury that, "the homicide being admitted to have been effected by the use of a deadly weapon, the prisoner must satisfy you that it was committed under circumstances reducing the

crime to manslaughter; and in determining the degree of the offense, all the evidence, as well that produced by the State as that produced by the prisoner, must be considered."

The counsel for the prisoner asked an instruction, to the effect that the case of the prisoner might rest upon the evidence coming from the State, and find matter there in extenuation or mitiga- (601) tion of his offense.

To this suggestion the judge replied: "I have already instructed the jury that, in forming a conclusion as to whether the prisoner be guilty of murder or manslaughter, they must consider all the evidence in the case. The prisoner is permitted to rely upon acts, circumstances and declarations proved by the State, in order to acquit himself of the more serious offense, and I now again so charge the jury."

Prisoner's counsel excepted to the instructions, for that, in laying down the rule as to the burden of proof, the judge "did not in terms tell the jury that matters in mitigation might be shown in the testimony offered against the prisoner, but left this to be inferred from the language used in the request and in the charge in response."

After the retirement of the jury for deliberation and to make up their verdict, they returned into court and inquired: "If the jury are in doubt as to the truth of the testimony of any witness is the prisoner entitled to it?"

The judge replied to the inquiry, addressing the jury as follows: "You have been informed that the prisoner's admission of the killing with a deadly weapon imposes on him the duty of satisfying you that the act is manslaughter. In determining whether it be manslaughter or murder it is proper for you to consider the character of the witnesses, both for the State and the defendant; their interest in the result; their demeanor on the stand; the relationship of the witnesses for the State to the deceased—for the purpose of ascertaining whether they are credible or not. Carefully analyze all the testimony, scrutinze and compare the statements of the different witnesses, ascertain the facts from the testimony, apply the facts to the law the court has announced; and if, upon all the evidence, after attaching such weight and importance to the testimony of each witness as in your opinion it merits, you are not satisfied that the offense is manslaughter, convict of murder; if so satisfied, convict of manslaughter, since the State is relieved (602) of the burden of introducing any testimony upon such admission, and the *onus* as to all matters is on the defendant." The jurors expressed their content and retired.

The prisoner again excepted, because the court did not say to the jury that the prisoner was entitled to the benefit of the doubt.

The court had previously explained the law of homicide as applicable to the different aspects of the case, as presented in the evidence, and to this there was no exception.

Attorney-General for the State.
J. C. L. Gudger and G. S. Ferguson for defendant.

SMITH, C. J., after stating the case: 1. The first objection to be considered is to the compelling the prisoner to tell with what crime he was charged before removing from Alabama.

When a person on trial for a criminal offense shall avail himself of the right conferred by the Act of 1881 (The Code, sec. 1353), to become a witness on his own behalf, he occupies, as such, the same position that any other witness would, and exposes himself to the same discrediting and impeaching evidence. *S. v. Efler,* 85 N. C., 585. This results from the necessity of ascertaining the value and weight to be given to his testimony by the jury; and it is certainly a material inquiry whether the witness is entitled to credit and deserving their confidence in the truthfulness of his statements.

In the absence of direct rulings on this point it would seem that a question ought not to be allowed to be put to an involuntary witness not a party to the cause, the answer to which would criminate, so that the refusal to answer, and the inferences to be drawn from it, would be almost, if not quite, as prejudicial and disparaging as a direct and affirmative reply. In the language of *Battle, J.*: "It is manifest
(603) that the only mode by which a complete protection can be afforded to the witness is to prevent the question from being put at all." *S. v. Garrett,* Busb., 357.

But the ruling in this Court has been otherwise, and in the case cited, the refusal of the witness to answer the inquiry, "have you not been indicted, convicted and whipped in the County Court of Warren for stealing," was allowed to be commented on before the jury to the discredit of the witness. As the disparaging question may be asked, and a refusal to answer can be used to discredit, the judge, in the opinion from which we have quoted, adds: "We are inclined to think with the very eminent judges who decided *S. v. Patterson,* 2 Ired., 346, that it follows as a necessary consequence that the *witness is bound to answer.*"

The testimony sought to be elicited in this case was disparaging only, and would not expose the witness to the perils of a criminal prosecution, if true, for that is assumed to have already taken place.

In the more recent case of *S. v. Murray,* 63 N. C., 31, which was on an indictment for rape, the prosecutrix was asked if she had not been

delivered of a bastard child and had had sexual intercourse with other men?" and the judge below would not allow the question to be put. Upon appeal, *Pearson, C. J.*, speaking for the Court, declared this to be error. But in *S. v. Marsh,* 1 Ired., 526, a witness was asked if he had not committed wilful and corrupt perjury in Georgia by swearing that he had not brought negroes into the State, and this question was propounded to impeach the credibility of the witness. It was ruled out, and upon appeal, *Battle, J.*, delivering the opinion, thus disposes of the exception: "If the witness had been asked whether he had or had not committed perjury in this State, he certainly would have been protected from answering what might have exposed him to a *criminal prosecution in our courts,* and, in such case, we are inclined to think that the question *ought not to be allowed to be put at all.* But our (604) courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked if he had not violated them. We are of the opinion, therefore, that the question was improperly ruled out, and that the defendant is entitled to the benefit of another trial."

This ruling proceeds upon the principle that self-criminating evidence cannot be drawn from the witness, against his will, when it relates to the offenses committed within the jurisdiction of the State; but the protection does not extend to such as are committed beyond its jurisdiction and which violate the laws of another State or country. The crime of perjury exists under the common law, and is recognized as such, in like manner as homicide.

This case is not distinguishable in principle from that before us. We prefer, however, to put our decision upon other ground—more satisfactory to our own minds and well sustained by adjudications in other courts.

A person charged with crime may, "at his own request, but not otherwise," become a witness on his own behalf upon the trial, and his failure to claim the privilege and offer his own testimony, is not permitted to become the subject of comment to his prejudice by counsel for the prosecution. The Code, sec. 1353. He is, when he chooses to testify, bound to disclose all he knows, whether criminating or disparaging to himself, as does an ordinary witness when testifying on matters of which he might claim the privilege of being silent, binds himself to tell the whole truth and all that he knows of the transaction, to part of which only he has testified. In either such case the privilege is waived.

In *McGarry v. The People,* 2 Lansing (N. Y.), 227-233, it is said of a party testifying: "It was not compelling him" to be a witness against himself, within Article I, section 6, of the Constitution of this State. He was a voluntary witness under the provisions of (605)

chapter 678 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable him to testify, "to tell the truth, the whole truth and nothing but the truth," upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all; but when he made himself a witness under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue." To the same effect is *Burdick v. The People,* 58 Barbour, 51-58.

In *Brandon v. The People,* 42 N. Y. Court of Appeals, upon the trial of the accused for larceny she was asked: "Have you ever been arrested before for theft?" An objection to the testimony was overruled and she answered in the affirmative.

In *Commonwealth v. Lannan,* 13 Allen (Mass.), 563-569, *Hoar, J.,* uses this language: "The defendant, by offering himself as a witness, waives his right to object to any question pertinent to the issue on the ground that the *answer may tend to criminate him.* He is not required to testify, and may protect himself by not doing so," citing *Commonwealth v. Price,* 10 Gray, 472.

Again, says *Bigelow, C. J.,* in *Commonwealth v. Mullen,* 97 Mass., 545-546: "If he offers himself as a witness he waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the cause."

"By taking the stand as a witness," to use the words of *Cobb, J.,* "he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness." *Commonwealth v. Morgan,* 107 Mass., 199-205. These references, in connection with *S. v. Marsh, supra,* disposes of the exception.

(606) 2. We do not find anything in the charge of the court to warrant the exceptions taken to it. So far as it relates to the burden of proof in reducing the grade of the homicide, when there had been a wilful killing, the charge is in accord with the law as declared in *S. v. Bowman,* 80 N. C., 432, and *S. v. Brittain,* 89 N. C., 481, and the series of cases cited by *Ashe, J.,* in the last.

The presiding judge, as the case on appeal states, while not setting out in words the charge upon the point, "explained to the jury the difference between murder and manslaughter, and applied *the rule of law so announced to the evidence in the case,*" and to this no exception is taken. The charge is not, therefore, obnoxious to the complaint based upon the ruling in *S. v. Jones,* 87 N. C., 547, when the Court declared the law in general terms without adapting it to the different aspects of the evidence, as required by The Code, sec. 412. So he did direct the jury to find of what crime the prisoner was guilty, from an examina-

tion of all the evidence, and, of course, if that of the State showed the mitigating circumstances, it would be as protective as if proved by the prisoner. He was not bound by the very words of the introduction, if correct in itself, when it was substantially given. *S. v. Neville,* 6 Jones, 423; *S. v. Boon,* 82 N. C., 637; *Rencher v. Wynne,* 86 N. C., 268.

The exception, based upon what transpired on the return of the jury, when information was asked whether, in case of doubt of the testimony of any witness, the prisoner was entitled to it, is also untenable. The inquiry, in form, is indefinite in its terms, but assuming it to refer to a supposed defect in the inculpating evidence, the answer from the judge seems to meet it, and was accepted by the jurors as satisfactory. It was virtually a repetition of what had been before said, that the homicide being conceded to have been committed with a deadly weapon, and intentionally, the law pronounced it murder, unless, upon the evidence, it should be reduced to a lower grade, and that the (607) doubt as to whether this was sufficiently proved was not to be resolved in the prisoner's favor.

The case has been ably argued for the prisoner and the defense considered with the consideration due to it. It must be declared there is no error, and the judgment

Affirmed.

Cited: S. v. Allen, 107 N. C., 807; *S. v. Rollins,* 113 N. C., 734; *S. v. Staton,* 114 N. C., 818; *S. v. Mitchell,* 119 N. C., 787; *S. v. Smarr,* 121 N. C., 676; *S. v. Byrd, ibid.,* 686; *S. v. Simonds,* 154 N. C., 198; *S. v. Spencer,* 185 N. C., 767; *S. v. Luquire,* 191 N. C., 481.

THE STATE v. PAT BREWER, JESSE HARRIS AND FRANK KIRBY.

Homicide—Evidence—Witness—Judge's Charge—Withdrawal of Appeal.

1. The defendant in a criminal action ordinarily will be allowed to withdraw his appeal after it is docketed in the Supreme Court, but when the Attorney-General opposes the application good cause must be shown why it should be granted.

2. Upon a trial for murder, a witness testified that immediately after the fatal shot was fired he heard a voice, which he recognized as that of one of the prisoners, say, "I have got one of the damned rascals"; the cross-examination tended to impeach this testimony: *Held,* that the declara-

tion of the witness, made soon after the killing, that he "knew the prisoner killed deceased," was competent, as corroborative of the statement made on the stand.

3. It is not necessary that the judge should give instructions to the jury in the words or in the order in which they are requested; it is sufficient if they are fairly and intelligently presented to the jury.

4. No question having been made by the prisoner, upon the trial, as to the character of the weapon (a pistol) with which the killing was done: *Held*, that an instruction to the jury that they must be "satisfied beyond a reasonable doubt that the deceased was killed by a pistol shot," without instructing them that the pistol was a deadly weapon, was not error.

5. When the evidence presents more than one aspect of the case it is the duty of the judge to submit each one to the jury as clearly as he can, without expressing an opinion.

6. Where the testimony tended to show that one of the prisoners fired the fatal shot from an upper window, late at night; that the other two prisoners, on the approach of the deceased and his friend, went up stairs with their comrade, some of them having pistols; that the firing commenced immediately, and there was other evidence tending to show that the prisoners were making common cause: *Held*, not to be error in the court to refuse to charge that there was no evidence to go to the jury that the two were present in the room when the shooting was done.

(*S. v. Leak*, 90 N. C., 655; *S. v. Lee*, 91 N. C., 570, and *S. v. Whitfield*, 92 N. C., 831, cited.)

(608) THIS was an indictment for murder, tried before *Phillips, J.*, at March Term, 1887 of ORANGE.

The prisoners were convicted of manslaughter, and from the judgment thereon appealed.

The State examined W. J. Fleming as a witness, who testified in substance, as follows:

I am a student at the University; was there 9 October; knew Jacob A. Frieze, the deceased; first met Pat Brewer that night at the house of Jack Barbee; met Morris (who is not a student) at rock wall of campus gate; Marshall was with me; Morris was drunk; Marshall and I went with Morris to take him home; started with him and got in front of Jack Barbee's house where he stopped, and Marshall and I went back to corner of yard on street; some negroes came out, about four, I suppose, and asked if we were looking for Pat Brewer? I told them we were not—"is he here?" About that time a negro came out, and said his name was Pat Brewer, and began cursing; he was conspicuous, and had a pistol. I recognized Pat—I did not recognize any of them except Pat and West Merritt; Marshall said, "come, it will never do to stay here." I was of the same opinion, and we started off, got a little way, and they threw rocks at us. We went to college and to Woodson's

room, and told him we had been cursed, assailed and rocked by (609) negroes, and asked him to go back with us. Woodson got up, put on his clothes and went over to the South building and got a pistol; I think I went to my room where Frieze was and told him the same in substance as I told Woodson. We then went to Sapp's room or Foust's, and every one was told the same thing. They got up and went with us—Frieze, Sapp, McKeever, Foust, Marshall, Woodson and myself, seven in all—went to ascertain what the negroes meant by rocking us and who they were; we went to my room on the way, and from thence to Jack Barbee's; called for the proprietor of the house, Jack Barbee. We understood he was the proprietor; two-story wood house. Jack Barbee came out and we asked him who had been rocking the students? I can't tell what his answer was; asked him if Pat Brewer was there? Don't know what his exact answer was, but the substance was that Brewer was there; we had some talk. Pretty soon some shooting commenced upstairs. Prior to that there were no threats as I heard. I was standing doing nothing; some of the others were talking; all of us in the yard. We were not together; Woodson, Frieze and myself were in a row, and the others, I suppose, were behind ten feet. A good many shots were fired; first shot nobody was hit; first a single shot, next a volley or a number of shots from the window upstairs to my left; then in quick succession another volley from the same place; in that volley Frieze was shot. After Frieze was shot I was hit, and I stepped back a step or two and drew a pistol, got a bead on the window, and commenced firing, and as soon as my pistol stopped firing I left. I went as far as the Baptist Church and examined to see if I was much hurt; went to Withers' room and got some cartridges and loaded the pistol. I went back to Frieze and thought he was dead or badly wounded; went for Dr. Mallett, who went to Barbee's house, and we picked Frieze up and carried him to a house near Baptist Church, and laid him on the porch. There were fifteen or twenty negroes in (610) and about the house. I recognized Pat Brewer; he said he was Pat Brewer; I didn't see him when the shooting was going on. Frieze exclaimed, "my God, boys, I am shot!" A voice from the window said, "I have got one of the God damn rascals," or words to that effect; I recognized that voice as the voice of the man who told me his name was Pat Brewer when I met him that night. I do not know what negroes were there; there had been no firing from any of us until they fired on us from the windows. When we were talking to Jack Barbee on the steps at the door there was a yellow negro behind him in the door, but I don't know who it was. There was considerable shuffling in the house while we were standing out doors. Frieze was shot in the

breast. I didn't recognize any but Pat Brewer except West Merritt, who I met, for the first time, when we were rocked.

Cross-examined: The shooting took place 9 October last—Saturday night; moon shining brightly; I boarded at Mrs. Davis'; after I got supper I went to college; then went to the Christian Association; thence to my room; thence to Dr. Robinson's Hotel; didn't stop long; from Robinson's Hotel I went up the street; don't know who was in the crowd. Brooks Brewer's shop is next to Jordan Weaver's; I stopped at Weaver's to get a glass of cider; I saw Pat Brewer at a house said to be Jack Barbee's. I didn't see Pat at Jordan Weaver's shop. From Weaver's I went west by myself; I went to Kirkland's corner; my purpose in going there was simply to take a walk; went from Kirkland's to campus gate and met Marshall; I didn't meet Frieze, McKeever and Woodson, and had not heard of any difficulty. I can't say that I heard of the difficulty going to Jackson Barbee's or after I told Woodson Pat was at Barbee's. I did not send word to Pat Brewer that we were going to give him a dose of the same that we had given Jim Weaver; no one else did in my hearing, and I heard all the talking that was
(611) done. I didn't, a short while before the homicide, go with Woodson and others to Simon Battle's or Hilroy Bynum's to wait for Pat Brewer. I had no whiskey; I was not drunk; Marshall was not drunk; Morris was drunk; didn't go to Morris and tell him to get us whiskey; didn't go for whiskey; did stop on the street in front of Morris' shop; Morris had no liquor that I saw; didn't tell us to go to Barbee's to get whiskey. We got in front of Barbee's, and Morris stopped and said he wanted to see some darkies; we were taking him home; didn't know that Morris lived in the shop. I had drunk one glass of cider—no wine or whiskey. Morris couldn't make much progress, and we supported him. Neither Morris, Marshall nor I went into Barbee's yard; Morris didn't tell us to wait at the gate and he would go in and get some whiskey for us; I stopped back at the corner. I didn't demand to know if Pat Brewer was there. Morris was at the gate; I didn't want to stand there while they were in conversation, on account of the appearance of the thing. Some negroes asked if we wanted to see Brewer; said we didn't; I did not have a pistol. Marshall did not take me off. Did not tell Pat we would get him; had no conversation with Pat Brewer; came out and said his name was Pat Brewer and commenced to curse us. Morris did not leave when I left. Marshall said, when Pat began cursing, "we must leave," and I thought so too. From the gate to Barbee's house was about ten steps; Frieze, Woodson and I went up to the door, Woodson standing to my left; I was somewhat to the right of the door; Frieze was to the right of me; didn't throw any rocks at the house; don't know who came to the door; we

asked for the proprietor; the proprietor stepped out on the steps; after that I asked if Pat Brewer was there; in substance he said he was; Woodson did not say that Pat was there and he intended to have him—heard no words to that effect. The shooting began from window upstairs. Neither one of us went into the house before the shooting. I did not see Jesse Harris. I was three steps from the (612) house when the firing commenced. I got in the walk before I began firing at the window; I saw nobody in the window when I fired. We all got a pistol before we went down to Barbee's; I didn't say that Frieze had two pistols; I heard that he had. I don't know where Pat Brewer lives; didn't know that he lived in a kitchen in Pritchard's yard; I never went there and demanded that Pat Brewer's wife should come out, or Pat himself. I don't know any of the students who fired but myself; I fired after I was hit; I was hit after Frieze was shot; I was shot at the third volley. The first time I ever heard Pat Brewer's voice was at Barbee's on the occasion of the rocking; the second time, later in the same night, when the shooting was heard. My object in going to Barbee's house that night was to find out the names of the negroes and see what they meant by rocking us; I can't say what would be done next; my purpose was to defend myself if necessary; my sole purpose in going to Jackson Barbee's house the second time that night was to get the names and see what they meant by rocking us; I supposed Pat Brewer would be there. I don't know Pat Brewer's wife; never spoke to her; have seen a woman who they said was his wife. It was about an hour and a half from the time I left Jack Barbee's house until I went back. I was sober; our purpose was to ascertain who it was that rocked us and why they did it; that was understood amongst us to be our only purpose.

West Merritt, a witness for the State, testified substantially as follows:

Live at Chapel Hill; recollect the night Frieze was shot; was there when Morris and two students came; I had started down the street; met Morris at the fence, who asked me if Pat Brewer was there; I said I didn't know; Jesse Harris said, "if you want to see Pat Brewer I reckon you can find him." Jesse went into his house and brought Pat to the fence, and Morris told him to step across the street; (613) Pat said he wouldn't do it—if he wanted to see him, see him there; Jesse told him to get over the fence and see what the man wanted; I didn't see him have anything. Morris and the students then left; in about half an hour Morris came back by himself and inquired for Pat Brewer. Jack Barbee, Frank Kirby, Bill Lynn, Pat Brewer and myself were there when the students came; I was in the house when they came back the second time; Pat Brewer said the students had

come, and he and Jesse Harris and Frank Kirby went upstairs; Frank Kirby didn't have anything, but had his hand in his hip pocket; the others had two pistols. I was in the house and heard the firing; there was such a row I could not tell what was going on around me; the noise was out of doors and up above; I was down stairs in the passage when the first fire was made, and they got to shooting, so I leant up against the door. They went upstairs as soon as the students came; I saw Pat Brewer come down with a pistol in his hand after Frieze hollered; he made at Woodson, who was then in the house, and snapped his pistol once or twice at him and told him to get out—he was after him tonight. Jack Barbee and Alice Brooks lived in the house down stairs; the upper rooms were not occupied. A minute or two after the parties got upstairs the firing commenced; none of the students had come in the house when these parties went upstairs; Jack Barbee was standing in the door.

Cross-examined: Don't know who the students were who came with Morris; don't know whether the students were drinking or not; think Morris was; students were across the street; they and Morris went off together; Morris told Brewer to step across the street, and Jesse told him to go; Pat got over the fence. I heard Pat say the students had come; he was in Jack's room, and had stepped out into the passage and started upstairs, and said students had come; students then came
(614) in the yard and asked Jack who it was that rocked the students; Jack told him it was Jesse Harris, Pat Brewer and me that rocked the students. Didn't hear Jack tell Woodson that his wife was sick and he didn't want him to come in. Pat Brewer, Jesse Harris and Frank Kirby were all that I saw go upstairs; wouldn't say whether the firing commenced upstairs or out of doors; in a very short time Frieze hollered out he was shot; I saw no one but Pat come down stairs; Woodson was in the door; I didn't see him do anything but run. I didn't throw any rocks at the students, nor did I see any rocks thrown at them, and I was out there from the time Morris came until he and the students left. I was indicted in this bill. I was in the house sitting down eating eggs when the students came. I went to Jack's that night to get some liquor from Bill Lynn; I got it; I never got liquor there before. I never heard Woodson threaten to whip Pat Brewer. Pat Brewer lived on the other side of town, in a house on the Askew lot. I don't know what Pat was doing at Jack Barbee's that night; I had no pistol; I don't remember seeing Ella Brewer there that night.

Redirect: There were two doors to Jack's house—one front and one back door. The magistrate bound me over as a witness, and at the last term of the court I was put in the bill and arrested; nobody stood my

security; I was just turned out. I didn't see any other parties about the house, and when I came out of the house I didn't see anybody about the yard.

Several other witnesses, introduced by the State, testified substantially to the same facts.

Dr. Mallett, a physician who examined the deceased soon after the shooting, was asked by the State, what did the witness Fleming "then tell you?" To which he replied: "Fleming said he knew that Pat Brewer killed Frieze." To this inquiry and response the prisoners objected.

The prisoners offered no testimony.

Attorney-General for the State. (615)
A. W. Graham for defendants.

MERRIMON, J. After the appeal in this case had been docketed, called regularly for argument and argued, and the court had considered of the errors assigned, two of the appellants presented their application, signed by them respectively and approved by their counsel, asking that they be allowed to withdraw the appeal as to themselves, and their counsel submitted a motion to that effect, which the Attorney-General opposed.

No cause is assigned in support of this motion; it seems to be expected that it will be granted as of course. This is a misapprehension of the rule applicable. The appellants having brought their appeal to this Court, the latter has jurisdiction thereof for all proper purposes, and may, in the exercise of a sound discretion, grant or refuse their motion. The court will ordinarily, with the assent of the Attorney-General, grant such a motion, but it will not when he opposes it, unless just and reasonable cause be shown why it should be allowed. The course of procedure in an action is serious, and must be observed and pursued until it shall be completed, and a party to it cannot abandon or rid himself of important steps taken in it without the consent of the opposing party or for cause shown, and with the sanction of the court. And this is so in criminal as well as civil actions. Courts are serious and practical tribunals that do not tolerate the mere whim or caprice of litigants; a reason or cause should prompt every step in the course of an action. No cause has been shown in support of the present motion, and it must be denied. *S. v. Leak,* 90 N. C., 655; *S. v. Lee,* 91 N. C., 570.

The single objection taken at the trial to the admission of evidence is not well founded. Obviously one purpose of the cross-examination of the witness Fleming—a witness for the prosecution—was to im-

(616) peach him as to his testimony. It was therefore competent to corroborate him in that respect by producing evidence that he had, before the trial and his examination, made statements the same in effect, or substantially the same, as he made on his examination in respect to some material matter of fact. *S. v. Whitfield,* 92 N. C., 831. His testimony tended to prove that the prisoner, Pat Brewer, on trial, discharged the fatal shot; he said that he saw the prisoner just before the firing began, and the latter told him that his name was Pat Brewer; that immediately after the fatal shot he heard a voice from the upper window of the house from which the shots came, which said, "I have got one of the God d—d rascals," or words to that effect. I recognized that voice as the voice of the man who told me his name was Pat Brewer, *etc.*

The corroborating witness, who examined the body of the deceased just after he was killed, and who then saw the witness sought to be impeached, was asked the question, "What did witness Fleming tell you?" His answer was—the prisoner objecting—"Fleming said he knew that Pat Brewer killed Frieze." This was not a very important fact, but it tended in some degree to corroborate the witness as to the account he gave of the presence of the prisoner Brewer in the house, and what he said he had done just after the fatal shot. The testimony of the witness on the trial went to prove that the prisoner killed the deceased, and his declaration theretofore made that he had done so was corroborative and therefore competent.

We are of opinion that not one of the numerous assignments of error as to the instructions the court gave the jury can be sustained. The appellants' counsel asked the court to instruct the jury that they must "be satisfied beyond all reasonable doubt that the defendants, or some one of them, fired a shot which killed" the deceased. If it be granted that this request was proper, the court gave it in substance re-

(617) peatedly. In one connection it said, "your first inquiry is, did the prisoner, Pat Brewer, Jesse Harris and Frank Kirby, the appellants, or either of them, inflict a wound with a pistol shot in and upon the breast of Jacob A. Frieze, and that his life was taken by that shot, and the State has proven this to your satisfaction and beyond a reasonable doubt," etc. In another connection it said, "the State must show to you beyond a reasonable doubt that Jacob A. Frieze was killed by a pistol shot, and that the defendants, or some one of them, did the act," etc. The court was not bound to give the instruction asked for in its very words; it was sufficient to give it in substance as it did. Nor was it necessary to give it in the order and connection asked for; it was

sufficient to give it fairly, so that the jury could understand and properly apply it, as the court certainly did.

That the court failed to instruct the jury, in a particular connection, that "the killing must be proven to have been done with a deadly weapon," is assigned as error. The evidence went to prove that the deceased was killed by a pistol shot, nor was there any evidence to the contrary. The court told the jury in a proper connection that they must be satisfied beyond a reasonable doubt that the deceased was killed by a *pistol shot,* and they could not mistake that this was a material part of the inquiry. No question was made on the trial as to the weapons used by the prisoners, and it was sufficient for the court to instruct the jury, as it did, in that respect. The pistol was manifestly a deadly instrument, and it was not necessary that the court should so specially designate it.

It is not necessary to pass upon the correctness of the instruction as to the aspect of the case in which the court told the jury that the prisoners would be guilty of murder, because there was a verdict of guilty of manslaughter. There was nothing in the instruction that could mislead the jury or prejudice the prisoners in other aspects of the case.

It is assigned as error that the court stated to the jury a "hypothetical case." This is a misinterpretation. The court only (618) presented two views of the case, clearly warranted by the evidence, that facilitated the inquiry to be made by the jury. A chief object of the instructions from the court is to help the jury to a just and intelligent view of the issue before them, without intimating any opinion of the court as to the weight of the evidence. When the evidence presents two or more aspects of the case, it is proper—certainly not error—for the court to carefully direct the attention of the jury to them.

The court was further requested to instruct the jury that there "was no evidence that Harris and Kirby (two of the appellants) were in the room from which the fatal shot was fired." This it properly declined to do. The witness Merritt testified intelligently, and that "Jack Barbee, Frank Kirby, Bill Lynn, Pat Brewer and myself were there when the students came, and he and Jesse Harris and Frank Kirby *went upstairs.* Frank Kirby didn't have anything, but had his hand in his pocket. The other two had pistols. I was in the house and heard the firing. . . . A minute or two after the parties got upstairs the firing commenced." There was other evidence tending to show that the prisoners named were about Pat Brewer and the house mentioned, making common cause with him at the time the fatal shot was fired. Clearly there was evidence from which the jury might reasonably infer that they were in the room referred to at that time.

We have carefully examined the record and discover no error therein, and we declare that there is none.

Le this be certified to the Superior Court according to law.

Affirmed.

Cited: S. v. Jacobs, 107 N. C., 876; *Burnett v. R. R.,* 120 N. C., 518; *S. v. Melton, ibid.,* 597; *S. v. Booker,* 123 N. C., 725; *S. v. Hicks,* 130 N. C., 710.

(619)

THE STATE v. J. H. MCBRAYER.*

Criminal Intent—Liquor Dealer—Statutes—Physicians—Sales to Minors.

1. A practicing physician, who keeps on hand intoxicating liquors for the purposes of sale or profit, is a "dealer" within the meaning of the statute (The Code, sec. 1077); and if he prescribe for a minor, knowing him to be such, any of said liquors as medicine, and thereupon sells, or gives them to him, he is guilty of a violation of the statute, notwithstanding he acted in good faith.

2. When a statute plainly forbids an act to be done, and it is done, the law conclusively implies the guilty intent, although the offender was honestly mistaken as to the nature of his act.

3. When the nature of the act is plainly made to depend upon the positive, wilful purpose to violate the law, the intent with which it was done will become an essential element of the offense.

4. The statute, chapter 115, Laws 1876-77, and chapter 133, Laws 1873-74, prohibiting the sale of liquors in the town of Shelby, are local, and do not affect the general law in respect of sales of liquors to minors.

(DAVIS, J., dissenting.)

(*S. v. Wray,* 72 N. C., 253, and *S. v. Wool,* 86 N. C., 708, distinguished; *S. v. Dickerson,* 1 Hay., 468 (407); *S. v. Boyett,* 10 Ired., 336; *S. v. Presnell,* 12 Ired., 103; *S. v. Hart,* 6 Jones, 389, cited and approved.)

THIS was a criminal action, tried before *Graves, J.,* at Fall Term, 1886, of CLEVELAND.

The defendant was indicted under the statute for selling liquor to a minor. It was in evidence that the minor purchased one-half pint of liquor from the defendant in the town of Shelby, in January or February, 1886; that the defendant was a regular licensed practicing physi-

*The opinion of the Court was filed at last term, but by inadvertence was not published in the Reports of the Decisions of that term.—REPORTER.

cian and owned a drug-store in Shelby; that the minor called at the defendant's store and was laboring under a congestion of the lungs from a severe cold; that the defendant gave him an ex- (620) amination and was satisfied that he needed the prescription, and prescribed whiskey, and sold him a half pint; that at the time of the sale the defendant prescribed how it should be used, and the quantity. It was in evidence that the liquor was sold to the minor as a medicine, and for medical purposes only; that it was necessary for the minor that he should have the spirits, and that whiskey was used by doctors as a medicine for such attacks. It was in evidence by the defendant that he invariably used whiskey in such cases for his patients, and that he would not have sold it to the minor except for the fact that he honestly believed that it was necessary as a medicine, and that it was not sold or prescribed to the minor for any other purpose. The physician also testified that the minor's father and mother resided in South Carolina; that he had practiced in their family and knew that lung affections were hereditary in that family; that the minor, who was about sixteen years of age, was working at a livery stable in Shelby and had been subject to much exposure.

The defendant introduced a statute regulating the sale of liquor in the town of Shelby and within two miles thereof, which was passed in 1873-74, Laws 1873-74, ch. 133, reënacted chapter 115, Laws 1876-77. This local act prohibited the sale of intoxicating liquors in the town of Shelby, except by "practicing physicians and for medicinal purposes only."

The counsel for the defendant asked the court to charge the jury that if he was a regular licensed and practicing physician in the town of Shelby, and sold to the minor the liquor as testified to, and that he honestly believed that it was necessary for the minor to take the liquor as a remedy for his affection of the lungs, and that the defendant, after examination of the patient, prescribed and sold the liquor for medicinal purposes only, he would not be guilty, and that they must find a verdict for the defendant.

The court refused to give these instructions, or any part (621) thereof, but charged the jury that if the boy was a minor, and unmarried, and the defendant sold him a pint of liquor as testified by the witnesses, he would be guilty of a violation of the statute.

The defendant excepted to this charge.

Verdict of guilty and judgment thereon, from which the defendant appealed.

Attorney-General and E. C. Smith for the State.
John F. Hoke for defendant.

MERRIMON, J. We had occasion in *S. v. Lawrence,* 97 N. C., 492, to construe the statute (The Code, sec. 1077), forbidding *"dealers* in intoxicating drinks or liquors" to sell or give the same in any quantity to unmarried minors, knowing them to be such, and we have held that the comprehensive, explicit and unqualified terms employed, and the purpose contemplated by it, excludes any exception arising by implication or allowable by interpretation. It therefore follows that if such a dealer—that is, in the language of the statute, "if one who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit," being a practicing physician—prescribes for such a minor, knowing him to be such, such drinks or liquors as a medicine as in his judgment the minor ought to take, and thereupon sells or gives him the same, he would be guilty of a violation of the statute. This is so, as we have said, because there is no exception to or limitation upon the *sweeping* terms of the statute, forbidding such sales and gifts.

But it is said, "can it be that a practicing physician shall not sell or give such drinks and liquors to his patients when they require them?" Certainly not, if he is a *dealer* in them—otherwise he may do so.

A practicing physician who is such *dealer* is prohibited from
(622) making such sales and gifts as certainly as other persons. It is suggested that he does not sell or give away such intoxicants as a *beverage,* but as a *medicine.* But the statute makes no such distinction. Why is none provided? Especially, why not in this statute, while such distinction is provided in similar statutes, forbidding the sale of intoxicating liquors generally in certain prescribed localities, as in the town of Shelby, where the sale in question was made and elsewhere? The striking omission was scarcely an inadvertence. It is not unreasonable to infer that it was intended, and that by it the Legislature intended the more certainly to effectuate the purpose of the statute.

The counsel for the appellant pressed upon our attention the case of *S. v. Wray,* 72 N. C., 253, which declared that a druggist might, in good faith, sell as a medicine, by direction of a physician, spirituous liquors in a quantity less than a quart. That case, it seems to us, went to the extreme limit of the power of interpretation, but treating it as well warranted, it does not apply here. It applied to a statute forbidding generally the sale of intoxicating liquors by a measure less than one quart, and was based upon the views that the statute was intended to prevent and suppress the abusive use of spirituous liquors generally and to enhance the revenues of the State. But the statute under consideration is different in its purpose and scope from that just referred to. It is not so general—it is limited in its operation to a class, and is intended to protect a class of young people of immature judgment and inexperience; and the total absence of exceptive provisions tends strongly

to confirm the view, that the intention was to cut off all opportunity for *dealers—all dealers* in intoxicating drinks and liquors—to sell or give the same to them for any purpose. The purpose is not to prevent such minors from having such intoxicants for proper purposes at proper times, but to prevent *dealers* in them from supplying them.

The decision of the Court in *S. v. Wool,* 86 N. C., 708, is (623) founded upon the same principle of interpretation as that in the case above cited, and what we have said applies with equal force to it.

That the defendant, in good faith, thought he had the right to sell the minor the spirituous liquors, did not excuse him from criminal liability. This could only affect the measure of punishment.

It is a mistaken notion that positive, wilful intent, as distinguished from a mere intent, to violate the criminal law, is an essential ingredient in every criminal offense, and that where there is the absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, wilful intent and purpose, nothing is left to interpretation.

It would be a very dangerous exercise of the power of courts to interpret positive statutes so as, in effect, to interpolate into them exceptive provisions. If the Court could do so, there would be scarcely a limit beyond which it might not go, and thus make, instead of interpret, the law.

Hence, in *S. v. Dickerson,* 1 Hay., 468 (407), where the defendant was indicted for extortion in demanding and receiving unlawful fees, he could not be excused upon the ground that he did so through mistake and bad advice. And also in *S. v. Boyett,* 10 Ired., 336, where the defendant was charged with voting unlawfully, he was held to be guilty, although he honestly thought he had the right to vote, and had been so advised by an intelligent person supposed to be familiar with the law. In that case *Pearson, J.,* said: "The question, in effect, was, shall a man be allowed, in excuse of a violation of the law, to prove that he was ignorant of the very law under which he professed (624) to act and under which he claimed the privilege of voting? If he was not ignorant of the law, and that he cannot be heard to allege, he voted *knowingly* and, by necessary inference, *fraudulently.*" And likewise in *S. v. Pressnell,* 12 Ired., 103, it was held that it is not a sufficient justification for a person who does a criminal act under a statute to show that he did not believe it was unlawful. In that case *Ruffin, C. J.,* said: "It was said that when one believes he is not doing

an unlawful thing, there is not the guilty mind necessary to constitute a crime. But this is not correct. When the act is unlawful and voluntary, the *quo animo* is inferred necessarily from the act." And so also in *S. v. Hart,* 6 Jones, 389, it was again held that the defendant was guilty of unlawfully voting, although he honestly thought he had the right to vote and had been so advised, *Ruffin, J.,* saying: "The defendant voluntarily gave an illegal vote, and necessarily the unlawful purpose attaches prima facie to the act. It is neither a justification nor an excuse for such an act, that other persons advised the party that it was lawful, and much less that other persons thought and believed it to be lawful. . . . He acted on his own mistaken or wilfully erroneous judgment, and must abide the consequences." *Ignorantia legis neminim excusat.*

The correctness of these decisions has not been seriously questioned, and decisions to the same effect, made in this and other States in large numbers, might be cited, some of them interpreting statutes more or less like that now under consideration. Whar. Cr. Law, secs. 2441, 2442, and numerous cases there cited; Bish. Stat. Cr., secs. 1019, 1020, 1023, and cases there cited.

It is only when the positive, wilful purpose to violate a criminal statute, as distinguished from a mere violation thereof, is made an essential ingredient of the offense, that honest mistake and misapprehension excuses and saves the alleged offender from guilt.

(625) The statute (Acts 1876-77, ch. 115, 1873-74, ch. 133), prohibiting the sale of spirituous liquors in the contingency prescribed therein in the town of Shelby, does not modify or affect the statute (The Code, sec. 1077), forbidding the sale or gift of intoxicating drinks or liquors to minors as first above pointed out. The latter is a general public statute. The former is a local public statute, and there is nothing in it that, in terms or by implication, repeals or modifies the provisions of the general law, nor is there anything in the nature or purpose of the local statute that has such effect.

There is no error. Let this be certified to the Superior Court according to law.

Affirmed.

DAVIS, J., dissenting: It is with diffidence that I dissent from my senior brethren, but the facts in this case negative any purpose to violate the spirit and intent of the statute, and I cannot concur in the opinion that the defendant is guilty.

The *spirit* of the law is its life and substance, and the letter is but "the bark." As the spirit may be violated without violating the letter, so, "the letter of the law" may be broken without violating its spirit.

It has often been held that evasions of the laws are violations—often the most criminal violations—of the law, and so it has been held that a violation of the "letter," when the spirit has not been violated, is no crime.

I regard the law in question as a most wholesome and just one, intended to protect the youth of the country from the evils of intemperance, with its attendant vices and crimes, and every violation of its intent and meaning—of its spirit and purpose—should be followed by its penalties.

The mischief and evil, the prevention of which was contemplated and intended by the statute, was the corruption of (626) youth—by giving or selling to them intoxicating drinks or liquors; it is that the spirit and purpose of the law as well as its letter makes criminal; but when it appears, as is conceded in this case, that there was no purpose to violate the law, but a bona fide different purpose, that was to supply a medicine admitted to be necessary and proper for the youth for whom it was honestly prescribed, it "is sticking in the bark" to say that the accused is guilty.

For some maladies and poisons, and the bite of some reptiles and poisonous insects, spirituous liquor is a specific remedy; and in answer to the suggestion, that in such cases, if the person attacked should be an unmarried minor, he might have to die, because the druggist could not sell or give to him the absolutely necessary *medicine,* it was said that, in such cases, the *dealer* might give or sell it to some one for him. This would be an *evasion,* and if it would be no crime to *evade,* it would be no crime to give or sell.

In *S. v. Wray,* 72 N. C., 254, it is said that spirituous liquor is an "essential medicine, frequently prescribed by physicians, and often used; and in this case it was bought in good faith as a medicine and was used as such. The letter of the law has been broken, but has the spirit of the law been violated? . . . In favor of defendants criminal statutes are both contracted and expanded. Now, unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law that no one shall suffer criminally for an act in which the mind does not concur."

A similar construction has been placed upon other criminal statutes. The statutes against carrying concealed weapons (The Code, sec. 1005) is as absolute and imperative as this, and yet in the case of *S. v. Gilbert,* 87 N. C., 527, indicted for carrying a pistol concealed, the fact being shown that there was no criminal purpose to violate the law, the Court said: "It is true it will always be presumed to be a man's intention to do what in fact he does, and that he must contem- (627)

plate the natural consequences of his conduct; but when the jury expressly find the contrary, and that, notwithstanding the act done, there was no criminal intention connected with it, that must put an end to the prosecution." This is in accord with the construction to be placed upon such statutes as deduced from a review of the decisions upon the subject, to be found in Bishop on Statutory Crimes, secs. 1019, 1020 and 1021: "We may presume," says he, "that the law makers had in mind the distinction between medicine and drink, and when they forbade the sale of a particular kind of 'drink' or 'liquor,' they did not intend to prohibit the sale of *medicine* necessary to restore life, and restore the sick to health, even though the medicine should happen to be composed of the same ingredients as the drink."

I think it may be said to be a common-law rule of construction of criminal statutes, that when the act done is not *malum in se,* but is proper and necessary in itself, and is not within the mischief designed to be remedied by the statute, it is not criminal. This rule of construction applies to all criminal statutes, general in their terms. Bishop, sec. 230, sums up the result of the authorities in the simple statement "that whenever the thing done comes not within the mischief which evidently the statute was intended to suppress, though it comes within its words, the person doing the thing is not punishable. The case must come not only within the words of the statute, but also within its reason and spirit and the mischief it was intended to remedy," sec. 232; and for this he cites a long list of authorities. This seems to me the well settled and just rule of construction of statutes, and to which they must bend.

This common-law rule of construction gives full force and effect to the spirit of the statute, and controls the letter, and keeps it within the mischief to be remedied. "There is," says Bishop, "in perhaps
(628) all cases of statutory crime a greater or less mingling of common-law principles with the statutory words. Indeed, there is no place where the principles of the common law prevail, where statutory crime, pure and simple, and as an existence entirely separate from the common law, is known. The statute may be the strong swimmer that boasts of being moved by no current, and of possessing all force in its own arm; still, around it in all its extent, and in all its parts, and constantly bearing it up, is the ever present arm of the common law."

I think the rule that "ignorance of the law excuseth not" has no application to this case, as it had to the cases of *S. v. Dickerson,* 1 Hay., 468; *S. v. Boyett,* 10 Ired., 336; *S. v. Presnell,* 12 Ired., 103; *S. v. Hart,* 6 Jones, 309.

It is conceded that the defendant was bound to know the law, and that the letter of the statute was broken; but if the sale was made, not

as an *"intoxicating drink* or liquor," but in good faith as a medicine, prescribed by a physician as necessary to cure the sick, then it was not within the *mischief* and *contemplation* of the statute, and therefore not criminal and within its penalties; and for this I think the cases of *S. v. Wray,* 72 N. C., 254, and *S. v. Gilbert,* 87 N. C., 527, are conclusive authorities.

It appearing in this case that there was no purpose to violate the spirit of the law, for the reasons given I do not think the defendant ought to be convicted.

Cited: S. v. Dalton, 101 N. C., 682; *S. v. Williams,* 106 N. C., 649; *S. v. Pritchard,* 107 N. C., 930; *Randall v. R. R., ibid.,* 753; *S. v. Scoggins, ibid.,* 961; *S. v. Brown,* 109 N. C., 807; *S. v. Kittelle,* 110 N. C., 561; *S. v. Downs,* 116 N. C., 1067; *S. v. R. R.,* 119 N. C., 821; *Epps v. Smith,* 121 N. C., 161; *S. v. McLean, ibid.,* 595; *S. v. R. R.,* 122 N. C., 1061; *S. v. Morgan,* 136 N. C., 630; *S. v. Powell,* 141 N. C., 785.

(629)

THE STATE v. LUCIEN ROWE.

New Trial—Burglary—Apprentice—Evidence—Witness—Requests for Special Instructions—Jurisdiction.

1. The jurisdiction of the Supreme Court in respect to granting new trials for newly discovered testimony is confined to civil actions.
2. A witness whose testimony has been impeached may be corroborated by showing that he made statements substantially similar to those on his examination at other times; and he is himself competent to prove those statements.
3. It is competent to show that a person charged with a crime made false and contradictory statements in reference to it.
4. If one gains entrance into a dwelling-house in the night-time by a trick, fraud or by conspiring with a servant of the occupant to be admitted, with the intent to commit a felony, it is a constructive breaking, and he will be guilty of burglary. An apprentice is a servant within the rule.
5. Requests for special instructions are required to be in writing, and they should be presented in time to give the court opportunity to consider them before submitting them to the jury.

(S. v. Miller, 97 N. C., 484; *S. v. Holland,* 83 N. C., 624; *S. v. Hardin,* 2 D. & B., 407; *S. v. Haney, ibid.,* 390; *S. v. Ludwick,* Phil., 401; *S. v. Swink,* 2 D. & B., 9; *S. v. Broughton,* 7 Ired., 96; *S. v. Whitfield,* 92 N. C., 831; *S. v. Parish,* 79 N. C., 610; *March v. Harrell,* 1 Jones, 329; *S. v. Jones,* 69 N. C., 16; *S. v. Starnes,* 94 N. C., 973, cited.)

STATE *v.* ROWE.

THIS was an indictment for burglary, tried before *Phillips, J.*, at Spring Term, 1887, of DURHAM.

The defendant was convicted, and from the judgment thereon pronounced against him he appealed.

The facts are stated in the opinion.

Attorney-General for the State.
W. A. Guthrie for defendant.

(630) DAVIS, J. The principal witness against the prisoner was one Mary Castleberry, and he moves for a new trial in this Court, upon the ground that his conviction was procured by her false testimony.

The motion is based upon the affidavit of the said Mary Castleberry, to the effect that her testimony on the trial was false in every material particular and was induced by causes set out in the affidavit; and the affidavit of the prisoner that the term of the Superior Court, at which the trial was had, expired before he had any knowledge or information of the fact upon which the motion is based; and that the affidavit of Mary Castleberry was without his procurement, and, in fact, that he had no knowledge that such affidavit would be made until informed by his counsel, and could not avail himself of it in the court below.

The able counsel, who so faithfully represented the prisoner, admits that the motion cannot be allowed without a reversal of the rulings of this Court heretofore made, but he earnestly insists that we shall review and reverse those rulings.

Upon careful consideration we must adhere to the principle, judicially settled, that in criminal actions the appellate jurisdiction of this Court is limited to a review and correction of errors in law committed in the trial below. *S. v. Jones,* 69 N. C., 16; *S. v. Starnes,* 94 N. C., 973.

The application is based upon the affidavit of a witness who was an accomplice, and who now makes oath that her testimony on the trial was false. How far the jury might have given credit to her testimony, impeached as it was, but for the corroborating facts and circumstances, we cannot determine, but the Executive is invested with the pardoning power, and has the discretion not only to consider facts that may be made to appear after the trial, of which the jury could have no knowledge, but to review and consider all the facts, and the extreme injustice and wrong which may often result from a refusal of this Court to assume the discretionary power, so earnestly pressed upon us by the learned counsel, can find a remedy there.

(631) The preliminary motion cannot be allowed, and we proceed to consider the errors assigned in the record.

The indictment, in different counts, charges:

1. That the defendant, in the night of 15 October, 1886, feloniously and burglariously did break and enter the dwelling-house of Samuel A. Thaxton, situate in the county of Durham, etc., and did feloniously and burglariously steal sixty dollars, the property of Samuel A. Thaxton.

2. That he feloniously, burglariously, etc., entered the dwelling-house of Eva C. Thaxton, etc., and did steal, etc., sixty dollars, the property of Eva C. Thaxton, etc.; and,

3. That he feloniously, burglariously, etc., entered the dwelling-house of Eva C. Thaxton, and did steal sixty dollars, the property of Samuel A. Thaxton, etc.

(1) Mary Castleberry, a witness for the State, was impeached upon the cross-examination, and upon such examination had testified that she had gotten money for the prisoner before; that in January, 1886, the prisoner told her to get $1.75 from Mrs. Thaxton, and that she got the money from Mrs. Thaxton for the prisoner, but was caught in the act of stealing it, and it was taken from her by Mrs. Thaxton. With a view of corroborating this witness, the Solicitor asked S. A. Thaxton, a witness for the State, whether she had made any statement to him about her relations to the prisoner, as testified to by her. The witness was permitted to answer, under objection by the defendant, that she had made a statement which, as given by the witness, was substantially that given by her.

The witness, Mary Castleberry, was impeached, and it was competent to support her by proving that she had made consistent statements at other times. It was competent, not as substantive evidence, but only to corroborate her. *S. v. Parish,* 79 N. C., 610; *March v. Harrell,* 1 Jones, 329.

Even the witness impeached may testify as to consistent state- (632) ments previously made. *S. v. Whitfield,* 92 N. C., 831.

(2) Mary Castleberry had testified, on cross-examination, that for three years she had been the kept mistress of the prisoner, and that he had frequently visited her on the Thaxton premises. With a view of corroborating her, S. A. Thaxton was asked if she had made any statements to him about the prisoner coming on his premises, as testified to by her. The witness was permitted to answer, under objection by the defendant, and gave the statement of the witness made to him, to the same purport as that testified to by her. This was competent, for the same reason and for the same purpose as the preceding evidence.

(3) C. B. Green, a witness for the State, testified that he was the committing magistrate before whom the preliminary examination was had; that upon that examination the prisoner was cautioned and informed of his right to refuse to answer; that "after this caution had

been given, and after Thaxton had testified that he had lost sixty dollars, the prisoner voluntarily offered himself as a witness on his own behalf. The defendant objected to witness testifying to what prisoner testified to because there was no evidence of any identification of the sixty dollars." The witness testified, under objection, that on the examination the prisoner swore that in October he had sixty dollars, which he had borrowed of Warren McCauley, of Alamance County.

The witness, S. A. Thaxton, was permitted to state, under objection by the defendant, to the same statement made by the prisoner. To show that the statement made by the prisoner as to how he came into possession of the sixty dollars, the State introduced Warren McCauley, who testified, under objection, that he never loaned the prisoner any money and that he lived in Alamance County.

The objection cannot be sustained. It was competent to show that the prisoner had made false or contradictory statements in regard
(633) to the substantive matter of the crime with which he was charged. *S. v. Conrad,* 95 N. C., 666.

In *S. v. Broughton,* 7 Ired., 96, the prisoner was charged with murder; the foreman of the grand jury was offered as a witness for the State to prove that the prisoner was a witness before the grand jury, and that he charged another with the murder of the deceased. The evidence was admitted, "not," said *Ruffin, C. J.,* "as a confession, but as a false accusation against another, and thus furnishing, with other things, an argument of his own guilt."

So in *S. v. Swink,* 2 D. & B., 9, *Gaston, J.,* delivering the opinion, it was said, "that all the surrounding facts of a transaction may be submitted to the jury when they afford any fair presumption or inference as to the question in dispute. Upon this principle it is that the conduct of the accused at the time of the offense, or after being charged with it, such as flight, the fabrication of false and contradictory statements, the concealment of the instruments of violence, the destruction or removal of proofs tending to show that an offense had been committed or to ascertain the offender, are all reviewable in evidence as circumstances connected with, and throwing light upon, the question of imputed guilt."

In *S. v. Ludwick,* Phil., 401, the prisoner was charged with the murder of his wife, and "among various contradictory accounts which he gave of his wife's disappearance, said that his father had shot her." On saying this at one time in the presence of the father, the latter indignantly denied it. The prisoner objected to the evidence of what the father had said, but it was received by the court.

The evidence of the "various contradictory accounts" seems to have been received without question, as a matter of course, and such, I think,

is the common practice on the circuits. This applies to, and disposes of, the several exceptions to the evidence in regard to the declarations and contradictory statements of the prisoner.

(4) It was in evidence that Mary Castleberry was bound as (634) an apprentice to S. A. Thaxton, and that the prisoner, in pursuance of a preconcerted arrangement with her, had gained admission to the house in the night through a door opened by her.

Counsel for the prisoner asked the court to give the following instructions to the jury: "That if a dwelling-house is left open by the occupants, and a thief enter by the opening (such as a door, which is the usual mode of entering such house), and open a trunk and steal therefrom, it is not burglary; nor is it burglary if, after the family have retired for the night, one of the family should open the door to admit the thief, and thus gaining admission, he should open a trunk and steal therefrom. That a bound child is something more in law than a mere servant—that the apprenticeship establishes a parental relation between the master and apprentice, and, for the purposes of domestic control and occupancy of the house and premises of the master, they stand on the same footing as parent and natural child. That while the unlocking the door of the employer's house by a mere servant in the night-time would be, in law, sufficient breaking to constitute that essential element in the crime of burglary, still, the unlocking the door of the house of a parent by his child, or the house of a master by his apprentice, in order to admit a thief to a room occupied by the child or apprentice for the purpose of stealing the goods of the parent or master, would not, in law, be such a breaking of the house as to constitute burglary."

Instead of charging as requested, his Honor, upon this point, instructed the jury, after explaining the law of burglary: "If a person leave his doors or windows open it is his own folly and negligence, and if a man enter therein it is no burglary. And the unlocking a trunk, or breaking open a trunk or other article of furniture, and stealing money therefrom, cannot be burglary, unless there was a (635) breaking and entering the dwelling-house for that purpose in the night-time. The breaking is not confined to an actual breaking—but constructive breaking may be committed, as where one, by artifice or fraud, procures the house to be opened and gaining admission by deceit, or where one gains admission by some trick; so if entrance is obtained by conspiracy, it is a constructive breaking. When a servant conspires with a thief to let him in at a door or window at night, it is burglary in both. Mary Castleberry testified that, by a preconcerted agreement with the prisoner, she opened the door at about ten o'clock at night, by unlocking the same for the defendant, at a given signal, after the mem-

bers of the family had retired, and that the prisoner was to steal the money from Mrs. Thaxton's trunk; that she was a servant of Mrs. Thaxton's, and that she stayed in a room of the house with Mr. Thaxton's adopted boy, and that she and another did the work, assisting Mrs. Thaxton, and that there were no other servants on the premises. Though Mary Castleberry may have been apprenticed to S. A. Thaxton, if she was there in the capacity of a servant, and she admitted, in the nighttime, by agreement, the prisoner into the house, and the prisoner entered for the purpose of stealing money, the prisoner is guilty."

The prisoner excepted to the charge as given and for refusal to charge as asked.

The exception cannot be maintained. It is a constructive breaking "if the house be opened by the servants within by conspiracy with those who enter." 3 Greenleaf, sec. 77; Wharton's Criminal Law, sec. 1540.

The apprentice is a servant. Bouvier's Law Dictionary; Title, Servant. The relation of the apprentice to the master is not that of child but servant—is created by contract or by law.

(636) After the evidence had closed, and just before the argument of counsel for the prisoner was commenced, his counsel asked the judge to put his charge in writing, at the same time asking him to give the instructions which they presented in writing.

After arguments were made, and as the last counsel for the prisoner, who had the conclusion, was about to begin the last speech, counsel for the prisoner stated to the court that they had an additional instruction to ask for; whereupon the court told counsel that the instructions asked by them to be put in writing were nearly finished, and that it could not now, at this stage of the case, and under the circumstances, consider further instructions. The counsel for the prisoner excepted, and filed the following prayer for instructions: "That it is deemed hard, and that it is unsafe, to convict upon the testimony of an accomplice, unless that testimony receives material support from evidence coinciding with it in considerable circumstances, as to leave no rational doubt in the mind of the jury of its truth."

By section 414 of The Code, the judge is required to put his instructions in writing, at the request of either party, made at or before the close of the evidence, and section 415 requires counsel asking for instructions to put them in writing. It was evidently intended that the judge should have time to consider and prepare his instructions; and it is unjust and unfair to him to present a prayer for special instructions at so late a period in the trial as to leave him insufficient time to consider them.

In the present case the exception, if there were any ground for it, is cured by the charge, for his Honor instructed the jury that they

"should be slow to convict on the unsupported evidence of an accomplice. Though Mary Castleberry be an accomplice she is competent to testify, and the jury must pass upon the weight and effect of her testimony. If the jury yield faith to the testimony of an accomplice, it is not only legal but obligatory on their consciences to (637) found their verdict upon it. The unsupported testimony of an accomplice, if it produce entire belief of the prisoner's guilt, is sufficient to warrant a conviction. You have heard the witnesses, have seen their manner and bearing on the stand, and it is for the jury to say, from all the evidence, whether they are satisfied beyond a reasonable doubt that the prisoner is guilty or not."

The advisory caution suggested by *Gaston, J.*, in *S. v. Haney,* 2 D. & B., 390, and from which the prayer for instructions requested by counsel for the prisoner is taken, is coupled with the qualification that unless the evidence of the accomplice is supported by "evidence derived *aliunde*" jurors are advised that it is unsafe to convict. His Honor charged the jury that "they should be slow to convict," etc., and his charge, taken together, as clearly presented to the jury, is supported by *S. v. Haney, supra; S. v. Hardin,* 2 D. & B., 407; *S. v. Holland,* 83 N. C., 624, and *S. v. Miller,* 97 N. C., 484.

There is no error.

Cited: S. v. Jacobs, 107 N. C., 876; *Posey v. Patton,* 109 N. C., 456; *Ward v. R. R.,* 112 N. C., 178; *S. v. Staton,* 114 N. C., 814; *Burnett v. R. R.,* 120 N. C., 518; *S. v. Hairston,* 121 N. C., 583; *S. v. Edwards,* 126 N. C., 1055; *S. v. Council,* 129 N. C., 513; *S. v. Lilliston,* 141 N. C., 865; *Craddock v. Barnes,* 142 N. C., 99; *S. v. Turner,* 143 N. C., 647; *S. v. Lane,* 166 N. C., 339; *S. v. Robertson, ibid.,* 365; *S. v. Cameron, ibid.,* 384; *S. v. Rogers,* 168 N. C., 114; *S. v. Spencer,* 176 N. C., 713; *S. v. Harden,* 177 N. C., 582; *S. v. Griffin,* 190 N. C., 135.

THE STATE v. ALLEN McCARTER.

Arson—Indictment—Criminal Intent—Trial.

1. An indictment, alleging that the defendant "a certain dwelling-house belonging to one B., and in the possession of one J. and by him occupied, feloniously, wilfully and maliciously did set fire to," sufficiently charges the common law offense of arson.

2. It is only where the statute makes the particular intent an essential element of the crime that it need be charged and proved.

3. Where the court in its charge to the jury, in cautioning them against any prejudice against the defendant, remarked that he was charged with a "dastardly crime": *Held*, not to be ground for a new trial.

(638) THIS was an indictment for arson, tried before *Gilmer, J.*, at May Term, 1887, of IREDELL.

The part of the indictment material here charges that the prisoner, "a certain dwelling-house, belonging to one J. W. Brawley, and in the possession of one Joe Allison and by him occupied, there situate, feloniously, wilfully and maliciously did set fire to," burn and consume, etc.

The counsel for the prisoner, in his argument to the jury, commented on the nature of the crime charged, and among other things said, "that the penalty of death for arson was a severe punishment, and therefore asked the jury to consider the evidence well before they found a verdict which would take away the life of the prisoner."

The solicitor for the State, who concluded the argument, commented fully and at considerable length upon this part of the argument for the prisoner.

The judge, at the commencement of his charge, after stating that the prisoner was charged with the crime of arson, "one of the highest crimes known to our law," and further in the introductory part of his charge in connection with words and language calculated and intended to caution the jury against any prejudice against the prisoner, remarked that he was charged with "a *dastardly* crime." The prisoner excepted to this remark.

There was a verdict of guilty, and the prisoner moved in arrest of judgment:

"1. Upon the ground that the bill did not charge the house burnt as the dwelling-house of Joe Allison, nor of any one, when the solicitor argued that it was the dwelling-house of J. W. Brawley, and read authorities in support of that contention; and,

2. Upon the ground that the bill does not charge that the burning was done with the *intent to injure any one,* which prisoner's counsel contended was a necessary averment."

(639) The court overruled the motion in arrest of judgment, and gave judgment of death against the prisoner, from which he appealed.

Attorney-General and E. C. Smith for the State.
No counsel for defendant.

MERRIMON, J., after stating the case: The prisoner is charged in the indictment with the common-law offense of arson, perpetrated by him in

the burning of a dwelling-house. This crime is defined to be the wilful and malicious burning of the house of another person. An essential requisite of it is, that the house burned shall be that of some person other than the offender, and this constituent fact must be charged in the proper connection in the indictment, else the offense will not be charged; and moreover, it must be charged with such reasonable certainty and precision as that the court can see from the record that the crime, and the particular crime, is charged; and so, also, that the prisoner can see and understand the same, and have such information in respect thereto as will enable him to make his defense, if he have any; and so also, as, if he shall be indicted a second time for the same offense, he can plead successfully his former acquittal or conviction, as the case may be. This rule is just and reasonable—essential, applied in some way, in the course of intelligent criminal procedure.

Now, the indictment in this case charges, not in every technical language, but intelligently and in substance, that the house charged to have been burned was the property of a particular person named, "and in the possession" of another particular person named. The ownership, and the manner of the ownership, are charged. The charge of the fact is intelligible—it designates with greater certainty and precision the house charged to have been burned than if it had simply charged that it was the dwelling-house of the owner of the fee-simple estate in the land on which it was situate, or of him who temporarily re- (640) sided on it as the tenant of the owner or otherwise. The court could see, and the prisoner could see, whose house, and what particular house, the latter was charged with having burned. The charge, as made, served every just and reasonable purpose of the law, and could not work prejudice to the prisoner, in any respect, in making his defense, or in defending himself in case of a subsequent indictment for the same offense. It does not charge the distinct ownership of two distinct persons—it is not confused, confusing and misleading—it simply describes one ownership. The charge thus made was capable of proof, and the burden was on the State to prove it as made. It might have been easier for the prosecution to make the necessary proof if the indictment had charged the property in the house in one count as that of the owner of the fee-simple estate in the land, and in a second count as that of the tenant or person in the actual possession; but as it could, and did, make proof of the charge as made, the prisoner had no just ground of complaint on this account. As we have seen, the offense charged is arson at the common law, and hence it was not necessary to charge an intent to injure a particular person otherwise than as intent is implied in the charge that the burning was done wilfully and maliciously. It

must be proved that the burning was both wilful and malicious. It is sufficient thus to prove the felonious intent.

It is only where a statute makes the particular intent an ingredient of the offense of burning, that it must be charged and proved as charged.

We are, therefore, of opinion that the motion in arrest of judgment was properly disallowed.

After the nature of the offense and the punishment thereof had been commented upon in the argument to the jury, the court cautioned them not to allow prejudice to weigh against the prisoner, and in that connection simply spoke of the offense charged as "dastardly."

(641) This remark was not made in a spirit or tone of unfriendliness or hostility towards the prisoner—it does not so appear, and the expression did not, in its nature, tend to prejudice him before the jury, nor does it appear that it did, in the least degree, so that the exception, in this respect, cannot be sustained.

We have carefully examined the record and discover no error therein. The judgment must, therefore, be affirmed.

Judgment affirmed.

Cited: S. v. R. R., 122 N. C., 1062.

THE STATE v. H. P. MORGAN.

Arson—"Wantonly and Wilfully"—Indictment—"Shop."

1. An indictment for a violation of section 985 of The Code, as amended by chapter 66, Laws of 1885, which fails to allege that the act of the defendant was done "wantonly and wilfully," is fatally defective, and the use of the words *unlawfully, maliciously* or *feloniously,* will not supply the lack of the essential descriptive terms.

2. A house used for the purposes of selling or manufacturing goods, etc., is a "shop" within the meaning of that term, as it is employed in the statute.

(S. v. Massey, 97 N. C., 465; *S. v. Stanton,* 1 Ired., 424; *S. v. Butts,* 92 N. C., 784, and *S. v. Brigman,* 94 N. C., 888, cited.)

CRIMINAL ACTION, tried before *Meares, J.,* at March Term, 1887, of the Criminal Court of NEW HANOVER.

The indictment charged that the defendant "feloniously, wilfully, maliciously and unlawfully did set fire to a certain house, used as a shop and store, then and there situate," etc.

On the trial there was a verdict of guilty. The defendant (642) moved in arrest of judgment, assigning as grounds of the motion,

first, that the indictment charges that the defendant "did set fire to a certain *house*"; and secondly, that it does not charge the act to have been done "wantonly and wilfully."

The court overruled the motion, and gave judgment against the defendant. The latter having excepted, appealed.

Attorney-General for the State.
M. Bellamy and T. W. Strange for defendant.

MERRIMON, J., after stating the case: The defendant is charged in the indictment with a violation of the statute (The Code, sec. 985, par. 6), as amended by the subsequent one (Acts 1885, ch. 66), which provides, as amended, that "whoever shall *wantonly and wilfully* set fire to any church, chapel or meeting-house, or shall *wantonly and wilfully* set fire to any stable, coach-house, out-house, warehouse, office, shop, mill, barn 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, shall be guilty of felony, and imprisoned in the penitentiary for not less than five nor more than forty years." This statute, before it was so amended, did not contain the words "wantonly and wilfully," but in the place of them, wherever they now appear, the other words "unlawfully and maliciously," which the amendment struck out of it.

It will be observed that the indictment charges that the defendant *wilfully* "did set fire to," etc., but it does not charge, as it should do, that he "*wantonly* and wilfully did set fire to," etc. *S. v. Massey,* 97 N. C., 465. It does, however, charge that he "feloniously, . . . maliciously and unlawfully did set fire to," etc.; and it was contended on the argument here that these words sufficiently supply the place and meaning of the omitted essential word "wantonly." It (643) is true that if a word or words, equivalent in meaning and effect to the word of the statute descriptive of and defining the offense, were used, this would be sufficient. *S. v. Stanton,* 1 Ired., 424; *S. v. Butts,* 92 N. C., 784. But the words, "unlawfully and maliciously," used, cannot supply the place of the word "wantonly," omitted, which, by the amendment mentioned, was in part substituted for them, as was decided in *S. v. Massey, supra.* Nor does the word "feloniously" supply the omission. This word implies that the act charged to have been done proceeded from an evil heart and wicked purpose. It is a highly technical term, and is employed particularly in criminal pleadings to describe and charge offenses that proceed from a depraved heart and import wicked purpose; that such offenses are felonious in their nature,

and are done with a deliberate intent to commit a crime. Wantonly, in a criminal sense, implies that the act was done of a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others, careless of consequences, and yet without settled malice. The meaning and application of the term is well considered by the *Chief Justice* in *S. v. Brigman,* 94 N. C., 888. It is essential that the indictment shall charge that the defendant "wantonly" as well as "wilfully set fire to," etc., and as this is not done in terms or effect, it is fatally defective—it does not charge the offense intended, and the judgment must therefore be arrested.

As to the first ground of objection to the indictment, we think it unfounded. A "shop," in the sense of the statute, implies a *house* or *building* in which small quantities of goods, wares or drugs and the like are sold, or in which mechanics labor, and sometimes keep their manufactures for sale; and as it is charged that the defendant . . . "set fire to a certain house *used as a shop* and store," it in effect and (644) sufficiently charges that he set fire to a "shop," a sort of house expressly named in the statute. A house used for the purpose of a shop is a shop while so used, within the meaning of the statute, whether built for that purpose or not. One of its purposes is to protect houses and buildings used as shops, and thus to protect shops.

As the judgment must be arrested, it is unnecessary to advert to other errors assigned in the record. There is error.

Let this opinion be certified to the criminal court of New Hanover County according to law.

Error.

Cited: *S. v. Howe,* 100 N. C., 452; *S. v. Harrison,* 115 N. C., 706; *Hansley v. R. R.,* 117 N. C., 572; *S. v. Pierce,* 123 N. C., 746; *S. v. Battle,* 126 N. C., 1044; *S. v. Harwell,* 129 N. C., 551, 555; *S. v. Millican,* 158 N. C., 623.

THE STATE v. J. E. BRYAN.

Attorney at Law—Agent—Justice of the Peace—Evidence.

1. A justice of the peace who practices law in any of the courts of the county wherein he holds his office is guilty of a misdemeanor. The Code, sec. 27.
2. To constitute a practicing of law, within the prohibition of the statute, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he demanded compensation for his services as such.

3. The fact that a person on one occasion acted as an attorney for a party to an action, but there was no evidence that he did so in other cases, or that he received or demanded compensation for his service, is some evidence to go to the jury, to be considered in determining whether he practiced law, in the meaning of the statute, but it is not conclusive of that fact.

INDICTMENT, tried before *Shepherd, J.*, at the Fall Term, 1887, of CHATHAM.

The defendant was a justice of the peace in and for the county of Chatham; and the indictment charges that he "did unlawfully and wilfully, on 26 August, A.D. 1886, practice law as an attor- (645) ney, in the county aforesaid, in a judicial court held by W. B. Wilkie, a justice of the peace of said county of Chatham, in the trial of a civil action wherein Luke Brothers were plaintiffs and J. E. Boling, Eliza Holden, and Mary Holden were defendants, by appearing as attorney of said plaintiffs, contrary to the form of the statute," etc.

Upon the trial B. I. Howze, Esq., an attorney at law, a witness for the State, testified as follows:

"In a case wherein Luke Bros. were plaintiffs and J. E. Boling, Eliza and Mary Holden were defendants, I appeared for Boling. The case was tried before W. B. Wilkie, in this county, in August, 1886. The defendant was present when the case was called by the justice of the peace. The plaintiffs did not appear. I asked the justice to have them called. The defendant then said that Luke Bros. were engaged or sick, and that he had come as their agent to represent them in the case. The case was then called. He said he was ready, and opened the case by reading some papers—a mortgage—and called witnesses; had them sworn and examined. Then he stopped, and I examined a witness, and defendant cross-examined her. I objected to the introduction of the mortgage and argued the point, and he argued that it was admissible. After the close of the case the defendant and I made regular arguments to the court. The defendant was a justice of the peace at the time of the trial. During the progress of the trial one of the Luke Bros. was present and examined as a witness."

The State rested, and the defendant introduced no evidence.

The defendant then insisted that, taking all the evidence to be true, he was not guilty:

1. Because section 27 of The Code was intended to apply to licensed attorneys at law, practicing law in the county where he holds the position of a county commissioner or justice of the peace. (646)

2. That the offense is *practicing* law, making it necessary for the State to allege and show that the defendant was in the habit of appearing as an attorney for a reward.

3. That the indictment charges no offense.

His Honor instructed the jury that if they believed the evidence, the defendant was guilty.

There was a verdict of guilty; motion in arrest of judgment, for that the indictment does not allege a criminal offense. Motion overruled; judgment and appeal.

Attorney-General for the State.
John Manning and T. B. Womack for defendant.

DAVIS, J., after stating the case: Section 27 of The Code is as follows: "It shall not be lawful for any attorney at law or justice of the peace to practice law as an attorney in any of the judicial courts held for the county wherein they hold the office of county commissioner or justice of the peace. And any person offending against this section shall be guilty of a misdemeanor," etc.

This is the first time that this Court has been called upon to construe the above section. It was earnestly insisted by the very able counsel who represented the defendant that it was intended to apply only to licensed attorneys, who might also be justices of the peace, and to prohibit such attorneys from practicing only in the courts of the counties in which they resided. We cannot give this restricted interpretation to the statute. If such had been the intention of the Legislature, the words "or justice of the peace," after the words "attorney at law," would have been surplusage. It was intended to make it a misdemeanor in a *justice of the peace to practice law as an attorney* in any of the judicial courts of his county. Is the evidence presented sufficient to establish be-
(647) yond a reasonable doubt the charge that the defendant did so practice law within the meaning of the statute? "An attorney, in the most general sense, is a person designated or employed by another to act in his stead—an agent; more especially one of a class of persons authorized to appear and act for suitors or defendants in legal proceedings. Strictly, these professional persons are attorneys at law, and non-professional agents are properly styled attorneys in fact; but the single word is much used as meaning an attorney at law. A person may be an attorney in fact for another, without being an attorney at law." Abbott's Law Dictionary—Attorney.

"A public attorney, or attorney at law," says Webster, "is an officer of a court of law, legally qualified to prosecute and defend actions in such court on the *retainer* of clients."

"The principal duties of an attorney are: (1) to be true to the court and to his client; (2) to manage the business of his client with care, skill and integrity; (3) to keep his client informed as to the state of his business; (4) to keep his secrets, confided to him as such. . . . His

rights are, to be justly compensated for his services." Bouvier's Law Dic.; Title, Attorney.

The transitive verb, practice, as defined by Webster, means: "To do or perform frequently, customarily, or habitually; to perform by a succession of acts: as to practice gaming; . . . to carry on in practice or repeated action; to apply, as a theory, to real life; to exercise, as a profession, trade, art, etc., as to *practice law* or medicine," etc.

There is no evidence that the defendant received any retainer or fee, or that he charged anything for his services, or that he proclaimed himself as a lawyer, or that he held himself out to the public as such, or that he *practiced* for reward as a lawyer, or that he appeared in any other case, or that he claimed any just "compensation for his services," which last is an essential element in the *practice* of law.

May not a justice of the peace act as agent or attorney of (648) another without being guilty of *practicing* law? The single act of the defendant, as testified to, is consistent with such an agency, and nothing more appearing, while it is evidence, it is not sufficient in itself to meet *all* the essential elements necessary to show that the defendant "practiced law as an attorney," so as to *require* that the jury should, without more evidence, render a verdict of guilty. There was no evidence that the defendant was in the habit of appearing or practicing "as an attorney at law," or that he received any compensation, or that he held himself out to the public as an attorney at law. He only professed to act as "agent," and the evidence was not sufficiently full and complete to make it *obligatory* on the jury to render a verdict of guilty.

There is error, and the defendant is entitled to a new trial.

Error.

Cited: *S. v. Van Doran,* 109 N. C., 869.

THE STATE v. FLOYD KING.

Larceny—Landlord and Tenant—Indictment—Personal Property.

1. Turpentine in "boxes" cut into the trees ready to be dipped is personal property, and is the subject of larceny.

2. If the crop is in the *actual* possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord.

(*S. v. Moore,* 11 Ired., 70; *S. v. Copeland,* 86 N. C., 691, and *S. v. Webb,* 87 N. C., 558, cited.)

STATE *v.* KING.

THIS was an indictment for larceny, tried before *Connor, J.,* at October Term, 1887, of ROBESON.

(649) The defendant was charged with having stolen turpentine, the property of one William M. White, the prosecutor, and who testified in substance that in July, 1887, the defendant dipped turpentine from boxes on his land and sold it; that he (witness) was the owner of the trees from which the turpentine was dipped and the turpentine was his property; that the defendant first denied taking the turpentine, but afterward acknowledged that he took it and offered to pay for it.

Upon cross-examination he said that the defendant had rented and worked the boxes in 1886, paying one-third for rent and keeping two-thirds; that at the time of the acknowledgment of the taking the defendant also said that he thought he had a right to it, as he had left some turpentine in the boxes when he ceased to work them the year before; that at and before the time of the alleged taking the crop of trees from which the turpentine was dipped was rented to one Peter Currie, and witness was to receive one-third from Currie for rent of the boxes; that the turpentine was undivided when the defendant dipped it out.

Peter Currie testified in substance the same as White.

The defendant introduced no evidence. He requested his Honor to instruct the jury "that they could not find him guilty upon the indictment, for that the property was laid in the indictment as that of William M. White, and the proof was that it was the property of Peter Currie, and William M. White was only entitled to a portion of it as rent."

His Honor held that "under the landlord and tenant act, the property was in the prosecutor, and sufficiently laid if the jury believed the evidence." The defendant excepted.

There was a verdict of guilty. Motion in arrest of judgment. Motion overruled and appeal.

Attorney-General and E. C. Smith for the State.
John S. Lewis filed a brief for defendant.

(650) DAVIS, J., after stating the case: Turpentine, when in boxes ready to be dipped, is personal property. It is no longer a part of the tree, but has been separated by a process of labor and cultivation, and may be the subject of larceny. *S. v. Moore,* 11 Ired., 70.

The Code, sec. 1762, declares that leases, or contracts to lease turpentine trees, shall be subject to all the provisions of the chapter entitled "Landlord and Tenant" (chapter 40 of The Code), and the turpentine is, therefore, deemed and held to be vested in possession of the lessor, as other crops, under what is known as the "Landlord and Tenant Act."

In *S. v. Copeland,* 86 N. C., 691, it was held that the cropper or lessee could not be convicted of larceny for appropriating the crop to his own use before delivery to the landlord, though done with a felonious intent, because he was in the *actual* and rightful possession, and there could be no *taking* in a legal sense; but if the crop had been put in the *actual* possession of the landlord, though undivided, it would have been different, as was held in *S. v. Webb,* 87 N. C., 558, where the defendant, a tenant, was indicted and convicted for stealing wheat, the property of his landlord, which had been harvested and threshed, and, before any division, stored in a house on the premises, the door to which was locked and the key kept by the landlord. The Court said that he was guilty, notwithstanding his interest in the property.

The ownership of the property was rightly laid in the prosecutor, and there was no error in the charge of his Honor.

No error.

(651)

THE STATE v. C. F. JONES.

Homicide—Evidence—Judge's Charge.

Where the testimony established a strong chain of circumstances, going to show that the prisoner had killed his wife by choking and then throwing her into a river, and there were appearances of a struggle on the bank near where the body was found: *Held,* that it was not error to instruct the jury that if the fact of killing was duly established, the crime was murder or nothing.

(*S. v. Rash,* 12 Ired., 382; *S. v. Haywood,* Phil., 376, and *S. v. Smith,* 77 N. C., 488, cited.)

THE defendant was tried upon an indictment for the murder of Tempy S. Jones, his wife, before *Shipp, J.,* at the Spring Term, 1887, of CRAVEN.

The mother of the deceased testified that on the day before the alleged murder the defendant came to her house, where his wife was staying, about dusk; that he and his wife seemed very affectionate toward each other; that defendant stated that he came to take his wife across Neuse River to Mr. Kirkman's, where he was working; that he and deceased left the house on the next morning, Sunday, 1 May, about 9:00 o'clock, and went in the direction of the river; that she saw the body of the deceased on Tuesday, 3 May, after it had been taken from the river, and that there were marks of finger-nails on the throat. She further testified that some time before the death of the deceased the defendant asked

her for a divorce, and, upon her refusing, the defendant said he would have one anyhow; that defendant lived with his wife till October, 1886, when he went off and left her at witness' house; that he furnished her no support after that, and did not visit her till about two weeks before her death; and that she found a piece of cloth in Pierce Ransom's
(652) boat, which deceased had carried from her house when she left on Sunday.

The father of the deceased testified substantially to the same facts, with the addition that on the night before the alleged killing the defendant seemed restless; . . . that he had heard the deceased say in the presence of the defendant, several months before the killing, that the defendant had struck her and would have killed her if she had not prevented it.

Pierce Ransom testified that he saw the deceased and the defendant, with a child in his arms, going towards Neuse River on Sunday morning, about 11:00 o'clock; the defendant had a stick under his arm; the deceased was lagging behind, carrying a bag of clothes; she looked troubled and was looking back; the defendant said to her, "Why in the hell don't you come on—you will repent your bargain before you get where you are going." This was about one mile from the river. Witness joined in the search for the body of deceased on Monday. He had three boats, which were locked and chained, on the side of the river on which he had seen the defendant and deceased; he found one of his boats on the opposite side of the river, about a mile below where it had been chained, near where the body was found; the chain had been broken from the boat and left where it had been fastened; he found a walking-stick in the boat, which was the same that he had seen under the arm of the defendant on Sunday; the boat was of large capacity and showed no signs of having been swamped or sunk. He saw the body of the deceased after it had been recovered, and it had thirteen finger-nail marks on the throat and bruises on the nose. This witness also testified that when he saw defendant and child on Sunday the child had a fan.

Mary Hayes testified that about 4:00 o'clock on Sunday afternoon the defendant stopped at her house, about a mile from the river, on
(653) the opposite side from where he was seen in the morning. He said that he had met with a great trouble; that while crossing the river with his wife and child the boat, which had a hole in the head, filled and sunk in the river and his wife was drowned; that his wife said: "I pray the Lord that you may be able to save yourself and the baby—you can't save me"; that after reaching the shore he looked back, but never saw either his wife or the boat; that he swam out with the child and bag of clothes; that he remained at the river three or four hours after his wife was drowned, looking for her.

This witness further testified that the defendant was wet up to the waist; that the child was wet on one side, and the bag of clothes was wet on the end; that the defendant had a paper fan which he said he had found in a house on the side of the river on which he then was, which was not wet; that there was a slough, about waist deep, between the house and the river, which the defendant had to cross in coming from the river. Witness proposed to go with the defendant to search for his wife's body, but defendant said he would wait till next morning.

Other witnesses testified to the same, substantially, as the last witness.

Two other witnesses testified that they saw the defendant about a quarter of a mile from the house of Mary Hayes, after he had been seen by her, to whom he gave substantially the same account as that given by her. They also testified that the defendant and child and clothes were wet, and that the defendant had a fan.

Several witnesses testified as to the finding of the body, whose statements were substantially the same, and, in substance, that the boat referred to was found in a ditch leading into the river; that the tracks of a man and woman were seen at the boat, and that they led to an old house in a field 400 or 500 yards from the river; that the tracks led through the house and, in a circuitous way, to the river, and then up the banks, where, on account of the hardness of the ground, (654) they were lost; that not far from where the tracks were lost they discovered a place which looked as if two persons had been scuffling with each other—the earth was trampled and the bushes torn and stripped of leaves; the body of the deceased was found about fifty or sixty yards below this point; that defendant stated to them that he had last seen the boat and his wife floating down the river, about eighty yards below where the body was found; that below the place where the scuffle seemed to have occurred and below where the body was recovered there were two tracks, one leading into the river and the other coming out. The defendant said these tracks were made by him when he swam after and went back into the river to look for his wife.

A witness testified that during the search for the body, and while the defendant was being questioned, "he stated that he supposed they would say he had killed his wife, so that he could marry Sarah Haddock."

Another witness testified that the defendant had asked if he could not go into another county and get a divorce from his wife; that he spoke about getting a divorce about two weeks before the death of deceased.

The owner of the boat testified that he showed the defendant the chain which had been broken from the boat, and that defendant owned it, but denied having used the boat.

The fan was exhibited, and the mother of the deceased testified that on Sunday morning, when the defendant left her house, she gave the

child a fan, and that the one exhibited looked like that she had given to the child. Other witnesses, who saw the defendant after he had crossed the river, testified that the fan exhibited was like that which the defendant had.

Dr. Cobb, a physician, testified that he examined the body after it was taken from the river—to the marks on the throat, etc., and that, in his opinion, the deceased came to her death by strangulation, or (655) was unconscious when thrown into the water.

The counsel for the defendant insisted "that the circumstantial evidence offered by the State was not inconsistent with the prisoner's innocence." He further insisted "that the evidence offered by the State did not prove any malice in the defendant; and if the jury should believe that the defendant took the life of the deceased, that the evidence as to the scuffle and the fact that no deadly weapon was used tended to show that the defendant and the deceased had engaged in a sudden quarrel, and that in the heat of passion the defendant had choked her to death; and that if this were true, the defendant would only be guilty of manslaughter."

His Honor did not so charge, but, upon the question as to manslaughter, charged the jury that, "according to the evidence in this case, it is murder or nothing." And again, when refusing the defendant's request for instructions upon the question of manslaughter, his Honor remarked to the jury: "I can't see, from the evidence in this case, that it is manslaughter. It is murder or nothing."

Verdict, guilty of murder. Judgment, and appeal.

Attorney-General for the State.
W. W. Clark for defendant.

DAVIS, J., after stating the case: Was there error in his Honor's refusal to charge as requested or in the charge given? If the killing be proved, the *onus* is thrown upon the defendant to mitigate or excuse the act. To do this he must show, either by direct or circumstantial evidence, the mitigating facts or circumstances. It is not pretended that there was any direct evidence in this case to mitigate the offense, but the counsel who was assigned to defend the prisoner, and who, it is but just to say, has faithfully and ably discharged his duty, insisted that, as the evidence was all *circumstantial,* the evidence of the scuffle and the (656) fact that no deadly weapon was used are circumstances from which the jury might infer that there was a sudden quarrel, and that the killing was without malice, and that the questions of motive and malice were improperly taken from the jury by his Honor's charge.

The case of *S. v. Rash,* 12 Ired., 382, is relied on by defendant's counsel, but we fail to see its bearing upon this case. It is true, as was held in that case, that *all* the circumstances, *for* as well as against the prisoner, must be taken together and not separately. All the circumstances taken and considered together must constitute a *chain* leading to the fact. In this case there was a chain of circumstances strong and, we may say, conclusively, leading to the fact that the prisoner killed the deceased.

The killing having been proved, and the burden shifted to the prisoner to mitigate or excuse the homicide, he must do so either by direct proof or by a *chain* of circumstances. It is not claimed that there was any direct proof, and there was not only no *chain* of circumstances tending to mitigate the crime, but there was not a single link of a chain; for the single circumstance upon which he relies—the signs indicating a scuffle—is just as consistent, and in this case more so, with the fact that the deceased was struggling for her life against a brutal attack, as that there was a sudden quarrel and affray; it could, at the most, raise only a conjecture of a fact, which it was incumbent upon the prisoner to prove. It was not even a link, when the law required a chain of circumstances.

In the case of *S. v. Haywood,* Phil., 376, there was no evidence of any quarrel or ill-will on the part of the accused toward the deceased. It was in evidence that the lock of the gun with which the homicide was committed was out of order and the hammer would not stand half-cocked, and the prisoner, when arrested, made the declaration that he did not know that the gun was loaded. It was held that this, standing alone, was no evidence of manslaughter by accidental (657) killing, as was insisted for the defendant.

In *S. v. Smith,* 77 N. C., 488, it is said: "Homicide is murder, unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury; and if the jury are left in doubt on this point, it is still murder."

In this case before us there is no evidence, and no aspect in which the evidence can be viewed, that presents the question of manslaughter. Upon the evidence it was "murder or nothing."

The chain of circumstances led conclusively to the fact that the prisoner killed the deceased. It was murder, and there is no error.

Affirmed.

Cited: *S. v. Cox,* 110 N. C., 505; *S. v. Clark,* 134 N. C., 707; *S. v. Guthrie,* 145 N. C., 494; *S. v. Williams,* 185 N. C., 687.

THE STATE v. C. A. KENNERLY AND GEORGE W. PATTERSON.

Liquor Dealer—Tax—Statute—Products of Farm.

The exception in the Revenue Act (ch. 135, sec. 31, Laws 1887) of the "products of the farm" from special license tax on liquor dealers includes only those products which are the result of cultivation of the soil. Tolls received from a mill erected on the farm are not such "products."

CRIMINAL ACTION, tried before *Clark, J.*, at Fall Term, 1887, of CABARRUS.

Upon the special verdict the court, being of opinion that the defendants were guilty, pronounced judgment against them, from which they appealed.

The facts are stated in the opinion.

(658) *Attorney-General, T. C. Fuller, George H. Snow, and E. C. Smith for the State.*

C. M. Busbee and John Devereux, Jr., for defendants.

MERRIMON, J. The defendants are indicted for selling spirituous liquors "in quantities of one quart and less than five gallons," without a license, the same not being "the products of his (their) own farm."

The statute (Acts 1887, ch. 135, sec. 31) provides, among other things, as follows: "Every person, company or firm, for selling spirituous, vinous or malt liquors or medicated bitters, shall pay a license tax semi-annually in advance, on the first day of January and July, as follows. . . . Second, for selling in quantities of one quart and less than five gallons, twenty-five dollars for each six months," etc. "Nothing in this section contained shall prevent any person selling wines of his own manufacture at the place of manufacture, or any person from selling spirits or wines, *the products of his own farm,* in quantities of not less than one quart."

It appears from the special verdict that the defendants sold to the person named in the indictment one quart of spirituous liquors, neither of them having a license to sell such liquors. It appears further, that the defendant Kennerly was in the employment of the other defendant as his clerk, and sold the spirits with the knowledge and consent of the former. It likewise further appears that the spirits so sold were manufactured out of "the products of" the farm of the said Patterson *"and* out of the said Patterson's *toll* from his mill, located on said last mentioned farm of said Patterson."

The spirits sold were of the tolls—the grain earned—of the mill, as well as the products of the farm mentioned, and the defendants could not

lawfully sell the same without a license, unless such toll should be treated as part of the products of the farm, as the counsel for the (659) defendants contend it should be.

The words of the statute to be interpreted are *"the products of his own farm."* Now, a farm, the farm, his farm, in the ordinary sense, implies the land cultivated—used in some way—for the purposes of production by the owner thereof, or some other person having a temporary estate or interest therein, and land, whether covered by forest or not, adjoining or near and made subservient thereto, and used in aid thereof, for the purposes of producing grain—such as wheat, Indian corn, rye, barley, cotton, fruits, hay, vegetables, and the like, and perhaps livestock, such as cattle, sheep, horses, swine, and the like, by transmutation, directly or indirectly, brought about by the cultivation of the soil. Bur. Law Dic.—Farm.

"The products" of the farm are such things as are so produced by labor or otherwise, and of spontaneous growth, and "the products of his own farm" are such as are produced by him who so owns and cultivates a farm. A mill situate on a farm is not a product of it—it is not the result of the cultivation of the soil—it is not essential to it—it is a structure enclosing machinery for the purposes of manufacture, transformation, not transmutation, and its earnings—the tolls—are not products of the owner's farm, but the products of the farms of other people, and the clause in question clearly does not therefore embrace them. A grist mill is no more a part of the farm than a cotton mill, a cotton gin, a blacksmith shop, or other structure or machinery erected on it for the purposes of manufacture. The earnings of such things are not of the product of the farm, in the sense of the statute.

The purpose of the statutory provision in question is not to encourage millers, but to afford every farmer the largest opportunity to sell the corn, wheat, rye, and the like, produced on his own farm, by turning it into an article of ready sale at a better price. He may sell spirituous liquors manufactured out of "the products of his own farm" (660) —the rye, wheat, and Indian corn produced by him, without paying a tax for license to do so; beyond that, he must pay a license tax. We cannot hesitate to hold that such is the meaning of the statute.

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

Affirmed.

Cited: *S. v. Hart,* 107 N. C., 798.

THE STATE v. GEORGE W. PATTERSON.

Constitution—General Assembly—Statute.

1. The provisions of the Constitution, in respect to the forms and methods to be observed by the General Assembly in the enactment of laws, are mandatory.
2. A statute without an enacting clause is void.

(*Scarborough v. Robinson*, 81 N. C., 409, cited.)

CRIMINAL ACTION, tried before *Clark, J.*, at Fall Term, 1887, of CABARRUS.

The defendant is charged in the indictment with the offense of selling spirituous liquors within a territorial boundary in the county of Cabarrus, within which the sale of such and other classes of liquors is prohibited by the supposed statute (Pr. Acts 1887, ch. 113, sec. 8). He pleaded not guilty, and on the trial relied upon the defense that the statute cited above was inoperative and wholly void, because it has no enacting clause, that is, the words, "The General Assembly of North Carolina do enact," do not immediately appear at all in connection with it as a particular act.

The court decided that the statute was valid without such appearance of an enacting clause, and the defendant excepted, and assigned (661) this ruling as error.

There was a verdict of guilty, and judgment against the defendant, from which he appealed.

Attorney-General, T. C. Fuller, George H. Snow, and E. C. Smith for the State.

C. M. Busbee and John Devereux, Jr., for defendant.

MERRIMON, J. The very great importance of the Constitution as the organic law of the State and people cannot be overstated. It is the embodiment of a system of free government of the people, affecting them collectively and individually, in many respects of the highest moment to them. Every provision of it is significant, as prescribing the form of government, conferring, defining, limiting and restraining power and authority delegated by the people to officers and agents of government, and as prescribing how, when and by whom such powers shall be exercised and its provisions executed. The Constitution, within its compass, is supreme in its nature, as the established expression of the will and

purpose of the people as to State government; and a distinctive and pervading feature of it is that it must prevail—be observed, upheld and enforced, according to its true intent and meaning, by every person within its jurisdiction, and especially by the officers and agents—whether individually or collectively, as composing coördinate branches of government—charged with the administration and enforcement of its powers and provisions, who, in addition to the ordinary obligations of patriotic duty, are, by its terms, required to take an oath to support it. It is not to be disregarded, ignored, suspended, or broken in whole or in part, nor can any officer or a coördinate branch of the government supply, superadd or assume power and authority not conferred by it. In this latter respect it expressly provides that "all powers not herein (662) delegated remain with the people."

More particularly, for the present purpose, when the Constitution prescribes and directs in terms, or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coördinate branch of government—as the Legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it—such direction cannot be disregarded—a due observance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide nonessentials—useless, unimportant details—such as may be disregarded and dispensed with. As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential. Nonessential details are left to the discretion of those who exercise and administer the powers of government. If this were not so, why prescribe the way and manner? Why not leave these things to convenience and the authority charged with the exercise of the power? Why direct them? Why restrict them? And if such directions may be disregarded, ignored, suspended in some respects, then to what extent and in what respects? If one coördinate branch of the government, or one class of officers, may do so, why may not another, and all, as to duties devolved upon them respectively directly by the Constitution?

The answer to these and like questions must be that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete—such thing is not effectual until (663) done in the way and manner so prescribed.

To interpret the Constitution otherwise would be to establish a dangerous rule subversive of it—one that would place it, to a great and alarming extent, within the power of and subject to the will of the Legislature, executive officers and courts—its creatures. This would be inconsistent with the nature—the supremacy of constitutions. A chief purpose of them is to prevent a usurpation of power not conferred, whether by construction, false interpretation or otherwise. Hence, this Court held in *Scarborough v. Robinson,* 81 N. C., 409, that the signatures of the presiding officers of the two branches of the General Assembly, in pursuance of Art. II, sec. 23, of the Constitution, must be affixed to an act of legislation during the session of that body, and that they are essential to its completeness and efficacy. In this connection we refer approvingly to the wise comments and cautionary suggestions of *Mr. Justice Cooley,* in his learned work on Constitutional Limitations (pp. 78-83), in respect to the impropriety and danger of applying the rules of interpretation as to directory provisions of statutes to the interpretation of constitutional provisions. See, also, *Hunt v. The State,* 22 Texas Ct. of App., 396; *May v. Rice,* 91 Ind., 546; *Swann v. Buck,* 40 Miss., 268; *The Seat of Government case,* 1 Wash. Yer., 115; Cushing's Rev. Law, sec. 2103.

We know there are cases to the contrary decided by courts of great respectability, but we cannot hesitate to adhere to what we conceive to be the more reasonable, the proper and safe rule to be applied in the interpretation of constitutions, which gives certain effect to their provisions.

We cite some of the cases last referred to: *McPherson v. Leonard,* 29 Md., 377; *City v. Riley,* 52 Mo., 424; *Pierpont v. Cranch,* 10 Cal., 215; and there are other cases more or less like them. Some of these decisions seem to have been prompted by a disposition to help imperfect and careless legislation. This, we are sure, should never be done to
(664) such extent as to invade constitutional limitations. There seems to be a tendency in the administration of government to treat constitutions lightly—as if they were little more than ordinary statutes. How far this may imperil free institutions in the future remains to be seen. In our judgment, it ought not to be encouraged, and especially the courts should prevent and restrain it when and as far as they may properly do so.

In the case before us, what purports to be the statute in question has no enacting clause, and nothing appears as a substitute for it. The appellant contends that it is void and utterly ineffectual. On the other hand, the appellee insists that an enacting clause is not essential to the validity of a statute, and inasmuch as that referred to is in all other

respects complete, it is valid and operative. The Constitution, in Article II, in prescribing how statutes shall be enacted, provides as follows:

"Sec. 21. The style of the acts shall be: *"The General Assembly of North Carolina do enact."*

"Sec. 23. All bills and resolutions of a legislative nature shall be read three times in each House, before they pass into laws, and shall be signed by the presiding officers of both Houses."

It thus appears that its framers, and the people who ratified it, deemed such provisions wise and important, the purpose being to require every legislative act of the Legislature to purport and import upon its face to have been enacted by the General Assembly, and to be further authenticated by the signatures of the presiding officers of the two Houses comprising that body. The purpose of thus prescribing an enacting clause—"the style of the acts"—is to establish the act—to give it permanence, uniformity and certainty—to identify the act of legislation as of the General Assembly—to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake and fraud. Such purpose is important of itself, and as it is of the Constitution, a due (665) observance of it is essential.

The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so. If the Legislature should pass a merely verbal expression of its will, not in writing, in respect to a particular matter three times, such act would not be a statute or have effect. It must be expressed in writing, or printed, so that it can be seen, read and preserved. A bill perfected and passed is not a statute—it cannot become so until it is authenticated. It ought regularly to have a clause of ratification. It must certainly be authenticated by the enacting clause prescribed and the signatures of the presiding officers of the two Houses. This Court has held in *Scarborough v. Robinson, supra,* that the signatures of these officers affixed to the bill, passed while the Legislature was in session, was essential to make it a statute; and for the like and other reasons the enacting clause is likewise essential. As we have seen, it serves an important purpose in connection with the statute—it is evidence, high evidence, of the enacting authority and the enactment—the Constitution makes it so; and what authority under the Constitution can be heard to say that it is not important and may be dispensed with?

There is nothing in the nature of its purpose, and nothing in the Constitution itself, that implies that it may be dispensed with, any more than the signatures of the presiding officers; it serves the like purpose with them, and a further important one.

We are, therefore, of the opinion that the supposed statute in question has not been perfected, and is not such in contemplation of the Constitution; that it is wholly inoperative and void, and that the assign-
(666) ment of error must be sustained. There is error.

Let this opinion be certified to the Superior Court, according to law.

Error.

Cited: Harris v. Scarborough, 110 N. C., 239; *Cook v. Meares,* 116 N. C., 590; *Bank v. Comrs.,* 119 N. C., 225; *Debnam v. Chitty,* 131 N. C., 682; *Graves v. Comrs.,* 135 N. C., 51.

THE STATE v. GEORGE W. PATTERSON.

Evidence—Variance.

The defendant was indicted for selling liquors within two miles of "Rocky Knoll" Church, in Cabarrus County, under a statute in which the locality was designated by the same name; the evidence was that it was generally called "Rocky *Ridge*" Church, though a few persons called it "Rocky Knoll," and that there was no other church in the county known by those names: *Held,* that the variance was not material.

CRIMINAL ACTION, tried before *Clark, J.,* at Fall Term, 1887, of CABARRUS.

It appears from the special verdict that the defendant sold within the county of Cabarrus, as charged in the indictment, one quart of spirituous liquors, to the person therein named, without having a license to sell such liquors by the quantity "of one quart and less than five gallons," as required by the statute (Acts 1887, ch. 135, sec. 31), but it likewise further so appears, that the spirits so sold were the "products" of the defendant's *own farm,* which he had the right to sell without a license "in quantities of not less than one quart, except in territory where the sale of liquors is prohibited by law." He was therefore not guilty of any offense, unless he so sold the spirits within such territory.

There is a count in the indictment charging that the defendant so sold the spirits mentioned "within two and one-half miles of 'Rocky Knoll' church, in Cabarrus County," within which territory the
(667) sale of all intoxicating liquors is absolutely prohibited by the

statute. Acts 1872-73, ch. 171. And it appears from the special verdict that the sale was made within that distance from "Rocky Knoll" church, in said county.

The special verdict further finds that, at the time when the prohibitory enactment was made, there was a church in that county generally known as "Rocky Ridge" church, while a few persons have heard it called "Rocky Knoll" church, and there is but one church with either of said names in said county.

The defendant insisted that there is a fatal variance between the allegation in the indictment and the proofs offered in its support—in the description of the church around which is the prohibited territory, and that the defendant is not guilty of the charge.

The court ruled otherwise, and, adjudging the defendant guilty upon the facts found, directed the verdict to be so entered, and from the judgment therein the defendant appealed.

Attorney-General, T. C. Fuller, George H. Snow and E. C. Smith for the State.

C. M. Busbee and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the case: The church is designated in the same terms in the statute and in the indictment, and in our opinion, concurring with that of the judge, sufficiently points out the locality in which the offense was committed. There is and has been but one church in the county to which either name has been applied, and the difference between "Rocky Knoll" and "Rocky Ridge," as designating the location of the church, is too slender to produce any uncertainty in identifying it. The name is manifestly suggested by the nature of the land whereon the building has been erected, as a *"Knoll"* or Ridge, (668) which in meaning closely approximate. Besides, some persons have heard it called by the name given in legislative act, and such must be the intention of the Legislature in passing the act, upon the principle *ut res magis valeat quam pereat.*

There is no error, and the judgment is

Affirmed.

Cited: S. v. Eaves, 106 N. C., 756; *Jones v. Comrs., ibid.,* 438.

THE STATE v. A. V. EMERY.

Evidence—Burden of Proof—License—Retailing.

Upon the trial of an indictment for retailing liquors without a license, the burden is upon the defendant to show a license.

(*S. v. Morrison*, 3 Dev., 299; *S. v. Evans*, 5 Jones, 250, and *S. v. Wilbourne*, 87 N. C., 529, cited.)

THIS was an indictment, tried before *Shepherd, J.*, at the March Term, 1887, of WAKE.

There were three counts in the indictment, to the first two of which a *nol. pros.* was entered, and the defendant was tried upon the third only, which charged: "That the said A. V. Emery, on the day and year last aforesaid, at and in the county aforesaid, wilfully and unlawfully did sell and retail unto Lafayette Nash spirituous liquor, by a measure and quantity less than a quart, to wit, by the pint, he, the said A. V. Emery, not then and there having a license to sell and retail spirituous liquors," etc.

The only evidence was that of Lafayette Nash, who testified "that on Monday, a week ago, he bought a cup of corn whiskey, less than a quart, of the defendant in the city of Raleigh, Wake County, and that he paid him fifteen cents for it."

(669) The defendant asked the court to instruct the jury that there was no evidence to show that he had sold the whiskey without a license. The court declined to give the instruction, and the defendant excepted.

The court, among other things, charged the jury that if they were fully satisfied that the defendant sold the whiskey, as stated by the State's witness, and that the defendant had no license to sell, he was guilty under the third count; and if defendant relied upon a license to sell, it was his duty to produce it.

The defendant excepted to that part of the charge that related to the production of the license.

There was a verdict of guilty, and the defendant moved for a new trial:

1. Because of refusal to give the instruction asked for.

2. Because the court erred in instructing the jury as to the duty of the defendant to produce the license.

Motion overruled and defendant excepted.

The defendant then moved in arrest of judgment upon the third count, for that it did not charge any indictable offense in Raleigh Township.

Motion overruled, and defendant excepted. Judgment and appeal.

Attorney-General for the State.
J. C. L. Harris for defendant.

DAVIS, J., after stating the case: We can see no error in refusing the instruction asked for, nor can we see any error in the charge given by his Honor. The production of the license, if there was one, was a question of evidence. The defendant says, "the State must show that there was no license, because it alleged, and it was necessary for it to *allege,* that he had none." The contrary has been adjudged and settled by authority and conclusive reasoning. The license, if it (670) exist at all, must be in the possession of the defendant, and ever since the case of the *S. v. Morrison,* 3 Dev. Law, 299—more than fifty years—it has been regarded as settled in this State that *proof* of the existence of a license to retail must come from the defendant. The clear and satisfactory reasoning of *Ruffin, J.,* in the opinion in that case, by which it was made an exception to the general rule that "he who alleges must prove," has been accepted by the courts, but counsel for the defendant now asks us to overrule that decision, upon the assumption that there was a necessity for it when *S. v. Morrison, supra,* was tried, which no longer exists, because of the fact that license issued now is a matter of record. So it was when the decision referred to was made, and it has since been recognized in *S. v. Evans,* 5 Jones, 250, and in *S. v. Wilbourne,* 87 N. C., 529, cited by counsel for defendant, though in the latter case *Ruffin, J.,* says it should be limited as a precedent "strictly to the facts of the case." It can never work a wrong or injury to the accused, and we can see no reason for reversing it now.

This disposes of the exception to his Honor's charge.

We are unable to see from the record upon what ground the motion in arrest of judgment is based, and it was not pressed in this Court. The charge is for retailing unlawfully and without license in the county of Wake, and the evidence sustains the charge. If there is an exception in regard to Raleigh Township it has not been made to appear to us.

There is no error.

Cited: S. v. McDuffie, 107 N. C., 888; *S. v. Blankenship,* 117 N. C., 810; *S. v. Glenn,* 118 N. C., 1195; *Cook v. Guirkin,* 119 N. C., 17; *S. v. Holmes,* 120 N. C., 576; *S. v. Neal, ibid.,* 621; *S. v. Bradley,* 132 N. C., 1061; *Meredith v. R. R.,* 137 N. C., 486; *S. v. Blackley,* 138 N. C., 623; *S. v. Connor,* 142 N. C., 708; *Trading Co. v. R. R.,* 178 N. C., 180; *S. v. Falkner,* 182 N. C., 796; *S. v. Valley,* 187 N. C., 573; *Speas v. Bank,* 188 N. C., 527.

(671)

THE STATE v. HAMPTON MOODY.

Slander of Women—"Incontinency."

To constitute the offense of slandering an innocent woman by an allegation of incontinency, it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual, definitive, illicit sexual intercourse.

(*Watt v. Greenlee*, 2 Dev., 87; *McBrayer v. Hill*, 4 Ired., 136; *Lucas v. Nichols*, 7 Jones, 32, and *S. v. Aldridge*, 86 N. C., 680, cited.)

CRIMINAL ACTION, tried before *Gilmer, J.*, at Fall Term, 1887, of YADKIN.

The indictment, drawn under the Act of 1879 (The Code, sec. 1113), charges the defendant with a wanton and malicious attempt to destroy the reputation of one Lucy B. Easter, an innocent woman, in saying of her, "she had promised to let me have criminal intercourse with her, and that I intend to have that thing." Upon the trial the words were proved to have been spoken, and were admitted to be false.

After conviction, defendant's counsel moved an arrest of judgment, as he had, before pleading, moved to quash the indictment, for that it charges no offense; and each motion being denied, and judgment pronounced against the defendant, he appealed.

Attorney-General for the State.
No counsel for defendant.

SMITH, C. J. The first enactment, made in 1808, in resolving a doubt whether any redress was open to a woman accused of a want of virtue, declares that, "any words written or spoken of a woman which may amount to a charge of incontinency, shall be actionable." Similar words are used in the act making the malicious attempt to ruin the reputation of a virtuous woman, "by words written or spoken,
(672) which amount to a charge of incontinency," a misdemeanor, punishable by fine or imprisonment. The same language used in both statutes must bear the same interpretation, and the meaning of the expression, "a charge of incontinency," as defined in adjudications upon the former, be understood in the same sense in the latter.

Those adjudications leave no doubt of the construction of the word "incontinency," and that nothing short of an illicit intercourse with the other sex will fulfill the conditions required to constitute the criminal offense.

In *Watts v. Greenlee*, 2 Dev., 87, the second count in the declaration averred the slander to consist in the utterance of the words, "she is

incontinent"; and *Henderson, C. J.*, says that the word incontinent "cannot be understood, when generally applied to a female, to mean anything else but that she is *unchaste.*"

In *McBrayer v. Hill,* 4 Ired., 136, *Ruffin, C. J.*, says: "The statute of 1808 gives to a woman an action for words which amount to a charge of incontinency, which imports, we think, not merely the *imputation of impure desires, or a lascivious disposition, but the criminal fact of adultery or fornication.*"

A still more distinct definition of the import of the words is given in *Lucas v. Nichols,* 7 Jones, 32, by *Manly, J.*, who says: "Incontinency means want of restraint in regard to sexual indulgence, and imports, according to our statute, *definitive illicit sexual intercourse.*"

The principle of interpretation thus announced is recognized in *S. v. Aldridge,* 86 N. C., 680, though not in as explicit language.

The charge in the present indictment is, that the woman promised to surrender her person to the accused for the gratification of his sexual propensities—not that she did so in fact; and this, however injurious to her good name, is not within the provisions of the (673) statute.

There is error in the refusal of the motion, and the judgment must be arrested.

Error.

Cited: S. v. Brown, 100 N. C., 525; *S. v. Hewlin,* 128 N. C., 572; *S. v. Harwell,* 129 N. C., 553; *S. v. Moody,* 169 N. C., 313.

THE STATE v. MIKE SHELLY.

Assault—Jurisdiction—Serious Damage—Presumption—Verdict—Former Conviction.

1. Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but it did not appear that the injuries were permanent: *Held,* that this was "serious damage," and a justice of the peace had no jurisdiction of the offense.

2. The Superior Courts will be presumed to have acquired jurisdiction of simple assaults, and the burden is upon the defendant to show that the offense was committed within six months from the finding of the bill.

3. If the offense has been committed within six months from the finding of the bill, the indictment must allege that the assault was made with a deadly weapon, and describe it, or that serious damage was done, and set out its extent and nature.

4. A mistake in the verdict of a jury may be corrected before it is recorded and the jury discharged.

SMITH, C. J., dissenting.

(S. v. Huntley, 91 N. C., 617, and *S. v. Earnest, post,* 740.)

THE defendants, Mike Shelly, Delia Bryson and John Daneheart, were indicted and tried at the September Term, A.D. 1887, of the Criminal Court of NEW HANOVER, upon a charge of an assault and battery upon one Gustave Friberg. Before the jury were em-
(674) paneled the defendants all entered a plea of "former conviction," and also excepted to the jurisdiction of the court, alleging that no deadly weapon was used and that there was no serious damage done.

Under the plea of "former conviction" the proof was, and it was not disputed, that soon after the assault occurred all three of the defendants above named repaired to the office of one Hall, a justice of the peace, in the city of Wilmington and county of New Hanover, and that one of the defendants, to wit, John Daneheart, then and there made an affidavit, setting forth the assault, and that the aforesaid Gustave Friberg was not present, and that there was no proof before the said justice of the peace that any deadly weapon was used or serious damage done, and that the said justice of the peace had assumed final jurisdiction of the case and had rendered a judgment therein.

This assault was made upon the person of Gustave Friberg, in the kitchen of a sailor boarding-house, of which one of the defendants, Delia Bryson, is the proprietress.

The State's witness, Gustave Friberg, testified in substance that the defendant, Delia Bryson, wanted him to ship on a certain vessel, and that he refused to do so; that she and Shelly came into the kitchen and the doors were closed, and Shelly asked him if he was going to ship on the particular vessel in question, and when he refused to do so, that Mike Shelly knocked him down and jumped on him, and beat him with his fist in a most cruel manner; that he was stunned and his brain was addled by the blows; that both of his eyes were badly injured by the blows; that one eye was getting better, but the other was still closed and badly swollen.

The court inspected the witness' eyes in the presence of the jury, while on the witness stand, for the purpose of determining the question of serious damage.

The assault was committed on Monday, and the trial was held (675) on Thursday of the same week. On the trial one of the witness' eyes was firmly closed and badly swollen, so much so that it appeared to the court, on close inspection, to protrude fully one inch from his eye-brow, or its natural position. It was very black, with some red places upon it, and presented a very ugly and peculiar appearance. He testified that he had opened the lids of this eye, to wash it, by using his fingers with considerable force or effort, and that when he did so the sight or vision was very dim and had been injured. He did not say that the sight was permanently injured. The other eye was not so much injured—the lids and surroundings were still black and looked bruised, but the lids were open and the sight good.

The defendant, Mike Shelly, stated on the stand that he struck the State's witness, Friberg, only one blow with his fist, and knocked him down, and that he did so because Friberg insulted him and tried to butt him.

The other defendants, Delia Bryson and John Daneheart, testified that they tried to part them while fighting, but both denied that they aided or abetted the defendant Shelly in any way.

It was also proved that the State's witness, Friberg, gave the cry of murder repeatedly, in a loud voice, while the defendant Shelly was beating him, and that several persons who were outside of the house were attracted by the noise created, and that three men entered the kitchen, who were attracted by the noise.

The court was of the opinion that serious damage was done, according to the evidence in this case, and overruled the plea of "former conviction," and also the plea to the jurisdiction of the court, and the defendant excepted.

There was no deadly weapon used.

While addressing the jury the counsel for the defendants said to the jury that he had nothing to say, so far as the defendant, Mike Shelly, was concerned, and then went on to submit his argument in behalf of the defendants Delia Bryson and John Daneheart. (676)

While the solicitor was addressing the jury, he remarked that it was not worth while speaking about the defendant, Mike Shelly, whose guilt was admitted, and then made an argument to show that the other defendants were also guilty.

When the jury returned to the court room to render their verdict, the clerk asked, in the usual way, if they had agreed on a verdict, whereupon the foreman answered, "the jury find the defendants not guilty." The solicitor *immediately* requested the court to inquire of the jury as to Mike Shelly, and the court, seeing that the jury had made a mistake, asked them what was their verdict as to the defendant,

Mike Shelly, and immediately and simultaneously three or four members of the jury answered that the jury did not understand that they had to render any verdict as to him.

The court then told the jury that all three of the defendants named in the bill of indictment were on trial, and that the jury must retire and render a verdict as to the defendant Mike Shelly. The jury retired, and in less than ten minutes returned and rendered a verdict of guilty as to Mike Shelly, and not guilty as to the other defendants.

The counsel for the defendants submitted a motion for a new trial, and also a motion to discharge the defendant Mike Shelly:

1. Because the court erred in overruling the plea of former conviction.

2. Because the court erred in assuming jurisdiction in this case, there being no serious damage proved.

3. Because the court refused the motion of defendants' counsel to discharge the defendant, Mike Shelly, upon the ground that the jury had returned their first verdict of "not guilty" as to all of the defendants.

(677) The court refused the motion for a new trial, and also the motion to discharge the defendant Mike Shelly.

There was judgment, and the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. We cannot hesitate to concur with the court below in deciding that serious damage was done to the prosecuting witness by the ferocious and unprovoked beating inflicted upon him by the defendant, as charged in the indictment and proved on the trial. The injury was not simply painful and humiliating—it disfigured the face, seriously bruised the eyes—closed one of them entirely for days, and probably permanently impaired the sight. It seems to us that there can be no question that serious damage was done. The justice of the peace, therefore, had no jurisdiction of the offense, and any judgment he undertook to render in a criminal action before him on that account was a nullity.

The plea of *autre fois convict* was properly not sustained. *S. v. Huntley,* 91 N. C., 617.

The criminal court had jurisdiction of the simple assault and battery charged in the indictment, if more than six months elapsed next after the time when the offense was perpetrated, and before the beginning of the present action; and this is none the less so because the justice of the peace did not have jurisdiction. The jurisdiction of the criminal court was presumed, and the burden was on the defendant to prove, as

matter of defense, that less than six months so elapsed, in order to defeat it. As no such defense was made, and no question in that respect was raised on the trial, it must be inferred that the court had jurisdiction of the offense, as charged. The presumption in favor of it was not rebutted. *S. v. Earnest, post,* 740, and cases there (678) cited.

It is true that the defendant might have been indicted—and it seems that regularly he ought to have been—for an assault and battery in which serious damage was done. The present indictment is not sufficient for that purpose, because it does not charge that serious damage was done, its nature and extent, but it charges the simple offense; and the court having jurisdiction it could, as it did do, give an appropriate judgment upon the verdict of guilty. One advantage of charging the offense as one in which serious damage was done is, that the jurisdiction cannot be ousted by showing that six months had not elapsed, as above indicated.

It may seem somewhat singular that the justice of the peace had not jurisdiction of the offense as a simple assault and battery, and the criminal court had. The reason and explanation of such seeming inconsistency is, that the criminal court has the larger jurisdiction—it had jurisdiction of the simple offense as indicated, and as well and exclusively of the offense accompanied and rendered more aggravated by serious damage.

The error assigned as to the rendition of the verdict of the jury cannot be sustained. Before the court received and entered it, at once it was suggested there was mistake and misapprehension of the jury, of which they became presently conscious upon explanation from the court; they returned for further consideration of their verdict, corrected the error, and in a few minutes rendered a verdict of guilty, without hesitation. It would savor of trifling to allow so small an irregularity to delay, perhaps defeat, justice, especially in a case in which plainly no injustice is done the party complaining.

The rights of the accused must be protected by every safeguard, but this does not imply that he is entitled to have substantial advantage—opportunity to defeat the ends of justice—arising from slight immaterial irregularities that work no injustice to him. *S. v.* (679) *Bishop,* 73 N. C., 44.

There is no error. Let this opinion be certified to the criminal court according to law.

Affirmed.

SMITH, C. J., dissenting: The indictment is for a simple assault and battery, and fails to charge any matter in aggravation of the offense, or

that any serious injury followed. On the trial the defendant showed, in his defense, that he had been convicted and punished for the offense before a justice of the peace, who had assumed and exercised jurisdiction over it. It was in evidence, however, that the assault was made with great violence, and the beating so excessive as to produce serious damage to the said Friberg (prosecutor), while no averment of such damage was contained in the warrant, so as to lift the crime to a higher grade and place it beyond the cognizance of the justice, except when investigating the matter as an examining magistrate. The accused is, therefore, put upon a second trial in the higher court *for the same offense* and charged in like form. If the indictment had further alleged that it was attended with "serious damage" to the person assaulted, specifying wherein it consisted, so that, upon inspection, it could be seen to belong to a superior jurisdiction, as required by The Code, secs. 892, 987, and the construction given those sections when enforced in *S. v. Cunningham,* 94 N. C., 824, the jurisdiction would have been exclusive in the higher court, but in the absence of such allegations the case is one of simple assault, of which, for six months, the justice has sole cognizance, and afterwards concurrent with such court. As it is an unvarying principle of the criminal law that no one shall be twice punished under judicial sentence for the same offense, it results that if the jurisdiction assumed and, upon examination of the facts, exercised by the justice, is conferred by law, the plea of a former conviction necessarily bars the present prosecution, for otherwise the accused would undergo a double punishment for one and the same act.

(680) The case of *S. v. Huntley,* 91 N. C., 617, does not dispose of the question now presented, for which there had been in that, as in this case, a trial and conviction before a justice of the peace, with similar pleas interposed upon the trial in the Superior Court. The special verdict presents the facts for the ruling of the Court upon the plea of not guilty, and this Court limited the inquiry to the infliction of serious damages, as affecting its own jurisdiction in the case.

What constitutes *serious damage* in the sense of the statute, as contradistinguished from the damage resulting from an assault, is a problem not easy of solution, and, in advance, to define the line of separation a difficult task, if practicable at all. In cases approximating the line much must be left to the sound judgment of the trying justice upon the facts before him, and such seems to be the character of our legislation on the subject. Bat. Rev., ch. 33, secs. 114 to 122, inclusive.

The justice, by these provisions, is to pass upon the nature and extent of the assault, and if it shall *"appear to him"* at the hearing "that a deadly weapon was used, or that any serious damage was done, or that the offense deserves a more severe or other punishment than it is

within his jurisdiction to impose," he is to send the party to the Superior Court to answer the charge, thus making *his judgment of the demerits* of the criminal act the test of his own jurisdiction in entertaining it.

Some change has been made in The Code, in order to a more distinct line of demarcation between the jurisdictions, than to leave it wholly to the justice's judgment as to what punishment ought to be inflicted, but still committing to him the determination of the question whether those additional facts exist that raise the offense up to a higher grade. The Code, secs. 896 and 897. Section 896 directs what the justice shall do when, upon investigating, he comes to the con- (681) clusion that he *has not final jurisdiction.*

The other section is in these words: "When the *justice shall be satisfied* that he has jurisdiction, if no jury shall be asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed, in any case, a fine of fifty dollars or imprisonment in the county jail for thirty days."

Most plainly, to my mind, this commits to his adjudication the question whether the damages are serious, within the purview of the act, and when he *"shall be satisfied"* upon the point he must proceed with the trial, and punish if the accused is guilty. This is mandatory upon him when he makes his adjudication, and can it be that, after this punishment he can be punished again because the court or jury in the Superior Court may come to a different conclusion as to the extent of the damage done? If this be so, there would seem to be no escape from a double penalty.

I do not include in the proposition cases where a deadly weapon, so designated by law, as a pistol, dirk or knife, has been in the assailant's hands, because the law determines the character of such an assault, but such as the present, and those in which the instrument is deadly, *not per se,* but by the manner and conditions under which it is used, as explained *supra.* It may be, that if the charge was in form of an offense cognizable only in the Superior Court, the justice should examine only as a committing magistrate, with a view of binding over, but when the charge is not such upon its face, but of an act unaccompanied with matters in aggravation, and these only appear and are developed in the evidence, he must determine, as in our case, the extent of the injury and of the damage done, and whether the damage is or is not serious, and his action consequent upon the results of the injury, as the accused cannot escape from the punishment imposed, and ought to be protected against another prosecution for the same act.

(682) There is no suggestion in the record that a fraud was practiced upon the jurisdiction of the criminal court and that the trial in the justice's court was resorted to as a scheme to evade the just responsibility incurred by the accused; and if so, the double punishment would be caused by his own voluntary action in the premises, and the first trial would be no obstacle to the second. But when the jurisdiction is bona fide exercised, and such it must be assumed to have been in the absence of any imputation, the great and fundamental principle must be maintained, that no person should be twice punished by judicial tribunals, having rightful cognizance of the offense, for one and the same act.

Cited: S. v. Porter, 101 N. C., 715; *S. v. Roseman,* 108 N. C., 767; *S. v. Nash,* 109 N. C., 837; *S. v. Kerby,* 110 N. C., 559; *S. v. Whitson,* 111 N. C., 697; *Luttrell v. Martin,* 112 N. C., 607; *S. v. Albertson,* 113 N. C., 634; *S. v. Battle,* 130 N. C., 657; *S. v. McLamb,* 188 N. C., 804; *S. v. Strickland,* 192 N. C., 256.

THE STATE v. ALBERT WHISSENHUNT.

Liquor Selling—Statute—"Place of Manufacture."

The "place of manufacture," at which the sales of "liquors and wines" under former Revenue Acts, and "wines" under the present act, may be sold without license or tax, is confined to the distillery, or to places so near as to be used in the business of distilling.

CRIMINAL ACTION, tried before *Clark, J.,* at December Term, 1887, of DAVIDSON.

The indictment, found by the grand jury at June Term, 1887, of Davidson Superior Court, charges the defendant with violating the Revenue Act in selling spirituous liquors without first obtaining a license therefor, specifying the offense in four separate counts.

The first count charges the selling, in general terms, by a measure less than a quart;

(683) The second in selling a quantity less than five gallons, to wit, by the quart, negativing the fact that the spirituous liquors thus sold were the product of the defendant's farm, or of his manufacturing, or that the sale was made at the place of manufacture;

The third, the selling in quantities less than five gallons, to wit, by the gallon, with similar negations.

The fourth, selling on Sunday intoxicating liquor without the prescription of a physician, and not for medical purposes.

The cause coming on for trial on the plea of not guilty, the jury rendered a special verdict, in which they find:

"That the defendant, Andrew Whissenhunt, on the first day of November, 1886, sold to one James M. Kinley (the person to whom the spirituous liquors in all the counts mentioned are alleged to have been sold) one quart of whiskey of his own manufacture; that the place of sale was at the dwelling-house of the defendant, about 200 yards from the place of manufacture; that at the place of sale the defendant had several barrels and jugs of whiskey moved there directly from his distillery; that if upon this state of facts, the court is of opinion that the defendant is guilty, the jury for their verdict say he is guilty, and if upon this state of facts, the court is of opinion that the defendant is not guilty, the jury find him not guilty."

The court being of opinion that the defendant, upon the findings, is not guilty, directed it to be so entered, and discharged the defendant, from which judgment the State appealed.

Attorney-General for the State.
No counsel for the defendant.

SMITH, C. J., after stating the case: The enactments in the Revenue Acts of 1885 and 1887, section 34 in the former, and section 31 in the latter, are, in terms, essentially the same in relation to the sale of spirituous liquors, and in requiring a previous license therefor, the differences not affecting the criminal act as a misdemeanor. The former requires the semiannual payment of the tax, the latter its payment quarterly; and there is a slight change in the form of the exceptions, in that a person in the one case may sell *liquors or wines,* the product of his own farm or of his own manufacture, at the place of manufacture; and in the latter enactment he may *sell wines* of his own manufacture at the place of manufacture, and wines or spirits, produced from his own farm, in quantities not less than a quart, elsewhere as well. (684)

The finding brings the case within the averments made in the third count and the condemnation of the statute; and its sufficiency, in form, to charge the offense is not controverted, nor the defendant's criminal responsibility denied, if they are true and supported by the proofs. The only point is as to meaning of the words which permit the selling at the place where the liquors are made, and can this be said of a sale at the defendant's house, some 200 yards distant from the locality of manufacturing the liquors?

We do not concur in the ruling of the judge in his construction of the statute. It was not, in our opinion, the purpose of the exception to convert a residence, so far remote, into a liquor-selling store, and thus multiply the evils intended to be remedied, but to authorize the disposition of these intoxicating drinks at the distillery, or at places so near as to be used in the business of distilling. If the distance of 200 yards be not too remote, where shall the limit to the privilege be assigned?

That both the residence and distilling operations are upon the same farm can make no difference in fixing the place at which the privilege may be exercised without the payment of the required tax for retailing.

There is error, and the judgment must be reversed and judgment against the defendant.

Error.

Cited: S. v. Hazell, 100 N. C., 473, 474; *S. v. Dalton,* 101 N. C., 683; *S. v. Hart,* 107 N. C., 798.

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THE STATE v. ED. WEATHERS.

Constitution—Statute—Convicts—Judge's Charge—Husband and Wife.

1. While it is erroneous for the court, where the testimony is conflicting, to single out one witness and make the case turn upon the truth of his statement, without submitting the aspect presented by the other evidence; yet if the conflicting statements are put side by side and the jury instructed that if they believed the facts to be as testified by one of the witnesses, they should so find, it is not error.

2. A husband will be justified in the use of such force as may be necessary to prevent another from taking his wife from him; otherwise, if she goes of her own volition.

3. The statutes authorizing the working of persons convicted of criminal offenses upon the public roads, under the supervision of the county authorities, is not unconstitutional.

(*Anderson v. C. F. St. Co.*, 64 N. C., 399; *Willey v. Gatling,* 70 N. C., 410; *Jackson v. Comrs.*, 76 N. C., 282, and *Crutchfield v. R. R., ibid.*, 320, cited.)

THIS was an indictment for an affray, tried before *Merrimon, J.,* at September Term, 1887, of WAKE.

The defendant Ed. Weathers and three others are charged in the indictment with committing an affray and mutually assaulting each, and upon their trial he and Monroe Rowland were found guilty and the others acquitted. Thereupon, after a motion for a new trial made and

refused, the court pronounced judgment, that the convicted defendants be put to work on the public roads of the county by the county commissioners, and so kept for the term of six months from 4 October, 1887.

From the judgment the defendant Weathers appealed.

The facts are stated in the opinion.

Attorney-General for the State. (686)
W. J. Peele for defendant.

SMITH, C. J. There were many witnesses examined, seven in number, and among whom were all the accused except Carey Rowland, and these, other than those participating in the fight, seeing parts of it only, and not the whole, introduce confusion and uncertainty in their narrative of the facts. There is, however, a general concurrence in representing a severe fight between the principal offenders, and the use of a grubbing-hoe, or attempt to use it, and the infliction of a wound upon the head of the appellant, from which, as he emerged from the house, there was a profuse flow of blood—a fight in which the combatants seem to have been voluntarily engaged and each intent on doing his best. It, therefore, devolved upon either to rebut the presumption of guilt by showing that he acted in self-defense and in the exercise of a legal right. The testimony of Weathers and Rowland was at variance, that of each tending to convict the other and excuse himself.

The court, contrasting the statement of these witnesses, told the jury that, if they believed the representation of facts made by the appellant, they should acquit him; while, if they accepted the testimony of Elijah Horton as a true version of the affair, both would be guilty, but that all the evidence should be considered, and if taken together they were not satisfied that the appellant *fought willingly,* they should find him not guilty.

To this part of the charge appellant's counsel, after the retirement of the jury, were allowed to enter an exception, which is defended in the argument before us upon the ground that undue emphasis is given in the instruction as to the testimony of the witness Horton, in singling it out from that of the others, and to sustain the objection reliance is put on the rulings in *Anderson v. C. F. St. Co.,* 64 N. C., 399; *Willey v. Gatling,* 70 N. C., 410; *Jackson v. Commissioners of Greene,* (687) 76 N. C., 282; *Crutchfield v. R. & D. R. R. Co., ibid.,* 320.

These cases, as will be found on an examination, establish the proposition that it is erroneous to separate and give prominence to the testimony of one witness, who is in conflict with others, thus leaving out, and in an indistinguishable mass, what others testify, and make the result dependent upon his credit and accuracy.

This is not the case before us, but the testimony of a witness against, and himself for, and these conflicting statements are put side by side and the jury directed, as they might find the facts to be, to convict in one case and acquit in the other, and is accompanied with an instruction to examine and weigh all the testimony and acquit appellant, unless satisfied that he willingly entered into the fight.

2. Counsel further requested a charge to the effect that if Rowland persuaded his sister, the wife of Weathers, to leave her husband, the latter was justified in the use of force and in fighting to prevent it, provided no more was used than necessary to that end. The court, refusing to so charge, told the jury that it being in evidence that she had separated herself from him previously, even if her brother did persuade her to go with him, and she went of her own will and was not restrained of her liberty in any way, the appellant would not be justified in fighting Rowland to prevent her from going. The attention of the jury was called to the testimony that she struck her husband when engaged in the fight with her brother, in passing upon the question whether she acted upon her own volition or under the persuasion of him.

In our opinion this was a correct statement of the law, and the court did not err in declining to give the instruction asked, nor that superadded, that if the disposition of the wife to depart from her husband was brought about by her brother's persuasion and influence, the
(688) accused would not be amenable to the law in using no more force than was necessary to prevent her going away with him.

3. The next exception is to the form of the judgment sentencing the appellant to labor upon the public roads under the control and supervision of the county authorities. This, we think, is also untenable.

The Constitution, Art. II, sec. 1, authorizes as a punishment for crime a sentence of imprisonment with or without hard labor, and this to be carried into execution by work and labor on public works or highways, etc.

It also allows the farming out of convicts "when and in such manner as may be provided by law," except in certain enumerated crimes of high grade.

It further provides "that no convict *whose labor may be farmed out* shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the *convicts so farmed out* shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of the State."

The restriction in terms extends to convicts farmed out, that is, hired to persons or corporations, who are not allowed to become masters

thereby, to administer correction and discipline at their own will, but this authority is lodged with and retained by responsible State officers, notwithstanding the farming out. But as highways are under county officers, convicts set to work upon them must almost necessarily be under their management, and, under the law, subject to their control.

This rendering of the Constitution finds expression in the enactment contained in section 3433 of The Code, and in section 3448. The form of the sentence is fully warranted in the recent act regulating the working of convicts on the public roads (Acts 1887, ch. 355), which directly warrants the judgment and places convicts sentenced to imprisonment and hard labor on the public roads under the control of the county authorities, investing them with power *"to enact all needful rules and regulations for the successful working of all convicts upon said public roads."* (689)

There is no error, and the judgment is

Affirmed.

Cited: S. v. Haynie, 118 N. C., 1270; *S. v. Smith,* 126 N. C., 1059; *S. v. Hamby, ibid.,* 1069; *S. v. Young,* 138 N. C., 573; *S. v. Summers,* 173 N. C., 777; *S. v. Faulkner,* 185 N. C., 637.

THE STATE v. HAYWOOD MITCHENER AND SAMUEL MOORE.

Evidence—Larceny—Witness.

1. Where it appeared upon the trial of an indictment for larceny that a storehouse had been broken open and property taken therefrom about midnight; that upon a witness, who was passing, calling out, shots were fired at him; that the defendant lived near by and had left his house after supper, but returned at about the time the shots were fired; that he remarked next morning he "did not reckon anybody would run in on anybody else again in a close place"; but there was no other testimony connecting him with the larceny: *Held,* that the evidence was too slight to be submitted to the jury.
2. Any removal of the property alleged to be stolen is a sufficient asportation.
3. It is not error to refuse to instruct the jury that they ought not to convict upon the testimony of a confessed felon, who is under indictment, and who testifies under a promise of immunity from punishment. The testimony of such witness that the defendant admitted to him that he was present at the commission of the crime charged against him is some evidence to go to the jury.

(*S. v. Atkinson*, 93 N. C., 519; *S. v. Powell*, 94 N. C., 965; *S. v. McBryde*, 97 N. C., 393; *S. v. White*, 89 N. C., 462; *S. v. Craige, ibid.*, 475; *S. v. Haney*, 2 D. and B., 390, and *S. v. Miller*, 97 N. C., 484, cited.)

INDICTMENT for larceny, tried before *Merrimon, J.*, at August Term, 1887, of JOHNSTON.

(690) The indictment charged Robert Watson, Haywood Mitchener, Samuel Moore and Wiley Sanders, with the felonious taking of the property of John H. Parker. Watson pleaded guilty, and the jury returned a verdict of guilty against the others.

Dr. R. C. Noble, for the State, testified in substance, as follows: "The store of J. H. Parker, in Selma, is about 110 or 115 feet from my house. About 17 August, 1885, came home at night between one and two o'clock, a. m.; saw a light flash several times over the transom of Parker's store; also something black, as if the white door of Parker's store was partly open; went towards the store and called "John" (the clerk); was then shot at several times from the inside of the store, and from the outside also; pistol balls made two holes in skirt of rubber coat (which witness had on); ran to Parker's house, who, with me and my brother, went back to the store, but found no one there; found a sack of bacon on the sidewalk in front of the store, and a small sack of flour."

John H. Parker testified: "Saw the flour and meat spoken of by Dr. Noble on the sidewalk; the flour was mine, with my mark; I think the bacon was mine also. It was like meat I had in the store."

Bob Price (col.) testified: "Was at Sam Moore's the night of the shooting—sat up in company with Jane Branch, step-daughter of Sam Moore, until about an hour before day. Sam Moore left the house after supper that night, and came back between one and two o'clock; . . . witness remained up with Jane Branch; . . . did not lie down; did not go to sleep at all that night; left Sam's awhile before day; . . . went back to Sam's to breakfast, the sun was about an hour high. At the table Sam said: "he did not reckon anybody would run in on anybody else again in a close place." . . . Witness had been accused of stealing by a negro, but was never indicted or prose-

(691) cuted, and was not guilty; was committed to jail as a witness, and kept there since the preliminary hearing in this case; while in jail received from Dr. Noble a shirt and some melons."

Dr. Noble testified that Price's character was good, and that he had made to him, in substance, the same statement in February, 1886, as that made by him before the court.

Henry Snow (col.) testified: "A short time after the shooting at Parker's store, Haywood Mitchener was passing by Wilson's Mills; the train stopped for a minute or two, and Haywood jumped off and ran

to where I was. I spoke to him about the shooting at Parker's store, and told him that I had heard that he was in it. Mitchener said, "Yes, I was, and it was I that did the shooting.'"

On cross-examination it was made to appear that this witness was a Methodist preacher; that he had been recently detected in stealing cloth from John H. Parker, arrested, and kept in a room all night, guarded by ten or twelve men, some of whom told him that it would be best for him to tell all he knew. It was there that he first made public what Mitchener had told him at Wilson's Mills. He had plead guilty at the present term to an indictment for the laceny of goods taken in the night-time from the store of Winston Bros., of Selma; also to an indictment for breaking into the smokehouse of Jackson Raines in the night-time and taking a large quantity of bacon therefrom. The smokehouse was in the same enclosure with the dwelling, and about 30 feet from it; had first admitted his guilt, and then protested his innocence of this charge; (was not indicted for breaking into Parker's, nor, so far as he knew, accused of it). Had been promised immunity from punishment if he would become a witness against other parties indicted with him, among them Haywood Mitchener. Judgment was suspended in the two cases upon the payment of costs. He had been promised by the men who guarded him on the night of his arrest that he should (692) go unpunished if he would tell on the rest.

Jane Branch testified, and contradicted, in detail, the statement of Bob Price, as to what occurred at Sam Moore's. This witness had had two husbands living at the same time.

Neil Munns testified that he was at Sam Moore's on the night of the shooting, and contradicted Bob Price.

Herod Smith testified that on the night of the shooting he and Haywood Mitchener slept in the same bed; was awakened by the pistol shots, and Haywood was then in bed with witness.

After verdict of guilty was rendered, and before sentence, the defendant moved for a new trial, on the grounds:

1st. That the verdict was not justified by the evidence.

2d. That there was no evidence of any asportation of the property charged to have been taken by the defendants.

3d. That the judge, in his charge to the jury, failed to instruct them that the evidence of Henry Snow, a confessed thief, who testified under the threat of punishment, and under promise of immunity from all punishment in case he did testify against the defendant Haywood Mitchener, was insufficient to convict.

The counsel for the defendant, in their argument to the jury, took the ground that the evidence of Henry Snow (as to a confession of Hay-

wood Mitchener), surrounded by the facts stated, was insufficient to convict, and asked his Honor to so charge the jury, which he failed to do.

All motions for a new trial overruled, and the defendants Mitchener and Moore appealed.

Attorney-General for the State.
Pou & Massey filed a brief for defendants.

DAVIS, J., after stating the case: 1. If there was any evidence it was for the jury to say what weight and effect should be given to (693) it. It has been often said that what is evidence, or whether there is any evidence, are questions for the court—its force and effect for the jury. When there is *any* evidence to go to the jury, it is not within the province of the court to say what weight they shall give to it. If, in the opinion of the court, the verdict is against the weight of evidence, or is not justified by the evidence, the judge may, in his discretion, set it aside, but this court cannot review, direct, or in any way control his discretion. These propositions are too well established to need reference to authority. Juries generally know best what weight to give to the testimony of witnesses—the bias and influence under which they speak—their manner and bearing—come under their immediate observation, and they can form a much more accurate estimate of the weight to which the testimony of witnesses is entitled than can be derived from a perusal of the testimony; and the judge, who presides at the trial and witnesses all that transpires, can form a more accurate opinion as to the fairness of the verdict, and is the best and safest depository of discretionary power over the verdict.

Was there any evidence in this case that should have gone to the jury? Upon a careful examination of the evidence sent up, we think that, as to the defendant Mitchener, there was some evidence, and the jury having found a verdict of guilty, the refusal to grant a new trial upon the first ground assigned is, as to him, not subject to our review. *S. v. Atkinson,* 93 N. C., 519; *S. v. Powell,* 94 N. C., 960; *S. v. McBryde,* 97 N. C., 393.

The character of the evidence against Mitchener will be considered under the third exception.

As against the defendant Sam Moore, we think the evidence was too slight and insufficient to reasonably warrant a verdict of guilty, and it should, therefore, not have been submitted to the jury. It was purely circumstantial, and instead of constituting such a chain of circumstances as to lead, beyond reasonable doubt, to that defendant's (694) guilt, there were but two broken links in the chain, neither sufficient in itself, nor both together, to constitute more than a *scin-*

tilla of evidence—a mere conjecture—of guilt. The simple fact that he was from home, without any circumstance in any way connecting him with the crime charged, could be no evidence of guilt. What was said at the breakfast table was entirely consistent with innocence, and, as was said by his counsel, "was a very natural remark, and might have been innocently made at half the breakfast tables in Selma." The matter was doubtless the subject of much talk, and a guilty person, interested in concealing rather than divulging the perpetrators of the crime, would have been less apt to make such a remark than an innocent person.

We think the ruling in the case of *S. v. White,* 89 N. C., 462, and what was said by *Merrimon, J.,* in that case, entirely applicable to this case, and we deem it unnecessary to do more than to refer to that case and the authorities there cited.

2. It is insisted that there was no evidence of asportation. Parker testified to the identity of the flour, and that it was his, and he thought the bacon was his also. The flour and ham were found on the sidewalk; it had been in the store. Somebody had removed it. Any removal is a sufficient asportation, and there was evidence of removal. *S. v. Craige,* 89 N. C., 475, and cases cited.

3. The failure of his Honor to charge the jury, as requested by counsel for the defendant in their argument to the jury in regard to the testimony of Henry Snow, is not a ground for a new trial. Since the case of *S. v. Haney,* 2 D. and B., 390, it has been held that juries may convict upon the unsupported testimony of an accomplice, if they shall believe his statements. *S. v. Miller,* 97 N. C., 484, and cases cited.

Henry Snow was not an accomplice in this case, but he seems to have been a very great thief, and testified under very strong inducements, and yet the jury may believe a notorious thief, even when (695) testifying under circumstances of great temptation, but they are not apt to do so, unless there is some inherent probability of truth in his statements, or unless, from *all* that appears before them in the trial, they are satisfied that he has told the truth. It is apparent that there were more thieves than one engaged in stealing the ham and flour—there seems to have been much stealing in Selma about the time. It is quite probable that the thieves engaged knew others of their own character and profession; and to whom would they more probably unbosom themselves than to a fellow-thief? And to what fellow-thief sooner than to one who, in addition to brotherhood in crime, was a spiritual guide and adviser, and pretended to pray and preach for them? The jury not only heard what was said, but the defendants as well as witnesses were before them, and they had the aid of what they saw as well as heard—of looks, manners, expression of countenance, etc. The attendant circumstances aid juries in determining what, if any, credit they will give to witnesses,

and there are circumstances under which they may believe the testimony of very bad and untruthful men, and cases in which such evidence may be satisfactory.

As to the defendant Moore there is error, and he is entitled to a new trial. As to the defendant Mitchener there is no error.

Affirmed as to Mitchener, and reversed as to Moore.

Cited: *S. v. Barber,* 113 N. C., 713.

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(696)

THE STATE v. WILLIAM H. WILKERSON.

False Pretense—Indictment—Parol Evidence—County Orders.

1. Parol evidence of the contents of written instruments will be received when the writing comes in question collaterally; and also, when its possession is traced to the adverse party and he refuses to produce it, without further accounting for its absence.
2. Where the defendant was indicted for obtaining an order, from the board of commissioners, for the payment of money on account of the support of a pauper, by means of false pretense that such pauper was a resident of the county, whereas she was in fact dead: *Held,* that although there may have been no evidence of fraud at the time the pauper was put on the "poor list," yet each application for an order made after her death, knowing she was dead, was proper evidence to go to the jury, to be considered in determining defendant's intent.
3. The description, in an indictment for false pretense, of the property obtained, as "an order for the sum of six dollars, issued for the support of S.," sufficiently describes the instrument; and it is not erroneous to charge that it was obtained from the board of commissioners of the county, who represent the county.
4. A county warrant or order may be recalled.

(*Abernathy v. Phifer,* 84 N. C., 711, and *Pollock v. Andrews,* 68 N. C., 50, cited.)

CRIMINAL ACTION, tried before *Philips, J.,* at January Term, 1887, of GRANVILLE.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

The defendant is charged with having obtained from the county authorities of Granville an order for the payment of money by means of false pretenses and fraudulent representations, in violation of section 1025 of The Code. The indictment consists of two counts, upon the trial of which he was convicted of the second only, and that is in these

words: "And the jurors for the State upon their oath do further present, that William H. Wilkerson, late of the county of Gran- (697) ville, at and in the county aforesaid, on the day and year aforesaid, with force and arms, unlawfully, wilfully, knowingly, falsely and designedly, did obtain from the board of commissioners of Granville County an order for the sum of six dollars, issued for the support of Sallie Eastwood, by falsely representing to said board of commissioners that the said Sallie Eastwood was a pauper, and a resident of Granville County, and by undertaking to receive and use the said order for the support and maintenance of said Sallie Eastwood, with the intent then and there to defraud; whereas in truth and in fact, the said Sallie Eastwood was not a resident of the county of Granville and a pauper, and was not entitled to receive support from the same, as the said William H. Wilkerson well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

The State, in support of the charge, introduced a portion of the records of the board, in possession of the register of deeds, in one of the books of which are contained the names of outside paupers, meaning such as received county aid and were not in the poorhouse, and an entry made 4 March, 1879, by which the said Sallie Eastwood, of Oak Hill Township, was declared an "outside pauper" and allowed $1 per month, "order to W. H. Wilkerson."

It also appeared that a second order for $5 issued on 4 August, 1879, to the defendant for the said pauper.

On the examination of Benjamin F. Bullock, a witness for the State, he testified that the name of the defendant in the book exhibited was in the handwriting of witness. When he was asked if the order referred to was in writing, and receiving an affirmative answer to his question, defendant's counsel objected to any parol evidence of its contents, the original not being produced, nor its absence accounted for. The solicitor stated, in explanation, that he proposed to show that such an order was issued every six months, and that the entry of 28 Feb- (698) ruary, 1884, which bore upon it the defendant's name, written by the witness, was offered to show that the order of that date was delivered to the defendant, and that he drew the semiannual allowance of $1 per month, and that he continued to draw it. The question was allowed, and to the ruling the defendant excepted. Thereupon the witness, who was at the time a deputy of the register, stated that the order of 28 February, 1884, was in print or writing, and was delivered to defendant, the entry being in the words: "28 February, 1884; Eastwood, Sallie; one dollar; W. H. Wilkerson"; and showing a delivery to defendant of the order for the monthly allowance to the pauper, and that such orders were issued twice a year and delivered to defendant.

On cross-examination, the witness further stated that he delivered the order to defendant, drawn on the county treasurer by the register of deeds, for $6 for support of Sallie Eastwood.

It was in evidence that the pauper lived in Granville with her daughter in 1879, in two miles of defendant's residence; that in August of that year the said Sallie left and moved to Person County, and never returned to her former home, and that she died in December, 1882.

Thomas Washington, register of deeds in 1885 and 1886, testified to the delivery of similar orders for the support of said Sallie during these years to the defendant, and this testimony was also objected to, because the orders were not produced. But the evidence was received. The witness stated that the last was delivered on 1 February, 1886; that defendant applied for it, when witness told him that it had been reported to the board that said Sallie was dead, when defendant replied that if she was dead, she had died since he left home that morning, and he did not know it, and that thereupon the order was delivered, and this was
(699) the third delivery to defendant by witness during witness' continuance in office for the two years.

W. H. Smith, a member of the board in 1885 and 1886, testified that the pauper list was revised twice a year, and the name of said Sallie was upon it; that in May or June, 1886, defendant came to see him, and said he had heard there was some complaint of his misapplying county funds issued for said Sallie, and he wanted to talk about it; that if she was dead he was not aware of it; that he had used her funds, for which he had no excuse except the sickness of his father and mother, and that "he got the orders issued for the support of Sallie Eastwood and got the money."

The testimony is stated in substance as necessary to an understanding of the defendant's exceptions appearing in the case on appeal.

Attorney-General for the State.
L. C. Edwards for defendant.

SMITH, C. J., after stating the case: 1. The first exception is to the admission of proof of the contents of the several orders issued to the defendant for the pauper's support.

The extent of the general rule, which requires the production of a written instrument to prove its contents, and admits of secondary evidence when it is lost or destroyed, is often misconceived. The rule does not apply to cases where the writing comes up on a collateral inquiry and a party is not expected to be prepared to produce it.

Mr. Justice Rodman says, in *Pollock v. Andrews,* 68 N. C., 50, that "the exceptions are more numerous where the question is only a collateral

one, as in this case. I find it decided that one party may prove the admission of the opposite party that he had a lease, note," etc. 1 Greenl. Ev., sec. 97. He also says: "Where the writing is in possession of the other party, who refuses to produce it, secondary evidence of its contents may be given, even when the contents are directly in (700) issue."

In the present case the papers are traced with the defendant's possession, and the contents are material only as showing their nature and value. The essence of the charge is the fraudulent practices and pretenses by which the defendant obtained them.

Moreover, the defendant admitted that he got the county orders and the substance of what they contained. It would not be necessary, in an indictment for stealing bank notes, to have the notes present, nor would it be, in our opinion, necessary if the larceny were of a bond or note. The contents are material only as showing the nature of the instrument, and are not drawn in controversy in the sense of the rule requiring the production of the papers themselves.

2. It is insisted, and so the court was asked to charge, that there was no evidence to sustain the averment that any false or fraudulent representations were made to the county commissioners, and that, in order to a conviction, this proof was indispensable. The instruction was that, "if the jury believed, beyond a reasonable doubt, that the defendant fraudulently, designedly, knowingly and falsely represented to the board of county commissioners of Granville, whether such representation be in writing, or in words, or in acts, that Sallie Eastwood was a resident and pauper of Granville, when, in truth and in fact, she was not a resident and pauper, and this was known to him, and that by means thereof he obtained the order, he is guilty."

The only defect imputed to the charge in this connection is that it was left to the jury to find the alleged false representations to the board, when there was no evidence of them. The defendant said, in his conversation with the witness Smith, that he "got the orders issued" for the pauper's support, and "got the money." This is certainly some evidence, in the absence of any other agency, of his instrumen- (701) tality in having the pauper placed on the list, of the orders directing payment to him, and of his being the only person to whom they issued. Now, originally, this was right, for then the facts did warrant the order for her allowance. This being so, after her removal, when she ceased to be entitled to it, every fresh application was, in fact and effect, a reaffirmation of her continuing rights as a pauper, and an act as expressive and significant as would be words to the same effect. This is plainly the import of what the defendant said to the witness, who issued the last order, when told of the reported death of the pauper, that if

dead he did not know it, and in consequence of such statement the order was issued by the agent of the board, and in the name of the board, and received by the defendant. The fraud then was perpetrated in the implication from the application that the pauper continued to be entitled to her allowance.

3. The motion in arrest of judgment must also be overruled. The allegation that an order was obtained from the commissioners for six dollars sufficiently describes the instrument as an order or warrant drawn by their officer upon the county treasurer—the appropriate method of disbursing the public moneys (The Code, sec. 777), so that all the elements are involved in the charge necessary in describing the instrument unlawfully obtained.

A further objection is made, in that the statute speaks of the obtaining money, etc., by false pretenses, from "any person or corporation," and that the county is the corporation, not the board of commissioners. We do not perceive the force of the argument. The statute uses words that cover the case, whether the board be *person* or *persons,* for the singular number includes the plural (sec. 3765, par. 1), or a corporation.

But the boards are county agents, and the county sues and is sued in their name. Section 704. And it acts by and through them. Sections 705 and following.

(702) The county warrant is not entirely like a bill of exchange in the relations it creates between independent parties. It is but a mandate from one officer to another to pay a third person, and as such is but evidence of a debt and may be recalled. *Abernathy v. Phifer,* 84 N. C., 711.

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

Affirmed.

Cited: Faulcon v. Johnson, 102 N. C., 268; *S. v. Hargrove,* 103 N. C., 334, 337; *S. v. Ferguson,* 107 N. C., 847; *S. v. Walton,* 114 N. C., 785; *Carden v. McConnell,* 116 N. C., 877; *S. v. Surles,* 117 N. C., 723; *S. v. Sharp,* 125 N. C., 631; *S. v. Stancill,* 178 N. C., 686; *Herring v. Ipock,* 187 N. C., 462; *Mahoney v. Osborne,* 189 N. C., 447.

THE STATE v. P. M. SUMMERS.

Fornication and Adultery—Rape—Merger.

Upon the trial of an indictment for fornication and adultery there was evidence that the defendants for a long period illicitly cohabited together, and there was also evidence tending to show that on some occasions the

female defendant yielded to the male defendant from fear of violence: *Held*, that it was not error to refuse to charge the jury that the male defendant was guilty, if guilty at all, of rape, and could not be convicted of the offense charged.

THE defendant and one Louisa Austin were indicted for fornication and adultery, and tried before *Clark, J.*, at the August Term, 1887, of IREDELL.

The mother of the female defendant testified that the defendant Summers was and had been a married man; that he visited the house of the witness, with whom the female defendant lived—at first slyly, but for more than a year before the trial these visits were regularly and repeatedly made; that they bedded together two or three times a week; that sometimes the male defendant was drunk and violent; that he carried a pistol with him, and would sometimes place it at the head of his bed and threaten witness if she interfered; that the female defendant had two children—one three or four years old and the other about one year old, and that both defendants claimed these children as (703) the children of the male defendant.

On cross-examination, the witness said the female defendant was her daughter; that sometimes the male defendant was cruel to female defendant and threatened her, and she believed the female defendant was afraid not to yield to him at times; that she did not "think the female defendant was to blame."

Two sisters of the female defendant testified in substance to the same facts; and one of them, in addition thereto, that the defendant would come to her mother's, make assignations with the female defendant, and most frequently she left the house to meet the engagements.

Other witnesses testified to criminating facts.

There was no exception to the evidence.

Counsel for the defendant asked the court to charge: "That the evidence showed that the male defendant had been guilty of rape, and this offense was merged in the felony, and the jury must not find the defendant guilty on this bill."

The court charged the jury that the State must satisfy them, beyond reasonable doubt, that the defendants were not married to each other, and that within two years before the indictment the female defendant habitually and voluntarily surrendered her person to the embraces of the man; that it was immaterial whether, on one or more occasions, there was violence which did or did not amount to rape, provided, upon the whole case the jury were fully satisfied there had been an habitual and voluntary cohabiting of defendants as man and wife, they not being married together. . . . And if, from all the facts and circumstances, they should become satisfied, beyond a reasonable doubt, that the defend-

ants, within two years, had been bedding and cohabiting habit-
(704) ually, as charged, then they should find the defendants guilty; otherwise, they should find them not guilty."

There was a verdict of guilty, and from the judgment thereon the defendants appealed.

Attorney-General and E. C. Smith for the State.
C. H. Armfield for defendants.

DAVIS, J., after stating the case: There was no error in the charge of his Honor as given, and none in refusing to charge as requested. It is difficult to conceive of a more wicked, unblushing violation of the law against fornication and adultery.

The evidence shows that the defendants were not married to each other, and that, beyond all doubt and with no attempt at concealment, they habitually associated, bedded and cohabited together, and this makes the defendant guilty of the offense charged.

If, at times, when the female defendant, from a sense of shame or any other reason, was not in a yielding or complying mood, he used violence and forced her, against her will, to yield to his brutal lusts, he may have been guilty of the more heinous crime of rape—he is none the less guilty of fornication and adultery in bedding and cohabiting with her in the manner testified to by the witnesses. The mistake that he commits is in supposing that he may not have been guilty of fornication and adultery in the habitual illicit intercourse to which she freely and voluntarily assented, and at other times of rape, if by violence he forced her to yield to his will. Of the former the proof of his guilt seems conclusive, and he cannot evade the effect of this indictment by admitting, as he seems to do, that the evidence shows that he is guilty of the latter; *he* may be guilty of both offenses, but in this indictment he and his codefend-
(705) ant can only be convicted and punished for the former.

Before judgment a number of witnesses of high character testified that the defendant was a man of bad character, his moral character being especially bad. It was competent for his Honor to hear such evidence as he might deem necessary and proper to aid his judgment and discretion in determining the punishment to be imposed.

There is no error.

Cited: *S. v. Dixon,* 104 N. C., 709.

THE STATE v. MOSES TYTUS.

Indictment—Larceny—Burglary.

An indictment, containing but one count, alleging that the defendant "unlawfully and wilfully did enter, in the night-time, a gin-house, in which there was cotton, meal and other personal property, with intent to commit the crime of larceny," and that "he was found by night in said house, with intent to commit the crime of larceny," sufficiently charges both of the offenses prohibited by secs. 996 and 997 of The Code.

(*S. v. Brown*, 2 Wins., 54; *S. v. Fore*, 1 Ired., 378; *S. v. Stanton, ibid.*, 424, and *S. v. Harper*, 64 N. C., 129, cited.)

INDICTMENT, tried before *Connor, J.*, at Fall Term, 1887, of ANSON.

It is charged that the defendant, "on the tenth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, with force and arms, at and in the county aforesaid, unlawfully and wilfully did enter the gin and mill house of one B. V. Henry, there situate, and in which said house there was at that time cotton, meal and other personal property, in the night-time, and with intent to commit the crime of larceny, and that the said Moses Tytus was found by night in (706) said house with intent to commit the crime of larceny, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There was a verdict of guilty, and motion for a new trial, which was overruled. The defendant then moved in arrest of judgment, which was also overruled. Judgment and appeal.

Attorney-General and E. C. Smith for the State.
No counsel for defendant.

DAVIS, J., after stating the case: The only question presented by the record for our consideration arises upon the motion in arrest of judgment.

Section 996 of The Code enacts, among other things, that if any person "shall break and enter a storehouse . . . or other building where any merchandise, chattel, money, valuable security, or other personal property shall be, . . . with intent to commit a felony or other infamous crime therein, every such person shall be guilty," etc.

Section 997, among other things, enacts, if any person "shall be found by night in any such building (dwelling or other building whatsoever), with intent to commit a felony or other infamous crime therein, such person shall be guilty," etc.

The indictment contains, in one and the same count, both charges, not set out, it is true, in the language, but in a manner sufficiently "plain,

intelligible and explicit" to express the charges against the defendant, within section 1183 of The Code. It has often been said that it is generally proper and safe, and therefore better, in an indictment for an offense created by statute, to describe it in the words of the statute. There are some exceptions, as was said in *S. v. Harper,* 64 N. C., 129, and *S. v. Stanton,* 1 Ired., 424. An adherence to this general
(707) rule would, in many cases, remove doubt and uncertainty, as in this case.

Larceny is both a felony and an infamous crime, and the charge, "with intent to commit the crime of larceny," we think sufficient, and as the crimes created by the two sections are of a "cognate character," they may be united in one count, or at all events, these objections come too late after verdict, as "sufficient matter appears to enable the court to proceed to judgment." The Code, sec. 1183. As was said by *Daniel, J.,* in *S. v. Fore,* 1 Ired., 378: "If the sense be clear, and the charge sufficiently explicit to support itself, nice objections ought not to be regarded."

In the days of slavery it was an offense to permit a slave to hire his owner's time. Rev. Code, ch. 107, sec. 29. In *S. v. Brown,* 2 Wins., 54 (Hinsdale's Edition, 448), the same count contained charges for both offenses, and after verdict the court refused to allow a motion in arrest of judgment, and said that the objection, if available at all, should have been taken upon a motion to quash.

The court below properly refused to allow the motion, and there is no error.

Affirmed.

Cited: *S. v. Christmas,* 101 N. C., 755; *S. v. Ellsworth,* 130 N. C., 713; *S. v. Peak, ibid.,* 713; *S. v. Staton,* 133 N. C., 644; *S. v. Goffney,* 157 N. C., 625; *S. v. Allen,* 186 N. C., 306.

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(708)

THE STATE v. J. G. DICKERSON.

Apprentice—Master and Servant—Assault—Evidence—Witness—Judge's Charge.

1. Where a master was indicted for an assault upon his apprentice, and there was evidence that the correction inflicted was excessive: *It was held,* that it was not competent for the defendant to show, in order to rebut malice, that the apprentice was of bad character and had been charged with larceny.

2. It is not competent to impeach a witness by proving that he had made declarations respecting the party against whom he testifies, showing ill-will and malice, without first interrogating him as to the declarations, and giving him an opportunity to explain or deny.

3. A master is not allowed to inflict cruel punishment upon his apprentice, or to punish from motives of malice.

4. Nothing to the contrary appearing, it will be presumed the judge gave the jury the instructions properly applicable to the facts, as disclosed by the evidence.

(*S. v. Patterson*, 2 Ired., 346; *Pipkin v. Bond*, 5 Ired. Eq., 91; *Edwards v. Sullivan*, 8 Ired., 302; *S. v. Harris*, 63 N. C., 1, and *S. v. Jones*, 95 N. C., 588, cited.)

INDICTMENT for an assault and battery, tried before *Merrimon, J.*, at July Term, 1887, of WAKE.

The defendant is indicted for an assault upon Joseph Weaver, a boy fifteen years of age, with a deadly weapon. He pleaded not guilty; and the ground of defense was that the boy named was his apprentice, a bad and incorrigible boy, and he had the right in good faith to correct him by whipping, as he did, and that the punishment inflicted was not unreasonable.

On the trial the boy was examined as a witness for the prosecution, and testified that "the last Saturday night in April he was sent to a store to get flour, and upon his return went to a baseball ground. Afterwards, defendant called him and asked him, 'What have I said to you about going there? Come in the room and let's see if I can't (709) make you remember it.' He made me take off my coat, and beat me and bruised my shoulders—the bruises stayed on my shoulders pretty near two weeks; the blood settled around my shoulders; had on a shirt of thin goods. I spat up blood, and my nose bled soon after. I went to my grandfather's one week after. I think one place on my side the blood was cut out by a knot on the stick. My shoulders ached and hurt for two or three weeks. I worked some. It pained me to put anything on my shoulders. Defendant beat me several times with hickory like the one shown; he made me take off my coat, and sometimes my pants and drawers." The boy denied being a bad boy, or that he was insolent to the wife of defendant.

It was in evidence that the switch used by the defendant in whipping the boy was "about the size of a man's thumb, and about five feet long."

Other evidence was produced on the part of the State tending to prove that the whipping was as severe as represented by the boy. The defendant introduced evidence tending to prove the contrary.

On the cross-examination of the boy he was interrogated as to certain larcenies imputed to him, which he denied.

On the examination of the defendant as a witness in his own behalf it was proposed to show by him that he had whipped the boy for such imputed larcenies, and this for the purpose of showing his bad character, and rebutting malice on the part of defendant.

The court rejected this evidence, and the defendant excepted.

It was proposed to prove by another witness that the boy, on one occasion, had "declared that he would say anything, and do anything which would put the defendant behind yonder posts," pointing to the penitentiary. (The boy had not been asked if he had made such
(710) declarations.) This was proposed with a view to show the animus of the boy toward the defendant.

The proposed evidence was rejected, and the defendant excepted.

The defendant asked the court "to charge the jury that upon the whole evidence the defendant was not guilty, as charged in the indictment."

This the court declined to do, and the defendant excepted.

There was a verdict of guilty and judgment against the defendant, from which he appealed.

Attorney-General for the State.
John Gatling for defendant.

MERRIMON, J., after stating the case: The first objection cannot be sustained. The evidence proposed and excluded, if it had been received, would not have tended to prove any legal excuse for the excessively severe whipping—beating—the defendant gave the boy, his apprentice; nor would it have tended to rebut or disprove malice implied, and which the jury might infer from such whipping. If the boy were incorrigible, as alleged, this did not warrant the cruel whipping the defendant gave him, certainly if it were prompted by a malignant heart.

Nor can the second exception be sustained. The evidence excluded was plainly irrelevant as to any principal ground of defense relied upon; and it was not competent to impeach the boy, who had been examined on the trial as a witness for the prosecution, without first interrogating him as to the unfriendly declarations it was suggested he had made against the defendant. It was reasonable and just that he should have been apprised on the cross-examination of the particular attack to be made upon him. It might be that he would have denied that he
(711) used the language attributed to him, or he might have made excusatory and satisfactory explanation of what he had said. The rule which requires the witness, whom it is proposed to attack, to be cross-examined as to imputed hostile declarations or acts as to a party

to the action, before evidence of the same shall be given, with a view to impeach, is reasonable, and settled by numerous decided cases. *S. v. Patterson,* 2 Ired., 346; *Pipkin v. Bond,* 5 Ired. Eq., 107; *Edwards v. Sullivan,* 8 Ired., 302; 1 Whar. on Ev., sec. 566. If, by inadvertence or misapprehension, the defendant failed to so cross-examine the witness, he might, with the permission of the court, have been recalled and examined for that purpose.

The court was not in error in refusing to instruct the jury, that upon the whole evidence taken as true, the defendant was not guilty. Exactly what measure of corporal punishment a master may lawfully or excusably inflict upon his apprentice is not settled; but conceding in this case that the defendant might in good faith have given the boy reasonable chastisement, because of his laches or incorrigibility, yet, if the whipping inflicted upon him was as cruel and merciless as the evidence tended to prove it was, the jury might well infer that it was done wantonly and maliciously; and in that case, the defendant would be guilty.

The master shall not whip of malice, and manifest cruelty inflicted implies malice. *S. v. Harris,* 63 N. C., 1; *S. v. Jones,* 95 N. C., 588; Shou. on Dom. Rel., secs. 244, 467.

The instructions the court gave the jury do not appear; no exception appears to have been taken in that respect, and nothing to the contrary appearing, the presumption is, they were correct—such as the evidence and the law applicable warranted. The burden was on the defendant to show the contrary.

There is no error. Let this opinion be certified to the Superior Court according to law.

Affirmed.

Cited: S. v. Cox, 110 N. C., 505; *S. v. Thornton,* 136 N. C., 613; *Smith v. R. R.,* 162 N. C., 33; *Kinsland v. Kinsland,* 186 N. C., 760.

(712)

THE STATE v. CHARLES T. DEBNAM.

City Ordinance—Trial—Exceptions—Appeal—Statement of Case.

1. The ordinance of the city of Wilmington making it an offense punishable by fine for any person to quarrel, or indulge in "loud and boisterous cursing or swearing, or other disorderly conduct, in any street, house, or alley," is valid.

2. It is too late after verdict to except because the judge did not give the jury instructions to which the party might have been entitled had he requested them in apt time, or because the judge did not correctly recapitulate the testimony.

3. It is only when it affirmatively appears that the action of the court in the conduct of the trial was prejudicial to the appellant that a new trial, as a matter of legal right, will be granted.

4. The statement of the case on appeal by the court imports absolute verity, and nothing will be heard to the contrary.

(*McDaniel v. King*, 89 N. C., 29; *Currie v. Clark*, 90 N. C., 17; *S. v. Miller*, 94 N. C., 902; *S. v. Gooch*, *ibid.*, 982; *S. v. Hicks*, Phil., 441; *S. v. Whit*, 5 Jones, 224; *Sprinkle v. Foote*, 71 N. C., 411; *S. v. Underwood*, 77 N. C., 502; *S. v. Savage*, 78 N. C., 520; *S. v. Browning*, *ibid.*, 555; *S. v. Laxton*, *ibid.*, 564; *S. v. Sears*, Phil., 146; *S. v. Knox*, *ibid.*, 312; *S. v. Parker*, *ibid.*, 473; *S. v. O'Neal*, 7 Ired., 251; *S. v. Grady*, 83 N. C., 643; *S. v. Calloway*, 90 N. C., 118; *S. v. Gould*, *ibid.*, 658, *and S. v. Caiman*, 94 N. C., 880, cited.)

CRIMINAL ACTION, tried before *Meares, J.*, at July Term, 1887, of the Criminal Court of NEW HANOVER.

The defendant, Charles Debnam, was charged in a warrant, issued by the mayor of the city of Wilmington, for a violation of section 1 (one), article 7th, of the ordinances of the said city. The said section of the said article reads as follows: "Every person guilty of quarreling or fighting, or of loud and boisterous cursing and swearing, or of any other disorderly conduct of any kind whatsoever, in any street, (713) alley, house or elsewhere in the city, shall be fined twenty dollars for every offense."

From the judgment of the mayor against him the defendant appealed to the Criminal Court of New Hanover County, when, at the July Term, 1887, he was placed upon his trial upon a charge of violating the said ordinance, in that, in the language of the warrant, the defendant "did curse and swear in a loud and boisterous manner, and did abuse one E. A. Anderson upon a street in the corporate limits of the city of Wilmington."

The proof was that there was a board walk on the eastern side of Water Street, located near the foot or western end of the market-house in the city of Wilmington, and that the defendant, who is a colored man, and who is a barber by trade, keeps a shop which is located by the side of this board walk and fronts upon the walk.

The State's witness, Dr. E. A. Anderson, testified that he was not a prosecutor in this case, and that the warrant was not issued by the mayor by his advice or request; that on the occasion in question he was walking slowly along the board walk, and when a short distance from the market building he observed in front of him the defendant and two colored women, who were talking, and standing in such a way as to

render it impossible for him to pass through them without touching one of them; that they had blocked up the walk across, from one side to the other; that when he had approached to within a few feet of them he stopped to see if they would give way sufficiently for him to pass, and that he observed that all three of them looked at him, but neither one of them moved or made any motion whatever; that he then turned his body sideways and carefully pushed his way through them, and that in doing so his right arm gently brushed the arm of one of these women; that he did not stop, but continued to walk slowly on, and that he made no remark whatever; that just as this occurred one of the women said something, and that the defendant, Charles Debnam, became angry and commenced to abuse him in an angry manner and (714) loud enough to attract the attention of those in the immediate vicinity; that he did not stop and did not hear all that the defendant said; that he did not hear the defendant curse or swear, but that he heard him talking in an angry manner and threatening what he would do if that woman was his wife.

The State's witness, Ewell Robinson, testified that his attention was first attracted by seeing and hearing the defendant quarreling in an angry and violent manner, and persons in the vicinity gathering around him, and that one of the remarks which the defendant made was, "if that woman was his wife he would knock the God damned old scoundrel's head off"; that he was certain that he used this language, and could have been heard more than twenty-five feet distant; that the defendant continued to quarrel and use angry and threatening language for a considerable space of time, applying his threats to Dr. Anderson, and saying what he would do if that woman was his wife.

The defendant testified that, when Dr. Anderson pushed his way between him and the two women, he shoved one of the women off of the sidewalk on the ground; that this woman exclaimed that that man had hurt her, and that he, the defendant, then said, that "if the woman was his wife he would hit him." He denied that he spoke in a loud voice, and he denied that he did any cursing or swearing.

The defendant introduced three colored witnesses, one of whom, a driver of the express wagon, testified that he arrived at the door of the shop just as the defendant commenced to quarrel; that the defendant was angry, and defendant said that "if that woman was his wife, and that man (referring to Dr. Anderson) was worth millions, he would hit him so hard that he could not hear thunder," whereupon the witness reproved the defendant, by telling him that it was wrong for him to speak to an old gray-headed gentleman like Dr. Anderson in (715) that way; that the defendant did not speak in a very loud tone of voice, and that the defendant did not curse or swear; that there were

very few people in the vicinity at the time; that three came out of the shop close by, and that there were a few others present.

Two other defendant's witnesses (both colored) testified in substance that the defendant did not curse or swear, and that he spoke in a moderate tone of voice, and that defendant is a member of the church, and he used some expression about striking Dr. Anderson, as stated by above witness. There were only a few persons in the immediate vicinity at the time of the occurrence, and these few persons were attracted by the language or voice or manner of the defendant.

The court instructed the jury that if the defendant cursed or swore, at the place described, in a sufficiently loud tone of voice to attract the attention of those persons who were passing along the street, or who were standing about or attending to their business in the immediate vicinity, it would be a violation of the city ordinance under which he was prosecuted, although cursing or swearing in an ordinary tone of voice, while in a conversation with other persons on the street, would not be a violation of the ordinance; also, that if the defendant quarreled and also used language abusive of Dr. Anderson in an angry manner, at the place described by the witnesses, he would be guilty of a violation of the ordinance in question, although he did not curse or swear at the time. The court also recapitulated the testimony in the case, and called the attention of the jury to the opposite statements of the State's witness, Ewell Robinson, who had sworn that the defendant did curse, and the statement of the defendant's witness, who had sworn to the contrary.

The defendant's counsel did not offer any prayer for instructions to the jury, and did not ask the court to alter or correct its recapitu-
(716) lation of the testimony to the jury, and made no objection to the charge until after the verdict.

While the defendant's counsel was addressing the jury he was interrupted by the solicitor, who arose and remarked to the court that he thought the counsel was going too far in his abuse of the witness, Dr. Anderson; and the witness, at the same time, asked the court for protection.

The counsel for the defendant was making a speech of a somewhat unusual character to the jury. His assertions and his argument were calculated to give offense to a cultivated, refined and spirited witness like Dr. Anderson; at the same time the counsel did not use any opprobrious or insulting epithets, and when he was interrupted by the solicitor he immediately denied that he had abused or insulted the witness.

The court then remarked, "that the decisions of the Supreme Court in this State had given to counsel very great latitude by way of argument; that this was owing, unfortunately, to the fact that it was impos-

sible to draw the line and say, in every case, precisely how far counsel should be allowed to go when claiming the right to make an argument, asserted by the counsel to be based on the evidence; that it was the right and duty of the court to interfere and check counsel when they used opprobrious and insulting epithets and applied them to witnesses, but that the counsel in this case had not used any such epithets; that counsel oftentimes abuse the privilege of unrestricted argument by bull-ragging and abusing highly respectable witnesses in, what this Court considered, an infamous manner, alleged to be done by way of argument, and that, too, without using insulting epithets."

The court, in recapitulating the testimony of the defendant's witnesses, Madditz, Davis and Butler, used the word "hear," and said that these three witnesses were standing close to the defendant and did not "hear" him curse; but it had been argued to the jury, by counsel on both sides, that there was a flat-footed contradiction between the State's witness, Ewell Robinson, who swore that the defendant did curse, and three witnesses of the defendant, who had sworn that the (717) defendant did not curse.

The jury returned a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The motions, first, that to quash the criminal warrant, and secondly, that in arrest of judgment, were properly disallowed. The city ordinance—certainly so much of it as the defendant is charged with having violated—is valid, and substantially like that of the city of Raleigh, upheld in *S. v. Cainan,* 94 N. C., 880. Such acts and conduct of individuals forbidden by it do not, of themselves, constitute a nuisance, or other criminal offense, under the general criminal laws of the State, but are such as, with the view to the peace, good order and well-being of society, especially in dense populations, should be prohibited by proper municipal ordinances, enforced against those who violate them by criminal prosecutions and just punishment.

The defendant did not request the court to give the jury any special instructions, nor except to the instructions given, nor object to the manner in which it recapitulated the evidence to the jury, until after the verdict was rendered. Nor does it appear that the court stated any proposition of law erroneously to the jury, nor was any exception taken, after verdict, on that account. It was too late after verdict to complain that the court did not give some particular instruction not asked for, or that it failed to present or suggest to the jury a particular

view of the evidence, favorable to the defendant. If the latter desired this to be done, he had the right to present proper requests for that purpose on the trial. As he failed to do so in apt time, he has (718) no just ground of complaint. If, by inadvertence, he failed to make such requests, and probably suffered prejudice thereby, this might be ground for a new trial, to be granted in the discretion of the court—not otherwise. Any other rule would greatly tend to unduly multiply trials and encourage carelessness, negligence and want of proper circumspection on the part of parties to actions and their counsel. *S. v. O'Neal,* 7 Ired., 251; *S. v. Grady,* 83 N. C., 643; *S. v. Calloway,* 90 N. C., 118; *S. v. Gould, ibid.,* 658.

No question was raised on the trial as to reasonable doubt in the minds of the jury in respect to the defendant's guilt, and as the court was not requested to instruct them that they must be satisfied of it, beyond a reasonable doubt, that it failed to do so is not ground for a new trial, especially as the offense charged is a mere misdemeanor. *S. v. Sears,* Phil., 146; *S. v. Knox, ibid.,* 312; *S. v. Parker, ibid.,* 473.

Nor do the general remarks of the court, in commenting on the abuse of privilege of counsel, made on the trial, in response to a request that it interpose its authority to protect a witness for the prosecution from unjust abuse of the counsel for the defendant, in the course of his address to the jury on the trial, entitle the defendant, as a matter of legal right, to have his motion for a new trial, based upon that ground, allowed.

The remarks of the court referred to did not, in their nature, legal effect and application, tend to prejudice the defendant before the jury, especially as the court, in declaring its authority and duty to check counsel when they used opprobrious and insulting epithets and applied them to witnesses, said, "that the counsel in this case had not used any such epithets." In other respects, what the court said did not apply to the counsel, unless by possible inference. The defendant did not suffer prejudice as a legal consequence of what was said, and if he did, in fact, this should have appeared affirmatively by affidavit, or (719) otherwise, to the satisfaction of the court, to entitle him to a new trial. It is only when the legal consequence of what is said or done on the trial is to the prejudice of a party, before the jury, that he becomes entitled, as matter of legal right, to a new trial. In other cases it must appear affirmatively that he suffered positive injury. *S. v. Hicks,* Phil., 441; *S. v. Whet,* 5 Jones, 224; *Sprinkle v. Foote,* 71 N. C., 411; *S. v. Underwood,* 77 N. C., 502; *S. v. Savage,* 78 N. C., 520; *S. v. Branning, ibid.,* 555; *S. v. Laxton, ibid.,* 564.

The evidence was, in some respects, conflicting, and the court, in recapitulating it to the jury, expressly called their attention to such

conflict, stating that a witness for the prosecution had testified as to certain facts, and witness for the defendant had testified just the contrary. In this there was no ground for complaint. It is true, the counsel for the defendant, in his motion for a new trial, says, in a measure, to the contrary, but the judge settled the case on appeal, and it is clear and well settled, that we can only take notice of, and act upon, the facts as stated by him. He is a high and responsible officer of the law, it reposes a great trust in him, and it is his province to state the material facts in settling cases on appeal. Moreover, he is disinterested—he sees what is done, and knows and takes note of the facts appearing in the course of the action before him. Hence, we must accept the case settled on appeal as importing absolute verity, for all the purposes of correcting errors assigned. Any other course of procedure and practice would be unreasonable, subversive of judicial propriety, and give rise to endless and disgraceful confusion. *McDaniel v. King,* 89 N. C., 29; *Currie v. Clark,* 90 N. C., 17; *S. v. Miller,* 94 N. C., 902; *S. v. Gooch,* 94 N. C., 982.

There is no error. Let this opinion be certified to the criminal court, according to law.

Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 364; *S. v. Wilson,* 106 N. C., 720; *Walker v. Scott, ibid.,* 57; *Blackburn v. Fair,* 109 N. C., 465; *S. v. Warren,* 113 N. C., 685; *S. v. Horne,* 115 N. C., 740; *S. v. Sherrard,* 117 N. C., 719; *Meadows v. Tel. Co.,* 131 N. C., 77; *S. v. Murray,* 139 N. C., 545; *Simmons v. Davenport,* 140 N. C., 410; *S. v. Yellowday,* 152 N. C., 797; *S. v. Davenport,* 156 N. C., 611; *S. v. Moore,* 166 N. C., 372; *S. v. Harris,* 181 N. C., 608; *Davis v. Long,* 189 N. C., 137; *Cook v. Mebane,* 191 N. C., 12.

(720)

THE STATE v. RICHARD GIERSCH.

Prohibition—"Spirituous Liquors"—Local Option—Statute—Wine and Beer.

The words "spirituous liquors," as employed in secs. 3113 and 3116 of The Code—the Local Option Act—embrace wines (except those designated in sec. 3110) and lager beer, and all other liquors, whether produced by fermentation or distillation, which by their free use produce intoxication.

(*S. v. Packer,* 80 N. C., 439; *S. v. Lowry,* 74 N. C., 121; *Attorney-General v. Bank,* 5 Ired. Eq., 71; *S. v. Nash,* 97 N. C., 514, and *Hines v. R. R.,* 95 N. C., 434, cited.)

STATE *v.* GIERSCH.

CRIMINAL ACTION, tried before *Merrimon, J.*, at July Term, 1887, of WAKE.

The facts are fully stated in the opinion.

Attorney-General, for the State, cited *S. v. Lowry,* 74 N. C., 121; *S. v. Lockyear,* 95 N. C., 633; *S. v. Packer,* 80 N. C., 439; *S. v. Oliver,* 26 W. Va., 422; *S. v. Shearer,* 2 Col. (Tenn.), 323; *Tompkins v. Taylor,* 21 N. Y., 173; Dwarris on Stat., 194; The Code, secs. 983, 1076, 2087, 3440, 3671, 3110; Laws 1887, ch. 135.

C. M. Busbee, John Devereux, Jr., E. C. Smith and Armistead Jones for defendant.

The question presented is, do the words "spirituous liquors," as used in secs. 3113 and 3116 of The Code—Local Option Act—embrace wines and malt liquors? That they do not has been declared by the most eminent text-writers and a long and uniform line of decisions by the highest and ablest courts in the Union. Bishop on Crim. Law, Vol. II, sec. 1145; Wharton on American Crim. Law, sec. ....; Webster's and Worcester's Dictionaries—"Spirits"; *S. v. Thompson,* 20 West (721) Va., 674; *S. v. Adams,* 51 New Hampshire, 568; *Walker v. Prescott,* 44 New Hampshire, 511; *Smith v. State,* 19 Conn., 493; *Commonwealth v. Herrick,* 6 Cushing, 465, 468; *Commonwealth v. Gray,* 2 Gray, 501; *S. v. Lump,* 16 Mo., ...; *Fritz v. State,* 1 Bax. (Tenn.), ...; *Caswell & Hill v. State,* 2 Hump. (Tenn.), 402; *S. v. Moore,* 5 Blackford (Ind.), 118; *S. v. Brittain,* 89 N. C., 574; *S. v. Packer,* 80 N. C., 289; *Rizer v. Randleman,* 5 Jones, 428.

This distinction between spirituous and vinous and malt liquors is clearly drawn in all the revenue acts in North Carolina. The Code, Vol. II, sec. 3701, and ch. 175, sec. 34, Acts 1885.

In the recent case of *S. v. Nash,* 87 N. C., 514, the Court follows the overwhelming weight of authority above cited, and intimates as plainly as possible that vinous and malt liquors are not included in the prohibition of the sale of spirituous liquors. The only case to be found in the books which seems to put a different construction on the term spirituous liquors is *S. v. Lowry,* 74 N. C., 121. It is submitted, however, that this case will no longer be followed. In the first place, it stands alone, there being no other case, either in England or America, that supports it, while it is directly opposed to the great weight of authority above cited; secondly, as an authority it is very much shaken by the intimation in *S. v. Nash, supra;* for the Court would never have made an intimation directly opposed to the decision of that case if they intended to follow it; and, thirdly, it is submitted that the case is not sound on principle. In the first place, it construes

a criminal law most strongly against the accused. The Legislature has, by plain and unambiguous language, made the sale of one commodity criminal—the Court, by construction, makes the sale of another article criminal. In the second place, it leaves to the jury the duty of construing the meaning of the act, when this duty should be performed by the Court; and thirdly, we submit that the rule laid down by that case is on its face impracticable. The Court say that the test (722) of whether liquor is spirituous, and so prohibited, is whether the liquor will cause intoxication. At the same time the Court admits that cider will intoxicate, but that it is not included in the act, so that in charging the jury under this case, a judge would have to say to the jury: "I charge you that the test of whether a liquor is or is not spirituous, is whether it will intoxicate; but I further charge you, that although you believe that cider will intoxicate, yet if you find that the defendant has only sold cider, you must acquit." *Reductio ad absurdum.*

MERRIMON, J. It appears that the sale of spirituous liquors was prohibited within Raleigh Township within the county of Wake, as provided and allowed by the statute (The Code, secs. 3110—3116); that while the sale of such liquor was so prohibited, the defendant sold for a price, to a certain person, within that township one glass of lager beer, and also one glass of wine, both being intoxicating liquors and containing alcohol produced by fermentation, not by distillation, and neither containing any foreign admixture of spirituous liquors; that at the time of such sale the defendant had a license granted to him by the sheriff of the county named, in pursuance of an order made by the county commissioners of the same county, while the sale of *spirituous liquors* was so prohibited, purporting to allow him to sell *vinous and malt* liquors within the township named, at the place where the sales mentioned were made.

The defendant was indicted for so selling the lager beer and wine mentioned, and pleaded not guilty. On the trial the jury rendered a special verdict, the material facts of which are above set forth. The court being of opinion that the sale of lager beer and wine was not a violation of the statute so prohibiting the sale of *spirituous liquors* within the township mentioned, directed a verdict of not guilty to be entered, which was done, and thereupon judgment was entered for the defendant, from which the solicitor for the State ap- (723) pealed to this Court.

The statute (The Code, secs. 3110-3116), as applied in this case, prohibits the sale of *spirituous liquors*—any spirituous liquors—within Raleigh Township in the county of Wake, and the question presented for our decision by the assignment of error in the record is, what is

meant by the words *spirituous liquors*—any spirituous liquors as used and applied in the statute to be interpreted, and particularly, does the inhibition extend to the sale of wine and lager beer.

It is contended by the counsel for the defendant that these words extend to and embrace only distilled spirits; on the other hand the Attorney-General insists for the State, that they are used in a comprehensive and remedial sense, and embrace all kinds of intoxicating liquors, including wine and lager beer, except in so far as domestic wine is expressly excepted.

The term "liquor," in its most comprehensive signification, implies fluid substances generally—such as water, milk, blood, sap, juice, but in a more limited sense and its common application, it implies spirituous fluids, whether fermented or distilled—such as brandy, whiskey, rum, gin, beer and wine, and also decoctions, solutions, tinctures, and the like fluids in great variety.

The term "spirit" or "spirits" has a general meaning, as applied to fluids, mostly of a lighter character than ordinary water, obtained but not produced by distillation; but as applied particularly to liquors, they signify the essence, the extract, the purest solution, the highly rectified spirit, the pure alcohol contained in them. The spirit of liquors is really the alcohol in them; it is this characteristic, this essential element, that makes them spirituous—that gives to all liquors of whatever kind their intoxicating quality and effect.

(724) Alcohol, this essential element in all spirituous liquors, is a limpid, colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source—the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contains starch, which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the alcohol from the mixture, whatever it may be, in which it exists.

That what we have thus said is in substance true and correct, every one knows who is familiar with the terms defined, the nature of alcohol, the method of its production, and who has accurate knowledge of the essential elements and qualities of spirituous liquors. "Spirituous" means containing, partaking of spirit, having the refined, strong, ardent quality of alcohol in greater or less degree. Hence, *spirituous liquors* imply such liquors as above defined, as contain alcohol, and thus have spirit, no matter by what particular name denominated, or in what liquid form or combination they may appear. Hence also, distilled

liquors, fermented liquors and vinous liquors are all, alike, spirituous liquors. These liquors respectively may have different degrees of spirit in point of fineness and strength. Distilled liquors may be stronger or weaker according to the quantity and quality of the alcohol in them, and so of the other kinds mentioned.

We know, from common observation and knowledge, and it is a generally admitted physical fact, not denied in this case, that lager beer and wine contain alcohol, and generally in such quantity and degree as to produce intoxication. These liquors are, therefore, spirituous, and obviously come within the meaning and are embraced by the words "spirituous liquors" as used in the statute, unless there is something in the latter that shows that these words were intended to (725) have a more limited application, and to exclude such beer and wine.

The closest reasonable scrutiny of the statute, its terms, phraseology, connections and purposes, shows no such narrow application of the words "spirituous liquors" employed in it as to exclude such beer and wine. But, we think, the contrary plainly appears. The terms used are, severally and taken together, broad and sweeping, not exceptive or limiting, but in a single respect presently to be mentioned; and the manifest purpose is to prevent and suppress drunkenness and the attendant evils produced by the free use of intoxicating spirituous liquors. The terms are not "any distilled spirituous liquors," not "any fermented spirituous liquors," but they are "spirituous liquors" and "*any* spirituous liquors." How sweeping!

The purpose being obvious, the language of the statute, its parts and its whole, must receive such reasonable interpretation as will effectuate the purpose. This is the rule of interpretation, of constant application to all statutes, whatever their nature or purpose. *Hines v. R. R.*, 95 N. C., 434. Here, there is no need of strained interpretation of terms or phraseology or purpose. These are plain, easily seen and understood.

As we have seen, "spirituous liquors" embrace lager beer and wine, by reason of their nature and the effects produced by the use of them. If the purpose of the statute is to prevent drunkenness by prohibiting the sale of spirituous liquors, is it not plain to the mind of the simplest observer that such purpose would only be partially served by preventing the sale of only distilled liquors? Fermented and vinous liquors, lager beer and wine, are spirituous liquors, and produce intoxication and drunkenness as certainly as distilled liquors produce the like effect. It simply requires the greater quantity of them to do so. Can it be said, with any show of reason, that the Legislature would (726) have intended to cripple, prevent and hinder its purpose by prohibiting the sale of one kind of intoxicating spirituous liquors and not

another? Can any just and fair mind reach the absurd conclusion that it intended to prevent drunkenness by prohibiting the sale of distilled spirituous liquors, and to allow and, in practical effect, encourage drunkenness by the toleration of the sale of fermented and vinous spirituous liquors; and if, for any reason, it had such mixed, contradictory purpose, would it not have said so—so provided as to leave no doubt as to such partial purpose? The presumption is, it intended to further and accomplish, not hinder and defeat, its plain purpose. And this is made the more manifest by an exceptive provision in respect to domestic wines, manufactured in this State from certain fruits mentioned. It is expressly provided in sec. 3110 of the section cited above, that such domestic wines may be sold "in bottles corked or sealed up, and not to be drunk on the premises," etc. But it is further provided that no person shall "sell any of said wines to any person who is a minor," and, moreover, this exception does not extend "to wines which contain any foreign admixture of spirituous liquors, and shall only apply to such wines as derive their ardent spirit from vinous fermentation."

This exceptive provision is very significant in various aspects of it. It points, by necessary implication, to the purpose of the statute to prevent drunkenness, in that, such wine—domestic wine—that has *no foreign admixture of spirituous liquors*—shall not be sold to a minor at all. It shall not be drunk on the premises where it is sold. And to prevent this, it must be corked or sealed in bottles. Now, why these cautionary regulations, if not intended to prevent excessive drinking, drunkenness, arising from the use of *any spirituous liquors*, even domestic wine? If it was intended that fermented spirituous
(727) liquors, generally, might be sold, why were they not excepted? Why were not lager beer and light wines generally excepted? Why except only domestic wines, the sale of which is so cautiously guarded?

Further, if the terms "spirituous liquors," as used in the statute, embrace only distilled liquors, then this cautious exceptive provision is wholly meaningless and nugatory; in that case, it serves no purpose at all, because, without it, all fermented liquors might be sold. Can any intelligent mind believe the Legislature intended this provision should be thus meaningless? Surely not. And treating it as serving the intelligent purpose plainly specified, does it not show, beyond serious question, that the terms spirituous liquors, so used in the statute, were not intended to embrace only distilled liquors? It cannot be said that this exception of the statute in question is by mistake, as suggested. It was enacted at the session of the General Assembly of 1874-75, and it has been of the statute in its present connection since 1883, and the Legis-

lature has not repealed or modified it, although it has repeatedly amended the statute in other respects.

We may advert, in this connection, to the general fact, of common knowledge, that the Legislature, the legal profession and the people generally who took note of the subject, understood that the inhibition of the statute in question extended to fermented as well as distilled liquors. The contrary has not been insisted upon, so far as we know, by any one, until the decision of this Court in *S. v. Nash,* 97 N. C., 514, in which the *Chief Justice* simply suggested a doubt in respect to the extent of the inhibition, in a connection not at all material. He expressly declared that any question in that respect was not decided. What he said was scarcely said *obiter.* It was not, nor was it intended to be, authority, and so every intelligent lawyer must have understood. *Attorney-General v. Bank,* 5 Ired. Eq., 71, and cases there cited.

What we have said finds strong support in the decision of this (728) Court in *S. v. Lowry,* 74 N. C., 121, in which it was expressly held, in construing the statute (The Code, sec. 1076) forbidding the sale of "spirituous liquors" by a measure less than a quart, that the inhibition extended to and embraced fermented liquors, and upon the ground that they are spirituous liquors. It interpreted a statute, the purpose of which is to regulate the sale of spirituous liquors and raise revenue. The purpose of the statute before us is to *prohibit* such sales, and it, therefore, has the greater weight and point. The learned counsel for the defendant, on the argument before us, seeing the force of this case, contended that it is not satisfactory and ought to be disregarded. We cannot hesitate to think otherwise, because of the brief, cogent reasons stated in the opinion, as well as the reasons stated above. The decision is authority, not to be disregarded for light or even plausible reasons. It was made by a very able Court, and the able judge who wrote the opinion was a learned lawyer, familiar with the legislation and statutory law of this State, and he was as well a scholar, familiar with the nature, meaning, power and compass of words, whether applied in statutes or otherwise.

It was likewise contended on the argument that the inhibition surely could not be treated as extending to all liquors that contained spirit, because very many liquors contain so small a percentage of alcohol as that it is scarcely perceptible; that the inhibition only applied to strong distilled liquors, and, therefore, not to lager beer or wine. This argument is without force. As we have seen, the purpose of the statute is to prevent and suppress drunkenness, and promote sobriety. The inhibition, therefore, extends to such spirituous liquors, whether fermented or distilled, as by their free use produce intoxication. Hence, when it is of common knowledge and observation that a particular kind of spirituous

liquors in question produces intoxication, then the Court may so declare, but if it is doubtful whether or not the liquor be such, then a
(729) question of fact is raised for the jury, as was decided in *S. v. Lowry, supra.* See, also, *S. v. Packer,* 80 N. C., 439.

The inhibition of the statute under consideration and, we may add, like inhibiting or other statutes, unless otherwise provided in them, extend and apply to all such spirituous liquors, however denominated, whether fermented or distilled, as by the free use of them ordinarily produce intoxication. This appears from the nature, terms and purpose of such statutes, and the causes of common knowledge that give rise to their enactment.

It may be added that the General Assembly, at its Session of 1887, recognized the statutory provision under consideration as having the meaning we attribute to it, and acted upon it. The statute (Acts 1887, ch. 135, sec. 31), among other things, provides that licenses, as prescribed therein, shall be granted to sell spirituous liquors, both fermented and distilled, "except in territory where the sale of liquors is prohibited by law." Within such territory license shall not be granted. Why this broad restriction, if, by the law prevailing at the time of this enactment, fermented liquors might be sold within the territory where the sale of spirituous liquors was prohibited, and the Legislature so understood? This view of the statute just cited was suggested, and acted upon, by the *Chief Justice* in *In re Giersch,* before and decided by him at chambers in June of the present year. It is not to be supposed that the Legislature acted unadvisedly and in ignorance of the law—the presumption is to the contrary.

We do not deem it at all necessary to advert here to numerous statutory provisions, in various connections, cited on both sides of the argument as indicating the legislative intent in respect to liquors, both fermented and distilled, as to the sale or to the prohibition of the sale thereof, under varying conditions and circumstances. In some of them it
(730) is clear that the terms "spirituous liquors" embrace only distilled liquors; in others, only fermented liquors; in others, all kinds of intoxicating liquors are embraced. They do not serve to strengthen or impair, in any material degree, the force of what we have said.

The strength of the argument for the defendant consisted mainly in the citation of numerous decisions of courts of great respectability in other states, in which it was held that the term "spirituous liquors" did not embrace fermented liquors. In most of the cases cited it was so decided; in a few it was decided otherwise. But it must be said that all these cases applied to particular statutes, construed by the courts deciding them respectively, and certainly do not apply to the particular statute and its peculiar *prohibitory* features that we are called upon to inter-

pret, and as to which we have clear and satisfactory convictions. Even if these cases were more in point than they are, we would not feel at liberty or be inclined to ignore, virtually overrule, a plain decision, almost directly in point, of our own Court, in the light of which the statute before us was enacted and from time to time amended. Nor could we escape the strength of argument, in every aspect of the case, which has led us to the conclusion we have reached.

It follows as a consequence that the supposed license relied upon by the defendant was ineffectual and void. The county commissioners had no authority to make an order directing the sheriff to grant it, and the latter had no such authority.

There is, therefore, error. The judgment must be reversed, the verdict of not guilty, entered upon the special verdict, set aside, and the verdict of guilty thereupon entered, and further proceedings had in the action according to law.

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

Error.

Cited: *S. v. Scott,* 116 N. C., 1016; *S. v. Parker,* 139 N. C., 588; *S. v. Piner,* 141 N. C., 763; *S. v. Dowdy,* 145 N. C., 435.

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(731)

THE STATE v. ED. CLAYWELL.

Limitations, Statute of—Slander of Women—Misdemeanors.

The offense of slandering an innocent woman is a malicious misdemeanor, and therefore is not within the operation of the statute (The Code, sec. 1177) barring prosecutions for misdemeanors not commenced within two years.

CRIMINAL ACTION, tried before *Clark, J.,* at August Term, 1887, of IREDELL.

The indictment framed under the statute (The Code, sec. 1113) is for an attempt, in a wanton and malicious manner, and by the uttering and publishing a slanderous charge imputing sexual criminal intercourse, to destroy the reputation of an innocent woman. On the trial, upon the plea of not guilty, the alleged defamatory words were shown to have been spoken more than two years before the commencement of the prosecution, and to several persons on different occasions. The accused insisted that he was protected by the lapse of time since the committing of the offense, under section 1177, which provides that "all misdemeanors, except the

offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, etc., shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards," with the proviso that "offenses committed in a secret manner may be prosecuted within two years after the discovery of the offender."

The prosecutrix having testified that she first heard of the slander in June preceding the trial, and that as soon as she could trace it to the proper source and get the evidence, the prosecution was started, the State insisted that the offense was a malicious misdemeanor within the meaning of the exception, and if not, was covered by the proviso.

The objection of the defendant to proof of what occurred more
(732) than two years before the finding of the bill was overruled, and thereto he excepted. No other error is assigned in the record.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General and E. C. Smith for the State.
No counsel for defendant.

SMITH, C. J., after stating the case: The objection must be taken to be directed not so much to the *reception* of the evidence as to its legal effect upon the question of the defendant's guilt, under his plea. If well taken, and the offense charged is one to which the limitation applies, the result would be an acquittal, unless saved by the proviso.

While we do not think the fact, were it true, that the implied sexual intercourse took place in secret, while the defamatory utterance was necessarily in the hearing of witnesses (and therein, when accompanied with the *specified* intent, consists the criminal act charged), brings the case within the operation of the proviso, it is clearly a malicious misdemeanor. Maliciousness in the act is an element necessary to its criminality, both as defined in the statute and as charged and found by the jury. The malice can be directed and entertained only towards the person of whom the false words are spoken, and clearly results from their unwarrantable utterance in the hearing of others. It involves an attempt "in a *wanton* and *malicious manner*" (and herein lies the essence of the crime) to destroy the reputation of an innocent woman; and such would be the tendency, if not the effect, of the charge of unchasteness made against a virtuous woman.

We therefore sustain the ruling and affirm the judgment.

Affirmed.

Cited: *Bowden v. Bailes,* 101 N. C., 617.

(733)

THE STATE v. S. E. GARRIS.

Mortgages—Descriptions in Deed—Parol Evidence—Unplanted Crops—Criminal Intent—False Pretense.

1. The essence of the crime of obtaining goods by false pretenses being the intent to deceive and defraud, the person charged may show that he acted under a misapprehension of the facts at the time—*e.g.*, that he only occupied the relation of surety in a transaction in which he, with another, executed a bond and mortgage, and that the latter only was intended to convey their joint property, though its terms might be broad enough to convey his individual property.

2. While under some circumstances parol evidence will be admitted to identify and aid the description of property attempted to be conveyed by a mortgage which would otherwise be void for uncertainty, mortgages of unplanted crops are not within the rule; in respect to them, the deed must describe them as crops raised by the mortgagor, and the lands upon which they are to be grown, and further, that they are to be raised in the season next following the execution of the deed.

(*Atkinson v. Graves*, 91 N. C., 99; *Rountree v. Vinson*, 94 N. C., 104; *Woodlief v. Harris*, 95 N. C., 211; *Blakely v. Patrick*, 67 N. C., 40; *Goff v. Pope*, 83 N. C., 123; *Spivey v. Grant*, 96 N. C., 214, and *Wooten v. Hill*, *ante*, 48.)

CRIMINAL ACTION, tried at April Term, 1887, of MECKLENBURG Criminal Court, before *Meares, J.*

The defendant is indicted for obtaining credit and supplies for plantation used in cultivating crops, to be raised of cotton, corn and cotton seed on his land, during the year 1886, furnished pursuant thereto, and to secure which a mortgage of said property was executed to them, by means of false and fraudulent representations, made to Philip Schiff, a member of the firm from whom the supplies were procured, that no prior mortgage of the crop had been made.

The indictment contains three counts, substantially the same, varying in unimportant particulars only, and presenting the offense in different aspects. (734)

The defendant, upon his arraignment, pleaded not guilty, and upon the trial the State, after offering evidence of the alleged false representations and pretenses, in reliance upon which the goods were furnished, introduced certain documentary proofs, to wit:

1. A mortgage deed, executed on 21 April, 1886, by one J. W. Rice and the defendant to said partnership of Schiff & Co., reciting an indebtedness by note in the sum of eighty dollars, due on the first day of October following, and conveying, in the words of the deed, "all our

crop of cotton, corn and cotton seed to be raised by either of us during the year 1886; on the place of S. E. Garris—no other mortgage on the same property," upon certain trusts therein specified, and with a power of sale, if the debt was not discharged at maturity, for its payment.

2. A mortgage deed, made on 2 March, 1886, by the defendant to the firm of R. M. White & Co., reciting a debt by note for two hundred and fifteen dollars, due on 15 October thereafter, and in which is conveyed for its security, and with a like power of sale in case of default, "these articles of personal property, to wit: one mouse-colored mule, one red, muly cow, one red heifer, and *all the crop of corn and cotton raised by me the present year.*"

After much testimony had been heard by the jury of what transpired between Schiff and the defendant to prove the representations, and their falsity, upon which, under the supposed security of the mortgage, the credit was given and the goods supplied, the defendant proposed to show, by parol, that the note given to Schiff & Co. was for an indebtedness of Rice, and was signed by him as a surety, without seal, and that the mortgage extended to their joint crop.

The evidence was held to be incompetent, and refused, to which the defendant excepted.

(735) The defendant insisted that the mortgage to R. W. White & Co. was inoperative to pass any title to the crops of cotton and corn mentioned in the second mortgage, because the land on which they were to be raised was not directly nor by reference described and identified.

The court held such to be the effect of the mortgage upon its face, but admitted parol evidence to supply the defect in the description, and it was accordingly shown by the testimony of one Porter that the defendant had only one place in the county, where in 1886 he lived, worked and planted cotton.

The verdict was against the defendant, and from the judgment he appealed, assigning as errors:

1. The ruling out of the evidence offered to show his relationship to the transactions with Schiff & Co. and the extent of the mortgage security.

2. The refusal to admit testimony to prove that when the indictment was found the crop was ungathered, and that after it was gathered the debt due Schiff & Co. was paid therefrom in full.

3. The receiving of proofs outside the deed to correct its imperfect description, and show what crops were meant, so as to give the deed efficacy and operation.

Attorney-General and P. D. Walker for the State.

W. W. Fleming and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the case: 1. The essence of the indictment is in the imputed intent to deceive and defraud, and thereby to obtain the goods of the defrauded owner. Unless this intent exists, and is found, the offense is not committed, and can only be inferred from acts and declarations, and especially from such as occurred at the time of the committing of the alleged fraud. Whatever tends to show that the person charged acted under a misapprehension tends to (736) repel the imputation, and becomes competent upon this inquiry. Much latitude must therefore be allowed in the reception of evidence bearing upon the issue of an intent to deceive and defraud, and we are not disposed to deny the competency of the rejected evidence, so far as it bears upon this point, and is not intended to vary or modify the terms of the written instrument.

2. The defendant has had the benefit of what occurred subsequent to the indictment, and *he, at least,* cannot complain of the ruling.

3. The judge correctly held that, by itself and unaided by extrinsic proofs, the crops mentioned in the first mortgage did not pass, and this is in accordance with the rulings in this Court. *Atkinson v. Graves,* 91 N. C., 99; *Rountree v. Vinson,* 94 N. C., 104; *Woodlief v. Harris,* 95 N. C., 211.

These cases establish the proposition that, to make effectual a mortgage of an unplanted crop, it must not only be raised by the mortgagor, but upon land sufficiently described in the deed, or by reference therein for identification, and, in *Wooten v. Hill, ante,* 48, confining it to crops grown on land next thereafter to be cultivated, and not extending to future successive years. The admission of proof of the understanding of the parties as to the land to be cultivated seems to have been allowed in consequence of a remark of *Mr. Justice Ashe* in *Rountree v. Vinson, supra,* in which he says, "The defect might possibly have been cured by parol evidence, offered to apply the description to the subject-matter intended to be conveyed." This intimation follows the declaration that "the description of the cotton, corn and fodder mentioned in the deed of mortgage was too vague and uncertain to pass any title to the property to the mortgagee." Page 108, *Rountree v. Vinson, supra.*

Now, while it is true that a deed conveying one of several articles of personal property belonging to the owner, perhaps not capable of being distinguished by words of description from others of the same kind, and the defect not patent until an attempt to fit the descrip- (737) tion to the thing intended, may be aided by extrinsic evidence.

Thus, in *Blakely v. Patrick,* 67 N. C., 40, where the mortgage was of ten new buggies, the mortgagor having more than that number on hand, and there was no delivery, *Pearson, C. J.,* said: "To vest the title or

ownership in any particular buggy, it was necessary to set them apart, so as to make a constructive delivery and effect an executed contract"; and this, of course, could only be shown by parol evidence given to the jury.

So, in *Goff v. Pope,* 83 N. C., 123, it is said: "A horse, a buggy or a cow is sold: how can the article be separated from many others of the same class except by the aid of parol testimony? The generality of the description, in many cases unavoidable, is latent ambiguity, discoverable when the object is sought, and removable by outside evidence of intent." And again, so late as February Term of the present year, the same principle is reiterated in *Spivey v. Grant,* 96 N. C., 214, and the mode of identifying pointed out.

But these decisions do not apply to the disposal of an unplanted crop —a thing not *in esse*—and when the description upon the face of the instrument is vague and incurable. Such property can only pass when of future growth, if the land, of which it is to be the fruit, is designated and this is the only means of identification.

The case of *Rountree v. Vinson* was not one of conflicting claims of different mortgagees, but it was a controversy between the administrator of the mortgagor and the mortgagees, and has some of the features of an unperformed contract, to be enforced. But we are clearly of opinion that the deed of 2 March, 1886, to R. M. White & Co. cannot prevail against that of 21 April to Schiff & Co., and that no parol proof was admissible to make it valid and effectual. As then the property
(738) passed under the last deed, and Schiff & Co. stand in the same relation to it as if the prior deed had not been made, there was, in legal consequences, no antecedent mortgage, no false representation as to the title and present capacity in the defendant to make the conveyance, the charge is not sustained.

For the error assigned the verdict must be set aside and a *venire de novo* awarded.

Error.

Cited: *S. v. Logan,* 100 N. C., 457; *Smith v. Coor,* 104 N. C., 141; *Taylor v. Hodges,* 105 N. C., 348; *Loftin v. Hines,* 107 N. C., 360; *Hurley v. Ray,* 160 N. C., 379.

THE STATE v. EDWARD SORRELL.

Indictment—Election of Counts—Evidence—Burden of Proof.

1. If, upon the trial of an indictment containing more than one count, the solicitor elects to try upon one count only, it is equivalent to a verdict of not guilty as to the other counts.
2. After the prosecution has produced evidence showing a sale of liquors, the burden is upon the defendant to show a license, if he have one, as well as all other matters of defense.

(*S. v. Taylor*, 84 N. C., 773; *S. v. King, ibid.*, 737; *S. v. McNeill*, 93 N. C., 552; *S. v. Thompson*, 95 N. C., 596, and *S. v. Chambers*, 93 N. C., 600, cited.)

INDICTMENT for liquor selling, tried before *Shepherd, J.*, at March Term, 1887, of WAKE.

The facts are stated in the opinion.

Attorney-General for the State.
John Gatling for defendant.

MERRIMON, J. The indictment contained three distinct counts. The solicitor for the State elected, at the close of the evidence on the trial, to rely upon only the third count, for retailing spirituous (739) liquors by a measure less than one quart, and upon this count there was a verdict of guilty, the jury saying nothing as to the first and second counts; and as to each of these the solicitor, after verdict and before judgment, entered a *nolle prosequi.*

This latter entry had no legal effect—it was void. The election to try upon the third count, at the stage of the trial mentioned, was equivalent to a verdict of not guilty as to the other two. This was the legal effect, and hence it was not necessary—indeed, not proper—to grant the motion of the defendant to enter a verdict of not guilty as to these. There was no such verdict rendered, and entries should be made only according to the fact of any matter to be entered of record. *S. v. Taylor,* 84 N. C., 773; *S. v. King, ibid.,* 737; *S. v. McNeill,* 93 N. C., 552; *S. v. Thompson,* 95 N. C., 596.

It is too well settled to require argument, or the citation of authority, that after the prosecution has produced evidence on the trial to prove the sale of spirituous liquors as charged in the indictment, the burden rests on the defendant to produce in evidence in his defense a license to retail such liquors, if he have one. It was not necessary for the prosecution to show that he had no such license. *Stare decisis.*

The defendant also moved in arrest of judgment, assigning as ground that the indictment charged no criminal offense, and suggesting that under the statute (The Code, secs. 3112-3117) the sale of spirituous liquors within the city of Raleigh was forbidden, and, therefore, the offense charged could not be committed there.

It is sufficient to say that the offense is not charged to have been committed in the city named, but in the county of Wake. If this were not conclusive, we cannot take judicial notice that the steps have been taken and things done under the statute cited, so as to render it unlawful to sell such liquors within that city, and it does not appear from the record that the fact is so. *S. v. Chambers,* 93 N. C., 600. The
(740) defendant should have raised the question he thus seeks to present in the course of the trial.

There is no error. Let this opinion be certified to the Superior Court, according to law.

Affirmed.

Cited: *S. v. McDuffie,* 107 N. C., 888; *S. v. Hunt,* 128 N. C., 587; *S. v. Williams,* 185 N. C., 688.

THE STATE v. LARKIN EARNEST.

Jurisdiction—Assault—"Serious Damage"—Indictment—Motion to Quash—Motion in Arrest.

1. To confer jurisdiction upon the Superior Court of an assault and battery, upon the ground that "serious damage" was done, it is essential that the indictment should set forth the nature and extent of the damage. Simply charging that the person assaulted was "seriously injured," or sustained "serious damage," is not sufficient.

2. Upon the trial of an indictment for simple assault the Superior Court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months of the finding of the bill.

3. If an indictment charges properly an assault with serious damage, or with a deadly weapon, but the proof shows only a simple assault, the Superior Court nevertheless has jurisdiction to proceed to judgment.

4. Exception to the jurisdiction of the Superior Court, for that no serious damage was done, or no deadly weapon was used, and six months had not elapsed, should be made, not by a motion to quash, or in arrest of judgment, but by a prayer for instructions to the jury to acquit.

STATE *v.* EARNEST.

(*S. v. Russell*, 91 N. C., 624; *S. v. Moore*, 82 N. C., 659; *S. v. Cunningham*, 94 N. C., 824; *S. v. Berry*, 83 N. C., 603; *S. v. Reaves*, 85 N. C., 553, and *S. v. Ray*, 89 N. C., 587, cited.)

CRIMINAL ACTION, tried before *MacRae, J.*, at Spring Term, (741) 1887, of CALDWELL.

The indictment charges that the defendant "did assault, beat, and *seriously injure* one Mary T. Livingston," etc.

The defendant moved to quash the same, upon the ground that it failed to charge "wherein the serious injury consisted." The court denied the motion, and the defendant pleaded not guilty.

On the trial, the evidence went to prove that the offense charged was committed within six months next before the beginning of the action, and an "indecent assault upon the person of prosecutrix."

The jury rendered a verdict of guilty; thereupon the defendant moved in arrest of judgment, assigning as ground for the motion that assigned for the motion to quash the indictment.

This motion was overruled. There was judgment against the defendant, from which he appealed.

Attorney-General for the State.
G. N. Folk for defendant.

MERRIMON, J. The indictment is not sufficient to charge an offense, within the exceptional provision, in respect to assaults and other offenses where "serious damage is done," of the statute (The Code, sec. 892), prescribing the exclusive original criminal jurisdiction of justices of the peace. It should, in apt words, describe the "serious damages" done, their character and extent, so that the court can see from the face of the indictment the particular descriptive facts charged, that the offense contemplated by the statute is charged.

To simply charge that the prosecutor was "seriously injured" or sustained "serious damages" is too general and indefinite. The court, not the pleader, must determine that the facts must constitute the offense, and these must be charged, so that the court can proceed (742) to judgment, in case the defendant is found guilty, upon what appears in the record, and so that the defendant may know what particular charge he must answer, and have adequate protection in case of a subsequent prosecution for the same offense. *S. v. Russell*, 91 N. C., 624; *S. v. Moore*, 82 N. C., 659; *S. v. Cunningham*, 94 N. C., 824.

The court, however, properly refused to quash the indictment, because it sufficiently charged a simple assault and battery, of which prima facie it had jurisdiction. It had, unless the defendant should prove in the

trial that the offense was committed within six months next before the prosecution began (The Code, secs. 892, 922), in which case the court ought to have instructed the jury to render a verdict of not guilty; in that case the court of a justice of the peace would have had, until the end of that time, exclusive original jurisdiction of the offense. It was competent for the defendant, on the trial, to prove that the offense was committed within six months, as indicated above, and thus show that the court had not jurisdiction.

The effect of a verdict of not guilty in such case would be, not guilty as charged in the indictment, and within the jurisdiction of the Superior Court; and if afterwards the defendant should be prosecuted before a justice of the peace, or, after the lapse of six months next before the offense was committed, in the Superior or other proper court, and he should plead the plea of *autre fois acquit,* the State might show on the trial that the court in which the verdict of acquittal was rendered had not jurisdiction, and thus defeat the plea. It is competent on the plea of not guilty to show, by proper evidence, that the court has not jurisdiction. *S. v. Moore, supra; S. v. Berry,* 83 N. C., 603; Arch. Cr. Law, 438.

If the indictment in this case had properly charged that "serious damage" was done to the prosecutrix, and it had turned out on the
(743) trial that the evidence failed to prove such damage, there might have been a verdict of guilty of simple assault and battery, and the court would have proceeded to give judgment, as was decided in *S. v. Reaves,* 85 N. C., 553; *S. v. Ray,* 89 N. C., 587; *S. v. Cunningham, supra,* and for the reasons stated sufficiently in these cases.

It may be that, for like reasons, the court might have given judgment in this case, if the indictment had charged a simple assault and battery to have been committed more than six months next before the prosecution began. Indeed, regularly and properly, when the time has so lapsed, the indictment should charge the offense.

The court properly refused to sustain the motion in arrest of judgment, because no cause for it appeared in the record. If the jury, under proper instructions from the court, had found specially the fact that the offense charged was committed within six months next before the indictment, and this finding had been spread upon the record, then the motion in arrest might—ought to—have been sustained, because in that case it would have appeared by the record that the court had not jurisdiction, and the action would have been dismissed. *S. v. Berry, supra;* Arch. Cr. Pl., *supra.*

As the evidence produced in the trial tended to prove that the offense charged was committed within six months next before this action began,

the court ought to have instructed the jury that, if they found the fact so to be, they ought to render a verdict of not guilty. In that it failed to do so there is error.

The judgment must be reversed and a new trial granted.

Error.

Cited: *S. v. Shelly, ante,* 678; *S. v. Porter,* 101 N. C., 715; *S. v. Roseman,* 108 N. C., 767; *S. v. Fesperman, ibid.,* 770; *S. v. Kerby,* 110 N. C., 559; *S. v. Battle,* 130 N. C., 657; *S. v. Lucas,* 139 N. C., 573.

(744)

THE STATE v. E. FOY.

Justices of the Peace—Indictment—Statutory Offenses.

1. The operation of sec. 765 of The Code, making it a misdemeanor for any of the officers therein named to fail to perform the duties prescribed, is confined to such as are ministerial in their nature.

2. An indictment against a justice of the peace, alleging that he "wilfully and unlawfully failed to furnish the clerk of the Superior Court . . . with a list containing the names of all parties tried in all criminal actions finally disposed of before him," etc., but omitting to state the names, if known, of the persons so tried, sufficiently charges the offense under sec. 906 of The Code.

(*S. v. Stamey,* 71 N. C., 202; *S. v. McIntosh,* 92 N. C., 795; *S. v. George,* 93 N. C., 567; *S. v. Hall, ibid.,* 571, and *S. v. Wilson,* 94 N. C., 1015, cited.)

CRIMINAL ACTION, heard by *Shipp, J.,* at Spring Term, 1887, of CRAVEN, upon defendant's motion to quash. The motion was allowed, and the State appealed.

Attorney-General for the State.
Clem. Manly for defendant.

SMITH, C. J. The defendant, as a justice of the peace, is charged with a wilful and unlawful neglect and failure to furnish the clerk of the criminal court of his county with the list of the criminal cases tried and finally disposed of by him during the year 1885, and before 10 May in that year, together with the papers in each case, as required by section 906 of The Code. This neglect is made a misdemeanor by the act of 4 March, 1879, when the justice or other officer failed to pay over fines, penalties and forfeitures that were received, but is extended to all

cases when there is such delinquency as to any of the duties imposed by The Code in the officers designated, among whom are justices of (745) peace. The Code, sec. 765. But a reasonable construction of the enactment, in our opinion, confines its operations to ministerial duties required to be performed, and to this class belongs the offense imputed.

The indictment alleges that the defendant, as a justice of the peace, did, on certain days in the year 1885, prior to 10 May, try and finally dispose of certain criminal actions which were before him, and "did wilfully and unlawfully fail to furnish the clerk of the Superior Court of said county, at Spring Term, 1885, with a list containing the names of all parties tried in all criminal actions finally disposed of by him as justice of the peace aforesaid since Fall Term, 1884, of said Superior Court." The allegations, in form, substantially pursue the terms of the statute in defining the offense. The counsel of the defendant moved the court to quash the indictment, for the reason that it omitted "to state the name of the person, or that his name was unknown, so tried, and whose case was finally disposed of by the defendant." The motion was allowed and the order to quash made.

It is not stated upon what ground the action of the court was predicated, but the judge seems to have instituted an inquiry into the facts, and he finds therefrom that no cases, such as are by the statute required to be returned, nor criminal cases of any kind, were before the defendant as a justice, to be disposed of during the period mentioned in the indictment. Though this statement is in the case prepared on the appeal of the State, we cannot attribute the ruling to the experienced and able judge who tried the cause, since the facts are to be passed on and ascertained by the jury on the inquiry into the truth of the allegations contained in the indictment, as found by the grand jury upon the evidence. We consider, therefore, the ruling to have been upon the insufficiency, in form, of the indictment to charge the statutory offense, and in this there is error.

(746) Generally, a crime, made such by statute, should be charged in the words of the statute; and this case does not belong to the excepted class when the statute is general in terms, and it is necessary to state facts that bring the case within its operation, and with a particularity that will protect the accused from a second prosecution for the same offense, as in the case cited for the defendant, *S. v. Stamey,* 71 N. C., 202.

"It is well established, as a general rule," says *Ashe, J.,* in *S. v. McIntosh,* 92 N. C., 795, "that in indictments for offenses created by statute it is not only sufficient to follow the words of the statute, but it is necessary to do so, or, at least, to use words of equivalent import, otherwise

the indictment will be defective." And to like effect are *S. v. George,* 93 N. C., 567; *S. v. Hall, ibid.,* 571; *S. v. Wilson,* 94 N. C., 1015; 1 Whart. Cr. Law, sec. 364.

The criminality in the present case lies in the wilful neglect to perform a distinct ministerial duty, in making return of certain criminal proceedings, and this is directly alleged, so that the questions are, Did he have before him such proceedings, and did he wilfully fail to make return of them? This advises the accused of the particulars of the criminal neglect imputed, and is, in itself, a protection against any further prosecution for the same offense.

There is error, and the ruling reversed, to the end that the cause proceed in the court below, to which end this will be certified.

Error.

Cited: *S. v. Tisdale,* 145 N. C., 424.

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(747)

THE STATE v. RUFUS SMITH.

Amendment—Warrant—Roads.

1. A warrant against a person for failing to work the roads, which fails to allege that the defendant had been duly assigned, and was liable to work on that particular road, and that he had been properly summoned, is fatally defective.

2. *It seems* that these defects might have been cured by amendment, upon application made in apt time.

(*S. v. Vaughn,* 91 N. C., 532, and *S. v. Crook, ibid.,* 536, cited.)

CRIMINAL ACTION, tried before *Merrimon, J.,* at July Term, 1887, of WAKE.

The facts are stated in the opinion.

Attorney-General for the State.
J. C. L. Harris for defendant.

MERRIMON, J. The defendant was held to answer criminally, before a justice of the peace, for having failed to do service on a public road, as he was bound to do, under a State warrant, the material charging part of which is in these words: "That Rufus Smith failed to work the road on 16 September, 1886, at and in the county aforesaid, as a

hand, in Swift Creek Township, on the old Haywood Road, leading from Raleigh to Haywood, for one-half day, against the peace and dignity of the State."

He was convicted and appealed to the Superior Court, and was there again convicted, and having assigned errors, appealed to this Court. In this Court, not in the Superior Court, he moved in arrest of judgment, assigning as ground of the motion that no criminal offense is charged against him, etc.

(748) The motion in arrest of the judgment must be allowed. The warrant is not simply informal, it is as well fatally defective, in that it fails to charge the substance of the offense intended to be charged. It does not charge, in terms or informally in effect, that the defendant had been assigned and was liable to do labor on the road described, in very general terms, nor that he had been duly summoned, as prescribed by the statute, and unlawfully and wilfully refused to do such labor as he was bound to do, etc. The warrant must contain and embody proper averments as to these matters, so that the court can see on the record that an offense, and what offense, is charged, and be able to determine what judgment may and ought to be given, and so also that the defendant can prepare to make defense, and in case of a subsequent prosecution can plead the judgment in his defense thereto.

It is scarcely to be expected that warrants and proceedings in the courts of justices of the peace will be very precise and formal. They are to be upheld as far as this may be done consistently with right, and to this end very extensive powers to amend, not only as to matters of form, but substance as well, are conferred upon these courts. But they cannot be upheld unless they contain in some way, to be seen, the essential substance of the matters to which they refer. When they fail in this respect, in apt time, application to the court to allow proper amendments should be made, and the power should be freely but cautiously exercised. *S. v. Vaughn,* 91 N. C., 532; *S. v. Crook, ibid.,* 536.

No offense is charged in the warrant. It was not an offense for the defendant, nothing to the contrary being alleged, to fail to work "as a hand in Swift Creek Township"—the substance of the material facts that made up his liability to do work "as a hand" should have been charged as well as proved.

(749) It is unnecessary to advert to the errors assigned. To the end that the judgment may be arrested, let this opinion be certified to the Superior Court.

Error.

Cited: *S. v. Pool,* 106 N. C., 699; *S. v. Baker, ibid.,* 759; *S. v. Yoder,* 132 N. C., 1113; *S. v. Green,* 151 N. C., 729; *S. v. Thomas,* 168 N. C., 149.

THE STATE v. JOHN M. ELLINGTON.

Disposing of Mortgaged Property—Evidence—Criminal Intent—Landlord and Tenant.

1. An intent to hinder, delay or defeat the rights of the mortgagee is an essential element in the offense of unlawfully disposing of mortgaged property.
2. It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien.

CRIMINAL ACTION, tried before *Gilmer, J.*, at July Term, 1887, of ROCKINGHAM.

The facts are stated in the opinion.

Attorney-General and E. C. Smith for the State.
No counsel for defendant.

MERRIMON, J. The defendant is indicted under the statute (The Code, sec. 1089). It is charged in the indictment that, having executed to the prosecutor a "chattel mortgage," he "did unlawfully and wilfully sell, and dispose of by sale, a part of the property" embraced in the mortgage, "with intent to hinder, delay and defeat the rights of the said The Southern Fertilizer Company, under said mortgage," etc.

The defendant pleaded not guilty. There was a verdict of guilty and judgment against the defendant, from which he appealed.

An essential quality of the offense charged in the indictment is (750) that the defendant disposed of the property mortgaged, or some part of it, "with intent to hinder, delay or defeat the rights of" the mortgagee. The mortgage embraced the matured tobacco crop of 1886 of the defendant. On the trial he offered evidence to prove that he had leased the land on which the tobacco was produced from a person named, who had a prior or first lien on the crop as landlord, and that it took all the tobacco to discharge the landlord's lien. Upon objection from the solicitor for the State, the court refused to admit the evidence, and this was assigned as error.

We think the evidence should have been received. It must be taken that it was such as the defendant represented it to be. So treating it, it would have tended strongly to disprove the criminal intent charged, and this was important. If the landlord had a first lien upon the crop for rent or advances of supplies, or both, as he may have had, he was entitled to have the same first discharged, and it was not a criminal offense, if the tenant, in good faith, so disposed of the crop.

The evidence was relevant and competent, and it was for the jury to believe or disbelieve it, and to give it such weight as they might deem proper.

There is error, and the defendant is entitled to a new trial. To this end let this opinion be certified to the Superior Court.

Error.

Cited: *S. v. Surles,* 117 N. C., 726; *S. v. Holmes,* 120 N. C., 575.

(751)

THE STATE v. T. J. ROBERSON.

Perjury—Indictment.

Where an indictment for perjury alleged that the false oath was taken before a justice of the peace upon the trial of a warrant against a person charged with the slander of an innocent woman, and that such justice had sufficient and competent authority to administer the oath: *Held,* (1) that the further averment in the bill that "issue was joined" on said warrant, and the cause was tried upon such issue, did not vitiate it; and (2) that in indictments for perjury it is not necessary to set forth the proceedings in which the false oath was alleged to be made.

(*S. v. Gallimon,* 2 Ired., 372; *S. v. Hoyle,* 6 Ired., 1, and *S. v. Davis,* 69 N. C., 495, cited.)

THIS was an indictment for perjury, tried before *Boykin, J.,* at Spring Term, 1887, of WILKES.

The indictment charged that the perjury was committed upon a trial, before a justice of the peace, of one Moore, "for the slander of Cornelia Moore, an innocent woman," and contained, with the other usual and necessary averments, the following: "Which warrant then came on to be heard, and issue was joined between the State and the defendant, . . . upon which said trial and issue joined"; and then charged that the present defendant appeared, was duly sworn, and made the false oath.

The defendant was convicted, and moved in arrest of judgment upon the following grounds:

"1. The indictment charges that an issue came on to be tried between the State and Osborne Moore, when the justice had no jurisdiction of said case.

"2. That the bill does not charge any offense known to the common law of North Carolina."

The motion was refused, judgment pronounced, and the defendant appealed.

Attorney-General and E. C. Smith for the State. (752)
C. H. Armfield for defendant.

MERRIMON, J. In support of the motion in arrest of judgment in this case, it is insisted that it appears from the face of the indictment that the justice of the peace, before whom the false oath is charged to have been taken, had not jurisdiction, in any aspect of it, of the matter before him in which such oath is charged to have been taken, and that no such issue as that charged could have arisen or been joined.

We think this objection cannot be sustained. The statute (The Code, sec. 1185) provides that it shall be sufficient, in indictments for perjury, to set forth the substance of the offense charged, by what court and before whom the false oath was taken, and that the court had competent authority to administer the oath, with proper charges to falsify the matter wherein the perjury is assigned, without setting forth the proceeding, or the proceedings in the action in which such oath was taken—the purpose being to render unnecessary useless details and niceties, in charging the offense of perjury, that at one time prevailed to the prejudice of the administration of criminal justice.

The indictment charges that the false oath was taken before a justice of the peace by the defendant in a matter mentioned, wherein there was an issue joined, pending before him, and that he had "sufficient and competent authority to administer the oath," etc. This implies, under the statute cited, that an action, proceeding or matter named was pending before the justice of the peace, and that the defendant took therein a false oath, as charged. This is sufficient. The court takes notice that the justice of the peace had jurisdiction, for some purpose, of all crimes and misdemeanors in his county, as well as of certain classes of civil actions and matters wherein witnesses might be examined, and, therefore, he might, just as any other court could do, administer an oath to a witness in an action or matter of which he had appro- (753) priate jurisdiction. *S. v. Gallimon,* 2 Ired., 372; *S. v. Hoyle,* 6 Ired., 1; *S. v. Davis,* 69 N. C., 495.

On the trial the State was bound to produce competent evidence to prove that such a proceeding was pending before the justice of the peace as that charged, of which he had jurisdiction, wherein the defendant perpetrated the perjury charged. The simple reference to the proceeding is sufficient to identify it, and such identification is sufficient for all practical purposes. The statute so contemplates.

There is no error and the judgment must be
Affirmed.

Cited: S. v. Murphy, 101 N. C., 701.

THE STATE v. JOHN H. WHITEACRE.

Evidence—Indictment—Statutory Crimes.

1. While the court may, for good cause, refuse to allow a plat or diagram prepared by one of the parties to an action to be used by a witness in illustration of his testimony, it is error to do so upon the ground that the other party did not have notice of its preparation or proposed use.

2. An indictment under sec. 1006 of The Code, making it a misdemeanor to buy or receive cotton in the seed, etc., between the hours of sunset and sunrise, must set forth *the manner in which the articles were brought or carried.*

(*S. v. Liles*, 78 N. C., 496, and *S. v. Stanton*, 1 Ired., 424, cited.)

CRIMINAL ACTION, tried before *Avery, J.*, at Spring Term, 1887, of BEAUFORT.

The defendant was convicted and appealed.

The defendant was indicted for selling cotton in violation of section 1006 of The Code, and tried before *Avery, J.*, at the Spring Term, 1887, of the Superior Court of Beaufort County.

(754) The indictment charges that "John H. Whiteacre, in Beaufort County, on 1 November, 1886, a certain quantity of seed-cotton, to wit, twenty pounds, the said cotton not then and there being baled, and being a less quantity than is usually baled, between the hours of sunset and sunrise, unlawfully and wilfully did buy from Rhoden Daniels, at a certain price, contrary to the statute," etc.

Upon the trial the defendant testified in his own behalf, and, while being examined, a plat or diagram of the premises was offered to show the position of the yard, houses, cotton, etc., for the purpose of illustrating the position of the defendant, and to show that he could not have seen or received the cotton.

Counsel for the defendant proposed to show that this was an exact plan of the defendant's premises.

The solicitor for the State objected, upon the ground that no notice was given of the making of the plat, and that it was *ex parte* and irregular.

The objection was sustained and this was assigned as error.

Attorney-General for the State.
George H. Brown, Jr., for defendant.

DAVIS, J., after stating the case: It is of frequent practice, when necessary to explain evidence and enable the jury to comprehend it fully, to illustrate the positions of parties, places, etc., by diagram, and no notice is required; in fact, they are frequently made by witnesses themselves in the progress of the examination, and often by the direction of the court. The court might, for good cause, exclude it. There was error in excluding the diagram upon the ground alleged.

An additional objection is raised in this court, and the defendant moves in arrest of judgment, upon the ground that the indictment does not sufficiently charge the offense created by the statute, in that it fails to allege that the cotton was "brought or carried," in (755) some mode, as designated by the statute.

Section 1006 of The Code is as follows: "If any person shall buy, sell, deliver, or receive for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint-cotton, brought or carried in a basket, hamper or sheet, or in any mode, when the quantity is less than what is usually baled, or when the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor."

The evident mischief which it was the purpose of the statute to remedy was the surreptitious traffic in buying and selling cotton in small quantities in the night-time, when stolen cotton may be sold without easy detection, or when the character of the transaction may be easily concealed, if the unlawful purpose is participated in by both the buyer and seller; and the words "brought or carried in a basket," etc., are not mere surplusage, but indicate clearly that the purpose of the law was to prevent the *receiving or delivering* the cotton between the hours named; and the indictment must charge that it was brought and carried in some mode, as required by the statute, between the hours of sunset and sunrise. It is not sufficient to charge simply that the cotton was *bought or sold* within the prohibited hours; it must be further charged that it was brought or carried, and how brought or carried. Nothing can be taken by intendment. *S. v. Liles,* 78 N. C., 496, and the authorities cited.

Would it be any violation of the statute if the cotton were brought or carried in the day-time and sold in the night? It is a safe rule to follow the language of the statute. Words thought essential by the Legislature in describing a statutory offense cannot be safely omitted, though there are some exceptions. *S. v. Stanton,* 1 Ired., 424.

This case does not come within the exceptions, and the motion in arrest of judgment must be allowed. (756)

Judgment arrested.

Cited: S. v. Howe, 100 N. C., 452; *Dodson v. Whisenhant,* 101 N. C., 648; *S. v. Watkins, ibid.,* 705; *Riddle v. Germanton,* 117 N. C., 389; *Tankard v. R. R., ibid.,* 565; *Andrews v. Jones,* 122 N. C., 667; *Bullard v. Hollingsworth,* 140 N. C., 637; *S. v. Harrison,* 145 N. C., 411; *Martin v. Knight,* 147 N. C., 578; *S. v. Rogers,* 168 N. C., 114; *S. v. Kee,* 186 N. C., 475.

THE STATE v. J. J. ROBERTS.

Jurisdiction—Former Conviction and Acquittal.

1. Until the expiration of six months from the commission of the offense, justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment cannot exceed fifty dollars fine or thirty days imprisonment; after the expiration of the six months their jurisdiction is concurrent with that of the Superior Court.
2. If, while an indictment is pending in a court having jurisdiction, the defendant is prosecuted for the same offense in another court having concurrent jurisdiction, the judgment in the latter may be set up in bar of the former.
3. Whether the plea of former conviction or acquittal can be maintained if it be made to appear that the jurisdiction of the court, whose judgment is pleaded, was fraudulently invoked or corruptly exercised—*quære.*

(S. v. Casey, Busb., 209; *S. v. Tisdale,* 2 D. & B., 159; *S. v. Williford,* 91 N. C., 529; *S. v. Bowers,* 94 N. C., 910; *S. v. Watts,* 85 N. C., 517, and *S. v. Moore,* 82 N. C., 659, cited.)

CRIMINAL ACTION, tried before *Merrimon, J.,* at September Term, 1887, of WAYNE.

The defendant was indicted for having failed, as a merchant, to deliver a "sworn statement" of his purchases of goods made, etc., to the register of deeds of the county of Wayne, as required by the statute (Acts 1885, ch. 175, sec. 25), and he pleaded that theretofore he had been duly convicted of the same offense before a justice of the peace of the same county.

(757) Upon the trial of this plea the jury rendered a special verdict, from which it appeared that the defendant had been held to answer criminally, and convicted of the same offense charged in the indictment, more than two months next before he was arrested and held to answer to the latter; that, however, he had been *presented* by the grand jury of said county for said offense *before* he was so tried by the justice's court, but the fact of such presentment was then unknown either to the defendant or the said justice.

Upon the facts found the court was of opinion that the defendant had been duly convicted before the justice of the peace; a verdict was entered accordingly; the plea was sustained; there was judgment for the defendant, and the solicitor for the State appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the case: It seems that a justice of the peace failed to take official cognizance of the offense charged in the indictment within six months next after the same was committed. After the lapse of that time, the court of a justice of the peace, the Superior, criminal, and inferior courts have concurrent jurisdiction of such offenses, although prior thereto only the court of a justice of the peace had exclusive, original jurisdiction. The Code, sec. 892; *S. v. Moore,* 82 N. C., 659; *S. v. Watts,* 85 N. C., 117; *S. v. Bowers,* 94 N. C., 910.

It is settled, that although a party may be indicted for a criminal offense in a court having jurisdiction of it, yet if pending that indictment, and before being held to answer thereto, he shall be indicted and convicted of the same offense in another court having concurrent jurisdiction thereof, he may plead as a defense to the first indictment such former conviction, and have his plea sustained. This has been repeatedly and uniformly held in this State. *S. v. Tisdale,* (758) 2 Dev. & Bat., 159; *S. v. Casey,* Busb., 209; *S. v. Williford,* 91 N. C., 529; *S. v. Bowers, supra.*

In *S. v. Casey, supra,* the plea of *former* conviction was sustained, although pending the indictment and before plea the defendant procured himself to be indicted in the county court, and he there voluntarily submitted, was fined, and paid the same. In this case, at the time of the former conviction, neither the justice of the peace nor the defendant had knowledge that the latter had been presented in the Superior Court.

The court of the justice of the peace had complete jurisdiction, and the conviction in that court was just as effectual as if it had been in the Superior Court.

It is sometimes said that offenders frequently procure themselves to be prosecuted before justices of the peace, and thus by concert evade merited and adequate punishment. This such magistrates—indeed all magistrates—should scrupulously guard against. It is to be hoped that such evil does not much prevail. If a justice of the peace or other judicial officer should participate in or connive at such evasion of criminal justice he should be made to answer for corruption in office.

It may be that such fraudulent evasion of justice would not be effectual, if made to appear by a proper pleading, in case of a subsequent prosecution for the same offense.

The Court, in this case, properly sustained the plea. There is no error. Let this opinion be certified to the Superior Court, according to law.

Affirmed.

Cited: S. v. Moore, 136 N. C., 583.

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(759)

THE STATE v. ALVA LAWSON.

Perjury—Forcible Entry and Trespass—Judge's Charge.

Upon the trial of several persons for a forcible entry the owner of the premises swore that he was present and forbade the trespass. He was indicted for perjury, and it appeared on the trial that some of the trespassers had effected an entry before the owner reached the place, and the others were in the act of entering; that he was fifty or seventy-five yards distant when he forbade them, and that they persisted nothwithstanding his forbidding: *Held,*

1. That the persons so entering were guilty of a forcible entry.
2. The facts that the owner was not on the very spot when he forbade the entry, and that the unlawful action of trespass had been commenced, but had not been completed, before the forbidding, were not material, and the defendant was not guilty of perjury.
3. That the charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, was not a compliance with the statute requiring the judge to explain the law arising on the evidence.

(*S. v. Dodd,* 3 Murph., 226; *S. v. Bobbitt,* 70 N. C., 81; *S. v. Wilson,* 94 N. C., 839; *S. v. Talbot,* 97 N. C., 494, and *S. v. Matthews,* 78 N. C., 537, cited.)

THIS was an indictment for perjury, tried before *Boykin, J.,* at May Term, 1886, of ROBESON.

At Spring Term, 1884, of the Superior Court of Robeson County, an indictment then pending against J. C. Atkinson, Alta Atkinson, R. R. Jones and Benjamin Long, for a forcible trespass, was tried. The defendant in this case was the prosecutor in that, and was duly sworn and became a witness for the State, and during his examination testified that he "was the owner of certain premises in said county; that on a certain day, while engaged at work at some distance from said premises, he received information that the said J. C. Atkinson (and the others)

were proceeding to his premises for the purpose of effecting an entry; that, in company with certain other persons, he hurried to the place and discovered the said Atkinson (and the others) in the (760) road near the said premises; that they were then in the act of entering thereon, but had not actually entered; that he then and there immediately forbade them to enter thereon; that notwithstanding said forbidding the said parties at once entered and remained in possession."

The assignment of perjury in the indictment was in substance, "that the said defendant therein, Alva Lawson, as such witness in said indictment for trespass, falsely and corruptly swore that he was present at the entry and forbade the said J. C. Atkinson (and the others) to enter the said premises, whereas, in truth and fact, he was not then present and did not so forbid such entry."

The State introduced evidence tending to show that said Lawson was not present and did not forbid the entry.

One Jones, a witness for the State, testified that he was a defendant in the trespass case. "When the Atkinsons and I got to the house Lawson was 50 or 75 yards off. He first forbade us, as a majority of us got into the field. Cross and I and one or two others were in the field before Lawson arrived."

One T. D. Watts, a witness for the State, testified that he was present; went with Lawson, at his request, to the house, the place of entry, and heard him forbid the Atkinsons coming into the house; they were then inside the field; he (Lawson) was standing in the door.

J. A. Lawson, witness for defendant, testified that he was present and heard Alva Lawson forbid their coming in. They came afterwards, tore down the house and burnt it.

The defendant testified in his own behalf that he *was* then and there present in person, and did forbid such entry at the time the entry was made.

The defendant requested the court to charge the jury "that although the jury should conclude that the defendant did not forbid such entry in fact, and refrained from doing so because the entry was made, after a race between Lawson and Atkinson (and the others) for (761) the possession of said premises, or the said Lawson concluded, by reason of the number of the alleged trespassers, and demonstration of force and violence on their part, that such forbidding would be of no avail, then the defendant would not be guilty, because the law would supply the forbidding."

The court declined the request of the defendant, because the defendant had sworn expressly that he did forbid the entry in question before it was made, and the request of the defendant was inconsistent with his evidence. The defendant excepted.

The court then charged the jury, in substance, after explaining to them the law of forcible trespass, that if they believed from the evidence that the defendant Lawson was present at the time of the entry into the field on the part of the defendants (Atkinson and others), and forbade the same, he would not be guilty; otherwise, he would be guilty.

The defendant did not except to this charge. Verdict of guilty. Judgment and appeal.

Attorney-General for the State.
W. F. French for defendant.

DAVIS, J., after stating the case: In *S. v. Dodd,* 3 Murph., 226, *Judge Henderson* said: "A false oath is injurious to the State, or to an individual, when it tends to prevent right. . . . If it be entirely immaterial, it cannot affect any one. . . . It is not for courts of justice to inquire how the act stands in a moral or religious point of view. It is the substance and effect of what the defendant swears that gives character to the oath. These must be material, and 'tend to prevent right.'" *S. v. Graves,* Busb., 402.

So far from negativing the facts charged to have been falsely sworn to by the defendant on the trial in which the perjury is assigned,
(762) the evidence offered by the State—all the evidence—tends to show that the main or material fact sworn to by him was true, and the *effect* of what he swore to could not be substantially different from that which would be the result of the testimony of the impeaching witnesses, and that was, that there was a forcible trespass—that the defendant in this indictment was present, and that he did forbid the entering. The precise time of the entering, so far as it affected the guilt of the defendants in that case, was immaterial. *S. v. Bobbitt,* 70 N. C., 81.

Jones, a witness for the State, and one of the defendants in the indictment for the trespass, testified that "He first forbade us as a majority of us got into the field"; another witness for the State said, "He forbade the Atkinsons coming into the house"; and J. A. Lawson, a witness for the defendant, testified to substantially the same facts, and that "they (Atkinson and others) came afterwards, tore down the house and burnt it."

As soon as Lawson forbade the trespassers to enter, whether all or any of them had gotten into the field or not, and they refused to get off, but continued with force to advance, they made forcible entry upon his premises against his will and his rights, and the material fact was, Did they do this? All the evidence shows that they did, and that was the substance and effect of the defendant's oaths. *S. v. Wilson,* 94 N. C., 839.

"It was a fresh aggression to pass with a strong hand" beyond the point at which the trespassers were when Lawson was present and forbidding it, and whether a majority, as one of the State's witnesses said, or all, were in the field when he forbade the entry, was immaterial. *S. v. Talbot,* 97 N. C., 494.

The testimony shows that the defendant was present and did forbid the act of the trespassers, and the instruction given by the court, especially when connected with what was *said* in refusing the (763) instruction asked for, and which was properly refused, was calculated to mislead the jury, and limit their consideration to the single question as to whether the defendant forbade the entry before the Atkinsons and others had gotten into the field.

It was a failure correctly to "declare and explain the law arising" on the evidence given in the case, as required by section 413 of The Code. *S. v. Matthews,* 78 N. C., 537.

The defendant is entitled to a new trial.

Error.

Cited: *S. v. Davis,* 109 N. C., 511; *S. v. Webster,* 121 N. C., 588; *S. v. Lawson,* 123 N. C., 743; *S. v. Jones,* 170 N. C., 756.

THE STATE v. LOUIS LACHMAN.

Jurisdiction—Justices of the Peace.

Where, upon the return of a warrant charging an offense of which a justice of the peace had exclusive jurisdiction, the record showed that the defendant waived a trial, and thereupon it was adjudged that he enter into bond for his appearance at the next term of the Superior Court, and at said term the record showed that "upon the foregoing warrant and appeal the case came on to be tried," the defendant pleaded not guilty, a verdict and judgment thereon against him: *Held,* that the Superior Court had not the acquired jurisdiction.

(*S. v. Wilson,* Phil., 237, cited.)

CRIMINAL ACTION, tried before *Merrimon, J.,* at Fall Term, 1887, of JOHNSTON.

On 10 May, 1887, D. W. Fuller made oath before C. W. Edgerton, a justice of the peace for the county of Johnston, that in said county, "on or about 10 May, 1887, Louis Lachman did, contrary to law, offer for sale, on the streets of Smithfield, to the highest bidder, merchandise as a 'Cheap John' merchant, contrary to the statute," etc. (764)

Upon this affidavit a warrant was issued by the said justice of the peace on the same day for the arrest of the said Lachman, and commanding that he be brought before the said justice of the peace, or "some magistrate of said county immediately, to answer the above complaint, and be dealt with as the law directs."

This warrant was returned "executed" on 10 May, 1887, whereupon the following entry was made on the back thereof:

"The defendant, Louis Lachman, waives a trial, and thereupon it is adjudged that he enter into a bond in the sum of two hundred dollars for his appearance at the next term of the Superior Court, to be held at the courthouse in Smithfield on the third Monday before the first Monday in September, 1887."

This was dated 10 May, 1887, and signed by the justice of the peace.

The case came on at next term of the Superior Court, and the record sets out that:

"Upon the foregoing warrant and appeal the case came on for trial, . . . when the defendant, Louis Lachman, by his attorney, plead not guilty. Whereupon the following jurors (naming them) being chosen, etc. . . . for their verdict, say that they find the defendant guilty."

Upon this verdict there was a judgment, from which the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the case: The evidence is set out in the case stated, but it is apparent upon the record that the Superior Court (765) did not have jurisdiction, and the judgment must be arrested.

The prosecution was intended to punish for a violation of chapter 135, section 23, of the Acts of 1887, which, among other things, imposes a tax of fifty dollars on itinerant salesmen, commonly known as "Cheap John" merchants, and requires a license to be obtained by them before selling. Section 35 of the act makes it a misdemeanor for such persons to sell merchandise without first paying the tax and obtaining the license, punishable "by a fine not exceeding $50, or imprisonment not exceeding thirty days." It also subjects them to a penalty of $50, which penalty it is the duty of the sheriff to cause to be recovered.

The punishment imposed, not exceeding a fine of $50, or imprisonment for thirty days, the justice of the peace, under section 892 of The Code, had exclusive original jurisdiction within six months. There was no trial had before the magistrate, and no judgment, and consequently there could be no appeal by which alone the appellate court could acquire jurisdiction. The justice of the peace seems only to have exercised his

functions as a committing magistrate, and required the defendant to enter into bond for his appearance to answer in the Superior Court, and this seems to have been treated as an appeal. There was no bill of indictment found by a grand jury.

This was erroneous. It is a criminal proescution, and though no exception has been filed, nor any motion made to correct the judgment, it is nevertheless our duty to examine the record, and see if there is any error in it. *S. v. Wilson,* Phil. Law, 237.

There is error, and the judgment must be arrested.

Error.

Cited: *S. v. Baskerville,* 141 N. C., 819.

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(766)

THE STATE v. GEORGE GOINGS.

Indictment—Larceny—Receiving—General Verdict.

A judgment, upon a general verdict of guilty, upon an indictment containing two counts—one for horse stealing, under section 1066 of The Code, and the other for receiving, under section 1074, is erroneous—the offenses not being of the same grade and the punishment being different.

(*S. v. Johnson,* 75 N. C., 123, and *S. v. Lawrence,* 81 N. C., 522, cited.)

INDICTMENT for larceny and receiving, tried before *Gilmer, J.,* at July Term, 1887, of ROCKINGHAM.

The defendant is charged in the indictment, in a first count under the statute (The Code, sec. 1063), with the larceny of a horse, and in a second count under the statute (The Code, sec. 1074), with receiving the same horse, knowing him to have been stolen, and both counts conclude against the statute. On the trial there was a general verdict of guilty.

The defendant moved in arrest of judgment, assigning as ground for the motion that the maximum of punishment for the former offense was twenty years (The Code, sec. 1066), and that for the latter was ten years (The Code, secs. 1074, 1075), and, therefore, as the verdict was general, the court could not intelligently determine upon which count it would proceed to judgment.

The court overruled the motion, and gave judgment that he be imprisoned in the penitentiary for the term of seven years, and he appealed.

Attorney-General and E. C. Smith for the State.

C. B. Watson for defendant.

(767) MERRIMON, J., after stating the case: We are of opinion that the court should not have proceeded to judgment upon the general verdict of guilty, because the two offenses charged in the indictment were not of the same grade, nor was the punishment the same in each, in contemplation of the statute. In the nature of the matter, the court could not determine for which offense the punishment ought to have been imposed, and, therefore, could not mete it out as contemplated by the law. The sentence was for but seven years imprisonment in the penitentiary, but for which offense? The record does not show. If the court had set forth in the judgment that the punishment was for one of the offenses, and not for the other, it could not have seen upon the record anything indicating for which offense the punishment should have been imposed, and if it imposed the punishment for receiving the stolen horse, it may be it would have imposed a greater measure, if it could have known that the defendant stole the horse. The record ought to show upon its face for what particular offense the defendant is punished, when two or more offenses are allowed to be charged in the indictment. It may be that if the jury had rendered a separate verdict as to each count—as to one guilty, and as to the other not guilty—this would have obviated the objection; but that view of the case is not before us.

The case of *S. v. Johnson,* 75 N. C., 123, was substantially like the present one. In it the Court said: "The offenses charged in the two counts are not of the same grade, and the punishment is not the same, so, upon a general verdict, 'the record' does not enable the Court to know upon which count, in other words, for which offense, the prisoner should be sentenced, and no judgment can be given without inconsistency and error upon the face of the record."

That case was afterwards recognized, with approval, in *S. v. Lawrence,* 81 N. C., 522.

There is, therefore, error. The judgment must be reversed. To that end, and to the end that further proceedings may be had in the (768) action, according to law, let this opinion be certified to the Superior Court.

Error.

Cited: *S. c.,* 100 N. C., 504; *S. v. Jones,* 101 N. C., 724; *S. v. Cross,* 106 N. C., 650; *S. v. McCollum,* 181 N. C., 585.

THE STATE v. A. V. EMERY.

Elections—Evidence—Prohibition—Local Election—Liquor Selling—Indictment.

Where it appeared that an election had been held under the local option act (The Code, Vol. II, ch. 32), and the returns had been canvassed by a board composed of one person from each of the voting precincts, appointed by the poll-holders and registrar, and the result certified to the board of commissioners of the county, who proclaimed the same: *Held*,

1. That this procedure was in conformity with the statute.
2. That properly authenticated copies of the proceedings of the canvassers and commissioners were competent evidence of the action of the respective boards.
3. That the result thus ascertained and declared was conclusive until reversed by some superior tribunal, and could not be assailed collaterally; nor could the election be assailed collaterally because of alleged irregularity in complying with the requirements of the statute in ordering the election.
4. It is not necessary, in an indictment for selling liquor within prohibited territory, to negative the allegation that it was sold upon the prescription of a physician. This fact, if it exists, is a matter of defense, and the burden showing it is on the defendant.

(*S. v. George*, 93 N. C., 567; *Simpson v. Comrs.*, 84 N. C., 158; *Norment v. Charlotte*, 85 N. C., 387; *Cain v. Comrs.*, 86 N. C., 8, and *Smallwood v. Newbern*, 90 N. C., 36, cited.)

THIS is a criminal action, which was tried before *Shepherd, J.*, at March Term, 1887, of WAKE.

The indictment contains three counts, the first two of which (769) charge a violation of the Local Option Law in Raleigh Township, adopted at an election held on 7 June, 1887 (1886), and the third, for retailing without license.

The third count was abandoned.

Clara Haywood, a witness for the State, testified: "I bought liquor of the defendant, at his store in Raleigh, during last December. I bought three times during the month. I got ten cents worth each time. I did not get as much as a quart.

The State then introduced the record of the meeting of the board of county commissioners, at which the votes of the election on prohibition was canvassed, a copy of which, marked "A," is sent up with the record; and also the return of the judges of election, a copy of which, marked "B," is filed with the record; also the original returns of the election, but these were not read.

It was admitted that these were genuine, and that the subscribers were the judges of the election, appointed therein.

The whole of the documentary evidence was objected to because the election was not held according to law, and that neither the judges of the election nor the county commissioners had authority to canvass or to declare the result; also, because the indictment failed to charged that there had been any declaration as to the result of said election.

The court admitted the evidence, and the defendant excepted.

The record of the proceedings of the board of county commissioners, sent up as part of the case, recites that, "in conformity to an order made at the meeting of the board of county commissioners on 5 March, 1886, the board began the canvassing of the votes cast at the election held on the 7th instant on the question of the sale of spirituous liquors in the towns and townships in the county in which elections had been ordered by the board." Then follows at length, and in full, the action of
(770) the board upon the various questions and objections raised before it, followed by an abstract of the returns of the judges of elections from the several wards and precincts of the city of Raleigh and Raleigh Township, made to the board of county commissioners, giving the number of votes cast in each ward and precinct for "Prohibition" and for "License," making the total number of votes cast for Prohibition at said election in Raleigh Township 1,260 votes, and the total number of votes cast for License 1,202 votes, there being a majority of 58 votes at said election for Prohibition.

These returns were certified to the board of county commissioners of Wake, under the hands and seals of the canvassing board, composed of one member selected by the registrar and pollholders from each of the respective wards and voting precincts of Raleigh and Raleigh Township, and the result was proclaimed at the courthouse door.

There was evidence tending to show that there had been no election reversing the result of the said election.

The defendant asked the court to give the following instructions: "That there is a total absence of proof of the condition precedent to the election, to wit, the petition of one-fourth of the qualified voters of said township, made to the commissioners, asking that said election be held, and that the commissioners examined and found that the requisite number of qualified voters had signed said petition, and that the election was ordered in consequence of said petition and said examination, and therefore the defendant should be acquitted. Also, he insisted that the State ought to show that the liquor was not sold upon the prescription of a physician and for medical purposes."

The court declined to give the instructions, and the defendant excepted.

The court, after explaining to the jury the allegations in the bill in reference to the election, charged that the original returns not having been read in evidence, it did not appear that they con- (771) flicted with the statements contained in the exhibits "A" and "B," and that upon these proceedings they would be warranted in finding that the question of Prohibition had been submitted to the qualified voters of Raleigh Township, and that a majority had voted for Prohibition, and the result, as declared, alleged in the first and second counts; that if they were fully satisfied of this, and that the defendant sold liquors, as stated by Clara Haywood, they would convict the defendant upon either of the said counts—provided no election had been held reversing the result of said alleged election."

There was a verdict of guilty, and the defendant moved in arrest of judgment, for that the said counts did not charge an indictable offense. Motion overruled, and the defendant appealed.

Attorney-General for the State.
J. C. L. Harris for defendant.

DAVIS, J., after stating the case: Section 3114 of The Code makes it the duty of the board of county commissioners to order elections upon "the petition of one-fourth of the qualified voters, etc."

Section 3115 provides that such elections "shall be held, and returns made, under the same rules and regulations as prescribed for holding elections for members of the General Assembly, so far as the same may be applicable, except as herein modified."

The evidence shows that the election was ordered by the board of county commissioners; that it was held, and the returns made and canvassed, and the result, as ascertained, proclaimed at the courthouse door, in accordance, as near as applicable, with the rules and regulations prescribed for the holding of elections for members of the (772) General Assembly.

"For all legal purposes, the result of the election is what it is declared to be by the authorized board of canvassers, empowered to make the canvass at the time when the returns should be made, until the decision has been reversed by a superior power." *Norment v. Charlotte,* 85 N. C., 357.

The copies of the proceedings of the county commissioners and board of canvassers, admitted to be genuine, were properly received as evidence. The result of the election, as decided and proclaimed, is conclusive in any collateral proceedings. It is to be taken, prima facie, that every necessary requisite has been complied with. All facts necessary to the

validity of the election must be ascertained and determined, and, when proclaimed, must be final and conclusive, unless impeached or attacked in some direct proceeding. The objection, therefore, to the validity of the election, for the want of proof of the conditions precedent, etc., cannot be sustained, and there was no error in the refusal of the court to charge as requested. *Simpson v. Comrs.,* 84 N. C., 158; *Norment v. Charlotte,* 85 N. C., 387; *Cain v. Comrs.,* 86 N. C., 8; *Smallwood v. New Bern,* 90 N. C., 36.

Neither was there any error in refusing to charge the jury that the State ought to show that the liquor was not sold upon the prescription of a physician, and for medical purposes. It was purely a matter of defense, if such ground of defense existed, entirely within the knowledge of the defendant, and must come from him. It was not alleged in the indictment, nor was it necessary for the State to allege or prove it. *S. v. George,* 93 N. C., 567. This is too clear to need citation of authorities.

By virtue of the election referred to, it became unlawful to sell spirituous liquor in Raleigh Township, and the offense charged is that the defendant "willfully and unlawfully did sell one gill of spirituous
(773) liquor" to the witness Haywood, in Raleigh Township, and the motion in arrest of judgment was properly refused.

There is no error.

Cited: *Bynum v. Comrs.,* 101 N. C., 414; *S. v. Cooper, ibid.,* 688; *Claybrook v. Comrs.,* 114 N. C., 461.

THE STATE v. W. H. BISHOP.

Larceny—Ownership—Bailment—Indictment—Evidence—When State not Required to Elect.

1. It is competent to show that the person charged with a criminal offense made false and contradictory statements in reference thereto; and for this purpose an affidavit made by him, in the cause previously, for a continuance may be used, and its contents shown to be untrue.

2. A check drawn by a United States pension agent on the Treasurer of the United States is an obligation for the payment of money within the meaning of The Code, sec. 1064, and is subject of larceny; and a description of it as "one United States Pension check on the Assistant Treasurer of the United States, for twenty dollars," is sufficient.

3. The ownership of such a check is properly laid in him who is proved to have had possession at the time of the felonious taking, though it may not have been endorsed by the payee—the possession of a bailee being sufficient to support the bill.

4. The voluntary acts and declarations of a person charged with crime, though made while in custody and bound, are competent against him.

5. In an indictment for larceny, containing one count, but charging the stealing of several articles, and the proof shows but one transaction, the solicitor will not be required to elect; and the jury may find the defendant guilty of taking one or all of the articles alleged to have been stolen.

(*Mason v. McCormick*, 85 N. C., 226; *S. v. Lemon*, 92 N. C., 790; *S. v. Rout*, 3 Hawks, 618; *S. v. Fulford*, Phil., 563; *S. v. Thomason*, 71 N. C., 146; *S. v. Hardison*, 75 N. C., 203; *S. v. McDonald*, 73 N. C., 346; *S. v. Sanders*, 84 N. C., 728; *S. v. Garrett*, 71 N. C., 85, and *S. v. Locklear*, Busb., 205, cited.)

INDICTMENT for larceny, tried before *Graves, J.*, at Spring (774) Term, 1887, of TRANSYLVANIA.

There was a verdict of guilty; judgment; and the defendant appealed. The facts are stated in the opinion.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J. The indictment charged the stealing of "fifty-five dollars in money, of the value of fifty-five dollars, and one United States pension check, on the Assistant Treasurer of the United States, for twenty-four dollars in money, check and property of W. McGaha and W. P. McGaha, trading under the firm name of W. & W. P. McGaha."

When the case was called for trial at Spring Term, 1886, the defendant made an affidavit for a continuance, in which he sets forth that "he stands indicted in this court for the larceny of fifty-five dollars in money and one pension check for twenty-four dollars, and that he cannot come safely to trial at this term of the court, for the lack of evidence of James Hunt, who, he is advised and believes, is a material witness for his defense; that affiant expects to prove by said witness that affiant won said pension check from the prosecutor, Percy McGaha, at a game of cards, on Sunday morning, the day before the alleged larceny; that said witness was present on said Saturday night and heard affiant and said McGaha make an agreement (setting it out, and that afterwards he heard McGaha say affiant had won the check." The affidavit states, as a further ground of continuance, the absence of Percy Robinson, a material witness, by whom he expects to prove "that a few days prior to the alleged offense he saw, in the possession of affiant, fifty-five dollars in paper money," etc.

On the trial the solicitor offered to read this affidavit to the
(775) jury as a statement made by the defendant, to which defendant objected.

The objection was overruled; the affidavit was read; defendant excepted.

The State then offered James Hunt, the witness named in the affidavit, to show that the statement contained therein, so far as it related to the game, was untrue. To this defendant objected, upon the ground that he had not been introduced as a witness, and the evidence tended to affect his character, and thereby put it in issue before the jury. The objection was overruled and the witness, Hunt, testified negativing the statements of the affidavit.

The affidavit was admissible, as a statement or declaration of the defendant, voluntarily made in regard to the crime with which he was charged, and the falsity of which it was competent for the State to show. Every act of the defendant in respect to the alleged crime, and every circumstance calculated to throw light upon it and aid the jury in coming to a correct conclusion, is competent. *S. v. Case,* 93 N. C., 545, and cases cited; *Mason v. McCormick,* 85 N. C., 226; *S. v. Lemon,* 92 N. C., 790. This disposes of the first exception.

The State offered in evidence a paper purporting to be a pension check, an exact copy of which is set out in the case stated. It is dated 17 September, 1885, and purports to be drawn by Robert L. Taylor, United States Pension Agent, on the Assistant Treasurer of the United States, New York, in favor of Mary E. Keith, for twenty-four dollars, and endorsed by the payee in blank.

The introduction of this check was objected to: first, because it was not sufficiently described in the indictment to identify it; second, because it is not the subject of larceny, under the provision of The Code, sec. 1064; and, third, because there is no evidence of property or ownership in the McGahas, or either of them, there being no endorsement to them by the payee.

(776) It was in evidence that the check was identified as the one that had been in the possession of the prosecutors for Mary E. Keith, and it was sufficiently described. *S. v. Rout,* 3 Hawks, 618; *S. v. Fulford,* Phil., 563; *S. v. Thomason,* 71 N. C., 146.

And it is an obligation "for the payment of money," within the spirit and language of section 1064 of The Code, and it was identified as being the same which the prosecutors had lost from their store, and was afterwards in the possession of the defendant. It was in the possession of the prosecutors, and the evidence is that it was taken while they had the custody and control of it, and the property is sufficiently laid in them. *S. v. Hardison,* 75 N. C., 203. So the objection to its admis-

sibility, and to the evidence of the witnesses, W. P. McGaha and W. McGaha, in regard to its identity, ownership, and possession by defendant, cannot be sustained.

The sheriff was permitted to testify, under objection by defendant, that while he was "bringing the prisoner from Greenville, S. C., to Brevard, under a requisition from the Governor, and while in his custody and handcuffed, in response to some questions by a passenger on the cars, the prisoner said that his father had given him fifty dollars, some time before he went to Greenville, to buy a horse with, and that on the road to Greenville he sold some chestnuts for five dollars, and that he won the check from W. P. McGaha playing cards. This conversation was on the cars in South Carolina." This was no confession, but seems to have been a voluntary statement made by the witness, accounting for his possession of the money and the check—it was not made under any threat or inducement. *S. v. McDonald,* 73 N. C., 346; *S. v. Sanders,* 84 N. C., 728.

The acts and declarations of the prisoner, relating to the crime charged, if voluntary, are competent, and, if contradictory or untrue, the State may show that they are contradictory or untrue; and the testimony of Percy McGaha, who was allowed to testify, under objection by defendant, was admissible, to show that the state- (777) ments of the defendant were untrue. *S. v. Garrett,* 71 N. C., 85.

The defendant offered testimony tending to show that prior to the alleged larceny he had in his possession more than fifty dollars, and that he usually had money, and after the close of the testimony he moved that the solicitor be required to elect "whether he would insist upon conviction for the taking of the money or the check," stating the grounds of the motion. It was overruled and the defendant excepted. The charge is that the money and check were stolen, and the evidence tends to show that they were together and taken at the same time—it is charged as one transaction, in a single count, and the State was not required to elect. The indictment does not charge separate and distinct transactions or larcenies, and is not objectionable because it charges the larceny of more than one article. The jury may find that he is guilty of either, or both, as the evidence may warrant.

When an indictment in one count charged the carrying of a "musket, rifle and shot-gun," under an act which prohibited free persons of color from carrying fire-arms, it was held good, and proof of carrying either was sufficient to justify a conviction. *S. v. Locklear,* Busb., 305.

The defendant's prayer that the court "should instruct the jury that there was no evidence that the prosecutors were bailees of the property, and that the State must prove that W. & W. P. McGaha were the owners of the check and money," was properly substituted by the

charge, "that if the McGahas were the owners, that ownership must be proven. There may be a qualified ownership. If the McGahas were not really owners, but had possession of the check and money, they would be bailees, and that would be sufficient ownership for the purpose of sustaining an indictment for larceny."

There is no error.

Cited: S. v. Austin, 108 N. C., 781; *Bagg v. R. R.,* 109 N. C., 290; *S. v. Whitfield, ibid.,* 876; *S. v. Flemming,* 130 N. C., 689; *S. v. Bohanon,* 142 N. C., 699.

(778)

THE STATE v. J. F. DIVINE.

Constitution—Statute—Presumption of Innocence—Special Verdict.

1. A special verdict must find the defendant guilty or not guilty, subject to the opinion of the Court upon the law as applicable to the facts ascertained therein.
2. A statute which deprives a person charged with a criminal offense of the presumption of innocence, or makes acts within certain localities, done by a particular class of individuals, criminal, when others in the same vocation and other sections under like conditions are exempt, is in violation of the Constitution.
3. The statute (The Code, secs. 2327-2330), making the killing of cattle upon railroads in certain counties a misdemeanor, and subjecting the president, superintendent, and others officers of such roads, to indictment if they refuse to pay for or refer to arbitration the claim for compensation for such cattle, is unconstitutional.

(S. v. Padgett, 82 N. C., 544, and *Doggett v. R. R.,* 81 N. C., 459, cited.)

THIS was a criminal action, tried before *Clark, J.,* at January Term, 1887, of ROBESON.

The prosecution of the defendant commenced by warrant, issued by a justice of the peace of Columbus County, and tried by him, charges the defendant, as superintendent of the Wilmington, Columbia and Augusta Railroad Company, with a personal criminal responsibility, for the running over and killing two cows, the property of J. C. Powell, the prosecutor, by a train moving over its track, on 19 May, 1886. The proceeding is instituted under the Act of 1880, ch. 13, which is brought forward, and constitutes the four last sections, 2327, 2328, 2329, 2330, of chapter 10 of Vol. II of The Code.

The enactment is in these wards:

"When any cattle, horses, mules, sheep or other live stock (779) shall be killed or injured by any car or engine running on any railroad in the counties of Columbus, New Hanover, Brunswick, Bladen, Robeson, Richmond, Anson, Union, Gaston, Lincoln, Cleveland and Burke, it shall be a misdemeanor; and the president, receiver and superintendent of such road, and also the engineer and conductor in charge of the train or engine by which such killing or injury is done, may be indicted for such killing or injury: *Provided,* if the parties indictable under this section shall, within six months after the killing as aforesaid of any stock mentioned in this section, and before any indictment is preferred or warrant issued, pay the owner of such stock as may be killed his charges for said stock, or in the event the charges are too high, or thought to be so, such sum or sums as may be assessed by three commissioners—one to be chosen by the party whose stock is killed or injured, a second by the party accused of killing the same, and the third by the two commissioners chosen as above indicated, who shall meet at some place in the county where the stock is killed or injured, to be selected by the parties interested—within thirty days after they are chosen and accepted, such payment shall be a bar to any prosecution under this section; and the decision of two of said commissioners shall be final for the purposes of this section: *Provided further,* if any person or persons liable to indictment under this section shall, within the time prescribed, propose to the party endamaged to refer the matter of damages in the manner hereinbefore indicated to three commissioners, and the party endamaged shall refuse or decline such proposition, such refusing or declining shall be a bar to any prosecution under this section: *Provided also,* if the party endamaged shall, at any time before the indictment is preferred, or warrant issued, directly or indirectly, receive any sum in full compensation of his damages, such compensation shall be a bar to any prosecution under this section; and if any compensation be so received after indictment is preferred or warrant issued, or if after said time the party accused shall (780) pay or tender to the owner of the stock killed the value of the same, as decided by the commissioners, as above provided—in either case the prosecution shall go no further, and the accused shall be charged only with accrued cost."

The second section prescribes the punishment by "fine not exceeding fifty dollars, or imprisonment not longer than thirty days."

The third provides that "when stock is killed or injured by a running engine or car in the counties enumerated, it shall be prima facie evidence of negligence on the trial of the indictment."

The fourth section declares that the indictment against the officers of railroad companies shall not lie "until a proposition to refer the matter has been proposed by the party claiming that he has been damaged."

Upon an appeal to the Superior Court from the judgment rendered against the defendant by the justice of the peace, a special verdict was found by the jury in these words: "The cattle were killed by the cars of the Wilmington, Columbia and Augusta Railroad Company as alleged, under the following circumstances, to wit: That at the time of the killing it was a bright moonlight night, about 10 p.m.; that the train was on schedule time, running at the rate of forty miles per hour; that the cattle could have been seen at least one hundred yards ahead of the train; that the cattle were not seen by the engineer until struck by the train; that the cattle were the property of J. C. Powell; that the corporation owning the road is the same which was chartered by the act of 1 March, 1870, as the Wilmington and Carolina Railroad Company; that the defendant is the superintendent of the said Wilmington, Columbia and Augusta Railroad Company; that the said company refused to refer the matter to arbitration; that the defendant, J. F. Divine,
(781) was not on the train that did the killing, and was in no way connected with said killing."

The court, being of opinion that the defendant was not guilty, adjudged that he go without day, and the solicitor appealed.

Attorney-General for the State.
George Davis (by brief) for defendant.

SMITH, C. J., after stating the case: The special verdict stops without the essential finding, that the accused is or is not guilty, as in the opinion of the court, upon the recited facts, they constitute or do not constitute the criminal act charged. The question of the defendant's guilt is to be decided, under his plea, alone by the jury in cases requiring a jury, and these include all criminal accusations, except in certain petty misdemeanors, by express provision of the Constitution, Art. I, sec. 13.

The special verdict, to be sufficient, must find, subject to the opinion of the judge upon the law, the defendant guilty or not guilty, or it is legally no verdict at all. *S. v. Padgett,* 82 N. C., 544, and cases cited in the opinion.

The proper course, then, would be to set aside the finding and direct a *venire de novo* in the court below, unless it can be seen, upon the face of the proceedings, that the prosecution cannot be successfully maintained; and this is the defense set up on behalf of the accused.

It is insisted that the facts charged in the warrant do not constitute a criminal offense, and cannot be made such under the act, without infringing upon the provisions of the organic law, taking from the accused some of the immunities and personal securities which it contains for the protection of the citizen against the exercise of legislative power.

The objections to the validity of the legislation are pointed out and forcibly presented in the brief of defendant's counsel, with an array of numerous rulings in their support, as follows:

1. In its whole structure and manifest purpose it creates out (782) of a *private civil injury a public prosecution,* to subserve the interests of the injured party, and to be put in operation or arrested at his instance and election.

2. It assumes a criminal liability to have been incurred by an officer of a railroad corporation, *without his concurrence* in the act of the subordinate, and, assuming negligence and guilt, puts him on the defensive, and requires him to repel the presumption, when he in no manner participated in what was done.

3. It undertakes to drive the accused to an adjustment of the claim for damages by assenting to a reference to arbitration, and to deprive him of his constitutional right to be tried in the courts of the State—tribunals provided under the Constitution—and by a properly constituted jury, acting under a judge.

4. It places at the election of the claimant the institution of the prosecution, which otherwise is suspended, by making a proposition for a reference.

5. It discriminates, without apparent difference, between counties and railroads, giving partial operation to a law, general in its provisions and equally applicable to all, by which the same act is rendered criminal in one locality which is not so in another, and raising out of an act done by one employee a presumption of guilt against another employee, who did not, in any way, participate in it.

We do not perceive any difficulty in the Act of 1856-57 (The Code, sec. 2326) raising a presumption of negligence on the part of the company from the fact of killing or injuring stock, in a civil suit for reparation, brought within six months thereafter, as is explained in the opinion in *Doggett v. R. R.,* 81 N. C., 459, and whose validity has not been questioned in the numerous cases which have been before the Court. But the present case passes far beyond the limits of that enactment, in fastening a *criminal* responsibility, not upon the (783) principal whose agent does the injury, but upon a co-employee in the same general service, and this not upon all, but specially upon railroads that run through or in particular counties.

We do not say that there may not be local legislation, for it is very common in our statute books, but that an act divested of any peculiar circumstances, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation.

Looking at the indictment it will be seen that the only material allegations are, that the prosecutor's cattle were killed by a moving train on the road of the company of which the defendant is superintendent, without connecting him with the act; and scarcely more definite is the special verdict.

Do these words impute crime, and upon mere proof of these facts is the charge established, and must the defendant be convicted unless he repels the negligence which the statute presumes in the subordinate employed in managing the train? The very question involves an answer, unless all the safeguards thrown around one accused of crime are disregarded, and he left without their protection.

The defendant was not on the train when the accident occurred, and has no personal relation to it except such as results from his position as a higher officer of the road—making the offense one by construction.

Judge Cooley, in his work on Constitutional Limitations, at page 309, referring to a trial for criminal offenses of different grades, uses this impressive language: "The mode of investigating the facts, however, is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well understood part of the system, and which the government *cannot dispense with,*" meaning, as (784) we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done.

In *Cummings v. Missouri,* 4 Wall., 328, *Fields, J.,* referring to certain enactments in that State, says: "The clauses in question subvert the presumption of innocence, and alter the rule of evidence which, heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable."

"But I have no hesitation in saying," remarks *Selden, J.,* in *Wynehamer v. The People,* 13 N. Y., 446, "that they (the Legislature) cannot subvert that fundamental rule of justice which holds that every one shall be *presumed innocent until he is proved guilty.*"

The case is not analogous to that wherein for civil purposes negligence is inferred from the fact of killing stock, and requiring matters in excuse to be shown, which lie peculiarly within the knowledge of the agent who perpetrated the act, or controls the running of the engine when it is done; nor to the statute (The Code, sec. 1005), which makes the having about the person one of the deadly weapons forbidden to

be carried, or worn, prima facie evidence of concealment, for this is the sole personal *act of the party,* of the consequences of which he is aware, and because a small weapon, if concealed, would be almost impossible of proof direct, while the possession of such is intimately and naturally connected with the secret carrying and furnishes strong evidence of the fact.

In *San Manteo v. R. R.,* 8 Am. & Eng. R. R. Cases, 10, in construing the Fourteenth Amendment to the Constitution of the United States, it is said: "Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them, by every one on similar terms in his life, his liberty, his property and in the pursuit of happiness."

Substantially the same doctrine is announced, and by the (785) same eminent judge *(Field, J.),* in *Barlier v. Connelly,* 113 U. S., 31, in which he adds: "that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

From what has been said, it results that the legislation in question has not the sanction of the Constitution, and cannot be upheld as within the competency of the law-making power to enact.

We have gone into this inquiry in order to settle the question of the validity of the statute in the application to the case before us, and because it will practically put an end to the litigation.

But for the defect in the special verdict we are compelled to direct that it be set aside for further proceedings in the court below.

Reversed and special verdict set aside.

Cited: Thornton v. Lambeth, 103 N. C., 89; *Guilford v. Georgia Co.,* 109 N. C., 313; *Cameron v. Bennett,* 110 N. C., 279; *Milling Co. v. Finlay, ibid.,* 413; *S. v. Kittelle, ibid.,* 568; *Farthing v. Carrington,* 116 N. C., 335, 337, 338; *S. v. Barrett,* 138 N. C., 644, 653; *S. v. Price,* 175 N. C., 808.

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